

injury of the plaintiff, but by widening and deepening the ditch on Herkimer avenue, they turned it more directly, and in larger quantities on to plaintiff's lands.

I do not agree with the defendants' further contention that the plaintiff's remedy is against the municipality, and not against them, and that his proceedings should be under the Drainage Act and not by action in this Court. I am unable to see how defendants can escape liability.

Then as to the amount of damages. Plaintiff says his property has been depreciated in value from \$12,000 (his statement of its value before the damage) to \$2,000. This is certainly an extravagant estimate. The main elements of damage are the injury to and the destruction of his fruit trees, the almost total loss of his vegetable crop during the past year, as well as a loss in 1911, and the loss of some of his hay crop.

One of plaintiff's witnesses attributes part of the damage to the lye contained in the water from the ashpits. The plaintiff has also suffered injury from the water getting into and remaining in his cellar. The evidence shews that this became so serious at times as to necessitate its being bailed out to prevent its rising as high as the fire in the furnace. He was not, however, the sole owner of the property, at the time of the commencement of the damage. On the death of his father on March 28th, 1911, he became entitled to the southerly part of the lands, and his brother to the northerly part. By a conveyance of May 30th, 1911, these brothers became tenants in common of the whole of these lands; and on August 20th, 1912, the plaintiff procured from his brother a conveyance of his interest.

In arriving at the amount of damages I am not overlooking these facts. The evidence of several witnesses, whose knowledge of fruit trees is derived from an experience of many years, and the evidence of other witnesses similarly qualified to speak of the value of market garden lands and the products thereof, was put in. The lowest value placed by any of the witnesses (a witness called for the plaintiff) on the apple trees was \$25 per tree. Others named a much higher value. The uncontradicted evidence of the plaintiff, is that his annual net return from his market garden produce and hay, has been reduced from \$600 to \$100. The evidence of other witnesses goes to corroborate this statement. Forty-one fruit trees have been killed or so far in-