

James H. Ramsay saw the ditch after it had been cleaned out, and could detect from the banks how deep it had been. It had ranged at the lowest places from three or four inches to nine inches; and he says that in that condition "It was sufficient if no back water from the creek."

Speaking of drainage by Sidney Street, he says: "It would be a better outlet for the water, but there would be a longer distance of pipe." He is asked: "But you think, irrespective of distance, that it would be a better mode of drainage?" and he answers: "Yes, I do."

In reference to this the learned Judge said: "I cannot see why there should be any difficulty about running a pipe down Sidney street to Fly creek, and it looks reasonable that if there is anything like half-a-mile difference, that you would get better drainage down there and less liability of blocking."

There were some witnesses who were sure that the water did not come in directly from the drain in question; but their evidence was theoretical, and could not reasonably displace the testimony of reputable witnesses speaking from the actual knowledge.

It is difficult, therefore, to surmise on what the judgment is based. If I may judge from the line of cross-examination of the plaintiff's witnesses, and enquiries made from time to time by the learned Judge, the error seems to be in assuming that if the lands in a state of nature were wet and comparatively useless—receiving large quantities of water from the lands to the north and west of them—it followed, *per se*, that there was no ground of complaint. This at all events seems to me to be the only, even plausible, ground upon which the judgment could rest.

But it is clear that the defendants cannot collect and concentrate even surface water and pour it upon the plaintiff's lands. Moss, J.A., in *Ostrom v. Sills*, 24 A. R. 526, at p. 539; *Tucker v. Newman*, 11 A. & E. 40; *Fay v. Prentice*, 14 L. J. C. P. 298; *Billows v. Sackett*, 15 Barb. 96. In a state of nature this surface water was certainly widely diffused.

Increasing the quantity or the velocity, too, makes the defendants liable. *Malott v. Township of Mersea*, 9 O. R. 611.