

*Testimony of E. Hutchinson, read for Defts.,
Direct.*

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EBERLY HUTCHINSON, called as a witness in behalf of the defendants, being duly sworn, testified:

Direct Examination by Mr. Dennison:

Q. Mr. Hutchinson, you are residing now at Canada Lake, a short distance north of the area known as Green Bay on that lake. A. I am.

Q. And for how long a time have you been acquainted with Canada Lake and the surrounding area. A. Since the fall of 1892.

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Q. That is fifty years, at least. A. Fifty-one years.

Q. And have you been well acquainted with it or has it been just a casual acquaintance. A. Well, quite well acquainted since I built the house which has been my only home since that time in 1900. Before that my visits to the lake were *confined to about, during the 1890's they were confined to about a month in the fall except in 1895 when with my mother and sister I occupied a cottage there for the summer.* Now you ask whether I have been well acquainted. I have always been very fond of canoeing and rowing, and I have gone around the lake and down the lake countless times and am familiar with all the nooks and crannies along the shore.

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Q. And you have been a permanent resident there since 1900. A. 1900, yes.

Q. In or about the year 1914, did you act as associate engineer with Mr. Burt Kasson in the construction of the macadam highway along the

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old road on the shore of Green Lake from Stony Point to the saw mill. A. I did.

Q. And were you constantly in that area during the course of construction of that particular portion of the road. A. I was. I was in charge of the work, in charge of doing the actual excavation.

Q. Will you describe to the jury what you found there as to the old road. A. The old road, there are about twelve or thirteen hundred feet of fairly level road across Green Lake Bay. That road, when we came to excavate, I have some levels, a copy of a field book, which I took at that time in order to know just what the town highway rights were there as to levels, but I will go into that later if you wish me to. The old road there was a sort of causeway; it had been built up on the sand and it was built up of cribbing, corduroy and with stringers under the corduroy and sometimes it was two or three feet; I mean we found that. It had been built across a level stretch of sand there, and this cribbing was filled up with a fill of miscellaneous sort. We had to discard all of it, we had to dig all of that out; we had to dig the road out to a depth of about three feet and replace that with a hard stony gravelly fill that we took from an excavation on the point this side of the bay.

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Q. When you did take out that old causeway and crib work, did you find underneath it the normal sand of the beach. A. No, we found a firm sandy layer slightly lower than the beach. I could-

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760 n't tell you just how much, but distinctly lower than the beach. In fact our fill, as we dug this out, it became a canal; the water came in, and we had to fill up with this firm stony fill from over on what they call Stony Point.

Q. In order to make that road and in constructing that road you had to bring in fill from some other sources. A. Yes, we had a very good supply of fill just at this end of that particular stretch of road. You can still see the extensive excavation we made there on Stony Point.

761 Q. But when you had removed the crib work of the old road, was this road area under water. A. Yes.

Q. Mr. Hutchinson, perhaps you had better step down here so that you could point to areas on the map. I am referring to the space on the map marked Green Lake and a point at which *Green Lake connected with the area marked Canada Lake* and from there southerly what appears to be the line of a road marked state highway. Is this the area as to which you are now testifying? A. It is, clear through to over here where the old sawmill was.

762 Q. And this point down at the bottom left hand corner is the area called Stony Point. A. Stony Point, yes.

Q. And this area along which we are discussing is commonly known as Green Bay.

The Court to Witness:

Q. Green Bay is the same as Green Lake.

Mr. Dennison: No, Green Bay is the area of Canada Lake just south of Green Lake.

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Witness: Green Lake Bay sometimes.

The Court: So what Mr. Hutchinson has been talking about, then, as Green Bay, is not this body of water shown on the map as Green Lake.

Mr. Dennison: No.

The Court: It is the easterly extremity of Canada Lake.

Mr. Dennison: Yes, sir.

Mr. Dennison to Witness:

Q. Now I call your attention to the area of land indicated on this map with the conventional symbols for swamp or marsh land down to the parcel on which is indicated the cottage lot of Katherine G. Folmsbee, and I ask you first what was the situation of that area of land at the time of your construction of the road as to whether it was covered with water.

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Mr. Belkin: I object to that question.

Q. Well, during what period of time were you engaged in the construction along this stretch. A. Well during the latter part of 1914 and the first part of 1915 of the construction season.

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Q. Now describe what the situation was of this area of land easterly of the road at the time of your construction in 1914. A. In 1914—well, now, I could do that most accurately by referring to a copy—you mean the actual land here, not the road levels.

Q. Yes. A. This was very largely under water.

The Court: Where he says this was very

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largely under water, to what area is he pointing.

Mr. Dennison: He is pointing now to the area marked with the conventional swamp symbols.

Witness: There were hummocks or little bunches of land here scattered over it, but the greater part of the area had water standing on it.

Mr. Dennison to Witness:

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Q. I am asking you if you know in a general way where the so-called flow line is on the ground in that area. A. I know now: Of course it was not so then.

Q. Mr. Hutchinson, the area that you are referring to is the area between the road and that flow line. A. That is right.

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Q. The fact is that in August of 1914, you and Mr. Kasson took water levels and road levels. A. Yes, before beginning our excavation, Mr. Kasson brought up his transit and we took the levels of the old road. We wished to know just what the town highway rights were there as far as elevation went.

Q. Did you take the water level as well. A. Now I will tell you just how we did it. You only have my word for it, but this was a copy that I made of the field book which I kept while handling the road and Mr. Kasson was doing the surveying. I kept it, as I say, to have a memorandum of what might be established as the town high-

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way rights there. We desired to build a road—if I am doing too much talking, shut me up, if I am.

Q. Tell us what level you found. A. We went down to the state highway bench mark No. 36 on a large rock about thirty feet east of the old Auskerada Hotel. This bench mark No. 36 showed a level 1553.38 above sea level. We levelled out to the water which on that day was 1541.35 feet. Then we went up to the old dirt road, this old causeway across the lake and we began at this end of that stretch and we took levels about every 100 feet. Beginning with the 1544.30—do you wish these levels.

Q. Not very many of them, because we cannot carry them in our heads. A. The highest was 1543.30; there was a considerable stretch of it that was 1543.20, 1543.30. Now we said we would take the highest level on this road which was 1543.30 and we would put about half a foot on that, making the level—seeking later to make the level of our pavement 1544.75.

Q. That is what you constructed the new road, the present road. A. Yes. It may have settled a bit or flattened out, but that is what we had at the time. May I further add for accuracy, we did this on a day when the water was very still and then we made a temporary bench mark up by the road on a tree not far from the road that we could use to verify levels from time to time.

Q. At the time when you took the level of 1541.35, can you say that the area east of the road, between the road and the flow line, was then

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water covered such as you have described except for the hummocks. A. It was in that condition.

Mr. Taylor: I don't like to object. I wish you would confine your questions to a particular date.

Mr. Dennison: I did, on the very day that he made the levels.

Mr. Taylor: You have not given any date.

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Witness: I beg your pardon, sir, August 7, 1914.

Mr. Dennison to Witness:

Q. By that you mean that the water was standing there. A. The water was standing there, yes.

Q. Do you know of your own knowledge whether or not there was any open connection between this water standing on the east side of the road which you have described and either Green or Canada Lake. A. There were some old culverts under the road to the lake.

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Q. To which lake. A. To Canada Lake.

Q. What about Green Lake. A. And the Green Lake end, I could not be positive, but I have been in there at some stages of the water. You had to wade across there, I know that.

The Court to Witness:

Q. Had to wade across what. A. Across the entrance to Green Lake, no great depth.

Mr. Dennison to Witness:

Q. Is it a fact that you have been in on this area by boat or other water vehicle. A. I have

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been in there in a canoe. I had no record of the water level at that time, of course, I have gone in there with a relative who went in there to gather cattails from the canoe at one time. We also used to go in there occasionally to look for a mess of bullfrogs along the shores of these waters in there. That was somewhat earlier in the season, but at the time I speak of in August that year you could have paddled a canoe about the area between these little hummocks and trees and so forth.

Q. Now I ask you whether the water which you have described as standing in this area was separate pools of water or connected areas of water?

A. Well, I think along part of that, as I recall, it was pretty much connected. Of course, all of the area immediately along the road there was water. We looked about in disposing of this stuff that we would have to waste, taken out of the road, and we reflected that we might throw it from there into the swamp, into the pools there on that side.

Q. The fact is you did dump your waste material on that side. A. We did some of it. You will find some of the old logs still visible there.

Q. And when you did dump it there state whether or not your material was dumped into water. A. It was; not in all places.

Q. State whether or not this condition which you have described as having specifically observed in 1914 was also true in the year 1918. A. Why, yes, there had been no material change there. I think there had been a little fill dumped up near where that house stood that has been mentioned

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in preceding testimony; there was a fill on that side of the road there and I don't know how much fill had been dumped on the other side. Very little, I should say. You see, I had to go up and down there constantly in going to and from town and I was pretty much aware of whatever changes there were.

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Q. Now state whether you observed any structure in this area in 1914 either east or west of the road. A. Well, west of the road there was an old structure there considerably before that. In about 1914 this house that is still standing there, either that year or the year before had been built because a certain Bill Hunter was living there. He aided me; or he had charge of the job of getting the temporary bridge across Green Lake while we put in the concrete bridge there, across the mouth of Green Lake.

Q. You were well acquainted with Mr. Hunter, were you not. A. Oh, very well.

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Q. Do you know that he continued to live in this house from 1914 for some subsequent years. A. Why, I think he was employed there at the mill until considerably later than that because he was a familiar—I knew him very well and I know that he was about there a good bit. Whether he was actually living in the house long after that or not, I don't know.

The Court to Witness:

Q. This house that you are talking about now is the one west of the highway on the Katherine Gage. A. Yes.

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Mr. Dennison to Witness:

Q. Hunter was a year round resident of the Canada Lake area, was he not. A. Yes, he was for a number of years.

Q. Have a family. A. I only recall his wife.

Q. Do you know what sort of a structure this house was. A. Why, it was a good firm frame structure. They lived in it in winter. It was properly insulated against the cold, plastered, I believe. They lived there throughout the winter time.

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Q. Two story. A. Two stories. Projected considerably over the—it was first, I think, as I recall on the side held up on posts, along the west side.

Q. On posts or stilts. A. Yes.

Q. From time to time as you have observed this area where that house is standing, has added fill been put in since you first noted it. A. Oh, yes.

Q. So that today it is—? A. Oh, it is bulwarked by cement, by a concrete wall, and considerable fill put in behind.

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Q. But not originally. A. No, not originally. There was an old remnant of an old tree or two along there, but no fill at that time.

Q. Now, east of the road right near that house was there another structure on this tract in question in 1914. A. It seems to me there was an old shed over there. Whether they use it as a stable or what, I don't know, but that was near the road.

Q. Now on the easterly side. A. On the easterly side.

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Q. That is in 1914, and did that continue to be there until 1918. A. I don't know that that did, but there was another place in there where there was a little store that it seems to me was there in 1918.

Q. The area where the store was located was southerly, on the east side of the road and southerly of the house you have just referred to, is that correct. A. Yes, near the tract that—

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Q. I ask you, Mr. Hutchinson, whether you observed the course of the red line or flow line easterly of this area in question. A. The one I have looked at on the map, oh, yes.

Q. Will you state whether or not there is a distinct bank, or change in level of the ground at that area. A. There is, yes, I have observed it.

Q. And from there easterly the land rises quite sharply, does it not. A. Yes, sir.

Mr. Calderwood to Witness:

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Q. Did I understand you to say, Mr. Hutchinson, that before this, what we called the Katherine Gage house was built there was an old camp there along the lake for some time. A. Yes, sir.

Q. And was that known as the William Phelps camp, or the old fisherman's camp. A. Well, it was usually known, to be exact, as the Daddy Phelps camp.

Q. And was he a fisherman up there for years. A. He was a fisherman; that was his vocation.

Q. And where was that camp located with respect to where the Gage cottage now is. A. Well,

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I never made a survey, but I am quite positive it was only a few feet to this side.

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Q. That would be southerly of the Gage house.

A. Southerly or south-easterly, yes.

Q. And on the west side of the road. A. On the west side of the road.

Q. And do you happen to know or do you happen to recall whether Henry Gage moved that old Daddy Phelps camp from the west side of the road and placed it over west of his garage and used it for an ice house for years, do you happen to recall that fact. A. I do not recall it distinctly. It seems highly plausible. Could I correct that. Plausible has a kind of innuendo of doubt in it. I did not mean to use that. I think it was, I recall the house there.

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Q. Daddy Phelps had lived in that camp for years, had not he. A. Yes, sir.

Q. When you were constructing this present macadam road, that ran right to the rear of this house. A. Yes.

Q. On the east of the house, and at that time what if any of the filled lot had been done. A. At that time I would say none.

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Q. The question is, at the time you put in the fill, the new road in 1914, what part, if any, of that filled lot was in existence. A. The concrete wall was not there. There was no artificial fill. There were some posts under the front of the house but the road at the rear, I remember, as we went through there, I was there constantly looking after the work and I recall no fill, anything

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like this. There was no such platform of earth in front of that. There was more angle. It has been eroded somewhat since.

Q. Is it not a fact that the area on the lake side of that house then was right down on a leve! with the rest of the bed of the lake. A. Yes.

Q. No fill there at all on the rear nor on the lake side. A. No.

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The Court: When you are referring to the front and rear of this house, did it front on the lake or did it front the road?

Mr. Calderwood: The front of the house is to the lake side and the rear of the house is to the road side.

Mr. Calderwood to Witness:

Q. You say that the house then was supported by posts. A. In front.

Q. What supported it on the lake side. When you say the front you mean the lake side. A. On the lake side, yes.

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Q. And what supported it on the road side, if you recall. A. Why there was some earth embankment running out from the structure of the old road.

Q. Which road do you refer to. A. The old road.

Q. This swamp area that is indicated on that map to the east of the road, what do you recall as to the levels of that with respect to the old road. A. Oh, it was lower than the old road. The old road I might describe as a sort of cause-

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way that had been built across there, held up on a cribbing of logs.

Q. And about how much lower if you can recall. A. Oh, three feet or more in parts. It was very irregular.

Q. How about the elevation with respect to the road that you constructed. A. Well, it was still considerably below that.

Q. And did that elevation continue from the east side of the road back to this red line here that is referred to as the flow line. A. I never actually paced it off but it must have run back there over 100 or 150 feet possibly. 764

The Court: I don't think you understood his question, Mr. Hutchinson. I don't think the question is very clear.

Q. Mr. Hutchinson, you told me that this area that is marked as a swamp area was about three feet below the level of the old road. A. Yes.

Q. And still more below the level of your new road. A. Oh, yes.

Q. Now from the edge of the old road and the new road back to this red line that we call the flow line did the elevation of this swamp land continue at about the same depth below the elevation of the road. A. It did. 795

Q. In other words, it was a level stretch in there. A. Yes. Water seeks its own level and the water stood back there for a very considerable distance.

Q. What was the nature of this territory in the neighborhood of the Katherine Gage cottage both

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in 1914 and at the present time. What was the character of this locality up there. A. Well, I think you can see some unreclaimed swamp over back of it now.

Q. I don't mean that. The surrounding territory. A. Oh, it is a residential region, you mean, along the lake, or do you mean was it wooded.

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Q. I want to know if during all this time here in question and from 1914 on and in fact for years prior to 1914 this had been a summer resort, these lakes. A. Precisely.

Q. And did you see these maps that were offered in evidence yesterday. A. I couldn't see them very well then. I didn't look at them very minutely.

Q. Is it not a fact that summer cottages—A. Oh, yes, precisely, the shores practically lined with them.

Q. Practically along the entire shores of Canada Lake? A. Yes.

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Q. And on the north shore and the east shore of Green Lake. A. Yes, sir.

Q. The summer cottage region extends up to Stoner Lake, does it not. A. It does.

Q. On this side, to the east and west of Caroga Lake. A. It is continuously occupied by cottage lots.

Q. Is it a fact that in 1914, just across this Green Lake bridge there was the sawmill of the Durey Land and Lumber Company which was formerly, was it, the Caroga Lumber Company. A. It was at one time, yes.

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Cross.*

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Q. And just up the little raise beyond the sawmill was there the store building. A. Yes.

Q. Was this Katherine Gage cottage separated from the adjoining territory by this public road that you have referred to on the east. A. The road ran immediately in the rear of the cottage.

Q. And immediately adjacent to Canada Lake on the south. A. Yes.

Q. Do you recall whether or not there was in the near proximity of the saw mill referred to a residence, all-year round residence. A. Oh, yes.

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Q. And who occupied that at that time. A. Who occupied the house near the sawmill.

Q. Yes.

The Court: At what time, Counselor?

Mr. Calderwood: 1914-1918.

A. I think Mr. Cyrus Durey was living there.

Q. That was his permanent home at that time, was not it. A. Yes.

Q. And had been for years. A. Yes.

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CROSS EXAMINATION by Mr. Taylor:

Q. Mr. Hutchinson, by profession you are a civil engineer. A. I used to do a good deal of civil engineering, mining engineering more particularly but that entails a knowledge of civil engineering.

Q. Because of that fact you were assistant to Mr. Kasson in building this highway. A. Yes.

Q. You spoke of a bench mark on a tree in the neighborhood of the land in question. What kind of a tree did you put that bench mark on. A. I

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can't recall now. We looked upon it as a sort of impermanent mark that we just used to verify.

Q. And which side of the highway was the tree.

A. That was over on the left side, over on the east side.

Q. The east side of the highway. A. Yes.

Q. Can you recollect now about what the size of that tree was. A. I think it was a small spruce, a small birch tree that we sawed off, a birch tree of small diameter.

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Q. What would you characterize this piece of land, as a swamp or hard land or what would you characterize it as? A. Well, the only way I know how to describe it, it was a swamp and it has been with considerable permanence of water levels there.

Q. You said in making the new highway you built culverts under the road. A. Yes.

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Q. Now what were these culverts for? A. For circulation of water when the lake went down, to draw off the water as much as possible at that time, or if rainfall fell heavily to help discharge that.

Q. Then if those culverts would draw off the water into Canada Lake, then the land in this area which you have called swamp would naturally be higher than the waters of Canada Lake, is not that so. A. The land.

Q. Yes. A. No. Parts of it were quite as low or lower.

Q. Wait a minute. If the culverts that you put in under the road were there to draw the water

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from this land, swamp land as you call it, would not it naturally be higher than the surface of the lake. A. Well, at times, yes. Not the land, but the water. This was a barrier you see, in a measure a highway across there was a dam. It was a causeway. It dams the water there from the lake. Originally the level had been about the same and I think if—am I out of order.

Q. You are going a little too far. A. All right.

Q. In this area all around here in which counsel has taken you, what kind of timber grew on that land. A. At that time.

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Q. Yes, generally speaking. A. Well, understand there was more than there was timber there.

Q. Now answer my question, please? A. But on these hummocks there was swamp maples, I think there was balsam too but it was very largely what we call soft swamp water maple.

Q. And I believe you mentioned some spruce, did you not. A. No, I didn't speak of spruce. There may have been spruce there. Balsam you know is very similar to spruce in its appearance.

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Q. And do you remember whether or not the Durey Land & Lumber Company or anyone else who previously to the sale to the state owned this land lumbered this section. A. They had taken off a few trees on it.

Q. Do you recollect whether there were any trees growing west of the road between the road and the lake shore at any time. A. Not at that time. Earlier there used to be—oh, early in the

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century, I remember I used to go along there on horseback and there were a few pines along there.

Q. Did you ever see any elms or maples growing there. A. I never saw an elm in our Adirondack region. It is apparently beyond the climatic region of the elm.

Q. You spoke of remnants of or stumps of old trees near this house which is now claimed by Katherine Gage. A. Yes.

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Q. Do you remember what kind of trees grew there where those stumps were. A. Well, those trees were dead before my time.

Q. I mean what kind of trees they were. A. I think there were a few pines along there.

Q. Then can you give me the approximate size of those stumps. A. Oh, some of those pines were very large trees.

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Q. Fourteen or fifteen inches in diameter, would you say. A. Well, if you asserted that I couldn't deny because I never got out and took the circumference of the trees.

Q. I just wanted it approximately. A. But I do recall a few trees but that was very early in my experience there. At the time of building the road I recall none.

Q. I believe you testified in answer to Mr. Denison's question or Judge Calderwood that the land back of this particular area here, this swamp land, rises quite a little, a hill like. A. Yes.

Q. Water descending from that hill in the spring time has only one way to go. A. Towards the lake.

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Q. It would naturally flow into this swamp area, would it not. A. It would.

Q. And if your highway was a little higher than the swamp, why it would naturally fill it up with water. A. It would except in so far as our drainage provided—

Q. Just a moment. And your culverts under the road were put in there for one purpose, to draw that excess water off. A. Yes.

Q. In 1914 when you recollect seeing this house on the west side of the road now claimed by Katherine Gage, was the entrance to the house about on a level with the old road. A. I couldn't tell you precisely. I can say it must have been. I could see a path that had been made across there.

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Q. I also recollect your testifying at that time this house was supported on the lake side with posts. A. That is right.

Q. Can you recollect about the height those posts were. A. I could not. I don't think they were very high.

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Q. They were sufficiently high to bring the house up on a level with the—on the approximate level with the road.

(Five photographs on a card produced and marked for identification Plaintiff's Exhibit No. 17)

Q. Mr. Hutchinson, I show you Plaintiff's Exhibit 17 marked for identification which consists of five photographs and particularly call your attention to the photograph marked Beach, Canada

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Lake, and ask you if you are familiar with that region as represented on that photograph. A. Yes, it looks like the road in question.

Q. There are some trees shown in that photograph—

The Court to Witness:

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Q. It looks like the road in question, which road, the old town road, or the one you built, Mr. Hutchinson? A. Why, that looks like a paved road. If that is the case there are more trees there than I recollect. The only trees I could remember were pines of earlier growth.

Mr. Taylor to Witness:

Q. Those trees represented on the photograph there are on the west side of the road between the road and the lake shore, are they not. A. Yes.

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Q. Here are some of the other lakes. A. Yes, they are familiar. May I glance at that just a minute more. I will tell you, I think this surprised me, this is Kane Mountain here. You are looking from this end of the road.

Q. Looking north. A. You are looking north and this end of the road is the higher part of the road and there were some trees along there, but I think if those were shown accurately, you would see from a view farther up where the road was lower. Now that I remember, but I can see how these trees at this end—

Q. Well on the east side of the road there are quite some sizeable trees represented, are there not. A. Yes.

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Q. Mr. Hutchinson, did you ever build any other highways or help build any other highways than the one which you testified to now. A. The nine miles this side of that during the three years Mr. Kasson and I were in charge of the construction of the highway from Staley's swamp up for nine miles up to the end of Canada Lake but my larger highway building was before the day of paved surfaces; it was largely just utility roads and so forth.

Q. Did you ever see this old road before you and Mr. Kasson rebuilt it or after you rebuilt it under water. A. After we rebuilt it, yes, last year. 818

The Court to Witness:

Q. You mean after the road was rebuilt you saw it under water. A. After we rebuilt it, yes.

Mr. Taylor to Witness:

Q. And that was during a time of high water in the spring time. A. Yes.

Q. The natural condition of the lake would not flow it. A. The natural condition of the lake in the spring is sometimes— 819

Q. Not in the spring but the natural condition of the lake? A. No, not the normal condition of the lake.

RE-DIRECT EXAMINATION by Mr. Calderwood:

Q. Did I understand you to say that the willow trees now between the Katherine Gage cottage and the road were not there in 1914.

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The Court: We have not had any discussion about willow trees.

Q. Or the trees. A. You mean on the western side of the road.

Q. Yes. A. I could not recall up to there that any trees remained. There used to earlier be a few trees there in the day when old Mr. Phelps had the place but I don't recall at the time of the road.

821

Q. Your attention was called to the Kodak picture marked for identification Plaintiff's Exhibit No. 17. Can you tell from your familiarity with that territory where that was taken from or what portion of the road it shows? A. It was taken from this end of the road where I think you will find the elevation was a little higher. I mean the land each side of the road was higher.

The Court to Witness:

822

Q. Do you mean, when you say from this end of the road, from the region of Stony Point. A. Yes, from Stony Point. I think I see the beginning of the curve and the shore there was measurably higher than farther down.

Mr. Calderwood to Witness:

Q. And about what distance would the trees appearing in that exhibit be from the Katherine Gage house. A. Oh, I think it is a thousand feet from here down there according to my recollection.

Q. And the picture to the left of Exhibit 17 at the top of the sheet; underneath is the legend S. E. shore of Green Lake, can you tell me where that is taken from. A. Oh, is not this taken from the

*Testimony of E. Hutchinson, read for Defts.,
Re-direct.*

north. What is this? There are the abutments of the bridge.

823

Q. I wanted you to identify that if you could, is that the abutments of the new bridge over the concrete highway. A. I fancy they are because I built the earlier bridge and I do not remember any marking on it at the time I built it, but it was in there that—that is taken from the farther side of the bridge looking this way, I think, from the conformation of the contour there it was near here that of course the new highway had dammed it up but from here you could work back in a canoe into that water.

824

Q. As a matter of fact in 1918 when the state took its title was not there a bay or inlet extending from Green Lake right back into this area that they are trying to characterize as a— A. There was. It was a little ways back from the road and I assume that I have pushed a canoe through there occasionally looking for frogs.

Q. And does not that bay or inlet appear at the extreme right down in the lower right-hand corner in that photo. A. Right down in here, yes. You see, I don't recognize these abutments. Whether this is just the place or whether this is a little farther to the north I can't tell from this because these are all new abutments, are they not, Mr. Counsel. Those are the abutments of the recent bridge.

825

Q. And that bay or inlet was filled and cut off by the road bed of the new concrete road. A. Yes.

*Testimony of E. Hutchinson, read for Defts.,
Re-direct.*

826

Q. And by the road bed of the approach from the old macadam up on to the new concrete road.

A. Yes.

Q. So that the condition as portrayed on this map do not portray the conditions as they existed in 1918. A. No.

Q. They omit this bay and inlet entirely. A. Yes.

827

Q. Do you observe in this Kodak picture designated S. E. shore of Green Lake trees growing right there in the water. A. Oh, you mean this one in the upper left-hand part, yes, this was taken sometime this spring.

Q. The trunks of the trees are covered with water. A. Yes.

Mr. Dennison to Witness:

Q. In addition to what you were questioned as to the old stumps of trees there were not live trees standing in the area in 1914 when you re-constructed the road. A. In which area.

828

Q. In the area opposite the tract in question. You were questioned about some stumps that stood at the left side of the road. That is, at the west side of the road. A. Oh, those were stumps near the cottage there.

Q. Yes, those were dead. A. They were dead.

Q. There were no trees standing. A. At that time, I do not recall any standing pine trees there.

Q. Now east of the road such trees as you observed, were they on the road fill itself. A. There was some of them along on that side. There were trees along the edge of the road on the fill of the

*Testimony of E. Hutchinson, read for Defts.,
Re-direct.*

829

shoulder of the road. When you got past that you found more water. The water in some places came up very close to the road and in other places there was a fringe of small growths along the embankment.

Q. And such trees as you did observe were growing out of a hummock. A. And other trees grew out of hummock, little elevations here and there, scattered through that lakelet in back.

Q. Is it a fair characterization from your experience and knowledge of this tract, is it a fair characterization of the area in question to describe as an arm of Canada and Green Lake which was cut off and separated from Canada Lake by the highway construction. A. It is.

830

Mr. Belkin: I object, the question calls for a conclusion of the witness, as it is a question of law.

The Court: I will sustain that objection.

Mr. Belkin: I ask that the answer be stricken out.

The Court: Motion granted. Defendants except.

831

Mr. Calderwood to Witness:

Q. Mr. Hutchinson, may I ask were you at the lake last Saturday, that would be October 2, 1943?

A. Yes.

Q. Living there. A. Yes.

Q. What have you got to say about the present level of the water in Canada and Green Lakes.

A. Well, I can tell pretty well if I look at the marks on my dock and the gauge at the bridge showing 1540.4.

*Testimony of E. Hutchinson, read for Defts.,
Re-cross.*

832

J. Unger, for Defts., Direct.

Q. 1540.4 feet when. A. What day did you say.

Q. Well between now and last Saturday. A. Well, for the last week, it has been up at level.

Q. Whether or not the water level in Canada Lake now is lower than usual. A. Very much.

RE-CROSS EXAMINATION by Mr. Taylor:

833 Q. Again showing you Plaintiff's Exhibit 17 for identification, and the picture called south-east shore of Green Lake, would you say that at the time that was taken it was a time of high water. A. Obviously. Not the highest but high unless—there is another condition I must put in there—there are times when the ice is shoved up that shore and makes the lake look higher than it is.
