

178-478 1639

Record No. 2416

In the
Supreme Court of Appeals of Virginia
at Richmond

THIRD BUCKINGHAM COMMUNITY, INC.,

v.

IVAN N. ANDERSON

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA

RULE 14.

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2416

THIRD BUCKINGHAM COMMUNITY, INC., A CORPORATION, FOURTH BUCKINGHAM COMMUNITY, INC., A CORPORATION, FIFTH BUCKINGHAM COMMUNITY, INC., A CORPORATION, Appellants,

versus

IVAN N. ANDERSON, Appellee.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Third Buckingham Community, Incorporated, Fourth Buckingham Community, Incorporated, and Fifth Buckingham Community, Incorporated, respectfully set forth that they are aggrieved by a final judgment of the Circuit Court of Arlington County, Virginia, entered on July 25th, 1940, which said judgment was based upon the verdict of a jury in said court originally in the amount of \$1,000.00 and which the court reduced to \$873.00 and costs. To the various rulings of the court in the proceedings exceptions were duly taken and the errors complained of are apparent on the face of the record. Filed with this petition is the record, including all of the evidence, and the plats filed as original exhibits have been forwarded by the clerk of the lower court to this Honorable Court to be used in connection herewith.

STATEMENT OF CASE.

The plaintiff filed motion for judgment in the Circuit Court of Arlington County on October 21st, 1939, against the three appellants, who will hereinafter be referred to as defendants in accordance with their relative position in the court below, claiming damages in the sum of \$1,500.00, claimed to be caused by an *overflow of surface water from the property of the 2* defendants onto and over the land of the plaintiff on which he was conducting a small nursery business. The essential charge of the plaintiff is that the defendants graded streets, put in underground drains, changed the natural watershed, diverted the flow of surface water and threw the same on the property of the plaintiff in a greater quantity and at an increased velocity than would have been so in its natural state.

At the conclusion of the plaintiff's case the defendants moved to strike the evidence which motion was overruled and evidence was then introduced by the defendants and rebuttal by the plaintiff and the case was fully argued by plaintiff's counsel and by both of the attorneys for the defendants. The jury brought in a verdict for \$1,000.00. The defendants moved to set this verdict aside and enter final judgment for them or award them a new trial which motion was overruled by the court. The court, however, put the plaintiff on terms and reduced the judgment to \$873.00, which reduction the plaintiff accepted under protest. Exceptions will appear in the record to the rulings of the court on the introduction of the evidence, the granting and refusal of instructions, the overruling of defendants' motions to strike the evidence and to set aside the verdict and enter judgment for the defendants or award them a new trial, and to the overruling of defendants' motion to withdraw a juror and declare a mistrial because of statements made by plaintiff's counsel on her final argument.

ASSIGNMENTS OF ERROR.

These petitioners assign as error the action of the court as follows:

1. Refusal to grant instruction "F" offered by defendants.
2. Overruling of defendants' motion to withdraw a juror and declare a mistrial because of improper argument
- 3* by the plaintiff's *attorney.
3. Overruling of defendants' motion to strike the evidence of the plaintiff.

4. Overruling of defendants' motion to set aside the verdict and enter final judgment for these defendants.

5. Overruling of defendants' motion to set aside the verdict and grant them a new trial.

THE FACTS.

The interests of the three defendants are identical in that the questions involved affect them all alike and, while they own separate parcels of land, their holdings cannot be segregated as they are all in the same drainage basin. They are the owners and developers of a large apartment project known as Buckingham recently constructed in the rapidly growing community of Arlington County. Their property involved in this suit is bounded on the East by Glebe Road, a state highway running approximately North and South. Running off of Glebe Road to the West are two County roads as follows: Henderson Road at the North boundary of Buckingham and Pershing Drive going directly through the Buckingham property. The property of the defendants lies directly south of and adjacent to Buckingham. South of him is the property of Pomeroy and then Lee Boulevard, a state highway. The property of the defendants lies in a small basin. Its lowest point is a short distance west of Glebe Road and it then rises to a small crest still further west. As this depression or basin goes toward the South it narrows in until when it passes into the property of the plaintiff its drainage passes through a small culvert or pipe placed there by the plaintiff or his predecessors in title. This culvert passes under a small garden road maintained by the plaintiff on his own property immediately adjoining the Buckingham land.

South of this road the plaintiff maintains a ditch to 4* carry the water *through his property from whence it passes on through the property of Pomeroy and into a culvert leading under Glebe Road. This basin may be likened to a funnel having its broad end along Henderson Road and narrowing as the center of the depression becomes more pronounced until it passes off into the plaintiff's land through the small bottleneck formed by the small culvert under the garden road. This culvert was placed by the plaintiff or his predecessors at the lowest point along the boundary and is the lowest point of the natural drain of surface water passing off of defendants' property while it was in its original natural state. Prior to the beginning of the apartment

project all of this basin, with the exception of one or two homes, was either tilled land or open land covered with broom sage or other wild grasses or woodland and of course a very large portion of surface water was absorbed before it reached the Anderson property.

Passing from North to South through the Buckingham property the natural grade is shown by the levels taken before ground was broken (Defdts. Exhibit 3) as follows: a drop of 14.5 feet from Henderson Road to Pershing Drive and a drop of 13.8 feet between Pershing Drive and the Anderson line, making a total drop down the lowest part of the depression between Henderson Road and the Anderson culvert under his garden road of 28.3 feet. The difference in elevation between the sides and center of the depression is upwards of 8.0 feet at all points except the flat end along Henderson Road. All of the surface water of this whole area flowed toward Anderson and such as was not absorbed in the fields and woods eventually passed through his garden road culvert and on through his ditch.

Buckingham has made no changes in this basin and has added no surface water to it nor has it brought into this drainage area any water formerly draining into any other basin and all efforts on the part of the plaintiff to prove 5* to the contrary are fully *rebutted by the maps showing levels taken before a street was laid or a house built.

Buckingham consists of a series of two story brick apartment dwellings with the necessary layout of paved streets. One of these streets is Thomas Street which runs generally parallel with the lowest part of the depression. In order to carry the surface water off in a proper manner the defendants placed a storm sewer or drain under ground along Thomas street and into it by catch basins they feed the drainage of the entire basin. The building of these many houses and surfacing of streets where there had been only open fields and woods necessarily increased the amount of surface water actually flowing off of said property and the gathering of the water into the storm sewer necessarily increased the velocity of the flow. This storm sewer runs to and empties at the North end of the garden road culvert which is the lowest point on the Anderson line and which Mr. Anderson has recognized as the lowest point by placing and maintaining said culvert and the ditch leading therefrom across his property. It is worthy of notice that this culvert had been placed and ditch dug long before Buckingham was begun and there was no attempt made by the defendants to change it but on the contrary they have brought their sur-

face water to the very point that the plaintiff has recognized and still maintains as the lowest point on his boundary.

The plaintiff himself testified that he considered the grading of streets and the building of apartment houses a reasonable use of defendants' land.

The plaintiff uses his land for the growing of plants and flowers and claims that in heavy rains in 1939 his land was overflowed and many of his plants ruined.

The main question involved is embodied in assignments of error Nos. 3 and 4. Briefly stated it is simply this, 6* "Is the *placing of underground conduits for the carrying off of surface water reasonable and proper in a thickly settled section such as Arlington County and can a lower proprietor complain of such drainage where it is brought to the lowest point of his boundary and where only the natural drainage basin is permitted to drain into it?" Upon this question hinges this case and it is one of the vital questions faced by many towns and cities as well as rapidly growing suburban districts. It is the contention of the defendants that they are not compelled to permit this water to run wild over the streets and into the cellars of their apartments but have the right to drain it off underground provided only that they do not bring in water from other basins and that they carry it to and deposit it at the lowest point on the Anderson boundary which has long been established as the natural drain.

THE LAW.

The principle relied upon is well stated in *Bowling Green v. Stevens*, decided by the Supreme Court of Kentucky in 1924, 265 S. W. 495, as follows:

"Manifestly the rights of the lower proprietor are subject to the rights of the upper proprietor to use his land in the natural and ordinary way, so long as there is no substantial change in the natural flow of the water. Hence, though the upper proprietor has no right to open or remove natural barriers and turn on lower lands surface water which would not otherwise flow in that direction, he has the right even by ditches and drains to drain the surface water from his land into the channels which nature has provided, even though the quantity of water thrown upon the lower lands is thereby increased."

This especially is applicable where the property is im-

proved in a reasonable manner in the construction of houses and the layout of streets, and the courts have held that a natural channel means not only a well marked ditch, but merely the lowest part of a depression or valley through which surface water passes, even though the grass itself has not been disturbed by the passage of the water, and

7* have also held that the drains leading into such *natural channels may be either surface or sub-surface. The only test seems to be whether the water carried by these drains falls naturally within the basin in which they empty.

The following authorities are briefly stated in support of this contention:

City of Boulder v. Boulder and White Rock Ditch and Reservoir Company, Sup. Ct. of Colorado, June 4, 1923, 36 A. L. R. 1458, 216 Pac. 553.

The reservoir company had in this case constructed a drainage ditch prior to the incorporation of the City of Boulder, the waters of which were used both for irrigation of land and for human consumption by tenants lower down. The city began paving its streets and alleys and constructing storm sewers running into this drainage ditch of the plaintiff. The general lay of the land was such that the original drainage naturally passed toward this ditch. After the city had constructed one of its storm sewers and opened the same, water was discharged directly into the irrigating ditch. The plaintiff brought action to enjoin it. We have there the exact situation that we have in the case at bar, with a storm sewer taking water off of the streets and emptying into the basin toward which the natural flow of water had been in years prior to the building of the city. The exact contention of the plaintiff was that the collection by the defendant city of the surface water on its paved streets and alleys into artificial channels or sewer pipes laid under ground and discharging the same in a mass upon and into the plaintiff's ditch at one point would thereby burden the ditch with more water than would naturally reach it, and in a concentrated mass or body, and in a different way and manner than would be the case if nature had not been interfered with. This is an exact statement of the plaintiff's contention taken from the opinion in 36 A. L. R. 1460. The Court held that the modified civil law rule, the same as we have in Virginia, applied in Colorado, and in disposing of the *question held

8* as follows:

“If, as is admitted, the surface drainage would naturally and ultimately flow into this ditch, if not obstructed, it (meaning plaintiff) would have no cause of complaint merely upon the ground that the city of Boulder, in building storm sewers and paving and grading streets, collected this surface water and accelerated its flow and precipitated or discharged the same at some particular point or points in the line of the ditch, instead of spreading it out at different places of entrance.”

Here we have all of the elements of the case at bar, to-wit, building of a storm sewer, paving and grading streets, collecting surface water and accelerating its flow and discharging the same at one particular point instead of spreading it out at different places of entrance on the property of the complainant.

W. A. Lessenger v. City of Harlan, Iowa Sup. Ct., September 17, 1918, 5 A. L. R. 1523—168 N. W. 803.

This case is so well in point and contains such a complete and clear description of the law that it is difficult to cite any portion that would give a concise statement of the principles involved, but read as a whole the opinion itself constitutes a very splendid and complete brief fully upholding all of the defendants' contention in the case at bar, and shows clearly the distinction between the cases cited by the plaintiff, Anderson, and those upon which we rely.

The City of Harlan paved its streets and put in a storm sewer, which carried and discharged surface water onto the plaintiff's land, and the plaintiff claims that this was an artificial drain gathering all the rainfall and melting snow, and all waters cast on the street by the street sprinklers, and the flushing of the city hydrants, and that the storm sewer emptied the same rapidly and in large quantities upon the property of the railroad company, and caused it to flood across the railroad land and on down through the plaintiff's land; that the outlet of said storm sewer was neither at, in or near a natural watercourse, and that if said pavement and said storm sewer were not maintained, the *water 9* which falls or comes upon the City's territory would evaporate or seep into the ground and disappear, and only a small portion of the same would find its way to the land of the plaintiff. There was an additional claim that a portion of the City's territory was not drained through the swale through which said storm sewer had its outlet. It

appears that the City graded its streets and established the permanent grade thereof by statutory authority, which, of course, exists in any municipal corporation. The land of the plaintiff was open agricultural land and the natural drain of the territory covered by the storm sewer was toward this land. In holding that the plaintiff could not enjoin the City the Court commented at length on the very principles involved in the case at bar, and gave the reasons why they should apply. One very apt quotation from the opinion is as follows:

“In the very nature of things the changing of agricultural or rural lands into city territory necessitates some disturbance of the surface of the ground, and out of this inevitably grows a disturbance of the surface drainage of the ground. * * * If we should hold that the city is liable to a citizen for consequent damages upon the simple showing that the city, in the lawful exercise of its right, without negligence in the manner of the doing, graded its streets, paved and guttered them, and as an incident thereto and a consequence thereof, the surface water was diverted from the course it pursued in the state of nature, we would throw in the way of public improvement insurmountable stumbling-blocks.

“This would be especially true where it is not shown that the city by the exercise of reasonable care and thoughtfulness for the safety of the citizens could have done the work complained of in any other manner.”

In the case at bar the municipality did not do the work, but the work was done by an individual, and the plans were approved after the suggestion of some changes by the County authorities; we are in that same change in this section of the Country from “agricultural lands into city territory” mentioned in the above case. It is apparent that to hold that the plaintiff is entitled to recover in the case at bar would be to throw “insurmountable stumbling-blocks” in the way of
10* public improvement. It will be *noted that Mr. Anderson testified that in his opinion the Buckingham interests were putting their property to a proper use, and that he had no complaint or criticism as to the construction of their buildings or the layout of their streets.

The Court further in commenting on the proposition advanced by the plaintiff Lessenger that a citizen has no right to divert water from its natural drainage and cast it upon lower land in greater quantities, or in any other manner than it would go in the course of nature held as follows:

“The citizen may tile his land into a natural channel on his land, even though by doing so it may facilitate the flow of surface water into the natural channel. He may lay tile in a natural channel or watercourses on his own land, even though the effect of it is to facilitate the flow of water along the channel. He may tile his land into a natural channel or watercourse even though it increases the volume of water that flows into the natural channel or watercourse. In doing so he does no wrong for which he is answerable, providing the waters brought into and discharged are ultimately released at the same place at which they would have been discharged in the course of nature. We are speaking now of surface water and the fact that *evaporation and seepage* are interfered with does not change the situation.” (Italics ours.)

The Court further holds that, if by the grading and guttering of the streets, any disturbance is made in the general surface of the ground, the consequent change in the course of the surface water was at best very slight and only followed as an incident to the exercise of the right to grade and gutter the streets, and that such changes in the natural course of the water upon the surface of the ground, which may have taken place, is the natural and inevitable result of the exercise of the right and dominion over property within the city given to the municipality by law.

In explaining what is meant by the principle that the owner of the dominant estate cannot concentrate at one point the surface water diffused over the surface of his own land and discharge it in a body upon the servient estate, the Court held as follows:

11* * “This rule, however, prohibiting the concentration of surface water at a particular point does not apply to natural depressions or drains through which the surface water on the higher land is in the course of nature carried to the lower land. The authorities hold that the flow of surface waters along such natural depressions or drains may be hastened and incidentally increased by artificial means so long as it is not diverted from its natural course.”

And further the Court holds:

“The owner of the upper estate may construct ditches and underground drains to hasten the flow of surface water into and along the natural depressions or drainways on his own

land so long as he does not divert the water from its natural course." Citing cases from Illinois, Ohio, Pennsylvania, Wisconsin, and Nebraska.

And finally as if to clinch the argument of the defendant in the case at bar, the Court holds:

"Where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water, the surface water which formerly took the same course toward the land of the lower adjacent proprietor, and causes to pass through this ditch the surface water which formerly took the same course, but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain, or upon which such lower proprietor can maintain an action. In other words, causing surface water to flow in its natural direction through a ditch on one's own land, instead of over the surface or by percolation, as formerly, where no new watershed is tapped by said ditch, and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch what formerly reached the same point on defendant's land over a wider surface by percolation through the soil or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act."

The general principles with respect to the layout of city streets and the drainage of surface waters therefrom through ditches are laid down in *Miller and Myers v. City of Newport News*, Sup. Ct. of Virginia, 1903, 44 S. E. 712, where it is held that the lower proprietor cannot complain of the action of the city in draining its surface water from its streets by artificial means and channels emptying into a ditch or drain which constituted a natural outlet for the surface water. While this case is confined entirely to the power of a municipality, we can see no distinction between the principles governing such a case and those governing a citizen where an individual is making the city improvements under the approval of the municipal authorities, such

12* *as was done in the case at bar.

In the case of *City of Bowling Green v. Stevens*, a quotation from which is cited in the beginning of this brief (265 S. W. 495), the City of Bowling Green, Kentucky, by the construction of streets and building of houses increased the flow of water into a natural drain, and Stevens, as the

lower proprietor, complained of this excess water. In addition to the quotation first above mentioned, the Court further said:

“The rule has been applied in favor of a municipal corporation, and its right to carry off surface water in order to improve the streets to render its territory more suitable for building purposes has been recognized. * * * If it may construct drains to carry the surface water into the natural channels, it necessarily follows that it is not liable for any increase in the quantity of water due solely to the construction of streets or erection of houses.”

It is apparent from this statement that the holding of the Kentucky Court is on all fours with the case at bar. We are using merely the modern method of carrying off surface water, the amount of which has been doubtless increased, in so far as the outflow is concerned, by the construction of streets and the building of houses, which the complainant himself says is a fair and proper use of the land.

Borough of Bridgewater v. Borough of Beaver, Sup. Ct. of Penna., 1920, 112 Atlantic 232.

The town of Bridgewater, being the lower proprietor, brought suit against the town of Beaver, as the upper proprietor, to abate what it alleged to be a nuisance caused by the increased flow of surface water due to the construction of streets and consequent construction of houses adjoining them in the town of Beaver. In a very brief opinion, the Court held as follows:

“1. The Borough of Beaver had a legal right to open, grade, pave and improve its streets within the drainage area in controversy.

“2. The owners of lots abutting on said streets had the right to erect houses thereon, fill up depressions therein and change the grades of their said lots to conform with the changed grades of streets.

13* “3. If by such changes in the grades of streets, the paving thereof, filling up of surface irregularities and depressions, the paving of sidewalks and the construction of houses the quantities of water drainage into the Borough of Bridgewater by means of Fair Avenue and Third Street have been increased in quantity and velocity and the Borough of Bridgewater has been injured thereby, it is *damnum abaque injuria*.

“4. Every municipality has the right to the natural, proper and profitable use of its land, and, if in the course of such use, without negligence, unavoidable loss is brought upon an adjoining municipality, it is *damnum abaque injuria*.”

In a former Pennsylvania case of *Meixell v. Morgan*, 24 Atlantic, 216, the Supreme Court of that state held that the upper proprietor could collect water by underground drains and discharge same on lower proprietor at one point, if that point was the natural watershed for both tracts of land.

City of Hamilton v. Ashbrook, Supreme Court of Ohio, 1900, 57 N. E. 239.

The City of Hamilton by improving its streets and by the consequent erection of houses along the same by individuals had increased the flow of water on Mrs. Ashbrook's land, and particularly damaged her vegetables and hot bed, and a rope walk. In keeping with the other cases above cited, the Court held that the city was not liable.

Not only is this principle applied where a city is involved, but also between individuals, and is well settled in the great mass of cases, only a few of which will be touched on here.

Frank Manteufel v. Gustav Wetzel, Sup. Ct. of Wisc., 1907, 114 N. W. 91.—19 L. R. A. (New Series) 107.

In this case there had been a sink hole or depression on the defendant's land some seven hundred feet west of the plaintiff's land, which in wet seasons formed a natural reservoir, and which the defendant had drained by a ditch running from this sink hole to a point about 150 feet from the plaintiff's line, at which point the water was allowed to spread out to the point where it entered the plaintiff's land. There was no complaint about this ditch, but after it had been in use a good many years, the *defendant 14* dug a further ditch, gathering this water together and emptying it upon the plaintiff's land at one point. As a direct result thereof the water was deposited on the plaintiff's land in greater quantities and with much greater rapidity and force than before. The quantity of the water and the force with which it came down this new ditch can be judged by the fact that four or five acres of the plaintiff's land was rendered too wet for ordinary use as agricultural land, and that a washout upon the land of the plaintiff of some forty-five feet in length, seven feet in width,

and three feet in depth was caused during the first year that this ditch was open. It is apparent that this is a much more severe collection of surface water than in the case at bar. The lower court held with the plaintiff, but the upper Court reversed the decision, remanded the case to the lower Court with directions to enter judgment for the defendant, and in the course of the opinion said:

We "do here determine that, where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water, the surface water which formerly took the same course toward the land of the lower adjacent proprietor and causes to pass through this ditch the surface water which formerly took the same course but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain, or upon which such lower proprietor can maintain an action. In other words, causing surface water to flow in its natural direction through a ditch on one's own land, instead of over the surface or by percolation as formerly, where no new watershed is tapped by said ditch and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch what formerly reached the same point on defendant's land over a wider surface by percolation through the soil, or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act. It follows that, upon the findings of fact of the court below, the conclusion of law should have been that the defendant was entitled to judgment dismissing the complaint and judgment accordingly."

Sykes v. Sykes, Sup. Ct. North Carolina, 1929, 147 S. E. 621.

While the facts in this case are very different from the case at bar, the principle involved is exactly the same, and the Court very succinctly held that:

15* "Defendants as the upper proprietor had the right to accelerate and even increase the flow of water from their land to the land of plaintiff, the lower proprietor. There was no evidence that the water was diverted from its natural course."

Trigg v. Timmerman, Supreme Ct. of Washington, 1916, 156 Pac., 846.

The plaintiff owned a forty acre farm. The defendants owned eighty acres, part of which lay just north of plaintiff's property and across a private road twenty-five feet wide. The plaintiff improved this road, which was on his property, and put a culvert under it. Running through both plaintiff's and defendants' land and crossing this road was a swale about five hundred feet wide and rising on each side of its lowest level about six or eight feet. This swale was wet and marshy and drained naturally to the south into a gulley near the south boundary of plaintiff's land. The defendants constructed and extended four or five drainage ditches upon their land which tended to hasten the flow of the water through the culvert leading under the private road. The plaintiff claimed that as a consequence the water was thrown through this culvert at an increased speed and in increased amounts.

It will be noted how similar this is to the case at bar where Anderson, the lower proprietor, maintains the private road under which he maintains a culvert, and that this culvert connects the lowest point of the swale or depression on defendants' property with the lowest point of the same depression which continues on through the plaintiff's property, and that the complainant in the case at bar is claiming that the flow of water through his culvert at this lowest point in the depression has been increased in both speed and amount. It will also be noted that this swale in the Washington case was of approximately the same width as that in the case at bar, and that it contains some marshy land which previously had drained naturally. It will also be noted, and the Court commented on this particularly, 16* that the *culvert under the roadway, which had been constructed by the plaintiff, was the only outlet left by the plaintiff for the water north of the roadway to pass through. Even in the question of direction in which the waters flow, the case is on all fours with the case at bar.

In holding with the defendants, the Court held as follows:

"The principle very generally accepted by the courts, that the owner of higher land may not concentrate at one point water diffused over the surface, and discharge it in a mass on the lower land, does not apply to natural depressions or drainways through which the surface water on the higher land drains into the lower land. On the contrary it is established by the great weight of authority that the flow of surface water along such depressions or drainways may be hastened and incidentally increased by artificial means so long as the water is not diverted from its natural flow."

"Our decisions are in harmony with our conclusion here reached that this swale is a watercourse in the sense that there is a natural gravitation of water therein towards the south and that respondents have the right to hasten the flow of water therein to and through the culvert constructed by appellant (pltf.) under his roadway by their construction of ditches upon their land. This we think is especially true in view of the fact that appellant improved his roadway and constructed this culvert in such a manner as to make that the only outlet for the water of the swale north of the roadway."

Bickel v. Martin, Ill. App. Ct., 1904, 115 Ill. App. 367.

Martin charged that Bickel conducted to and discharged water on his land through an artificial system of tile drainage, and that the water was consequently discharged in larger quantities at a time and with more force and current than would have naturally been the case. The trial court held for the plaintiff, but this was reversed by the Court of Appeals, which, in the course of its opinion, said:

"The owner of the dominant heritage has the right, by ditches and drains, to drain his own land into the channels which nature has provided, even if the quantity of water in that way thrown on the next adjoining lower lands is thereby increased. * * * In natural drainage over the surface of the land some water must evaporate and some must seep away and percolate through the soil and such water will not reach the lower land at all. Tile drainage will not only increase the quantity of water cast upon the lower land but such water will pass upon the lower land
17* *with greater force than where it runs over the surface of ordinarily flat land."

The principle of this case was followed and approved by the Supreme Court of Illinois in 1919, in the case of *Adams v. Abel*, 125 N. E. 320.

"There can be no question that under the law of this state the owner of a dominant heritage or higher tract of land has the right to have the surface water falling or coming naturally upon his premises pass off the same upon or over the lower or servient lands and the owner of the dominant heritage may by ditches or drains drain his own land into the natural and usual channel even if the quantity of water thrown upon the servient heritage is thus increased."

In another Illinois case, *Young v. C. C. C. & St. Louis Ry.*, 203 Illinois Appeals, 37, decided in 1916, the Court said:

"It has been repeatedly held in this state that the owner of the dominant heritage has the right to collect the waters falling on his land and throw them on the land of the servient heritage in increasing quantities, and is not liable for damages caused thereby, providing the waters are thrown onto the servient heritage at a point where, in the course of nature, they originally flow."

Broussard v. Cormier, Sup. Ct. of Louisiana, 1923, 98 So. 403.

In following the principles hereinbefore set forth, the Court stated the law as follows:

"The owner of the superior or creditor estate may make all drainage works which are necessary to the proper cultivation and to the agricultural development of his estate, and to that end he may cut ditches and canals by which the waters running on his estate may be concentrated and their flow increased beyond the slow process by which they would ultimately reach the same destination. But the upper proprietor cannot improve his land to the injury of his neighbor by cutting ditches and canals or do other drainage works by which the water will be diverted from their natural flow and concentrated to flow on the lower lands at a point which would not be their natural destination."

Rehfuss v. Weeks, Oregon Sup. Ct., 1919, 182 Pac. 137.

"The owner of upper lands is not prohibited by the rule from cultivating his lands or draining them by artificial ditches, though surface water is thereby precipitated more rapidly upon the adjacent owner below, provided he does not cause water to flow on such lands which, but for the artificial ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the interests of such adjacent owner."

In order to be a natural drain or channel as used in these cases, the same need not be within fixed banks or definitely defined ditch, but simply means the lowest point of a
18* depression, *valley or swale. This is particularly commented on in the case of *Reichert v. Northern Pacific*

Railway Company (Sup. Ct. N. D., 1918), 167 N. W. 127, where the Court says that a natural drain or channel need not contain a continuous flow of water, but may be grown over with grass. This seems to be in keeping with the broad definition of natural drain or channel upon which the foregoing decisions are based.

It is therefore submitted that Assignments of Error, Nos. 3 and 4 are well taken and that these defendants were and are entitled to a final judgment in their behalf.

Assignment of Error No. 5 is based partly on the reason heretofore given in the Argument relative to assignments Nos. 3 and 4 and if the Court should conclude that final judgment should not be entered for these defendants we submit that there should be at least a setting aside of the said judgment and the award of a new trial.

In addition to the argument heretofore set forth there are two additional grounds relating to the granting of a new trial. First, the refusal of the Court to grant instruction "F" offered by the defendants. This is set out in Assignment No. 1. This is set out in Certificate of Exception on pages 193-194 of the record. It is apparent upon the face of this instruction that it properly states the law and it covers a very vital point in the defense. Failure to grant it was a very material error and nothing in the instruction granted remedied it.

In addition to above the Court erred in failing to withdraw a juror and declare a mistrial because of prejudicial argument on behalf of the plaintiff's counsel as set out in Certificate of Exceptions appearing at pages 179, etc., of the record. The final arguments in the case were presented in full by Miss Hedrick for the plaintiff who opened and closed

and by both counsel for the defendants. In the closing 19* of her final *argument Miss Hedrick stressed the unfairness which she claimed these large defendant corporations were showing toward the little flower grower and after building up a very strong and appealing background she made this statement: "What is reasonable in Russia is not reasonable in the United States and we are thankful we are in a country where a small person is just as important in the eyes of the law as a millionaire corporation." This strong appeal to the prejudice of the jury especially in view of the present odium in the minds of the American people at the mention of the Russian dictatorship, was doubtless a moving force in arousing the jury to the point where the law was ignored and the facts forgotten. With this appeal to their prejudice ringing in their ears they took the case and

returned their verdict. It would be difficult to think of anything more prejudicial to say in this type of case than these well chosen remarks of the plaintiff's counsel and it is submitted that the Court should have withdrawn a juror and declared a mistrial and in the absence of this it was plainly the Court's duty to grant the motion to set aside the verdict and award a new trial.

We therefore respectfully submit that at the worst the defendants are entitled to have the verdict set aside and a new trial awarded.

These petitioners therefore respectfully pray that they may be awarded a writ of error and *supersedeas*; that this Honorable Court may reverse the rulings and actions of the trial Court; that the final judgment entered by the lower Court may be reversed and final judgment entered herein in favor of these petitioners or that this case may be remanded to the lower Court for a new trial.

A copy of this petition was delivered to plaintiff's counsel, Miss Anna F. Hedrick, on the 24th day of October, 1940, 20* and *receipt thereof is acknowledged hereon. Notice is hereby given that counsel for petitioners desire to state orally the reasons for granting the writ of error to the judgment herein complained of; and that they will adopt this petition as their opening brief on behalf of the plaintiff in error.

And as in duty bound they will ever pray, etc.

THIRD BUCKINGHAM COMMUNITY,
INC., A CORPORATION,
FOURTH BUCKINGHAM COMMUNITY,
INC., A CORPORATION,
FIFTH BUCKINGHAM COMMUNITY,
INC., A CORPORATION,
Petitioners.

CLAUDE O. THOMAS,
FRANK L. BALL,
Attys. for Petitioners.

Legal service of this petition is acknowledged this 24th day of October, 1940.

ANNA F. HEDRICK,
Attorney for Plaintiff.

We, Frank L. Ball and John C. McCarthy, Attorneys at Law, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in our opinion there is error in the judgment complained of in the foregoing petition for which the same should be reviewed by the Supreme Court of Appeals of Virginia.

FRANK L. BALL,
JOHN C. McCARTHY.

Received Oct. 25, 1940.

M. B. WATTS, Clerk.

January 16, 1941. Writ of error and *supersedeas* awarded by the court. Bond \$1,200.

M. B. W.

RECORD

In the Circuit Court of Arlington County, Virginia.

Filed October 21, 1939

Ivan N. Anderson, Plaintiff.

v.

Third Buckingham Community, Inc., a corporation, Fourth Buckingham Community, Inc., a corporation, and Fifth Buckingham Community, Inc., a corporation, Defendants.

AT LAW NO. 633.

NOTICE OF MOTION FOR JUDGMENT.

To Third Buckingham Community, Inc., a Corporation, Fourth Buckingham Community, Inc., a Corporation and Fifth Buckingham Community, Inc., a Corporation, 313 North Glebe Road, Arlington, Virginia.

You and each of you are hereby notified that on the 10th day of November, 1939, at 10:00 o'clock A. M., or as soon thereafter as it may be heard, the undersigned will move the Circuit Court of Arlington County, Virginia, at the Court House thereof, for a judgment against you and each of you in the sum of Fifteen Hundred Dollars (\$1,500.00) which sum

is due and owing by you and each of you to the undersigned for the damages, wrongs and injuries hereinafter set forth, to-wit:

1. That the undersigned before and at the time of the committing by you of the grievances hereinafter mentioned was and from thence hitherto has been and still is the owner in fee simple and lawfully possessed of certain lands and improvements thereon, situate in the County of Arlington, State of Virginia, containing 2.5 acres, more or less, conveyed to the undersigned in the year 1933 by one Robert H.

Forman and wife, which said property is bounded page 2 } on the northeast by Thomas Street, North, on the south by Lee Boulevard, on the southwest by the lands of National Boulevard Association, Pomeroy and Groves, and by Trenton Street, North; and on the northwest by the lands of Third Buckingham Community, Inc.; and that before and at the time of the committing of said grievances the undersigned did operate and still does operate on said land a nursery, garden and landscaping business, and maintains thereon greenhouses, cold frames and gardens where the undersigned raises, cultivates and sells at a profit hardy plants, perennials, herbs, flowers and shrubbery;

And you are the owners and developers of large tracts of land to the northwest and west of said land of the undersigned; the land of Third Buckingham Community, Inc., adjoining the undersigned's northwest boundary from Thomas Street a distance of approximately 82.66 feet; the land of Fourth Buckingham Community, Inc., adjoining the balance of the undersigned's northwest boundary to Trenton Street, a distance of approximately 300 feet; and the land of Fifth Community adjoining to the north and west the aforesaid lands of Third and Fourth Buckingham Communities.

And thereupon it became and was the duty of you and each of you to so use and develop your said lands as not to unnecessarily and unreasonably injure the said land of the undersigned, and more particularly not to cast storm and surface water upon the land of the undersigned in page 3 } such a manner as to unnecessarily and unreasonably injure the said land of the undersigned.

Yet you, and each of you, contriving and wrongfully, and unjustly intending to injure, prejudice and aggrieve the undersigned in the use, occupation and enjoyment of my said land and improvements thereon, and to render the same unprofitable, unfit for nursery and garden purposes and of little use or value to the undersigned and to destroy the

plants thereon did unnecessarily, unreasonably and wantonly cast storm and surface water in great quantities and at a great velocity upon said land of the undersigned; and did change the natural watershed in the aforesaid area, and did change and cause to be changed the grade of Pershing Drive, a public street; and did cut through said area several new streets, to-wit: Thomas Street, 2nd Road and 4th Street, North; and did block off Trenton Street, a public street, at its intersection with said 2nd Road, and did divert the surface and storm water which prior thereto had run down Trenton Street and not upon the land of the undersigned from said street onto the said land of the undersigned; and did install curbs, gutters and hard surfacing along said streets, and did place drains at the intersection of Thomas Street and Pershing Drive, and at the intersection of Thomas Street and 2nd Road, and did connect the same with a large underground pipe, and by means of said curbs, gutters, hard surfacing and drains did gather together the storm and surface water over a large area, to-wit: approximately
 page 4 { 26 acres and conduct the same through said large pipe to the boundary of the land of the undersigned, and did cast said water, so collected, from the mouth of said large pipe directly upon the land of the said undersigned in tremendous quantities and at tremendous velocities, to-wit: at a velocity of approximately 20 feet per second; and did conduct storm and surface water from Pershing Drive and the area to the northwest thereof, which, prior to the committing of said grievances, drained away from and not upon the land of the undersigned, in said large pipe and cast the same directly upon the land of the undersigned;

By reason of which the said land of the undersigned was flooded, eroded, and undermined, and the top soil was washed off, and the valuable plants of the undersigned were uprooted and washed away, and the gardens of the undersigned were covered with debris, rocks and gravel deposited thereon by said water, and the cold frames of the undersigned were damaged and the pots and potted plants therein were washed away and destroyed; and the undersigned was obliged to expend large sums of money in and about the removal of said debris, rocks and gravel, and the repair of said cold frames, and has expended and will be required to expend further sums in and about the replacement of said plants, pots and top soil.

By reason whereof the undersigned has been damaged in the sum of One Thousand Dollars (\$1,000.00).

2. And for this, to-wit: that heretofore, to-wit: page 5 } during the month of August and early September, 1939, you and each of you, by your agents and employees, did wrongfully and unlawfully enter upon the said land of the undersigned and close up a small drainage ditch, which the undersigned had maintained for a long period of time prior thereto, to-wit: since 1933, upon his said land, near its northwest boundary, as a proximate result whereof the land of the undersigned was heretofore, to-wit: on the 4th day of September, 1939, flooded, washed and eroded by storm water, and valuable plants of the undersigned were uprooted and washed away, top soil was washed away, and debris and gravel was deposited by said water upon the gardens and plants of the undersigned; and the undersigned was obliged to expend large sums of money in and about the removal of said debris and gravel and has expended and will be required to expend further sums in and about the replacement of said plants and top soil;

By reason whereof the undersigned has been damaged in the further sum of Five Hundred Dollars (\$500.00).

Wherefore judgment in the sum of Fifteen Hundred Dollars (\$1,500.00) will be asked at the hands of said court at the time and place aforesaid.

Given under my hand this 19th day of October, 1939.

IVAN N. ANDERSON,

ANNA F. HEDRICK, p. q.

page 6 } ORDER ENTERED NOVEMBER 13th, 1939.

THIS DAY came the Plaintiff and his Attorney; and the Defendants, being solemnly called, came not.

THEREUPON came a panel of nine, who were sworn on their *voir dire* and found free from exceptions, from which the Plaintiff struck one and the Court struck one.

THEREUPON came a jury of seven, composed of the following named persons, to-wit: Hugo J. Odenthal, Hiram S. Hart, Parker W. Luckett, A. J. Porter, Clair J. Bressler, George H. Corder and George J. Cost, who were sworn as the law directs as the jury for the trial of this case.

THEREUPON came the Defendants, by their Attorney, and moved the Court for leave to file a plea of not guilty.

WHEREUPON, by agreement of all the parties, by their Counsel, the jury was discharged, and leave is granted to the Defendants to file a plea of not guilty on this day.

WALTER T. McCARTHY, Judge.

page 7 }

PLEA.

Filed Nov. 13, 1939.

Now comes the Defendants, by their attorneys, and say that they are not guilty of the premises in this action laid to their charge, in manner and form as the Plaintiff hath complained. And of this, the said Defendants put themselves upon the country.

THIRD BUCKINGHAM COMMUNITY,
INCORPORATED.
FOURTH BUCKINGHAM COMMUNITY,
INCORPORATED.
FIFTH BUCKINGHAM COMMUNITY,
INCORPORATED.

By: FRANK L. BALL,
CLAUDE O. THOMAS,

Counsel.

FRANK L. BALL and
CLAUDE O. THOMAS,
Attorneys for the Defendants.

(#8 omitted.)

page 9 } MOTION TO STRIKE EVIDENCE OF PLAINTIFF

Filed February 28, 1940.

Come now the Defendants, and each of them, by counsel, and move to strike, the evidence of the plaintiff herein, and for grounds of such motion set forth:

1. That the plaintiff, in his motion for judgment, bases his claim for damages on the casting and diversion of surface water only upon his land by the said defendants;

2. That this, being a controversy between private adjacent property owners, the evidence fails to show that the defendants, in the exercise of dominion over defendants' own property, exercised such dominion in a wanton, careless, negligent, and unnecessary manner;

3. That the defendants, having the right to construct and maintain the buildings on defendants' own property, have committed no legal wrong, and are not liable in damages to the plaintiff, unless the evidence shows that such construction and maintenance was not done in a proper and reasonable manner, thereby inflicting unnecessary injury on the plaintiff, and that the evidence does not so show;

4. That the evidence and the notice of motion for judgment in this cause disclose that surface water only was diverted by the buildings of the defendants, and the evidence fails to show that said buildings were constructed and have been maintained in an unreasonable, improper, and careless manner, and without due regard to the rights of adjoining land owners, including the plaintiff.

THIRD BUCKINGHAM COMMUNITY,
INC.,
FOURTH BUCKINGHAM COMMUNITY,
INC.,
FIFTH BUCKINGHAM COMMUNITY,
INC.,

By: CLAUDE O. THOMAS,
FRANK L. BALL,

Counsel for Defendants.

page 11 } PLAINTIFF'S EX. NO. 2.

150	Doronicum Saucasicum	18.00
250	Myosotis (Forgetmenots)	27.50
400	Primroses	70.00
150	Japanese Anemone	32.50
75	Tricyrtus	18.75
200	Hata minor	50.00
100	Doronicum excelsum	12.00
200	Lamin Machlatum	22.00
200	Campanula carpatica	22.00
100	Campanula Poscharskyana	15.00
50	Prunela Julia	7.50
12	Prunela Seboldii	2.50
200	Pulmonaria saccharata	22.00

250	Pulmonaria augustifolia	42.50
400	Hedera Helix assorted	21.00
500	Pots	25.00
150	Heuchera	18.00
	Sand	3.00
	Repair of cold frame	25.00
300	Aquilegia	33.00
	Labor ditching	27.50
	Labor removing debris	35.00
	Loss of Top soil	300.00
	Road Blue stone washed away	15.00
75	Phlox Camla	8.25

page 12 } ORDER ENTERED FEBRUARY 28TH, 1940.

THIS DAY came the Plaintiff and his Attorney, Anna F. Hedrick, and the Defendants and their Attorneys, Claude O. Thomas and Frank L. Ball.

THEREUPON came a panel of nine, who were sworn on their *voir dire* and found free from exceptions, from which panel each side struck one.

THEREUPON came a jury of seven, composed of the following named persons, to-wit: George W. Barr, Edwin B. Chapman, John P. Divine, Charles E. James, Russell G. Johncox, H. L. Kennerly and Ashby Lee Miskell, who were sworn as the law directs as a jury for the trial of this case.

THEREUPON opening statements were made to the jury by Counsel for the Plaintiff and Counsel for the Defendants, and the Counsel for the Plaintiff then proceeded to introduce his evidence, at the conclusion of which the Defendants, through Counsel, moved to strike the Plaintiff's evidence, which said motion the Court denied and to which said ruling of the Court, the Defendants, by Counsel, excepted.

BE IT REMEMBERED, however, that during the progress of the trial, the Court recessed for luncheon for a period of one hour, but before recessing, formally instructed the jury not to discuss the case with any one, nor to permit any one to discuss it with them or in their presence.

page 13 } BE IT FURTHER REMEMBERED that previous to the evening adjournment of the Court, the Court again formally instructed the jury not to discuss the

case with any one, nor to permit anyone to discuss it with them or in their presence, nor reach any conclusion until the case is ended.

BE IT FURTHER REMEMBERED that all of the witnesses for both sides were sworn as the law directs as they took the witness stand to testify.

BE IT FURTHER REMEMBERED that the parties, through Counsel, stipulated as to certain deed book records of Arlington County, Virginia, and also to a map prepared by Mr. Lincoln Mackey, Civil Engineer.

BE IT FURTHER REMEMBERED that throughout the progress of the trial of this case, the parties, through Counsel, noted various exceptions to rulings of the Court on matters of evidence, which are more particularly set out in the stenographic report of this trial.

THEREUPON the Court adjourned at 4:38 P. M. and the jury was excused to February 29th, 1940, at 10:00 o'clock A. M.

WALTER T. McCARTHY, Judge.

page 14 } ORDER ENTERED FEBRUARY 29TH, 1940.

PURSUANT to adjournment, this day came the Plaintiff and the Defendants and their respective Counsel.

THEREUPON the jury was polled and placed in the jury box.

WHEREUPON the Defendants, through Counsel, proceeded to introduce their evidence, at the conclusion of which the Plaintiff, through Counsel, proceeded to introduce rebuttal evidence.

THEREUPON the Court directed the jury to retire to its room and the matter of instructions was argued by Counsel.

WHEREUPON the jury returned to the jury box and were instructed by the Court and after hearing closing arguments of Counsel for the Plaintiff and Counsel for the Defendants, the jury retired to its room to consider its ver-

dict; and after a time returned into Court and presented the following verdict, to-wit:

“We the Jury, find for the Plaintiff damages in the sum of one thousand dollars.

(Signed) JOHN P. DIVINE,
Foreman of Jury”.

THEREUPON the jury was discharged.

WHEREUPON, Counsel for the Defendants moved to set aside the verdict of the jury and for a verdict *non obstante veredicto* or to award the Defendants a new trial on the grounds that the verdict of the jury was contrary to the law and the evidence and without evidence to support it and that the Court erred in permitting the introduction of testimony on behalf of the Plaintiff over the objection of the Defendants and refusing Defendants' motion to
page 15 } withdraw a juror and declare a mistrial on the grounds that the statement of the Plaintiff's Counsel in closing argument was prejudicial and in instructing the jury, which said motion the Court took under advisement.

BE IT REMEMBERED, however, that during the progress of the trial, the Court recessed for luncheon for a period of one hour, but before recessing, formally instructed the jury not to discuss the case with any one nor to permit any one to discuss it with them or in their presence.

BE IT FURTHER REMEMBERED that previous to the luncheon recess, the jury, in the presence of the Court, and Counsel for both parties, viewed the property involved in this controversy.

BE IT FURTHER REMEMBERED that during the progress of the trial, the Defendants, by Counsel, moved the Court to withdraw a juror and declare a mistrial on the grounds that the statement of the Plaintiff's Counsel in her closing argument was prejudicial, which said motion the Court denied and directed the jury to disregard said statement, and to which said ruling of the Court, the Defendants, by Counsel, excepted.

BE IT REMEMBERED also that throughout the progress of the trial of this case, the parties, through Counsel, noted

various exceptions to the rulings of the Court on matters of evidence and instructions to the jury, which are more particularly set out in the stenographic report of this trial.

AND this cause is continued.

WALTER T. McCARTHY, Judge.

page 16 } DEFENDANTS' GROUNDS OF MOTION TO
SET ASIDE VERDICT.

Filed April 17, 1940.

The defendants, in support of their motion heretofore made in open court to set aside the verdict returned by the jury in this cause and enter final judgment for these defendants or award them a new trial, assign the following grounds:

(1). That the verdict is contrary to the law and the evidence and without evidence to support it.

(2). That the verdict is excessive.

(3). That the Court erred in not withdrawing a juror and declaring a mistrial upon the motion of these defendants because of the argument of counsel appealing to the prejudice and passion of the jury.

(4). That the Court erred in granting instructions of the plaintiff over the objection of the defendants.

CLAUDE O. THOMAS,
Attorney for the defendants.

FRANK L. BALL,
Attorney for the defendants.

page 17 } ORDER ENTERED APRIL 25TH, 1940.

THIS CASE came on this day to be heard upon the motion of the Defendants to set aside the verdict of the jury, and for a verdict *non obstante veredicto* or to award the Defendants a new trial and argument of Counsel.

UPON CONSIDERATION WHEREOF the Court again took the matter under advisement.

WALTER T. McCARTHY, Judge.

page 18 } FINAL ORDER ENTERED JULY 25TH, 1940.

THIS MATTER came on this day to be heard upon the motion of the Defendants, and each of them, to set aside the verdict heretofore returned in favor of the Plaintiff in this cause and for a verdict *non obstante veredicto* or to award a new trial, argument of said motion and briefs thereon having been heretofore had and submitted to the Court;

AND after due consideration the Court is of opinion that the Plaintiff should be placed on terms to accept the sum of \$873.00, or upon his refusal so to do the said verdict should be set aside, but upon the Plaintiff's indication that he would accept the said sum the motion should be overruled and judgment entered for the Plaintiff in the sum of \$873.00 and costs,

AND THEREUPON came the Plaintiff and indicated that he would accept the said sum of \$873.00 under protest, in lieu of the amount set forth by the jury in its verdict, and requested the Court to enter judgment in his favor for said sum;

IT IS, THEREFORE, the judgment and order of the Court that the said motion to set aside the verdict and for a verdict *non obstante veredicto* or to award a new trial be, and the same is hereby overruled and that the Plaintiff do recover of and from the said Defendants the sum of \$873.00 and his costs;

AND THEREUPON the said Defendants, and each of them excepted to the ruling of the Court in overruling their said motion and in entering judgment as aforesaid.

page 19 } AND THEREUPON the said Defendants, by Counsel, moved the Court to suspend the execution of the said judgment for a period of ninety (90) days in order to permit them to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the said judgment, which motion the Court granted upon condition that the said Defendants execute before the Clerk of this Court within fifteen (15) days from the date this order is entered a suspending bond in the penalty of \$1,000.00 conditioned as the law directs and with approved surety.

BE IT REMEMBERED that during the trial of this case certain exceptions were taken to the ruling of the Court as to

the introduction of testimony and the giving of instructions, all of which will appear in the transcribed record of said trial.

THIS ORDER IS FINAL.

WALTER T. McCARTHY, Judge.

page 20 } In the Circuit Court of Arlington County, Virginia.

Ivan N. Anderson, Plaintiff,

v.

Third Buckingham Community, Incorporated, a corporation,
Fourth Buckingham Community, Incorporated, a corporation,
Fifth Buckingham Community, Incorporated, a corporation,
Defendants.

The following evidence on behalf of the plaintiff and of the defendants respectively, as hereinafter denoted is all the evidence that was introduced on the trial of this cause, the original exhibits referred to herein being separately identified by the initial of the judge upon the originals thereof.

page 21 } In the Circuit Court of Arlington County, Virginia.

Ivan N. Anderson, Plaintiff,

v.

Third Buckingham Community, Inc., a corporation; Fourth
Buckingham Community, Inc., a corporation; and, Fifth
Buckingham Community, Inc., a corporation, Defendants.

IN LAW

Testimony in the above-entitled cause was taken before The Honorable, Walter T. McCarthy, Judge of the Circuit Court of Arlington County, Virginia, in the Court House, Arlington, Virginia, commencing on Wednesday, February 28, 1940, and continuing through Thursday, February 29, 1940.

Appearances: Miss Anna F. Hedrick, Counsel for the Plaintiff;

Frank L. Ball, Esquire, Claude O. Thomas, Esquire, Counsel for Defendants.

The jury was sworn on the *voir dire*, but no challenges were made. Following the strikes, the jury was sworn to try the issue joined.

Opening statements were made by Miss Hedrick, on behalf of the plaintiff, and Mr. Ball, on behalf of the defendants.

(Here followed discussion off the record.)

The Court: Do you stipulate that is a map of the streets?

Mr. Ball: Made up by Mr. Mackey, and it is not necessary to have him prove it.

Miss Hedrick: I offer this map in evidence as Plaintiff's Exhibit No. 1.

(Said map, so offered and received in evidence, was marked Plaintiff's Exhibit No. 1)

Mr. Ball: I suggest that the Anderson boundaries be marked with blue pencil.

Miss Hedrick: It is admitted that this land in here is owned and developed by the Third Buckingham; this land over here by the Fourth Buckingham; and up here, this land by the Fifth Buckingham. Do you want me to indicate on here where that street went through that was abandoned or do I have to prove it?

Mr. Ball: I don't know. We have no distinction between Third, Fourth and Fifth Buckingham. There is no use of carrying in your mind any distinction between them.

Mr. Thomas: The street came through here.

The Court: It is admitted that North Trenton page 23 } Street formerly was projected in a straight line through the Buckingham property, which is indicated on the map to have been developed by Fourth Buckingham to Pershing Drive?

Mr. Thomas: To Pershing Drive, that is right.

Miss Hedrick: This property here is owned by the Church.

A Juror: This street is to go through there?

Miss Hedrick: Yes, to go through there.

The Court: I do not want to cut you gentlemen of the jury off, but I suggest that if you have a little patience, a lot of these questions will be answered in the testimony. If they have not been answered by the time you have gotten through with the evidence, you may ask them then.

Ivan N. Anderson.

Mr. Ball: In admitting this map, we do not admit this shows everything.

Miss Hedrick: This scale up here is a different scale, but the distances are placed on the map.

The Court: The scale of the map north of North Pershing Drive is different from the scale of the map south of it.

Miss Hedrick: Yes. Mr. Anderson, will you take the stand.

Thereupon,

IVAN N. ANDERSON,

called as a witness for and on behalf of the plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

page 24 } By Miss Hedrick:

Q. You are Ivan N. Anderson and the plaintiff in this case?

A. I am.

Q. When did you first move on the property indicated on that map as the "Anderson" property?

A. I moved on there as a partnership, I cannot say the definite date, but I would say it was about seven years before I purchased the land.

Q. When did you purchase the land?

A. In 1933.

Q. During the time you have been on there, I will hand you this red pencil and ask you to place on the map any drains which have existed during that time on your property?

A. My own drains?

Q. Yes, your own drains.

A. (Witness marks map.)

Q. The drain from Buckingham and the one near the Buckingham line are the only two that are involved?

A. The one that was there before they came?

Q. Yes, the one that was there before they came.

A. They are the only drains that are involved in this case is what you want. This drain was not necessary.

Miss Hedrick: No.

Mr. Ball: What drain are you speaking of?

page 25 } The Witness: The underground drain.

Ivan N. Anderson.

By Miss Hedrick:

Q. Are you familiar with this upper tract of land as well as your own before Buckingham came there?

A. I am.

Q. Tell the Jury just what the topography of that land was, where the natural drains were, and which was the high land and which was the low land.

A. Between the streets or the whole drainage area?

Q. The drainage area of this water that came into your property.

A. In this area (indicating) was a swamp before Buckingham came there or above the area, and there was water on what was this street (indicating) all the way through that went down this street (indicating). There was no water from Pershing Drive in this direction that came to my property at all to the best of my knowledge.

Mr. Ball: What was that?

The Witness: There was no water from this area north of Pershing Drive that came into this drainage area of my property.

A. (Continued) And the water that came from this area—this road (indicating) was non-existent before Buckingham came there. This road was dedicated but not cut through to the point of my property line. This was existing as a nursery road between my former partner and myself. I am explaining these things so the drainage can be considered.
page 26 } The area here (indicating), as I said, was low so that most of the water either seeped in the ground, or I don't know what terms you would call it. It dissipated in some way before it came to this point so that a twelve-inch pipe I have under the road, which is here, took care of all the water that was there. I had a small ditch here that took care of this water and had no flood in all the years I was there until Buckingham came.

By Miss Hedrick:

Q. When Buckingham came, what changes took place in the amount of water that flowed across your land?

A. This little ditch here carried very little water before Buckingham came and never overflowed, and I had no difficulty with it. After Buckingham came, these streets overflowed even with all the pipe drains that they had put in. The water didn't only go in those pipes, but it ran down these

Ivan N. Anderson.

streets, ran over a driveway they have here, washed down in this ditch, flooded my whole area from the point about here (indicating) to a point about there (indicating).

Miss Hedrick: Mark them with X's.

A. (Continued) The water came in a point about like this. I will have to mark it a little bit on the other side to show just how it would go. That water, when we had storms, ran from my property to an adjoining property here and the next property over here, and carried debris from Buckingham's own area and threw it all over this low area of my page 27 } property and also carried it as far as this property marked "Pomeroy," all over his area, which is a little lower than mine. He has a line that is graded to, I believe, all the way to his property line, which is a point about here (indicating). I cannot say definitely about that. My plant material was washed out of the ground and even debris from Buckingham's property was carried as far as Pomeroy's and deposited on his land with plant material and my top soil and even pots and material from a cold frame I had at this point was broken, and parts of it carried on to my adjoining property owners.

By Miss Hedrick:

Q. What was the size and nature of the debris that was carried down?

A. There were rocks about that size (indicating) from Buckingham and smaller rocks and gravel and mud, and then pots were carried from my own cold frame to adjoining property owners, to show the force the water had when it came. There must have been a quantity of water when it flooded this whole area and washed with such force and washed plant material I had in the ground out entirely with the top soil.

Q. Can you put on this map for the Jury the terminus of the drain pipe of Buckingham? Indicate where the opening is.

A. Well, to do that, I will have to mark the road down here, my driveway.

Q. We have the boundary.

page 28 } A. That is enough. I have a driveway that enters here, North Thomas Street, and goes to North Trenton. This is high and gradually goes to this low point. Trenton Street is much higher than Thomas Street. Do you want me to tell about the courses?

Ivan N. Anderson.

The Court: Yes.

By Miss Hedrick:

Q. Have you observed water coming from that pipe or have you observed the effect of it?

A. Water comes from that pipe.

Q. During a storm does the water from that pipe connect directly with your pipe?

A. No. It can't. The water comes with such force and the pipe is so much larger, it doesn't have any opportunity of connecting with this small pipe. Sometimes it forms a fountain.

Q. Has your driveway ever shown any effects of the storm?

A. The driveway, the blue stone and all the surface of the driveway has been washed away several times and even down to material that was put as a base for the road back ten or twelve years ago has come to the surface and shown itself. I had forgotten it was even there. In other words, down at the lower part of this road, I should say, in some places the force of the water has eaten into the road eight or nine inches.

That is pretty hard old surface and been driven page 29 } over many years.

Q. Directing your attention to North Thomas Street, will you state to the Jury where any drains are located on North Thomas Street?

A. The openings?

Q. Yes, place them on the map.

A. There is a low place approximately a hundred feet from my property line, which is a low point on North Thomas Street, and there is located a drain.

Q. Mark them with an X.

A. All right. There is a drain here, and one here, and one here, one here, here, here, and here. (indicating) That I cannot definitely state.

Q. Were you familiar with this area between here and Glebe Road before Buckingham came there?

A. Somewhat.

Q. Was that high or low?

A. That was a higher area. No, I cannot say definitely where the high point and low point would be there.

Q. Do you recall whether or not that was dry ground or marshy ground in that area?

A. In here (indicating) I would say it was dry ground, definitely dry ground.

Q. During the period when North Trenton Street was open,

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then North Randolph Street, open all the way to
page 30 } Pershing Drive, where did the water flow during
 storms in that vicinity?

A. The water that came from this area here (indicating) ran down North Trenton, then called North Randolph, and before that various other names. We had difficulty at different times keeping this ditch open because there was so much water that ran down North Trenton Street to the Boulevard, the general contour of the land was such that the water ran in that direction toward Pershing Drive. I cannot say definitely all the way from Pershing Drive, but I think a short distance from Pershing Drive, about here (indicating) the water ran in this direction.

Q. Does water now run down North Trenton Street?

A. The water from here (indicating) runs into Second Road and into the drains that Buckingham has installed here, and into the pipe, and along this street. It does not always go into the pipe in bad storms; it runs along the street and goes to their driveway here, and then the drains collect it, and that water also goes to this place here (indicating).

Q. What happened, if anything, to the small ditch that you had between your roadway and the Buckingham line?

A. When Buckingham built their sewer, the regular sewer, they destroyed that ditch, and after that sewer was put in—

Q. Which sewer are you referring to now?

A. I am talking about the regular County sewer system, not the storm sewer, the regular County sewer system. When
page 31 } that was put in, they destroyed my ditch, my drain-
 age ditch, and also my property line at North
 Thomas Street.

Mr. Ball: There is no damage claimed for that?

The Witness: No. No, I was just merely stating that because—

Miss Hedrick: No.

Mr. Ball: I don't want the Jury to think that is an item of damage.

The Witness: After their sewer was put in, they proceeded to put another ditch in there, which they started on my property line, within my property line, and dug down to this point where I have a small tile drain under the driveway. This lowest point, I was talking about here. That was put partly on their property and partly on mine as they went down, and when they got down to the bottom of that point, they dug it out to my pipe, which is about six feet from the property line,

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and then they put cement and cobblestones at the bottom of that ditch.

By Miss Hedrick:

Q. Did any damage result to your property because of filling in and destroying your drainage ditch?

A. Yes, when this storm sewer—

Mr. Ball: That is a new item that is not alleged.

Miss Hedrick: That is the second count.

Mr. Ball: Is that what you mean by it? Filling the ditch up?

page 32 } Miss Hedrick: Yes.

By Miss Hedrick:

Q. Was there any damage to your property because of their filling in and destroying your drainage ditch?

A. Not before they replaced it, but after they replaced the drainage ditch, they put in this large storm sewer, and in constructing that, they filled in the drainage ditch with soil that was taken out when they installed this large storm sewer.

Q. Did the filling in of your ditch at the time they installed the large storm sewer cause any damage to your property?

A. Yes, when the storms came, that dirt and rock was washed out over my driveway and on the lower area where I have plant material on each side of the ditch, and a great deal of that debris was deposited on my plants, covering them entirely, and in some instances, by having that rock and mess go down, it helped to take the plants out as it went along because it came with such force and that rock material also helped to wash out my plant material.

Q. Mr. Anderson, do you recall a severe storm in the summer of 1933?

A. There was a storm in August, 1933, as I recall.

Q. Was it a severe storm?

A. It was one of the most severe storms we have had in our location up to that time. It was the most severe I had seen.

Q. Was it severe in reference to the quantity of water that fell?

page 33 } A. There was, as I recall, three days of water fall.

Mr. Ball: I don't think the damage from 1933 can come into this action.

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Miss Hedrick: I am leading up to general conditions.

Mr. Ball: I don't see how the Jury is going to segregate the damages you are claiming for.

The Court: This particular item, I didn't think she intended to claim damage.

Miss Hedrick: The point is there wasn't any damage from that particular storm.

The Court: Objection overruled.

The Witness: There was about three days' rain. It started and lasted over a period of three days, and we had so much water fall that in this lower area on my property, the ground was so thoroughly soaked with water, trees blew out of the ground, roots and all, and during that time the water did not overflow the ditch or do any damage to any plant material I had in that bottom area. That area is my richest topsoil so I have been using it and keeping it as full of plants as I possibly could, and at the time of this storm, there was no damage done to my plant material.

By Miss Hedrick:

Q. Was there any damage done to your land in the summer of 1938?

Miss Hedrick: I might say, Mr. Ball, we are not claiming damage for anything in the year 1938; strictly
page 34 } 1939.

Mr. Ball: All right.

A. There was damage done at that time. Should I say the cause?

Miss Hedrick: Yes.

A. (Continued) Buckingham at that time had started their excavations, and water collected in their excavated areas, and there was quite a bit of mud and cement, paper, cement bags, and things of that sort that did quite a good bit of damage because of them stopping up the ditch, and at that time there were rocks and more—I would have to call it sticky clay than anything else, silt that came down from their excavation at that time, and changing of their property grades, filling in.

By Miss Hedrick:

Q. Did they have any notice of damage to your property after it occurred?

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A. I told them about it.

Mr. Ball: You mean in 1938?

Miss Hedrick: Yes.

The Witness: Yes, I told them about that at the time.

Mr. Ball: I object to that, if the Court pleases.

Miss Hedrick: I said "wantonly and unnecessarily destroyed and continued the same line after notice of damage."

The Court: Objection overruled.

Mr. Ball: We note an exception, please.

Miss Hedrick: The question was already an-
page 35 } swered, I believe that you notified Buckingham.

Mr. Ball: Yes, he answered that far.

The Witness: Yes, I notified Buckingham at that time.

By Miss Hedrick:

Q. Coming down, now, to the summer of 1939, what, if any, damage was caused to your property by water, surface and storm water, coming from the direction of Buckingham? Can you give the date?

A. I cannot give a date, but it was known, and I think the Jury will remember the date, as the thundershower while the King and Queen were here. It was a very heavy thundershower and did quite a bit of damage, caused by Buckingham's water and how they had dumped the water coming down the points I have already described on the map here. At that time—this larger pipe was installed after that—there was a smaller pipe that was not adequate and water ran down the streets and in a small valley behind the building. There wasn't much from that but it ran down the street with such force—

Q. Thomas Street?

A. Yes, it ran down Thomas Street with such force, it washed all the bluestone off my driveway, and it washed a path of its own across the road and carried all the rubbish that collected by tearing up the road and flooded quite an area that had never been flooded up to that time. It was not
even flooded in the storm of 1938.

page 36 } Q. You say that afterwards they replaced the inadequate pipe?

A. They replaced this smaller pipe with a larger one, and I do not know whether they have taken the smaller one out—the smaller one, I cannot say whether that was taken out or not, but this new one, much larger one, was added.

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Q. What other damage was done during the summer of 1939?

A. In August we had a storm that did more damage than any had before that time, and at that time the ditch—this ditch that goes from Thomas Street down to this lower area,—had at that time been filled with the dirt that had been taken out where this pipe was laid and all of that was washed out, to such an extent that the mud and dirt that was in that ditch was washed over the driveway and at one point, the driveway was impassable. I couldn't use it for my car until after I dug new ditches, and all this area in here was filled with debris that was, in some places, as deep as four inches, and many places as deep as one inch. That is enough to kill some of the plants I had there that were not very tall and it ruins the roots.

During that storm the water came also with such force the pipe did not quite take care of it, and one of Buckingham's own men told me they could not understand it. At that time the water came down the street as well as the pipe and washed the whole length of the driveway, way across my property to my adjoining property owner, and washed some page 37 } of the debris from that ditch and some of my plant material and pots, and as I said once before, parts of a cold frame I had constructed from cinder block, and very heavily constructed, were thrown on to my adjoining property owners.

Q. Did you notice anything about the drain, the storm pipe, which they had laid under the ground along Thomas Street?

A. During that storm, the storm was so severe that this large drain pipe was laid under the sidewalk, and the storm came with such force that it injured the sidewalk quite a good bit in some points.

Q. The rain beating down on the sidewalks?

A. No, they had added so much more drainage area to it, and the water ran to this point, that where they had laid the pipe along North Thomas Street was under a cement walk, and the water was so forceful that it tore up the cement sidewalk.

By Mr. Ball:

Q. It tore up the sidewalk?

A. Yes.

Q. No damage to you?

A. Yes, there was damage to me. I was just showing the

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force it had. If it had that much force there, there would be more force when it got to me.

By Miss Hedrick:

Q. Have you made an itemized statement of damage to your plants and equipment during the storms of 1939?
page 38 { A. I have.

Q. Have I that?

A. Yes.

Miss Hedrick: I am not offering this paper in evidence yet because there may be some objection to it, but I want to ask the witness how this paper was prepared and by whom.

The Witness: This paper was prepared by me, and it was prepared from a temporary inventory list I had of my nursery stock and actual count on the ground.

By Miss Hedrick: .

Q. Actual count of what?

A. Of the plant material that was left after the storm.

Q. This is by deducting what was left from your inventory of what you originally had?

A. Yes.

Q. When did you count the plants that were left?

A. Those counts were made as I transplant. As I said once before, this particular area is my richest soil, and I aim to keep it as full as possible. I transplant from other areas, and when I transplant a new bed or a new area, I make a list of the material that was transplanted into that area. When that begins to grow, I make another check to see how many of the plants died, I might say, from the transplanting, which is not often, as a rule, in this particular point, because they are usually large plants.

Q. When you make your count, how is it re-
page 39 { corded?

A. On an old catalogue, as a rule.

Q. Is this paper compiled from the count you made on your old catalogue?

A. Yes.

Q. Are the old catalogues still in your possession?

A. Some of them may be but that sort of thing is a temporary count so I hardly could find all of them.

Q. I want to ask you if this paper you have before you represents a true and accurate list of the plants that were destroyed during the storm of the summer of 1939.

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Mr. Ball: I have no objection to his using that paper to refresh his memory.

Miss Hedrick: I want to introduce the paper itself.

Mr. Ball: We object, if Your Honor pleases, to the introduction of this paper. The information there was transferred to it from another record.

Miss Hedrick: It is his permanent record from his temporary record.

Mr. Ball: My understanding is that that paper was made up for the purpose of this suit.

Miss Hedrick: The same as an automobile accident, a list of repairs.

By the Court:

Q. Is that for one storm or more than one?

A. Two storms.

page 40 } Q. How close together were they?

A. One of them was in June and the other in

August.

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Mr. Ball: This statement is dated in October; October 6, I think it is.

The Court: I think the statement itself is objectionable. We come down to the question now of whether or not he can use it to refresh his recollection. It seems to me that he can.

Mr. Ball: It seems to me it is the same thing as a man who kept books and made up a statement of the books, and attempts to testify from the statement without bringing in his books. Those statements, I don't know whether they are in existence, but they should have been kept. They were kept in October. This was something that happened in June. It doesn't seem to me this particular statement should be used to refresh his memory.

The Court: Refreshing his memory is quite a different thing from that. I am not inclined to think the objection should be sustained. Had this statement been prepared from memory, I think he could use it now to refresh his memory. It wasn't; it was prepared from records. When he looks at that, he is not refreshing his memory on it. Is it going to recall to his mind that they are right or is he going to rely on the paper? What about that?

The Witness: I would have to rely on the paper.

The Court: Objection sustained.

Miss Hedrick: May I ask if I may put this witness on the

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stand after he has had an opportunity—the whole
page 41 } question of damages, I want to try to bring out
what he recollects.

Mr. Thomas, did you admit the new street that was put through?

Mr. Thomas: We admit whatever street is shown in the evidence. There was no street—

The Court: He testified that part of Thomas Street was new.

Mr. Thomas: As I recall,—gentlemen, I am not testifying—Mr. Anderson, if I am incorrect, you correct me—the whole length of this street, North Thomas Street, it was originally just a line drawn across this plat.

The Witness: Well, as it exists now—

Mr. Thomas: Go back now to the Corbett property. The folks who owned this land took twenty feet on either side of the property. There never was any street in there until this street was cut through. There was no actual street in there. After we came, we put this street in.

The Court: Except as to North Thomas Street from Lee Boulevard to the north end of his property.

The Witness: That was an old nursery, and that was not touched until after some of this happened.

Mr. Thomas: The other street, Miss Anna, this was an old street, North Randolph Street. That is a new street.

The Court: George Mason Drive.

Mr. Thomas: Second Road is new.

Miss Hedrick: Fourth Street.

page 42 } Mr. Thomas: Fourth Street, as shown on this
plat, is new.

Miss Hedrick: North Pershing Drive was in existence.

Mr. Thomas: That is right. North Pershing Drive was in existence.

Miss Hedrick: You may take the witness.

The Court: We will recess for one hour.

Thereupon, a recess was taken for lunch from 12:30 to 1:30 P. M.

Miss Hedrick: I will put Mr. Anderson back on the stand.

IVAN N. ANDERSON,
resumed the stand, and further testified as follows:

DIRECT EXAMINATION (Continued).

By Miss Hedrick:

Q. Mr. Anderson, subsequent to the damage to your plants during the summer of 1939, did you at any time go upon the ground and make any written record of those plants destroyed?

A. Yes, I did.

Q. What was the date of that?

A. I can't recall the exact date, but it was a few days after the last storm.

Q. Have you that written memorandum with you?

A. I have.

Mr. Ball: What do you mean by the last storm?

Miss Hedrick: It was the Labor Day storm.

Mr. Ball: I understand that is the original state-
page 43 } ment made up on the ground?

Miss Hedrick: The original statement made up on the ground and in his own handwriting. I offer this in evidence.

(Said list, so offered and received in evidence, was marked Plaintiff's Exhibit No. 2.)

By Miss Hedrick:

Q. Is this the paper you made up on the ground as to the damage that was done?

A. Yes.

Mr. Ball: We want to reserve the right to object when we have a chance.

By Miss Hedrick:

Q. Will you read it to the Jury?

A. These are perennial plants. I have to explain them a bit. These names are the regular biological names of the plants in the bed in that area. These are the actual plants that were destroyed. 150 *Doronicum Caucasicum*—

Q. Have you placed the value on these different plants?

A. I have.

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Miss Hedrick: I think you admitted he is qualified in the landscape business.

Mr. Ball: Yes.

By Miss Hedrick:

Q. As you read each item, fix the value of it.

Mr. Ball: We, of course, do not agree his price page 44 } is right.

A. The prices that I have set on each item here is based on the wholesale catalogue cost of replacing this material. It has nothing to do with the cost of putting them in the ground nor the transportation charges. It is what they would actually cost me from another nursery.

150 *Doronicum Caucasicum*, \$18.00; 250 *Myosotis*, \$27.50; 400 Primroses, \$70.00; 150 Japanese Anemone, \$32.50; 75 *Tricyrtis*, which I cannot replace because I do not know any nursery that handles it. It is one of the items that I have no idea where to get the replacement. 200 *Hata minor*, \$50.00; 100 *Doronicum excelsum*, another form of *Doronicum* in another bed, the value of it is \$12.00; 200 *Lamin Machlatum*, \$22.00; 200 *Campanula carpatica*; 100 *Campanula Poscharskyana*; 50 *Prunela Julia*; 12 *Prunela Seboldii*; 200 *Pulmonaria saccharata*; 250 *Pulmonaria augustifolia*; 400 *Hedera Helix*, assorted—

By Miss Hedrick:

Q. Some of those you have read, you have left out the amounts.

A. Oh, I am sorry. The *Campanula carpatica* is \$22.00; 100 *Campanula Poscharskyana*, \$15.00; 50 *Prunela Julia*, \$7.50; 12 *Prunela Seboldii*, \$2.50; 200 *Pulmonaria saccharata*, \$22.00; 250 *Pulmonaria augustifolia*, \$42.50; 400 *Hedera Helix*, assorted, \$21.00. The 500 pots were in several sizes and they were \$25.00. 150 *Heuchera*, \$18.00; sand for the cold frame, entirely washed away, \$3.00; repair of the cold frame, \$25.00, that includes both material and labor; 200 *Aquilegia*, \$33.00; labor for digging a ditch that was filled up was \$27.50; labor of removing debris, \$35.00; loss of top soil, which was based on the price, the regular wholesale price quotation I got from the man that deals in top soil, \$1.40 per cubic yard, came to \$300.00; crushed blue stone on the road, I had to estimate, and that was what one load would cost me, \$15.00; 75 *Phlox Camla*, \$8.25.

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Q. Since this list was made up, two or three days after the last storm, has there been any subsequent loss on your plants since the storm?

A. That I cannot say the exact amount, but between 750 and 800 additional English ivy that appeared to be in such condition that they would revive have since died. They were also in that cold frame.

Q. They are not included in this list?

A. They are not included in this list because it took about three months for those things to show they were not going to live.

Miss Hedrick: I think that is all.

By the Court:

Q. Have you that totaled?

A. This is not totaled. I had a copy but it was not acceptable to the Court.

CROSS EXAMINATION.

By Mr. Ball:

Q. Is this list the same as the list dated October page 46 } 6, which you had in your hand a while ago?

A. That was made previous to that list.

Q. Is it the same list?

A. Yes, the other was a copy of this list.

Q. That is correct, isn't it? The other was a typewritten copy of what you have written out by hand?

A. Yes, that is true.

Q. When you had the other list, you said you arrived at it from some inventory on catalogue leaves?

A. Those inventories I had before me when I made this, and this is the balance of the plant material. In other words, this is the plant material that was washed out.

Q. What date did you make this as near as you can recall? I understood you could not fix the exact date, but give us the approximate date.

A. The only way I can fix anything like a date on that would be to say either the second or third day after the storm.

Q. The big storm in September?

A. Either Labor Day or the day before.

Q. Was that an unusually heavy rain at that time?

A. Well, we had had rains that were much heavier than that

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one, but that was the heaviest rain we had had since June.

Q. When did you take the inventories which you used in compiling this statement?

A. When the plant material—I can say better page 47 } than that. About a month after the plant material was put into the ground.

Q. And when was that material put in the ground? What time in the year?

A. At various times in the year because, as I stated before, I tried to keep that land with growing material in it as much as possible because that was the richest land.

Q. Some of that material had been put in in the spring, had it not?

A. Some of that material was put in in the spring.

Q. And others at various times during the summer months or spring months, which?

A. It was put in during the spring months, during the growing season.

Q. When would you call the end of the growing season, the end of May?

A. No, the end of June.

Q. So that all the items on the original inventory—that entire inventory had been taken by the middle of June, the last of June, or when?

A. All that inventory would have been made by the first of June.

Q. As I understand it, it was more or less a running account. As you put some things in the ground, you put them in your inventory, and you keep building your inventory as you put the things in the ground?

page 48 } A. That is right.

Q. You checked back in September after the storm, took what was left, and deducted that from what the inventory showed in the ground?

A. That is right.

Q. Had any been taken out?

A. No.

Q. Not a plant had been taken out?

A. No.

Q. You recognize that we had one of the driest seasons last year?

A. Yes, that is true.

Q. During all the summer you did not lose a single plant?

A. There was no plant in this particular area that was killed by the drought.

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Q. Not a single one.

A. That area is more affected by excessive rainfall.

Q. Not a one died from disease or anything of that sort?

A. There are no plants on that list that are susceptible to any diseases.

Q. In other words, every plant you put in there in the spring was there when the rain came in September and were living?

A. No, some of those plants were injured in June during that first storm.

Q. You do not know which ones they were?

page 49 } A. I had an inventory list of that plant material that the notations were made at the time, and one item I remember particularly—there were very few things that were destroyed in the first storm other than the plant material that was in loose soil. By that, I mean the things that were transplanted in late May. The soil was very light, and there was one item, the myosotis on there, was entirely washed away, including the top soil.

Q. In June?

A. In the June storm. There are so few items that when I look at that list I can tell what they were. I put no notation down other than the plants entirely destroyed in June because they were only in the beds of very loose soil.

Q. Did I understand you to say that in this particular area more injury was done by rainfall than by drought?

A. Normally there would have been because there is practically no damage caused by anything other than the overflow of this ditch because this is deep, rich soil, not affected by drought.

Q. Are there any springs in there?

A. No spring.

Q. This soil is deeper than any other?

A. Yes.

Q. The deepest and best and that is the lowest?

A. That is true.

Q. Isn't that soil composed of silt washed down from Buckingham and that area through the years? Isn't
page 50 } that soil made from silt washed down?

A. A little of it may be. The lay of the land being in a moist area, I have built up a great deal of that soil myself with manure, peat moss and soil building material.

Q. Have you put soil in there to build it up?

A. My soil is very poor and I had to build it up.

Q. Peat moss doesn't add to the depth, does it?

A. Palpably.

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Q. You said that was unusually deep there?

A. Yes.

Q. Do you know any way that depth was caused except by being washed down from former owners of this area?

Miss Hedrick: All soil is caused by rocks disintegrating and washing down from one place to another. Unless you limit this to a definite period—

Mr. Ball: He was getting the advantage of soil that was washed down until Buckingham came.

A. No, the lay of the land there when we took it over was such that that soil could have come off any other—it could have come off the two hills which had nothing at all to do with Buckingham.

By Mr. Ball:

Q. Doesn't the strata of the soil show that the soil has been washed there? Don't you find from working in it that that is so?

page 51 } A. That cannot be the case altogether. There is some; there is bound to be. How much is the question. Where land is more moist, you get a deeper growth, and moist areas are more likely to build up a humus condition than by washing. If it was washed soil, it would go further down, it would go beyond me because my land is not the lowest land there. That is not the case because the soil on other properties there does not have as deep soil deposits as I have in this particular area.

Q. Along the low part?

A. Along the low part. It is not as deep down there in the valley as it is on my particular property.

Q. As I understand you, you made this list up when you had the inventory before you?

A. I did.

Q. And counted the plants still alive?

A. I did.

Q. And made this up at that moment right on the property?

A. I did.

Q. What catalogue did you take these prices from?

A. I took them from several wholesale dealers.

Q. Do you have any of those catalogues here?

A. I have none of those catalogues, but I could produce any number of those catalogues to prove those prices because in many cases the price is lower than the majority.

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Q. Two hundred and fifty forget-me-nots. When page 52 } do you sell those plants?

A. In the spring and in the fall.

Q. You did not sell any of these in the spring?

A. I did not sell any of those plants after the first of June.

Q. I understood you to say you did not sell any of those plants after you put them in the ground?

A. Not from that area. I had others to draw from that were larger.

Q. Is that true of all of these?

A. That is true of all of these.

Q. When is the best selling time for primroses?

A. No quantities. They sell mostly in the fall to people coming to the nursery and pick them in bloom.

Q. You sold none of these in your field?

A. Not after the inventory.

Q. They were all in the best land?

A. Yes.

Q. People who came to buy bought from your poor land?

A. These plants were not in as good condition in the case of the primroses, not in as heavy bloom as older plants I had about that time.

Q. Did you move the older plants to a poorer land?

A. No, I have another area I grow these plants in.

Q. In low land?

page 53 } A. In low land, yes.

Q. That was not overflowed?

A. That was not overflowed. As far as this is concerned, I have primroses in two beds above here not affected by the storm at all or by the overflow. It is too high, but that whole area is good soil.

Q. This overflow happens to be in the area in which you had plants you were not going to use until fall?

A. I would use them in the fall if I had a sale for them, and most of those things may go to the next season, may go to spring before they are sold, but they were not plants I had calls for that I had to draw on this to help supply because this is rotating material for growing plants

Q. Who removed the debris?

A. My own laborer.

Q. How many days did he take?

A. I have a notation there. I cannot recall from memory but on the debris I should say it took two or three days. As

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I recall, those days were not consecutive because I had other work for them to do.

Q. Two men two or three days?

A. Yes, sir. It was scattered all over the place, and it was an awful job to rake that off.

Q. How much do you pay them?

page 54 } A. \$3.25 and one man \$3.75 and another \$3.50.

Q. You have charged \$35.00 for two men for two or three days. Isn't that rather high?

A. In saying debris—I kept a record of the time. My memory is not that accurate. I cannot say definitely that they did not work longer than that. It was work done on the item I have there, and it was worked out on the basis of the men who actually worked there. Evidently my memory failed there, and they worked longer than that. I tried to keep them straight. There is an item of cleaning out ditches.

Q. Where did you keep a record of the time the men put in for removing debris?

A. I have regular index cards that I put on the work that they do.

Q. Did you bring those with you?

A. No, I did not. Those cards—at that time I totaled them and put it on that sheet. I keep a card record for the individual expenses and the nursery expenses. I thought that this probably would be required, and I kept those separate from the others. I marked on there what the actual labor was for, and then entered the total on that particular sheet.

Q. You did the same thing as to ditching. You charged \$27.50 for ditching. Did you keep a record of the number of days on that work?

page 55 } A. I even did more than that. I kept a record of the times I sent them on the ditches. The ground was in such condition I could not use it again until I did ditch. That is the item I think I was speaking of when I spoke about the other one. The ditching had to be done before we moved the debris.

Q. Where was this ditching done?

A. The ditching was done on the sides of my driveway, down along the driveway.

Q. Right along the Buckingham line?

A. Right along my road down into the ditch, and the large ditch itself had to be cleaned out because in places it was completely full. This ditch was completely filled up in some

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spots, and then I have my driveway down here, and there is another road.

Q. Show that to the Jury.

A. I have another road that comes in from the Boulevard here, which has a ditch on both sides of it, and there is a road, I have already stated, that came down here. This area in here is pretty well ditched, and those ditches were completely filled so I had to dig those out in order to prevent any more water coming over the area where the plants were.

Q. When, before this big storm in June, 1939, was it after the June storm or September storm that you cleaned it out?

A. It wasn't necessary—I have no item there, I didn't consider the item large enough to put down a charge for the June storm.

Q. The September storm, then?

page 56 } A. But in the September storm, the debris was so great that I had in many cases to completely dig a new ditch. There was no ditch in evidence in some spots on the side of my driveway.

Q. When had you cleaned out those ditches before? How long was it since you cleaned them out last?

A. It must have been about four years.

Q. None of those ditches had been cleaned out for four years?

A. They didn't need it. Nothing had been washed over that area.

Q. How big was this cold frame you have mentioned here?

A. It is approximately seventy-five feet long, and it is six feet wide. It is built with the idea of covering it with an ordinary cold frame sash.

Q. Any flowers in that frame?

A. It was completely full of potted plants.

Q. What happened to it? What was done to it?

A. The water was so high at that point, and that is ground that is two feet higher than any adjoining property owner because we put a little pile of stones there to protect it from any caving in of my bank. There is a rise of ground about two feet, and this cold frame—the force of the water was so great and so high—I didn't mention that the frame is six inches high.

Q. What happened to it?

page 57 } A. The frame itself was broken to pieces. It was made of cinder blocks laid with mortar in between and was perfectly strong enough to with-

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stand any sort of water. That was broken, collapsed, and caved in, and parts of the cinder blocks washed on to my neighbors, and all the plants in there either washed out forcibly and deposited in my neighbor's ground or were covered with debris. It looked absolutely hopeless. The pots were in every sort of condition, very few upright. The sand was all washed out and in its place, mud, rocks, and clay, so it had to be entirely made over. All those plants had to be repotted.

Q. I am talking about the frame itself. Do I understand the frame was broken up?

A. The frame was broken up.

Q. A frame that was made of concrete blocks cemented together?

A. It was broken in places. It collapsed, and parts of it were even washed as much as fifteen feet. It may have been more, but I am sure it was at least fifteen feet that some of that cold frame was washed on my neighbors.

Q. Is that restored now?

A. Yes, the frame is exactly the same and in the same spot and entirely rebuilt.

Q. How do you arrive at the number of yards of top soil that was washed away?

A. I went over the area carefully and estimated—that, as you will recognize, is a very difficult thing to estimate. I was rather careful in going over the area and trying to estimate at each point how much was washed away, and the only conclusion I could come to was to go where it was cut deepest, deepest into the beds, and estimate what that level was to what the original level appeared to be to the existing soil that had not been washed. That made me figure from two to four inches had been washed away in some places.

Q. Well, now, isn't it a fact it was washed away in some places and deposited other places?

A. No, it was not. The force was so strong it was washed on to my neighbors.

Q. None of this silt that was washed down went on your land at all?

A. There was no silt from Buckingham. It was rock as well as mud, and it did much more damage.

Q. Did you move that away?

A. I moved that away.

Q. The Jury couldn't see any of that now?

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A. You can see some of it that was piled on the road because it was such heavy material some of it was good enough to put on the road.

Q. How many yards of top soil did you estimate?

A. That I cannot remember accurately; a little over two hundred and forty.

Q. Did you make a memorandum of it?

page 59 } A. It is on that list.

Q. It says, "Loss of top soil, \$200.00." I am trying to figure out how you arrived at it.

A. There is a memorandum made of it somewhere because I figured it at two hundred and forty-some cubic yards.

Q. What did you get that from? Two hundred and fourteen yards, where did you get that from?

A. That came from the notes when I was figuring that out. I had other sheets I was figuring on.

Q. Didn't you think it was important to bring some of the things you figured on?

Miss Hedrick: If he has the total and value of the cubic yards, it is a simple matter to find out.

By Mr. Ball:

Q. Did you use any instruments on that land?

A. I have no instruments to use. Any one going there now can see where the original area was. Some of that area has not been altered since the last storm. Any one used to a thing like that could estimate at least that much top soil.

Q. Are you an engineer?

A. I am not.

Q. You made an estimate and put that estimate on something?

A. Yes.

Q. You do not have that memorandum here and you do not know where it is?

page 60 } A. That is true.

Q. On this piece of paper you have put in 214 cubic yards. Isn't that made up from your memory?

A. That is not.

Q. Did you have that memorandum at the time?

A. I had that memorandum at the time.

Q. Why did you keep it all summer and then—When did you make the estimate of the top soil?

A. I made the estimate of the top soil when I was working

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on the estimates of my losses. It was done and finished after I made up this list of what the actual plant losses were. I had quite a bit, Mr. Ball, of this material with me last November when this case was to come to trial, and I have been away this winter, and I could not find the material when I came home.

Q. Why didn't you put the amount of the top soil on this statement? You were making this up on the ground and the top soil appears with the flowers and everything.

A. I figured these items out on scratch paper which even that is, as you can see, and I ran across that particular item when I thought it might be important so I put it on the list that I thought would be more permanent than on that one.

Q. You have on this list the amount you claim exactly the same as it is on that list, but the cubic yards are not on there.

A. That was a list I considered a scratch list, and I didn't think it was important. When I found the item, I page 61 } thought it would be important so I put it on what I call the permanent list.

Q. What do you mean, when you found the item?

A. I had quite a few of these papers I had been figuring on, scratch paper, odds and ends. I had these things all together, as I said, last fall when I thought this case was coming up. Now I don't know where they are. I didn't think they were important.

Q. Do I understand the item you have on this list is scratch paper?

A. I figured the total on scratch paper and put the total on there.

Q. You did not enter that item right on the ground?

A. No. I couldn't. That would not be possible. I had to enter that when I had time to figure it out.

Q. You did enter all the flowers on the ground?

A. The labels were on the ground, I had to enter them. The plant labels and markers were there.

Q. Why is it there are some flowers before you have that item and some flowers after you made that item?

Miss Hedrick: Let him look at the itemized statement.

Mr. Ball: He said the flowers were all entered on the ground and this other item was entered somewhere else. I am asking him why there are flowers listed both before and after it.

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A. The way this was made out, when I was on the ground, I listed the items that I considered were losses, and I listed those items without totals, and so the total in this page 62 } case was inserted after the actual listing of loss of top soil. Those words were written in without the total because I was itemizing the things that it would be necessary for me to put down. Then I went up to the house and figured what the total would be, and then I entered the total afterwards.

By Mr. Ball:

Q. Were any of these flowers you have on there raised by you from seed?

A. I will have to see the list again, please, to tell that. I raise very few things from seed.

Miss Hedrick: May I ask here, do you intend, Mr. Ball, to show the cost of the seed plus the cost of raising the plant up to the time it was destroyed?

Mr. Ball: I don't know whether I am or not.

Miss Hedrick: I don't mind your doing that.

A. (Continued) The only item I raised from seed was the 300 Aquilegia plants. They were put in the cold frame.

By Mr. Ball:

Q. And there were exactly three hundred there? You counted them plant by plant?

A. Yes.

Q. How large were they when they were put in the cold frame? Give the jury some idea.

A. Quite small.

Q. Were they an inch high?

page 63 } A. You can't go very well by the height; it is the size of the root.

Q. I asked you about the height.

Miss Hedrick: He says height doesn't make any difference.

Mr. Ball: That is my question.

By Mr. Ball:

Q. How high were they?

A. In the cold frame or when they were destroyed?

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Q. When you took the inventory?

A. When I took the inventory, those plants were about a foot high.

Q. You didn't take that inventory when you first put them out?

A. Yes, I did.

Miss Hedrick: You mean in the cold frame or in the ground?

A. (Continued) When I put these things out in the ground at this particular place, that is the reason I say the height does not make any difference because the root was planted and the top grows—it does not grow, it stretches out. A few weeks after they were planted, those plants are taken from the cold frame.

Q. Forget-me-nots, you raised those from plants?

A. Cuttings or divisions.

Q. You put cuttings out?

A. I put divisions in.

Q. When you put cuttings out, did you put them
page 64 } in the spot where they were?

A. Yes.

Q. And you counted them as cuttings?

A. No, they had been in the ground longer than the cuttings. You have a wrong idea of my inventory. I take an inventory in the spring, in April, always of the old material that was there, and these particular forget-me-nots had been in the ground over a year when the inventory was taken.

Q. Mr. Anderson, maybe I misunderstood you. I understood you to say that you took the inventory as you put them in the ground. You take the number you put in at various times.

A. I probably said that in such a way that you misunderstood. That was my fault, possibly. I made an error there in not saying that there was an additional inventory taken every spring of the existing material on the ground. I neglected to say that, which this item of forget-me-nots was.

Q. Let me ask you this—

A. I am mistaken on the forget-me-nots. It was the primroses. The forget-me-nots had been in the ground in this particular place, this happened so long ago that I have to think this thing over. The forget-me-nots you speak of were transplanted, the large plants. They had been in a month or a month and a half the first of June, before the storm.

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Q. Where were they transplanted from?

A. Another area a little bit higher up, but I
page 65 } needed to clear the ground out for these things. I
moved these large plants and they were at least
six inches across.

Q. I understood you to say the reason you did not sell these plants out of this rich ground was because you had larger plants?

A. I did have larger plants.

Q. Larger forget-me-nots?

A. I had larger forget-me-nots.

Q. You said this was your rich land?

A. The ground up higher, not so much higher, is good ground. All of my good ground is not flooded. This is a bed and I said before there are only two beds above the one that was flooded.

Q. Mr. Anderson, I understood you to say you had been there a good many years. You were there as a partner with Mr. Foreman?

A. That is right.

Q. And in 1933 you bought this particular piece of land and started for yourself?

A. I did.

Q. How many years all together have you been on that area?

A. I can't say accurately.

Q. About twelve or fifteen years?

A. I have been there at least twelve years and that I can definitely state, but I may have been there fifteen because we cleared the land there, and I started with it when it was cleared from woods.

page 66 } Q. The land Buckingham bought north of you
was in bushes?

A. It was in heavy woodland growth.

Q. Oak trees, pine trees, bushes, and some cedars and weeds and everything else were in there, isn't that right?

A. That is right.

Q. Just waste land with no improvements?

A. That is right.

Q. That extended all the way up Pershing Drive, isn't that a fact?

A. Yes.

Q. When Buckingham came in, they graded these streets and put up these buildings?

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A. That is right.

Q. There was nothing unusual in the grading of the streets? It was done in the ordinary manner?

A. I had nothing to do with it. I suppose it was.

Q. You have no criticism of it?

A. No.

Q. So far as the buildings that went on it, do you consider that a reasonable use of the land?

A. Yes.

Miss Hedrick: The reasonable use of the land is for the Jury to determine and not this witness.

Mr. Ball: He has got to show that we used it unreasonably.

You have stated in your notice of motion we did
page 67 } an unreasonable thing in occupying this land and
drained it in an unreasonable manner.

Miss Hedrick: And that is the very thing we are asking the Jury to determine.

Mr. Ball: That is right. I am asking him what the unreasonable thing was.

Miss Hedrick: That is for the Jury to determine. It is all set out in the notice of motion for judgment.

The Court: Objection overruled.

By Mr. Ball:

Q. Isn't that a fact that you consider that a reasonable use of the land, the buildings such as they put on there?

A. The buildings?

Q. They are in keeping with the development in this County?

A. Yes.

Q. And similar to that construction in Colonial Village and Arlington Village?

A. Oh, yes.

Q. In regard to the streets, isn't it true that the streets are laid out in a manner considering the development in Arlington County?

A. I don't quite understand what you mean by reasonable manner.

Q. Was there anything unusual about their streets as laid out in other sections of the County?

page 68 } A. No.

Q. The same black top?

A. Yes.

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Q. They laid out sidewalks as they have in other developments?

A. Yes.

Q. In all that use of the land they have made, can you point out anything unreasonable either in the buildings, the layout of the streets or sidewalks?

Miss Hedrick: Or any other reason.

Mr. Ball: We will come to that later.

By Mr. Ball:

Q. Is there anything you have seen in the layout that you do not consider reasonable?

A. The only thing is the way they pipe their drain on my property.

Q. I am talking about the construction or use of the land.

A. I have nothing to do with that.

Q. You have no criticism of that at all?

A. No.

Q. The thing you are complaining of is the amount of water or the manner of carrying it off?

A. Both.

Q. The amount of water to be carried off necessarily increased when the buildings were put in and their
page 69 } streets laid out, did it not?

A. I didn't know they were going to drain it on to my property.

Q. Can you tell me where they can drain it?

A. They can carry it down the streets where it belongs, not on some one else's property.

Q. What streets do you have reference to?

A. On Thomas Street to Lee Boulevard.

Q. This water can be carried on Thomas Street to Lee Boulevard?

A. It could.

Q. In this same drainage basin?

A. They could pipe it.

Q. Wasn't it piped in order to get it to the lowest part of your property?

A. No, it was piped to keep it off Buckingham property.

Q. Suppose the piping had not taken place, where would the water have gone?

A. A great deal of the water would have gone in other directions if Buckingham had not graded their streets as they did.

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Q. Let's get that about the water that would go in other directions. That is Pershing Drive?

A. That is Pershing Drive. As near as I can recollect, there is no water north of Pershing Drive that entered into my property.

page 70 } Q. Where did it go?

A. I don't know. I have no idea where it went.

Q. You were speaking now of the area north of Pershing Drive. You say the grades were changed in there, in some wise the grades were changed to throw the water on you. Show me where the grades were changed.

A. Fourth Street, so far as I know, the water ran in some other direction, but just as soon as this area was graded, the water was greater coming down here and into my area. This I know definitely and have watched it run after a rain; when Trenton ran all the way to Pershing Drive, the water ran to Lee Boulevard on Trenton, which was then Randolph, to Lee Boulevard.

Q. Let's confine it to one section. I want to confine it first to the property north of Pershing Drive.

Miss Hedrick: I thought he finished that.

By Mr. Ball:

Q. Have you finished that?

A. Yes.

Q. You claim the grades were changed in what way?

A. That I cannot say. All I can say is mud and water that ran down in this street before pipes were installed comes from up here. I have been living and going down this street at Pershing Drive, and I have never seen water standing or running down here.

Q. When they built the buildings and surfaced the road north of Pershing Drive?

page 71 } A. I have never seen water running across Pershing Drive at this particular point until after Thomas Street was opened in this direction, and Fourth Street, and a connection made to Henderson Road. After that, the water was running very heavily into these drains, and before that drain was installed down Thomas Street here—when that area, when the former property owners had it, I had never seen water stand in that particular point, and for that amount of water there must have been some of it conspicuous before the grades changed.

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Q. Unless there was some change in the grades, the water would just follow the ordinary natural lay of the land that existed before the streets were put in there, wouldn't it?

A. It would have, but how can you account for the amount of water in here when there never was any in this area?

Q. This was open land, was it not?

A. Open land, and you never saw any water standing in there.

Q. And part of that was cultivated, some of that in that area?

A. Some small part of it may have been.

Q. There was something there to absorb the water, the ground there and cultivated land to absorb the water, wasn't there?

A. Not the amount of water running across Pershing Drive when I saw it.

Q. Where do you claim this water came from that you saw going across there?

page 72 } A. The water that I saw going across Pershing Drive at Thomas Street was coming from Fourth Street and this part of Thomas Street, but I cannot say how much was coming from any one point there. There was quite a quantity of water in the street; it wasn't even in the drain.

Q. That was after Buckingham put its apartments in here north of Pershing Drive and the streets had been surfaced?

A. Yes.

Q. That is right, isn't it?

A. Yes.

Q. So the water was coming off the roof and off the sidewalk and the hard surface street, and naturally would run down there, wouldn't it?

Miss Hedrick: He didn't say "naturally."

A. No, it was not natural.

By Mr. Ball:

Q. You mean to say the lay of the land from Fourth Street to Pershing Drive, that slope was not down toward Pershing Drive before Buckingham came there?

A. That land appeared to be perfectly flat because it was land and the water wasn't there.

Q. Did you ever in your life see water run in any other direction except toward you?

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A. I never saw it run toward me before Buckingham came there. There was no water in there.

page 73 } Q. You knew water fell there, didn't you?

A. I never saw it come off in' any direction. There was no water standing there, no sign of water at that particular point.

Q. Going down Thomas Street, there was no street in there at all until they came?

A. No.

Q. They graded that street and surfaced that street?

A. Yes.

Q. Instead of leaving the water on top of the street, they put it underneath in culverts, didn't they?

A. Yes.

Q. There is nothing unreasonable in that, is there?

A. They could take that off that many blocks and never dump it on one small point of a property owner.

Q. Take the water off the street?

A. And pipe it deliberately so it ruins an individual's business, I do.

Q. Suppose they left it on top of the ground, eventually it would have gone to your land, wouldn't it?

A. I doubt if it would have made as much damage as the force with which it did come.

Q. It would have gotten there?

A. No. some of it would sink in the ground.

Q. In the streets?

page 74 } A. Yes, but some other lines there would make it come down the street slower. It gives it much more force when in pipes.

Q. You think it would be much more reasonable to leave that water on the streets so people could slush in it?

A. They could take care of the water on the street where the water came from and not pipe it down on one particular person and let him drain the whole thing.

Q. From Thomas Street, the course of the street from Pershing Road is down, isn't it?

A. Down to a low point before it gets to my property. The low point is not at my property.

Q. Now, about a hundred feet before it gets to your property, Thomas Street begins to rise again and goes up to the Catholic Church that has been established there?

A. Yes.

Q. So that water up on this part of Thomas Street to the

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Catholic Church and east of your property runs back this way, doesn't it?

A. Very little.

Q. And accumulates there?

A. Yes.

Q. That also goes back down on your property?

A. Yes.

Q. And that did it before any pipe was there, didn't it?

A. That did.

Q. With regard to this area that has been closed,
page 75 } North Trenton Street—

Miss Hedrick: Are you going to repeat that? He has testified to that.

Mr. Ball: I want to go over it street by street.

By Mr. Ball:

Q. You say that that area formerly did not drain in this basin your pipes are in?

A. This part of it where Trenton Street is, it was Randolph Street then, that water ran down in the ditch on both sides all the way to the Boulevard and created quite a difficulty down in the low point here.

Q. Where did it run before that street was graded?

A. That street has been graded twelve years.

Q. Don't you know, as a matter of fact, it ran down through your place?

A. It couldn't have. There was a large ditch here that water flowed into.

Q. North of Second Road, that is the area you say is changed. You have not changed anything south of that road?

A. Second Road now is graded in such a condition that the water runs down from Second Road that used to run to the Boulevard in this other direction on Trenton Street.

Q. Second Road has not been changed any, has it?

A. Second Road grade was changed.

Q. Was North Trenton Street changed?

page 76 } A. Cut off.

Q. You mean this is not open today?

A. I am talking about this area here. It was cut off, and this area in here now drains down to Second Road and that drainage used to go to the Boulevard and into a deep ditch that is here.

Q. You say North Trenton Street used to take this drainage?

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A. Yes.

Q. And North Trenton Street from Second Road south in this area here is still open?

A. Yes.

Q. At the original grade?

A. No.

Q. What did they do on North Trenton Street?

A. Changed the grade in here.

Q. Did they raise or lower it?

A. Lowered this grade in here.

Q. The street is lower than it was?

A. In this point it is. All the water from a point about in here, but even if the water did run that way on Pershing Drive, I would have gotten it from somewhere along in here. The old part of Trenton Street, the pitch of the ground is in this direction. That water ran to the Boulevard. That water now runs back down through the pipe and into my property. That I never used to have before.

page 77 } Q. Now, Mr. Anderson, do you recall when you built your road across here, you ran your ditch, your north line of your road, you ran your ditch all clear across to North Trenton Street? That will show on the ground today?

A. The ditch did not go any further than this point for years.

Q. Afterwards, did it?

A. No, there is just a little ditch built since this last storm. There was a ditch on this side of the road, quite a small one, to prevent any water that collected in my area from going on my plants.

Q. You mean you have no ditches on both sides?

A. On the south side I have a ditch that started at nothing.

Q. At North Trenton Street?

A. At North Trenton Street, and the other ditch was dug. The other ditch was dug to take care of water Buckingham deliberately piped down to me.

Q. The other ditch was taken out?

A. Yes, they had taken care of that.

Q. Where did that pipe run from?

A. It was just a small pipe, just a small pipe, in order to make the water run on my property instead of theirs. They regraded around their buildings to prevent the water from running on their buildings.

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page 78 } Q. That threw the water south instead of north?

A. That has been taken care of. It was such a small amount of water, the only damage it did was when they took the pipe on the sidewalk and ran it out on my road. It was just a small amount of water but it would wash my road eventually, and I had to dig a ditch eventually.

Q. That ditch took some water off North Trenton Street, didn't it?

A. It did not, not until Buckingham came. When Buckingham was built, Trenton Street was in such condition the water did run down there. It was unable to do that before because I had raised my driveway, and even Mr. Forman raised it before I used this particular piece of land. Mr. Forman originally graded and gravelled this North Trenton Street.

Q. Didn't Buckingham, as a matter of fact, raise that to keep the water off you?

A. They raised it to throw the water on me.

Q. With regard to your area here, you do not claim any water comes in here except rain water?

A. So far as I know, it is rain water. So far as I know, it is rain water.

Q. That is the only time you have any difficulty?

A. The only time I have any difficulty is when we have rain.

Q. When you have rain?

A. Yes.

page 79 } Q. You put your pipe in here at the lowest point in this little valley, didn't you?

A. As a matter of fact, I didn't put that pipe in there. It was put in by Mr. Foreman fifteen years ago.

Q. Was that put in before you went with Mr. Foreman?

A. No, I was there but he put it in there.

Q. You know that is the lowest point?

A. Yes.

Q. At that time a twelve-inch pipe was adequate?

A. At that time a twelve-inch pipe was more than adequate.

Q. Wasn't that pipe above the level of the area north of his land and didn't water back up there?

A. No, to my knowledge it did not. I can't say so much about that. This area was so much lower than my grade there was bound to be some water standing in there. When we dug that down deep enough to drain any water off, it drained through there.

Ivan N. Anderson.

Q. That pipe is in exactly the same position, is it?

A. That pipe is in exactly the same position.

Q. Is it the same original pipe?

A. No, Buckingham broke it and they repaired it.

Q. Didn't Buckingham offer to put you a three-foot pipe in there to carry the water off?

A. No, Buckingham talked and talked and talked about that, but they never agreed to do it. They did an awful lot of talking but I never could get any agreement.

page 80 } Q. You didn't refuse to let them do that?

A. I didn't refuse to let them put that pipe in there if they would take care of beyond there. They asked if they might do it and never said they would or did do it. They said if they put that pipe in there would I be satisfied. I said no, because that amount of water would do damage beyond there, and I would have to go to the expense of doing all this ditching and keeping this ditch clear for years.

Q. You have dug the ditch through your place?

A. I have dug and dug and dug to try to take care of the water. I have never been able to get it large enough since Buckingham came there.

Q. When was that right angle put in there?

A. The year before I bought the property.

Q. How many right angles are there?

A. There are two in there.

Q. The ditch itself is not large enough to take the water off, is it?

A. The ditch was always large enough to take it off before Buckingham put this water on me. The ditch never ran over in the hardest storm until Buckingham piped the water down on me.

Q. The ditch is not large enough?

A. I can't tell. I increased the ditch last fall. When that water goes spouting out, it doesn't take any course. The force of the water makes its own way.

page 81 } Q. It goes to the lowest point, doesn't it?

A. It falls out of the pipe and digs holes with its pressure and then runs to the lowest point. It does quite a bit of damage before it gets to the lowest point. It is just like a water main.

Q. If you put a sufficient size pipe across your road, wouldn't that solve your problem?

A. That I can't say.

Q. Do you feel any responsibility of carrying that surface water across your property, or do you think—

Ivan N. Anderson.

A. I took care of that for years so I feel they should at least cooperate to some extent to take care of that water they put on me. I never had any cooperation from them.

Q. In regard to your ditch, you say they went on your place and filled your ditch up?

A. The ditch is partly on me.

Q. Have you had any surveyor come there to determine that?

A. I know within a foot where that survey stake was.

Q. Whose survey stake?

A. A man down by Mr. Sunderman's some years back used the same survey stake, and when the Catholic Church had a surveyor come there, they said that stake was accurate.

Q. When Buckingham began putting in its sanitary sewer across the line or along the line between your and their property, you saw them there, didn't you?

page 82 } A. Yes.

Miss Hedrick: Where is the sanitary sewer?

Mr. Ball: Crossing his line.

Miss Hedrick: Across Trenton Street?

Mr. Ball: Yes.

By Mr. Ball:

Q. Were you out there when that digging was going on?

A. Yes.

Q. Did you ever tell them they were on your place?

A. When they were doing that, I made them move certain soil and move their trucks. I had any amount of trouble with them.

Q. They did that?

A. After I had a lot of trouble with them.

Q. After you got their trucks off, did you call their attention to the fact that their ditch was on you or was it on you?

A. That ditch—you mean the sewer ditch?

Q. That is what caused the trouble, isn't it?

A. No, that is not the sanitary sewer. I am talking about this sewer.

Q. They didn't fill your ditch up *with* they were digging the sanitary sewer?

A. They filled my ditch up when they were digging the sanitary sewer, but when the sanitary sewer was finished, they dug a new ditch.

Ivan N. Anderson.

Q. When they were filling your ditch up, did you page 83 } call their attention to the fact?

A. Indeed, I don't remember. I had so much trouble at that time with their trucks, I called their attention to many things.

Q. They paid for that entirely?

A. I had nothing to do with it.

Q. When they finished digging that sewer and putting back your ditch, they put a stone bottom to it, didn't they?

A. They put in, I believe, stones with a little cement in between.

Q. It was a considerably better ditch than they found, wasn't it?

A. A better ditch?

Q. They improved what was there before?

A. I didn't ask them to do it.

Q. But it was an improvement?

A. Yes.

Q. Now then, as I understand it, they came along and dug this connection between North Thomas Street and your pipe. They put a connection across there?

A. No, it didn't have anything to do with my pipe.

Q. Isn't it headed right at your pipe?

A. It is not connected with my pipe.

Q. They brought that connection across and emptied the water where your pipe was?

page 84 } A. Right on to my property.

Q. You have not even kept that pipe open, have you?

A. Yes, I have tried to.

Q. Isn't it stopped up today?

A. No.

Q. Wasn't it day before yesterday?

A. I don't know. The children play there.

Q. When did you open it last?

A. Before the snow. I think it was day before yesterday I did notice it. The children play down there so much they close it one day and we open it the next day.

Q. If we assume and can prove that this water that comes down here is all water that naturally flows through this drainage basin, would you be willing—

Miss Hedrick: I think that is a hypothetical question.

Ivan N. Anderson.

By Mr. Ball:

Q. If we assume that, would you say it would be unreasonable to pipe the water to your lowest point?

A. I do.

Q. Rather than to have it run into the land any places?

A. I don't want it on my land at all if it is coming with that force.

Q. Do you know of any other way to do it?

A. They can carry the storm sewers down the streets where they should go.

page 85 } Q. Who should? The municipality?

A. That I can't say. The person who develops the subdivision does that.

Q. You would not claim that one man who develops a subdivision up in the center should run it—

Miss Hedrick: We don't have that situation here.

A. It is only Buckingham's concentrated water.

By Mr. Ball:

Q. They are taking it down to the lowest point now.

A. That point is destroying my livelihood.

Q. This rain water, they are not responsible for that, are they?

A. They are responsible for it in that they have concentrated it and destroyed my livelihood.

Q. The only way to do it is to run it through Thomas Street, isn't it?

A. They are ruining my property as well as my living, and I didn't have any trouble before they did that.

Q. Suppose you did, how would you get the water from the low land in the middle?

A. That would be such a small thing, that water wouldn't be anything compared to what comes down now, so I am not interested in the water that comes in through there. The force of the water is taken from the streets.

page 86 } Q. A portion of this water coming on your land is water coming off this road there, formerly your farm road?

A. That street has since, at the Lee Boulevard end, been graded. Most of the water goes to Lee Boulevard by the regrading of this street.

Q. Why did you put this underground drain in here that you testified to this morning?

Ivan N. Anderson.

A. That was put there originally to drain an area up above here. Forman owned that, and he ran it all the way up to the Boulevard. The part I used comes straight up here, and I had that ditching to protect my plants on the hill. That has no value at all. It used to go under that street.

Q. That water goes on that street and on Buckingham's property and back into the pipe, doesn't it?

A. Most of that water that used to be in that area goes in the other direction to Lee Boulevard, half-way of this point, all this area in here even. All of the water there before Lee Boulevard was built, runs in that direction.

Q. You put this drain in to take care of the water up in that section?

A. Yes, but that has been regraded.

Q. None of this water comes down here?

A. None of the water. There is none for that tile to take care of.

Q. Will you point that out to the Jury when we go over there?

page 87 } A. I could. That tile is practically dry.

Q. You spoke about big rocks coming down that street. What storm was it that brought the big rocks down there?

A. The second storm.

Q. The September storm?

A. The September storm.

Q. Did they go through the storm sewer?

A. No, the rocks came over and from that ditch, that ditch that was filled in on the property line. They came over that driveway. Some of it was where their driveway had washed out and the fill had not settled on their pipe yet.

Q. Point that out on the map.

A. This ditch was filled in. When they put in this large pipe, they covered this pipe so lightly you can see where the dirt washed off that pipe and is above ground now. That was covered. That ditch was entirely filled, and this driveway was soft at the time the last storm came. It wasn't packed and the water came with such heavy force it washed it on my area.

Q. The rocks put in your ditch were washed out?

A. Yes, that was filled level.

Q. Where did that come from?

A. Thomas Street level.

Q. That didn't go down through the pipe?

Ivan N. Anderson.

A. No, it didn't all go through the pipe. It came down through here.

Q. It didn't come from the Catholic Church, page 88 } did it? Or would you say that was negligible and didn't mean anything?

A. Very little water comes from there at any time. The water came with such force, it filled up this point up over their driveway and my driveway and washed it out just about like a waterfall, we will say.

Q. And then there is one other thing. You said the sidewalk bulged up?

A. All this sidewalk along here was damaged and had to be replaced.

Q. Don't you know that it sank down?

A. I don't know.

Q. You said the water pushed it up?

A. No, I didn't say that. I said the water washed it out. The water came with such force that it broke it out.

Mr. Ball: I think that is all.

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. Mr. Anderson, one more question in reference to the cinder blocks you spoke about having as the foundation of your cold frame.

A. Yes.

Q. What distance were those blocks washed by that storm water?

A. Some of them merely collapsed and caved in. Some of them were carried as far as fifteen feet.

page 89 } Q. Could you show on the map where those cinder blocks were carried?

A. There is the mark where the cold frame is located. This is my neighbor's property, two feet lower than the cold frame. This cold frame is not quite straight with the property line so there is a distance of approximately six feet here and four feet there, ten feet here and six feet there from the property line, but the cinder blocks from this cold frame were knocked at least fifteen feet over into my neighbor's property as well as pots.

Miss Hedrick: That is all.

Mr. Ball: No further questions.

Witness excused.

Merrett C. Pomeroy.

The Court: We will recess for ten minutes.

Thereupon, a ten-minute recess was taken, at the conclusion of which the following occurred:

Miss Hedrick: Mr. Pomeroy, will you take the stand.

Thereupon,

MERRETT C. POMEROY,
called as a witness for and on behalf of the plaintiff, and
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Miss Hedrick:

Q. What is your name?

A. Merrett C. Pomeroy.

Q. Where do you live?

page 90 { A. 15 North Trenton Street.

Q. Is your property indicated on that map?

A. Yes.

Q. What is your occupation, Mr. Pomeroy?

A. Government clerk.

Q. How long have you lived at that address?

A. Since June, 1933.

Q. Do you recall a storm in the summer of 1933 of unusual severity?

A. There was a very severe storm in August, 1933.

Q. Was it severe as to the quantity of water that fell?

A. It was severe as to the quantity of water that fell and also a high wind.

Q. Are you familiar with the little drainage ditch across Mr. Anderson's property that touches your boundary?

A. Yes.

Q. Do you yourself have a ditch across?

A. Yes, it continues.

Q. And goes from there to Lee Boulevard?

A. And goes from there to Lee Boulevard.

Q. During that summer storm of 1933, was there any flooding of the Anderson ditch?

A. No.

Merrett C. Pomeroy.

Q. In the old days before Buckingham came there, you were familiar with that general locality just above Mr. Anderson's where Buckingham now is, were you not?
page 91 } A. You mean north of Mr. Anderson's property line?

Q. From this section to Pershing Drive?

A. Yes.

Q. Was Pershing Street an open street in the old days?

A. Yes.

Q. Did Trenton Street or Randolph Street go through to Pershing Drive?

A. It went through to Pershing Drive.

Q. During all this time before Buckingham came there, did any water enter your property that came from the other side of Pershing Drive?

A. I don't believe so. I never saw any water cross Pershing Drive.

Q. You have frequently been on Pershing Drive prior to that time?

A. Yes.

Q. As a matter of fact, you used to go to work that way before Lee Boulevard was opened, didn't you?

A. Yes.

Q. During the past summer was there any flooding over the back of your property?

A. This last summer?

Q. Yes.

A. I believe in June there was a storm and the last part of August or the first of September.

page 92 } Q. What was the effect of those two storms?
Did the ditch carry off the water that came down in those two storms?

A. The creek overflowed.

Q. By the "creek," what do you mean?

A. The ditch that goes through this property is always spoken of as the creek.

Q. You speak of it as the creek?

A. Yes.

Q. What area was flooded in the storm of June, 1939?

A. You are speaking of my property?

Q. Yes.

A. The northeast section of it, right in here, was flooded.

Q. And Mr. Anderson's property, did you observe what part of that was flooded?

Merrett C. Pomeroy.

A. It would appear right along in here. Can I draw that creek down through here?

Mr. Ball: Sure.

By Miss Hedrick:

Q. Just indicate in red pencil on your property where the boundary of the flood was.

A. Right there (indicating).

Q. What was the velocity? What evidence was there that the water came down there with any more than usual velocity?

A. It came down with a great deal of force.

Q. How did you know that?

page 92-A } A. The fact that the creek overflowed and much debris was left there.

Q. What was the nature of that debris that was left on your property?

A. Left on my property?

Q. What was the nature of that debris?

A. Rock and clods of dirt, potted plants and pots from Mr. Anderson's property, large rocks, fairly large rocks, six or eight inches in diameter, and they were strewn practically the full width of the property.

Q. Up until that time what had been the nature of your property there? Had it been in the state of cultivation or what shape was it in?

A. It had been planted and cultivated.

Q. Was it in grass?

A. Grass and planting.

Q. Do you recall pieces—are you familiar with Mr. Anderson's cold frame?

A. He has a cold frame built just a few feet to the east of the east property line.

Q. Did any part of that ever come on your property that you could recognize?

A. As I recall, the last storm, the storm of August or September of 1939, there were several pieces of the cinder blocks of this frame together with potted plants that he page 93 } had stored in it, strewn along the edge of the creek.

Q. In the old days before Buckingham came there, did you observe the passage of water down Trenton Street?

A. You mean Randolph Street?

Merrett C. Pomeroy.

Q. During rainy times, would there be any water passing your house?

A. Yes, it would.

Q. Has the amount changed since Buckingham started operations?

A. I would say it has been lessened.

Miss Hedrick: That is all. You may take the witness.

CROSS EXAMINATION.

By Mr. Ball:

Q. Mr. Pomeroy, you stated that you had never seen water flow across Pershing Drive?

A. No, I never have.

Q. Have you ever been out there in a storm?

A. I have been by on rainy days.

Q. How do you remember the storm of 1933?

A. I lost eleven trees.

Q. They were washed out?

A. Not washed out the ground. It had rained very heavily three or four days and the ground was pretty well saturated, and the heavy wind blew the trees down.

Q. There was considerable water in there and page 94 { lots of water coming through your place?

A. Yes, lots of water.

Q. Did you go out at that time to look at the pipe on Mr. Anderson's road to see what was bringing the water down?

A. No.

Q. You know there is quite an area north of Pershing Drive, north of Pershing Drive and Henderson Road?

A. Yes.

Q. Do you claim Pershing Drive is higher than Henderson Road is or not, or can't you tell?

A. No, I can't.

Q. Can't you tell that Henderson Road is very much higher than Pershing Drive?

A. It is perfectly level, I think.

Q. Have you ever driven up North Thomas Street, up towards Henderson Road?

Miss Hedrick: That is since Thomas Street was put in and graded.

Merrett C. Pomeroy.

By Mr. Ball:

Q. (Continued) Have you driven up since then?

A. I have driven up since then.

Q. Couldn't you tell what the natural lay of the land was?

Miss Hedrick: I object to that because the natural lay of the land has been changed.

Mr. Thomas: If you are going to testify—
page 95 } The Court: Objection overruled.

By Mr. Ball:

Q. Can't you tell by driving along there you were going up a little from Pershing Drive to Henderson Road?

A. It looks like it had been graded to me.

Q. You mean that the whole area has been graded so it has been switched around in two or three blocks?

A. No, indeed.

Q. The lay of that land is practically the same as it was then, is it not?

A. I would say practically the same, yes.

Q. As a matter of fact, there was a culvert across Pershing Drive before Buckingham ever came there, wasn't there?

Miss Hedrick: At what place?

By Mr. Ball:

Q. Pershing Drive has been a County road for a long time, has it not?

A. Yes.

Q. I will ask you if there wasn't a culvert on Pershing Drive just a few feet east of the present east line of Thomas Street before Buckingham ever came there?

A. If there was, I never saw it.

Q. You drove that road every day and never saw a culvert?

A. It must have been pretty well covered up.

Q. There was no provision there for the water
page 96 } to get from one side of the road to the other?

A. Not that I know of.

Q. You know there is a low place in there?

A. That is true.

Q. And there was no provision at all for the water to get from one side of Pershing Drive to the other?

A. Not that I ever saw.

Merrett C. Pomeroy.

Q. You never saw water running through or across the road?

A. No.

Q. Did the water gather in a point there?

A. Yes.

Miss Hedrick: Point at the map.

By Mr. Ball:

Q. Which side?

A. On the south side.

Q. It did gather in a point on the south side, on Mr. Anderson's side?

A. Yes.

Q. Where was that?

Mr. Ball: He is pointing to the intersection west of Thomas Street.

A. This was always swampy and boggy.

By Mr. Ball:

Q. And water stood in there, didn't it?

A. Yes.

page 97 } Q. Well, was that lower than Pershing Drive or higher, that point where you say the water stood there?

A. Pershing Drive is graded up a little bit.

Q. Just where did these trees stand that went down in the storm in 1933? Were they close to that little ditch that went through your place?

A. Yes.

Q. How many trees went down in there?

A. Eleven.

Q. Oak, pine, or what?

A. Oak.

Q. Good-sized trees?

A. Yes, they were.

Q. There was no flooding of water in there at all?

A. No, there was not.

Q. Mr. Pomeroy, so far as the construction is concerned of the buildings and the layout of the streets in Buckingham, there is nothing unusual about that or unreasonable about that, is there, in your opinion?

A. No, there is not.

Merrett C. Pomeroy.

Q. The streets are laid out in a manner in keeping with other layouts in the County?

A. Yes.

Q. And the buildings so far as the placing of them, is reasonable?

page 98 { A. Yes.

Q. All that area in there, yours and Mr. Anderson's, has been improved?

Miss Hedrick: I object to that. We are not asking for any permanent damages. Any improvement would not be proper evidence.

Mr. Ball: If this was put in there in a reasonable manner, it seems to me we ought to be able to show, if that is so, that there has been an improvement as to all surrounding property.

The Court: I don't think so. Objection sustained.

Mr. Ball: We note an exception.

That is all, Mr. Pomeroy.

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. Mr. Pomeroy, during the time you have been there on Second Street, had there been any flooding in your back yard prior to 1938?

A. No, there has not.

By the Court:

Q. Mr. Pomeroy, do you know when—you have been in here all the time?

A. Yes.

Q. When was the Buckingham piping completed?

A. Which piping are you referring to?

Q. The one he is referring to that empties into
page 99 { his pipe.

A. I don't recall.

Mr. Ball: We can get that information.

The Court: All right.

RE-CROSS EXAMINATION.

By Mr. Ball:

Q. As a matter of fact, Mr. Pomeroy, that pipe wasn't put

Merrett C. Pomeroy.

in there until two months after the storm in June, 1939, that you gentlemen testified all this stuff was washed out, was it?

Miss Hedrick: There were a series of pipes put in there.

Mr. Ball: I am talking about the pipes Mr. Anderson testified to.

A. In my opinion that was put in in the early spring of 1939.

By Mr. Ball:

Q. That is your opinion. You thought the damage in 1939 came from that pipe?

A. I don't know whether it came from that pipe but it came from the fact that there was an excess of water.

Q. I understood you gentlemen testified directly about that storm sewer pipe and that was the cause of the damage.

Miss Hedrick: He didn't say that.

By Mr. Ball:

Q. You know the pipe we mean by storm sewer pipe on Buckingham?

A. That was changed. It was installed and then changed.

Q. Did you go up and look at the layout of page 100 } that pipe after the storm in June?

A. No, I did not.

Q. Did you go up and look at Mr. Anderson's land after the storm in June?

A. I didn't have to; it was all on my property.

Q. Did you go up there and look at it?

A. I could see it from my place.

Q. His land is still on your property?

A. Yes, some of it.

Mr. Ball: That is all.

Witness Excused.

Thereupon,

REED MUNSON,
called as a witness for and on behalf of the plaintiff, and
being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Miss Hedrick:

Q. Mr. Munson, state your full name.

A. William Reed Munson.

Q. And your occupation?

A. Assistant engineer.

Q. Of Arlington County?

A. Yes.

Q. You were subpoenaed to testify in this case,
page 101 } were you not, and to bring with you a plat?

A. Yes.

Q. Have you that plat with you?

A. Yes.

Q. Mr. Munson, was this plat prepared in the Engineer's
Office?

A. No.

Q. Is it part of the records in the Engineer's Office?

A. Yes.

Q. Was it presented to you by Buckingham and approved?

A. That was checked by a man in the Engineering Department.

Q. On what date?

A. 7/13/39.

Q. Will you state what this plan shows?

A. Well, it shows the street off of Glebe Road leading to the west to a turn-around.

Q. This map has been placed in evidence. By looking at this map, can you indicate to the Jury where this plat joins on to your plat?

Mr. Ball: Where the turn-around is.

Miss Hedrick: Yes, where the map would connect up with this.

Mr. Ball: There is a difference in scale.

A. There is a great deal of difference. I don't know that I can indicate it on the plat.

Reed Munson.

page 102 } By Miss Hedrick:

Q. Pershing Drive shows on this map?

A. Yes.

Q. This map does not show Glebe Road.

A. This turn-around would be in here (indicating).

Mr. Ball: North of Pershing Drive?

The Witness: Yes, Third Street.

By Miss Hedrick:

Q. Indicate on the map where that turn-around would be. Just mark that.

A. (Witness marks map.)

Q. That corresponds with this (indicating)?

A. Yes.

Q. Does this map show any drains, drains for storm sewer?

A. It shows two catch basins at the top of the turn on Thomas Street.

Q. Would you indicate on this map approximately where those catch basins would be?

A. (Witness marks map.)

Q. And indicate on this map to what those catch basins connect.

A. (Witness indicates.)

Mr. Thomas: He has indicated in blue pencil.

By Miss Hedrick:

Q. And what is on Thomas Street that these connect with?

A. There are four catch basins at the intersection of Thomas Street and Pershing Drive.

Q. What do these blue dots connect with?

A. With the catch basins on the east side of Thomas Street.

Q. Do they connect with the storm sewer line?

A. Yes.

Q. So that these two catch basins are directly connected with the main line down Thomas Street?

A. Yes.

Q. Does this plat indicate contour and figures?

A. No, only levels.

Q. Have you also indicated on the map the direction in which water would flow if it flowed downhill?

Reed Munson.

A. Yes, it is indicated by levels and arrows too. The arrows are more clearly understood, I believe.

Q. Taking these figures, going down Glebe Road, there is a continuous fall down Glebe Road?

A. That is right. From north down to the south it is 74.50 and the next one is 71, four or five inches higher. They give the elevation, the grade levels.

By Mr. Ball:

Q. That is on Glebe Road?

A. The center line of Glebe Road.

By Miss Hedrick:

Q. So that when you reach Third Street, North, that is a higher point?

page 104 } A. Yes, a foot and a half higher than it is at Third Street. 72.20 and this is 72.50.

Miss Hedrick: I offer this plat in evidence as Plaintiff's Exhibit No. 3.

(Said plat, so offered and received in evidence, was marked Plaintiff's Exhibit No. 3.)

By Miss Hedrick:

Q. Mr. Munson, are you familiar with the street work that has been done in that section?

A. Yes, ma'am.

Q. Has any change been made in the grade of Pershing Drive since Buckingham started their work up there?

A. Yes, ma'am.

Q. I will ask you to indicate on this map what change has been made in the grade of Pershing Drive since Buckingham began its developments there.

A. Well, originally, there was a drain 125 feet on Thomas Street. Right about this point, (indicating).

Q. Put in your figure 125.

A. (Witness marks) Plus and minus.

Q. What has been done, if anything, to change that drain?

A. Well, when the drains were approved on Thomas Street, it called for a regrading of Pershing Drive to simplify the drainage, and they moved the low point 125 feet west to Thomas Street to do away with this cross drain which had been there for I don't know how long.

Reed Munson.

page 105 } Q. In other words, they moved the grade of Pershing Drive so that water which would ordinarily fall into Buckingham would flow into Thomas Street?

A. That is right.

Miss Hedrick: That is all.

CROSS EXAMINATION.

By Mr. Ball:

Q. Mr. Munson, there has been considerable question as to whether or not there was a culvert across Pershing Drive east of the present location of Thomas Street before Buckingham ever came there.

A. That is right.

Q. Am I right about that?

A. Yes, approximately 125 feet east.

Q. East of the east line of Thomas Street?

A. We deal with center lines.

Q. That culvert has been there a long time?

A. Yes.

Q. And the natural course is from north to south?

A. Yes.

Q. The land on the north side drained to the south?

A. That is right.

Q. And the only thing you did, when you established this layout, was to move that crossing down to Thomas
page 106 } Street and let it go into the catch basin there?

A. That is right.

Q. The water is still flowing the same way?

A. Yes.

Miss Hedrick: Well, as a matter of fact,—
The Court: Go ahead.

By Mr. Ball:

Q. Isn't it a fact that Henderson Road, which I am pointing to here, approximately two blocks north of Pershing Drive, is a higher elevation than Pershing Drive?

A. I have nothing to show that.

Q. Isn't it a fact that Glebe Road north of Thomas Street is a higher elevation than Thomas Street?

A. Absolutely.

Q. There is no question about that?

Reed Munson.

A. No question about that.

Q. Miss Hedrick asked you to give some elevations down Glebe Road?

A. Yes.

Q. I will ask you if there is not a difference between the elevation at Glebe Road and the elevation at this turn-around of approximately eight feet? I call your attention to the figures.

A. It is 72.20 there and 64 there.

Q. Eight feet and two-tenths?

A. That is right.

page 107 } Q. This turn-around is eight feet and two-tenths lower than Glebe Road?

A. That is right.

Q. And the natural flow of the water would be westwardly down to this turn-around?

A. That is right.

Q. And the natural flow would be down to Thomas Street?

A. Yes.

Q. Isn't it a fact that Thomas Street is lower than this turn-around?

A. Yes.

Q. And that whole area in there is in the same drainage area, is it not?

A. I don't know. There is no doubt about it, but I never ran the levels all over the ground.

Q. So far as these maps show, that is true?

A. Right.

Q. From your observation, you think there is no doubt. That is correct, is it not?

A. That is correct.

Q. Well then, it is a fact, is it not, that the layout of that street into the turn-around and the drains into the turn-around, merely followed the natural drainage?

A. There is no doubt in my mind.

page 108 } Q. And the water before those streets were placed there at all went in that direction?

A. Yes.

Mr. Ball: I think that is all.

Reed Munson.

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. Buckingham put in this turn-around, did they not?

A. Yes, ma'am.

Q. They made it eight and two-tenths feet below Pershing Drive, did they not?

A. Yes. I believe they followed the natural contours about that.

Q. On what do you base that belief?

A. My knowledge of the country and the rest of the streets.

Q. And Buckingham also put in Thomas Street, did they not?

A. Yes, ma'am.

Q. And they also had a change made in Pershing Drive, did they not?

A. They requested a change.

Q. And the County made it at their request?

A. That is right.

Q. And when you speak about the water flowing the way it naturally would flow, you mean that it flows in these drains that Buckingham has constructed downhill in the way the water naturally would flow, but it is confined to the drain, is it not?

A. Yes. That turn-around is built all around page 109 } and the pipes carry the water to the curb and gutter on Pershing Drive.

Miss Hedrick: That is all.

RE-CROSS EXAMINATION.

By Mr. Ball:

Q. There is no artificial water, just surface water?

A. That is right.

Q. That plan was approved by the County, was it not?

A. Yes, sir.

Q. Before the work was done?

A. There has been some confusion about that, Mr. Ball.

Q. Regardless of that—

Miss Hedrick: Just a minute. I would like to have him finish his answer.

Mr. Ball: Go ahead.

Reed Munson.

Miss Hedrick: Whether this plan was approved before or after the work was done.

The Witness: May I go into that a little bit?

The Court: Yes, sir.

The Witness: Buckingham maintained their own engineering department and drew up their own plans and submitted them to be approved by the County.

By Mr. Ball:

Q. And the County approved them?

A. And the County approved them.

Q. And that is the manner in which this was done?

A. To the best of my recollection.

page 110 } Q. The plan submitted by Buckingham was
checked by some one in the Engineering Department and approved?

A. Yes.

Q. Pershing Drive has been a County road for a long time, hasn't it?

A. Yes.

Q. When the grade was depressed, it was done by the County, was it not?

A. Yes, sir.

Q. You didn't change the drainage basin by changing the grade, did you?

A. The only thing it did was to move the natural low spot about 125 feet west.

Q. It didn't throw any new area into that drainage basin, did it?

A. I don't believe so.

Mr. Ball: That is all.

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. As a matter of fact, Buckingham quite often did the work represented in the plans before the plans were approved by the County, did they not?

A. That is right. They presented a preliminary plan which just had the grades. The grades were then approved and work was started and sometimes completed before completed plans were brought in the office.

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Benjamin Y. Harrison.

RE-CROSS EXAMINATION.

By Mr. Ball:

Q. But they always had plans giving you the grades before they did any work?

A. That is right.

Q. But whether they were done before or after, there was nothing done here to change that drainage in that particular drainage area except the shifting of that one point?

A. I don't recall any.

Mr. Ball: We have no further questions.

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. This date of approval would not mean that the work was necessarily done after that time but it might have been done before that date?

A. That is right.

Miss Hedrick: That is all.

Witness Excused.

Thereupon,

BENJAMIN Y. HARRISON,
called as a witness for and on behalf of the plaintiff, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

page 112 } By Miss Hedrick:

Q. Will you state your full name?

A. Benjamin Y. Harrison.

Q. And your occupation?

A. Government employee.

Q. In what capacity are you employed?

A. I am in the Department of Agriculture and Bureau of Plant Industry.

Q. What is your division?

A. Introduction of new plant material from all over the

Benjamin Y. Harrison.

world for any Government project, especially, however, in the Bureau of Plant Industry.

Q. Does your work entail the buying of plants from different sources?

A. It does.

Q. Are you familiar with the price of plants?

A. I am familiar with the price of plants in that it is my business to consult every year the price list. I would not be able to cite a price list for you.

Q. Does the purchasing by the Government come before you?

A. Only for use in my Department.

Q. How many years have you been engaged in that?

A. In this particular work, about seven.

Q. And what would be the approximate volume of work that would go through your office and the amount page 113 } of purchasing you do in dollars and cents?

A. That would vary entirely with the projects that particular year. It might be as low as \$5,000.00 or it might be as high as \$20,000.00, involving all types of plants, even trees.

Q. I hand you this list, Plaintiff's Exhibit No. 1, and ask you if you can—

Mr. Ball: I object unless he is familiar with those plants.

By Miss Hedrick:

Q. Are you familiar with Mr. Anderson's gardens?

A. I am.

Q. Are you familiar with the type of plants he had near the small ditch running down to Mr. Pomeroy's place?

A. I think so.

Q. How frequently have you seen them?

A. I cannot say specifically; frequently.

Q. Did you see them in the summer of 1939?

A. I did.

Q. Are you familiar with the size and the general condition of the plants in Mr. Anderson's gardens?

A. In a general way, only.

Q. Now, I will ask you if you will take that list and state if you are familiar with the value of the types of plants set out in this list?

Mr. Ball: He said he was only familiar in a general way with those plants.

Benjamin Y. Harrison.

page 114 } Miss Hedrick: What way can you be familiar with them?

Mr. Ball: You asked for the value.

Miss Hedrick: How can you expect the particular thing when it has been washed down?

Mr. Ball: How is he going to testify to the value of it?

The Court: Objection overruled.

Mr. Ball: We note an exception.

Miss Hedrick: Will you read the question, please?

Thereupon, the question was read by the reporter as follows:

“Q. Now, I will ask you if you will take that list and state if you are familiar with the value of the types of plants set out in this list?”

Mr. Ball: That says “types of plants.”

Miss Hedrick: The value of the types of plants.

Mr. Ball: Not these particular plants.

Miss Hedrick: He says he knows Mr. Anderson’s gardens.

The Court: The question that has now been asked is the types of plants. We will get to the other later.

The Witness: Yes, I am familiar with these types of plants.

By Miss Hedrick:

Q. With the value of those types of plants?

A. I think so.

Q. And are you familiar with the value of the grade of that type that Mr. Anderson had in his flower bed?

A. I don’t know the population of Mr. Anderson’s flower bed well enough—

Q. I don’t mean the number of plants, the grade of the plants, the quality of the plants. In other words, you might have, I take it, we will take primroses because I can pronounce that. You might have plants of several different qualities and the prices differ with the quality. Isn’t that true?

A. Yes, according the species and the size of the individual plant.

Q. From your knowledge of Mr. Anderson’s plants, and from your knowledge of those different types of plants, can

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you state whether or not the value he has fixed for those particular items is the fair and reasonable value of the items set out?

Mr. Ball: As of what date?

Miss Hedrick: As of—well, you fix the date.

Mr. Ball: I know it varies with different times of the year.

Miss Hedrick: As of September 15, 1939, or approximately thereafter.

Mr. Ball: We object to that testimony. Some were destroyed in June.

The Court: September first was the date.

Miss Hedrick: He said in June big rocks came down there. If he wants to confine the damage to the September storm, that is all right.

By Miss Hedrick:

Q. I will ask you first if the prices of those page 116 } plants varied from the first of June to the middle of September.

A. Yes, they should represent larger, older stock in September than in June.

Q. How much would they vary?

A. Fifty per cent.

Q. On all those plants.

Miss Hedrick: I think the witness misunderstood my question. We are trying to get at the replacement value and the replacement value of the plants washed out in June did not change from June to September; did not change in value.

The Court: Which ones were washed out in June and which in September? If you ask this witness a question right out and out, the answer is going to be he doesn't know.

By the Court:

Q. Do you know what the value of those plants if some were destroyed in June would have been?

A. I don't know which were destroyed in June and which in September.

Q. Do you know what the value of the plants that might have been destroyed on the first of September would be?

A. Assuming they were all destroyed, yes, I think I do. All of these would have increased in value except the forget-me-nots.

Benjamin Y. Harrison.

Q. Do you know the fair market value of those particular plants on that particular day?

page 117 } A. As if the entire lot were destroyed?

Q. On that day.

A. Then I would say these prices are fair prices of the plants at that time.

The Court: That is all.

CROSS EXAMINATION.

By Mr. Ball:

Q. What is the price of forget-me-nots?

A. \$37.50 for one-quarter thousand.

Q. How much is that a plant?

A. Eleven cents.

Q. What is the value in June?

A. Probably five cents.

Q. I understood you to say they would drop off; that they would all increase in value except the forget-me-nots and they would decrease in value. Didn't you say that?

Miss Hedrick: If the plants were washed out in June—if the storm had not taken place, those plants would have continued there and at the replacement time in September, he would be obliged to expend this larger sum. If the plants had been left there, they would have grown.

The Court: Maybe they would have. We are only dealing with the things destroyed and the loss occurred at that time when the destruction took place. That is the only thing we are interested in here.

page 118 } By Mr. Ball:

Q. Didn't you say a little while ago that all those plants increased in value except the forget-me-nots?

A. I did, but I was interrupted.

Q. Now you say the forget-me-nots are worth eleven cents in September and five cents in June.

A. I beg your pardon but the 250 plants in June would have been fifteen hundred in September.

Q. Assuming that only 250 were destroyed and destroyed in June, they were worth five cents a piece?

A. That is right.

Q. If they were destroyed in September, they were worth ten cents a piece?

Benjamin Y. Harrison.

A. That is right.

Q. You mean an individual plant in September is worth ten cents?

A. Yes, sir.

Q. And the individual plant in June was worth five cents?

A. Yes.

Q. You said first it decreased and now you say it increases.

A. The normal procedure for forget-me-nots is division. If the plants are destroyed, you have more in the end.

Q. You say the individual plant is worth eleven cents in September?

A. That is right.

page 119 } Q. And in June it is worth five cents?

A. That is right.

Q. What difference does it make in the value of the individual plant?

Miss Hedrick: He counts division as another plant. Each division is worth eleven cents.

The Court: Is there any question before this witness?

By Mr. Ball:

Q. You say that the other plants mentioned there increased in value, that the fall sale was a higher price than the spring sale, except forget-me-nots.

A. Yes.

Q. Isn't it a fact that in this area the spring sale is the highest value?

A. Not in my experience.

Q. That would be so as to plants that grow outside, would it not?

A. Not necessarily so.

Q. Not in the yards?

A. Not these.

Q. What are these, annuals or perennials?

A. Perennials.

Q. And once planted, they grow forever?

A. Theoretically.

page 120 } Q. You say that even perennials bring more in the fall than in the spring?

A. Certainly.

Q. Can you get any practical florist to back that up?

Miss Hedrick: The florists are not selling plants.

Benjamin Y. Harrison.

By Mr. Ball:

Q. The Government market is higher than the trade, is it not?

A. We get it cheaper whenever we can.

Q. Is there a difference between the Government market and other markets?

A. It all depends on the size of the Government order.

Q. Can you pick out any particular plant and tell me what size they were in June? The particular plant.

A. In regard to Mr. Anderson's plants?

Q. The plants he says were destroyed.

A. No, sir, I cannot.

Q. You could not pick out a single one and state how big they were in September, could you?

A. No.

Q. It would be right difficult to fix the value, wouldn't it?

A. If you are discussing only Mr. Anderson's plants.

Q. That is all we are discussing.

A. The question was the types of plants.

Q. Your testimony was not about his particular plants?

A. No.

Mr. Ball: I move that it be stricken out then.

The Court: It will be stricken out if that is what he means.

Miss Hedrick: He was taking into consideration the quality of Mr. Anderson's plants.

The Court: We are trying a case to see how much money this man has lost. You have been put on the stand with your knowledge of plants and experience to value what he lost. Do you know what the market value of those plants would have been? Can you answer that question?

The Witness: Not as asked.

The Court: I thought that was the answer you were going to give the first time. I think that is the answer you must give.

Miss Hedrick: I just as soon withdraw this witness and strike out his entire testimony.

The Court: All right.

Witness Excused.

Miss Hedrick: That is the plaintiff's case, if the Court please.

Mr. Ball: We wish to make a motion at this time.

The Court: You gentlemen of the Jury will retire to the Jury Room.

Thereupon, the Jury retired.

Mr. Ball: If Your Honor pleases, we want to move to strike all the plaintiff's testimony on the ground
page 122 } that they have not made out a case, a proper case
for relief; that they have not shown that there is anything unreasonable in the use that is being put to the property by Buckingham, or anything unusual in the layout of its streets, and certainly nothing unreasonable in the layout of its drainage system by putting it underground instead of leaving it on top of the ground.

So far as Mr. Anderson's statement that there was a certain drainage area brought in that did not belong to that drainage area naturally, was completely refuted by the testimony of Mr. Munson, who showed that all the area north of Pershing Drive has been naturally draining in here long before Buckingham ever obtained any part of that property. We contend that in order to maintain this action, the plaintiff must prove that they are putting that property to an unreasonable use or that they are putting the drainage in in an unreasonable manner.

The Court: The motion is denied.

(Here followed discussion off the record.)

Mr. Thomas: We would like to file that motion in writing and note an exception.

The Court: All right.

Mr. Ball: We would like to renew the motion as to the second count. They left him a better ditch than the one he had.

Miss Hedrick: No, they filled up the better ditch. They made a better ditch and then filled up the better ditch.

The Court: We will adjourn until ten o'clock tomorrow.

page 123 } In the Circuit Court of Arlington County, Virginia.

Ivan N. Anderson, Plaintiff,

v.

Third Buckingham Community, Inc., a corporation; Fourth Buckingham Community, Inc., a corporation; and Fifth Buckingham Community, Inc., a corporation, Defendants.

P. R. Rupert.

IN LAW.

Testimony in the above-entitled cause was continued on Thursday, February 29, 1940, between the hours of 10:00 o'clock A. M. and 5:00 o'clock P. M.

Appearances: Same as heretofore noted.

PROCEEDINGS.

Mr. Thomas: If Your Honor pleases, may we have the privilege of offering these linen tracings and substituting blueprints for these linen tracings?

The Court: Any objection?

Miss Hedrick: No objection.

Mr. Ball: Is there any disagreement?

Miss Hedrick: No. I am willing to have Mr. Rupert identify them. One of them I thought was not necessary.

Mr. Ball: We offer these four maps showing the page 124 { elevations taken in fifty-foot intervals over the area involved and adjacent areas.

The Court: Have those maps some legend on them?

Mr. Ball: Yes, and ask that they be marked Defendants' Exhibits No. 1 to No. 4, inclusive.

[Said linen tracings, so offered and received in evidence, were marked Defendants' Exhibits No. 1 to No. 4, both inclusive.]

Thereupon,

P. R. RUPERT,

called as a witness for and on behalf of the defendants, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Ball:

Q. Mr. Rupert, will you state your name?

A. P. R. Rupert.

Q. Mr. Rupert, what is your occupation?

A. Surveyor.

Q. Are you a civil engineer?

A. Yes, sir.

P. R. Rupert.

Q. How long have you been practicing surveying?

A. In the County here about five years.

Q. And where before you practiced here?

A. All along the East Coast as far South as Florida.

Q. For how many years?

page 125 } A. About thirty-four.

Q. Are you a graduate of any Engineering School?

A. No, sir, no college.

Q. And in your surveying, you have had practical experience in running levels?

A. Yes, sir.

Q. And making cross-sections showing elevations?

A. Yes, sir.

Q. Over what period of time have you had that experience?

A. I would say for the last twenty years.

Q. Have you been engaged in that particular work in this County during the last five years?

A. Yes, sir.

Q. Did you run the levels that are shown on these cross-section maps?

A. Yes, sir.

Q. You have seen these four maps?

A. Yes, sir.

Q. You actually, yourself, conducted the field party that took these readings and these plats were charted from your notes?

A. I did part of the work myself and supervised the rest of it.

Q. There are just a couple of other questions. The maps are entered by agreement. What was on this land when the cross-sections were made?

page 126 } A. Just the natural lay of the land, trees, and a few houses.

Q. Was Buckingham in there?

A. No.

Q. Any of the streets of Buckingham in there?

A. No, sir.

Q. You have a street there marked Randolph Street?

A. Yes, sir.

Q. I understand that is known as Trenton Street now?

A. Yes, sir, I understand that is true.

Q. I will ask you to refer to your elevations along Persh-

P. R. Rupert.

ing Drive from Randolph Street east and state which way the land falls.

Miss Hedrick: I think the map speaks for itself. I don't think the witness can testify to any more.

The Court: It is not really necessary, but it does expedite the matter.

By Mr. Ball:

Q. What I mean is, beginning at Randolph Street, along Pershing Drive, and going East, which way does the land fall?

Miss Hedrick: He can read out the figures.

Mr. Ball: I want to come from Pershing Drive down this way, get the elevation at Randolph Street and the elevation where you show a pipe.

Miss Hedrick: State what distance apart the elevations are.

The Witness: These intervals are fifty feet.

page 127 } By Mr. Ball:

Q. Beginning at Randolph Street and going eastwardly two hundred feet.

A. 66.1, 66.2, 65.7, 65, and down at this pipe, 63.5, a difference of 2.6 lower.

Miss Hedrick: That went up first.

Mr. Ball: A tenth of a foot.

The Witness: Yes.

By Mr. Ball:

Q. First there was a rise of that much and in the next hundred feet there is a fall of 2.6 feet?

A. That is right.

Q. As I understand it, at the time you made this plat, Randolph Street ran through to Pershing Drive?

A. Yes, it was a dirt street.

Q. And you have so shown it on your plat?

A. Yes.

Q. Coming in from Pershing Drive, now, Mr. Rupert, first I want to take a distance of four hundred feet. I will ask you to give the elevation you took inside of North Randolph Street, that is, within the boundary of North Randolph

P. R. Rupert.

Street, and the first elevation east of North Randolph Street.

A. 59.1.

Q. And what was the first elevation east of North Randolph Street?

page 128 } A. 60.1.

Q. In other words, the first elevation east was one foot higher?

A. No, it was seven-tenths lower. Yes, just one foot.

By Miss Hedrick:

Q. The street is one foot lower?

A. Yes.

By Mr. Ball:

Q. This first elevation east of Randolph Street is how far from the east line?

A. About four hundred feet.

Q. Going back toward Pershing Drive, give the elevations at each fifty feet, if you don't mind. First within the street, and then east of the street.

A. This particular line cuts across. 61, 62.35, 63.65, 66.4, 66.3, 66.6, and then up in the center line, 65.9.

Q. Beginning at a point approximately 175 feet south of Pershing Drive, I will ask you if the elevation on the east and west of Randolph Street is not approximately the same at that point?

A. 65.9, practically 66 feet would be there, and over here it would be 65.8. Yes, 65.9 and .8.

Q. From that point on Pershing Drive, the east side of the street is a little lower than the west from this point to Pershing Drive?

page 129 } A. Yes, it is a little lower than the west side.

Q. Beginning at 150 feet south of Pershing Drive, the drainage from North Randolph Street and the area around it would be to the east?

A. Yes, that is right.

Q. Mr. Rupert, isn't it a fact, from that point on south, that Randolph Street rides almost on the crest of the divide between the two little valleys?

A. One place it does. Here is another place it seems to be a little lower than in the center line. Both sides are equal. That is it.

Q. I don't mean right down to the tenth of a foot.

Miss Hedrick: We might as well have it accurate.

P. R. Rupert.

By Mr. Ball:

Q. Let us take any point along in there. Take five hundred feet south of Pershing Drive. Read your first elevation east of Randolph Street.

A. East of Randolph Street?

Q. First, in Randolph Street?

A. 56.4.

Q. The first elevation east?

A. 57.

Q. The second?

A. 58.6.

Q. The third?

page 130 } A. 58.5.

Q. The course at that point, the drainage is to the west?

A. That is correct.

Q. Now, when you go east of Randolph Street, at that point, approximately 175 feet, the point I am indicating, there is a drop to what?

A. 56.7.

Q. So that in a space of fifty feet, there is a drop of how much?

A. There is a drop going east of one foot and eight-tenths.

Q. And it still continues to drop?

A. East, yes.

Q. Are you familiar with the street known as Second Road, North? We are trying to get it. It is 433 feet south of Pershing Drive.

A. About here. It really would be in there (indicating). From the center line, do you want it?

Mr. Ball: This is not absolutely accurate.

The Witness: From the south edge of Pershing Drive, how many feet do you want?

Miss Hedrick: 433.

The Witness: That would be about there (indicating).

By Mr. Ball:

Q. Beginning at Randolph Street, there is a rise coming east of approximately two and two-tenths feet in the first 75 feet. Am I right in that?

page 131 } A. There is a rise coming this way of 1.4 on this line, and here there is a rise of 1.3.

P. R. Rupert.

Q. You are not reading from the street. You are reading from east of the street.

A. Yes, and from here there is a rise.

Q. Isn't it a fact that the first 75 feet east of Randolph Street, at that point, had a very slight slope downward toward the west?

A. Yes.

Q. And beginning at that point it began sloping toward the east?

A. That is right.

Q. And very much more marked in its slope to the east?

A. Yes.

Q. Mr. Rupert, I think we can show the difference in elevation between Mr. Anderson's property and Pershing Drive and North Henderson Road. Whom did you make these maps for?

A. Gerand Realty Corporation.

Q. That is the same organization that handles the Buckingham interests?

A. Yes, sir.

Miss Hedrick: Not the same corporation.

Mr. Ball: Made by the same people who operate it.

By Mr. Ball:

page 132 } Q. These maps were delivered to them?

A. Yes, copies of these maps.

Q. You had nothing to do with making up contour maps from these maps?

A. No, sir.

Mr. Ball: You may cross examine.

CROSS EXAMINATION.

By Miss Hedrick:

Q. Mr. Rupert, it is true, is it not, to take each elevation here on Trenton Street and then go over a distance of fifty feet and then a hundred feet and then go back up Trenton Street for four hundred feet, that the highest point is on the east side of Trenton Street?

A. Starting from here, you say?

Q. Just read them out and begin farther down than that. Is this the Buckingham boundary?

P. R. Rupert.

A. Yes.

Q. Fifty feet from their boundary to Randolph Street, and fifty feet—

A. 53, 53.2, 53.5.

Q. The next one.

A. 54.0, 54.4, 55.3, 55.2, 55.7, 56.9, 56.4, 57.0, 58.6, 57.8, 58.7, 60, 59.1, 60.1, 61.5, 61, 62.1, 63.0, 62.35, 63.81, 63.96, 63.8, 64.7, 64.9, 65.1, 65.8, 65.6, 66.4, 66, 65.1, 66.3, 66.2, 65.6, 66.6, 65.8, 66.1, 66, 66, 66.9.

Q. So that the lowest, as you approach Pershing page 133 } Drive, the lowest point on Trenton Street, is actually higher than the first point on Pershing Drive? This point on North Randolph Street is actually higher?

A. This particular point did not fall a little to the west of old Randolph Street. It is a matter of twenty feet. This line is not exactly parallel with Randolph Street. The line to the west of Randolph Street is 66.6, and the line to the west of the east side would be 66.8, and that falls in there. The point in Randolph Street is a little lower than the point to the west.

Q. Now, coming up to Pershing Drive is 66.0, and coming east, what is your next figure?

A. 66.9.

Q. So when you told Mr. Ball the land sloped from Randolph Street down to Pershing Drive, you mean the first point was higher than Pershing Drive?

A. That was on the edge of the right of way. Old Pershing Drive was not graded out the full width of that forty feet. When we run that elevation, this particular elevation could have been on a little embankment.

Q. Then any of those elevations might be a little embankment or a little hill in the land?

A. Not the center line. That was a paved street.

Q. I thought you said it was not.

A. Pershing Drive was paved.

page 134 } Q. All the way through?

A. Yes, I think they had a black top on it for a good many years.

Miss Hedrick: That is all.

Albert D. Lueders.

RE-DIRECT EXAMINATION.

By Mr. Ball:

Q. Mr. Rupert, when you stated a while ago, taking the first elevation in the center line of Pershing Drive and coming east fifty feet, there is a rise of one-tenth of a foot?

A. That is right.

Q. And then immediately it begins to fall to the east?

A. That is right.

Q. And in the next 150 feet it falls over two feet?

A. That is right.

Q. The only difference is in the center line?

A. Wait a minute. The last answer is wrong. In the last fifty feet, it falls one and a half feet.

Q. In 150 feet, how far did it fall?

A. 2.7.

Q. So that the only difference in the first fifty feet was the difference you held up there?

A. Yes.

Q. In the next 150 feet it falls 2.7 to the east?

A. Yes.

Q. So that the water would drain from that area
page 135 } down through the Buckingham property?

A. Correct.

Mr. Ball: That is all.

Witness Excused.

Thereupon,

ALBERT D. LUEDERS,

called as a witness for and on behalf of the defendants, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Ball:

Q. What is your full name?

A. Albert D. Lueders.

Q. Your occupation?

A. Architect.

Q. Are you a registered architect in the State of Virginia?

A. Yes, sir.

Q. How long have you been registered in this state?

Albert D. Lueders.

A. Since early in 1937.

Miss Hedrick: Is he going to testify to anything further than the building?

Mr. Ball: He is going to testify to plotting these elevations on the contour map.

By Mr. Ball:

Q. Where did you practice before that?

A. New Jersey and New York.

page 136 } Q. Where did you study to prepare yourself for this work?

A. Columbia University.

Q. Columbia University in New York City?

A. That is right.

Q. How long have you had experience in that profession?

A. Since 1920.

Q. In your profession are you familiar with plotting contours?

A. Yes, sir.

Q. From elevations given on a cross-section map?

A. Yes, sir.

Q. Is that a part of your profession to do that?

A. In this type of work, it is, yes. That is, if you are working on city work or large buildings, you don't go into that, but in large-scale developments you do.

Q. How long have you had experience in that type of work?

A. Since 1925.

Q. You have seen these maps Mr. Rupert identified?

A. Yes, sir.

Q. Did you plat a contour map from those maps?

A. The map was plotted under my direction.

Q. And you checked that map?

A. Yes.

Q. Are you employed by the Buckingham interests?

A. Yes, sir.

page 137 } Q. How long have you been employed by them?

A. Since November, 1936.

Q. Did you come here before any of the buildings were constructed west of Glebe Road?

A. Yes, sir.

Q. And was this contour map made prior to that date?

A. Yes, sir.

Q. I hand you a map which we have had identified by the

Albert D. Lueders.

mark, Defendants' Exhibit No. 5, and ask you who made that map?

A. The map was made in Buckingham office by a draftsman who was under my direction. On the completion of the map, it was checked by me against Mr. Rupert's cross-section map.

Q. In referring to Mr. Rupert's cross-section map, do you mean Defendants' Exhibits Nos. 1 to 4?

A. Yes, sir.

Q. Do those contours correctly represent the elevations as prepared by Mr. Rupert's map?

A. Yes, sir.

Q. As I understand it, this was made before the buildings were put on the ground or the streets graded?

A. Yes, sir.

Q. What does that map show?

A. That map shows, by a series of lines, a constant elevation which carries over the terrain of the ground. Mr. Rupert's map takes this every fifty feet, whereas this takes the elevation of 50 all over the terrain and shows page 138 } how that elevation varies.

Q. What is the difference in elevation as shown by these lines?

A. Those are one-foot contours.

Q. By that, as I understand it, you take one line at 50 feet elevation wherever it runs?

A. Yes.

Q. Then you take the next and carry it around in the same manner?

A. Yes, sir.

Q. You have some of those lines marked heavier than others?

A. That is right.

Q. What is the difference?

A. Those are every five feet to make easier reading.

Q. Does North Trenton Street show on that map?

A. North Trenton Street as it is now in place is shown on this map.

Q. And is Second Road shown on there?

A. Second Road is also shown.

Q. North Thomas Street?

A. That is right.

Q. And Pershing Drive and the old roads?

A. Yes, sir.

Q. At the time this map was made, as I understand it,

Albert D. Lueders.

North Trenton Street was old Randolph Street,
page 139 } and Second Road and North Thomas Street had
not actually been laid out on the ground?

A. No, sir.

Q. I would like for you to take that map, Mr. Lueders, and first give us the elevation at the point where the water enters the property of Mr. Anderson, runs from Buckingham property to Mr. Anderson's property.

Miss Hedrick: What water are you talking about?

Mr. Ball: The water you are fussing about.

A. The elevation is 43.

By Mr. Ball:

Q. You use an arbitrary figure of 50?

A. Yes, it is 243 feet above sea level.

Q. I will ask you to give the elevation at Pershing Drive at the lowest point.

A. 257 feet above sea level.

Q. There is a rise of fourteen feet between the Anderson property and Pershing Drive?

A. That is right.

The Court: When the Jury gets these maps back in the Jury Room, I am wondering if these two sets of figures will not be somewhat confusing.

The Witness: The only thing we have left off is the "2".

The Court: If you place a "2" in front, they are the same?

The Witness: Yes, sir.

By Mr. Ball:

Q. That point, as I understand it, is a little
page 140 } east of the present North Thomas Street?

A. That is correct.

Q. Do you know whether there was a culvert under the road at that point?

A. Yes, sir.

Q. Originally?

A. Originally.

Q. Have you seen that culvert yourself?

A. I have seen that culvert myself.

Q. Do you know what became of that culvert?

A. When we started to develop lower Buckingham, there

Albert D. Lueders.

was a low point, and in discussing with the Engineering Department of the County—

Miss Hedrick: I object to any evidence of that discussion.

The Court: Objection sustained.

Mr. Ball: We note an exception, if Your Honor pleases, not only because it is relevant but because Miss Hedrick has brought in a man from the County Engineering Department with a permanent map of the Engineer's Office.

Mr. Thomas: You had a subpoena *duces tecum* issued.

The Court: This objection is sustained anyway.

By Mr. Ball:

Q. Now, taking the lowest point at Pershing Drive and going northwardly to North Henderson Road, did you carry your elevations all the way there?

page 141 } A. Yes, sir.

Q. What is the lowest point of North Henderson Road?

A. Pershing Drive, 57.

Q. What is the lowest point in Henderson Road?

A. 70.

Q. Going northwardly from Pershing Drive to Henderson Road, there is a rise of thirteen feet?

A. That is right.

Q. The total rise from Mr. Anderson's property to Henderson Road is how many feet?

A. Twenty-seven feet.

Q. Does your map go all the way eastwardly to Glebe Road?

A. Yes, sir.

Q. I will ask you what is the slope of the ground of Glebe Road in a westwardly direction on to the Buckingham property? Is it down or up?

A. Generally, westwardly from Glebe Road it is flat.

Q. Which way would the natural drainage go from west of Glebe Road from the Buckingham Theatre?

A. It would run parallel for a ways on Glebe Road and then cut south.

Q. Are you familiar with the present layout of the Buckingham property along Glebe Road?

A. Yes, sir.

page 142 } Q. Is any drainage taken off Glebe Road and brought back to this drainage area any place?

Albert D. Lueders.

A. No, sir.

Q. The drainage that normally went down there still flows down there?

A. Yes, sir. We are not allowed to touch Glebe Road.

Q. Mr. Lueders, are you familiar with the point that was mentioned yesterday where there is a little turn-around and buildings in it?

A. Yes, sir.

Q. I don't believe that street is named?

A. Third Road.

Q. Can you show us approximately where that is on that map?

A. That property does not belong to us, this whole square that was.

Q. West of Glebe Road and north of Pershing Drive. Will you indicate approximately where it is in red pencil?

A. Right in here (witness marks).

Q. And I will ask you in which direction was the natural drainage in that area covered by that road and turn-around before the buildings were put in there?

A. Before any buildings? Toward the south.

Q. Toward vacant property?

A. Toward the west and south.

Q. Away from Glebe Road?

A. That is right.

page 143 } Q. Coming south from Pershing Drive and taking the area west of Glebe Road, what was the course of the natural drainage in that area prior to the construction of any buildings?

A. To the west.

Q. That is toward the present Buckingham property? Toward North Thomas Street?

A. Yes, sir.

Q. Are you familiar with the actual construction of the highways in Buckingham property?

A. Yes, sir.

Q. I will ask you now, going west from North Thomas Street off Pershing Drive, first, and up to a point where North Randolph Street formerly joined Pershing Drive, what is the course of the natural drainage there?

A. Along Pershing Drive?

Q. Yes, sir.

A. That is to the east.

Q. Now, coming into the point where Second Road is graded, adjoining George Mason Drive, North Trenton Street, and

Albert D. Lueders.

North Thomas Street, coming in immediately east of North Trenton Street, what is the course of the natural drainage for the first fifty or sixty feet east of this street?

Miss Hedrick: You mean after the street was put there.

Mr. Ball: The street was on there then.

Miss Hedrick: I mean Second Road.

page 144 } Mr. Ball: Randolph Street was there.

By Mr. Ball:

Q. What is the course of the natural drainage along the course of the present Second Road for the first fifty or sixty feet east of North Trenton Street?

A. East.

Q. East or west?

A. West. A short distance east of North Trenton Street there is a little rise. The natural drainage was toward North Trenton.

Q. The first fifty or sixty feet?

A. Roughly, seventy-five feet.

Q. From that point east, what was the course of drainage?

A. Toward North Thomas Street.

Q. In the present layout has that natural elevation been changed?

A. The natural elevation was changed some on Second Road to take out this protruding high point, but the slope is still in the same direction.

Q. Was there any change made in the natural drainage to the east and west basins?

A. No change in the drainage, no.

Q. Are you also familiar with this pipe, which we call the storm sewer along North Thomas Street?

page 145 } A. Yes, sir.

Q. And the catch basins in it?

A. Yes, sir.

Q. Are you familiar with the whole drainage area that empties into that pipe?

A. Yes, sir.

Q. I will ask you if there is any drainage going in that pipe now that did not actually flow in that direction?

Miss Hedrick: He doesn't know.

Mr. Ball: He can tell from the map.

Albert D. Lueders.

A. I was on the site.

By Mr. Ball:

Q. Can anything go in that drainage area now that did not naturally go in that drainage area before the construction of any buildings?

A. No, sir.

Q. There is no water except rain water and snow water in those pipes?

A. No, sir.

Q. All surface water?

A. All surface water.

Q. Mr. Lueders, in your opinion, is that present layout a reasonable way to get the surface water through that property?

Miss Hedrick: What layout?

Mr. Ball: The present drainage set-up to care page 146 } for surface water.

By Mr. Ball:

Q. In your opinion is it an unreasonable manner to carry it through the Buckingham property?

A. No, sir.

Q. Do you know of any other manner it could be carried through except to carry it down that way?

A. If the County had an extensive sewer—

Miss Hedrick: I object to anything about the County.

Mr. Ball: I will ask this—

The Court: Objection overruled.

Mr. Ball: This is subject to objection.

By Mr. Ball:

Q. Did the County require that storm sewer or recommend that storm sewer?

Miss Hedrick: I object to that. What storm sewer? The one on North Thomas Street?

Mr. Ball: Yes.

Miss Hedrick: I object to that. I don't think what the County did has anything to do with this case.

Mr. Ball: The location of that sewer was actually approved by the County authorities.

Miss Hedrick: I object on the same grounds.

Albert D. Lueders.

The Court: Objection sustained. There is no duty on the County. They cannot force some one else to do it.

Mr. Ball: It is offered to show the layout is page 147 } reasonable. The public officials would not approve a layout that is not reasonable.

By Mr. Ball:

Q. Do you know when that storm sewer was actually constructed?

A. It was constructed in a period from some time in July and completed around the beginning of September.

Q. 1939?

A. 1939.

Q. Was that sewer in during the June storm in 1939 and being used at that time?

A. No, sir.

Q. Does your map show any of the elevations on North Thomas Street south of your property?

A. No, sir.

Q. Are you familiar with the elevations along that street?

A. Yes, sir.

Miss Hedrick: Where?

By Mr. Ball:

Q. By the Catholic Church and south of your property and east of Anderson, which way does it slope?

A. It starts in a low point 175 feet north of our property line and continues to rise to Lee Boulevard.

Q. It drains into your property until it reaches the lowest point?

page 148 } A. Yes, sir.

Q. Does that actually go off in that pipe you are speaking of?

A. Yes, sir.

Q. From those elevations and from your knowledge of the terrain there, isn't it a fact that the water that goes through that pipe goes to the lowest point between your property and the Anderson property?

A. Yes, sir.

Q. From the natural course of the drainage it reaches that point?

A. Yes, sir.

Q. Is there any way to keep it away unless you dig through a hill?

Albert D. Lueders.

A. No, sir.

Q. The Buckingham interests had nothing to do with the construction of that street south of your property on to Lee Boulevard?

A. No, sir.

Q. Do you know whether that is a County road or not?

A. I believe it is.

Q. Mr. Lueders, there has been some testimony about a little road Mr. Anderson has across his property?

A. Yes, sir.

Q. As I understand it, that road runs across page 149 } the southerly line of your property?

A. That is right.

Q. Are you familiar with the point where that road runs into North Trenton Street?

A. Yes, sir.

Q. Do you know whether the water off North Trenton Street can get into that road or whether any provision has been made for that?

A. We ran a small valley along the curb line and raised up the grade of the ground toward Mr. Anderson's property to try to keep water from running down there.

Q. Did your concern do that?

A. Yes, sir.

Q. You heard Mr. Anderson say he did that and that you folks graded it to throw water into his place, and he graded it to throw it off?

A. I think we put the paving up.

Q. Did you ever do any grading to throw the water on him?

A. Not wilfully, no, sir.

Q. Do you know of any water that goes in on him from North Trenton Street?

A. In a terrific downpour, the curb overflows.

Q. Is his property better protected from an overflow since you did the work than it was in Randolph Street?
page 150 } A. Not to my knowledge. We did not change the grades at all.

Q. Have you examined the little pipe that goes under Mr. Anderson's road?

A. I have seen it, yes, sir.

Q. How high does he have his road above the elevation immediately to the north of it, on your side of the line?

A. I will say it is some two feet or so.

Q. If the pipe were not under there, the road would act as a dam?

Albert D. Lueders.

A. That is right.

Q. Have you noticed the size of it?

A. Twelve inches.

Q. Is it big enough to carry the water off in a storm?

A. No, sir.

Q. Has Mr. Anderson made any other provision at all to get surface water across there except through that little pipe?

A. No, sir.

Mr. Ball: I think that is all.

CROSS EXAMINATION.

By Miss Hedrick:

Q. Mr. Lueders, this twelve-inch pipe of Mr. Anderson's you do not know whether or not it was adequate before Buckingham put in the drainage system there, do you?

A. I would say offhand it was not because I noticed a couple of times after a rain that that area was page 151 } swampy and boggy.

Q. That was before Buckingham was there?

Mr. Ball: I object to that. I don't think it is a question of whether Anderson's land was put to a reasonable use. It is a question of the buildings being reasonable and the streets reasonable. The only matter he has complained about is getting water off there. The fact that the water has been increased by construction so it cannot be absorbed in the ground, I submit he has to take care of it under the laws in Virginia. So long as we do not bring any water in there that does not naturally come from the rains and snows, it is immaterial. He must make provisions to take it off.

Miss Hedrick: That is not my theory of the case at all.

The Court: Objection overruled.

Mr. Ball: We note an exception.

By Miss Hedrick:

Q. Do you have any knowledge of conditions there before Buckingham came to that place?

A. Only from tramping through the woods and over the area before we started construction.

Q. At that time was there anything to indicate that Mr. Anderson's twelve-inch pipe was not adequate to carry off the water?

Albert D. Lueders.

A. As I stated before, the area north of that was a swampy area.

Q. How far from Mr. Anderson's pipe was that page 152 } swampy area?

A. Seventy-five feet or so.

Q. Was it dammed up against Mr. Anderson's pipe?

A. Dammed up?

Q. Yes.

A. I don't recall whether it was dammed up or not. There was a lot of dead wood and stuff in that area.

Q. Over Mr. Anderson's land or in the Buckingham area?

A. In Buckingham.

Q. There was nothing on Mr. Anderson's land between his line and the pipe?

A. Between our property line and the pipe?

Q. Yes.

A. No, I would say offhand, it was not.

Q. So if there was any obstruction to the flow of the water, it was on what later became Buckingham property?

A. If the water backs up in there, after a while it becomes soggy.

Q. You have never seen it back up to Mr. Anderson's pipe?

A. I have never been there when it has been backing up.

Q. So you don't know anything about it?

A. No.

Q. This thing on the map that looks like a bottle, what does that indicate?

A. Slight knoll.

Q. A knoll that slopes off in all directions?

page 153 } A. For a few feet, yes.

Q. You do not know whether this is over from here to here a slight rise?

A. No.

Q. And coming out North Pershing Drive; this plat indicates that the low point was approximately 125 feet east of what later became Thomas Street?

A. That is right.

Q. In the natural course of the water flowing, it would flow across what is now Buckingham, across Pershing Drive to what is now Buckingham before the change was made?

A. That is right.

Q. You say down here at Second Road you took out a protruding section on Second Road?

A. At this point there is a slight high point indicated by

Albert D. Lueders.

this contour. Instead of taking that over the hump and dropping it down slightly, we cut off that protrusion there.

Q. That made no difference in the drainage in that area?

A. That is right.

Q. Doesn't ordinarily the cutting out of a high point change the drainage?

A. It wasn't very high.

Q. To get this road level you still left a high point?

A. Still left a high point.

Q. How much did you cut off?

page 154 } A. About eighteen inches or so.

Q. How much of a rise did you leave?

A. From what point to what point?

Q. From the highest point here to Trenton Street?

A. Probably one per cent slope. That is customary.

Q. So if you go on the ground now, you can see that one per cent slope down?

A. That is right.

Q. You say you think all this drainage system they put in was a reasonable way to carry the water through Buckingham?

A. Under the circumstances, yes.

Q. Do you think it was a reasonable way to discharge the water on Mr. Anderson's property?

Mr. Ball: He is not charged with any duty except carrying it through their own property.

Miss Hedrick: Their own property and their neighbors' property.

Mr. Ball: It is always injurious to the neighbors' property.

Miss Hedrick: Sometimes it is a benefit.

The Court: Objection overruled.

Mr. Ball: We note an exception.

By Miss Hedrick:

Q. Do you consider that a reasonable way to discharge the water on Mr. Anderson's property?

page 155 } A. Under the circumstances, yes.

Q. You are familiar with the type pipe they have at Mr. Anderson's property?

A. Yes, our pipe.

Q. What is the size of that pipe?

A. Twenty-four inches.

Q. You testified Mr. Anderson had a twelve-inch pipe?

Albert D. Lueders.

A. Yes.

Q. What is the distance between the mouth of your pipe and Mr. Anderson's twelve-inch pipe?

A. About seven or eight feet.

Q. Have you ever been in that area during a heavy storm or immediately after a heavy storm?

A. No, I didn't go over there. Somebody else from our organization went over there.

Q. Would your experience as an architect lead you to believe that proper drainage would be to lead a twenty-four inch pipe to try to connect up with a twelve-inch pipe?

Mr. Ball: We are not trying to connect with it.

Miss Hedrick: He said they carried it to the lowest point.

Mr. Ball: He didn't say we have to discharge it at the low point or the high point. We are not trying to discharge water on anybody. We are carrying it to the lowest point or the reasonable place, whether it is some other point or not.

The Court: Objection overruled.

page 156 } Mr. Ball: We note an exception.

By Miss Hedrick:

Q. The question was, in your experience as an architect, do you think it is good engineering to discharge water from a twenty-four inch pipe and try to make it connect with a twelve-inch pipe?

A. No, it is not, and we tried to remedy it.

Q. In what way did you try to remedy it?

A. We offered to run the twenty-four inch pipe under the driveway.

Q. Have you any written offer of that?

A. No, I have not.

Q. Who made the offer?

A. Mr. Kampsford and Mr. Thomas, our attorney.

Q. Was that in your presence?

A. No.

Q. Then you do not know anything about it?

A. I accept the word of my fellow employee.

Miss Hedrick: I object.

Mr. Ball: She brought it out.

Miss Hedrick: I asked him if any offer was made in writing.

Mr. Ball: You asked if he thought it was good engineering

Albert D. Lueders.

and he said no and they had tried to remedy it. I submit every bit of it has been brought out by Miss Hedrick.

Miss Hedrick: He is testifying to something page 157 } he knows nothing about except by hearsay.

The Court: I think the motion ought to be granted and the testimony stricken out. It seems to me what you are after is rebuttal. She leaves it high and dry.

Mr. Ball: We note an exception, if Your Honor please.

Miss Hedrick: That is all.

RE-DIRECT EXAMINATION.

By Mr. Ball:

Q. Would you consider it good engineering for a man to try to carry waste water that requires a twenty-four-inch pipe to carry it through your property in a twelve-inch pipe?

A. No.

Miss Hedrick: I object to that.

The Court: Objection overruled.

By Mr. Ball:

Q. Would you consider a twelve-inch pipe was a reasonable manner in which to attempt to carry off the surface water coming from Buckingham property on down?

A. No, sir.

Q. As a matter of fact, it was totally inadequate, isn't that correct?

A. Yes.

Q. Wouldn't that be so regardless if it was not brought down in a pipe but allowed to go down the streets?

Miss Hedrick: If the witness knows.

page 158 } By Mr. Ball:

Q. Is the volume increased any by the fact that it is taken off the street and put in a pipe?

A. Not if the streets are improved.

Q. These are improved streets?

A. Yes.

Q. The only difference is bringing it underground?

A. Yes.

Q. You are also bringing it to the lowest point?

A. Yes, sir.

Albert D. Lueders.

Q. He had a ditch on your road carrying it to the lowest point, the same one you are carrying it to?

A. Yes, sir.

Mr. Ball: That is all.

RE-CROSS EXAMINATION.

By Miss Hedrick:

Q. In this new matter, Mr. Lueders, as a matter of fact, if the water had been on the street instead of in the pipe, when it reached a depth sufficient to rise over the curb—how high is the curb?

A. Six inches.

Q. If it got higher than six inches deep, it would flow over the lawns at Buckingham, would it not.

Mr. Ball: I object.

The Court: Objection overruled.

Mr. Ball: Exception.

page 159 } A. It would.

By Miss Hedrick:

Q. And as a matter of fact, the low point on Thomas Street is some seventy-five feet north of Mr. Anderson's line, is it not?

A. Roughly about that.

Q. If the water were in the streets and not in the pipe, it would flow out over that section of Buckingham before it reached Mr. Anderson, would it not?

A. If the volume became great enough.

Q. As a matter of fact, there is enough rise between the low point and Mr. Anderson's line so it would jump that curb?

A. That is right.

Q. So it would be dissipated before it reached Mr. Anderson's land?

A. I would not say dissipated.

Q. What would you say?

A. It would go on down.

Q. In its own channel?

A. Yes.

Albert D. Lueders.

Q. Where?

A. I think it did that in the June storm.

Q. How far is it from Trenton Street down to the terminus of the pipe?

A. About one hundred feet.

page 160 } Q. And if the water were on the street instead of in the pipe, it would have a hundred feet to go across Buckingham?

A. That is right.

Q. So the force of the water would be spread out over considerable area instead of concentrated in a two-foot pipe?

A. That is right.

Q. You testified the drop is twenty-seven feet down to Mr. Anderson's line?

A. That is right.

Q. Water coming out of a pipe would it get velocity with a drop of twenty-seven feet?

A. It depends. It runs from Pershing Drive. That is the beginning of the main storm sewer.

Q. And beyond that is Third Road?

A. Yes.

Q. From Pershing Drive down to Mr. Anderson's line, is the slope sufficient so the water comes down with considerable velocity?

A. It is between one and three per cent slope, which is not a terrific slope.

Q. Do you know what slope there is from Thomas Street? Is it a continuous slope all the way or is the slope greater from Thomas Street down that extra hundred feet?

A. From out south property line, that hundred feet—

Q. Beyond where you leave Thomas Street and go that last hundred feet to Mr. Anderson's land?

page 161 } A. Yes, that is a greater slope there.

Q. What is that slope?

A. I don't know, offhand.

Q. I suppose we can reach it.

A. This shows only the natural contour. The actual finished grade of that road is not indicated. Roughly, it used to be a six- or seven-foot slope.

Q. This was a seven-foot slope in a hundred feet?

A. Yes.

Miss Hedrick: I think that is all.

Albert D. Lueders.

RE-DIRECT EXAMINATION.

By Mr. Ball:

Q. Mr. Lueders, Miss Hedrick asked you about the water on North Thomas Street collecting at the low point seventy-five or a hundred feet on your property?

A. Yes.

Q. Would it be reasonable to let it collect there? What do you have constructed on your property?

A. At that point we have a catch basin on each side of the street.

Q. And what do you have immediately west of Thomas Street so far as building is concerned?

A. An eight-family building.

Q. And what is between that building and the road? Does it have a lawn?

page 162 } A. We have a small lawn, sidewalk, curb and parking space.

Q. If you did as Miss Hedrick suggested, what would be the result of the building and lawn?

A. The first thing it would strike as it went over there would be the cellar stairs.

Q. Do you have a cellar underneath that building?

A. Partly.

Q. What happened during the June storm?

A. We had five feet of water in the cellar.

Q. Do you think that would be a reasonable way of handling the water?

A. Unsatisfactory and unsanitary.

Q. Did you ever hear of that being advocated in any town or city?

A. It is against the law.

Miss Hedrick: Against the law in Arlington County to have water in the cellar?

The Witness: No, to make provision to get rid of the water.

Miss Hedrick: Have you been in any cellars in Arlington County?

Mr. Ball: We offer this contour map in evidence and ask that it be marked Defendant's Exhibit No. 5.

(Said contour map, so offered and received in evidence, was marked Defendant's Exhibit No. 5.)

Ivan N. Anderson.

page 163 } The Court: We will recess for ten minutes.

Thereupon, a ten-minute recess was taken, at the conclusion of which, the following occurred:

Mr. Ball: That is our case. We rest.

Miss Hedrick: I want to put Mr. Anderson for a few questions.

Thereupon,

IVAN N. ANDERSON,

being recalled to the stand in rebuttal, further testified as follows:

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. Mr. Anderson, in connection with the water coming out of this two-foot pipe on Buckingham, which they have placed a little distance from your twelve-inch pipe, during a heavy storm explain how the water comes out of that.

Mr. Ball: He has already done that.

The Court: Objection sustained.

By Miss Hedrick:

Q. Where does that water first strike the ground?

Mr. Ball: He has already testified to that.

The Court: Objection sustained. Even if he had not testified to it, he should have as part of the plaintiff's case in chief.

Miss Hedrick: That is all.

Mr. Ball: No questions.

Witness Excused.

Mr. Ball: We would like to request that the
page 164 } Jury be permitted to make a view of the premises.

The Court: Any objection?

Miss Hedrick: No, I was going to make the same request.

Mr. Ball: There are a number of points we would like to designate. Do you want us to go along and designate them?

Albert D. Lueders.

The Court: Be glad to have you. I wish you would be very careful about trying to argue the case.

Mr. Ball: All I ask is that they look at particular points and notice the street signs so we can identify them on the plat.

The Court: All right.

Thereupon, a recess was taken, during which the Jury together with Court and counsel viewed the premises, and at the conclusion of the recess, the following occurred:

The Court: Was there some further testimony to be put in at this time?

Mr. Ball: I want to put Mr. Lueders back on the stand for a few questions.

Thereupon,

ALBERT D. LUEDERS,

being recalled to the stand in rebuttal, was further examined and testified as follows:

RE-DIRECT EXAMINATION.

By Mr. Ball:

Q. Mr. Lueders, there were two questions asked page 165 } by members of the Jury while we were over on the scene, I would like to ask you about. The first was, you noticed two small pipes emptied at the same point where the large pipe emptied from your property. Can you tell us where those two pipes lead from?

A. The one directly alongside the twenty-four-inch is an old twelve-inch pipe which we installed at the time we put up two sections of Buckingham and had hooked up those two catch basins. After that was installed, we found that was not sufficient and we disconnected the basin on the east side of Thomas Street and hooked that up with the 24-inch and we left the one on the west side of Thomas Street hooked up with the twelve-inch pipe.

Q. It only has one catch basin emptying into it now?

A. Yes.

Q. What is the second smaller pipe?

A. It is really a culvert under our garage and the drive-

Albert D. Lueders.

way which leads from our place directly north. It takes it under the garage.

Q. How long would that run?

A. Seventeen or eighteen feet.

Q. That merely drains the water off the rear lawns?

A. That is right.

Q. The other question one of the jurors asked was something about the culvert under Lee Boulevard. Do you know how large that culvert is?

A. There is a 24-inch culvert there. As far as page 166 } I know, it was installed at the time Lee Boulevard was put through.

Q. Was it installed before Buckingham did its work?

A. Oh, yes, it was already in.

Mr. Ball: I would like to ask if any gentleman of the Jury has any question he had in mind. That is all.

RE-CROSS EXAMINATION.

By Miss Hedrick:

Q. There was one question I wanted to ask. You testified and it is marked on the plat about these two drains here (indicating). Your testimony is that this one on the west side connects with the little pipe and this one is still connected with the bigger pipe?

A. That is right.

Q. Was a jag in the sidewalk cut under there and pipe put underneath?

A. That cut in the sidewalk was put in by us as an effort to stop an overflow. If water comes down there, it is taken care of by this overflow cut underneath the sidewalk.

Q. Then there was a drain?

A. The second one in there is really not a drain. It is a means of cutting out the bend in that twelve-inch pipe. This twelve-inch pipe comes from that catch basin at an angle and takes another drain down to the 24-inch in case anything gets in and at the same time it does act as a drain.

Q. It drains off in the small culvert?

page 167 } A. That is right.

Miss Hedrick: That is all.

Ivan N. Anderson.

RE-DIRECT EXAMINATION.

By Mr. Ball:

Q. Mr. Lueders, maybe it would be better to bring out this question. On whose property is this located? I am speaking now of the storm sewer.

A. The 24-inch?

Q. The 24-inch, at the outlet. The question was raised on the ground as to whether that was on Buckingham or whether it overlapped on Mr. Anderson's property.

A. It is approximately a foot inside of our property.

Mr. Ball: That is all.

Witness Excused.

Mr. Ball: I think that is all.

Miss Hedrick: I want to recall Mr. Anderson.

Thereupon,

IVAN N. ANDERSON,

being recalled to the stand in rebuttal, was further examined and testified as follows:

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. Mr. Anderson, the question was asked on the grounds as to where your boundary line was with reference to the edge of the mouth of that large 24-inch pipe.

page 168 } A. I base my opinion on where that is located as to where the line that ditch runs, and my opinion is that it is either an inch one side or the other, maybe two inches, within an inch or two of that point is my opinion.

Miss Hedrick: That is all.

RE-CROSS EXAMINATION.

By Mr. Ball:

Q. How do you arrive at that?

A. Because at the time that ditch was put in, the property corner was showing. Buckingham had replaced that

Ivan N. Anderson.

pipe with a bigger one. When the ditch was put in, at that point, the ditch was entirely over on my property.

Q. That is your ditch? The ditch we have been referring to as your ditch?

A. Yes.

Q. Alongside your road?

A. Yes.

Q. Now, there was some talk there, I forget by whom, concerning the east end of that ditch, North Thomas Street. Is that ditch entirely on your property at that point?

A. At that point it is mostly on my side is the easiest way I can say that because I am not positive, as I said before. When that wooden survey peg was in there, I am taking Buckingham's engineer's peg on that point because mine was removed, that peg was there so that the ditch appeared to be entirely on me, up at that end. But that
page 169 } ditch does not go straight down. It bends in toward Buckingham slightly.

Q. As it goes downhill, it goes to the north?

A. As it goes downhill, it goes to the north and then it bears to my line or to my road, that would be south, when it gets down to the other end.

Q. What do you mean by the other end, where your culvert is?

A. Yes, where my culvert is. Of course, it takes a definite bend at the culvert, I am not talking about that. I am talking about that general line.

Q. Is it true that the ditch in some parts is over on Buckingham?

A. That is true.

Q. More so at Thomas Street and then cuts—

A. At Thomas Street it is completely on me.

Q. Completely on you?

A. Maybe a little on Buckingham, but very little at that point.

Q. It bears in on Buckingham?

A. Yes, and then back on me.

Q. It is practically a line ditch?

A. I believe that is what Buckingham intended it to be.

Q. Is that what you intended it to be?

A. I had nothing to do with that particular ditch.

Q. Isn't that where you had your original
page 170 } ditch?

A. When I put the original ditch in, that was

Ivan N. Anderson.

all rather rough ground, quite a lot of trees and things of that kind, and the ditch was probably on both sides. It wasn't straight. It wasn't a deep ditch; it was less than six inches deep in some places.

Q. You allege here that they came on your land to fill up your ditch. You meant that ditch that was partly on your land and partly on theirs?

A. I never contended it was my ditch.

Q. You are asking for five hundred dollars for that?

A. They didn't ask my permission to dig the ditch.

Q. There was a ditch in approximately that location that had been prepared by you?

A. Yes.

Q. That is correct?

A. That ditch had been there many, many years before Buckingham came.

Q. Was that dug before you went there with Forman?

A. It was dug before I bought the premises.

Q. You were there at that time, were you not?

A. Technically, I was a renter.

Q. The little road referred to as your road, was that there when you bought the property?

A. It was built after I went on the property.
page 171 } I had no interest in the land whatever when the
partnership existed. I had no ownership of any
of the nursery property which was very nearly ten acres at
that time.

Q. Here is what I am getting at. The road and the pipe, the twelve-inch pipe, are in the same location now and the pipe the same size, same pipe and same ditch, as when the land was waste land?

A. It is.

Q. And no changes have been made to take care of modern improvements?

A. No.

Mr. Ball: That is all.

RE-DIRECT EXAMINATION.

By Miss Hedrick:

Q. This original drain that was there, what percentage of that drain was on your land, the original ditch down the road-way?

Ivan N. Anderson.

A. It is a little hard to say that. When we dug the ditch, we thought it was all on what we thought was Forman's land. It was not my property.

Q. Have you any reason to believe that a substantial part of it was on Buckingham land?

A. Well, Buckingham didn't own the property at that time.

Q. I mean the land that is now Buckingham's property.

A. I cannot say accurately as to that because the ground—
I recall something about that. That ditch was dug
page 172 } before we built the road and the land was cleared,
and it was—I cannot even state that I dug that
ditch.

Q. I didn't ask you to state whether you dug the ditch. I asked you if you could say whether a substantial part of that ditch was off and beyond your boundary line or whether it was on your own land, the land you subsequently bought.

A. If there was any of it over, it was no more than a third.

Miss Hedrick: That is all.

Witness Excused.

The Court: Does that cover all the testimony now?

Mr. Ball: I think so.

Miss Hedrick: Yes.

The Court: The Jury will retire to the Jury room for a few minutes while we take up the law.

page 173 } Instructions offered by the Plaintiff, numbered
One and Two, were granted, without objection or
exception.

Instructions offered by the Defendant, lettered "A" to "G," were discussed as follows:

Miss Hedrick: I think the words, "and recklessly," should be changed to "or unreasonably." Carelessly or unreasonably is usually the test as to whether it is unreasonable or not.

Mr. Ball: I think that is all right.

The Court: Instruction "A" is granted as amended.

The Instruction as amended reads as follows:

"The Court instructs the jury that the burden of proof is upon the plaintiff in this case to show that the defendant has so carelessly or unreasonably constructed its buildings and its surface water drainage conduits as to inflict needless and unnecessary injury upon the land of the plaintiff which could have been avoided by the exercise of ordinary care. In other words the plaintiff must show that the injuries suffered by the plaintiff because of the defendant's acts *was* needlessly and negligently inflicted. If the plaintiff fails to establish these facts by a fair preponderance of the evidence he cannot recover."

The Court: Instruction "B."

Miss Hedrick: The preliminary paragraph in "B" I don't know whether that is necessary or not. I have no particular objection to it except that he cannot turn it back upon the land of his neighbor. Then in the last paragraph, I think the words, "unreasonable or," should be page 174 } added before the words "improper manner," and striking out the word, "and."

The Court: I am going to strike out the sentence, "He may obstruct or hinder its flow, or may even turn it back upon the land of his neighbor, whence it came," and with the other amendment, the instruction will be granted as amended.

Instruction "B" as amended and granted, reads as follows:

"The Court instructs the jury that, in this State, surface water is considered a common enemy, and that each land owner may fight it off as best he may. This results from the dominion the law gives him over his land.

"But the Court further instructs the jury that this right must not be used wantonly, carelessly, or unnecessarily, so as to injure the rights of another; that it must be a reasonable use of the land for its improvement or better enjoyment; that the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary; that where the exercise of the right is thus guarded, although injury may result to the land of another, he is without remedy.

"Unless the jury believes from the evidence that such right has been exercised in a wanton, careless, negligent, un-

necessary, unreasonably or improper manner, it must and for the defendants.”

page 175 } The Court: We will take up Instruction “C.”

Mr. Ball: I think the last sentence of “C” is plain repetition, but if Your Honor pleases, the first part of “C” is the only place where we ask for an instruction to the effect that they have a right to reasonable use of the land for the purpose of its improvement or better enjoyment. It is our contention, and we expect to argue to the jury, that they have put this land to a reasonable use.

Miss Hedrick: Those are the same words as you use in “B.”

Mr. Ball: We will withdraw “C,” if Your Honor pleases.

The Court: All right. We will take up Instruction “D.”

Mr. Ball: In Instruction “D” there are two things involved; first, putting the land to reasonable use, and second, if their method of disposing of surface water is a reasonable manner in which to do that, and we have tried to cover that briefly in that instruction. First, if they believe it was put to a reasonable use, and, further, if they believe it was done in good faith.

Miss Hedrick: I do not see what that instruction adds to Instruction “B.”

The Court: Instruction “D” is granted, as offered.

Miss Hedrick: I object to Instruction “E” on the ground it does not properly state the law for this reason: It states, “there is no legal duty on the part of the defendants to provide any drainage through the property of any one else or beyond their own holdings.” At the same time a person

cannot turn water loose at their boundary line
page 176 } and close their eyes to results. They are not required to go upon other property and drain it, but the test of whether their acts are reasonable or not does not stop at their boundary line.

The Court: I think the argument is very good to the jury but I don’t think it fits this instruction. This instruction, as I see it, is drawn for the purpose of supporting the argument that all the trouble comes from your client’s bottle neck. Objection is overruled.

Miss Hedrick: Exception.

The Court: Instruction “F.”

Miss Hedrick: My objection to “F” is that after the word “coming” in the fifth line, the word “reasonably” should be inserted, so that it will read—“surface water coming reasonably from the holdings of proprietors higher up”—

(Here followed discussion off the record.)

The Court: I think the instruction should be amended to read "naturally coming from the holdings of proprietors higher up."

(Here followed discussion off the record.)

The Court: I am going to refuse Instruction "F."

Mr. Ball: We except to Your Honor's refusal of Instruction "F."

The Court: Is there any objection to Instruction "G"?

Miss Hedrick: No.

The Court: Instruction "G" is granted as offered.

page 177 } Thereupon, the Jury was brought in and the instructions read. Miss Hedrick on behalf of the Plaintiff made the opening and closing argument, and Mr. Ball presented the argument on behalf of the Defendants.

The Jury's verdict was as follows:

"We, the Jury, on the issue joined, find for the Plaintiff and fix his damages at ten Hundred Dollars (\$1,000.00)."

page 178 } Teste: This 13th day of September, 1940.

WALTER T. McCARTHY,
Judge

page 179 } In the Circuit Court of Arlington County, Virginia.

Ivan N. Anderson, Plaintiff,

v.

Third Buckingham Community, Incorporated, a corporation,
Fourth Buckingham Community, Incorporated, a corporation,
Fifth Buckingham Community, Incorporated, a corporation, Defendants.

The following is a true record of the argument of the plaintiff's attorney to the jury in the concluding presentation of the plaintiff's case together with the motion and exceptions made by the attorneys for the defendants.

page 180 } In the Circuit Court of Arlington County, Virginia.

Ivan N. Anderson, Complainant,

v.

Third Buckingham Community, Inc., a corporation, Fourth Buckingham Community, Inc., a corporation, and Fifth Buckingham Community, Inc., a corporation, Defendants.

CLOSING ARGUMENT OF MISS ANNA F. HEDRICK,
ATTORNEY FOR PLAINTIFF, ON FEBRUARY
29, 1940.

Miss Hedrick: May it please The Court, and Gentlemen of the Jury, the evidence in this case discloses that the plaintiff comes before you, Gentlemen of the Jury, with a very real grievance. Mr. Anderson has been occupying the land involved in this County and has been using it in his garden and nursery business for more than twelve years. For the past six years, he has been the owner of that particular land. During all that time there has been a small ditch running through his property. The evidence has been during all those years, the ditch has never overflowed. Mr. Pomeroy substantiated this testimony of Mr. Anderson's that during all that period of time the ditch was adequate to carry off all the surface water.

In 1938, Buckingham came into that community.
page 181 } They proceeded to fill in above Mr. Anderson, which their own witnesses testified was swamp and bog, to cut through their streets and install curbs and gutters, to install a large storm sewer extending all the way from Pershing Drive down along Thomas Street, turning off Thomas Street and opening right at the edge of Mr. Anderson's property.

In the year 1938, Mr. Anderson has testified that Buckingham was beginning operations, there was quite a storm and some damage was caused by flooding. He called attention of Buckingham to the injury, but Buckingham, instead of seeking any remedy for the situation, continued in their operations and added area after area to this general drain, which eventually emptied itself on Mr. Anderson's property. The result of it all was that during the year 1939, twice Mr. Anderson's land was flooded. At the time of the second flood, this pipe had been in place and in position that it is today. The first flood was not so serious, but it did do some damage in carrying out plants in light soil. The second

storm destroyed his cold frame, broke out the cinder block of which the cold frame was constructed, and carried those cinder blocks over on Mr. Pomeroy's land.

Your gentlemen can realize with what velocity that travelled over his property, to his cold frame, and still had the velocity to break up the cold frame and carry it over on Mr. Pomeroy. It also carried the pots in the cold frame and broke them up and the plants were destroyed in those pots.

page 182 } The evidence further discloses that stones six to eight inches across were carried down by that tremendous rush of water. Mr. Anderson has told you it didn't run out of that pipe, it landed on his road and tore great holes in his road. It even, he said, not only carried off the top part of the road, but it dug down so deep it dug out rocks that had been put there years and years before. That is the force the water had that came out of the pipe right at the edge of his property. The gravel, the bluestone, his plants washed away, and damage done. That wasn't any trifling damage that is easily forgotten, but the damage was terrific.

Now, let us see the cause for all of this. The Court has instructed you that in order to recover against Buckingham we must show they made some unreasonable use of their property and did some acts that were not reasonable. This is the main issue in this case, what acts did Buckingham do in that way that were unreasonable.

In the first place, Trenton Street, which was old Randolph Street, had been a through street from Lee Boulevard to Pershing Drive, and both Mr. Anderson and Mr. Pomeroy testified that considerable water ran down that street, but after Buckingham cut off Second Street and regraded, rather, about three hundred feet this side of Pershing Drive, since that time, the water that has come down Trenton Street, a great mass of water, was carried over to Thomas Street, and from Thomas Street, straight down.

page 183 } You would think, with all their buildings and roofs that more water would come down Trenton Street. The water that formerly came down Trenton Street had been diverted to run down Thomas Street and from there, to the plaintiff's property. If you will look at the map of Mr. Rupert's, which he indicates every fifty feet, the different elevations, and run down the numbers on Trenton Street, the numbers gradually increase. That, Gentlemen, was one unreasonable act.

Another unreasonable act was that it has been testified

by all the witnesses in this case, whichever side called them, originally the lowest point on Pershing Drive was one hundred and twenty-five feet east of Thomas Street. In other words, on Glebe Road, to Thomas Street, a hundred and twenty-five feet, it is obvious that water that came down there did not, in the old days, reach Mr. Anderson's property. What did Buckingham do? They were not going to have water run across Pershing Drive on their property and into their basements. They forthwith changed the grade of Pershing Drive back to Thomas Street, so that the water which they objected to and would not have on their property would come down Thomas Street on Mr. Anderson's property. That, also, was a needless and unnecessary act.

The third thing they did was coming down Thomas Street, where they put this drain, this big pipe. The testimony is that the lowest point on Thomas Street is not at page 184 } Mr. Anderson's line but some distance up on the Buckingham property. They were not satisfied to have the low point there and to have water run from Thomas Street on their property. They couldn't change the grade on Thomas Street because they couldn't control it. They put a drain so the water would not run on them but go down and run on Mr. Anderson's property. They were not going to have the water in their basements. They were going to put it in a pipe and pass it in a body on Mr. Anderson.

Now, the fourth thing is this turn-around that has been in evidence here which lies between Thomas Street and Glebe Road. They went all the way up Thomas Street and way over here to find additional water to carry down and pass on Mr. Anderson's property. If you gentlemen will examine that plat properly, you will find arrows that indicate the flow of water. These arrows not only drained this turn-around, but drained the street coming in from Glebe Road, and you find it not only drained Third Street, North, but these little arrows indicate, also, it took the water off Glebe Road and put it in pipes and all the way to Mr. Anderson's property.

Mr. Ball: I object. There is no evidence as to that. The evidence of your own witnesses was that there was not a bit of water off Glebe Road.

The Court: Objection is overruled.

Mr. Ball: We note an exception.

Miss Hedrick: If you will note the elevation page 185 } along Glebe Road, you will find there is a gradual slope to carry water down Glebe Road, but they

have made more of a slope coming into Third Street, so it is natural for water to flow down there, down Third Street, and into those drains and on to Mr. Anderson's property.

The fifth thing that was unreasonable was when they put in all these different drains that has been testified they put in, two drains, when they put them in, they showed an utter disregard for Mr. Anderson's rights, and dumped the dirt from the excavation of the drains over and filled up his ditch, and he has testified that the rock and debris from their excavations they had placed in this ditch passed a volume of water over his property.

One more unreasonable act, which shows the ruthless manner in which Buckingham has acted in this matter, the climax, the final thing, after going over this tremendous area and taking the water and putting it in a pipe, they carried it all the way down Thomas Street. They were not satisfied with that; they brought it off Thomas Street within one foot of Mr. Anderson's property, according to their testimony, and within one inch of it, according to Mr. Anderson's testimony, where they turned the tremendous quantity of water loose and said to Mr. Anderson, "It is yours. You take it from here on." How is Mr. Anderson going to take care of water from a two-foot pipe that comes out like a water main? How

is he going to take care of water in that quantity
page 186 } and with that velocity? I think, when Buckingham brought that sewer pipe directly to his boundary, it was not only unreasonable, but such an act as to show complete indifference to the right of the adjoining land owners.

The question of damage—Mr. Anderson—we have tried in this action to give you the best evidence we can about the damage that has been done to the plants. They are gone, and we have tried the best way we can to establish the value of what is destroyed. There is not a person within traveling distance of this Court House who knows more about what was destroyed and the value of what was destroyed than he does. I think, Gentlemen of the Jury, if he had sat in that chair hour after hour, you could not help but be impressed with Mr. Anderson's honesty, and he would not vary one iota from the truth to help his own position or anybody else's position.

Now, therefore, considering the damages, I ask you that you take Mr. Anderson's yellow sheets. I have not added up those amounts myself. I think it comes to around eight hundred and fifty dollars. Mr. Anderson has testified that he has not included the transportation charges to replace

this material, he has not included the cost of setting out the plants after they arrived, and that several hundred ivy plants have since died, since this list was made out. We will not quibble on small things; we are satisfied with the sum of that list of damages Mr. Anderson has made out.

* * * * *

page 187 } Miss Hedrick: Gentlemen of the Jury, let's freshly dispose of this rhododendron matter. It is a matter of common knowledge that when water strikes something immovable, such as cinder block or cement or brick, the cement and cinder block and such things will give, will break away, and anything that will give, the water flows on over without causing any particular damage. That is common knowledge, and you have seen it along the water banks.

Now, to hear Mr. Ball and Mr. Thomas, they all think Mr. Anderson is just fine, and they all believe what Mr. Anderson says and would not harm him, but as a matter of fact, they are continuously inflicting more and more damage. It started in 1938. They started draining the extra water on him there. He dug out his ditch, in order to try to keep up with the damage. He has done everything he could. They went on and on with the operations, draining more and more operations on him. He could not keep out of it. It went entirely out of bounds, nothing he could do to control the water. They talk about being reasonable. Whatever will help Buckingham is reasonable for them. It is reasonable for them to keep the water out of their cellars, at the expense of Mr. Anderson. They can't have their grass covered with it; that is not unusual, but they don't seem to think about Mr. Anderson's plants and livelihood being ruined down there where they are carrying the water, down there on his property.

page 188 } Time and time again in the testimony and argument, everything they consider when they look at it that is reasonable is something that will help Buckingham, in spite of the fact that everything they do to save themselves is hurting Mr. Anderson. They went to all this expense of this tremendous pipeline, which goes for a distance of approximately six hundred feet. They have gone to the expense of putting this pipe out here which would apparently be a distance of another some four or five hundred feet. All that expense they have gone to to save themselves and to carry the water where it won't do any damage to their prop-

erty. When they get down here, they refuse to go to the extra expense because it can no longer injure them. The only person it can injure is Mr. Anderson. They have saved themselves and spent their last penny to protect themselves, and they are not willing to spend another cent to save Mr. Anderson.

It is most unreasonable. Not only have they saved themselves at Mr. Anderson's expense when they have so collected and artificially controlled this water to Mr. Anderson's land, but what they do now, today, they ask him to do, and that was the whole trouble with Mr. Anderson, that he didn't go to the expense of a two-foot pipe to drain all these acres of ground. I think perhaps that that is the key to this whole case, and Buckingham's attitude in this matter is that they seem to think because their apartments are constructed as
 page 189 } probably they should be constructed, that it is reasonable, and that we should not object to the water that comes off the roof, and we do not object because they have put in streets and surfaced them. We should not object to that, and we do not object to surfacing the streets, but what we object to is changing the grade and controlling the surface water and throwing it on Mr. Anderson.

Suppose I have a car. The car, in itself, is reasonable, and I drive it on the public highway. Then suppose I start to take a short cut down across the flower gardens of one of you gentlemen of the jury. Then suppose when that is brought to my attention, I am not satisfied with that. I go back and get all my kinfolks, cousins, and uncles, and they get in their cars, and they all make a trip down the street and cut across your flower bed. Do you think that would be a reasonable act?

It seems to me that the action of Buckingham passes the point of being reasonable and reaches the point of utter disregard and contempt of any right of the adjoining land owner. What is reasonable in Russia is not reasonable in the United States, and we are thankful we are in a country where a small person is just as important in the eyes of the law as a millionaire corporation.

Mr. Ball: I think that is very unfair, and if Your Honor please, I want to move for a mistrial. I move that a juror be withdrawn. I think that is highly unfair.

The Court: The motion is denied. The rights
 page 190 } and issues in this case have nothing to do with whether one is large and one small. You are to determine the case solely upon the question of whether some-

thing wrong has been done, and do not be governed by any sympathy in the case.

Miss Hedrick: Coming to Mr. Pomeroy's testimony, what he said was, from his observation, he had never seen water cross Pershing Drive. It is a long distance from where Randolph Street came in, and where the drain was from Pershing Drive, and if there had been any great flow of water, Mr. Pomeroy would have noticed it. Very few drivers notice a drain under the roadway. I do not think it affects Mr. Pomeroy's credibility because he did not notice it.

If you will look at this contour map over here, you will see from Pershing Drive, that long before Buckingham was built up, you gentlemen realize that there is a great deal of natural absorption in the property that is not built up, and particularly in the low places, all the flat places, but the water would not run across Pershing Drive on Mr. Anderson's property. Mr. Ball seems to assume the water would come directly from this drain. You gentlemen know that is not the case, because in the natural course of absorption, that water would be absorbed before it reached Mr. Anderson's property.

In conclusion, may I state that the whole question in this case is whether or not Buckingham has acted reasonably in collecting this water and controlling it and turning it on Mr. Anderson. Mr. Ball speaks of the floods in California. No one controls the floods. No one has turned the water into a pipe and then suddenly turned it loose on a land owner. It is flowing the way it should naturally flow, and the same would be true of water flowing off a house roof. If the water flows naturally off a house roof, that is one thing, but suppose some one collected that water, drained it down the street line and then drained it directly loose on your property. Do you not, Gentlemen, think that would be an unreasonable act?

I leave this case with you and ask that you bring in a verdict for my client.

page 192 } Teste: This 13th day of September, 1940.

WALTER T. McCARTHY,
Judge.

page 193 } Refused F

The court instructs the jury that it was the duty of the plaintiff, as well as the defendants and other proprietors

along a water shed to use reasonable care and make reasonable provision for the drainage through their own properties of surface water naturally coming from the holdings of proprietors higher up, and if the jury believe from the evidence that the plaintiff himself did not make reasonable provision for the drainage of such water through his property and that such failure on his part caused his damage the defendants could not be held liable.

page 194 } The foregoing instruction requested by the defendants was denied and the defendants excepted.

Teste: This 13th day of September, 1940.

WALTER T. McCARTHY,
Judge.

page 195 } In the Circuit Court of Arlington County, Virginia.

Ivan N. Anderson, Plaintiff,

v.

Third Buckingham Community, Incorporated, a corporation,
Fourth Buckingham Community, Incorporated, a corporation,
Fifth Buckingham Community, Incorporated, a corporation, Defendants.

The following instructions granted at the request of the plaintiff and of the defendants respectively as hereinafter denoted are all of the instructions that were granted on the trial of this case:

page 196 } INSTRUCTION NUMBERED ONE (1).

The Court instructs the Jury that the defendants and each of them are under a duty not to cast water unnecessarily nor unreasonably upon the land of the plaintiff, and if the Jury find that the defendants unnecessarily or unreasonably caused water to be cast upon the land of the plaintiff, Ivan N. Anderson, and that the plaintiff was damaged thereby, the Jury shall find for the plaintiff against the Defendants in such an amount as will compensate him for the loss of top soil, plants and equipment and injury thereto caused by said water, & the cost of making repairs and restoring the condition of his property.

Granted at the request of the complainant.

page 197 } INSTRUCTION NUMBERED TWO (2).

The Court instructs the Jury that if they find that the defendant, by their agents or employees, filled up a ditch on the plaintiff's land, the defendants are guilty of trespass, and if the Jury further find that the filling of such ditch by the defendants, or their agents or employees, caused water to overflow the land of the plaintiff and to injure his land and the plants, top soil and nursery stock thereon, the defendants are liable to the plaintiff for the damages thus caused.

Granted at the request of the complainant.

page 198 } INSTRUCTION A.

The court instructs the jury that the burden of proof is upon the plaintiff in this case to show that the defendant has so carelessly or unreasonably constructed its buildings and its surface water drainage conduits as to inflict needless and unnecessary injury upon the land of the plaintiff which could have been avoided by the exercise of ordinary care. In other words the plaintiff must show that the injuries suffered by the plaintiff because of the defendant's acts *was* needlessly and negligently inflicted. If the plaintiff fails to establish these facts by a fair preponderance of the evidence he cannot recover.

Granted at the request of the defendants.

page 199 } INSTRUCTION B.

The Court instructs the jury that, in this State, surface water is considered a common enemy, and that each land owner may fight it off as best he may. This results from the dominion the law gives him over his land.

But the Court further instructs the jury that this right must not be used wantonly, carelessly, or unnecessarily, so as to injure the rights of another; that it must be a reasonable use of the land for its improvement or better enjoyment; that the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary; that where the exercise of the

right is thus guarded, although injury may result to the land of another, he is without remedy.

Unless the jury believes from the evidence that such right has been exercised in a wanton, careless, negligent, unnecessary, unreasonable or improper manner, it must find for the defendants.

Granted at the request of the defendants.

page 200 }

INSTRUCTION D.

The court instructs the jury that if you believe from the evidence that the defendant is putting its land to a reasonable use and that the drainage of the same in carrying off the surface water was done in good faith with no intent or purpose to interfere with the rights of the plaintiff and with such ordinary and reasonable care with respect to the plaintiff's property as not to inflict unnecessary injury thereto you will find for the defendant.

Granted at the request of the defendants.

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INSTRUCTION E.

The court instructs the jury that the duty of the defendants to use reasonable care to conduct or drain the surface water as set out in other instructions, extends only to their property line and there is no legal duty on the part of the defendants to provide any drainage through the property of anyone else or beyond their own holdings.

Granted at the request of the defendants.

page 202 }

INSTRUCTION G.

The Court instructs the jury that if you believe from the evidence that the alleged damage to the plaintiff was caused by any failure on his part to use reasonable care to make reasonable provision for the drainage of surface water through his own property, you will find for the defendant.

Granted at the request of the defendants.

page 203 } Teste: This 13th day of September, 1940.

WALTER T. McCARTHY,
Judge.

page 204 } I, C. Benj. Laycock, Clerk of the Circuit Court
of Arlington County, Virginia, the same being a
Court of Record, do hereby certify that the foregoing copies
are true copies of the originals on file and of record in my
office in the case of Ivan N. Anderson v. Third Buckingham
Community, Incorporated, a corporation, Fourth Bucking-
ham Community, Incorporated, a corporation and Fifth
Buckingham Community, Incorporated, a corporation, and
that they, (together with the original exhibits forwarded by
registered mail to the Supreme Court of Appeals under date
of October 7, 1940) constitute the transcript of record in
accordance with the notice of C. O. Thomas and Frank L.
Ball, Attorneys for the Defendants and accepted by Anna F.
Hedrick, Attorney for the Plaintiff.

Given under my hand this 7th day of October, 1940.

C. BENJ. LAYCOCK, Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

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