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STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE THOMAS,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendants-Appellants.

EUGENE TALLMAN,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

OSCAR SOMERS,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendants-Appellants.

THEODORE SMITH,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendants-Appellants.

Actions at Law.
On Appeal.
Stipulation.

MARTIN V. B. SCULL,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendants-Appellants.

JOHN H. SMITH,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendants-Appellants.

WALTER J. LLOYD,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

SMITH HICKMAN,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendants-Appellants.

Actions at Law.
On Appeal.
Stipulation.

It is hereby stipulated and agreed between Bourgeois and Coulomb, counsel for the plaintiffs-appellees, and Robert K. Bell, counsel for Ocean City Automobile Bridge Company, defendant-appellant, and Thompson and Hanstein, counsel for Hill Dredging Company, defendant-appellant, that this stipulation may be printed in the State of the Case in lieu of printing the separate pleadings in each of the above entitled cases, and it is stipulated and agreed that the complaints in the eight cases above mentioned were all similar in substance to the complaint of Jesse Thomas against the Ocean City Automobile Bridge Company and Hill Dredging Company, defendants, which complaint is as follows:

"Plaintiff, Jesse Thomas, a resident of Atlantic County, in the State of New Jersey, says:

FIRST COUNT.

1. That from the first day of January, 1927, plaintiff was, and thence still is, lessee from the State of New Jersey of 3.80 acres of oyster ground in Atlantic County, bounded as follows: BEGINNING in the Southeasterly corner of Oscar Somers' ground, lease #79, thence (1) Southwestwardly along his line 520 feet to a corner of his ground thence (2) Southeastwardly along Smith Hickman's line 300 feet to a corner (3) Northeastwardly along Martin V. B. Scull's ground 550 feet to a corner, (4) Northwestwardly in a straight line to the place of beginning.

And also of the ground bounded as follows: BEGINNING at a point distant 360 feet North-

wardly of the Southwesterly corner of Theodore Smith, Lease #76, thence (1) Northwestwardly 940 feet to the corner of Japhet Barrett, thence (2) Northeastwardly along Barrett's ground and Hickman's ground, 700 feet to the Southwest corner of Martin V. B. Scull's ground, lease #78, thence Southeastwardly along John H. Smith's ground 640 feet to a corner, thence (4) Southwestwardly in a straight line to the place of beginning, containing ten acres; which two tracts of oyster ground are the same as that described as Lots 172, 157 and 168, in Section F, in lease #87 of the year 1928, by the Board of Shell Fisheries of New Jersey, situate in Great Egg Harbor River; and lying Northwestwardly of and in proximity to the Ocean City Automobile Bridge, which bridge was during the year 1927 and 1928 erected across Great Egg Harbor River.

2. That at and before the acts of defendants, or one of them, hereinafter mentioned, there had been planted by plaintiff, and was then growing upon said oyster ground of said plaintiff, a vast quantity of live oysters and clams, of various sizes, to wit, in excess of 16,000 bushels.

3. That said oysters and clams before and at the time of their destruction by defendants, or one of them, by its agents and servants hereinafter mentioned, were of the value of at least $4,140.00.

4. That during the year 1927 and 1928, defendant companies, or one of them, by its agents

and servants, disregarding the rights of plaintiff, pumped sand into the bed of Great Egg Harbor River, and negligently caused said sand, so pumped, to cover the oyster ground of plaintiff.

5. That by reason thereof, all of said oysters and clams of plaintiff on his ground aforesaid, died by reason of the covering thereof with the sand aforesaid, and the value thereof was wholly lost to plaintiff.

6. The plaintiff has suffered damage, by reason of defendants' negligence, or the negligence of one of them, to the extent of $4,140.00, and therefore brings this suit.

SECOND COUNT.

1. Plaintiff repeats paragraphs 1, 2 and 3 of the First Count as paragraphs 1, 2 and 3 of this Count.

4. That during the year 1927 and 1928, defendant companies, or one of them, by its servants and agents, disregarding the rights of plaintiff, with force and arms, broke said close, pumped sand in and upon the same, and covered said close and oysters and clams of plaintiff.

5. That by reason thereof, all of said oysters and clams of plaintiff, on his ground aforesaid, died by reason of the covering thereof with the sand aforesaid, and the value thereof was wholly lost to plaintiff.

6. That plaintiff has suffered damage, by reason of defendants' negligence, or the negligence of one of them, to the extent of $4,140.00, and therefore brings this suit.

Bourgeois & Coulomb,
Attorneys of Plaintiff."

With the exception that in the complaint of EUGENE TALLMAN, paragraph 1 of the first count is as follows:

"1. That from the first day of January, 1927, plaintiff was, and thence still is, lessee from the State of New Jersey, of 6.54 acres of oyster ground in Atlantic County, bounded as follows: BEGINNING at the Southeast corner of Theodore Smith's ground, lease #76, thence (1) Southwestwardly in his line, 1040 feet to a corner, thence (2) Eastwardly 360 feet to a corner of W. Lloyd's ground lease #53, thence (3) Northeastwardly along Lloyd's ground, 850 feet to a corner, thence (4) Northwestwardly in a straight line, 260 feet to the place of beginning; which said oyster ground is the same as that described as Lot 153, in Section F, in Lease #85, of the year 1928, by the Board of Shell Fisheries of New Jersey; situate in Great Egg Harbor River, and lying Northwestwardly of and in proximity to the Ocean City Automobile Bridge, which bridge was during the year 1927 and 1928 erected across Great Egg Harbor River."

And further, in the Eugene Tallman complaint, the quantity of live oysters and clams was 7600 bushels, and the damages claimed $1962.00.

In the OSCAR SOMERS complaint, paragraph 1 of the first count was as follows:

"1. That from the first day of January, 1927, plaintiff was and thence still is, lessee from the State of New Jersey, of two acres of oyster ground in Atlantic County, bounded as follows: BEGINNING in the Northerly corner of Jesse Thomas' ground, Lease #87, thence (1) Southwestwardly along his ground 520 feet to a corner in the line of Smith Hickman, thence (2) Northwestwardly along Smith Hickman's ground, 300 feet, thence (3) in a straight line in a Northeasterly direction, 370 feet, thence (4) in a straight line in a Southeasterly direction, 470 feet to the place of beginning which said oyster ground is the same as that described as Lot 162, in Section F, in Lease #79 of the year 1928, by the Board of Shell Fisheries of New Jersey; situate in Great Egg Harbor River, and lying Northwestwardly of and in proximity to the Ocean City Automobile Bridge, which bridge was during the year 1927 and 1928 erected across Great Egg Harbor River."

And further, in the Oscar Somers complaint, the quantity of live oysters and clams was 3300 bushels, and the damages claimed $900.00.

In the THEODORE SMITH complaint, paragraph 1 of the first count is as follows:

"1. That from the first day of January, 1927, plaintiff was and thence still is, lessee from the State of New Jersey of 8.43 and .24 acres of oyster ground in Atlantic County, bounded as follows: BEGINNING at the Northerly corner of the grounds of E. Tallman, and extending

thence (1) approximately 1320 feet Southwestwardly, to the Westerly corner of W. Lloyd, thence (2) Northwestwardly 260 feet to the Southerly corner of J. H. Smith, thence (3) Northeasterly 1370 feet to the Easterly corner of the said J. H. Smith, thence (4) Southeastwardly 290 feet to the place of beginning: BEGINNING at the Southerly corner of the ground of J. H. Smith, and extending thence (1) Southwestwardly approximately 50 feet to a point, thence (2) Northwestwardly 260 feet to a point, thence (3) Northeastwardly approximately 50 feet to the Southwesterly corner of the ground of J. H. Smith, thence (4) Southeastwardly in a straight line to the place of beginning; which said oyster ground is the same as that described as Lot 154, in Section F, and Lot 164, in Section F, in Lease #76 of the year 1928, by the Board of Shell Fisheries of New Jersey, situate in Great Egg Harbor River, and lying Northwestwardly of and in proximity to the Ocean City Automobile Bridge, which bridge was, during the year 1927 and 1928, erected across Great Egg Harbor River."

And further in the Theodore Smith complaint, the quantity of live oysters and clams was 10,500 bushels, and the damages claimed $2630.00.

In the MARTIN V. B. SCULL complaint, paragraph 1 of the first count is as follows:

"1. That from the first day of January, 1927, plaintiff was and thence still is, lessee from the State of New Jersey, of ten acres of oyster ground in Atlantic County, bounded as follows: BEGINNING at the North corner of the

grounds of Jesse Thomas, Lease #87, thence Northwestwardly along Hickman's ground, 340 feet to the corner of Jesse Thomas' ground, thence Northeasterly along Jesse Thomas' ground, 550 feet to a corner, thence Northeastwardly 320 feet to a corner, thence South 48 degrees East, 580 feet to the North corner of John H. Smith's ground, thence Southwestwardly along Smith's ground 300 feet to a corner of Smith's ground, thence, still Southwestwardly, 790 feet to the place of beginning; which said oyster ground is the same as that described as Lot 158, in Section F, in Lease #78 of the year 1928, by the Board of Shell Fisheries of New Jersey; situate in Great Egg Harbor River, and lying Northwestwardly of and in proximity to the Ocean City Automobile Bridge, which bridge was, during the year 1927 and 1928, erected across Great Egg Harbor River."

And further, in the Martin V. B. Scull complaint, the quantity of live oysters and clams was 11,700 bushels, and the damages claimed $3,000.00.

In the JOHN H. SMITH complaint, paragraph 1 of the first count is as follows:

"1. That from the first day of January, 1927, plaintiff was and thence still is, lessee from the State of New Jersey, of twenty acres of oyster ground in Atlantic County, bounded as follows: BEGINNING at the Northeasterly corner of grounds the of Theodore Smith, and extending thence (1) Southwestwardly 1370 feet to the Southwesterly corner of the said Theodore Smith, thence (2) Northwestwardly 260 feet to

a point 100 feet Southeastwardly from the Southeasterly corner of J. Thomas, thence (3) Northeasterly 270 feet to a point 100 feet Southeastwardly from the Easterly corner of the said J. Thomas, thence (4) Northwestwardly 740 feet to the Northerly corner of the said J. Thomas, thence (5) Northeastwardly 1090 feet to the Easterly corner of M. V. B. Scull, thence (6) Southeastwardly 570 feet to the place of beginning; which said oyster ground is the same as that described as Lots 155 and 156, in Section F, in Lease #77 of the year 1928, by the Board of Shell Fisheries of New Jersey; situate in Great Egg Harbor River, and lying Northwestwardly of and in proximity to the Ocean City Automobile Bridge, which bridge was during the year 1927 and 1928 erected across Great Egg Harbor River."

And further, in the John H. Smith complaint, the quantity of live oysters and clams was 24,000 bushels, and the damages claimed $6,000.00.

In the WALTER J. LLOYD complaint, paragraph 1 of the first count was as follows:

"1. That from the first day of January, 1927, plaintiff was and thence still is, lessee from the State of New Jersey, of ten acres of oyster ground in Atlantic County, bounded as follows: BEGINNING at a point 670 feet South, 60 degrees 15′ East, from the South corner of Theodore Smith's ground, Lease #76, thence (1) North 60 degrees, 15′ West, 670 feet to said Smith's corner, thence (2) Northeastwardly 280 feet along said Smith's ground to a corner of E. Tallman's ground, thence (3) Southeast-

wardly along Tallman's ground 360 feet to another corner of Tallman's ground, thence (4) Northeastwardly 850 feet to a corner, thence (5) Southeastwardly 340 feet to another corner, thence (6) Southwestwardly in a straight line to the place of beginning; which said oyster ground is the same as that described as Lot 152 in Section F, also Lot 163 in Section F, containing 1.15 acres, also Lot 168 in Section F, containing 1.35 acres in Lease #53 of the year 1928, by the Board of Shell Fisheries of New Jersey; situate in Great Egg Harbor River, and lying partly under and crossed in a Northeasterly direction by the Ocean City Automobile Bridge, which bridge was, during the years 1927 and 1928, erected across Great Egg Harbor River."

And further, in the Walter J. Lloyd complaint, the quantity of live oysters and clams was 11,700 bushels, and the damages claimed $3,000.00.

In the SMITH HICKMAN complaint, paragraph 1 of the first count was as follows:

"1. That from the first day of January, 1927, plaintiff was and thence still is, lessee from the State of New Jersey, of six acres of oyster ground in Atlantic County bounded as follows: BEGINNING at the Southerly corner of the grounds of M. V. B. Scull, thence extending Southwestwardly 200 feet to the Easterly corner of J. Barrett (2) thence extending Northwestwardly 670 feet to the Northerly corner of said J. Barrett, (3) thence extending Northeastwardly 530 feet to the Southwesterly corner of S. Somers, (4) thence extending Southeast-

wardly 940 feet to the place of beginning; which said oyster ground is the same as that describel as Lot 167, in Section F, in Lease #38 of the year 1928, by the Board of Shell Fisheries of New Jersey; situate in Great Egg Harbor River, and lying Northwestwardly of and in proximity to the Ocean City Automobile Bridge, which bridge was, during the year 1927 and 1928, erected across Great Egg Harbor River."

And further, in the Smith Hickman complaint, the quantity of live oysters and clams was 7,000 bushels, and the damages claimed $1800.00.

It is further stipulated and agreed between the parties hereto, that the answer of the Ocean City Automobile Bridge Company, filed in the case of Jesse Thomas, which answer is hereinafter set forth:

"Ocean City Automobile Bridge Company, a corporation of the State of New Jersey, amends its answer, and answers the second amended complaint filed herein, and says that:

FIRST COUNT.

1. Defendant is without knowledge and will demand strict proof as to the allegations of paragraph 1.

2. Paragraph 2 is denied.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

SECOND COUNT.

1. Paragraphs 1, 2 and 3 are denied.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

FIRST DEFENSE.

This defendant, Ocean City Automobile Bridge Company, never did any pumping of sand in Great Egg Harbor River or Bay on the lands of the plaintiff, or on any other lands, nor did this defendant ever have any agent or servant do any pumping of sand in Great Egg Harbor River.

SECOND DEFENSE.

1. This defendant alleges that the only pumping done in Great Egg Harbor River that was done in the erection of the bridge property was done by Hill Dredging Company under a contract with the Ocean City Automobile Bridge Company, which said contract is dated March 5, 1928, a copy of which contract is in the posses-

sion of this defendant and will be produced at the time of trial or upon demand.

2. This defendant alleges that the work done by the Hill Dredging Company was not done negligently, but was in accordance with and by virtue of a permit from the State of New Jersey granted through the Board of Commerce and Navigation, and further in accordance with the rights granted by the State of New Jersey by Riparian Grant Deed dated March 10, 1928.

3. Any injury done to plaintiff's property, as alleged, was not as a result of the work of the Hill Dredging Company, but as a result of the actions of tides and currents, over which this defendant had no control.

Robert K. Bell,
Attorney of Defendant
O. C. Auto. Bridge Co."

is the same answer filed in all of the other cases above mentioned, and that the answer of the Hill Dredging Company, in the case of Jesse Thomas v. Ocean City Automobile Bridge Company and Hill Dredging Company, which answer is hereinafter set forth:

"Defendant, Hill Dredging Company, amending its answer filed herein, and answering the second amended complaint of the plaintiff, says that:

ANSWER TO FIRST COUNT.

1. It denied paragraph 1.

2. It denies paragraph 2.

3. It denies paragraph 3.

4. It denies paragraph 4, except so much thereof as is hereinafter admitted.

5. It denies paragraph 5.

6. It denied paragraph 6.

ANSWER TO SECOND COUNT.

1. It makes the same answers to paragraphs 1, 2 and 3 as is made to paragraphs 1, 2 and 3 of the first count.

4. It denies paragraph 4.

5. It denies paragraph 5.

6. It denies paragraph 6.

AFFIRMATIVE DEFENSES TO FIRST AND SECOND COUNTS.

Defendant, Hill Dredging Company, further answering says that:

1. It entered into a contract with the Ocean City Automobile Bridge Co. under the terms of which it was required to do certain filling, and certain other work towards the construction of a bridge for said company, within certain areas

defined by said Ocean City Automobile Bridge Company.

2. That this defendant did this work in accordance with said contract, carefully and without any negligence, and under the direction of said Ocean City Automobile Bridge Company.

3. This defendant did said work in accordance with the usual method employed for so doing, and with such equipment as is usually used for said purpose.

4. This defendant was not negligent.

5. Defendant did this work by virtue of a permit from the State of New Jersey, granted through the Board of Commerce and Navigation, together with a supplemental permit.

6. Defendant's work was done in accordance with the requirements, and at the places designated by the State of New Jersey.

7. Any injury done to plaintiff's property, as alleged, was done through an intervening agency over which this defendant had no control.

8. Any injury done to plaintiff's property, as alleged, was done by the actions of the tides and currents.

9. Said work was done in accordance with rights granted by the State of New Jersey by riparian grant deed.

Thompson & Hanstein,
Att'ys. of Def't. Hill
Dredging Company.

Dated: March 10th, 1928."

is the same answer as filed in all of the other cases as above mentioned, and that the reply of Jesse Thomas filed in the case of Jesse Thomas v. Ocean City Automobile Bridge Company and Hill Dredging Company, which is hereinafter set forth:

> "Plaintiff, Jesse Thomas, replying to answer of Ocean City Automobile Bridge Company, says:
>
> 1. That plaintiff has no knowledge of the allegations set forth in the first and second defenses, and demands proof upon trial.
>
> Bourgeois & Coulomb,
> Attorneys of Plaintiff."

is the same reply that was filed in all of the cases above mentioned.

It is further stipulated and agreed, that the postea, filed in the case of Jesse Thomas v. Ocean City Automobile Bridge Company and Hill Dredging Company, which postea is hereinafter set forth:

> "This case was tried before his Honor, W. Frank Sooy, and a jury, at the Atlantic County Circuit, on June 24, 25, 27, 28 and 30, 1930.
>
> The jury rendered a general verdict against the defendant, Ocean City Automobile Bridge Company, and in favor of the plaintiff, for fourteen hundred ($1,400.00) dollars.
>
> Whereupon it is adjudged that the plaintiff Jesse Thomas do recover of the said defendant
>
> $1400.00
> 68.81
> ———
>
> Ocean City Automobile Bridge Company the sum of Fourteen Hundred Dollars, damages together with his costs, which have

$1468.81 been taxed at the sum of sixty-eight dollars and eighty-one cents, making in the whole the sum of one thousand four hundred sixty-eight dollars and eighty-one cents.

Judgment entered and signed July 7, 1930.

Wm. J. Gummere, C. J."

is identical with the postea filed in the other cases, except that the verdict in the Oscar Somers case was for the sum of $669.06; that the verdict in the Theodore Smith case was for the sum of $1068.31; that the verdict in the Martin V. B. Scull case was for the sum of $1068.31; that the verdict in the John H. Smith case was for the sum of $2068.54, and that the verdict in the Smith Hickman case was for the sum of $868.81.

It is further stipulated and agreed, that the postea filed in the case of Eugene Tallman was for a recovery from the defendant, Ocean City Automobile Bridge Company, and the defendant Hill Dredging Company, for the sum of $1573.77 and that the postea in the Walter J. Lloyd case was for a recovery from the defendant Ocean City Automobile Bridge Company and the defendant Hill Dredging Company, for the sum of $2573.75.

It is further stipulated and agreed, that the judgments entered in the New Jersey Supreme Court for Atlantic County, in each of the cases, were entered as follows:

Judgment entered July 7, 1930, for the plaintiff Walter L. Lloyd against the defendants Ocean City Automobile Bridge Company and Hill Dredging Company, in the sum of $2500.00, together with $73.75 costs; judgment entered July 7, 1930, for the plaintiff Eugene Tallman against the defendants

Ocean City Automobile Bridge Company and Hill Dredging Company, in the sum of $1500.00 and $73.77 costs; judgment entered July 7, 1930, for the plaintiff Jesse Thomas against the defendant Ocean City Automobile Bridge Company, in the sum of $1400.00, together with $68.81 costs; judgment entered July 7, 1930 for the plaintiff Oscar Somers against the defendant Ocean City Automobile Bridge Company, in the sum of $600.00, together with $69.06 costs; judgment entered July 7, 1930, for the plaintiff Theodore Smith against the defendant Ocean City Automobile Bridge Company in the sum of $1,000.00, together with $68.31 costs; judgment entered July 7, 1930, for the plaintiff Martin V. B. Scull against the defendant Ocean City Automobile Bridge Company in the sum of $1000.00, together with $68.31 costs; judgment entered July 7, 1930, for the plaintiff John H. Smith against the defendant Ocean City Automobile Bridge Company, in the sum of $2000.00, together with $68.54 costs; and judgment entered July 7, 1930, for the plaintiff Smith Hickman against the defendant Ocean City Automobile Bridge Company, in the sum of $800.00, together with $68.81 costs.

It is further stipulated and agreed, that during the trial, the ad damnum were amended in the following complaints as follows:

In the Smith Hickman complaint to read $2500.00; in the Walter J. Lloyd complaint to read $6,000.00; in the Eugene Tallman complaint to read $3500.00; in the Jesse Thomas complaint to read $5,000.00, and in the Oscar Somers complaint to read $2,000.00.

It is further stipulated and agreed between the parties, that the Notice of Appeal of the Ocean City Automobile Bridge Company filed in the matter of Jesse Thomas, which notice is hereinafter set forth:

"To Bourgeois and Coulomb, attorneys of plaintiff, or to whom it may concern: Sirs:

Please take notice, that the defendant Ocean City Automobile Bridge Company, in the above entitled cause, appeals to the Court of errors and appeals in the last resort in all cases in New Jersey, from the whole of the judgment entered in this cause.

Robert K. Bell,
Attorney of Defendant
O. C. Auto. Bridge Co."

is the same notice of appeal as filed in all of the other cases as above mentioned, and that the notice of appeal filed by the Hill Dredging Company in the case of Walter J. Lloyd, which is hereinafter set forth:

"To Messrs. Bourgeois & Coulomb, attorneys of plaintiff, or to whom it may concern:

Please take notice, that the defendant, Hill Dredging Company, in the above entitled cause, appeals to the Court of errors and appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause.

Thompson & Hanstein,
Attys. for Deft. Hill
Dredging Company."

is identical with the notice of appeal filed by the Hill Dredging Company in the case of Eugene Tallman.

It is further stipulated and agreed, between the parties, that the grounds of appeal filed by the Ocean City Automobile Bridge Company, in the matter of Jesse Thomas, which grounds of appeal are hereinafter set forth:

"Defendant, OCEAN CITY AUTOMOBILE BRIDGE COMPANY, hereby assigns the following grounds for appeal in the above entitled cause:

1. Because the Court refused to non-suit the plaintiff.

2. Because the Court refused to direct a verdict against the plaintiff and in favor of the defendant Ocean City Automobile Bridge Company.

3. Because the Court refused to strike the testimony of the plaintiff as to the quantity of oysters and clams that he had on his ground.

4. Because the Court refused to charge the jury as follows:

'If the jury find that the Ocean City Automobile Bridge Company used diligence in selecting the Hill Dredging Company to do the pumping, and they find the sand going on plaintiff's property is not a direct result of the contract, then the jury should find a verdict of no cause of action as to this defendant.'

5. Because the Court refused to charge the jury as follows:

'If the jury find from all the evidence that the roadway could have been filled in without permitting any sand to go on the property of the plaintiff, then the jury should find a verdict of no cause of action as to this defendant.'

6. Because the Court charged the jury as follows:

'In performing the work under the contract in this cause, defendant was bound to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine.'

7. Because the Court charged the jury as follows:

'The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in question were notice to defendant of some right in plaintiff in said lands.' ''

is the same ground of appeal as filed in all of the other cases as above mentioned, and that the grounds of appeal filed by the Hill Dredging Company in the case of Walter J. Lloyd, which is hereinafter set forth:

''Defendant, Hill Dredging Company, hereby assigns the following grounds for appeal in the above entitled cause:

1. Because the Court refused to non-suit the plaintiff.

2. Because the Court refused to direct a verdict against the plaintiff and in favor of defendant, Hill Dredging Company.

3. Because the Court refused to strike the testimony of the plaintiff as to the quantity of oysters and clams that he had on his ground.

4. Because the Court refused to charge the jury as follows:

'If the jury finds that the work which the Hill Dredging Company did in Great Egg Harbor Bay was done pursuant to a contract between it and the bridge company, then the Hill Dredging Company owed no duty to the plaintiffs Lloyd and Tallman arising out of that contract.'

5. Because the Court refused to charge the jury as follows:

'If the plaintiffs, Lloyd and Tallman, suffered any damages by reason of sand settling upon their leased grounds, there could be no recovery against the defendant, Hill Dredging Company, if the said sand was pumped under the terms of its contract with the bridge company.'

6. Because the Court refused to charge the jury as follows:

'If the work that was done by the Hill Dredging Company was done under a permit from the agency of the State of New Jersey that had control of the same, namely, the Board of Commerce and Navigation, the plaintiffs, Lloyd and Tallman, are not entitled to recover against the Hill Dredging Company.'

7. Because the Court refused to charge the jury as follows:

'The deed, or grant, made by the State of New Jersey to the bridge company, gave to the bridge company the title to the land under water covered by that deed, or grant, and the Hill Dredging Company, acting under a contract with the bridge company, was entitled to carry out the terms of its contract with the bridge company upon said land.'

8. Because the Court refused to charge the jury as follows:

'Insofar as the deed covered part of plaintiff Lloyd's ground, the bridge company was entitled to cause the Hill Dredging Company to enter upon said ground, and such entry would be without any liability insofar as the Hill Dredging Company was concerned.'

9. Because the Court refused to charge the jury as follows:

'The leases made by the State of New Jersey to the various plaintiffs were made subject to the right of the State of New Jersey to permit the building of a bridge and roadway across Great Egg Harbor Bay, and for the doing of that there would be no liability on the part of the defendant, Hill Dredging Company, acting under a contract with the bridge company.'

10. Because the Court refused to charge the jury as follows:

'The Hill Dredging Company cannot be held liable in damages for damage flowing to the plaintiffs, Lloyd and Tallman, from the work in connection with the building of the bridge and roadway, if the damage alleged to have been suffered by the various plaintiffs arose merely from the carrying out of a plan or building adopted by the bridge company.'

11. Because the Court refused to charge the jury as follows:

'If the Hill Dredging Company did its work pursuant to its contract with the bridge company, and the type of construction called for

by the bridge company was the usual type of construction, there can be no liability under this case as against the Hill Dredging Company.'

12. Because the Court refused to charge the jury as follows:

'If the injury complained of by the plaintiffs was done through the intervening agency of the tides and currents of Great Egg Harbor Bay, there could be no liability upon the defendants.'

13. Because the Court refused to charge the jury as follows:

'If the plaintiffs have only established that they planted oysters and/or clams upon their respective grounds, there is no presumption that said oysters and/or clams continued to be there, and to live up until the time of the happening of the acts complained of by the plaintiffs.'

14. Because the Court refused to charge the jury as follows:

'The loss of the value of clams and oysters which, if planted, would depend upon the contingencies of weather and season, must be excluded as incapable of estimation with that degree of certainty which the law exacts in the proving of damages.'

15. Because the Court refused to charge the jury as follows:

'The plaintiffs' leases from the State are not leases in the ordinary sense; they are merely exclusive fishing privileges on the land the ownership of which is in the State of New Jersey.'

16. Because the Court refused to charge the jury as follows:

'Since defendant Lloyd had knowledge that the bridge was to cross his land, it was incumbent upon him to take such reasonable steps to protect his oysters and clams as were proper under the circumstances, and if he failed to do so he cannot recover for the value of the oysters and clams destroyed.'

17. Because the Court refused to charge the jury as follows:

'If you believe that defendant Tallman did not make a grab upon his land since 1925, there is no presumption that his oysters and clams previously planted, were there and alive at the time of the filling.'

Thompson & Hanstein,
Sol'rs. for Def't. Hill
Dredging Company.''

are identical with the grounds of appeal filed by the Hill Dredging Company in the case of Eugene Tallman.

Robert K. Bell,
Attorney for Defendant O. C. Automobile Bridge Co.
Thompson & Hanstein,
Attorneys for Defendant, Hill Dredging Company.
Bourgeois and Coulomb,
Attorneys of Plaintiff.

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

MARTIN V. B. SCULL,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.
Action at Law.

SMITH HICKMAN,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.
Action at Law.

WALTER J. LLOYD,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.
Action at Law.

THEODORE SMITH,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.
Action at Law.

JOHN H. SMITH,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.
Action at Law.

OSCAR SOMERS,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.
Action at Law.

JESSE THOMAS,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.

Action at Law.

EUGENE TALLMAN,
Plaintiff,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY AND HILL DREDGING COMPANY, jointly and in the alternative,
Defendants.

Action at Law.

TESTIMONY.

Atlantic City, N. J., June 24, 1930.

Before Hon. William Frank Sooy, Judge, and a Jury.

Appearances:

For Plaintiffs: Messrs. Bourgeois & Coulomb (Mr. Bourgeois, appearing).

For defendant, Ocean City Automobile Bridge Company: Robert K. Bell, Esq.

For defendant, Hill Dredging Company: Messrs. Thompson & Hanstein (Mr. Hanstein, appearing).

The Court: Are these cases tried together.

Mr. Bourgeois: I move one case, but I understand you are going to consolidate them.

The Court: Yes.

Mr. Bourgois: I move the case of Martin Scull against the Ocean City Automobile Bridge Company, Number 39, but the same issue is involved in 34, 40, 41, 42, 43, 44, 45 and 46.

The Court: As I understand it, the same issue is involved in each one of these suits, and I understand that the trial of any one suit would take a day or more, and it would simply be a waste of time of the Court and an expense to the county which would not be justified if I did not order a consolidation of the cases, and for that reason I will make an order that they be consolidated.

(Exception noted for puaintiffs.)

Mr. Hanstein: Might I suggest in that connection that it appear on the record that these cases have been on the list for no less than two terms and have always been bracketed and considered together.

Mr. Bourgois: I will not consent to that going on the record.

The Court: I have always so considered and can see no reason at all why these cases should not be tried together.

Mr. Bourgois: There are some amendments to the ad damnum clause that we have agreed may be made. Mr. Hanstein and Mr. Bell, will you be content that I shall move to amend these ad damnum clauses as the proof goes in?

Mr. Hanstein: That is all right. As I understand it, you are not moving the case of Japhet Barrett?

Mr. Bourgeois: No, I am going to discontinue that suit.

The jury was sworn at 11:45 A. M.)

PLAINTIFFS' OPENING TO THE JURY.

Mr. Bourgois: Ladies and gentlemen, there are eight cases to be tried together, and these eight cases will tax your memory to the limit unless you have at some time a pad and make figures so you will know what you are going to do, because the numbers will go into very large figures, and I think it will be impossible for any juror to attempt to carry in your minds all that you will have to take care of in these cases; but at some time during the proceeding I am quite sure the Court will tell you you may have a pad and you may make what memoranda you want to for your future guidance.

These cases grow out of the result of the building of the bridge from Somers Point over to Beesley's Point by a corporation known as the Automobile Bridge Company. Prior to the building of that bridge for years the men whom I represent, these clients, with other men, of course, were oyster men, planters. They had leased from the State oyster and clam grounds and they had such grounds under lease at the time they started to build this bridge, with oysters and clams on them. We will show you that, for instance, John H. Smith and Theodore Smith—John H. Smith had ten acres of land over there, ten acres of what they call oyster ground, leased from the State, on which he had planted some 396,000 clams. Since clams are sold by the thousand or hundred and not by the bushel, you can see you have to deal with numbers that mean thousands. Not only 396,000 for this man, but some of them 480,000, so that the amount of figures is so large you cannot hope ever to remember it unless

you make a record of it on a piece of paper or somewhere.

John H. Smith and Theodore Smith, brothers, in 1924 and 1925, had nineteen acres of land. John H. Smith had ten acres of land, and Theodore had nine acres, and they planted on that land. Of course, they had some clams and oysters on it at the time, but they planted additionally thirty-three bushels of clams. I am going to prove the things that I tell you. This was entirely new to me and maybe to you. A handful of them—they are so small that a handful will contain maybe two hundred or more clams. In a bushel of clams of the ones they plant, of the size of your fingernail and less, there are from 12,000 to 15,000 in a bushel, and they buy them by the bushel to plant. So when they plant thirty-three bushels, you have got to multiply that by either twelve thousand or fifteen thousand or some other amount that you folks figure is a correct amount, to find out how many clams have been planted, because when they sell them, they sell them by the thousand or by the hundred, and assuming that there were twelve thousand clams in a bushel, in these thirty-three bushels it made 396,000 clams, and dividing that up in proportion to their ten acres and nine acres, it gave 273,000 for John Smith and 123,000 for Theodore Smith of clams planted in 1924 and 1925.

After a couple of years those clams grow large enough so that they become little-necks. The next year they are cherry stones. The next year they are what they call mediums, and the next year they are full-grown clams, and the price of them each year is different. The cherry stone price is different from the little-neck, and that is different from the medium, so that we hope that you will be mathe-

maticians enough so that you will be able to figure out what it means to them in the losses that I am going to show you they had.

Walter Lloyd had—I forget the number of acres he had, but the map will show. I think it was fourteen acres. I cannot attempt to be accurate in this, because I have not got the figures in front of me. Fourteen acres, and he planted forty bushels of clams that same year, 480,000, to grow and to sell.

Eugene Tallman planted 50 bushels on his land. He had some ten acres.

Jesse Thomas planted forty bushels on his.

Smith Hickman planted thirty-three bushels on his.

Martin Scull had on his about 200,000 of large clams, not planted, but they were there; he had planted them before, and they had been growing and were there.

In 1927, I think it was, they started to build this bridge across Great Egg Harbor River, and soon after they started the work on the bridge, these oyster men saw that it was going to damage their plants, their grounds, and they made some complaint that was not heeded. They went on with their bridge and after a while, of course, it had to be filled in, and then the Hill Dredging Company came on to do the filling, not for the oyster men, but for the bridge company. The bridge itself went directly across some of the land. Walter Lloyd's land lay right underneath the bridge. The Hill Dredging Company commenced to pump in that sand. I suppose all you people know how sand is pumped in with these large sand dredges. They have a pipe maybe sixteen or eighteen inches in diameter, and it pumps the water, the engine does, and sand together, about two-thirds full, and some of you have seen

them pump over the land where they are filling it in. You will know how, with the force of the water coming through that pipe, it discharges itself at the end of the pipe, but flows on for hundreds of feet.

They pumped this sand right into the river, and the sand not only had the impetus of the engine, the pump back of it, but it also had the current of the tide in the river to help it along.

The result of it was that they, without any protection whatever—they did not build any sheath piling or anything of that kind to hold the sand in, but just pumped down there until they got a foundation for it. The result was that they pumped over the land that these oysters and clams were on. After they had gotten a basis for it, when they pumped the sand in, as I understand it, after they had pumped the sand in a part of the distance, then they dumped some little sheath piling in the sand they had already pumped in, so as to save as much of that sand as they could, but they did not do that into the mud before they commenced to pump in, and it allowed all this land to be covered over with this sand. In some places under the bridge, for instance, over Lloyd's property, I think it is some eight or ten or twelve feet, but over the other property, over the oyster grounds that were half a mile away it was as deep as two feet over it all.

The result was that all of these oysters and all of these clams were destroyed, absolutely destroyed, because they were all smothered. They all just died.

In addition to having these clams on the ground, most of these men had a reasonable quantity of oysters there also, and they were all lost. Oysters cannot do a thing. You put three or four inches of sand on them and they will smother. Put two inches of

sand on them and they will smother, and when you put two feet on either a clam or an oyster, of course, it is gone.

For the purpose of recovering to them the damage they have lost, the loss they have sustained, these suits were brought, and while it is a burden on you ladies and gentlemen to expect you to go into this thing in such detail as to give us what we are entitled to have, yet we are going to ask you to do it, because they have sustained a loss. Their oysters are gone, their clams are gone, they cannot have them any more. In fact, the land itself is no good, the oyster ground is ruined, but that belonged to the State and not to them. They leased it. But their oysters that were there are gone, their business is gone, and we are suing to recover for the value only of the oysters and clams that they had there and that were lost to them.

The price, as I understand, of oysters at that time, was $1.50 a bushel. It will not be difficult for you to figure the oysters, because they are sold and figured by the bushel. The price of the clams, as I understand it, was from six to eight dollars a thousand for the little-necks, and then when you get to the larger clams, they were as high as ten dollars a thousand. That will be more difficult for you to figure and to remember, but we ask you to give it your careful attention and give us what we are fairly entitled to have, assuming we are entitled to have something.

(The following motion was made at side bar:)

MOTION TO NON-SUIT ON PLAINTIFF'S OPENING.

Mr. Hanstein: If your Honor please, on behalf of the Hill Dredging Company, I move for a non-suit on the plaintiff's opening. I think it is agreed, is it not, Mr. Bourgeois, that the complainants are identical in form?

Mr. Bourgeois: Yes.

Mr. Hanstein: The first count is as follows:

Paragraph I recites the loss of the land; paragraph 2, the plaintiff had a certain quantity of oysters on the ground; paragraph 3, that the oysters had a certain value; paragraph 4, that during the years 1927 and 1928, defendant companies or one of them, by its agents, disregarding the rights of plaintiffs, pumped sand into the bed of Great Egg Harbor River and negligently caused the sand so pumped to cover the oyster ground of plaintiff; by reason thereof all the oysters and clams of plaintiff on his ground died. The plaintiff has offered to show that we came along and pumped sand into Great Egg Harbor River and he says that this sand destroyed the oysters. He recites as to a certain one of the plaintiffs, whose name slips me for the moment, that we actually directed the pumping of the sand on to that man's ground. As to the others, that the same drifted there, some of it being carried by the tide. There is not the slightest suggestion that we pumped sand negligently.

The Court: Yes, there is. He says you failed to put anything there that would confine the sand to the place where you pumped it.

Mr. Hanstein: There is nothing in his showing to say that that is negligent. Sand is frequently pumped. He says after we pumped our sand in, then we came along and put up a bulkhead. The burden is on them. They have to make a tender of proof that that was a negligent thing to do, assuming that that is the gravamen of the claim of negligence; but there is nothing up to this point to show that they offer to prove that we did anything that was negligent. Coupled with that they say that the sand was blown a couple of hundred feet and the tide carried it to some of these oyster beds a half mile away. That is certainly no negligence. Count 1 is distinctly a negligence count.

Count two says we broke the close and pumped sand in and that by reason of negligence they suffered damage. I assume that that count is trespass. They predicate that on the ground of negligence, and there is not a suggestion in their offer to prove any negligence.

The Court: They say in the second count, "disregarding the rights of the plaintiff, with force and arms they pumped in sand and covered the clams and oysters of the plaintiff."

Mr. Bourgeois: We do not have to have negligence in that at all.

Mr. Hanstein: I am directing my motion to the two counts, the negligence count and the trespass

count, and I think each one stands on a separate footing.

The Court: The motion is overruled.

(Exception noted for defendants.)

CHARLES R. RUTTER, sworn:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Rutter, you live where?
A. At West Creek.
Q. Do you hold some position relating to the oyster industry in the State?
A. I do. I am Chief of the Division of the Atlantic—of Ocean and Burlington Counties Department of the Atlantic Coast, and I am surveyor for the whole Department of the Atlantic Coast.
Q. That is, from the beginning to the end of it?
A. That is from Sandy Hook to Cape May.
Q. Including Great Egg Harbor River?
A. Yes, sir.
Q. I show you a map that is on the easel. Will you tell me by whom that was made?
A. By me.
Q. What does it show?
A. It shows the grounds leased in Great Egg Harbor Bay at the mouth of Great Egg Harbor River.
Q. Does it show anything else?
A. It shows the bridge built across those grounds.
Q. I have in my hand a lease from the State of

New Jersey, by the Board of Shell Fisheries, to Jesse Thomas, for lot or plot, I don't know what you call it—ground, maybe you call it—157, 169, 172, F section. Does that map show those lots?

A. It shows 157—what is the other?

Q. 157, 169 and 172.

A. It shows the 157. Probably the others are not in this block.

Mr. Bourgeois: I want to offer in evidence this lease to Mr. Thomas. It is dated January 1st, 1928.

Mr. Hanstein: What is this supposed to cover?

Mr. Bourgeois: It covers land of Jesse Thomas. Not all of the land, because he has others, but I have checked up here three of his pieces, lot 157, Section F, and this shows also lot 169, Section F, and 172, Section F. It has others that are not in this plot at all, and this witness has not located two of these.

Mr. Hanstein: Which one does he locate?

Mr. Bourgeois: 157, Section F. I offer it in evidence as to the lands on this map, not as to other lands. There are two other sections in here that are not in this territory.

The Court: You are offering it as to 157?

Mr. Bourgeois: As to 157, unless 169 and 172 are on the map. I will offer it as to 157 now, and when Mr. Thomas comes on the stand I think he can tell where the other two are.

Mr. Hanstein: I think it ought to be proven, before that is admissible, that the land described in the complaint is in fact the land identified on the board as being 157 and covering by this lease.

Mr. Bourgeois: I am trying to do that now. This calls for 157, doesn't it? I could not do it all now by this one witness, anyhow.

The Court: They are entitled to have the lands embraced in the complaint identified as being the lands included in that lease.

Q. Is lot 79 on that map?
A. No.
Q. Do you know where 79 is?
A. No, sir.
Q. You do not?
A. I do not.

Mr. Bourgeois: I will withdraw the offer for the time being.

Q. Mr. Rutter, will you look at the map and tell me whether or not lot 153 in Section F to Eugene Tallman is on there?
A. It is.
Q. Will you also look at the map and tell me whether or not lot 165, Section F, is there, to Oscar Somers?

The Court: Is there any dispute that these various plaintiffs had these various leases and that they cover the land embraced in the various complaints?

Mr. Hanstein: On some of them there is. Some of them there is not.

(Recess taken until 1:30 P. M.)

AFTERNOON SESSION—1:30 P. M.

CHARLES R. RUTTER, resumed:

Direct examination (continued).

By Mr. Bourgeois:

Q. Now, Mr. Rutter, let us locate these lands of Jesse Thomas. First is a tract of 3.80 acres of land beginning in the southeasterly corner of Somers' ground; thence (1) southwestwardly along his line 520 feet to the corner of his other ground; thence (2) southeastwardly along Smith Hickman's line 300 feet; thence, northeastwardly, along Martin B. Scull's ground 520 feet to a corner; thence (4) northwestwardly in a straight line to the place of beginning. Now, the next one ——

The Court: Do we have to read off each one of these descriptions and trace them on the map, when the defendant says there are only some that are controverted?

Mr. Hanstein: Don't need to for me.

The Court: Let us get some kind of an agreement so we will know where we stand in reference to the locus in quo. If there is any dispute as to the lease-

hold interest of any of the plaintiffs, we ought to have it. If there is not, what is the use of proving it?

Mr. Hanstein: What was it he attempted to show there?

The Court: Where Jesse Thomas's leased land is.

Mr. Bourgeois: We showed that, and then they wanted us to show that it was what we had described in the complaint.

The Court: Unless that is controverted, it seems to me it ought to be stipulated that the lands described in the complaint are the lands leased by the State of New Jersey to the respective plaintiffs.

Mr. Hanstein: What one of these lots was it you asked him about?

Mr. Bourgeois: In this present lease it is 172. This suit was started last year, and in 1927 the leases were not the same numbers that they are now, but the quantity is the same and the description is the same, and this lease I have just had him identify as block number—what is the number of that, Mr. Rutter?

The Witness: 166.

Mr. Bourgeois: On the lease I have here it is 172, but it is the same acreage, 3.80 acres.

Mr. Hanstein: Do I understand, then, that the description in the complaint describes 166?

Mr. Bourgeois: That is right. On this map 166. On the map that I had and under this lease it was 166. This is 172. The next one was 157 and 169. 157 had six acres and 169 had four acres, and they are combined on this map as 157, with ten acres in it, but the description covers them.

Mr. Hanstein: I think what would simplify the whole thing would be this: I do not want to stand on technicalities here, because there is no doubt these men had leases, and it is purely a matter of locating the particular land. These numbers are in accordance with the numbers described in the leases shown on a map or plan of oyster grounds on file in the office of the Board of Shell Fisheries in Trenton, New Jersey, to which reference is hereby made. It seems to me if we do that we have got the whole thing solved.

The Court: With that map, you mean?

Mr. Hanstein: Yes, particularly with Mr. Bourgeois talking about the changing of numbers. We have investigated this thing, and I must confess I do not know anything about the change of numbers.

Mr. Bourgeois: I don't think the number means anything if you have the description. I will get Mr. Smith to go and get the map that Mr. Hanstein wants.

Mr. Hanstein: It is not the one I want. It is the one the lease calls for.

The Court: Well, we can presume that they are

going to be proved as the lands that are in the complaint. If that is the case, and it unquestionably is, all you have to do is go ahead and prove the rest of your case.

Mr. Bourgeois: I am at a loss to know whether I want to prove the leases by Mr. Rutter or whether it wants to be done by Mr. Smith, until after I see the map. Probably it will be done by Mr. Rutter, because he made this map.

(Witness withdrawn.)

JOHN HENRY SMITH, sworn:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Smith, you live where?
A. Scullville.
Q. How long have you lived in Scullville?
A. About sixty-one years or so.
Q. What is your business, your vocation?
A. I have been going in the oyster business and clam business all my life, ever since I have been big enough to work.
Q. Where have you been conducting your oyster business?
A. In Creek Channel, Great Egg Harbor Bay.
Q. I show you a lease made by the State of New Jersey, the Board of Shell Fisheries, to John H. Smith, being January of 1928, January 1st, 1928, and it shows the leasing of two parcels, 155, and the

other 156, in Section F, each for ten acres. Are you the John Smith in that lease?

A. I am.

Q. Can you tell or show the jury where those two pieces are, those ten-acre tracts are?

A. I can. 155 and 156.

Q. They are marked on the map as 155 and 156?

A. 155 and 156.

Q. And each of them has ten acres in it?

A. Ten acres.

Mr. Bourgeois: I offer this lease in evidence.

Mr. Hanstein: I object to it until he links it up with proper proof showing the map.

Mr. Bourgeois: I have a right to offer it, anyway. It is a recorded copy of a lease and it is admissible in evidence for whatever it is worth.

The Court: I think it is admissible in evidence, and I have no doubt it will be connected up, anyway.

(Exception noted for defendants.)

(The paper was marked Exhibit P1.)

Q. Now, Mr. Smith, this lease is for a period of one year. Have you had this ground leased from the State prior to this year, 1928?

A. I have.

Q. For how many years back?

A. Ever since 1905.

Mr. Hanstein: If he is going to prove some other lease, I think he ought to prove it by proper proof.

The Court: He is proving that he had possession prior to the date of this lease.

Mr. Bourgeois: That is all I want to show.

(Exception noted for defendants.)

Q. For how many years prior to 1928 did you have it?

A. 1905.

Q. From 1905 to 1928?

A. Yes.

Q. What use did you make of the land that you had leased from the State?

A. Planting oysters and clams.

Q. Do you know when was the last time you planted clams on that ground?

A. 1924 and 1925, in September.

Q. How do you get the clams that you plant? Do you go up and dig them yourself or are they bought, or what happens?

A. Well, I bought some and I caught some.

Q. How large are those clams that you gathered to plant on these leased grounds?

A. Well, the ones that I bought run about twelve thousand to the bushel.

Q. What is the usual quantity of clams in a bushel?

A. Well, at that size, they run from that down to six or seven hundred, that is, small clams.

Q. But the clams that you plant out?

A. They run from ten to twelve thousand to the bushel. Twelve thousand to fifteen, sometimes.

Q. In 1924 and 1925, did you buy these clams for planting?

A. I did.

Q. Did you buy them all for yourself or for yourself and someone else?

A. My partner and I bought them together.

Q. Who is your partner?

A. Theodore Smith.

Q. Is he your brother?

A. He is no relation to me whatever.

Q. Do you know how many acres he had?

A. Somewheres about nine acres, nine or ten; close to ten acres, I think.

Q. How many bushels did you buy, do you know?

A. Thirty-three in the Thorofare up here.

Q. Twelve thousand to the bushel would mean 393,000 clams. What was done with those thirty-three bushels?

A. One-third was put on Theodore Smith's ground, and the other two-thirds on mine.

Q. What was the nature of the bottom on which you put those clams?

A. Fine as could be. Good as could be.

Q. What was it?

A. Fine shape, good shape.

Mr. Hanstein: I move that be stricken.

The Court: It will be stricken as a conclusion.

Q. I want to know what kind of a bottom it was.

A. It was a hard mud bottom.

Q. On what kind of bottom do clams grow, thrive?

A. Well, they will grow on sand, that is, you know, in the Thorofare where it is sand; they will grow sometimes in soft mud, sometimes grow in hard mud.

Q. You had been planting your clams on this bottom for years before?

A. I had.

Q. Did you have any oysters? Were there any oysters on that ground?

A. I did have.

Q. Had they been planted by you?

A. Planted by myself. Me and Theodore Smith together.

Q. What is the natural growth of these little clams that you put out? You put them out, you say, in 1924 and 1925. Is that in the winter time or when?

A. In September.

Q. What is the natural growth of them? How do they come along?

A. Take three to four years to make a prime clam. From three to four years.

Q. Take those that you planted in 1925, what size clam would they be in 1928?

Mr. Hanstein: I object to this. I do not think we are concerned with what kind they would be. It is what kind they were.

Mr. Bourgeois: I will ask what kind they were.

The Court: I think he has a right to show generally the course of growth of clams, and then he has to show specifically what kind of clams he had on the ground at this time.

Q. What was the size of the clams that you had on that ground in 1928, that is, in, say, January 1st, 1928?

A. They were at that time good-sized necks, what we call good-sized necks.

Q. That is next to the cherry stone?

A. Yes, somewhere between a cherry stone and a neck.

Q. And those that you had planted in 1924, what size clam were they in January 1st, 1928?

A. They were somewheres about the same size.

Q. What proportion of those clams that you plant live?

Mr. Hanstein: I object to that. That is getting into generalities, and I do not think we are called upon to meet generalities.

Mr. Bourgeois: I am satisfied if you don't want it in.

Q. Can you determine how many oysters you had on your land at that time, in January, 1928?

A. As near as I can tell, there was about 1500 bushels between Theodore Smith and I.

Mr. Hanstein: I ask that be stricken.

The Court: The answer should have been yes or no.

Q. Answer that yes or not. The question is, can you determine approximately how many clams you had on the ground at that time?

A. I could.

Q. How many?

A. How many I had at that time?

Q. How many oysters first?

A. How many oysters on the ground?

Q. You said about 1500 bushels between you and ——

A. Theodore Smith, yes.

Q. And they were divided how?

Mr. Hanstein: Whenever he said that, it was stricken.

The Court: Yes, it was stricken. I struck his conclusion as to the number of oysters or clams, whichever it was, as not responsive to that question.

Q. I asked you how large the clams were, and you told me. How large were the oysters that were on your ground at that time?

A. The oysters at that time were large enough to take up.

Q. What do you mean, were large enough to take up?

A. Culls and primes.

Q. If you can tell from having worked them, what proportion would be culls and what proportion would be primes?

A. Well, they would be at least one-fourth primes.

Q. What quantity of oysters did you have on your ten acres, twenty acres?

A. I planted one thousand bushels.

Mr. Hanstein: I ask that be stricken.

The Court: That will be stricken.

Q. You planted a thousand bushels? How many did you plant there? How many did you say you planted?

A. Fifteen hundred bushels together.

Q. That is a thousand, you said, for yourself?

A. Yes, sir.

Q. When did you plant them?
A. 1923 and 1924.
Q. What is the increase in oysters after they are planted, if you know?

Mr. Hanstein: I object to that because he is proving generalities again, and we are only interested in this particular case.

The Court: You are dealing in generalities. I suppose you have to deal with this particular tract.

Q. Is there a general recognized rule of increase in oysters after they are planted?
A. There is.
Q. Have you ever observed what the increase is from your own experience?
A. I have.
Q. What is the increase per year in oysters after they are planted?

Mr. Hanstein: I object to that because there is no proof that that rule would apply in this particular case or did apply in this particular case and under the circumstances.

The Court: I will permit this, and expect it to be connected up with this general place.

(Exception noted for defendants.)

(Question repeated.)

A. Well, they will double each year in size.

The Court: Double in size?

A. Yes, sir, if they do right.

Q. Where, with relation to what land, did you make your observation of the increase in oysters?

A. In Creek Channel, right where I planted them.

Q. Then the thousand bushels of oysters that you planted, in 1925, were they planted?

A. 1924 and 1925. 1923 and 1924.

Q. In 1928, the first of January of 1928, you would have had how many bushels on that land?

Mr. Hanstein: I object to that.

The Court: This testimony is not that there is an increase in the number of oysters. The testimony is that they increase in size.

Mr. Bourgeois: I was talking about bushels. He said he had a thousand bushels.

The Court: Then you asked him what they were in 1928, and he said they increased in size, doubled the size, and that is all.

Mr. Hanstein: If they do right, he said.

Q. How many bushels would the thousand bushels you planted in 1925, make in January 1st, 1928?

Mr. Hanstein: I object to that, because we are not trying a case on what might happen. We are trying a case on what did happen.

The Court: I think the first preliminary question is whether or not he can tell as a result of his investigation on these particular grounds whether or not there was an increase. I think the jury is entitled to know upon what he bases that knowledge.

(Exception noted for plaintiffs.)

Q. Mr. Smith, directing your attention exclusively to the lands that are now in question, the twenty acres that you have, have you made any study or inquiry to ascertain how much increase there is in oysters planted on that ground per year?

Mr. Hanstein: It seems to me I have made my points clear enough that these questions should be ——

The Court: I will permit this question.

(Exception noted for defendants.)

(Question repeated.)

A. Yes.

Q. How much is that increase?

A. Each year—if you take an oyster an inch long, the next year, if it does right, it is two inches, and the next year, it is four inches, and it will keep on up until it is a prime.

Q. In other words, they double each year?

A. Double each year.

The Court: You are misunderstanding his answer. He says that an oyster increases in size every year, but he has not testified there is an increase in the number.

Mr. Bourgeois: Not in number. I am speaking of quantity.

Q. In other words, a thousand bushels planted in

1923, if taken up in 1924, would be two thousand bushels; is that right?

A. Yes.

The Court: By reason of the increase in size?

Mr. Bourgeois: Yes. And so on until they are taken up or destroyed.

Q. Now, what was the wholesale price—do you sell wholesale or retail?

A. Wholesale.

Q. What was the wholesale price of oysters in the open market on January 1st, 1928?

Mr. Hanstein: I object to that as not being the proper proof, because it might be that the market was in New York or some other place.

The Court: I sustain the objection.

Q. Where do you sell them, in what market?

A. At Atlantic City and at home there at the wharf.

(Former question repeated, striking out the words "open market" and inserting "Atlantic City," as follows: "What was the wholesale price of oysters in Atlantic City on January 1st, 1928?")

A. $1.50 a bushel.

Q. What do you do with your clams?

A. Well, I sell them to Atlantic City.

Q. Wholesale or retail?

A. Wholesale.

Q. What was the wholesale price of clams in Atlantic City in the open market January 1st, 1928?

A. I got $6 a thousand for little-necks, and $12 a thousand for the large clams and cherry stones mixed.

By the Court:

Q. I think, Mr. Smith, that you testified as to the increase in size of clams from year to year, didn't you?

A. Yes, sir. Not in numbers; in size.

Q. What increase each year did you say there was?

A. It takes a clam about three to four years from a small clam up.

By Mr. Bourgeois:

Q. Mr. Smith, I want to ask you what, if anything, happened to your oyster and clam grounds, in 1928?

A. As soon as they commenced to pump, the land commenced to fill, and it commenced to cover the oysters and clams.

Q. When did they begin to pump? What was the occasion of their pumping?

A. Build the bridge across to Beesley's Point, and bulkheads.

Q. When did they begin to pump?

A. I don't just remember the date.

Q. Was it in the fall or the winter?

A. It was in the fall when I first noticed it.

Q. At the time they commenced to pump there, what was the condition of the oysters and clams on your grounds?

A. All living.

Q. Do you make tests of them during the sum-

mer to find out what the condition is, and during the fall and winter?

A. We always in the spring or in the fall, we commence and we work all fall and winter, whenever we can get down the bay, and we generally stop somewheres about the first of July.

Q. When do you say it was that the sand commenced to come in there?

A. As soon as they commenced to make the fill.

Q. Up to that time had you taken any of these clams and these oysters off since they had been planted?

A. No.

Q. They had been left to grow?

A. Yes.

Q. What was done when that sand commenced to come there? What did you do? Anything?

A. We notified the people that they were doing damage there.

Mr. Hanstein: I ask that be stricken. It is a mere conclusion.

The Court: I will strike that out. He can tell what he did with respect to whom he did it.

Q. They want you to be more specific. You say you notified the people. What did you do? Whom did you notify?

A. We went to work and called a meeting at Mr. Scull's, and we got Mr. Scull to come and see you, I think.

Q. What was done with regard to the people who were doing the pumping?

A. They kept on pumping.

Q. Kept on pumping?

A. Kept on pumping.

Q. What was the effect of their pumping?

A. It was the sand and the washing that went over and killed the clams and oysters, buried them up.

Q. How deep were they buried under the sand?

A. Take the oysters on the new leased side, they are covered up so you can't find a shell, even, and the same way with the clams.

Q. How much sand does it take to kill an oyster?

A. Very little in the winter time.

Q. That isn't very much. How much must it be?

A. Take two inches of sand over the top of an oyster to kill it in the winter time. It will smother it to death.

Q. How much sand to kill a clam?

A. Well, I don't know how much it takes, but I know there is about a foot and a half sand there where we had the clams.

Q. How about the clams? Are there any clams on top of that sand?

A. No. The sand covered them up. Can't find them.

Q. Your land is how far distant from the bridge?

A. There is my corner there, and there is the sand at the corner where I had two foot and a half of water, and I can go around now with a low pair of shoes on without getting my feet wet.

The Court: He asked how far your land is from the bridge.

A. It ain't over two hundred feet, I think, from the bulkhead.

Q. Some of your land is further away than that?

A. Yes.

Q. Was all of your land covered?

A. It was all covered with either the sand or mud. On the western side there, the mud went across and got on the oysters and covered them up and smothered them in the winter. We went down after the oysters and when we went there the meat was running right out of them. We couldn't handle them. Wouldn't put them on the market, because they wasn't fit to eat.

Q. Did they pump mud as well as sand?

A. There is always more or less mud comes through a machine when they are pumping.

Q. Then they did?

A. Sure.

Q. How far up the river, if you know, did that sand drift? Not drift, but how far was it pumped?

A. Well, I should judge it went up there for a half mile, maybe three-quarters in that particular place.

Q. Did any of the representatives of the bridge company or any of the representatives of the Hill Dredging Company ever go out on the lots with you to examine there?

A. Not with me, no.

Q. Did they ever offer to?

A. No.

Q. Were there any oysters or clams left on your ground alive after they had pumped in there in the beginning of—well, whenever it was, 1927 or 1928, that you could market?

A. No.

Q. Did you ever market any of them?

A. Couldn't make wages out of it.

Q. I beg pardon?

A. Couldn't make wages taking them up.

Q. Were there any there at all? Was there anything there at all?

A. My partner and I went down and worked all day, and we got, if I remember right, about two hundred or three hundred clams, and a half bushel of oysters.

Q. And before the sand had covered them, how much would you make in a day? How much could you gather in a day?

A. Forty or fifty bushels.

Q. Fifty bushels?

Mr. Hanstein: So far as this witness' testimony purports to prove how many oysters or clams were on this land prior to the time of pumping, I move that his testimony be stricken out as not proving that fact.

The Court: The motion is overruled, and exception granted.

(Exception noted for defendants.)

Cross-examination.

By Mr. Hanstein:

Q. Now, you say that back in 1923 and 1924, you planted a thousand bushels of oysters?

A. I did.

Q. What were they, seedlings?

A. No, sir.

Q. What were they?

A. They were what are called cullentines.

Q. How old were they?

A. Two years old.

Q. They were two years old?

A. When I planted them.

Q. How long does it take cullentines to reach the point where they are fit for market?

A. Two to three years. Two years, sometimes. If they are fat you can handle them. If they are not, you have got to wait a year until they do get fat.

Q. So that the oysters that you planted in 1923 were ready for market in 1925 or 1926, weren't they?

A. Yes, but they were poor and I couldn't handle them.

Q. They were ready for market in 1925 or 1926?

A. They were ready if they had been fat, I told you. If they were fat I would have handled them.

Q. Were they ready for market, these particular oysters?

A. Yes, if they were fat, they would have been.

Q. Well, were they fat?

A. Not at that time, no.

Q. Isn't this good oystering ground?

A. Sure.

Q. How is it they didn't get fat, if that is the usual length of time it takes oysters?

A. They are not always fat every year, I don't care where you plant them.

Q. They don't grow as much every year as they do other years, do they?

A. No, once in a while there is an off year.

Q. And isn't it a fact that before any pumping started on this ground you removed those oysters and took them to market and sold them?

A. I did not.

Q. Do you know James Stevens?

A. I do.

Q. Didn't he work with you removing these oysters before any pumping was done?

A. Never in his life he ever worked for me.

Q. Did he work with you to remove any clams off of these beds?

A. He did not.

Q. You deny that he helped you take these oysters up and take them to market?

A. I absolutely do deny it.

Q. Where did you buy these oysters that you say you planted?

A. I caught them off of where I propagated them; raised them myself.

Q. So you didn't buy any?

A. No, sir.

Q. Where did you get the clams?

A. I bought them to Atlantic City, the Thorofare.

Q. You bought them here?

A. Yes, 33 bushel of them.

Q. Do you have the bill for them?

A. No, I haven't.

Q. Did you take these clams up before any pumping started?

A. I did not.

Q. You knew they were going to pump out there, didn't you?

A. Yes, I knew they were going to pump.

Q. Oysters don't double in size every year if conditions aren't right, do they?

A. They double every year if they do right, yes.

Q. What do you call do right?

A. If an oyster—a good-sized plant should make a prime in three years. It doubles itself every year until it gets to a prime.

Q. What are the things that happen to oysters that prevent them from growing?

A. Heavy rain.

Q. Heavy rain will prevent it?

A. Yes.

Q. What is the effect if the tides, new currents set up and dig under your oysters? What about that?

A. Never had that there for forty years.

Q. Well, it does happen, doesn't it?

A. Never there.

Q. Never knew anything to change that bottom?

A. Not there, no, sir.

Q. What do you know about drum-fish out in that bay?

A. Never had none to bother us there.

Q. What do drum-fish do to oysters?

Mr. Bourgeois: I object. It is not within the issue.

The Court: I will permit it. You are trying to prove that you planted a certain number of bushels of oysters and that they were there.

(Exception noted for plaintiffs.)

(Question repeated.)

A. Well, not on our particular piece, they never bothered us.

Q. Never knew of any drum-fish there?

A. Never bothered us in Creek Channel, no. Never seen no big lot there.

Q. When you are talking about Creek Channel, you are talking about the place where your lot number 156 is?

A. 156 and 157, yes.

Q. 157 or 155?

A. 155.

Q. 155 and 156. That is what you call Creek Channel?

A. Yes, sir.

Q. Ever have borers affect oysters?

A. No.

Q. Borers do affect oysters, don't they?

A. Never affected us there to any amount.

Q. Never mind that. They do affect oysters, don't they?

A. They say they do.

Q. Well, you have been in the oyster business long enough to know that they do, don't you?

A. They don't bother me.

Q. Well, I am asking you generally if they don't affect oysters?

Mr. Bourgeois: I object.

The Court: I will allow the question.

(Exception noted for plaintiffs.)

(Question repeated.)

A. I said they never did in Creek Channel on my planting.

Mr. Hanstein: I ask that the witness be directed to answer the question.

The Court: If you know whether they do affect oysters generally, not your particular oysters, you may answer.

A. I have heard some of them say they do. That is all.

The Court: That is all you know?

A. Yes.

Q. Sometimes a shift in a bar caused by the tides will affect oysters, won't it?

A. If the bar ever shifts.

Q. Well, bars do shift, don't they?

A. Not there.

Q. I understand that, but you have known them to shift other places, haven't you?

A. Down around the beaches I have, yes.

Q. When they do it affects the currents, doesn't it?

A. Down around the beaches, yes.

Q. Nothing ever affects the oysters here, does it?

A. Not with us, that is, in the way of bar shifting and things of that kind.

Q. What are the things that do affect oysters up where you planted?

A. Well, we have never had not much trouble up in there, but a very little.

Q. Do your oysters grow the same every year?

A. No, not every year.

Q. What is it that causes them to grow less some years than other years?

A. I told you because we have rains, right heavy rains, starting somewhere about this time of year and then you wouldn't have the growth.

Q. What else affects them?

A. Nothing.

Q. That is the only thing?

A. It just stops the growth.

Q. I say that is the only thing?

A. That stops the growth, yes.

Q. Did you ever know anything to kill oysters there outside of the Hill Dredging Company and the Bridge Company?

A. A certain amount, but no big lot.

Q. So you do know of some oysters dying up there?

A. Very few.

Q. What has killed them?

A. Well, weather conditions, or something of that kind. I don't know just what.

Q. Some shifting of the bottom would kill them, wouldn't it?

A. We never had any shifting of the bottom.

Q. It would kill them if it did shift, wouldn't it?

A. It would if it did, yes.

Q. There was no sand pumped by the Hill Dredging Company on your land, was there?

A. Came close to it.

Q. Is there any way that you know of that a person can tell how many oysters are in a given area under water without taking them up and counting them?

A. Without taking them up and counting them? You can tell by the bushel what you plant there.

Q. If they don't all grow you can't tell, can you?

A. Certainly you can tell what you have got left.

Q. You can tell by what?

A. What you have left on the ground when you take them up.

Q. When you take them up?

A. Yes.

Q. So that the best way to tell how many oysters you have or clams is by taking them up, isn't it?

A. No. If you know how many clams you planted, you know how many you have there, if nobody don't take them or kill them.

Q. Did people ever take your clams there?

A. They all claim they are honest there. I don't know.

Q. So nobody has ever taken any of your clams?

A. Not to my knowledge, no.

Q. None of your clams ever died?
A. Not until they went to pumping on them.
Q. You never knew any clams to die out there?
A. No, sir, never had none to die until they went to pumping on them.
Q. Did you ever know of any oysters to die out there?
A. Very few.
Q. Some do, don't they?
A. Very few.
Q. I say some do, don't they?
A. I say very few.
Q. Do you mean by that that some do?
A. Maybe one bushel out of a hundred.
Q. If the tide brings mud down over oysters, you say it kills them?
A. I didn't say mud. I said somebody pumping on them.
Q. Well, if the tide brings mud down over oysters, it kills them, doesn't it?
A. No, not there.
Q. Mud doesn't kill your oysters?
A. Not unless it stays on them from being pumped in or something of that kind. I have never had none killed there.
Q. If the tide brings the mud and settles it over your oysters, does it kill them or doesn't it?
A. If it did, it would, yes.
Q. Clams can live even though they are under mud, can't they?
A. A certain distance.
Q. You know of clams that have lived under mud bottom, don't you?
A. To a certain extent.
Q. So that the mere fact that there is mud on top of clams doesn't mean that it kills them, does it?
A. If you get too much there.

Q. How far can clams go down before they are killed?

A. I said three or four inches.

Q. Not further than that?

A. I wouldn't want them any deeper than that.

Q. I didn't ask you that. How deep have you dug and found clams living?

A. Not over three inches.

Q. Never over three inches?

A. No, sir. Three or four.

Q. What is that?

A. Maybe four in a shell bed.

Q. You never dug deeper than that and found a live clam?

A. I never dug no deeper than four inches, I don't think, in my life.

Q. You have never gone out to your bed and taken up these oysters around the time of this dredging operation to find out how many oysters were there, have you?

A. I went down there and tried, yes.

Q. Did you ever take them up?

A. No.

Q. That is the answer. In order for you to market clams, you would either have to go yourself and work to get them up and transport them to market or employ some one to do it, wouldn't you?

A. Sure.

Q. How close did you say your land is to this fill?

A. From where the fill stops?

Q. Yes.

A. Well, it may be two hundred feet or something like that from the bulkhead, but the sand has run off the bulkhead and come up to my corner, and it is filled in. Where I had two foot and a half of water it is all dry now.

Q. Part of your land was already in eel-grass, wasn't it?

A. No, sir.

Q. Isn't there eel-grass on the northerly side of your land?

A. On the northerly side and on the southwesterly side, both. Northeast and southwest.

Q. There is eel-grass there?

A. Not on the ground.

Q. What do you mean, not on the ground?

A. Not on the channel part. Out on the bar on each side there is grass.

Q. Do you mean to say there is no eel-grass on your land at all?

A. There was not, no, sir.

Q. Is there now?

A. No.

Q. None now?

A. Not to my knowledge.

Q. You say your land is two hundred feet away from this fill?

A. No, not from where the—from the bulkhead, I said.

Q. Isn't it a fact that your land extends seventeen or eighteen hundred feet away from there?

A. No, sir, it doesn't. The upper end may. I don't know.

Q. You had clams all over it, didn't you?

A. I had clams all over it and oysters all over it.

Q. You say that there was just as many clams up seventeen hundred feet away as two hundred feet away?

A. No, the biggest part of them laid down next to the bridge.

Q. You had the biggest part of them at the point near the bridge; is that it?

A. On Theodore Smith and I, yes.

Q. I am not talking about Theodore Smith. I am talking about yourself. Did you have the most of your clams on the land nearest the bridge?

A. Sure I did.

Q. What part did you have on your lot 155 and what part did you have on your lot 156?

A. It was all on—went right across on the line between the two.

Q. What is that?

A. I planted them on the line between the two properties.

Q. Between what two properties?

A. Fifty-five and the other lot, the two lots.

Q. You planted them on the line?

A. Yes, so as to be on the two properties. Took a space and just put them here was the space was. Not in a heap.

Q. So you didn't plant any clams down at the corner of your lot that was nearest to the bridge, did you?

A. That is Theodore Smith's. That is where he planted his, over in there.

Q. You had a corner of your lot that is closer to the bridge ——

A. No, Theodore Smith is nearest. When I spoke, I was speaking about—we planted together there, and I always call that my corner, but I am the second one up. Take my lot, it is about—maybe it is three hundred or four hundred feet to the bridge.

Q. You think the corner of your lot is three or four hundred feet from the bridge?

A. That is, my own lot.

Q. What is that?

A. My own piece. You see, I was thinking about the partnership, what we both had together.

Q. Where you did your planting was on the di-

viding line between your two leases; that is right, isn't it?

A. Yes.

Q. And that is a couple of hundred feet further away yet, isn't it?

A. All right, yes.

Q. That is right, isn't it?

A. Somewheres thereabouts.

Q. So that you were five hundred feet away from the bridge with the line where you planted?

A. No, I wouldn't say it was that far. I could tell by looking at the map. I had it measured, but I can't remember what the measurement was.

Q. And you didn't know of any eel-grass on the edge of your lot before this?

A. There was none on it.

Q. And you don't know whether there is any there now?

A. There wasn't any down there the first of May or the first of June.

Q. The first of this June there was no eel-grass there? It takes quite a while for that to grow, doesn't it?

A. I don't know; I never seen any there.

Q. Do you know how long it takes eel-grass to grow?

A. No.

Q. You don't know that?

A. No.

Re-direct examination.

By Mr. Bourgeois:

Q. You say that you have been oystering there for forty years?

A. Forty-three.

Q. Before the Hill Dredging Company began pumping for that bridge, did the tides of Great Egg Harbor River ever move the mud up and cover up the oysters on your ground?

A. No, never.

Q. Was there any difference in the flow of the tide the year before the Hill Dredging Company went there and before that, or was it always the same?

A. Always the same.

Q. You have told us that those clams were worth from six to ten dollars a thousand. How much would it cost to harvest them? How much would it cost to gather them and bring them in to the market, a thousand?

A. We would just tong them up ourselves and run them in our machine. We never hired it done.

Q. I am trying to find out how much profit there would be in it. There would be some profit to you, aside from your labor. Take the $6-a-thousand clams. You gather them and sell them for $6. How much is there in that, exclusive of your labor?

A. Exclusive of my labor?

Q. Yes.

A. Well, where you buy them that way there is close to five dollars on a thousand profit.

Q. In other words, a dollar a thousand would cover the cost of gathering them and bring them into Atlantic City?

A. Yes.

Q. And those oysters where you say the market price was $1.50 a bushel, what would be the cost of gathering the oysters and bringing them into Atlantic City?

A. We used to hire men to take them up for 25 cents a bushel.

Q. Who is this man, James Stevens?

A. He lives in Somers Point.

Q. What does he do?

A. I don't know what he does nowadays. He used to oyster with his father when he was a little bit of a boy.

Q. How long ago is that?

A. Several years ago. I can't just say. Twenty-five; maybe thirty. Maybe longer than that.

Q. Before the Hill Dredging Company commenced pumping, was there any sand bottom down there in that river?

A. Not in our grounds, no.

Q. How far away was the sand bottom from your ground?

A. That is quite a distance. The bar is all mud bottom there except where the Horse Shoe is. There was a strip of sand on the Horse Shoe.

Q. How far away was that?

A. That was maybe three hundred feet from the oyster ground?

Q. Had that ever drifted at all?

A. Never had. That has never filled on the ground.

Q. Where was that with relation to the filling in that the Hill Dredging Company did?

A. How is that?

Q. Where was that with relation to the filling in that the Hill Dredging Company did?

A. The Horse Shoe?

Q. Yes.

A. Just the same as it was before. It is just a little bit higher now than it was before.

Q. Is that higher than it was before?

A. Yes.

Q. The sand that was there previously has increased now since they pumped in?

A. A little higher. Maybe three inches higher. Maybe four inches higher.

Q. It is still there, and there is more added to it?

A. Yes.

Re-cross examination.

By Mr. Hanstein:

Q. Isn't there some limit as to the quantity of oysters and clams you can safely plant on an acre?

A. Some limit in the safety of clams? You can plant any amount you want from five hundred to a thousand bushel or two thousand bushels to the acre. That is up to you, but I wouldn't plant over ——

Q. What effect does it have if you plant more as against planting less? Do they grow as well?

A. Oh, no.

Q. So that if you plant them too thick, they don't grow very well; is that it?

A. Don't grow as well, and that is where you make a lossage, if you plant them too thick.

Q. If you scatter them out more, they grow better?

A. Yes, sir.

Q. How many bushels per acre would you think would be safe for planting for proper growth?

A. We usually plant from four to five hundred.

Q. You would plant from four to five hundred bushels per acre?

A. Yes, that is what we generally plant.

Q. You think if you get thicker than that it crowds them and they don't grow so well?

A. That is the reason we try to plant them that way.

Q. Do they die if you plant them too thick?

A. They would if you got them entirely too thick, got them in piles.

Q. I suppose in planting these seedlings which you say are going to double every year, you have got to take that into consideration, that they are going to grow, and spread them further out, don't you?

A. Give them a chance to grow, yes, sir.

By the Court:

Q. What do you have to pay a bushel for the seed clams?

A. Five dollars.

Q. What for the oysters?

A. Then about 75 to 80 cents a bushel. It has been some years now. I sold them last spring—I had nowheres to plant them. I sold them last spring, took them up to Oceanville last spring a year and got $1.25 a bushel for plants delivered there.

By Mr. Hanstein:

Q. One thing I want to get straight from you, Mr. Smith. You say that if these oysters do right, they double in size each year?

A. Sure.

Q. That is, one bushel—is it your theory that one bushel, if it does right, becomes two bushels the next year and four bushels the next year?

A. No, they don't double that way.

Q. They don't double that way?

A. No. If this year I have got two bushel, next year we will have four, and then if it does right and none don't die, then we have eight, and then we figure a certain amount of lossage, and that is the rea-

son we claim they will grow better from the time they are planted until they are growed. We figure on the losses, so we just double on the amount we plant.

Q. That is, from the amount ——

A. If we plant one bushel we figure on getting up two, and that takes care of all these little elements you have been talking about.

Q. So that this statement about their doubling in size every year isn't quite right?

A. It applies to the ones that live, yes.

Q. What is that?

A. It applies to the oysters that live.

Q. So if you plant a bushel of oysters, you leave them down how many years?

A. Three or four years.

Q. Three or four years, and then at the end of that time, you take up two bushels of oysters?

A. Take up two bushels of oysters. We figure on their lossage outside of that. If they did right we would have eight times as many, but we figure on the lossage always.

By the Court:

Q. Has that been your experience after forty years' planting?

A. Yes, sir. I have done better than that, but on an average that is the way I figure.

By Mr. Hanstein:

Q. Is that true of the clams, too?

A. No, clams don't die like an oyster.

By the Court:

Q. What ratio of living clams do you find after planting a bushel and reaching the harvest time?

A. We take clams on an average, if we put out, say, ten thousand clams, we figure on ten out of a hundred or one hundred out of a thousand is gone.

Q. One hundred out of every thousand?

A. That is the way we figure them.

By Mr. Hanstein:

Q. That die?

A. The loss, yes.

By Mr. Bourgeois:

Q. Did I understand you to just say that clams only double in size in three years?

A. Clams? No. They more than double in size in three years.

Q. I understand you to say that they grow to be little-necks in three years.

A. Little-necks from the time we plant them in three years. Of course, they will make them in some bottoms in less time, but up there with us it takes about three years from a small clam to a little-neck, and the next two years to be a prime clam. Slower growth there with us.

EDMUND SMITH, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Smith, you live in Atlantic City or Brigantine?

A. Brigantine.

Q. And you have some connection with the Shell Fisheries Board?

A. I am Chief of the Board of Shell Fisheries of the District.

Q. Do you have a map showing the various leases to lands in Great Egg Harbor River?

A. Yes.

Q. Have you it with you?

A. Yes.

Q. Will you produce it, please?

A. (The witness produced a map).

Mr. Bourgeois: I am wondering if we can save some time by having Mr. Hanstein and Mr. Bell examine this map.

(A recess was taken for ten minutes).

The Court: As I understand it, counsel stipulate that the lands described in the complaints are the lands leased by the State of New Jersey to the plaintiffs named in the complaints, with the exception of the complaints of Lloyd, Thomas and Somers.

Mr. Bourgeois: I offer in evidence what is already offered, the lease of John H. Smith. Also of Eugene Tallman.

(The last mentioned paper was marked Exhibit P2.)

Mr. Bourgeois: I offer in evidence the lease of Martin V. B. Scull.

(The paper was marked Exhibit P3.)

Mr. Bourgeois: Theodore Smith.

(The paper was marked Exhibit P4.)

Mr. Bourgeois: And Smith Hickman.

(The paper was marked Exhibit P5.)

(No cross-examination).

JESSE THOMAS, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Thomas, you are a resident of Atlantic County?

A. Yes, sir.

Q. What is your vocation? What do you do for a living?

A. Oyster grower.

Q. Do you have some position over there with the Shell Fishery?

A. Yes, sir.

Q. What is that?

A. Oyster watchman.

Q. Are you familiar with the oyster lands of the different oyster men over there?

A. Yes, sir.

Q. And of your own, also?

A. Yes, sir.

Q. Mr. Thomas, I have in my hand a lease made from the State to you for lot 157, Section F, for six acres, and lot 169, Section F, for four acres, making ten acres in all.

A. Yes, sir.

Q. Can you point out on the map where your ten acres were?

(Witness indicated on the map).

Q. That is marked just 157?

A. Yes, sir.

Q. Which calls for only six acres, and 169 for four. How is it they are both in one?

A. I bought this piece first up here. I bought that first, and about two year later I bought the other piece and made it ten acres.

Q. And they just put it in one lease?

A. Yes, now.

Q. Or one map?

A. Yes. It used to be in two.

Q. Who adjoins you on the north? What oyster men on the north have lots there, if you know?

A. I know them all.

Q. Whose land adjoins you on the north?

A. This is Smith Hickman. This used to be Japh Barrett.

Q. Who is on the northeast?

A. Over here?

Q. Yes.

A. This is John Henry.
Q. John Henry Smith?
A. John H. Smith.
Q. Who is this?
A. Martin Scull.
Q. Whose land lies southeast of yours?
A. This is Theodore Smith.
Q. You have another piece of land for 3.80 acres. Where is that?

(The witness indicated on the map).

Q. Who is on the north from you, northwest?

Mr. Hanstein: What do you call that, 172?

Mr. Bourgeois: This is 166 on the map, but I want to show that that is what is marked 172.

Q. Whose land adjoins yours on the northwest?
A. Oscar Somers.
Q. Whose adjoins you on the southeast?
A. This piece here?
Q. Yes, this piece right here.
A. Martin Scull.
Q. And whose adjoins you on the southwest? That is over on this side.
A. Smith Hickman.
Q. How long have you been in possession of that piece of land, oystering on it?
A. This one here?
Q. No. The 3.80 acres.
A. You have got me. Somewhere around five years.
Q. Now, Mr. Thomas, that is marked on the map as being lot 166.

A. Yes.

Q. In this lease they have marked it 172. Do you know why that was?

A. No, I don't know.

Mr. Hanstein: I object to that.

The Court: He says he does not know.

Q. Have you ever leased any other lot up there of 3.80 acres except the one you pointed out to me on the map?

A. No, sir.

Q. That is the only one?

A. The only one.

By the Court:

Q. And you pay a dollar a year to the State for that?

A. Two dollars.

Q. And have for the last approximately five years?

A. I have had that piece five years, that little piece, maybe longer.

By Mr. Bourgeois:

Q. You said to Judge Sooy you paid two dollars rent. What is that, for the three acres or each acre?

A. Each acre, two dollars an acre.

Mr. Bourgeois: I offer the Thomas lease in evidence.

(Paper marked Exhibit P6.)

(No cross-examination).

WALTER LLOYD, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Lloyd, I want to find out from you where your oyster land is. I am not going to ask any preliminaries. Can you tell the jury where your land is on that map?

A. In that corner there, and there. That corner there, going to there.

Q. Right under the bridge?

A. Yes. Right from that line there, over there, down there, down here, across there.

Q. How long have you been in possession of that?

A. I am not sure, but I think it was 1916.

Q. When?

A. 1916, I leased it the first year. 1916 or 1917, but I think it was 1916.

Q. Have you been in possession of it ever since?

A. Yes, sir.

Q. Do you have a lease for it now since the bridge went across?

A. I have a lease for it up to the first day of this year.

Q. I have this description, and I want you to tell me if it is right: "Beginning"—I guess you can't tell me. It begins at the corner of Theodore Smith's land. Is that right?

A. No.

Q. Where does it begin?

A. Eugene Tallman.

Q. All right, it begins at Eugene Tallman's land, but the way I have got it, it begins at his land here.

Just wait and see if we can't get along better here. That is a corner of your land there?

A. Yes.

Q. That is a corner also of Theodore Smith's land?

A. Right.

Q. Then from that corner you go what, in a southeastwardly direction?

A. Yes, sir.

Q. I have here 670 feet. Is that correct or not correct?

A. About correct.

Q. To whose corner does that go?

A. That is mine.

Q. Then you go northwesterly 280 feet, is that right, along Theodore Smith's land?

A. Right.

Q. Then, third, southeastwardly along Tallman's land 360 feet. Is that right?

A. Right.

Q. Then northeasterly 850 feet to a corner along Tallman's land. Is that right?

A. Right.

Q. Then, sixth, southwesterly in a straight line to the place of beginning. That is the first one. That comes across there. Is that right?

A. Right.

Q. How long did you say you had been in possession of that land?

A. Either leased it in 1916 or 1917, I am not sure which. 1916, I think.

Q. This says you have 152, Section F. Where is that? That is the one you gave me for ten acres. That is your tract?

A. Yes.

Q. It also says you have 163 for 1.15 acres; where is that?

A. I am not familiar, but it must be this piece there.

Q. Then it says you have 168 or 1.35 acres; where is that?

A. It must be the piece over there.

Mr. Bourgeois: It is in the amended complaint, both of them.

Mr. Hanstein: You had him identify three up there, and you only describe two.

Mr. Bourgeois: In the complaint are all of them, I am quite sure. After the first description in the amended complaint, also lot 163 in Section F, containing 1.15 acres, and also lot 168 in Section F, containing 1.35 acres. I ask this lease be marked in evidence.

(The paper was marked Exhibit C7.)

(No cross-examination).

Oscar Somers, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Somers, you live in Atlantic County?

A. Yes, sir.

Q. Over around Scullville somewhere?

A. Yes, sir.

Q. And you are an oyster man?

A. Oyster man.

Q. Do you lease lands off the State for oyster purposes and clam purposes?

A. Yes, sir.

Q. How long have you been leasing them?

A. Around about 1926.

Q. From that time on?

A. Yes.

Q. How many acres?

A. Two acres.

Q. Where are your lands, can you tell me on that map? Who adjoins you on the south?

A. Jesse Thomas.

Q. Thomas' land is there?

A. Yes.

Q. Is that your land up there?

A. Yes.

Q. Have you planted on that?

A. Yes, sir.

Q. Who adjoins you on the southwest?

A. Nobody on the southwest.

Q. Well, I call this the southwest there. Who has that land, do you know?

A. The only one that adjoins me is Jesse Thomas.

Q. But you do know he adjoins you on the south?

A. Yes. I am the last one up.

Q. Well, Mr. Somers, they have marked it here lot 162, Section F, and this on the mark is marked 161, but that is the lot, is it?

A. That is the lot.

Mr. Bourgeois: That is described as follows: "Beginning in the northeasterly corner of Jesse Thomas's ground; thence (1) southwesterly along his ground 520 feet to a corner in the line of Smith Hickman; thence northwesterly along Smith Hick-

man's ground 300 feet; thence in a straight line in a northerly direction 370 feet; thence (4) in a straight line in a southerly direction 470 feet, to the place of beginning."

That describes this piece of land here and he says that is the piece of land he has been oystering on or had in his possession the last five years.

The Court: And I presume, like the others, paid $2 an acre to the State all that time. Is that right?

The Witness: Yes.

Cross-examination.

By Mr. Hanstein:

Q. Your lease calls for lot 162, which is shown on the map as being the isolated lot to which I now point. Is that correct?

A. This here.

Q. This lot on this map to which I direct your attention is 162, isn't it?

A. 162, yes.

Q. Isn't that what your lease calls for?

A. Yes, lot 162.

Q. And the lot you say you occupy is lot 161?

A. That is where I have got the ground points.

Q. What was it you said?

A. There is where the ground points in the ground.

Mr. Bourgeois: That is 161?

A. Yes.

Q. You don't occupy 162, do you?

A. No; 161.

The Court: And 161 is the lot described in the complaint?

Mr. Bourgeois: 161 is the lot described in the complaint. I think I had the leases for 1927, from which I drew these complaints.

The Court: But the descriptions cover the land?

Mr. Bourgeois: Cover the land he is in possession of. I will offer the lease.

(The paper was marked Exhibit P8.)

WALTER LLOYD, recalled.

Direct examination.

By Mr. Bourgeois:

Q. You live where?
A. Scullville.
Q. How long have you lived there?
A. About sixty years.
Q. What is your vocation? What do you do?
A. Bay man now.
Q. How long have you been a bay man?
A. Since 1916.
Q. 1916?
A. Yes.
Q. In what line?
A. Oystering and clamming.
Q. Where have you had your oysters? What did

you do, plant for yourself, work for yourself or for somebody else?

A. Planted for myself.

Q. Where was your ground?

A. Several different places.

Q. In the neighborhood of where the Automobile Bridge now is?

A. Some of it was exactly where the bridge is.

Q. And you had that ground in 1927 and 1928?

A. Yes, sir.

Q. How long had you worked the same ground before 1928?

A. From 1916. Either 1916 or 1917, I am not sure which.

Q. What did you have growing, if anything, on that ground?

A. Oysters and clams.

Q. Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?

A. It is a rather hard question to answer, but I had taken up the majority of my oysters, but I should say a fair estimate I probably had a thousand bushel.

Q. Of oysters?

A. Yes.

Q. How large were they?

A. I said I probably had a thousand bushel.

Mr. Hanstein: I ask that that be stricken. I make my motion to strike this on the ground it is purely an estimate, it is purely a speculation and it is encumbent upon them to make proof, and it does not constitute proof.

The Court: I will strike the answer as not being

responsive to the question. The answer should be yes or no.

(Exception noted for plaintiffs).

(Former question repeated as follows: "Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?")

A. Yes.

Q. How many?

A. About a thousand bushel, I should say, to the best of my ability.

Mr. Hanstein: I ask that be stricken as not being proper proof.

The Court: No. That was a competent question, there was no objection made, and the answer will not be stricken.

Q. Of what size were those oysters?

A. Marketable.

Q. What do you mean by marketable?

A. Culls and primes.

Q. What proportion would be prime and what proportion would be culls?

A. About one-fourth primes.

Q. What did you do with them, with the oysters that you had there?

A. Sold them on the market.

Q. Where?

A. Part of them right at my own retail stand, and part of them wholesale.

Q. Those that you sold at wholesale, where did you sell them?

A. The most of them I sold to David Smith down here—he has a market down here in Ventnor. I can't think of the name of the street.

Q. What was the wholesale price of the culls at that time, that is, the beginning of 1928?

A. We usually sold them all at the same price, that is, culls and primes mixed. They averaged about a dollar and a half.

Q. What would be the cost of gathering and marketing oysters per bushel?

A. Well, I sold them as I delivered them on the land.

Q. I know, but it would cost you something to gather them and deliver them to him?

A. Yes. Probably fifteen cents a bushel was my actual cost.

Q. What price did you get for the oysters that you sold at your own market?

A. $2 a bushel.

Q. Would it cost you any more to gather them and take them to your market or home than it cost for the others?

A. No, sir.

Q. Now, Mr. Lloyd, did you have anything else on that land excepting the oysters?

A. Clams.

Q. How many clams did you have on there?

A. I planted forty bushels.

Mr. Hanstein: I ask that be stricken.

The Court: Yes, that is not a responsive answer.

Q. If you planted forty bushels, what became of them? I mean did they go down on your ground?

The Court: The record now does not show that he planted forty bushels.

Mr. Bourgeois: I want to know what became of the clams. There seems so little difference between how many he planted and how many he had on there, because as soon as he dumped them overboard, he had them there.

Q. How do you plant clams?

A. I planted mine with a shovel.

Q. How do you plant them with a shovel?

A. You have them down in the boat and you shovel up a few on the shovel and scatter them around on the bottom, scatter them around in the water.

Q. And let them go to the bottom on your land?

A. Scatter them.

Q. How many of them did you do that to? How many bushels did you throw in the water in the manner you have mentioned?

A. Forty.

Q. How large clams were they?

A. Anywhere from the size of your little fingernail up to the size of your thumbnail.

Q. How many of those clams would be in a bushel?

A. Average about twelve thousand.

Q. How long after you plant those clams is it before you can market them?

A. What size do you want them?

Q. You begin to market them as soon as you can sell them, I expect?

A. No, I do not.

Q. How long does it take them to grow to littleneck size?

A. Three to four years.

Q. How long before they come to the cherry stone?

A. A couple of years more.

Q. When did you plant these forty bushels of clams?

A. Some time in September, 1924.

Q. Then in 1928 they would have been—if you had gathered them, they would have been four years old and they would have been what size?

A. Little-necks.

Q. And how much would they have been worth a thousand?

A. All depends on how I sold them and where I sold them.

Q. I beg pardon?

A. It would depend on where I sold them.

Q. Did you ever sell them in the market in Atlantic City?

A. I have. No, I never sold them in Atlantic City.

Q. Where have you sold them?

A. I have sold them at Somers Point. I have also sold them at my own retail stand.

Q. When you sold them in Somers Point, were they sold wholesale or retail?

A. Wholesale.

Q. What did you get for them in the fall of 1927 or the winter of 1928 at Somers Point, wholesale?

A. Either five or six dollars a thousand. Sometimes it was five and sometimes it was six, but I couldn't exactly say just which.

Q. What did you get for them when you sold them at your own place?

A. A cent apiece.

Q. That was rather more?

A. Yes.

Q. Now, Mr. Lloyd, did you sell any of the clams off of your ground in the winter of 1927 and 1928, spring of 1928?

A. Yes, I sold two thousand.

Q. Two what?

A. Two thousand.

Q. Two thousand?

A. Of those little clams that I planted.

Q. And when was that?

A. It was in the fall of 1927. No, it was in the fall of 1928.

Q. 1928 or 1927?

A. No; 1928.

Q. In the fall of 1928?

A. Yes.

Q. Why did you sell only two thousand?

A. Well, I understood they were going to pump into that bridge, and my understanding was that they was going to pump from Jimmy's Island to the Horse Shoe, in other words, fill the Creek Channel up and bulkhead it. If they did, everything I planted there would be gone, so I says, "I will tong up some." I went there and tonged one hour. I took them down to Somers Point and sold them to Mr. Sharp, two thousand, and he says, "Have you got any more?"

Mr. Hanstein: Don't tell what he said.

Q. You tonged an hour?

A. I worked one hour.

Q. And got how many?

A. Two thousand.

Q. Then what happened to them?

A. I left them there, and, of course, they did the pumping afterwards.

Q. How soon afterwards did they do the pumping?

A. I think they commenced the next spring, I think. I am not sure about that. No, they didn't. They commenced pumping in September.

Q. In September?

A. Yes. They pumped a while, then they took the machine away, quit pumping and went to Mays Landing, and then came back the following summer and finished up. That is my recollection of it.

Q. What was the effect on your oyster and clam ground?

A. Well, it covered it up more or less. Some of it —I don't know. They must have pumped out a couple of acres, probably six or eight or ten feet above high water, part of it probably ten feet or so, but the map will show you exactly where the bulkhead is on my ground, and then they pumped up after that in back there to hold the bulkhead, and then it runs off gradually to nothing at least a hundred feet from the bulkhead.

Q. Was any of your land left so you could raise oysters or clams on it after the pumping had been finished?

Mr. Hanstein: I object to that because I do not see how that is a proper measure of damage.

The Court: No, I don't think so.

Q. Was there any of your land that was unaffected by the pumping of the Hill Dredging Company for the bridge?

A. You asked me if there was any that was not affected?

Q. Yes.

A. I don't think so. If there is, I don't know where it is.

Q. How was it affected?

A. Well, there was more or less mud settled, mud and sand together settled all over it.

Q. To what depth did it settle over it?

A. Well, I couldn't say exactly. On the eastern side it is five times as much as it is on the western side.

Q. That is, on the eastern side of the bridge?

A. No, on the eastern side of my ground.

Q. How much is there on the easterly side?

A. Oh, anywhere from two feet to twelve or fourteen feet.

Q. And how much on the westerly side?

A. Oh, it isn't so much over there. Might be two or three or four inches.

Q. That is that little triangular piece, as I understand it, lying on the southeasterly side of the bridge, is it?

A. It comes down here above the high-water mark. Over this way.

Q. I am not sure that I had got the right side from the bridge. On which side of the bridge was the pumping in the heaviest, on the southeasterly side or the northwesterly side?

A. Practically the same.

Q. And how much was the depth of that fill?

A. Here at the bridge?

Q. Yes.

A. Oh, I would say five or six feet above high-water.

Q. And then as it went out ——

A. This bulkhead when they put it there, it was pumped in there for that bulkhead, which is probably six or eight feet high there, and runs off to nothing, probably to three or four inches. It may run off a hundred feet and may run further.

Q. After the filling had been done, did you attempt to gather any clams or oysters on that ground?

A. Yes, sir.

Q. What did you find?

A. I found nothing of the small ones left there.
Q. Not any?
A. Of the small clams that I found, not any.
Q. Did you find any large ones?
A. Once in a while one.
Q. Healthy, so you would go and gather them up to sell?
A. No, sir.
Q. What about the oysters?
A. I think I am safe in saying you can't catch a bushel there in a day anywhere on my ground today. If there is a place you can catch any more than that, I don't know where it is.
Q. Before they commenced to pump this sand, did you go and see any of the Hill Dredging Company people or any of the bridge people about it?
A. Not personally.
Q. Did they come to see you about it?
A. No, sir.
Q. Did they make any effort—what did they do to protect your land when they started in to fill under the bridge? What, if anything, did they do?

Mr. Hanstein: I object to that. I do not see how that is material, competent or relevant. It is not part of their complaint.

The Court: They say they negligently pumped, as I understand the complaint, and I presume if that is true, if I am right about that, that they have a right to show how they did it.

Mr. Hanstein: That was not the question.

The Court: The question was what did they do to protect, and that, I think, is simply calling for a

conclusion on the part of this witness and not the proper mode of attempting to prove negligence.

Q. What, if anything, was done by the Hill Dredging Company or the bridge company to retain the sand within the limits of the bridge?

A. Not anything.

Q. Mr. Hanstein: I object to that. I do not know that there was any particular burden on them to retain the sand in any particular way. I think they can show what we did.

The Court: I think they are by this question attempting to show what you did, and under that theory I will permit it.

(Exception noted for defendants.)

Q. Will you tell the jury just how this pumping was done? How many pumps did they have there?

A. It strikes me they had one part of the time and two part of the time.

Q. How large was the pipe they used through which they pumped the sand?

A. Not exactly, no.

Q. You don't know?

A. Not exactly.

Q. Did they pump anything else in there excepting the sand?

Mr. Hanstein: I object to that because the only thing they charge us with is that we pumped sand. I do not think they ought to prove that we pumped dynamite or something else.

The Court: The only allegation in the complaint

is sand, in both the fourth and fifth paragraphs, as I understand it.

Q. How long did this pumping continue?
A. I can't answer that question.
Q. Well, can you give me any idea at all?
A. Well, I wouldn't like to put that in.
Q. Mr. Lloyd, when you said there was a thousand bushels of oysters there, did you mean there were a thousand bushels as they then were?
A. Yes.

Cross-examination.

By Mr. Hanstein:

Q. Mr. Lloyd, as I understand you, there was pumped on to your leased ground sand over at this end. Isn't that so? They filled it up over high-water mark, did they?
A. Right.
Q. And up to the point I indicate on this map, that was solid fill, was it not?
A. Yes.
Q. And from this point on across over to Beesley's Point, it is purely a bridge, isn't it?
A. Yes.
Q. And that bridge is up on piling, isn't it?
A. Yes.
Q. Do you call this the easterly end of your land?
A. Yes, sir.
Q. The easterly end of your land was filled up over high-water mark, wasn't it?
A. Right.
Q. There was no filling placed out on this part of your tract 152, was there?

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A. Not above water.

Q. The Hill Dredging Company pumping stopped right here, didn't it?

A. Where the pipe stopped.

Q. You claim this piece down here that I am now pointing to?

A. Yes, sir.

Q. None of the fill went on that, did it?

A. Yes.

Q. Isn't this area out here the—there is a drawbridge further on in this bridge, isn't there?

A. Yes.

Q. And the boats use that going in and out, don't they?

A. Yes.

Q. And that is the full channel there, isn't it?

A. That is what we call the main channel.

Q. That is the main channel that the boats use? Isn't that so?

A. Yes, sir.

Q. And the tide flows in and back and forth there, doesn't it?

A. Sure.

Q. You say you found out that there was going to be a bridge built there; is that right?

A. Right.

Q. And you went out there and gathered up your clams, didn't you?

A. Two thousand.

Q. Did you gather up any oysters?

A. Don't catch oysters in the summer-time.

Q. Well, you gathered up some clams?

A. Yes, sir.

Q. Why didn't you gather up all of your clams?

A. Simply because I was going to lose too much money by doing it.

Q. You wouldn't lose any more money by taking them up than by leaving them lay, would you?

A. I would unless somebody paid for destroying them.

Q. So that you stood by, knowing that there was going to be a bridge, and thinking it important to take up two thousand of them, but you didn't take up the rest of them; is that it?

A. I stopped when I got that many up.

Q. And you got them up in an hour, didn't you say?

A. I worked one hour.

Q. And you got up two thousand in one hour?

A. Yes, sir.

Q. Brought them to Atlantic City and sold them?

A. No, sir.

Q. Where did you sell them?

A. Mr. Sharp at Somers Point.

Q. You sold them to Mr. Sharp at Somers Point, and you didn't bother to get any more of them up?

A. No, sir.

Q. You told Mr. Bourgeois it is a pretty hard question to answer as to how many oysters you have on your ground, didn't you?

A. I think I did.

Q. The only certain way of telling how many oysters you have is by digging them up, isn't it?

A. That is the most sure way.

Q. Any other way is a guess; isn't that true?

A. More or less.

Q. How much did you get for those two thousand clams?

A. Ten dollars.

Q. That is, for the whole two thousand?

A. Yes, sir.

Q. That is the regular price, isn't it?

A. Usually the wholesale price, from five to six dollars a thousand.

Q. And you say that you sold oysters for a dollar and a half a bushel at the wholesale market?

A. Right.

Q. And you get two dollars a bushel for them at your stand?

A. Right.

Q. It costs you more to sell those oysters at your stand than it does to gather them up and take them into the wholesale market, doesn't it?

A. No, sir.

Q. Well, you have to dig them up just the same way, don't you?

A. Yes, sir, just exactly.

Q. Instead of hauling them to the market, you haul them to your stand, don't you?

A. No. You have got the wrong idea.

Q. Then you straighten me out.

A. When I come in when I go oystering and come into the landing, if I am going to sell wholesale I set them out on the meadow, put a bushel in a bag or bushel and a half and set them out on the meadow at the landing. If I am going to sell them at the retail stand, I simply set them on the meadow, take them in the machine, and the same machine that takes me home takes them with me, and I set them out on the stand, and there is somebody always there, and no expense attached to them.

Q. You have got to have somebody there devoting his time to it?

A. I did have somebody there all the time. There is no extra expense whatever to me.

Q. You use somebody's time, whether you pay for it or whether you don't, don't you?

A. Well, I have got a partner there.

Q. What is that?

A. I have got a partner at home.

Q. You have got a partner who attends to it?

A. Yes, sir. She happens to wear a dress.

Q. Now, you went out with Mr. Elton Risley after some dredging had been done, and went over this ground, didn't you?

A. Went over some of it.

Q. Well, the dredging wasn't completed at that time, was it?

A. I couldn't swear whether it was or whether it wasn't.

Q. Don't you know that there was a good deal of dredging done after that?

A. No, sir, to be candid with you I couldn't swear whether it was all done or whether it was not.

Q. You don't know, then?

A. No.

Q. Well, you undertook to take him over the ground, didn't you?

A. Mr. Thomas asked me to take Mr. Risley out, and he also went in the boat with me, and a couple of other gentlemen besides.

Q. You had Mr. Elton Risley in the boat, of the Hill Dredging Company?

A. Yes, I think so.

Q. And took him out to show him where your oysters were?

A. That was the understanding.

Q. And where your clams were?

A. No, I didn't.

Q. What is that?

A. No. You have got the wrong idea.

Q. What was the reason for your taking him out?

A. To show him where he had done the damage. Not where our oysters and clams were.

Q. You didn't want to show him where your oys-

ters and clams were? You just wanted to show him damage?

A. I am not in the habit of showing anybody.

Q. So you took him out, and did you show him any clams that had been damaged?

A. No, sir.

Q. Didn't show him any clams that had been damaged?

A. No, sir.

Q. Show him any oysters that had been damaged?

A. No, sir.

Q. Did you find any clams?

A. No, sir.

Q. Couldn't find any clams?

A. No, sir.

Q. Couldn't you find any oysters?

A. No, sir.

Q. Mr. Collisson was along, wasn't he?

A. There were two other gentlemen along. I don't recollect what two it was, but there were two other men.

Q. And do you mean to say you didn't find any clams and didn't find any oysters?

A. No, sir.

Q. Not a one?

A. Not to my knowledge.

Q. And you were tonging around there to show them how they had been spoiled, weren't you?

A. No, sir.

Q. What were you doing out in this boat with these three men?

A. Went down to show them around where the fill had drifted. There was no tongs in my boat for anybody to tong with.

Q. And you were not—you said a little while ago you wanted to show them what damage they had done?

A. Exactly.

Q. Didn't you show them where they had killed your clams and oysters?

A. That was out of the question, to show them that.

Q. Why was it?

A. Because they were buried out of sight.

Q. Well, they weren't buried out of sight all over your ground?

A. Oh, yes, they were.

Q. Well, you told Mr. Bourgeois that the settlement after the pumping on the westerly side was only two or three or four inches?

A. That is right.

Q. That doesn't kill clams, does it?

A. Who said I had any clams over there?

Q. You didn't have any clams there?

A. I never claimed to.

Q. So that you don't claim that we destroyed any clams of yours?

A. I absolutely do.

Q. But you didn't have them there?

A. No, sir.

Q. What is that?

A. No, sir.

Q. Where were these clams?

A. On the eastern side of the ground.

Q. Will you show us on the map where the clams were?

A. Yes.

Q. Just point it out there, will you?

A. About in this space in there.

Q. I see. That was the only place you had any clams?

A. Those little clams, yes, sir.

Q. Where were your oysters?

A. Practically all over it.

Q. You had oysters all over it; is that right?
A. Right, more or less.
Q. How big an area of land did your clams cover?
A. Well, about an acre and a half.
Q. Acre and a half of clams?
A. Yes.

(Recess taken until 10 o'clock A. M., June 25th, 1930.)

Atlantic City, N. J., June 25th, 1930.

Trial of the cause resumed at 10 A. M.

WALTER LLOYD, resumed.

Cross-examination (continued).

By Mr. Hanstein:

Q. Mr. Lloyd, do you know how many clams you had on this ground at the time the filling started?
A. Do you mean what I planted there?
Q. What is that?
A. Do you mean what I planted there?
Q. No, sir. Do you know how many you had there?
A. No, sir.
Q. How thick do you plant oysters?
A. Don't intend to plant any not one on top of another.
Q. I don't hear you.
A. Don't intend to plant any one on top of another.
Q. No, but how many oysters do you plant to an acre?
A. Four or five hundred bushels.
Q. How thick do you plant clams?
A. Well, they will grow much thicker than oysters. Three times as thick.
Q. Well, would you say twelve to fifteen hundred bushels of clams to an acre?
A. You could if you want to.

Q. That is pretty thick for successful growing?
A. Yes.
Q. You wouldn't plant them that thick, I suppose, would you?
A. Repeat that question, please.

(Former question repeated as follows: "Well, would you say twelve to fifteen hundred bushels of clams to an acre?")

A. No, I wouldn't plant them that thick.
Q. How thick would you plant clams?
A. Well, a thousand clams will grow in a space twice as large as that desk there.
Q. I don't think that means anything to us. How thick would you plant them to an acre?
A. How many thousand?
Q. Yes. Do you consider them by the thousand or by the bushel?
A. Well, either way.
Q. Well, tell us either way, then, will you?
A. I planted forty bushels, and I figure I put them on about an acre and a half.
Q. I understand that. What I want to know is how thick you consider good planting?
A. Well, that is about the way I plant them.
Q. You think forty bushels to an acre and a half?
A. It is all right. At least, that is what I think.

Re-direct examination.

By Mr. Bourgeois:

Q. Mr. Lloyd, how did you know where your oyster ground was?
A. Well, we had stakes to stake it out.

Q. How did the other planters know where theirs were?

Mr. Hanstein: I object to that.

The Court: I do not see how he can testify as to the knowledge of other planters.

Q. What was there to mark Tallman's ground?
A. Stakes.
Q. What was there to mark Theodore Smith's?
A. Stakes.
Q. And did all the other planters have stakes to mark their ground?
A. All practically the same.
Q. What kind of stakes were they?
A. Some would use one kind and some another. Different kinds of wood. It all depends on where they cut their wood.
Q. Extend above the high water?
A. Oh, yes.
Q. How high out of water?
A. Anywhere from two to ten feet.
Q. Then there was something there to indicate to these people who built the bridge that there were oysters and clams planted there, or, at least, those grounds were there?

Mr. Hanstein: That is objected to.

(Question withdrawn.)

Q. There was something there to indicate to the people who built the bridge that there were stakes there for some purpose?

Mr. Hanstein: I object to that.

The Court: He has testified the stakes were there.

(Question withdrawn.)

Q. You have said that the pipe stopped, that is, the pipe through which they pumped, at a certain place. Did the sand stop at the same place where the end of the pipe was?

A. No.

Q. That went on?

A. Yes.

Q. Why did you not show those people, Elton Risley and Mr. Collisson, the clams and oysters that were on the ground?

A. I didn't think it was any of their business.

Q. Could you have shown them to them if you had wanted to?

A. Not at that time when he was there.

Q. Why?

A. Simply because he had buried them.

Q. They had been covered up?

A. Yes, sir.

Q. You just said to Mr. Hanstein you didn't know how many clams you had on your ground at the time they started to fill?

A. Yes.

Q. Were there any clams on your ground before you planted that forty bushels in 1924 and 1925?

A. Yes, sir.

Q. And whatever number there was, was still there?

A. As far as I know.

Q. Plus the twelve thousand—well, 480,000 clams that you planted?

A. Yes, sir.

Q. Less the two thousand that you took out?

A. Yes, sir.

Q. Mr. Lloyd, the Great Egg Harbor River, the northeasterly line of it is along here somewhere, I assume?

A. Yes, sir.

Q. What is the depth of the water from the—I am going to take the low-water line—from the low-water line of the river on the northeasterly end of the bridge down to and including your land, oyster grounds, in the river? What is the depth of the water?

A. Well, there is a narrow channel runs up through about there ——

Q. Leave the channel out. Exclude that. How about the rest of it?

A. Shoal over on this side, all shoal flats. A few islands growing up in it.

Q. How much water is up over them at high tide, or was there?

A. Practically all dry.

Q. When you came out here beyond the channel, how much water was there on the ground at low tide?

A. On this side?

Q. Yes. On the side where your oyster grounds and clam grounds were.

A. From here to there?

Q. Yes.

A. About two feet and a half at an ordinary low water.

Q. That is, from the northeast side of your ground to the southeast side along the line of the bridge?

A. Yes, from the northeast side to the southwest side.

Q. Along the line of the bridge? About two and a half feet, you say?

A. Yes. I have waded all over it. About that deep.

Q. You say there was a little channel went up there. What was that channel called?

A. Drag Channel.

Q. Where was that with relation to this bulkhead that is shown on the map?

A. This side here.

Q. A little bit nearer to the southwesterly side of it than it was to the northeasterly side?

A. Considerably nearer.

Q. How deep was the water in that?

A. You mean from the bridge up?

Q. No, I mean where they filled it in. They filled it in, didn't they?

A. You could work with twelve-feet tongs. In other words, at high water, about ten feet.

Q. And at low water about how much?

A. Four or five feet.

Q. Now, Mr. Lloyd, when they commenced to fill in there, where did they put their sand dredge?

A. In the Drag Channel, somewhere about there.

Q. Where did they run their pipes?

A. They had pontoons to hold the pipes on, and loaded the pipes on pontoons, and had them over there.

Q. Over to the northeasterly end, near the northeasterly end of the bulkheading now?

A. Yes. Not all the way across. On the bar.

Q. What did they have to retain the sand when they commenced to fill there?

A. Not anything that I know of. Just dumped—the water run out of the pipe right into the water, because there was a shoal flat there, and it wasn't but a little while before the sand would appear above

the water, and they would keep the pumping spreading both ways.

Q. When did they put in this bulkheading that I see there? Before the pumping was done or after they pumped the sand in there?

A. They put that in after they had pumped. Pumped all out of water. Practically done pumping. After they put this bulkhead across here on the side, they pumped some to fill it up. It was all six or eight feet out of water. Jimmy's Island was all pumped out of sight.

Q. Before they commenced to pump there, did you have any clams underneath what is now the bridge itself and that embankment that is built there?

A. Sure. That is where I planted clams.

Q. And if they are there at the present time, how far underneath the sand are they?

A. Well, surely ten feet.

Q. And anything besides the sand over them?

A. Nothing but a concrete road over the top of them.

Re-cross examination.

By Mr. Hanstein:

Q. What did you take Mr. Risley out there for?

A. Didn't take him out for anything.

Q. Well, how did he come to be in your boat?

A. Because Mr. Thomas, the State Warden's, engine didn't happen to be working well in his boat, and mine happened to be working at that time, and he asked me to use my boat and take him, and I did so.

Q. So you just took him out and you didn't show him anything about clams or oysters?

A. No, sir, I didn't.

Q. And the reason you didn't is because you didn't think it was any of his business?

A. I didn't think so then.

Q. Didn't have any tongs at all and didn't take up any part of the bottom, did you?

A. Didn't have no tongs in my boat.

Q. Well, was any part of the bottom dug up while you were along, just by way of showing these people the character of the bottom?

A. Mr. Risley borrowed a pair of tongs and did do a little tonging.

Q. From your boat?

A. No, sir. Yes, he stood in my boat.

Q. I thought you said there weren't any tongs in your boat.

A. There wasn't.

Q. Well, if he stood in your boat with some tongs, there were some tongs in your boat, weren't there?

A. There wasn't.

Q. There wasn't?

A. No.

Q. How did he work those so that they weren't in your boat?

A. There happened to be another one of the men that leases ground there in his boat, and he had a pair of tongs, and he was working on his ground. Mr. Risley asked us to run over alongside of that boat, which I did, and he took Mr. Tallman's tongs and stood in my boat and made a few grabs.

Q. So now we do have Mr. Risley tonging from your boat?

A. Yes.

Q. Which you didn't tell us about before?

A. Didn't ask me that.

Q. Didn't ask you that at all, did I?

A. No.

Q. Did he bring up any clams?
A. Not to my knowledge.
Q. Did he bring up any oysters?
A. One.
Q. He brought up one oyster?
A. Yes, sir.
Q. Did you see anybody eat it?
A. I don't remember whether he eat it or not. I don't think he did.
Q. Why is it, when I asked you all this before, that you said that you didn't see him bring up any clams or oysters, and that there weren't any tongs in your boat?
A. I say so yet. There wasn't no tongs. You didn't ask me whether I saw him bring up any oysters or clams, not to my knowledge.
Q. But now you admit that there were some tongs in your boat?
A. No, sir, I do not.

Mr. Hanstein: I would like to make a motion to strike the testimony as to damages to clams and oysters on the part of this plaintiff, on the ground that he admittedly is only guessing that he had a thousand bushels of oysters, and he admits that he does not know how many clams he had.

Mr. Bell: I would like to make the same motion on behalf of the defendant, the Ocean City Automobile Bridge Company.

Mr. Bourgeois: If he has to demonstrate everything there is no use having a jury.

The Court: The jury is not to guess damages. I

presume each one of these cases has to stand on its own individual testimony, has it not?

Mr. Bourgeois: Yes, and this man put in there 480,000 clams, and did not take any out.

The Court: He took out two thousand.

Mr. Bourgeois: How could he tell whether there were 480,000 or 468,000 in there? That is for the jury. He put in 480,000 to begin with, and these people covered them up.

The Court: There is no testimony in this case as to the death of any clams or anything else. I will hold the motion until the end of the case. I refuse it at the present time, giving you a right to renew it at the end of the entire case.

(Exception noted for defendants.)

THEODORE SMITH, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Smith, you live at Scullville?
A. Scullville.
Q. How long have you lived at Scullville?
A. About sixty-five years.
Q. What is your vocation?
A. Oystering and clamming.

Q. Are you the Theodore Smith who worked for Henry Smith?

A. Yes, sir.

Q. Partner?

A. Partner.

Q. And your lot was where?

A. Number 154.

Q. That is the lot here marked "Theodore Smith," is it, with 8.43 acres?

A. And lot 164, with a quarter of an acre.

Q. That makes nine acres, practically. Did you have that leased in 1927 and 1928?

A. Yes, sir.

Q. And how many years prior to that?

A. Leased it in 1906.

Q. In 1927, and the beginning of 1928, what, if anything, did you have growing on it?

A. Oysters and clams.

Q. Had you planted any clams on it?

A. Yes.

Q. When?

A. 1924.

Q. Do you remember how many you planted on there?

A. Me and my partner bought thirty-three bushel, and I planted one-third of them on my strip, and the other two-thirds was on his.

Q. How many clams would there be in a bushel that you planted there?

A. From twelve to fifteen thousand.

Q. And if there was twelve thousand, eleven bushels would make 132,000 clams. How deep was the water on that ground where you planted the clams at low tide? How much water was there?

A. About two feet and a half.

Q. What, if anything, did you have to mark the

ground, your ground? What told people where it was?

A. It was staked off; stakes.

Q. Did you have anything else on there besides the clams?

A. Had oysters planted there.

Q. How many oysters did you have planted there?

A. Five hundred bushel.

Q. Five hundred bushels in 1924——

A. No.

Q. Was that 1924 you planted them?

A. Planted 1925 on this strip.

Q. Then 500 bushels of oysters planted in 1925, by the increase, would amount to how many in 1928, the beginning of it?

Mr. Hanstein: I object to that. It does not matter what the increase would have been under some theoretical situation. It is how many oysters were there in 1928.

The Court: I will permit it.

(Exception noted for defendants.)

(Question repeated.)

A. Why, it should double.

Q. Just double? Would be a thousand bushels in 1928, in the spring? I don't mean the spring. The first of January, 1928. How many of the oysters, Mr. Smith, if any, did you gather between 1925, when they were planted, and when they commenced to fill in the bridge in the fall of 1927 and first of 1928?

A. Hadn't gathered any.

Q. How many of the clams that you planted in 1924 had you gathered prior to the filling in of the bridge at that time?

A. Not any.

Q. Did you sometimes go down on your grounds to ascertain the condition of your clams and your oysters?

A. Yes.

Q. When was the last time you were down on the ground prior to the fall of 1927 or in the fall of 1927?

A. Prior to 1927?

Q. Yes.

A. Everything was all right.

Q. I say when were you last down there?

Mr. Hanstein: I ask that the last answer be stricken.

The Court: Yes.

(Question withdrawn.)

Q. I am assuming that they commenced to fill in this bridge about September of 1927. How long prior to that time was it that you had gone on your ground to find out the condition of your clams and oysters?

A. I was down there every few days.

Q. Would you try them to find out what the condition was?

A. Yes.

Q. And then after you brought them up and found them alive, what would you do with them?

A. Why, I would leave them on the ground.

Q. Throw them back again? Is that customary among oyster men?

Mr. Hanstein: I object.

The Court: I don't see that makes any difference, whether it was customary. It is what he did.

Q. Mr. Smith, there came a time in the fall of 1927, I think, when some pumping was done in connection with the building of a bridge across the river there. Do you remember that?

A. Yes, sir.

Q. What effect, if any, did that pumping have upon your ground?

A. The effect of their pumping, it brought sand up on the oysters and smothered them, and they died.

Q. What effect, if any, did it have upon the clams?

A. The same effect.

Q. How much sand was deposited on your land after they commenced that pumping?

A. Four or five inches.

Q. Had there ever been any sand deposited on your lot prior to the time they commenced that pumping?

A. No.

Q. In all those years, none?

A. No.

Q. What effect did the four or five inches of sand on top of the clams that were on your ground have upon them?

A. Why, they died.

Q. Did you gather any clams or oysters from that lot, from that ground, after this sand was pumped up on the ground?

A. No.

Q. Why?

A. Because there wasn't none there to gather.

Q. What did you do with your clams and oysters after they were gathered? Not these that you didn't gather, but previous to that time?

A. Why, I sold them.

Q. Where?

A. To Atlantic City and to home trade.

Q. Wholesale or retail?

A. Wholesale.

Q. What size clams did you have on your ground? I mean those that were planted in 1924, what size were they in the summer of 1927?

A. Why, they would be necks, little-necks, we call them.

Q. What would be the market value or market price of little-necks? What was it at that time?

A. Five to six dollars.

Q. A thousand?

A. A thousand.

The Court: Can't we agree that the market price of little-neck clams was from five to six dollars, and that the market price of the big clams was ten to twelve dollars?

Mr. Hanstein: I will have Mr. Risley find out from some of these folks.

Mr. Risley: Five and ten is correct.

The Court: Five dollars for the little-necks and ten dollars for the big ones?

Mr. Risley: Yes.

Mr. Hanstein: I suppose we might as well do the same thing about the oysters.

Q. What was the market value of oysters at that time?

A. Dollar and a half a bushel.

The Court: I imagine there is no doubt about that.

Mr. Bourgeois: Then we are going to assume that that is the price?

Mr. Hanstein: Yes. Clams five and ten dollars a thousand, and oysters a dollar and a half a bushel. All right. That is in the Atlantic City wholesale market.

Mr. Bourgeois: Will you admit, also, that it costs 25 cents a bushel for gathering oysters and putting them in the market?

Mr. Risley: If they are good and thick.

Mr. Bourgeois: The testimony so far is that it costs 25 cents a bushel for the gathering of the oysters and putting them on the market.

The Court: Is there any dispute about that?

Mr. Risley: When they stop gathering is when it costs as much to get them as they are worth in the market.

Mr. Hanstein: You mean when they are scattered?

Mr. Risley: Yes.

The Court: I suppose you will have to make each one of your men testify as to how much it cost him to do it.

Q. Mr. Smith, how much would be the cost of gathering and delivering to market oysters per bushel taken from your ground before the sand was pumped on them?

A. I should say 25 cents a bushel.

Q. And what would be the cost of gathering and delivering clams from your ground to market before the sand was pumped on them? Of course, it would cost more now after they are covered over, if you could find them, but how much before?

The Court: How much a thousand?

A. How much to gather them and deliver them?

Q. Yes, a thousand?

A. It would cost 50 cents.

Mr. Bourgeois: Do we agree on that, Mr. Hanstein?

Mr. Hanstein: You have asked him as to his ground.

Mr. Bourgeois: I am asking him as to his ground to make it specific, but the cost would be the same as to all of them, I assume, if they are in the same locality.

The Court: No, it does not seem so. It seems the other man said it would cost a dollar a bushel.

Mr. Bourgeois: Yes, but he said six dollars was the price and it would be five dollars net, and this Mr. Smith said five to six dollars a thousand and then we agreed on five.

Mr. Hanstein: I am afraid there may be some controversy as to that.

Mr. Bourgeois: Now I am against a proposition, if they will not agree on the cost of delivery, about agreeing on the price of clams being five to six. He said five to six and they wanted to agree on five. The jury may say they are worth five dollars net, as Mr. Smith, his partner, said.

The Court: All right, go ahead.

Q. Mr. Smith, would they all be little-necks in the summer of 1927, or would some of them be cherry stones?

A. Cherry stones.

Q. And the cherry stones, what was the market price of them?

A. Why, about eight dollars.

Cross-examination.

By Mr. Hanstein:

Q. Mr. Smith, have you ever gathered clams that were covered over by mud?

A. Tonged clams covered—what was the question?

(Question repeated.)

A. Yes.

Q. They were all right, weren't they?
A. Where they are about two inches.
Q. They were all right, weren't they?
A. Where they are about two inches under the mud.
Q. They were all right, I asked you, weren't they?
A. Yes.
Q. Have you ever gathered clams that were covered over by sand?
A. No.
Q. Never gathered any?
A. No.
Q. You don't know when there is sand on top of them whether it kills them or not, do you?
A. Yes, I know it killed what I had.
Q. Well, I asked you if you had ever gathered any, and you said no. Did you ever gather any on your land?
A. On my land?
Q. Yes.
A. I gathered clams on my land, but there was no sand on it before it was pumped.
Q. I am talking about after sand is on top of them, haven't you gathered up clams and found them perfectly good and living?
A. No.
Q. A couple of inches of sand, you say, will will clams?
A. A couple of inches, no. Two inches won't kill them.
Q. Will three inches kill them?
A. Yes, three inches will kill them.
Q. Will two and a half inches kill them?
A. No.
Q. Two and a half won't, but three will? You have been around that bay a whole lot, haven't you?
A. Yes, sir.

Q. You make your living out of it, don't you?

A. Yes.

Q. You certainly have dug clams that were covered over by the bottom and found them perfectly alive, haven't you?

A. Well, clams, yes, found them perfectly alive.

Q. Why did you go out every day or two to look over your clams and oysters?

A. Every day or two?

Q. Yes.

A. Why, we was in the bay clamming and we would come up and throw our necks overboard on the ground.

Q. Why? To gather them?

A. Then we worked on our ground.

Q. On this particular ground?

A. On this particular ground, some.

Q. So that you did gather clams off of this ground, didn't you?

A. Large clams?

Q. I am talking about before the filling.

A. No. No, we didn't before the—let me see. We clammed for large clams on the ground before the filling.

Q. That is, between 1924 and the time the filling started, you clammed on this ground, didn't you?

A. Not much. Very little.

Q. Well, what were you doing out there every day or so, every few days, as you put it?

A. Why, we clammed and come up and threw our necks overboard on the grounds.

Q. What are necks?

A. Little-necks. The market was cheap and we planted them, planted them back on the land.

Q. Where did they come from?

A. Off of natural privileges.

Q. You would throw clams overboard; is that it?

A. Yes, the small ones, necks.

Q. You didn't need to use a tong to throw those clams overboard, did you?

A. No.

Q. Well, what I want to know is if you raked over this ground every few days with your tongs prior to this filling?

A. Yes.

Q. Why did you do that?

A. To see how the stuff was doing, if they was there, and whether they was growing and whether they was there.

Q. Did you have to do that every few days to find out if they were growing?

A. No. I done it every—well, maybe—in the summer, about two or three months in the year, that I didn't work in the bay.

Q. What were the months you didn't work in the bay?

A. The summer-time. This time of the year.

Q. That is, around June and July and August.

A. And August, yes.

Q. You didn't work in the bay in June, July or August of 1927, did you?

A. June and July I didn't work in the bay. Commenced the first of September, when we commenced working in the bay.

Q. You commenced working in the bay the first of September of 1927; is that right?

A. Yes.

Q. How were your clams and oysters then?

A. They was all right then.

Q. Your clams and oysters were all right on the first of September, 1927; is that right?

A. Yes.

Q. Do you know that dredging and pumping had

already started before that time? Did you know that?

A. The dredging?

Q. Yes.

A. No.

Q. I am asking you if you knew it.

The Court: He means the sand dredging, of course.

A. No.

Q. You didn't know it had started then; is that right?

A. Yes.

Q. During the rest of the time you went out there every couple of days and pulled up some of your clams; is that it?

A. No, I didn't go every two days or three days.

Q. Well, you testified that you went every few days, didn't you?

A. Yes.

Q. And your idea was to find out if those clams were growing; is that it?

A. Yes, to see if they was there and growing.

Q. Did you think they were likely to get away?

A. No.

Q. Well, then, why did you have to see if they were there?

A. Why, you always want to look to see if your stuff is there.

Q. You don't worry about it unless you think somebody is going to steal them, do you?

A. No, I guess they wouldn't steal them.

Q. Then if they didn't steal them, they would be sure to be there, wouldn't they?

A. Yes.

Q. And there wouldn't be any need for you to go dig them up to find out, would there?
A. What was that question?

(Question repeated.)

A. If they wasn't there?
Q. If you weren't worried about somebody stealing them, there wasn't any occasion for you to go to dig them up to see if they were there, was there?
A. Yes, go to see if they was large enough for market.
Q. Do they get large enough for market over night?
A. No.
Q. Well, if you went once a month, you could find that out, couldn't you?
A. Yes.
Q. But you went every few days; is that right?
A. I was on the ground every few days.
Q. Did you tong in those beds every few days?
A. Yes.
Q. And the idea was to see how they were growing; is that right?
A. Yes.
Q. And from 1924, when you planted those clams, up until 1927, you didn't gather any clams off of this land at all; is that right?
A. Off of this land?
Q. Yes.
A. Yes, I gathered large clams.
Q. You did gather some large clams?
A. Yes, some large clams.
Q. And took them to market and sold them?
A. Yes.
Q. Did you gather any oysters?

A. No, no oysters.

Q. Never gathered any oysters?

A. They wasn't in shape to handle them.

Q. Why not?

A. They was poor.

Q. Your oysters ——

A. Wasn't fat. Wasn't in condition before that.

Q. Now, you say that after this pumping took place, there weren't any clams or oysters to gather. There were some clams there, weren't there?

A. After the pumping?

Q. Yes.

A. We went down in January—some time in January, 1928, and we worked all day and we got—we didn't get more than a bushel of live oysters and about three hundred clams, me and my partner.

Q. So you gathered some in January of 1928?

A. So we quit.

Q. And you never went back again; is that right?

A. Yes, went back again, but we couldn't find anything nowhere to make wages.

Q. What was that?

A. Couldn't make wages.

Q. Well, there were some there, weren't there?

A. No. You would catch about two hundred a day. Two men, about three hundred. That is about a hundred and fifty to a person, each one of us. It wasn't wages.

Q. Did you find some of them under the bottom? Were they buried over, those that you found?

A. Buried over?

Q. Yes.

A. Yes.

Q. And they were living, weren't they?

A. All we got was living.

Q. All that you got were living? Now, the rest

of the clams that had been there didn't walk away, did they?

A. No, they were buried up.

Q. And so far as you know, they were still living?

A. No, they wasn't living.

Q. Well, the ones that you dug up from underneath the bottom were living, weren't they?

A. Not all of them.

Q. Some of them were, weren't they?

A. Some was living.

Q. And for all you know, some of them that were down there were living, too?

A. Well, I couldn't reach them with the tongs.

Q. You couldn't get them with the tongs?

A. Couldn't get them, nothing but dead ones.

Q. What is the best way of telling how many oysters are on a piece of ground?

A. The best way of telling?

Q. Yes.

A. Why, you plant so many bushel on the acre and then you judge what the percentage will be, and then you can tell that way. Go over the bottom and feel. You, of course, couldn't be accurate.

Q. Of course, a good many of the oysters that you plant do die, don't they?

A. Some die. We figure for them to double themselves with what few dies out after you plant them.

Q. When you talk about doubling themselves, you are talking about doubling in size?

A. Doubling in size, yes.

Q. That is, if you plant one bushel of oysters, if they grow normally, that gets as big as two bushels the next year; is that right?

A. Yes, that is right.

Q. And how many bushels do you have the next year?

A. Well, it would double the next year.

Q. That would be four bushels, wouldn't it?

A. Four bushels.

Q. And how many bushels would you have the third year?

A. Well, they wouldn't gain any more. You couldn't figure on—take the lossage, you would figure just about doubling it right through. If you plant one bushel you would get two when they are three to four to five year old.

Q. They double in a year, don't they?

A. If the conditions is right some seasons.

Q. There are a good many things that kill these oysters that we don't know anything about, aren't there?

A. I don't know about that.

Q. Well, you don't figure on all of them living, of course, do you?

A. Not every oyster, no.

Q. A good many of them die, don't they?

A. Some die.

By the Court:

Q. Is your experience gained since 1906, or did you work oysters before 1906?

A. I was working with oysters before 1906.

Q. How long?

A. Well, I worked in the bay ever since my father took me in the bay when I was ten years old, to cull oysters, and I guess I have been in the bay pretty nigh ever since.

Q. And the result of all your experience is that if you plant a bushel of oysters, at the expiration of four or five years, allowing for deaths and other things, you will get two bushels of oysters?

A. Two bushels, yes, sir.

Q. How about clams?

A. Clams, if you plant a hundred, if you got them all you would only get a hundred. You see, they go by the hundred.

Q. If you plant a thousand clams in 1924, what do you get in 1928?

A. Why, you would get a thousand if they was all there. I mean a hundred, just the same. You wouldn't get any more.

Q. Would you allow for deaths during that period?

A. Yes, there would be some deaths.

Q. What has your experience been as to the death rate in clams per thousand?

A. About one hundred.

Q. So that if you plant a thousand clams in 1924, in 1918 your experience has been that you should get nine hundred clams?

A. Nine hundred clams.

By Mr. Hanstein:

Q. Well, Mr. Smith, there do arise conditions that cause a great many of your oysters to die in the year, don't there?

A. No, not as I know of.

Q. Well, did you ever hear of any of these borers that kill oysters?

A. I have heard tell of them, but I never saw them.

Q. Did you ever hear of drum-fish destroying an oyster bed?

A. I have heard of it, but I never saw it.

Q. Did you ever hear of this plague that affects them, such as they recently had down in Virginia this year? You know of that, don't you?

A. I read something about a starfish or something.

Q. You heard about that, didn't you?

A. I read about it, but it is something I don't know nothing about. I never seen them in our bay on oysters.

Q. You know of the tides shifting in Great Egg Harbor Bay from time to time, don't you. Don't the currents shift out there once in a while?

A. The current goes all the same way all the time.

Q. Well, did you ever hear of it shifting from one place to another?

A. Down towards the Inlet sometimes bars make up and it would shift.

Q. When a bar makes up, if that shifts over on an oyster bed and it is high enough, that would kill oysters, wouldn't it?

A. Yes.

Q. You don't know how many clams you had on this land at the time that the fill started, do you?

A. I know what I put there.

Q. You know what you put there?

A. Yes, sir.

Re-direct examination.

By Mr. Bourgeois:

Q. And from you trying them do you know that they still were there in 1927?

A. Yes.

Q. Now, Mr. Smith, what kind of bottom is this oyster and clam bottom that you had staked out?

A. Hard, muddy bottom.

Q. And does a hard, muddy bottom shift? Does that change location?

A. No.

Q. And these bars that Mr. Hanstein talks about, what are they? Are they mud bars or sand bars?

A. Sand.

Q. Sand bars? Do they select land that is near a channel that shifts or is going to shift or does shift, for oystering?

Mr. Hanstein: I object to that.

The Court: I suppose that is objectionable. Whether their land shifted or not is material, I think.

Q. They have talked a lot about oysters. They die. Suppose an oyster does die, does the shell act as a means of propagating other oysters? Does the shell of the oyster—does oyster spawn gather to that and another oyster grow on it?

A. Yes.

Q. So they come out in clusters? They grow and increase?

A. Not on this ground they wouldn't. Up on what we call the propagating ground, they would.

Q. Then your theory is that the amount of the lossage is taken up by the increase, so that after the loss is taken out, the oyster—whenever one bushel of oysters is planted one year, three years later will produce two bushels? Is that right?

Mr. Hanstein: That is objected to as leading.

The Court: He so testified.

Mr. Hanstein: It is leading. It is predicated on somebody's theory.

The Court: I sustain the objection.

By Mr. Hanstein:

Q. Did you ever hear of cabbage coming down and affecting oysters?
A. No.
Q. Never heard of that?
A. No, sir.
Q. You don't know that cabbage does affect them?
A. No, I never seen any where it was affected with cabbage.

Mr. Hanstein: I would like to make the same motion with regard to testimony as to damages to oysters and clams as I did to the other witness.

Mr. Bell: I make the same motion.

The Court: The same ruling.

(Exception noted for defendants.)

FRANK GANDY, sworn.

Direct examination.

By Mr. Bourgeois:

Q. You live in Atlantic City?
A. Yes, sir.
Q. And have lived here how long?
A. About forty years.

Q. What is your business?

A. Contracting. Submarine contractor. Bulkheads and wharves.

Q. How many years' experience have you had in building bulkheads?

A. Thirty.

Q. And in localities where?

A. All over Atlantic City and coast, the Jersey coast.

Q. Ever have any experience in building bulkheads below the low-water mark?

A. Yes, sir.

Q. Suppose, Mr. Gandy, that a bridge were about to be built from Atlantic County across Great Egg Harbor Bay to Beesley's Point in Cape May County, and suppose they wanted to have a solid fill under a part of that bridge by pumping in sand, is it possible to so construct a bulkhead or some other means as to retain the sand that they pump in under the bridge within the limits that they desire the fill?

Mr. Hanstein: I object to that on the ground it is immaterial and incompetent. The mere fact that it is possible has no relevancy in this case.

Mr. Bourgeois: I will strike out "possible," and make it "feasible."

Mr. Hanstein: I do not think that will cure it. The mere fact that there might have been some different way for this bridge to have been constructed, and roadway, than the way that it was built, does not affect this case.

The Court: I will permit the question.

(Exception noted for defendants.)

(A portion of the question was repeated as follows: "Suppose, Mr. Gandy, that a bridge were about to be built from Atlantic County across Great Egg Harbor Bay to Beesley's Point in Cape May County, and suppose they wanted to have a solid fill under a part of that bridge by pumping in sand ——")

Q. —— and assuming that the water at low tide is of the depth of two and one-half feet, is it feasible ——

(The remaining portion of the original question was repeated as follows: "—— to so construct a bulkhead or some other means as to retain the sand that they pump in under the bridge within the limits that they desire the fill?")

Mr. Hanstein: I want the further objection that there is no proof that the depth was two and a half feet.

Mr. Bourgeois: I asked Mr. Lloyd about it.

Mr. Hanstein: As to his land.

The Court: I assume we will have the depth before we are finished. I will permit the question.

(Exception noted for defendants.)

(Question repeated.)

A. Yes.

Q. How would it be done, Mr. Gandy?

A. You mean right under the bridge here?

Q. On the sides of the bridge. Take the sides of the bridge. Suppose they had wanted to retain the sand within the limits of the bridge from the northeasterly end of these oyster grounds to the southwesterly side of them?

A. They would do it just the same as they did through here. They built a bulkhead here on each end.

Q. Then what about the sides?

A. I don't know whether it is a bulkhead here.

Q. I want to know how it could be done.

A. With piling and stringers and sheath plank up and down, the same as they do in building a fence.

Q. And then pump in that?

A. Yes. Get the plank down in the ground with hydraulic pressure, is the way they do it.

Q. Suppose in that same bridge there was a channel that was called Drag Channel that at low tide was seven feet deep, is it feasible to bulkhead on either side of the bridge under that channel so as to retain the sand there?

Mr. Hanstein: I want to object to that on the ground there is no proof that there has been any fill in Drag Channel.

The Court: I think the testimony is that there was.

Mr. Hanstein: No. As a matter of fact, there is a bridge across Drag Channel.

The Court: I understood Mr. Lloyd to so testify.

Mr. Bourgeois: It shows on the map it is all filled in.

The Court: Then I will permit it.

Mr. Hanstein: The map does not show Drag Channel.

Mr. Bourgeois: No, because it is all filled up. There is no channel any more.

Mr. Hanstein: The map distinctly shows a bridge. I don't know why Mr. Bourgeois says it shows it is filled up across Drag Channel.

Mr. Bourgeois: May Lloyd testified that Drag Channel went right through there and now it is all filled up about up to the bridge.

The Court: I don't know whether Drag Channel is filled or not, but I certainly do know there ought not to be any trouble to know whether or not it is filled. My understanding is that Mr. Lloyd so testified and under that theory I will permit it, and under the representation by Mr. Bourgeois that Drag Channel has been filled and so shows on the map. If subsequently it appears that that is not true, we will strike it out.

A. Yes, it could.

Q. By what method? The same method?

A. The same method. Steel sheathing or wood, either one.

Q. Beg pardon?

A. Some use steel sheathing and some use wood.

By the Court:

Q. If the sheath piling isn't put there in order to retain the sand when it is pumped in, what becomes of the sand?

A. It will just find its level until they got the elevation they want. That is the only thing it could do.

By Mr. Bourgeois:

Q. What would be the effect of the current on the sand that is pumped in there if there is no sheath piling to retain it?

A. The sand will flow away with the tides.

Cross-examination.

By Mr. Hanstein:

Q. Mr. Gandy, if this sand is pumped on to eel grass and the pumping is continued until it develops a height above high water, that sand that is above high water will stay there, of course, won't it?

Mr. Bourgeois: I object. That is not cross-examination.

Mr. Hanstein: I want to show by this witness that other methods are equally feasible.

The Court: I will permit it.

(Question repeated.)

A. Why, I should say it would stay there. It would get its bearing. It would run some. It de-

pends a good bit on how soft the bottom is and how much current is there. There may no current and may be a lot.

Q. The less current there is, the less likelihood of the sand washing away; isn't that so?

A. Yes.

Q. And if after you pump sand out onto eel grass in that manner ——

Mr. Bourgeois: Where is this eel grass? I would like to know where that is.

The Court: Let us hear the question.

(Question repeated.)

Q. —— and you then build a bulkhead on the sand so sunken, and fill in within that bulkhead, that is a perfectly feasible method of building a fill, isn't it?

Mr. Bourgeois: I object unless they first show where the eel grass is.

(Question allowed.)

(Exception noted for plaintiffs.)

A. Yes.

Q. Mr. Gandy, suppose there were no eel grass at the particular point, and you pumped sand at a given point until the sand was above the high-water mark, and then put a bulkhead into that sand, and then fill in within that bulkhead, that would be a feasible method of making the fill, wouldn't it?

A. Yes.

Re-direct examination.

By Mr. Bourgeois:

Q. Now, Mr. Gandy, what would be the effect of the currents on the sand that you filled in under Mr. Hanstein's last theory?

A. Well, it would stop the currents if you built it high enough.

Q. If you built it high enough, but what would become of the sand before you got it up above the high water?

A. As I said before, it would run until it got its bearing. I wouldn't know what would become of it.

Q. You don't know whether it would go a hundred feet or a mile?

A. No, I couldn't tell that.

Q. If you wanted to retain it within the limits of the bridge, the way you would do it would be to build a bulkhead; isn't that true?

A. Yes, that is right.

Q. Then the currents wouldn't affect it?

A. No.

Q. And the force of the flow coming through the pipes, hasn't that a tendency to force it out?

A. Sure.

Q. And when you pump right in on ground on a flat piece of meadow, or when they do, that flow carries for three or four hundred feet, doesn't it, right on the marsh?

Mr. Hanstein: That is objected to.

The Court: I sustain the objection. It is leading.

(Exception noted for plaintiffs.)

Re-cross examination.

By Mr. Hanstein:

Q. Mr. Gandy, the method that you talked about first to Mr. Bourgeois of sinking in sheath piling by the use of hydraulic pressure, by that you mean pumping water through a pipe so as to make a hole for the plank to go down, don't you?

A. Either that or use a hammer, according to the bottom. If it is mud, you can use a hammer.

Q. They use both methods?

A. Yes.

Q. When they use the hydraulic method of pumping water through a big pipe in order to make a hole for the planks to go down, that throws up the sand and disturbs it, too, doesn't it?

A. Yes.

Q. And you can't tell how far that sand would run, either, can you?

A. No.

By Mr. Bourgeois:

Q. That doesn't pump up any more sand, though, than the piling occupies, does it?

A. That is the idea, pump out sand to the planks will go down.

EUGENE TALLMAN, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Tallman, you live where?
A. Scullville.
Q. And you have lived at Scullville how long?
A. About sixty-six years.
Q. What is your vocation?
A. Bay man.
Q. How long have you been a bay man?
A. Ever since I have been big enough. I went pretty small, too, I will tell you those.
Q. Are you familiar with the location of the Somers Point-Beesley's Point Bridge?
A. Yes, sir.
Q. Do you remember a channel that ran along up the river, Great Egg Harbor River, near the Atlantic County side, that is called Drag Channel?
A. Yes, sir. I have been there hundreds and thousands of times.
Q. And the bridge goes over that?
A. The bridge is built over it.
Q. Is the channel there now?
A. Yes, sir.
Q. Where is it?
A. I can't see which is north and which is south. That is north there?
Q. Yes. That is north. There is your lot in there.
A. I should say—well, right up there, right across here, I should imagine, in this position some place.
Q. Is the channel open or is it closed up?

A. It is open.
Q. Then it is beyond, is it, this solid fill here?
A. Oh, yes, sure.

The Court: The state of the record now seems to show that the channel is open, and therefore your question with reference to the sheath piling in the channel has no bearing at all.

Mr. Bourgeois: I do not say that, because if they had sheath piled since the channel, then it would not have carried this sand up. There is testimony that will come in in a little while that will show it carried over Martin Scull's land.

Mr. Hanstein: I would like to make a motion that the question that was objected to before on the ground that there was no proof that the channel was closed should now be stricken and the answer thereto.

The Court: I will not do it yet.

Q. Mr. Tallamn, are you familiar with the map that is on the easel?

A. Yes, sir. Know every foot of it.
Q. Well, now, look at it, please, and tell me what this part here that has a circle around there, that says "Low water mark", what does that mean?

Mr. Hanstein: I object to that. Here he has on the board a map—I haven't said anything about it, but he didn't prove it. He had the engineer who made it here and he did not have him prove that he made the survey. I have not made any point about

it, but the engineer has written on here some of his own ideas of things, "Approximate line of low tide", and now he is asking this witness to testify as to what that means, and the witness did not make the map, and I do not see how he can be called on to explain it.

The Court: I do not see how the witness can be called upon to explain a map made by somebody else.

Q. I want you to tell me what is the nature of the ground that is under the bridge along the place where the map shows a bulkhead on both sides of the bridge. Can you see that?

A. Yes, sir. That is all sand.

Q. How high is the sand? How near to the bridge?

A. It goes off this way, and comes up ——

Mr. Hanstein: I don't know whether Mr. Bourgeois is putting more confusion into this, but the place to which he points is not a bridge. It is a solid fill, and your map so says.

(Question repeated.)

Mr. Bourgeois: I have used the word "bridge" with relation to the driveway or the crossing from the Atlantic County side over to Cape May County side, without regard to whether it is on stilts or whether it is solid fill.

The Court: With that explanation, the question is permissible.

(Question repeated.)

A. It goes off. It comes up. I don't know how high it is.

Q. Is it the same level as the bridge?

Mr. Hanstein: I object to that as leading.

The Court: The objection is sustained.

Q. Mr. Tallman, I don't mean the level of the sand as it goes from the bridge southeast and northwest, as it goes that way, but what is the level of it as it goes from one end of the bridge across to the other end of the bridge?

A. I can't say how high it is.

Q. You don't know how high it is?

A. It is all so that the tide never comes over it, anyway.

Q. Do people drive over it?

A. Sure.

Q. What is there to drive on?

A. Sand fill, and gravel on top of it.

The Court: In other words, a roadway?

A. A roadway.

Q. A part of the roadway, is it, of the bridge?

A. Yes, sir.

Q. Do you lease some oyster grounds over there in that vicinity?

A. Yes, sir.

Q. How many acres do you lease?

A. Six acres and a half.

Q. And yours is marked, "E. Tallman", here, 6.54, number 153?

A. That is right.

Q. Did you lease that ground in 1924 and 1925?

A. Yes, sir.
Q. How long have you leased it?
A. I think I got a lease of it in 1911.
Q. Until 1928?
A. Yes, sir.
Q. For what purpose did you lease it?
A. Plant oysters and clams on.
Q. What mark—are the corners of it marked?
A. Yes, sir.
Q. How is it marked?
A. By stakes and shell corners, down to the bottom, on the bottom.
Q. What, if anything, did you plant on that ground prior to 1927?
A. Oysters and clams, both.
Q. When did you plant your clams?
A. 1924, the 11th September, I planted fifteen bushels.
Q. What size clams were they?
A. They went all the way from twelve to fifteen thousand in the bushel.
Q. Fifteen bushels?
A. Yes.
Q. In 1924? What size clams would they be in 1927, September of 1927?

Mr. Hanstein: I object to that. That is the same line of proof he has adopted all the way through, proving generalities.

The Court: I will permit it.

(Exception noted for defendants.)

(Question repeated.)

A. They would be necks and a few cherries. The larger ones I planted, they would be cherries, I imagine.

Q. All of them would be as large as little-necks, would they?

A. Yes, sir.

Q. And some larger?

A. Yes, sir.

Q. When did you plant oysters there?

A. In 1921 and 1922 and 1925.

Q How many did you plant in 1925?

A. I can't say. I can't recall.

Q. Can you tell us how many you had there in the summer of 1927?

A. I can give you some idea what I put there in them three years.

Q. Then can you tell me how many you took away?

A. No, I can't tell. I know what I caught the last day I worked.

Q. From that can you form a judgment as to how many bushels you had on your six and a half acres? Can you from working on it form a judgment as to how many you had there?

A. No, I could not.

Q. You testified that you put fifteen bushels of oysters on this ground of yours. How long did it take you to put them on there?

A. How is that?

Q. How long did it take you to put the fifteen bushels of clams that you spoke of on your ground?

A. Just as soon as I could shovel them overboard.

Q. That was 1924?

A. 1924.

Q. Did you put any more on there besides that?

A. Yes, sir.

Q. How many others did you put on there?

A. All together I had about fifty bushels.

Q. How long, then, did it take you putting them on there?

A. I would bring them home Saturday when I came home.

Q. Then you had all together fifty bushels instead of fifteen?

A. Yes. I planted fifteen the first day.

Q. And then followed them up until you planted fifty?

A. Yes.

Q. After they were planted on there in 1924, did you ever go to try them to find out whether they were growing or not?

A. Yes, sir.

Q. How frequently?

A. Oh, two or three times in the summer.

Q. You say you had some oysters on there?

A. Yes, sir.

Q. When you would tong for the clams, would you try your oysters, too?

A. I planted oysters right over the clams.

Q. When you tried the clams, could you form any notion of how many oysters you had there?

Mr. Hanstein: I object to that.

The Court: I will permit it to be answered, yes or no.

A. Yes, sir, I can give you some idea. I should have about five hundred bushels there.

Mr. Hanstein: I ask that be stricken.

The Court: Strike that.

Q. How would you try these clams and oysters? All in the same place or different places over the ground?

A. I planted some ——

Q. I don't mean plant them. How would you try them? When you would go there with your tongs to find out how they were doing, would you try always the same place or different places?

A. Different places, sure.

Q. From the oysters that you would pull up when you would be trying them, could you form any judgment as to the number of bushels of oysters you had on the ground?

Mr. Hanstein: I ask that be limited.

The Court: Yes or no.

A. Yes, I could give some, from what I took up and what I put overboard. I suppose I had four or five hundred bushels there.

Mr. Hanstein: I ask that be stricken.

The Court: That will be stricken.

A. As near as I could get to it.

The Court: That will be stricken.

Q. I am trying to find out, Mr. Tallman, whether or not from the oysters that you would take up when you were trying them, you understand, and throw them back again ——

A. Sure, certainly.

Q. From that could you tell, from the quantity you would get up in the tongs each time, could you tell approximately how many oysters there would be on that ground?

Mr. Hanstein: I object to that. I do not think we ought to be bound by any approximation.

The Court: In this case, we have not yet, according to my notion, any evidence at all as to the number of oysters and clams. He says he planted in 1921, 1922 and 1925, but he has not said what number of oysters he planted at any time. I will permit this question, and then I will refuse to permit him to hazard a guess based on nothing more than the pulling up of oysters here and there as he went along tonging, testing what his oysters and clams were doing. We have got to have some basis upon which he can form an estimate and the jury can pass upon the question as to whether or not that estimate is a mere guess. He has answered this question several times "yes."

Q. Mr. Tallman, from the tonging that you did during the period that these oysters were there in 1927, how many oysters, in your judgment, your best judgment, were on that ground at that time?

Mr. Hanstein: I object to that.

The Court: I sustain the objection on the ground that it could be nothing more than a mere guess. There is no testimony in the case as to the number of oysters he planted or anything else that would justify his giving an opinion.

(Exception noted for plaintiffs.)

Q. Mr. Tallman, do you know how many oysters you planted on that ground in 1921, was it?

The Court: 1921, 1922 and 1925.

Q. 1921, how many bushels did you plant?

Mr. Hanstein: He has already answered that question.

The Court: I do not think he has.

Mr. Hanstein: My notes show that he does not know how many he planted.

Q. How many oysters did you plant in 1921, if you know?

A. In 1921, as near as I can remember, I planted about a couple of hundred bushel.

Mr. Hanstein: I ask that be stricken as being purely speculative and nothing that could be the basis of an estimate.

The Court: I will strike the answer.

By the Court:

Q. Do you know how many oysters you planted in 1921?

A. As near as I could tell ——

Q. I say, do you know? Yes or no?

A. No, sir, I couldn't say to the bushel.

By Mr. Bourgeois:

Q. What have you to refresh your memory, if anything, that will refresh your memory, if anything, about the number of oysters you planted in 1921? Is there anything to refresh your memory?
A. No, sir, I couldn't just say.
Q. What about 1922?
A. I put quite a lot in 1922.
Q. Do you know how many bushels you planted?
A. No, sir, I couldn't tell you accurately.
Q. How about 1925, was it?
A. Yes.

Mr. Hanstein: It has already been answered.

Q. How many did you plant in 1925? How many oysters?
A. Couple of hundred bushels.
Q. Two hundred bushels? Did you gather any of those oysters in 1926 or 1927?
A. Not a one.

Mr. Hanstein: I want to move to strike that testimony as to him having planted a couple of hundred in 1925, as being purely speculative.

The Court: I do not so consider it.

(Exception noted for defendants.)

Q. What quantity would those 200 bushels in 1925 make in 1927?
A. Well, they should double themselves in growth.
Q. Then there would be four hundred bushels in 1927; in that correct?

Mr. Hanstein: I object to that.

The Court: That is a mere mathematical calculation.

Q. What was the condition of those oysters in the summer of 1927?

A. They was in condition so you couldn't handle them.

Q. I don't mean that. I mean were they alive or were they dead?

A. I haven't been there since the summer of 1925. I haven't catched an oyster or a clam off of there.

Q. What, if anything, happened to them in 1927, the fall of 1927 and the winter of 1928?

A. Well, they were covered over. The bridge was right over them. Sand. Ten foot out of water.

Q. The sand is ten foot out of water?

A. Sure it is.

Q. Over your land?

A. Yes, sir Here is an acre in here you can't see at all, from there to there You can't see it at all.

Q. In that portion there is marked solid fill on the map?

A. Yes, sir. Here is an acre in here you can't see a stake mark; right from there to there.

Q. Is that where the oysters were planted, or the clams, or both?

A. Both. Planted clams and oysters right over the top of them.

Q. Since 1927, or since they built the bridge and made that fill, have you been down there to try your grounds to find if there are any oysters or clams you can get?

A. I haven't made a grab there since July, 1925.

Q. Why not?

A. The last time I was there I couldn't catch any.

Mr. Hanstein: I object to that. I do not see why the reason is material at all.

The Court: I do not see how it is material.

Mr. Bourgeois: Suppose he says because they are all filled over.

The Court: He could not have said that in 1926.

Q. How much of your ground is covered over by this sand that you speak of? How much of the ground where you planted these clams and oysters?

A. I should say there is six acres and a half in the piece that has half been covered over.

Q. What did you have on the other half of it?

A. I had some oysters all over it.

Q. Some oysters there?

A. Yes.

Q. Were the oysters that you planted in 1925 on the part that is covered over or the part that isn't covered over?

A. The part that is covered over.

Q. Were the clams that you planted in 1924 in the part that is covered over or were they in the part that is not covered over?

A. In the part that is covered over.

Q. Then, what, if any, produce have you had from the clams and the oysters that you planted in 1925 and the clams in 1924? Have you had any yield at all?

Mr. Hanstein: I object to that. It does not seem

to me that has any bearing, in view of the fact of there being no proof here of their being dead.

The Court: The yield makes no difference at all. The question is where are the clams? He may not have had a yield.

(Question withdrawn.)

Q. Where are the clams that you planted in 1924?

Mr. Hanstein: I object to that.

The Court: I think he may testify to that.

Mr. Hanstein: He has not been there since then.

The Court: I do not know that he says that. He says that he has not dredged there since 1925. Have you been there on the ground since the bridge was put up?

The Witness: I haven't made a grab there since.

Q. Have you personally been on the ground?
A. I have been over it, but not to catch anything. Never tried it. Where I put the stuff in, it is all covered over.

Mr. Hanstein: I object to that and ask it be stricken.

The Court: He has already testified about where the clams and oysters were and that it is all covered over with sand.

Q. To what depth was it covered over with sand? What was the depth of the sand?

A. I can't say. Six to ten foot, I expect.

Q. Under what depth of sand will oysters grow?

A. I shouldn't say very deep. Very little sand will kill an oyster in the winter time.

Q. In what depth of sand will a clam grow?

A. Oh, he has got to have some water. He can't grow where there ain't any water.

The Court: Now, is there any water here?

A. Not where I put my clams in, there ain't a drop of water, no, sir. Not a drop at no time of the tide.

Cross-examination.

By Mr. Hanstein:

Q. Do I understand you to say, Mr. Tallman, that one-half of your land is covered over?

A. With sand.

Q. One-half is?

A. Yes, I am willing to say one-half.

Q. Well, Mr. Tallman, directing your attention to this map, you have lease 153, don't you?

A. Yes, sir.

Q. And Mr. Bourgeois has a map here that shows the line of low water cutting over the corner of your land. You say that this map isn't right, don't you?

A. No, I don't say it isn't right.

Q. But you say that sand comes half-way over your land?

A. Yes, sir.

Q. And if this map shows the low water mark

over in this corner, as it does, it isn't right? You say the low water mark is over here, don't you?

A. No, I haven't said no such stuff.

Q. Do you say it now?

A. No, I don't say nothing about it.

Q. Where do you say the low water mark is?

A. This is the bulkhead right there, isn't it?

Q. I think this is the bulkhead.

A. Well, it runs away out—I can't just see, but way out here at low water it is all dry.

Q. Then you say the low tide mark is in the middle of your lot?

Mr. Bourgeois: I object.

A. I say so, yes, sir.

Q. And about where the number .54 is?

A. Somewhere near there, as near as I can tell.

Q. And this map that shows low water mark over in the corner isn't right, is it?

Mr. Bourgeois: I object to him trying to disprove the map.

The Court: No, the question is where the high and low water mark is, if it has any bearing on his particular land, that is all.

Q. Didn't you put any oysters or clams over in the part of your land that didn't get covered over?

A. Yes, sir.

Q. So you do have some oysters and clams over in the part of the land that isn't covered over?

A. Very few.

Q. But some of them are there; isn't that right?

A. Possibly a few.

Q. You have caught clams that have been under the bottom, haven't you?

A. Yes, sir, I catched them when they had been under the bottom.

Q. In winter they go down even deeper, don't they?

A. Yes, sir.

Q. If a clam lays right on top of the bottom, he gets killed in the winter, doesn't he? That is right, isn't it?

A. Probably he does. I wouldn't say whether he does or not.

Q. Don't they go into the bottom for protection in the winter?

A. Absolutely.

Q. That doesn't kill them, going down in the bottom, either?

A. Not on your life.

(The witness's testimony on direct examination was repeated as follows: "When did you plant oysters there? A. In 1921 and 1922 and 1925. Q. How many did you plant in 1925? A. I can't just say. I can't recall.")

Q. You talk about planting some clams there in September of 1924. Then you say that you planted some more later?

A. Yes, sir.

Q. When did you plant them?

A. I come home every Saturday and we worked there thirty days, over here in this canal down here, and I come home every Saturday and I brought what I caught through the week and brought them home and planted them.

Q. What do you do, take the little ones you caught some place else?

A. All the kind we caught was little ones. They wouldn't allow you to catch any big ones.

By the Court:

Q. You came over here and caught seed clams and took them over there and planted them?
A. Yes, sir.

By Mr. Hanstein:

Q. Did you measure them?
A. Yes, sir.
Q. What did you measure them in?
A. A bushel basket.
Q. Did you keep any record of it?
A. Sure.
Q. Where did you keep your record?
A. I had a little book to put it on.
Q. And you kept a record in a book of how many clams you put down there?
A. Yes, sir.
Q. Why didn't you keep any record of how many oysters you put there?
A. I didn't suppose there would ever be any trouble like this.
Q. What is that?
A. I don't know.
Q. Don't know why you kept your record of the clams and not a record of the oysters; is that it?
A. I can tell you why I didn't keep a record of the clams, why I kept a record of them. My brother and I worked together, and he planted his and I planted mine, and we tried to split square.
Q. I see. Was the same relationship true as to the oysters?

A. No, sir.

Q. You were just partners on clams?

A. Yes, sir.

Q. Did you bring your book along showing where you wrote it down?

A. I couldn't give you any idea where the book is.

Q. Couldn't tell us where the book is?

A. No, sir, not a bit.

Q. I thought that book was to keep this record between you and your brother straight.

A. That was ——

Q. What is that?

A. That was when we was working together.

Q. When you stopped working together you still owed him some clams, didn't you?

A. No, I didn't. He took his home and I took mine home.

Q. You took some of these clams home?

A. Took them and planted them, yes. Had to take them home in the boat.

Q. Well, your brother owned some of these clams you planted on your land?

A. Not on your life.

Q. He didn't? Well, then, why did you keep it in a book?

A. He took home and planted. He took his and I took mine.

Q. You divided the clams?

A. Divided the clams, yes.

Q. And you put yours down on your ground?

A. Sure, and he took his on his ground.

Q. Then why did you have to write down in a book how many you planted? They were all yours, weren't they?

A. There was no law to compel us not to, was there?

Q. I didn't hear you.

A. There ain't no law to compel us not to keep account, is there?

Q. I don't know. I am not sure about that. When was it you planted these clams?

A. 1924.

Q. What?

A. September, 1924.

Q. When did you plant the rest of them?

A. In September, 1924.

Q. You planted all of them in September, 1924?

A. Yes, sir.

Q. All of them on September 11th, 1924?

A. Not on your life.

Q. The rest of them you brought there on Saturday afternoons; is that it?

A. Yes, sir.

Q. In September?

A. In September.

Q. So that in September, in the remaining Saturday afternoons, you planted some more clams?

A. Yes, sir.

Q. And that is written down in a book somewhere, but you can't find the book; that is right, isn't it?

A. Yes, sir; I told you that, didn't I?

By the Court:

Q. In the early part of your direct examination, you were asked how many oysters you planted in 1925, and you said you didn't know. Then later on in your direct examination you were asked the question how many oysters you planted in 1925, and you said 200 bushels. When you said 200 bushels, were you just guessing?

A. As near as I could get at it. I didn't measure them.

The Court: I will reconsider the motion made by Mr. Hanstein when that question was answered, and strike out the answer with reference to the 200 bushels. My understanding at the time that answer was given was that he was testifying to a positive fact, but it appears that he had no count and was, therefore, merely guessing.

(Exception noted for plaintiffs.)

Re-direct examination.

By Mr. Bourgeois:

Q. Now, Mr. Tallman, about these clams. After the book that you have spoken about had served its purpose in making the division of clams between your brother and you, did you have any further use for it?

Mr. Hanstein: I object. I do not know why he should lead the witness.

The Court: Well, I don't see that it makes much difference. I think the jury understands that book. I do, and I know if I do they must.

Mr. Bourgeois: I want to know what the price of clams was. I thought we agreed on it.

The Court: No, you did not. You agreed and then you said that the price for gathering was too much.

Mr. Bourgeois: I am willing to agree that the value of clams net to them after the delivery was

five dollars a thousand and ten dollars for the large ones. They ranged five, eight and ten. Eliminate the eight, and I am willing to agree that the net price of the clams will be five dollars, and the net price of the large clams will be ten dollars.

Mr. Hanstein: Without charging anything for taking them up or delivering them?

The Court: That will be eaten up by the eight dollar item.

Mr. Bourgeois: That will be free of the delivery.

Mr. Hanstein: The agreement is that the wholesale price of clams net to them was five dollars per little-necks ——

Mr. Bourgeois: Five for all of them excepting the large clams, and ten for the large. That means five for the little-necks, the cherry stones and the mediums, and ten dollars for the large ones.

Mr. Hanstein: I guess it is as broad as it is long. Nobody knows what it is all about, anyway.

Mr. Bourgeois: And the price agreed on the oysters is $1.25 net.

Mr. Hanstein: I am afraid we do not agree on that.

The Court: $1.25 is near enough, isn't it?

Mr. Hanstein: Yes.

The Court: $1.25 is agreed on.

Mr. Hanstein: I move to strike the testimony of Mr. Tallman as to the effort to prove damages as to the loss of clams, on the ground that there is no proof as to how many there were on the land in question at the time of the alleged damage.

Mr. Bell: I make the same motion.

The Court: The same ruling.

JESSE THOMAS, recalled.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Thomas, you have been on the stand before and you have some oyster grounds and clam grounds over in Great Egg Harbor River?
A. Yes, sir.
Q. Did you plant any clams or oysters on those grounds?
A. Yes, sir.
Q. When did you plant the clams?
A. 1924.
Q. On how many acres did you plant those clams that year?
A. Well, you couldn't tell how many acres.
Q. Beg pardon?
A. You couldn't tell how many acres you planted them on.

Q. You had ten acres and three and eighty hundredths; 13.80 acres all together?

A. Yes.

Q. Did you plant them on those grounds?

A. Sure.

Q. All on one?

A. No. Part on one and part on the other.

Q. How many clams did you plant?

A. Sixty bushels was what I catched and bought.

Q. How many clams would there be to the bushel?

A. Twelve thousand. Twelve to fifteen.

Q. Did you plant any oysters?

A. Yes, sir.

Q. When did you plant them?

A. Planted them in 1925.

Q. How many oysters did you plant?

A. Five hundred bushel.

Q. During the succeeding years of 1925 and 1926 and 1927, and up until the summer of 1927, did you at times go over there and find out what the condition was?

A. I generally tried them twice a year, in the spring and fall.

Q. And the last time when you tried them was in the spring of 1927?

A. To find any, yes.

Q. What was the condition of them in the spring of 1927?

A. All right.

Q. And were they making the regular growth?

A. Yes, sir.

Q. What would have been the yield of the five hundred bushels of oysters that you planted in 1925, in the fall of 1927, or first of January, 1928?

A. I don't know. I didn't get them.

Q. I beg pardon?

A. I don't know. I didn't get them.

Q. You can tell me how much they would increase. What is the increase? How much will oysters increase?

A. About half, so they say.

Q. How much?

A. About half, so they say.

Q. What do you mean by half? Each year?

A. Yes.

Mr. Hanstein: I move that answer be stricken out, "Half, so they say."

The Court: It will be stricken.

A. I don't know. I didn't get them.

Q. Have you had any experience in finding out how much the increase is?

A. Not so much.

Q. What about your clams?

A. What do you mean?

Q. What would be the size of those little clams that you planted in 1924, in the fall of 1927?

A. Just a nice size neck they was the last I seen them.

Q. Little-necks?

A. Yes, just a nice size little-neck the last time I seen them.

Q. What, if anything, happened to the clams and the oysters on your ground in the summer or fall of 1927 and 1928, the early part?

A. Covered up with sand.

Q. Where did the sand come from?

A. From the mud-digger.

Q. What?

A. From the fill, the mud-digger.

Q. When did it commence to go there?

A. Commenced to go there about ten or twelve days after they started work there.

Q. When did they start working there approximately?

A. Some time in September.

Q. Of 1927?

A. Yes.

Q. What effect upon your clams and oysters did the sand that went there have?

A. Killed them.

Q. How deep did the sand gather?

A. On one piece, about a foot.

Q. And on the other piece how much?

A. About six inches, five or six inches.

Q. Do you know how far up the river that sand drifted or went?

A. Well, it went clean up to Job's Point.

Q. How far is that from the bridge?

A. Over a mile. About a mile, anyway.

Q. Were your oysters making the usual growth of oysters from the time you planted them in 1925 up until the last time you saw them in 1927?

A. Yes, sir.

Cross-examination.

By Mr. Hanstein:

Q. You were occupying two pieces of ground, weren't you?

A. Yes, sir.

Q. Which one was covered by a foot of sand?

A. Come here and I will show you. That one there.

The Court: Number what?

A. 166.
Q. 166 covered by a foot?
A. Yes, sir.
Q. Where is your other one?

(The witness indicated on the map.)

Q. 157 covered by what?
A. Five or six inches.
Q. You have caught clams under the bottom, haven't you?
A. Caught them under the bottom?
Q. Yes.
A. Yes, sure.
Q. They were living, weren't they?
A. Yes.
Q. The mere fact that clams are covered over doesn't kill them, does it?
A. If they are covered deep enough it does.
Q. Clams go down into the bottom, don't they?
A. Yes.
Q. In winter they do particularly, don't they?
A. Always in the bottom a little.
Q. What?
A. They are always in the bottom a little.
Q. And in winter they go down still deeper?
A. Not much deeper.
Q. You have to tong deeper in winter, anyway?
A. A little bit, yes.
Q. The mere fact that they are covered over doesn't kill them, does it?
A. They ain't covered deep enough. They know how deep to go in the bed themselves.
Q. You went out there about twice a year to check it over?
A. Yes, spring and fall.

Q. And the last time you were out there was in the spring of 1927?

A. I was out there this morning.

Q. I mean before the fill?

A. Yes.

Q. Do you know when they started to do any pumping out there?

A. Sometime in September. I don't know just what day.

Q. You say the sand was out on your place in ten days?

A. Ten or twelve days, I said.

Q. Were you out there then?

A. Sure I was there.

Q. Why did you go out?

A. I am there every day, down across there every day. Every day or night I am down across them grounds.

Q. What is that?

A. I am down across them grounds every day or night.

Q. What did you mean by telling us that the last time you were out there before the fill was in the spring of 1927?

A. To catch any.

Q. To tong?

A. Yes. I catched them to try to see how they was.

Q. That was in the spring?

A. Yes.

Q. How much did you pay for these clams that you bought?

A. Six dollars.

Q. For how many?

A. A bushel. Put on the ground.

Q. How much bushels did you buy?

A. Twenty.

Q. What size were the clams that you caught and planted?

A. Caught?

Q. Yes.

A. The little ones, you mean?

Q. Didn't you say you caught and bought clams?

A. Sixty bushel, yes. Right little ones.

Q. What?

A. Right small clams.

Q. Where did you get them?

A. Over here in the canal when it was opened up.

Q. How big were they?

A. Twelve or fiften thousand to the bushel.

Q. The ones you caught?

A. Yes.

Q. Where is this canal where you caught them?

A. Down here.

Q. What is the name of it?

A. I don't know what the name of it is. Ventnor canal; I don't know what the name of it is. I know I catched them. That is all I know. I can tell you where it is at, too.

Q. Did you keep any record of the clams that you caught and put down there?

A. Yes, sir.

Q. Where did you keep your record?

A. I kept it right in my head. I worked seven days and catched forty bushel.

Q. When you say you kept a record, you mean you just remembered it?

A. I remembered it, yes. I catched forty bushels.

Q. Did you take any clams off of this ground in 1924?

A. No, sir.

Q. Didn't take a one?

A. No, sir. I have never taken none off since, I guess, by the looks of it.

Mr. Hanstein: I ask that be stricken.

The Court: Strike the last part.

Re-direct examination.

By Mr. Bourgeois:

Q. Mr. Thomas, you say you were on the ground this morning. For what purpose?
A. Just went down across them.
Q. Did you try them to see if anything was there?
A. No. I am employed by the State and I make a circuit either day or night over these grounds.
Q. When did you try them to find out if there were any there?
A. Tried them this spring.
Q. And there weren't any there?
A. There ain't nothing there.
Q. Not anything?
A. No.
Q. You say you get clams under the bottom. Does the clam lie on the top of the sand or the top of the mud, as an oyster does?
A. No, sir.
Q. How does it live?
A. An oyster lays flat on the ground, on the bottom.
Q. And can't move, can it?
A. A clam lays the sharp point down.
Q. With the large part on the top?
A. Yes, the back part up.

Q. And when the clam is in his proper state, how much of him is in the mud?

A. In the summer time he ain't hardly even with the mud. In the winter time he is just about even.

Q. They move up and down, then, maybe a half inch or something of that kind, between summer and winter?

A. They might raise up an inch in the summer time to what they are in the winter.

Q. How deep will they go in the mud? How deep have you known them to go in the mud and still live, or sand, as it may be?

A. So the sand will be about even with the back of him is all, as far as I know.

Q. If they get down below that, they are likely to smother?

A. Yes, sure.

Q. Can they live if they get down to where the water doesn't get to them?

A. Where water doesn't get to them?

Q. Yes.

A. Down in the bottom, you mean?

Q. The water will go through the sand, but take the mud that it doesn't go through, can they live in mud where the water won't go to them?

A. No, certainly not.

Q. And if the sand is deep enough so the water won't go to them, they don't live there?

A. No, sir.

Q. What do they do for air? Do they need air or not?

A. No, the air ain't no good to them, I guess. They live without air, I guess.

Re-cross examination.

By Mr. Hanstein:

Q. When you say you were there this spring and you couldn't find anything, do you mean to say those clams had moved away?

A. No.

Q. Well, they were underneath the bottom, weren't they?

A. No doubt but what they were there. I know the shells are there. They are dead. You can dig them up and they are dead.

Q. You said you didn't find anything.

A. Clams, you are talking about. Shells, I am talking about now. Shells I found, clam shells, where they are dead.

Q. You didn't find any live clams?

A. No, sir, there ain't any there.

Mr. Hanstein: I would like to make a motion to strike the testimony of the witness as to the oysters, on the ground that all he knows is that he planted some oysters, he does not know how they increase, they were planted in 1925, he tried them in the spring of 1927, and he does not know anything about the condition of them at the time of the alleged injury. As to the clams, the last he testified to any knowledge as to their condition was in the spring of 1927, and this injury is alleged to have taken place in September of 1927.

Mr. Bell: I make the same motion for the Bridge Company.

The Court: The same ruling. I want to call attention to this, however: In some of the cases the plaintiffs have testified that as a result of their experience extending over a period of years, they find that a bushel of oysters planted in 1924 doubled in the next two years, and that allows for the killing or deaths that may follow after the planting; and that in clams they allow one hundred to a thousand for fatalities. That stands, in so far as those plaintiffs themselves are concerned, and I assume that it ought to be stipulated that that same testimony shall extend for the benefit of the other plaintiffs.

Mr. Bourgeois: I was going to ask about this same thing, but these cases are being consolidated and the testimony in one case is testimony in another case as far as it is relevant, as I understand it.

The Court: I would think so. I did not want any misunderstanding about it because if that is not so then we would have simply to keep repeating that testimony, and the same expert would testify to the same thing in each case, of course. The question as to the weight to be given to that expert testimony is a question for the jury.

Mr. Bourgeois: Certainly, but it is evidence.

The Court: Yes, it is evidence, and that evidence extends to each case unless there is some dispute about that. It would only mean that we would have to recall that witness every time.

Mr. Hanstein: It is my judgment that there is not any point in doing the idle thing of having the witness go on the stand and just repeat it eight times, so as to tie it up with eight different cases. The point as to my motion is that there is no such proof as to Jesse Thomas's claim of damage as would justify a jury, even assuming they would give him a verdict, in giving him more than nominal damages. There is no proof here, such legal proof as is required.

The Court: I understand your motion, but what I wanted clear was that the testimony of the expert witnesses who have testified, shall be for the benefit of each one of the plaintiffs. For instance, Mr. Thomas has not testified, and, in fact, says he does not know what five hundred bushels of oysters in the ordinary course of years would produce in 1928. Expert witnesses have testified that as a result of their experience, five hundred bushels would increase double, to a thousand bushels. I want it understood that that testimony is for the benefit of all the plaintiffs.

Mr. Hanstein: Oh, it is my judgment that even though Mr. Thomas does not happen to know that thing, if it is in the case from the testimony of somebody else, it applies to all the cases. May I have an exception to your Honor's ruling?

(Exception noted for defendants.)

SMITH HICKMAN, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Hickman, you live in Scullville?
A. I do.
Q. How long have you lived there?
A. All my life, practically.
Q. What is your business?
A. I am seventy-four now, so you can figure it up.
Q. What is your business?
A. Bay man.
Q. How long have you been a bay man?
A. Well, I have bayed, I suppose, about sixty years.
Q. Do you have an oyster and clam ground down near what is now the bridge?
A. In Patcong Creek, what they call Cedar Swamp Creek.
Q. I don't understand that at all.
A. Well, it is Cedar Swamp Creek, then.
Q. Does this bridge go across Patcong Creek?
A. No, it goes across Cedar Bridge.
Q. Great Egg Harbor River, doesn't it?
A. Yes, it goes across Great Egg Harbor River, but it goes across this other creek.
Q. Look on the map and tell me if you have a ground up here that is called 167?
A. Yes.
Q. It has six acres in it?
A. Yes, sir.

Q. How long have you had that ground? How long have you leased it?

A. I won't tell you just how long I have leased it, but I had it in 1924.

Q. Have you ever planted anything on it?

A. Yes, sir.

Q. When?

A. 1924.

Q. What did you plant?

A. Clams.

Q. How many?

A. Thirty-three bushels.

Q. Did it have anything else on it besides clams?

A. Very few.

Q. What?

A. Oysters; but very few.

Q. Do you know how many?

A. No, sir, I couldn't make no estimation of that at all whatever.

Q. Then you planted thirty-three bushels of clams on it?

A. Yes, sir.

Q. How many clams were there to the bushel?

A. Well, from eight to twelve thousand. From eight thousand to twelve thousand to the bushel.

Q. On your land, from eight to twelve?

A. Yes.

Q. And did you go on the ground to find out the condition of them in 1925?

A. I did not.

Q. 1926?

A. I did in 1926.

Q. What did you find there in 1926?

A. They was all right, but they was hardly large enough for market.

Q. Growing, were they?

A. Yes, sir, seemed to be.

Q. Did you go on the ground in 1927?
A. I did not.
Q. When did you next go on the ground?
A. October, 1928.
Q. What did you find there then?
A. I found nothing but sand and mud, a little mud on top, and sand.
Q. A little mud on top and sand?
A. A little mud on top of sand, yes, sir.
Q. Did you dig down to find out how deep the sand was?
A. I did, but I didn't get to the bottom of it. I didn't bring up any shells or anything.
Q. How deep did you dig?
A. Well, tong teeth, I suppose, is about four to five inches, and I dug down with them and I didn't strike anything. I always did before, but I didn't then.
Q. Didn't you find any clams at all?
A. I did not.
Q. Just covered over?
A. Completely covered over.
Q. Mr. Hickman, I think you adjoin Martin Scull's land, don't you, there?
A. I do, yes, sir.
Q. Do you know whether or not there were any clams planted on his ground?
A. Well, I couldn't tell you positively.
Q. You didn't plant any there?
A. They told me I planted some there, but I couldn't hardly tell whether I did or not.

Mr. Hanstein: I ask that be stricken.

The Court: Strike that.

Q. But you did have the thirty-three bushels on your ground?

A. I planted the thirty-three bushels and I aimed to put them on my own land.

Q. And those clams, what happened to them, did you say?

A. I can't find them. They are buried up or something. I can't find them.

Q. What kind of bottom did you plant them in?

A. Kind of a sticky mud.

Q. Was that the same kind of bottom you found when you went there in October, 1928?

A. I did not.

Q. Was there any sand on your ground when you planted the clams?

A. There was not, not that I know of. To the best of my knowledge, there wasn't any.

Q. Wouldn't you know?

A. Supposed to know when you try it.

Q. Did you try it?

A. I did.

Q. And there was nothing but mud showed?

A. Nothing but sand and mud.

The Court: When do you mean there was sand and mud? When you tried it in 1924?

A. No, sir.

Q. When did you find sand and mud?

A. 1928.

Mr. Hanstein: October, 1928.

Q. Was there any sand there, I say, in 1924, when you tried it?

A. No, sir.

Q. Was there any sand there in 1926, when you tried the clams?
A. No, sir, no sand there then.
Q Just the mud?
A. Just the mud?

(Recess taken until 1:30 P. M.)

AFTERNOON SESSION—1:30 P. M.

SMITH HICKMAN, resumed.

Direct examination (continued).

By Mr. Bourgeois:

Q. Were these clams that you planted at the time you planted them alive?
A. Supposed to be.
Q. I didn't ask you that.
A. Yes, sir.

Cross-examination.

By Mr. Hanstein:

Q. Where did you get them, Mr. Hickman?
A. Up in the canal in Atlantic City.
Q. You didn't buy them at all?
A. Sir?
Q. You didn't buy them, did you?
A. No, sir, didn't buy them.
Q. You went and looked at them in 1926?
A. Yes, sir.

Q. They weren't large enough to take up?

A. I didn't think they was large enough for market, no, sir.

Q. Didn't you plant some of these on Mr. Scull's land?

A. I don't think so.

Q. Well, did you put some of them on Mr. Smith's land?

A. I did not. Smith Hickman, but not Mr. Smith.

Q. Some of them might be on Scull's land, though, might they not?

A. I don't think so.

Q. Well, it depends on the location of the stakes, doesn't it?

A. Yes, sir.

Q. If the stakes between your ground and Scull's ground were in the wrong place, these might have gone on Scull's ground, mightn't they?

A. Yes, they might have gone there.

Q. Who put the stakes down between your ground and Scull's ground?

A. I couldn't say who put them down, all of them. I put some of them down.

Q. Were there any stakes between your ground and Scull's ground?

A. Yes, sir.

Q. Did you put them there?

A. I didn't put them there, no, sir.

Q. Who put them there?

A. I couldn't tell you.

Q. Do you know whether they were in the right place?

A. Supposed to be by the shell corners that we had.

Q. I am asking you if you know that they were?

A. Shell corners tells you the stakes. I will say this, they was in the right place.

Q. Did you ever take an engineer out there to find out if they were in the right place?

A. I did not.

Q. So that if the fellow who put it down made a mistake, then you couldn't tell which was the dividing line, could you?

A. Tell by the corners as they go across.

(Question repeated.)

A. Nothing only my corners that I go by.

Q. Mr. Scull claimed that you put some clams on his ground, didn't he?

Mr. Bourgeois: That is objected to as not cross-examination.

The Court: I do not see what difference it would make what Mr. Scull claimed. I will sustain the objection.

(Exception noted for defendants.)

Q. Didn't you and Mr. Scull have some trouble about the taking of clams off of the grounds out there?

A. We did not.

Q. Clams go down deeper in winter than they do in summer, don't they?

A. Supposed to, yes, sir.

Q. Not supposed to. Don't they?

A. Yes, sir.

Q. Around October they are usually digging in, aren't they?

A. Go down.

Q. So that in October when you went out there,

you would naturally expect to find them deeper in the bottom than in the summer time, wouldn't you?

A. Yes, sir, find them deeper, but I didn't find them at all.

Mr. Hanstein: I would like to make a motion to strike the testimony as to the proof of damages in this case, on the ground that the witness says that he was on this bed in 1926, he was not there in 1927, and the next time after 1926 that he went there was October of 1928, and he found nothing but sand and mud at that time, and I contend that there is no proof that any clams were injured by reason of any work done by the defendant, and there is no proof as to any quantities of clams being on this bed at the time of the alleged actions by the defendant, which are the basis of the suit.

Mr. Bell: I make the same motion.

The Court: The same ruling as heretofore.

Oscar Somers, recalled.

Direct examination.

By Mr. Bourgeois:

Q. You have been on the witness stand and pointed your ground as being the one furthest up?

A. Yes.

Q. Did you have anything planted on that ground?

A. Twenty bushels of clams.

Q. When were they planted?
A. 1924.
Q. Were they alive or dead when you planted them?
A. Alive.
Q. Where did you get them?
A. Over in the Thorofare.
Q. What Thorofare do you mean?
A. Atlantic City here, in the Thorofare.
Q. In the Thorofare, is that what you mean?
A. Yes.
Q. Just why were they disposing of clams in the Atlantic City Thorofare at that time, if you know?

Mr. Hanstein: I object to that as incompetent.

(Objection sustained.)

Q. How many bushels did you say you got?
A. Twenty.
Q. How many clams in the bushel?
A. Twelve thousand and a little over.
Q. Where did you plant them?
A. In Creek Channel.
Q. Where?
A. Creek Channel, the eastern side.
Q. Up on your lot there, do you mean?
A. (The witness indicated on the map.) East. On this side.
Q. What time of the year did you plant them?
A. 1924.
Q. What time of the year was it?
A. In September.
Q. September, 1924? What kind of bottom did you plant them in?
A. Hard bottom.

Q. Mud or sand?

A. It wasn't all hard, part soft and part sand. Part mud and part sand.

Q. Where was the sand?

A. Right along by the bar, the sand was.

Q. Where was the bar?

A. Right along Creek Channel.

Q. Which part of your lots, of your oyster ground was there sand on?

A. Eastern side.

Q. The east side, that is in 1924?

A. Yes.

Q. You planted clams on that sand, did you?

A. Yes, sand and soft, together.

Q. How deep was the water at that time at low tide?

A. Around about six foot.

Q. Did you try those clams afterwards?

A. Yes, sir.

Q. What year?

A. I didn't try—I tried them around in 1926, I tried them.

Q. Tried them in 1926?

A. Yes.

Q. What was the condition of them then?

A. They was living then.

Q. Litle-necks then?

A. Yes.

Q. What, if anything, happened to them the next year?

A. I don't know. I didn't try them. They were all covered up.

Q. When did you try them with relation to the time when they commenced pumping in there at the bridge?

A. A few month before they commenced to pump in.

Q. What was their condition then?
A. They was good then.
Q. When did you try them after that time, after they had pumped in? How soon was it after?
A. Between 1927 and 1928 I tried them.
Q. What did you find then?
A. Didn't find them. All covered up.
Q. With what?
A. With sand and mud, both together.
Q. How much sand and mud, if you can tell us, was on top of the clams then?
A. I imagine around three inches.
Q. Around three inches?
A. Three and four, something like that.
Q. Did you try to get them with your tongs?
A. Oh, yes.
Q. Could you get them?
A. Couldn't get them.
Q. Couldn't you get any of them at all?
A. Nothing but shells.
Q. None were good?
A. Not any good. All dead.
Q. How many did you get, do you think, that were good?
A. Oh, I got thirty or forty of them at one grab, all dead.
Q. Have you ever been able to market any clams off of that ground since then?
A. No, sir.
Q. Those twenty bushels that you planted there you bought, as I understand it, down here in Atlantic City?
A. Yes.
Q. Or Ventnor, wherever it was?
A. Down here.
Q. Did you have any oysters on your ground?
A. Yes, sir.

Q. How many
A. Planted 150 bushels.
Q. When were they planted?
A. They were planted around 1926.
Q. How many did you plant?
A. 150 bushel.
Q. And according to natural growth, they would amount to how much in 1927, how many bushels?
A. They would grow up. They would have made double.
Q. That would have been 300 bushels?
A. Yes.
Q. 1927? Were you able to market any of those oysters?
A. No, sir.
Q. What happened to them?
A. Sand and stuff on top of them killed them.
Q. Did you go there to tong for them?
A. Yes, sir.
Q. Could you get any of them up?
A. Nothing but shells. Nothing but just shells.
Q. No live oysters at all?
A. No live oysters, no.

Cross-examination.

By Mr. Hanstein:

Q. How much did you pay for the oysters that you planted in 1926?
A. Didn't pay nothing for them. I tonged them off my own stuff.
Q. How big were they?
A. Plants.
Q. Just tell the jury how big they were in size.
A. About that size and on up (indicating). That

size and maybe that size. Different size in plants. Run all sizes.

Q. You indicated there from a half inch to an inch, I suppose?

A. Yes, and over that sometimes. That is just the size. They run from that size on up. Plants and on up.

Q. That was in 1926?

A. 1926.

Q. In 1927 they weren't fit for market yet, were they?

A. No, sir, they wasn't.

Q. How many years does it take before they are fit for market?

A. Around three and four years.

Q. It takes three or four years? How do you know there were twelve thousand clams to the bushel in the clams you bought?

A. I counted them. Counted them to see how many was in the bushel.

Q. Of these particular ones?

A. Yes, I did. I counted them on the way up from Atlantic City up home in the motor boat.

Q. Who was with you in the motor boat?

A. Walter Lloyd and Jesse Thomas.

Q. And you sat there and counted them?

A. Walter Lloyd and I. We both counted them going up. Jesse Thomas run the motor boat while we counted them. Sometimes they run over twelve thousand.

Q. How many did you count in a bushel?

A. We counted 12,028 in a bushel.

Q. What is that?

A. 12,028 we counted in one bushel.

Q. How did you come to count them?

A. Just wanted to see how many was in a bushel.

Q. Is that the first time you ever counted how many there were in a bushel?

A. I never tonged little ones like that before. That is something I had never done before. I had caught big ones before, but not little ones like them, as big as your finger-nail to your thumb-nail.

Q. Why did you count them?

A. I wanted to see how many were in a bushel.

Q. Why did you want to know?

A. Wanted to count them to find out.

Q. You say that the place where you planted these clams was sandy, don't you?

A. Part sand on the outside, and on the inside it was part soft and part sand.

Q. So you planted them in a sandy bottom?

A. It wasn't all sandy bottom.

Q. Well, some of it was sandy bottom?

A. Some was and some wasn't.

Q. And when you came back and found that your clams were all destroyed, you found a sandy bottom again, didn't you?

A. Quite a little bit softer.

Q. What?

A. More mud this time. More mud.

Q. More mud?

A. Yes.

Q. It wasn't more sand?

A. No. More mud there.

Q. You have got clams out, that have been covered by sand and mud, before, haven't you?

A. Not that deep.

Q. Well, what is the greatest depth at which you have ever goten live clams?

A. About two inches.

Q. You never got clams that were deeper than two inches?

A. Not down there I ain't.

Q. What is that?

A. Not down in my ground, I ain't.

Q. Have you gotten them on other grounds?

A. Down the bay, down around maybe three inches.

Q. You have found them three inches deep?

A. Down in the bay, yes.

Q. How did you get them out, tonging them?

A. Tonged them out with tongs.

Q. With the tongs?

A. Yes, sir.

Q. Mr. Somers, could you tell when you were sitting up in a boat handling a pair of tongs, just how deep a clam is in, whether it is in two inches or three inches or four inches?

A. Yes, you can tell by the teeth on your tongs.

Q. You say you could tell?

A. The teeth on your tongs. If there is a clam down there deep enough, you can't find them.

Q. Haven't you ever been able to rake clams up with a rake?

A. Not in deep water.

Q. Haven't you ever done it?

A. Done it on top of the bar.

Q. From a boat? You have used a rake from a boat, haven't you?

A. No, sir.

Q. Never?

A. No, sir.

Q. You never did that?

A. No, sir, not from no boat.

Q. When was it that you last tried these clams before the pumping started?

A. About two months.

Q. What month was it when you tried them?

A. Around July.

Q. That was what year?

A. 1926.
Q. 1920 what?
A. 1926.

The Court: Did you say 1926 or 1927?

A. I mean the year going on 1927. The year 1926 and 1927. Around in July.
Q. Around July, going on to 1927?
A. 1927, yes.
Q. You tried them in that year, then?
A. Yes.
Q. Then the next time you went out was how long after they started to pump? What month was it when you went out next?
A. That was 1927. 1927 and 1928.
Q. What month was it?
A. I couldn't just tell you what month it was. In the year 1927 and 1928, but I can't tell you just what month.
Q. Well, was it the spring or the fall or when was it?
A. In the spring.
Q. In the spring?
A. In the spring of the year, yes.
Q. Pumping didn't start there until the summer of 1927. You went out in the spring of 1928; is that it?
A. Yes, between 1927 and 1928.
Q. I don't know what between 1927 and 1928 means.
A. Months during 1927 to 1928, in that year.
Q. Could you tell us whether it was 1927 or 1928? Do you know that?
A. In 1927.
Q. You went out in 1927; is that right?

A. Yes.
Q. In the spring time of 1927?
A. Yes.
Q. And were your clams covered over then?
A. Yes, sir, covered over.
Q. Covered over in the spring of 1927? That is all.

By Mr. Bourgeois:

Q. When you went out and found your clams covered over, had the pumping under the bridge been done or not done?
A. Yes, they were pumping.
Q. It had been done?
A. Yes.
Q. Then whenever it was, whether it was 1927 or 1928, it was after they had done the pumping under the bridge?
A. Yes.

Mr. Hanstein: I would like to make a motion with regard to the oysters, that all proof as to damages in connection with oysters be stricken, on the ground that he testified to having planted them in 1926, and there is no proof as to the value of such oysters in 1927, the testimony even by the witness being that it would be three or four years before they were fit for market. As to the clams, on the ground that there was no proof as to the presence of the clams on the grounds at the time of the occurrence of the alleged acts by the defendants.

The Court: In so far as the proof of the value of the oysters is concerned, I thought you had agreed on the value of the oysters .

Mr. Hanstein: Yes, as to the marketable oysters, but he says these were not marketable.

The Court: The clams he says were not marketable in 1926.

Mr. Hanstein: No. I do not think your Honor understood him. He said that in 1926 he planted 150 bushels of oysters, which he said would take three or four years until they were fit for market.

The Court: He testified that in 1926 he planted 150 bushels of oysters, and that in 1927 there would be 300 bushels.

Mr. Hanstein: Yes, but they were not fit for market.

The Court: If that is so, I suppose they will have to prove the value of those particular oysters, because we have been talking about marketable oysters. Bring him back.

Oscar Somers, recalled.

Direct examination.

By Mr. Bourgeois:

Q. How large were those oysters in 1927 that you planted in 1926?

A. About that size (indicating).

Q. That would be a cull?

A. Yes.

Q. How much would they be worth a bushel in the market?

A. About a dollar and a quarter.

Q. Does that mean exclusive of the cost of getting them out, or $1.25 and then you had to pay for harvesting them out of that?

A. It didn't matter with some of them.

Q. How much does it cost to get them out and cart them to market? How much a bushel?

A. About $1.50.

Q. $1.50 a bushel?

A. I don't know what you mean.

Q. Well, I am not surprised at that so much. How much net would those oysters yield you per bushel in 1927 if you had harvested them, if you had gathered them?

A. I ain't got you on that.

Q. See if I can make it clearer.

By the Court:

Q. How much a bushel does it cost you to dig up oysters?

A. I don't know. I don't know what it costs to dig them up. I dig them up for $1.25 and $1.50 a bushel, take them up and sell them for $1.25 and $1.50 a bushel.

By Mr. Bourgeois:

Q. That is what they were worth at that time?

A. Yes. Take big ones, they were worth $1.50 at that time. These were $1.25.

Cross-examination.

By Mr. Hanstein:

Q. You showed the jury here that some of these oysters you put in were this big (indicating)?

A. That is when I planted them in 1926.

Q. They were twice that big the next year; is that right?

A. Yes. Bigger than that the next year. If you plant that size, the next year they would be that size.

Q. Yours more than double in a year, do they?

A. Over double in a year, yes.

Q. They more than double in a year?

A. Yes.

Q. Were they fit to eat?

A. Oh, they were fit to eat, but they were that size. They were fit to eat, sure.

Q. Do people buy oysters the size of yours in 1927 for eating?

A. I didn't sell none in 1927. There wasn't none there.

Q. There weren't any there in 1927; is that right?

A. No. They were dead. They were covered up.

The Court: I make the same ruling on the same motion.

JOHN H. SMITH, recalled:

Direct examination.

By Mr. Bourgeois:

Q. You were on the stand and testified to the oysters and clams that you and Theodore Smith planted. Are you familiar with the grounds of Martin Scull?

A. Adjoining me on the northwest side.

Q. That is ten acres?

A. Ten acres.

Q. It is numbered 158?

A. 158.

Q. Have you ever worked that ground?

A. Mr. Scull turned that over to me and ——

Mr. Hanstein: I ask that be stricken as not responsive.

The Court: The question is have you ever worked the grounds?

A. Yes.

Q. What year, last?

A. 1927.

Q. Now, Mr. Smith, from your experience in gathering oysters, can you determine with reasonable accuracy the number of bushels on an acre of ground?

A. Any man that uses a pair of tongs can do it.

Q. I didn't ask you that. Can you?

A. Yes.

Q. How do you determine it? By what means can you determine it?

A. After you have tried a piece of ground, you put your tongs overboard, if a man can get half a tong full at a time and go another place and do the same thing, and try all over the ground, he can come within a very few bushel of how many bushel there is on the ground.

Q. Did you make that experiment?

A. I did.

Q. On Scull's ground?

A. I did.

Q. How many bushels of oysters, in your opinion, were there on Scull's ground in the spring of 1927?

Mr. Hanstein: It does not seem to me that anything like a proper foundation has been laid for this witness testifying as to the quantity of oysters on this ground, and I submit that such proof as is intended apparently to be predicated on this testimony would be highly improper and certainly speculative.

The Court: I will let you cross-examine the witness. The witness says that as the result of his experience in tonging he is competent to say after an investigation of the bed as to the number of oysters he will find on an acre, and gives you the way he makes his test and the method upon which he arrives at the conclusion. You may cross-examine him.

Mr. Hanstein: I want my objection on the record, and I reserve my right to cross-examine at the conclusion of the testimony.

The Court: I will admit the testimony on the statement made by this witness that he can tell and the method by which he does the telling. The weight of that testimony, of course, is for the jury.

(Exception noted for defendants).

(Question repeated).

Q. That is, on the ten acres.
A. At least two thousand bushels.
Q. Were there any clams on that ground?
A. There were.
Q. Can you determine the approximate quantity of clams on a ground?
A. From what little I worked there, it would be very hard for me to know, but what I tried ——

The Court: No. Can you tell by trying them how many there are?

A. I could.
Q. Did you try on Scull's ground?
A. Some places on it.
Q. How many bushels on it?
A. About ten.
Q. On what part of his ground, all over it or some particular part?
A. On the eastern shore, mostly.
Q. Did you make enough experiments to arrive at a fair judgment of the number of clams, quantity of clams, or the number of clams on the part that you tried?
A. On the part that I tried I could say there was ——

Q. I didn't ask you that. Did you do it?
A. I did, sure.

The Court: The question is did you make a sufficient test on the part that you did try so that you can fairly estimate the number of clams there were there?

A. Yes.
Q. On the part that you tried?
A. On the part that I tried, I did.
Q. In your judgment, how many clams were on the portion of Scull's land that you tried?

Mr. Hanstein I object to that because, aside from the very great crudity of the method of testing that was adopted, there is no proof as to the area he tried it on, and so far as using that for a standard I would say it is grossly improper.

The Court: The only damage they could recover would be for the destruction, if there was a destruction, of the clams on the area which he tried, and there would be no evidence before the jury as to any clams on the other area. That is all. All he is testifying to is to that restricted area that he tried.

(Exception noted for defendants).

Q. How many, in your opinion, were there on the area that you tried?
A. On the area that I tried I would say, on the area that I tried, somewheres about one-quarter of the ground, would be in the neighborhood of fifty or seventy-five thousand clams.
Q. All right. Put it down fifty thousand, then.

Mr. Bourgeois: I will withdraw my objection to that form of stipulation about the testimony, and I will stipulate what Mr. Hanstein wants, that the witnesses, if called, would each testify that the clams and oysters planted by them were alive at the time they were planted.

Mr. Hanstein: I move at this time to strike the testimony as to the number of oysters and clams on Scull's ground, on the grounds that I embodied, I think, completely, in my motion made in regard to it before, and with particular reference to the clams on the ground that for a witness to go on the stand and say there were fifty or seventy-five thousand clams, a spread of fifty per cent, clearly shows that it is speculative, so speculative that it does not seem to me that there is anything that should be permitted to go to the jury. The mere fact that Mr. Bourgeois says he will call it fifty thousand does not correct the speculative nature of this sort of testimony.

Mr. Bourgeois: I do not care anything about calling it fifty thousand. Let the jury determine it.

The Court: The objection is overruled.

(Exception noted for defendants).

Cross-examination.

By Mr. Hanstein:

Q. Mr. Smith, when did you work over this ground in 1927?

A. In July.

Q. Did you do it for the purpose of estimating the amount of oysters and clams there?

A. Before I took charge of it, yes. Wanted to see if it was going to pay me to handle them or not.

Q. In what way did you take charge of it?

A. On one-half. Fifty-fifty basis.

Q. You are one-half owner of this Scull ground?

A. No, sir.

Q. What do you call the fifty-fifty basis?

A. He furnishes seed and I done the work, took the oysters up and clams on a fifty-fifty basis. He got one-half and I got the other half.

Q. When did you take them up?

A. I never got them took up.

Q. You just this minute said "He furnished the seed and I took them up."

A. I went there to try them. The seed was already there. A man named Abel Smith put them there.

Q. How many places did you try to find out how many oysters were there?

A. Maybe twenty or twenty-five, maybe more than that. I just can't say how many.

Q. How did you try? Put tongs in the water?

A. Yes, sir, I used a pair of tongs.

Q. When you put the tongs down in the water, you didn't know whether you were going to bring up oysters, clams or nothing, did you?

A. When I feel the bottom, I know what is there.

Q. When you put them in the water, you don't know whether you are bringing up clams or oysters, do you?

A. Not when you put them overboard. You can't see them then, no, sir.

Q. Why is it that you only tested ten places for clams and twenty-five places for oysters?

A. Because I seen where a man named Abel Smith had planted the oysters. I knowed nearly where

they were at, but the clams was by somebody else, and I had to look for them and find them, and I found them after a while.

Q. You had to go around to find the clams?

A. Yes, because they was over on the eastern shore. I was on the western side of the grounds for the oysters.

Q. Is it so hard to find fifty or seventy-five thousand clams on ten acres of ground that you missed them in all of twenty-five tries?

A. You go out there and try and see if you can find them.

Q. Can you answer the question?

A. I say it is hard to find if you don't know where they are throwed out.

Q. It was hard to find fifty or seventy-five thousand clams, wasn't it?

A. Not after I got where they were at, no, but I had to locate the place first.

Q. So far as the oysters go, it is a mere guess as to how many were there, isn't it?

A. Not much of a guess.

Q. Well, it is something of a guess, isn't it?

A. Very little.

Q. You put down the tongs and you gathered up so many oysters; is that it?

A. Yes, sure.

Q. How many oysters did you gather up each time?

A. Sometimes ten, sometimes fifteen. Half a tongful. Sometimes get a tongful.

Q. What does that prove to you when you get ten? How many does that prove there are in an acre?

A. If I can get ten big oysters a day on a piece of ground, ten at a grab, or five at a grab, I can catch twenty-five or thirty bushel a day.

Mr. Hanstein: I ask that be stricken.

(Question repeated).

A. If there are ten oysters to a grab, I would get in the neighborhood of fifteen hundred to eighteen hundred bushels of oysters to the acre, big oysters, that is, prime oysters.

Q. Suppose in your first grab you got ten, and your next grab you got none, what would that prove?

A. Maybe you would get twenty the next time.

Q. I didn't ask you that. What would it prove if you got none the second grab? How many would you say you have got to the acre then?

A. That don't make any difference. You can't tell in two grabs what you are going to do.

Q. How many grabs does it take you?

A. After you make twenty-five or thirty grabs you know what you are going to do, pretty darned close to it.

Q. If out of the twenty-five or thirty grabs you had five grabs when you wouldn't get any, what would you say then?

A. I didn't have them.

Q. Didn't have that?

A. No, sir.

Q. Did you make up any figures as to how many oysters there were on those beds?

A. Do what?

Q. Did you make up any figures as to how many oysters there were on those beds?

A. Just from my own estimate from the time when I tried the ground. I have handled thousands of bushels of them.

Q. When did you do this?

A. 1927.

Q. What month?

A. Along in June or July. Along in July, likely. I don't know. Somewheres in the same year, the early part of the summer.

By the Court:

Q. How long did you say you had been tonging oysters all together?

A. Forty some years.

Q. In these waters all the time?

A. In our bay and Great Bay up here. Wherever you use a pair of tongs. Any practical oyster man can go on an oyster bed, natural bed or anything, to try the bed, and he knows pretty near what he is going to catch the first day of the season. Any practical oyster man knows that.

Mr. Bourgeois: I want to move to amend the ad damnum clauses that we were going to amend as we went along. Take first in the Smith Hickman case, I want to amend that to read $2500.

The Court: Instead of $1800?

Mr. Bourgeois: Yes. Also in the fifth clause of the second count, I want $2500 instead of $1800. The next one is Walter Lloyd. I want to amend that to be six thousand instead of three thousand, and also in the second count.

Eugene Tallman, I want to amend that to read thirty-five hundred instead of nineteen fifty-two.

Jesse Thomas I want to amend to five thousand instead of forty-one hundred, and the second count the same way.

Oscar Somers, two thousand instead of nine hundred, in both counts.

PLAINTIFF RESTS.

(The following motion was made at side bar).

MOTION TO NON-SUIT.

Mr. Hanstein: If your Honor please, I make a motion for a non-suit as to the Hill Dredging Company. The basis of the motion in general is that the complaints say in paragraph one that the Hill Dredging Company negligently caused the sand so pumped to cover the oyster grounds. That runs all the way through. There is absolutely no proof of negligence in this case.

Count two is a trespass count and says that by reason of the defendants' negligence or the negligence of one of them, plaintiff has suffered. In the case of Oscar Somers, there is no proof whatever that we ever entered upon his land. As to Walter Lloyd there is some proof that we did in fact go on his land, and as to Eugene Tallman there is proof that we in fact went on his land. As to Oscar Somers, I want to urge as a further ground for non-suit the fact that he was occupying a part of a bed of a navigable stream belonging to the State of New Jersey, without any lease for that ground. His lease is for 162 and it is not described in the complaint. It describes 161, and he has no lease for 161.

As to Martin Scull, there is no proof that we ever entered on his land, and no proof that any of the oysters which were attempted to be proven as being

on that ground were damaged. It might be appropriate at this time to make a motion to strike the testimony as to the existence of oysters on Scull's ground.

Mr. Bourgeois: If that is done, I shall put Smith back on the stand and prove that they were killed.

The Court: I was going to say I do not remember any proof of the oysters being damaged. I think that is true. We will assume for the purpose of this motion that he will connect that up.

Mr. Hanstein: As to Smith Hickman, there is no proof of our entering on that land. The only thing that these men prove is that there was sand on the land. That does not constitute negligence. It is a different situation as to Lloyd and Tallman. We did concededly get some of our fill on Tallman's land.

As to Jesse Thomas, we have the same motion, no entry.

As to John H. Smith and as to Theodore Smith, the same.

As to Tallman and Lloyd, this present motion would have no application, this present feature of the motion.

As to Eugene Tallman, I make the additional ground that all of his testimony as to damage with regard to oysters was stricken.

The Court: Yes, on the theory that he says he does not know how many oysters he had and he could not tell how many oysters he had.

Mr. Hanstein: Also the clams are out, in my judgment, on Tallman, because there is no proof

whatever that any of the clams on that land were injured, because he said he had not made a grab on that land since 1925, and there is no proof whatever of injury to Tallman. Also there is no proof that these clams were alive and in existence on these grounds at the time of the alleged action by the Hill Dredging Company.

Mr. Bell: I would like to make the same motion, with this exception: I would like to repeat Mr. Hanstein's motion and make the further motion in behalf of the Bridge Company that there is no proof submitted here that the Bridge Company or its agents or servants committed any acts which caused these clams to be killed. We have in the two cases of Lloyd and Tallman the situation where the bridge covers that ground, but as to the others, there is absolutely no proof that the Bridge Company in any way had anything to do with this pumping. The Bridge Company would not be liable for the contractor's negligence.

Mr. Hanstein: I might add something for the sake of clarifying the record, if there is any doubt about it. One count, I take it, is strictly a negligence count, and the other count is based on trespass. Despite the fact that all pleadings have been abolished in this State, my understanding of the action of trespass is that it will lie only where the injury complained of is the direct and immediate result of the trespass complained of. If there is an indirection in the result, there is a different action. As to Tallman and Lloyd, there is proof of a direct entry, but as to the charge of trespass where they do not show a direct entry, where they show nothing more than the projection of sand into a body of

water where the tide ebbs and flows, there arises an intervening agency over which we have no control.

The Court: It would appear to me to be a serious state of affairs if these clammers and oystermen could have planted their clams and oysters in ground leased from the State and have them all killed by the action of either of the defendants in this case by pumping sand down there, and there be no remedy for it. It would seem to me necessarily to follow that if the proof showed that these clams were there and that they were covered by sand, and that that sand smothered the oysters, that a non-suit should be granted it seems to me would be ridiculous. I cannot even conceive of such a situation. In so far as Lloyd and Tallman are concerned, where the proof shows that there is an occupancy of the land by the abutments of the bridge, it seems to me it would be likewise ridiculous to say that they cannot recover for the damage they have proved they have sustained. For that reason I will overrule your motion and grant you an exception to it.

(Exception noted for defendants).

The Court: As to the further motion of Mr. Bell that there is no proof that the Bridge Company was there, there seems to be ample proof that the Bridge Company was there. I mean, it is conceded that it was there. It is conceded that the bridge was being constructed for the Bridge Company by the Hill Dredging Company, and is now being used by the Bridge Company as a bridge.

(Defendant noted for defendant Ocean City Automobile Bridge Company).

Mr. Hanstein: You deny my motion as to a non-suit based on the negligence count, and a non-suit generally on the failure to prove negligence?

The Court: Yes, I refuse your motion on the negligence count, in so far as that negligence count applies to all with the exception of Lloyd and Tallman, and with reference to Lloyd and Tallman the case will be presented to the jury on the theory that there has been an entry and therefore a trespass.

(Exception noted for defendant Hill Dredging Company).

(It is stipulated and agreed by and between the respective counsel that the bridge was being built by the Ocean City Automobile Bridge Company and the filling was being done by the Hill Dredging Company under contract with the Ocean City Automobile Bridge Company).

DEFENDANTS' TESTIMONY.

CLARENCE I. COLLISSON, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Collisson, what is your business?
A. Civil engineer.
Q. How long have you been a civil engineer?
A. Twenty-three years.
Q. Are you familiar with Great Egg Harbor Bay?

A. Yes, sir.
Q. Where do you practice your profession?
A. Ocean City.
Q. Did you make a survey showing the location of the Ocean City Bridge from Somers Point to Beesley's Point?
A. Yes, sir.
Q. Does this map show the location of that bridge?
A. Yes, sir.
Q. Did you make it by an actual survey?
A. Yes, sir.
Q. This map also depicts the location of the oysters grounds that are referred to in this suit?
A. Yes, sir.
Q. This map does in fact show that, does it?
A. Yes, sir.

Mr. Hanstein: I offer the map in evidence.

By Mr. Bourgeois:

Q. When was it made?
A. When was it made?
Q. Yes.
A. In April.
Q. Of what year?
A. This year, 1930.
Q. From what data did you delineate on your map the oyster grounds?
A. Data from Mr. Rutter.
Q. That was second-handed, in other words?
A. Yes, sir.
Q. And the bridge you put on the map from what?
A. Actual survey.
Q. When was that made?
A. Last March.

Q. Of this year?
A. Yes, sir.

Mr. Bourgeois: I have no objection to it going in.

(The map was marked Exhibit D1.)

Q. When did you make the survey of these water marks? April of this year, also?
A. This year, yes.

By the Court:

Q. What is the rise and fall of the tide there?
A. Approximately four feet.

By Mr. Hanstein:

Q. Mr. Collisson, suppose you explain the various features of this map. Directing your attention to this map which is marked D1, what body of land is on the right of this map?
A. Somers Point, Atlantic County.
Q. Through this area that I now designate, what body of water?
A. The Great Egg Harbor Bay.
Q. And these straight lines indicate what?
A. The Ocean City Automobile Bridge Company's bridge across the bay.
Q. The bridge and roadway across the bay?
A. Yes.
Q. And over to the left of this map is Beesley's Point; is that correct?
A. Yes.
Q. Will you indicate on here for the jury at what

points the fill was placed and at what points bridges were built?

A. The fill starts here and then the bridge goes across Drag Channel from here to here, and then this is fill or roadway from here over to here, and from this side all the way across to Beesley's Point is bridge.

Q. Which way is the ocean from here? The ocean is toward the bottom?

A. That is right.

Q. Which way is the flow of the tide, up and down on the map?

A. Up and down.

Q. You have indicated a body here as being Drag Channel. That is Drag Channel?

A. That is right.

Q. And there is a bridge across there?

A. Yes, sir.

Q. You have some dotted lines. I direct your attention to this one. What is that?

A. That is a sand bar.

Q. You have some dash lines that run around an area. What is that?

A. It indicates eel-grass there.

Q. Do you know what eel-grass is? Can you describe it to the jury?

A. Simply tall grass that grows, I should say, about two foot long.

Q. In the water?

A. In the water.

Q. Covered over by the tide?

A. Covered over by the tide, yes.

Q. Now, you have a solid line that runs around as I have just indicated. What does that indicate?

A. It indicates the edge of the fill at low water.

Q. Did you make measurements to show the distance of these various oyster beds from the bridge?

A. Yes, sir.

Q. Do you have a record of them?

A. Yes, sir.

Q. Suppose you state what those distances are.

A. It doesn't give the distances. It is done by triangulation. It is done by calculation.

Q. Tell us what the distances are from the bridge.

A. In other words, we establish a base line here and here and here and turn two transits until they intersect, and have a man there hold the pole, and turn to that, and he will go at these different points and hold that pole, and the two instruments will turn an angle and form an intersection. That is how we get these points in the water. It would be impossible to measure.

Q. I want to know the distance of the last one of these oysters beds.

A. I can scale it.

Q. Is this all through scale?

A. Yes, sir, absolutely.

Q. You didn't make any survey to show the actual distance?

A. Only the location of what corners were there.

Q. What is the scale of your map?

A. 150 feet to the inch.

Q. Will you measure the distance—Oscar Somers says he occupied 161, which is where I indicate. Tell us how far that is from the fill.

A. 2110 feet.

Q. That is from what point?

A. From the center line of the bridge to the beginning of his side line.

Q. To the closest point?

A. Yes, sir, of lot 161.

The Court: That is the furthest oyster bed away

from the bridge, that is, the furthest oyster bed as described in these complaints?

Mr. Hanstein: Yes, sir.

Q. Tell us how far the Smith Hickman one is.

Mr. Bourgeois: Which way are you measuring, diagonally?

A. I have to, to get this one here. I am measuring from the fill, not from the bridge. 1820 feet.

Q. Are these oyster beds located out in the stream of Great Egg Harbor Bay?

A. No.

Q. They are not?

A. No, sir.

Q. Do you know what was the character of the ground now covered by the sand fill at the point I now indicate and where the solid fill went across where I indicate before the fill was put in?

A. Merely low ground with about two foot of water at low water.

Q. What was it with respect to the growth of eel-grass?

A. Well, the eel-grass passed over it. In other words, the eel-grass came right on down to the other side of it.

Q. This fill was put on over eel-grass?

A. Over the eel-grass.

Mr. Hanstein: I am going to recall Mr. Collisson later as to different phases of the case, but so far as establishing the map goes, that is all.

Mr. Bourgeois: I object to him calling the witness more than once, unless for some special purpose.

The Court: He has a right to prove the map by him and then call him back for something else.

Mr. Bourgeois: My understanding of the law is that you have to exhaust your witness in the first instance unless there is something you have overlooked.

The Court: I am going to permit him to do it.

(Exception noted for plaintiffs).

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Collisson, what is the tract of land in here that is marked "Bare at low water," and marked "30 and 60" nearest to the Somers Point line?

A. That was a flat, what they call a flat at low water.

Q. Above or below low water?

A. That falls bare at low water.

Q. Is it still a flat?

A. It is still a flat, except a portion that is pumped across.

Q. How high is that that is pumped across?

A. That is pumped to an elevation of eight feet.

Q. When it was bare at low water, how much was out of the water at the time the water was low?

A. That would be what we would call datum, and datum is two foot below high water, so that would be six feet of fill over that portion, over the bar.

Q. Then you put in on that six feet of fill? Were you the surveyor on the job at the time the bridge was being built?

A. Yes, sir, from the start to finish.
Q. Who was doing the filling?
A. Hill Dredging Company.
Q. What protection, if any, did they provide for the retaining of the sand that they pumped through their engine or through their pipes?

Mr. Hanstein: I do not consider that is cross-examination of this witness.

The Court: It is not cross-examination of this witness at all.

(Exception noted for plaintiffs).

Q. Then you came across to a place that is marked "Bridge." What is the length of that bridge?
A. A little over eight hundred feet.
Q. And along one side of it, that is, one end of it, near one end of it, is a channel called Drag Channel?
A. That is right.
Q. What is the width of Drag Channel?
A. Drag Channel is about 330 feet.
Q. What was its depth at the time you made the soundings before you started to build the bridge?
A. Eight foot and a half at low water.
Q. And the Drag Channel began where and ended where?
A. Drag Channel begins down here near Ship Channel by Somers Point and ends at the mouth of Patcong Creek. Patcong Creek comes out here and Drag Channel comes out here, and they enter the bay up above.
Q. You go on across this little bridge over Drag Channel, and you come to another fill. What is the length of that fill from the point you have got

marked "Low water mark" on the northerly end to the low water mark on the southerly end?

A. 1460 feet.

Q. Before there was any filling made there, what was the kind of land there?

A. It was sort of marshy, covered with eel-grass.

Q. What?

A. Eel-grass.

Q. No.

A. Marshy; soft.

Q. What was its elevation with relation to the low water mark?

A. It would run from about a foot to two foot of water at low water.

Q. And you filled that to what height?

A. To an elevation of eight feet. Four feet above high water.

Q. And the eel-grass, you say, was about half a foot, or foot and a half high, did you say?

A. No. That grows, I should say, anywhere from eighteen inches long to thirty inches long. It is a long, thin blade.

Q. As you filled that in, what became of the eel-grass? Did it fall down and get covered over?

A. Covered over.

Q. After that was fallen down and was covered over, you kept on filling up to the top of the eight feet, the elevation of eight feet?

A. Yes, sir.

Q. And from the end of that fill—how far northerly of the fill, the low water mark, does the bridge begin?

A. Approximately 150 feet.

Q. What is the width at the line that is marked "Edge of 1926 survey?" What is the width of this filled tract from the northwesterly line to the southeasterly line?

A. 530 feet.

Q. I see on here, "Edge of eel-grass." When was that survey made about the edge of the eel-grass?

A. 1930, in April.

Q. That is, from this intersection of Tallman's land?

A. That is right.

Q. Up over the oyster grounds up on to Scull's land, and then down into almost Drag Channel?

A. That is right.

Q. That was made in 1930?

A. Yes.

Q. When you made the survey for this bridge, it was what year?

A. 1927 and 1926.

Q. At that time did you make any survey to locate these oyster grounds?

Mr. Hanstein: I object. I do not see that that is cross-examination.

The Court: I will permit that.

(Exception noted for defendants).

A. No, sir, I did not.

Q. Did you at that time make any soundings except the soundings in the line of your proposed bridge?

A. Yes, sir.

Mr. Hanstein: I object to that on the ground it is not cross-examination.

The Court: I will permit it.

Q. What soundings did you make?

A. Depth of water. To find the depth of water which the War Department requires for half a mile either side of the bridge.

Q. To ascertain the depth of the water?

A. Yes.

Q. What did you find the depth of the water northwesterly of the bridge for the half mile over these oyster grounds?

A. It will vary.

Q. About what?

A. Well, it will run from two-tenths of a foot to maybe six feet, seven feet.

Q. What did you find the depth of the water southerly of the proposed bridge?

A. Practically the same.

Q. The bridge was located where? Upon the most shallow or the deepest water?

A. No, it was located in the most direct line to the road in Beesley's Point.

Q. Without regard to the depth of the water?

A. Yes.

HARRY L. GARRISON, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Garrison, where do you live?

A. Linwood.

Q. What is your business?

A. Landscape gardener and florist.

Q. Do you work in the bay?

A. Yes, sir.
Q. How long have you worked in the bay?
A. Around about five years.
Q. Did you ever work in Great Egg Harbor Bay?
A. Yes, sir.
Q. How often have you worked out there?
A. Mostly every day that it is fit.
Q. For how long a time have you been working out there?
A. The last five years.
Q. What work have you done?
A. Clam.
Q. Are you familiar with the grounds claimed by the various plaintiffs in these cases?
A. Yes, sir.
Q. Have you been over this ground that is shown on the map?
A. Yes, sir.
Q. How long have you been familiar with those grounds?
A. Around about twenty-five years.
Q. How many years?
A. Twenty-five years.
Q. Have you been on those grounds at low tide?
A. Yes.
Q. Have you ever seen any part of the land, shown to be covered by lease, bare of the tide?
A. No, sir.
Q. Have you seen the tide low there?
A. Yes.
Q. Have you ever undertaken to clam around there?
A. Not right inside of the stakes, no, sir.
Q. How close to these stakes have you worked?

Mr. Bourgeois: I object as irrelevant and imma-

terial. We did not plant any clams outside of the stakes.

Mr. Hanstein: It is just a preliminary question.

The Court: I will allow it.

(Exception noted for plaintiffs).

(Question repeated).

A. Right up to the line.
Q. Have you seen stakes out for those grounds?
A. Mighty few.
Q. Have you ever clammed up on the eel-grass alongside of those stakes?
A. Yes, sir.
Q. Have you ever seen any of these plaintiffs move their stakes?

Mr. Bourgeois: That is objected to as leading.

The Court: I will allow it.

(Exception noted for plaintiffs).

A. I have seen them sticking stakes back.
Q. Do you know anything about any changes in the location of stakes out there?
A. No, sir.
Q. Were you familiar with this ground before the fill was put in?
A. Yes, sir.
Q. Do you know whether there were any oysters on these grounds?
A. I never seen them.

Q. Did you ever see any of these plaintiffs planting oysters there?

A. Not while I were out in the bay.

Q. How frequently were you in the bay?

A. Mostly every day that it was fit.

Q. For a period of five years?

A. Yes, sir.

Q. And you never saw any of them plant any oysters?

A. No, sir.

Q. And never saw any of them plant any clams?

A. No, sir.

Q. Have you had any experience in determining under what depth clams will live?

A. I have found them at a depth of about ten inches.

Q. Have they been alive?

A. Yes, sir.

Q. Have you ever found them that deep in Great Egg Harbor Bay?

A. Yes, sir.

Q. About where? Could you show on the map the general locations where you found them?

A. No, sir, it isn't on the map.

Q. What do you know about the habits of clams in summer and in winter with regard to depth?

A. In the summer time they are mostly right up to the top.

Q. What do they do in the winter?

A. Lower.

Q. In your experience, is it your opinion that three or four inches of sand out in Great Egg Harbor Bay would kill clams?

Mr. Bourgeois: I object. It is leading and calling for a conclusion.

The Court: This man has testified that for five years he has been clamming in that district, and Mr. Hanstein contends that makes him an expert on the habits of clams and what will happen to them in sand.

Mr. Bourgeois: I object to that. If he is qualifying him as an expert, I object further that he has not qualified him.

The Court: I do not think you have done anything more than show that he has dug clams and that he found some clams ten inches below, and whether he has ever had any experience with clams embedded in sand, and how deep, and so forth, I do not think you have qualified him.

Q. In winter do you know how deep clams will dig in?

A. Why, I have known them to go down six inches. That is the bottom of the clam, understand—not from the top up to the surface, but from the bottom up to the top.

Q. The bottom of the clam would be six inches below the surface?

A. Yes.

Q. Have you ever dug such clams up?

A. Yes, sir.

Q. Were they living?

A. Yes, sir.

Q. Edible?

A. Yes, sir.

Q. Such clams as you could sell on the market?

A. Yes, sir.

By the Court:

Q. Were they clams that were embedded in mud or sand?

A. Both.

Q. Were they clams that were embedded in sand or mud under water?

A. Yes, sir.

By Mr. Hanstein:

Q. And you say it didn't affect the clams?

A. No, sir.

Q. Is it anything unusual to find clams at that depth?

A. No, sir, that is mostly their habit, winter and summer.

Q. Have you been over this ground that is covered by these leases since the fill has been put in at the bridge?

A. Yes, sir.

Q. Have you gone out for the—what was your purpose in going out there?

A. For an interview.

Q. What is that?

A. Interview.

Q. What were you trying to find out?

A. Whether there were any oysters or clams there.

Q. Did you make any observations while you were out there as to the bottom?

A. Yes, sir.

Q. What did you do by way of finding out the character of the bottom?

A. Tonged.

Q. What did you do, bring it up?

A. Not myself, understand.

Q. Were you along when that was done?

A. Yes, sir.

Q. Did you see the character of the bottom that was brought up?

A. Yes, sir.

Q. What was the character of the bottom?

A. A natural bottom I found, such as what we call fiddler bottom and putty mud.

Q. Did you find sand?

A. No sand, only on the bars.

Q. Was the specimen of the bottom, that you saw brought up, similar in character to the bottom as it was before?

A. Yes, sir.

Q. Did you see any clams that were brought up?

A. Yes, sir.

Q. What was their condition?

A. The ones that were in on the eel-grass were white, what we call chopbacks, in the eel-grass. I would say that it was a natural growth in the bottom.

Q. What do you mean by natural growth?

A. Grow right there from the little seedlings, from the spawn which had settled there some time or other.

Q. Did you find other kinds of clams?

A. Yes, sir.

Q. Were they living?

A. Yes, sir.

Q. Have you been over that oyster ground—do you know what ones of these leases you have been over since that time?

A. Over them all.

Q. Have you seen specimens of the bottom from all of them?

A. Yes, sir.

Q. What was that like?

A. That was practically the same in the channels.

Q. Practically the same?

A. Practically the same in the channels, as I said before, fiddler bottom and putty mud.

Q. Is that the kind of stuff that oysters and clams live in?

A. They will live on that.

Q. Is that the natural bottom of Great Egg Harbor Bay?

A. In that place.

Q. Did you find any oysters on your investigation?

A. One.

Q. Was it living?

A. We were just about to throw it from the tongs overboard, just about enough so you could see it was a live oyster by the brightness of it .

Q. Are you familiar with the things that affect oysters?

A. Yes, sir.

Q. Will you tell us what it is that affects oysters in Great Egg Harbor Bay?

A. Drumfish will devour them. A snail like—it is a borer, and those tiny little snails, king crabs, and starfish will smother them and suck the meat from the shell.

Q. What do these snails do?

A. When the clam brings its tongue out, as we call it, in order to work itself in the bottom, a snail will be right there working on that and not give him a chance to pull it back, or if he is out on the top they can pile on top of him and just pester the life right out of him.

Q. Do snails affect oysters?

A. Not so much.

Q. Is there a snail borer? Is there such a thing?

A. Yes, sir.

Q. What is that?

A. It is a sort of a snail like that will bore a hole

through an oyster, make a hole, and has a tendency to kill it.

Q. What is the effect of that?

A. Well, it will kill the oyster by drilling the hole.

Q. Have you ever seen oysters in Great Egg Harbor Bay that have been affected by these snail borers?

A. Yes, I have.

Q. Have you ever seen signs of drumfish in Great Egg Harbor Bay?

A. Yes, acres of them.

Q. What is that?

A. Acres at a time.

Q. What do you mean?

A. A tremendous school of them traveling together.

Q. Of drumfish?

A. Yes, sir.

Q. What do they do to an oyster bed?

A. Just crunch them.

Q. Does that affect the oysters?

A. Just crunches it.

Q. Kills it?

A. Yes, sir.

Q. Have you known that to happen in Great Egg Harbor Bay?

A. Yes, sir.

Q. What is the effect, if anything, from cabbage?

A. That will smother oysters or clams to death.

Q. Is there cabbage in Great Egg Harbor Bay?

A. Yes, sir.

Q. Have you seen oysters and clams that have been killed by that?

A. Yes, sir.

Q. When you went over these oyster grounds, for this investigation after the fill, do you know whether or not the clams that were brought up were edible?

A. Yes, sir.

Q. Were they all right?

A. Yes, sir.

Q. Do you know how deep they were?

A. I couldn't say how deep they were, but we had tongs with teeth in about six inches long, around about six inches long.

Q. Is it true that a clam that is buried in three or four inches of sand will die?

A. Not always; no.

Q. Is it the usual thing for it to die?

A. No, sir.

Q. Do you know of any change in the bottom out in the neighborhood of these oyster beds since the fill?

A. No, sir, I haven't noticed any whatever.

Q. And you have been out there?

A. Yes, sir.

Q. Familiar with them?

A. Yes, sir.

Q. Can you tell us whether or not there is any eel-grass in the neighborhood of where that fill was placed?

A. Each side of the Creek Channel along the edge of the bar.

Q. Does it extend within the dash lines?

A. Along here. This is grass along here, this bar.

Q. The grass is along here?

A. Yes, sir, parallel with the bar.

Q. Are you familiar with these plaintiffs? Do you know them?

A. Yes, sir.

Q. Have you seen any of these men working out on their oyster beds since this fill was put in?

A. No, sir.

Q. You have never seen that?

(No response).

Cross-examination.

By Mr. Bourgeois :

Q. I didn't catch where you live.

A. Linwood.

Q. How long have you lived in Linwood?

A. Since October 11th.

Q. Before moving to Linwood, you lived where?

A. Somers Point.

Q. How long did you live in Somers Point?

A. I have lived in Somers Point, off and on, on or about thirty-four years.

Q. How much of that thirty-four years was off?

A. Why, I were away maybe four and five years at a time, and back maybe for a summer, and then gone again after the summer.

Q. And then you would be gone maybe four or five years more and then back for another summer?

A. Yes, sir.

Q. If there were five-year intervals, you would have been there—five goes into thirty-five seven times—you would have been there seven summers in the thirty-four years?

A. I didn't say every one at Somers Point.

Q. How many of those summers did you live at Somers Point, do you think?

A. I were in the gardener business about twenty years, and I were back about six times, I presume, in that.

Q. So six times you would spend the whole summer there?

A. Maybe two months.

Q. How long have you been a landscape gardener?

A. On or about twenty years.

Q. Does that mean twenty years from now, or twenty years from 1925?

A. I had the twenty years' experience at one time.

Q. Where?

A. I were with Hendrickson at Northfield, and I was with Fleming's at Ocean Heights, and William Knott, the leading rose growers of America, I was the supervisor, and with J. B. Dukes I was designer.

Q. J. B. Dukes where?

A. Somerville, New Jersey.

Q. How long were you with Dukes?

A. On or about three years. Two years the first time and one year the second time.

Q. Which two years were they?

A. They were during 1916 and 1917, and then I went in the Service, and when I was discharged I was with him in 1920 again.

Q. Then from 1916 to 1920 you were not in the neighborhood of Somers Point?

A. No, sir.

Q. How much of the time did you spend as a landscape gardener with these concerns in Atlantic and Cape May County? How much of each year?

A. Why, with William Knott in Cape May City, from April first until Labor Day of September in 1915.

Q. And then with the other people, you were how long with them?

A. I was with them about two years. I couldn't tell you just exactly.

Q. All together about two years?

A. Yes.

Q. When you were not with them and were not with Dukes, where were you then?

A. I was for myself.

Q. Where?

A. In the gardening business.

Q. Where?

A. Sometimes at Somers Point and Ocean City, Linwood or Pleasantville, or some place like that.

Q. Landscape gardener and florist?

A. Yes, sir.

Q. Conducting your business as such?

A. Yes, sir.

Q. When did you have the time to acquire the knowledge that you have talked about, about oysters and clams?

A. The last five years.

Q. Then all you know about it you have gained in the last five years?

A. Yes, sir.

Q. That is, between 1925 and 1930?

A. Yes, sir.

Q. Now, Mr. Garrison, you have spoken about tonging and finding clams with six-inch teeth on tongs?

A. Yes, sir, on and about that.

Q. That is not the regular length tooth for tongs, is it?

A. Well, some use that type and some use others.

Q. Isn't the ordinary type of tooth very much shorter than that, the usual type, the type that baymen usually use?

A. They wear down. They get them practically that long, but they wear down.

Q. What is the length of the teeth that they usually tong with?

A. In the summer time they can use them about two and a half or three inches.

Q. Two and a half inches?

A. Yes.

Q. And that is the customary length of them, two and a half to three inches, is it not?

A. Well, if the tong is worn down in the summer time, they make out with those.

Q. When you come to use a six-inch tong and get those teeth six inches in the mud and attempt to raise them up, you have some load, don't you?

A. It depends upon the bottom.

Q. If it is a muddy bottom, you have something to lift, don't you?

A. Sometimes you don't bring the mud up. That is the skilled part of it.

Q. In that sort of bottom clams don't grow, do they?

A. In mud?

Q. That is, that soft mud.

A. They do, provided it isn't too gassy.

Q. If it is too soft, they won't? They can't stay up, can they?

A. They can. They can go up or down.

Q. What was the occasion on which you went out with these tongs with six-inch teeth? What did you go for?

A. For an interview.

Q. What do you mean by an interview?

A. To find the bottom conditions, to see how conditions were, whether there was any fill or not, or whether it was a natural bottom.

Q. I don't understand what you mean by an interview. Do you mean an investigation?

A. Yes, sir.

Q. I thought you wouldn't go out there to interview the clams. You went out to investigate. At whose request did you go out to investigate?

A. I was called for by the Hill Dredging Company.

Q. On how many occasions did you investigate?

A. Once.

Q. When was that occasion?

A. I just don't remember. It has been about two weeks ago.

Q. How long were you in the bay?

A. We were there—I presume we were there two hours and a half.

Q. As much as that?

A. Yes, sir.

Q. These oyster grounds cover about sixty acres of land, don't they?

A. I don't know, indeed.

Q. Where did you make your investigation, on what part of the ground?

A. All over it. In each plot, we tried.

Q. In a sail boat or power boat?

A. Power boat.

Q. Couldn't have made it in a sailboat, I guess, could you?

A. Not very well. It could be done, but it would give you a lot of trouble.

Q. Couldn't have gotten around so quickly?

A. It depends on conditions.

Q. Two hours and a half doesn't seem so long. There are eighty-five acres of land which you investigated in two and a half hours?

A. Yes, sir.

Q. Did you feel after you had gotten back that you had made really a thorough investigation, or did you think it was only a casual one?

A. We worked as fast as we could, and we covered as much ——

Q. I didn't ask you that.

(Question repeated).

Mr. Hanstein: I object to that.

The Court: I will permit it.

A. I would consider it was thorough as far as we went.

Q. I beg pardon?

A. Thorough as far as we went.

Q. How far did you go?

A. We covered—that is, I would say—I will put it this way: that we would make about twenty grabs in various places, like here and there, you see, on each plot.

Q. Twenty grabs? In what places with relation to these different tracts of land?

A. We would go like in the corners and in the middle and different places on them.

Q. How many grabs, as you call it, would you make in each one of those tracts? Take Martin Scull's ten acres there. How many would you make in that?

A. Well, we would make about—well, I would say about thirty grabs.

Q. About thirty grabs in Martin Scull's? Did you make that many in his, or didn't you know which his was?

A. I didn't count them. We made enough, anyway, but I didn't count them.

Q. You are just guessing as to the number?

A. Yes, sir.

Q. How many did you make on Henry Smith's land?

A. I never counted them.

Q. Do you know where his land is?

A. I can tell by the map, I believe.

Q. All right. Go on and tell me by the map.

(Witness indicates).

A. That is Mr. John Henry Smith.

Q. How many did you make on that tract of land?

A. Oh, I presume about—on and about fifteen.

Q. Fifteen on that one? Thirty on Scull's?

A. I am not saying exact on the amount.

Q. And fifteen on Smith's? How many on Theodore Smith's?

A. Well, about the same.

Q. Fifteen on his, and where? What part?

A. All over.

Q. How many on Smith Hickman's?

A. Well, we made—as I said before, I didn't count them, but we made a number, enough to convince us of the bottom that was there always, and as it has been for years.

Q. Convince you?

A. Yes, sir.

Q. How could you know that the bottom is as it has been for years when you are only familiar with it for the past five years?

A. That is, for the last five years.

Q. Did you go out there before the bridge was built?

A. I have been familiar with that for about twenty-five years.

Q. How did you become familiar with the bottom of their oyster grounds?

A. I used to go there with my brother-in-law when I culled oysters for him.

Q. Who is he?

A. Mr. Boice, Somers Point.

Q. Where does he have ground? What was he doing up on these grounds?

A. He had leased grounds there. Supposed to have.

Q. Where?

A. I don't know where it is at now. It doesn't specify there on the map.

Q. Then you haven't been on these grounds at all? You have been on other grounds testing oysters?

A. I have been on these grounds right here.

Q. Under what conditions? What right would you have to go on those grounds?

A. I wasn't working on those grounds. I have a right to go over it with any power boat.

Q. You don't have a right to put your tongs down.

A. I didn't put them down.

Q. How would you find out what the bottom was if you didn't put your tongs down?

A. See somebody else doing it.

Q. Tell the jury why, in 1925, you would have gone out on those oyster grounds to see somebody else tonging oysters.

A. Not in 1925.

Q. I beg pardon?

A. Do you mean for what occasion?

Q. Yes. What would be the occasion in 1925, or 1926, for you to go out there and watch somebody there either gathering clams or gathering oysters?

A. I have seen them work there and seen the bottom.

Q. I beg pardon?

A. I have seen others work there.

Q. I am asking you why you would go out there for that purpose.

A. Might be fishing, crabbing.

Q. Were you fishing?

A. Yes, sir.

Q. Fishing out on oyster grounds?

A. Yes, sir.

Q. With water two feet deep?

A. High tide.

Q. What kind of fish were you hunting for?

A. Weakfish.
Q. In seven feet of water? Six feet of water?
A. Yes, sir.
Q. On oyster grounds?
A. Yes, sir.
Q. Not near the channel?
A. That would be the channel, Creek Channel.
Q. That was what you went for at that time?
A. Yes, sir.
Q. While you were out fishing in seven feet of water, you saw some oyster men out there in the summer time?
A. Yes, sir.
Q. Gathering oysters or clams on these grounds?
A. Yes, sir.
Q. Whom did you see?
A. I have saw Mr. Jesse Thomas.
Q. Who else?
A. Others I am not acquainted with.
Q. You don't know whether they belonged out there or whether they didn't?
A. I don't know.
Q. Jesse Thomas was watchman. He was required to be out there to see that people didn't come there to steal, wasn't he?
A. Yes, sir.
Q. That is what he was doing there?
A. Yes, sir.
Q. But he wasn't going down to find out about the oysters or clams, was he?
A. No, I didn't see him.
Q. You can't tell me who the people were that you did see ——
A. No, sir, I don't know them by name.
Q. —grabbing for the oysters or clams?
A. I don't know them by name, no.
Q. Your knowledge of the condition of the bottom

prior to 1925 was gained from going out on these grounds on high tide to fish for weakfish and while there seeing somebody come along on the ground whom you didn't know, and use tongs, that would bring up the soil above the water?

A. I have seen them do that and also when we investigated.

Q. And you can't tell who it was?

A. No, sir.

Q. And it was in the summer time?

A. In the summer time.

Q. What year was that? 1925 or 1926?

A. Well, I fished out there mostly every year.

Q. 1925 and 1926? Were you here both of those years?

A. In 1925 and 1926?

Q. Yes?

A. Yes, sir.

Q. When do you follow your trade or business or profession or whatever you call it, of landscape gardener?

A. I haven't followed it for the last five years. Maybe five and a half years.

Q. You have followed since that time fishing; is that the idea?

A. Yes, sir. Mostly around the bay to regain my health.

Q. Did you see anybody there in 1927?

A. In 1927?

Q. Yes?

A. I have seen them. I have seen them there. How do you mean, working there?

Q. Well, I don't know whether they were working there or whether they were experimenting, whatever it may have been. Did you see anybody up there in 1927?

A. I have seen ones working there.

Q. At what time of the year?
A. During the summer.
Q. Working for what?
A. I don't know.
Q. Did you see them pull anything up?
A. I couldn't see anything.
Q. You couldn't see?
A. Only the bottom.
Q. You were not near enough to see whether they had clams or oysters?
A. They didn't have neither.
Q. Had neither clams nor oysters, but you saw the bottom?
A. Had the bottom, yes, sir.
Q. Why would those people be gathering up or pulling up the bottom if there were no clams or oysters there?
A. I don't know.
Q. You saw them?
A. Yes, sir.
Q. You were fishing?
A. Yes, sir.
Q. And they were working?
A. Yes, sir.
Q. And you don't know who they were?
A. I don't know who they were.
Q. Do you know where they live, whether they live in Atlantic County or not?
A. No, sir.
Q. What kind of boats were they in?
A. Some were in garvies, some were in bateaus.
Q. What kind of tongs did they have?
A. They had iron heads.
Q. How long teeth?
A. Well, I didn't measure the teeth. I presume they would be about, maybe, four inches and a half, on and about that.

Q. How close were you to them?

A. I was right as close as from here to you, maybe a little closer.

Q. Talk to them?

A. Yes, sir.

Q. Go out with them?

A. No, sir.

Q. Go in with them?

A. Only just the ones with the Hill Dredging Company.

Q. Who went out with you in the effort for the Hill Dredging Company besides you? Who else went?

A. Why, some of them were strange to me. Mr. Risley here, and Mr. Rice, and Mr. Lashley and Mr. Johnson.

Q. Mr. Garrison, you have given quite a good deal of testimony regarding oystering and so on. Have you ever been an oyster planter?

A. No. I have just helped by brother-in-law when I was a small fellow. I have never planted for myself.

Q. Never have been a lessee of any oyster ground?

A. No, sir.

Q. How long has it been since your brother was lessee of oyster grounds?

A. My brother-in-law. I culled for him when I was about around ten and eleven years old, and I don't know how long he had the lease, and I don't know how long he kept it up.

Q. You are how old now?

A. I am thirty-nine. I will be forty in September.

Q. When you culled for him, it was thirty years ago?

A. Well, I was about ten or eleven years old.

Q. That would be about thirty years ago. I sup-

pose at that age you wouldn't be able to gain very much expert knowledge about drumfish or starfish or anything of that kind about oysters, would you?

A. Not the actual experience, no, sir. I have learned since.

Q. Where have you ever had any experience with drumfish and what they do to oysters?

A. When I am working on the grounds where it is not leased. They will bore a hole ——

Q. I am asking what experience you have had. You are telling me what happened. Where have you worked and had it happen? With whom did you work?

A. I worked for myself. I work independent.

Q. Where did you work for yourself?

A. Well, we will say in Little Bay.

Q. I want to know as a fact where.

A. Little Bay.

Q. Where is Little Bay?

A. That is on the southeast side of the Beesley's Point bridge.

Q. That is down the river from where these ground are?

A. Yes, sir.

Q. When did you ——

A. That is the opposite direction from the grounds.

Q. When did you have experience in Little Bay about drumfish?

A. Last summer.

Q. The drumfish didn't do any damage to the oysters and clams on these oystermen's grounds last summer, did they?

A. I didn't see them.

Q. Where were your grounds last summer, I mean next to whom, or give me some indication where the drumfish destroyed the oysters or the clams?

A. I haven't said—they will destroy. I don't know whether they have destroyed any, but they will destroy them.

Q. How do you know they will?

A. By the experience I have had where they work, and I have seen them bore in the ground.

Q. The drumfish?

A. They will bore for clams. They will scoop oysters on the top and bore for clams like a pig rooting.

Q. Where have you seen that?

A. In Little Bay.

Q. But you have never seen any oysters or clams they have destroyed?

A. No, sir. I have seen where clams has been crushed. Whether it has been done by them—I didn't see them do it, but I found the crushed shell.

Q. I suppose if a heavy boat happened to go aground on them, it might crush them?

A. If it hit them right, laying on the hard bottom.

Q. What experience have you had with starfish?

A. I have caught the starfish wrapped right around the clams like that, with its mouth and tongue sticking out, smothering it.

Q. Where have you found that?

A. In about twelve feet of water with a shinney-cock rig I would bring it up.

Q. Where would that be, down in Little Bay?

A. No. What we call Loud Mouth or Lousy Harbor in Great Egg Harbor Bay.

Q. That is on this side of Somers Point?

A. Yes, on this side of all the bridges.

Q. That is about ten miles away from these oyster grounds, isn't it?

A. I never measured it.

Q. Where have you had experience with cabbage smothering them?

A. While we were up there this day with them, when we would make grabs occasionally into the holes, I will call them—the bottom naturally is unlevel, you know, and there will be holes in it, and this tripe will settle.

Q. In other words, you found cabbage up there in 1930?

A. Yes, sir.

Q. Two weeks ago?

A. About that.

Q. You don't know anything about cabbage being there in 1925 or 1926 or 1927 at all?

A. No, sir.

Q. Will you tell us why cabbage will smother clams if sand won't?

A. Why, it can't get its—well, I won't say breathing, but it consumes air.

A. Clam consumes air, and when you shut that off any length of time, it is done.

Q. How can it get air through sand that it can't get through cabbage?

A. It has what we call a breathing hole. That is, I say breathing. It has a hole made so that the air can get to the clam.

Q. What has? You mean when it goes down?

A. When it is standing still or goes down, either.

Q. Do you mean that cabbage will smother a clam that mud won't?

A. If you get a clam deep enough in the mud, naturally it would, but it won't go deep enough to smother itself.

Q. How deep do you have to get a clam in sand to smother?

A. I don't know.

Q. Isn't it a fact that if the clam goes down deep enough so that the sand goes over the top of it, so that it is sand everywhere, it will smother?

A. If it goes deep enough.

Q. If it is covered over with sand, it can't get the air, can it?

A. If it isn't below six inches.

Q. How can it get the air in six inches if the hole above the clam is filled over?

A. The air hole it makes itself. Its own life keeps it open.

Q. How can it keep open?

A. That is how we find them in the spring and fall of the year, by the signs they make.

Q. How can the clam keep the hole open unless it comes up to the top of the mud?

A. As it consumes this water, it squirts it.

Q. Where does the water come from to squirt?

A. It is in the bottom. The bottom of the bay is naturally saturated with water.

(Recess taken until 10 A. M., June 27, 1930.)

Atlantic City, N. J., June 27th, 1930.

(Trial of the cause resumed at 10 A. M.)

(One of the jurors being absent, it was agreed by counsel for the respective parties that the trial should proceed with eleven jurors.)

HARRY L. GARRISON, resumed.

Re-direct examination.

By Mr. Hanstein:

Q. Mr. Garrison, you testified at the last meeting here that you had been on these grounds with your brother-in-law, I believe?

A. Yes, sir.

Q. How long ago was that?

A. Why, that is in the neighborhood of twenty-five to twenty-eight years ago.

Q. Where was your brother-in-law's lease?

A. I couldn't say. It doesn't appear upon the map. I would say it was on or about around Mr. John H. Smith's oyster ground.

Q. Were you familiar with the character of the bottom there?

A. Yes, sir.

Q. Has there been any change in the character of the bottom?

A. I haven't noticed any whatever, no, sir.

Re-cross examination.

By Mr. Bourgeois:

Q. Twenty-five or twenty-eight, and you are forty-three. Twenty-eight from forty-three leaves fifteen, so at the time you were on those grounds you were fifteen years old; is that right?

A. I culled oysters when I were around ten and eleven years old.

Q. Is it your notion that you at forty-three can carry your memory back and have any definite notion of the condition of a piece of mud in the bottom of a river when you were eleven years old?

A. I am not forty-three.

Q. How old are you?

A. I will be forty my next birthday.

Q. Forty?

A. Yes, sir.

Q. Then twenty-eight from forty leaves twelve. Do you think you can carry your memory back for twenty-eight or twenty-nine years until you are a child eleven years old, and determine now what the condition of the mud bottom in the river was at that time?

A. If I can remember culling oysters and broadcasting them, I can remember the bottom.

Q. You can?

A. Yes, sir.

Q. Is there no difference between that?

A. I haven't noticed any whatever, no.

Q. When you culled the oyster, you had it in your hand, and when you broadcast you throw it over?

A. Yes, sir.

Q. You don't have the mud bottom in your hand, and you don't have it in your sight, do you?

A. We lift the oysters with tongs.
Q. With what?
A. With tongs.
Q. But you don't lift the bottom except just what happens to carry with them?
A. Sometimes.
Q. Did you do the oystering yourself?
A. No, I didn't do the oystering myself.
Q. Let me ask you, do you consider yourself an expert on oyster grounds?
A. I don't consider myself an expert from my experience, no.
Q. You don't consider yourself an expert? That is all.

CHARLES S. NICHOLS, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Nichols, what is your business?
A. Photographer.
Q. Where are you in business?
A. Ocean City, New Jersey.
Q. How long have you been a photographer?
A. Nine years.
Q. How many?
A. Nine.
Q. Did you recently go out on Great Egg Harbor Bay and take some photographs?
A. I did.
Q. With whom did you go?
A. Mr. Collisson.

Q. The Mr. Collisson who is sitting here now?
A. Yes.
Q. Did you take some pictures?
A. I did.
Q. Where were you—at what point in Great Egg Harbor Bay were you when you took these pictures?
A. Why, I believe about over in this corner, in here somewheres, right around here.
Q. Right over there somewheres, pointing to a place somewhat westerly of the Smith Hickman lot, 167; is that where you think you were?
A. I believe so.
Q. Of what did you take a picture?
A. I took a picture of the nearest Atlantic County shore and a picture of the nearest fill.
Q. Is this the nearest that you took, facing the bridge and fill?
A. It is.

Mr. Hanstein: I offer it in evidence.

Mr. Bourgeois: That is objected to.

The Court: What is the purpose of the offer?

Mr. Hanstein: I want the jury to have a picture of the distance from the end of the grounds where the photographer said that he stood to take the picture, and the bridge.

The Court: For the purpose of just showing them a picture?

Mr. Hanstein: For the purpose of illustrating the distance.

Mr. Bourgeois: It will not show anything. It will not show whether it is a mile or forty miles. It shows nothing but the water. It does not show anything that is in dispute at all.

Mr. Hanstein: Yes, it does. It shows where the sand fill stops and where the bridge starts.

The Court: It seems to me the picture shows nothing at all that will be of any value to the jury from the standpoint of anything else other than having a picture of the bridge as it extends across water, and something on the left-hand side of the picture that looks as if it might be a sand fill. I will sustain the objection.

(Exception noted for defendants.)

(The photograph was marked D2 for identification.)

(No cross-examination.)

William E. Shourds, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Shourds, where do you live?
A. Pleasantville.
Q. How long have you lived there?
A. Forty years.
Q. What is your business?

A. Bay man.
Q. How long have you been a bay man?
A. Thirty-five years.
Q. Are you familiar with the waters of Great Egg Harbor Bay?
A. Yes, sir.
Q. Have you worked out on those waters?
A. Yes.
Q. Have you ever had any experience in planting oysters?
A. Yes, sir.
Q. Have you had any experience in planting clams?
A. Yes, sir.
Q. Have you ever caught clams and oysters out on Great Egg Harbor Bay?
A. Yes.
Q. How near to the area shown on that map on the board, in so far as the map indicates the location of oyster leases, have you worked?

Mr. Bourgeois: He does not show that he knows anything about the map.

A. I have worked all over this territory here, all around through here. In fact, I have worked on some of these grounds, planting oysters.
Q. And do you recall when the fill was put in by the Hill Dredging Company?
A. I think in 1927.
Q. Were you around there when this work was going on?
A. Yes, I was around there.
Q. Have you worked on these oyster beds and around these oyster beds prior to that time?
A. Yes.

Q. Have you worked on them since?
A. No.
Q. Have you worked around them since?
A. Yes.
Q. Will you describe to the jury the character of the bottom around these oyster beds prior to the putting in of the fill?
A. Mostly mud, eel-grass, and some sand. On the high flats, there were more or less sand. Where it was lower it was more mud.
Q. What method of gathering clams and oysters do you adopt?
A. Well, in fact, I use all methods known to the clammer.
Q. Do you use what they call the treading system or wading system?
A. In the summer, in shallow water.
Q. How do you work that?
A. You feel the clams with your feet.
Q. You get overboard and walk around?
A. Yes, sir.
Q. Has there been any change in the character of the bottom since this fill was put in?
A. Not around this territory, as far as I know, but right here to the abutment of this bridge right here on Jimmy's Bar, that has been pumped there. There is sand there, but as far as I know around here the bottom is pretty much the same, as far as I know.
Q. Have you been over that bottom since?
A. Yes, sir, I was over it this spring.
Q. What is the character of it?
A. Mud, eel-grass.
Q. Is that true all the way around these leases?
A. That is the general run of the bottom.

Mr. Bourgeois: I object.

A. All through there, only what they call the Horseshoe and the ——

Mr. Bourgeois: It is not relevant in this case what the condition is around other parts of that bay over there.

The Court: Yes, but he is testifying as to the condition he found there last spring on these particular grounds.

(Question repeated.)

(Objection withdrawn.)

(Question repeated.)

A. —— Jimmy's bottom.

Q. Have you been able in your experience in the bay to observe the habits of clams and oysters?

A. Yes, sir.

Q. At what depth have you dug clams?

A. As an average in the winter time, clams are from six to eight inches deep in the bottom, sometimes more, sometimes not so much. All depends on where they are. The shoaler the water the deeper the clams. Clams doesn't feel as deep in deep water as they do where it is shoal.

Q. What can you tell us as to the habits of clams with respect to winter and summer?

A. In the winter time, in fact, take along the month of November, clams begin to go down for their winter protection. They go down below frost line, which sometimes in exceedingly cold weather I have known the bottom to be frozen so hard under twenty feet of water that you couldn't get a pair

of tongs in it, your tongs would jump just the same as though you put them down on Atlantic Avenue. The bottom was actually frozen. In some cases those clams are actually lifted by frost right out of the bottom and lay there and perish in some cases.

Q. When the bottom gets cold like that, you have some idea as to the depth to which clams dig down?

A. When the weather becomes severely cold, the clam has no power to move, he is dormant. After the water gets to a certain temperature, that clam can't move any further until the temperature of the water rises. He is dormant. If the frost line reaches to that clam he will perish, but as a rule they seem to know what depth to go.

Q. How deep have you dugs clams?

A. I have dug clams on a bar, while digging for soft clams, the length of a spade handle.

Q. Were they hard clams?

A. Yes, sir, and live clams.

Q. How deep would that be?

A. I would say two feet, at least.

Q. You have dug clams out of sand on the bar two feet deep?

A. Sand and meadow bottom, yes, sir.

Q. And they were alive?

A. Yes, sir.

Q. What happens to these clams that dig down in winter when the warm weather comes?

A. In the month of March clams become active as the temperature rises in the water. They begin to move towards the surface.

Q. And they get up higher then?

A. Yes, sir. They come up and stay up until about the middle of June or possibly the first of July, and then they begin to go down. The temperature of the water is a little too warm for them,

and they go deeper, and they go almost as deep as they do in the winter time.

Q. During the summer months?

A. Yes, sir, in most cases.

Q. Have you dug clams in the summer?

A. Yes, sir.

Q. At what depth have you found them in the summer?

A. Well, I have waded over a piece of bottom that was considered soft mud, say this week, and not find any clams of any consequence, and what I did find was, say, mediums and cherry stones, particularly in the month of August. You go back there in the month of September and find as big a clam as you ever saw, and good clams. That is when clams come up again, in the fall, in September.

Q. By reason of the fact that they come up?

A. Yes, sir.

Q. What, in your opinion, would be the effect of two or three or four inches of sand drifting over a bed of clams?

Mr. Bourgeois: I object unless he has had experience in it.

The Court: I do not know that he has testified that he has ever had experience in reference to sand-drifting.

Mr. Hanstein: He has testified as to the depth he finds clams.

The Court: When you say drifting over, you mean drifting over and settling on clams?

Mr. Hanstein: Yes.

A. Every clammer has had experience almost every year.

Q. You have?

A. Yes, sir, that is where we make our bread and butter, by the bottom changing. If the bottom remained perfect and hard all the time, we would have a hard time getting a living from the clam industry. It is when the winter changes its temperature and the vegetation moves and settles that it causes the bottom to soften up. In fact, take hard bottom where you can't get clams enough to make wages, and possibly along, we will say, in May and June, that bottom may soften up and those clams will raise up in that soft mud until we gather them very easily. That applies to tonging and wading, also raking.

Q. Do you know anything about whether or not the bottom out in Great Egg Harbor Bay does drift?

A. Yes, sir, it does shift.

Q. In what way? Do you know?

A. Yes, sir. Going back along 1918, 1919, there came a growth of mussels all over the entire bay at Great Egg Harbor, extending down into Little Bay, up into the mouth of the river, in fact, all along the Jersey coast, from Barnegat to Cape May, to my knowledge. Where the bottom was hard before these mussels grew, in a year or year and a half afterwards those mussels were large enough so that they had accumulated great soft lumps. In some cases the mussels had raised to the extent in lumps three and four feet right straight up, and that was all soft, and those clams had raised up in that mud until us boys at Somers Point made more money in 1920 and 1921 than we ever did in our lives.

Mr. Bourgeois: I object to that.

The Court: The question was about the shifting of the bottom.

Q. The money you made by reason of that has nothing to do with it?

A. That raised all the clams up so we could catch them very easily.

Q. Do you know other things that have changed the bottom out there?

A. Yes, sir.

Q. What?

A. Bay cabbage.

Q. How does that change the bottom?

A. Why, it settles. In certain times ——

Q. Will you tell us what bay cabbage is?

A. It is a big, flat leaf of fungus. It is green in color. It grows very rapidly. In some cases it grows in sheets a foot square, we will say, and it seems to grow almost in a week or ten days, and it tears loose from the bottom and drifts in great quantities and settles in some places to such an extent that the farmers go and get that for a fertilizer. They can go and get it by the load. And where that settles, regardless of where it is, anything that is under that, if it stays there long enough, the bottom becomes decomposed under it and everything under there that can't get through it is gone, it will die, and we follow those places up in order to find clams where they have been raised out of the bottom by being smothered out.

Q. That does affect the bottom?

A. Yes, sir.

Q. What about eel-grass?

A. Eel-grass has apparently no effect on the bottom. Clams live and thrive in it as long as it is alive, but when it is tore loose and becomes dead,

decomposes and settles, it has almost the same results that the cabbage does.

Q. Will you explain to the jury what it is that cabbage and eel-grass will do to an oyster bed if it gets on it?

A. It will kill everything that is on there, oysters or clams, if it stays there long enough.

Q. In what way does it kill it, do you know?

A. The vegetation decomposes and therefore the bivalve can't get any oxygen. There forms a gas that we call a meadow gas or mud gas, and that gas will kill any living thing that is in it, and if you would happen to stick a pole down or step down where this layer is, the gas comes out of there in fine bubbles. You hear it all over. If you jump overboard in it sometimes, I have went to my waist just like that, down right in that stuff.

Q. These changes in bottoms, do they affect the covering over of the clams and oysters by sand?

A. Yes, sir. Well, you see, it is this way: Regardless of the conditions underneath, when this shift of bottom takes place, the dead vegetation settles, it doesn't change it underneath, but it increases, it raises, it accumulates and becomes soft and muddy, and it kills anything that is down underneath there.

Q. Did you ever have any experience with any of the bars in Great Egg Harbor Bay shifting?

A. Yes, sir.

Q. What takes place when that happens?

A. Well, nothing in particular that I know of, not more than sand lumps. The sand does the shifting. The mud seems to be more permanent, but the sand will shift, and it seems to be the tides, the ebbs of the tides and the winter conditions that is really the cause of that.

Q. What does it do, move the sand to a different place?

A. Yes, it moves it from one place to another. It will cut down in one place and build up in another.

Q. Where it is built up, have you ever dug clams?

A. Not if it had built up right recently.

Q. Does it affect the clams?

A. Yes.

Q. In what way?

A, Where the sand pulls away from the clams it leaves them sticking there with their bills up. We go there and catch them. We can see them.

Q. Do you know what other factors there are in Great Egg Harbor Bay that affect the living of clams and oysters?

A. The snail borers will kill the oysters.

Q. Just explain to the jury what a snail borer is and how it works.

A. A snail borer is a snail—I don't know what the scientific name of it is, but it is a snail that has a high speed auger, similar to a winkle. In fact, it is identical to a winkle, if you happen to know what that is, and its way of living is boring on the smaller oysters. It will get on top of an oyster and stick fast, and it has a little auger that it drills a hole right through the shell down into the heart of the oyster, and there it stays. Sometimes there will be a dozen on one oyster, sometimes one, sometimes none, and if that auger is long enough to go through the heart of that shell to the heart of that oyster, that oyster will die, but they do their greatest damage in what we call the spats. That is the oyster after it has been spawned, the first year of its spawn. After they become older, their shells is harder, and thicker, and the snail borer can't get through them so easy.

Q. Let me just show you something and ask you what it is.

A. That is a snail borer.

Q. What is the other one?

A. Snail borer. Small one.

Q. Have you ever seen snail borers like that in Great Egg Harbor Bay?

A. Yes, sir, plenty of them.

Mr. Hanstein: I offer it in evidence.

Mr. Bourgeois: Where did they come from?

Mr. Hanstein: I don't know. Somebody sent them up to me. He says they are the same kind they had in Great Egg Harbor Bay. I will put a witness on after a while to prove it.

Q. Have you seen these snail borers in Great Egg Harbor Bay?

A. Yes, sir.

Q. In large numbers or small?

A. Well, you would hardly find them in large numbers unless you were interested in catching oysters and looking for them, because sometimes if they are on an oyster, when you touch that oyster or move it, it will roll off, but in some cases they stay there and you actually find them. They are stuck fast. The vacuum holds them.

Q. What other elements or factors affect oysters and clams in Great Egg Harbor Bay?

A. The greatest effect that we have is the elements.

Q. The elements?

A. Yes.

Q. How does that affect them?

A. In the winter time when it comes severe cold weather, and we have a low run of tides, it exposes the flats until the mud freezes to such a depth that it kills both clams, oysters, crabs and everything else, and then the ice comes along drifting, and as it goes with the tide it will strike these bars and root in there and start the sand to moving and plow great big holes in the sand bars and mud flats. In fact, it will change the area where this particular floe of ice is going. Sometimes it cuts deep grooves in the bars.

Q. Do starfish affect clams and oysters?

A. They will affect oysters particularly.

Q. In what way?

A. They smother them.

Q. Are there many starfish in Great Egg Harbor Bay?

A. Some years there is and some seasons there is not so very many.

Q. Is this a starfish?

A. Yes, sir, that is a starfish.

Q. Is that similar to the starfish that they have in Great Egg Harbor Bay?

A. Yes, sir, or anywheres else.

Mr. Hanstein: I offer that in evidence.

Mr. Bourgeois: I have no objection to it.

Q. Do you ever have any drumfish in Great Egg Harbor Bay?

A. Yes, sir.

Q. Do they affect oysters and clams?

A. Yes, sir.

Q. In what way?

A. They feed on them. They grind the shell and oysters to a pulverized powder.

Q. Have you ever seen many of them in Great Egg Harbor Bay?

A. I have seen them there in schools of acres and acres in it. It would be a very difficult matter to estimate the number.

Q. But you have seen schools of them that cover acres?

A. Yes, sir, most every year.

Q. When they cross an oyster bed, what happens to the bed?

A. That all depends. It is hard to tell. If the oysters are young and laying on top and the bottom is clean, if they feel so they want to feed on them, they will go ahead and do it.

Q. Clean out the bed?

A. Yes, sir, they will clean out the bed over night. It has been done many a time.

Q. And an oyster bed can be cleaned out over night by them?

A. Yes, sir.

Q. Have you seen any of these plaintiffs working out on their oyster beds?

A. At what time?

Q. Since this fill?

A. No, sir, not since this fill, I haven't.

Q. You haven't worked out around there since this fill, have you?

A. Yes, I have been out since that fill, but no great length of time.

Q. But you haven't seen any change in the bottom?

A. Not that I would notice particularly, not on their oyster grounds or around that territory. The only particular change I have saw is what we call

Jimmy's Island. That is the abutment of that bridge.

Q. That is where the sand was pumped directly?

A. Yes.

Q. Do you know Mr. Martin Scull?

A. I know of him.

Q. You don't know him personally?

A. Not personally.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Shourds, I understood you to say you are a bay man?

A. Yes, sir.

Q. And you are still working at that vocation?

A. Yes, sir.

Q. Where do you have your grounds, if you have any?

A. I haven't any grounds at this particular time. I have no grounds. I work on the natural privileges.

Q. In other words, you don't have any grounds at all on which you plant oysters?

A. Not now.

Q. For instance, before the fill came in, you would go around and work on the outside of their planted grounds so as to gather the oysters or clams that happened to have fallen outside of that line; is that the idea?

A. Beg your pardon. Not oysters.

Q. Clams, then?

A. Yes, sir.

Q. Of course, if the line happened to be a little

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bit crooked and your boat got over a little bit further, you would be working on their grounds?

A. Possibly.

Q. Where they had planted?

A. Yes, sir.

Q. Where they had planted?

A. Yes, sir.

Q. And in that sort of manner you gained your information about clams and oysters?

A. Not necessarily, no, sir.

Q. Well, now, let us go into this question about the very, very many things that devour clams and oysters. First is this snail borer. Where is the borer part? I show you the sample and ask you where is the part that does the boring?

A. Right down in this little tail here. If that was taken out of the shell you would find there is a little instrument there that is known as the borer, the same thing as in a winkle.

Q. Is it here now or is it dead?

A. I suppose it is; I couldn't say whether that is living or dead.

Q. It is your theory, is it, that there is some little life on the inside of this small shell that is strong enough to bore through the shell of an oyster?

A. No theory. It is a fact.

Q. That is what you are saying. All right. And the effect of that is to kill the oyster? How many oysters are killed by that means? Are there many or are there a few?

A. According to the oyster industry in general along the coast, they claim there is hundreds of thousands of dollars of damage done by the snail borer. That is one of the greatest pests that the oysterman has to fight.

Q. Answer the questions I ask you, please, but do not orate.

Mr. Hanstein: I don't think the witness ought to be criticized in that manner. He did not orate. He answered your question.

Q. I want you to give me from your experience, not from what somebody told you or what you imagine, but your own experience. What has your experience shown you to be the extent of damage done by snail borers to oysters?

A. In 1906 I was planting oysters on the eastern shore of Virginia, and I had planted some three thousand bushel on one particular piece of ground, and like everything else, some years those snail borers are much worse than others, and I always contended that I lost more than one-half of those oysters by snail borers. In fact ——

Q. Will you confine your experience to Great Egg Harbor River, and answer the same question?

A. Well, the only thing I can say about Great Egg Harbor River, as I never planted oysters there, is what I have heard others say.

Q. Then, so far as the snail borer is concerned, that is only from statements you have heard other people make, not from your knowledge?

A. My knowledge of oysters, I have saw snail borers in Great Egg Harbor Bay kill oysters, but not in no big quantities, because I wasn't interested at that time.

Q. What has been your experience and to what extent has damage flowed from drumfish in Great Egg Harbor River?

A. I don't know as I can name any particular case.

Q. Where anything has been killed by drumfish?

A. It hasn't killed anything of mine, for I haven't had anything there. The rest will have to speak for themselves.

Q. You have never had anything there, though, have you, except what we might say in a common way has slopped over from other people's work?

A. No, sir. Natural privilege. Natural privileges everywhere, only with the exception of where these men hold those lots. We can work there anywhere, clam or oyster. We have an open oyster season.

Q. Your work has been, of course, right up next to the line where they plant?

A. Not necessarily. All over. The mouth of Tuckahoe River, Great Egg Harbor River.

Q. They plant there, too, don't they?

A. In some cases on the flats, but still there is natural privileges there.

Q. I am asking you whether your experience, your work, hasn't been along the edge of the beds that other people have planted, so as to get your oysters from those that they have thrown overboard and gone outside of their lines?

A. No, sir, I have never taken any oysters from their grounds. When I went there, I would be clamming, not oystering.

Q. You have taken clams?

A. Yes, sir.

Q. But not oysters?

A. No, sir.

Q. They are all oysters to me.

A. There is a lot of difference if you have to catch them.

Q. To what extent has your experience shown you that starfish has killed oysters or clams?

A. When I was around the Delaware——

Q. I mean in Great Egg Harbor River.

A. Yes, sir, I have saw them. When I was working in Creek Channel tonging clams along in '24 and '5, there were starfish there in such numbers that you could find clams that had been forced out of the bottom with starfish wrapped around them, dead.

Q. Where were you working?

A. At the mouth of Creek Channel.

Q. Where is that?

A. Right down here there is a channel goes through we call Creek Channel, right here beyond Mr. Lloyd's oyster ground which extends clean on out into the Great Egg Harbor Bay, and all down through here is natural privilege everywhere with the exception of these particular lots, and I have tonged there and have found starfish there that has killed clams.

Q. And they killed the clams that were in the ground where you say it is natural privileges?

A. Yes, sir.

Q. To what extent?

A. That would be hard to say, to what extent. It all depends on the amount of clams in the first place that are in this particular area.

Q. Well, Mr. Shourds, whatever may have been the extent of it, did you continue with that vocation? Did you continue to do clamming?

A. Yes, sir.

Q. Then whatever the injury to the clams was, it wasn't great enough to affect you in your vocation? You continued that same business?

A. But you understand, sir, that ——

Q. Just a minute.

(Former question repeated.)

A. No, not in that particular place.

Q. Mr. Shourds, I understand you to say that the mud beneath the water twenty feet deep would freeze in cold weather?

A. No, sir, I didn't say anything about that.

Q. What did you say about the mud?

A. I said it would freeze under water.

Q. The mud would freeze under water?

A. Yes, sir.

Q. You mean by that that the water doesn't freeze and the mud freezes?

A. Yes, sir, exactly so.

Q. Where there is regular live water?

A. Yes, sir.

Q. To what depth will that mud freeze under water? I don't mean that. Under what depth of water will freeze?

A. Do you mean to what depth will the frost extend?

Q. I mean how much water can you go through and still find frozen mud?

A. That all depends on the temperature, to begin with. If it is a very severe cold winter—I had a particular experience in 1919.

Q. That is in Great Egg Harbor Bay?

A. That is in Great Egg Harbor Bay, with sixteen to twenty foot tongs, that the bottom was frozen so hard that we could not work.

Q. What do you mean when you say the bottom was frozen? Frozen the same as ground freezes on the surface?

A. Just the same. You couldn't even get a pair of tongs to go in it. It was just like dropping them down on concrete. If the bottom wasn't frozen we could gather the bottom and bring the clams along with it if there was any there.

Q. I want to go along with you, but do I understand you to say or to contend that under water

twenty feet deep there is not frozen, the mud will be frozen?

A. Yes, sir. The frost comes from the ground, from the surface, not from the top. Ice always raises; it doesn't settle.

Q. Ice raises?

A. Yes, sir. Ice comes from the bottom, not from the top.

Q. Since when did that happen?

A. Always, ever since the world stood.

Q. Then when a river freezes, it freezes from the bottom up?

A. The ice comes from the bottom up, yes. There is ice on the bottom before there is on the top.

Q. It freezes down there first and finally it gets to the top?

A. Not necessarily freezes the bottom. It takes severe cold weather to freeze the bottom, but the ice itself does start at a given frost line under water, and not on the surface.

Q. You are quite sure of that, are you?

A. Yes, sir.

Q. You are satisfied that is correct?

A. Yes, sir, that is correct.

Q. Is your information, your knowledge of that fact, of the same character as your knowledge about the other things you have testified to?

A. Well, you know, when you have experience of a thing year in and year out ——

Q. I am asking you a question.

A. Yes, sir.

Q. It is all the same?

A. It is.

Q. And you say that clams go into the mud in the winter time, in November ——

A. October, and, in fact, they are always in the mud. That is their home.

Q. Entirely covered with mud?
A. Yes, sir.
Q. Have you clams here?
A. Yes, sir, there are clams here, plenty of them.

(Mr. Hanstein produced a clam.)

Q. Do you mean to say that that clam lives entirely beneath the mud?
A. That is its home.
Q. I beg your pardon. I didn't ask you that.
A. Yes, sir, that clam lives in the mud.
Q. I mean entirely beneath the surface?
A. In the warm weather, sometimes you might just be able to see just a little bit of that shell in the summer time, but in most cases you can't see it at all. But if the tide runs over it and removes a little filament of sand, you can see it. I have caught hundreds of thousands of them that way, just with the nose sticking out.
Q. That is where the tide has fallen bare?
A. Yes, sir.
Q. Of course, you wouldn't know otherwise, would you?
A. Yes, sir.
Q. How would you know?
A. These clams make a sign. We find these clams when the clam is four and five inches down in the mud without seeing them, but we know it is there.
Q. How do you find them?
A. The clam makes a little sign. He makes a hole and we go looking for them. We have a little rake and a basket and we go along until we see them.
Q. Now, Mr. Shourds, a witness yesterday testified that when the clams went down that way beneath the surface of the mud or the sand, that they left

a little hole so as to get air through; is that correct?

A. They are supposed to.

Q. Well, is it correct?

A. I think it is, yes, sir.

Q. You think that is correct?

A. Yes, sir.

Q. Then it is necessary for him to have that hole there to get back again or else he smothers?

A. No, sir, it ain't the hole he travels up and down, but it is the oxygen that travels to him.

Q. Then as he goes down he enlarges the hole?

A. No, sir; only a very small vent. A vent hole.

Q. Large enough for the air to get down or the water?

A. That is it.

Q. And all the air the clam gets is in the water?

A. Yes, sir.

Q. And the water goes down to him. What is the effect of closing that hole up?

A. That all depends on the time of year. That clams hibernates in the winter time and he is dormant, and that clam can live under more severe conditions during the severe cold weather than he can in the summer time. In the summer time, beginning in March,, the clam becomes active.

Q. When it becomes March, it becomes active and he has to have air?

A. He comes up to get it.

Q. He has to have air down there to come up.

A. At all times.

Q. In other words, he has to have that little tunnel down to him to get the air all the time; isn't that true?

A. Yes, sir.

Q. Is that true with oysters?

A. No, sir.

Q. What would be the effect if the clam went down, as you say, four or six inches in November, and in December and January they pumped a lot of loose sand on the top of him and closed that hole up?

A. What would be the idea?

Q. No, not the idea. I want to know how he would get a chance to live.

A. That clam as soon as his air supply was cut off would begin to raise to the surface.

Q. In November, would he?

A. He would in November, yes, sir, unless the water was so severely cold that he was dormant.

Q. Then what would happen? Then he would die, wouldn't he?

A. If the condition lasted long enough, he would, but, understand ——

Q. In other words, if the hole was filled up in the fall, when the time came for him to come to life again, there was no air for him to get, he would smother?

A. He would smother.

Q. Is that true with oysters?

A. Yes, sir. More so with oysters than it is with clams. An oyster can't move.

Q. And a clam can't move except up and down, can he?

A. He can move sideways.

Q. An oyster doesn't hibernate, does it?

A. No, sir, not within himself, but nature has provided a cover for him.

Q. What kind?

A. We call that a slime, a scum. In the fall of the year the vegetation that is in the water settles and becomes a blanket for the winter time which protects the young seed and it lasts until along about May, and then it cuts off.

Q. But if you cover the oyster up in mid-winter or any other time, he smothers, doesn't he?

A. He won't smother in the winter time half as quick as he will in the summer.

Q. But he will do it?

A. If you cover him deep enough.

Q. But you don't have to have much cover?

A. Yes, sir, quite a bit.

Q. Isn't two inches enough to smother an oyster?

A. Two inches of what?

Q. Of sand on the top of him?

A. Yes, sir.

Q. Two inches of mud will do it?

A. No, sir.

Q. If it is solid mud?

A. No, sir. There is no such thing as solid mud, only where he lays. He lays on the solid mud.

Q. And soft mud, two inches?

A. No, sir, that is what he lives on.

Q. He lives on the solid mud, doesn't he, off of the pure water that goes over him?

A. He lives off the vegetation that flows in the water.

Q. You are sure?

A. Yes, sir.

Q. If the oyster had a foot of sand and mud on top of him, he wouldn't live, would he?

A. For how long a time?

Q. I don't care whether it is for a week or two weeks or ten weeks.

A. Yes, sir, he will live for a week.

Q. Will he live for two weeks?

A. Possibly.

Q. Three weeks?

A. I wouldn't like to say.

Q. Would he have any means of getting out of the mud?

A. No, sir.

Q. If the mud isn't removed, he has to die?

A. Not necessarily, in mud.

Q. Well, sand or mud, whatever it might be, that cuts off the access of the water to him, smothers him, doesn't it?

A. Yes, sir, but it takes considerable to smother him.

Q. Well, it is possible to do it, isn't it?

A. It is possible, yes, sir.

Q. Now this testimony that you have given about snails and starfish and drumfish has no application whatever, so far as you know, to the clams and oysters that were growing on the land of these particular plaintiffs in 1924, 1925, 1926 and 1927, does it?

A. No, sir.

Re-direct examination.

By Mr. Hanstein:

Q. Is there anything different about these grounds covered by these leases from surrounding ground?

A. Nothing in particular.

Q. Would the same things that would affect the oysters and clams in the surrounding ground affect the oysters and clams in the leased grounds?

A. Yes, sir.

Q. How does this clam when he goes down and makes this vent, make it, do you know?

Q. As a clam works himself in the bottom, he leaves his shell and he puts that tongue down, he makes the hole first with his tongue, and by working that shell there is a fluctuation of mud here that oozes up, and he keeps that up continuously until he works down. In the summer-time, in the spring of

the year in particular, a clam is capable of working himself entirely out of sight in the period, we will say, of an hour or hour and a half, on a sand bar if there is water under him. It would only have to be to a half inch, we will say. I have dumped clams in a heap and went there and found the whole bottom of that heap bedded down with nothing but their noses sticking out in just one tide's work, say two and a half to three hours.

Q. How do they keep this hole open?

A. By simply opening and closing their shell. They can squirt water four and five feet in the air right off a dry bar. I have been walking along close to a clam and seen that stream of water go up, and if you look right there you wouldn't see a hole, either, because that water seems to go up and sink in, but there is a little vent there and I know that clam is in there.

Q. And that is how they keep that hole open?

A. Yes, sir.

Q. You referred to winkles. Is this a winkle?

A. Yes, sir.

Q. Do you know what this is that I show you wrapped around that stick?

A. It is a worm.

Mr. Hanstein: I offer the winkle in evidence.

ALONZO ATKINSON, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Atkinson?
A. Somers Point.
Q. How long have you lived there?
A. Forty-eight years the 28th day of last March.
Q. Do you know anything about clams and oysters?
A. I have done it ever since I was eleven years of age.
Q. Ever been out on Great Egg Harbor Bay?
A. Three-quarters of the time.
Q. You know your way around there pretty well, don't you?
A. I think I do.
Q. Do you have any oyster leases of your own?
A. I haven't none particularly of my own. Me and Mr. Sharp leases what is known as the harbor from the Longport Bridge to the mouth of it.
Q. Is it in Great Egg Harbor Bay?
A. It is in Great Egg Harbor Bay, yes, sir.
Q. Do you plant oysters there?
A. I plant oysters there, yes, sir.
Q. Have you made a business of that?
A. For the last four years.
Q. Had you been in the oyster planting business before that time?
A. Yes, sir, I had planted the ground where the Beesley's Point Road leaves the Somers Point side, or better known to me as Hickory Point. I planted

that for about eighteen years, the flat of it, where the road now stands.

Q. Can you point out where that is on this large map? This is Somers Point over here. Do you recognize that as Patcong Creek?

A. Yes, sir.

Q. There is the bridge. Show us where you had the lease.

A. I had the lease here from the meadow off to what is known as Drag Channel. This, I presume, is the low water of Drag Channel.

Q. So you planted oysters right in this neighborhood for how many years? How many years did you work that lease?

A. Well, I had no lease. There was no lease at that time. That was before the leases was issued.

Q. But you did plant oysters?

A. I planted oysters, yes, sir.

Q. And the oysters grow just the same whether there is a lease or whether there isn't, don't they?

A. Sure.

Q. Have you done any oystering or clamming out around the grounds that these plaintiffs claim to be their leased grounds?

A. Not for the last fifteen years.

Q. You haven't clammed out there in fifteen years?

A. Not in their leased grounds.

Q. I didn't say in their leased grounds, but I say around there.

A. I have clammed south of the bridge.

Q. You mean over on this side?

A. Yes.

Q. Have you never clammed up in this neighborhood?

A. Oh, I have clammed there, but it has been many a year ago.

Q. It has been a long time?

A. Before the leases was issued.

Q. Do you know Mr. Lloyd, one of the plaintiffs?

A. I do.

Q. Did you ever see him clamming or oystering on his ground?

A. I seen him clamming between the 9th and the 14th of June within one hundred foot or less of that bridge, and Patcong Creek Channel, south of it. Cedar Swamp Creek. Maybe you know it as Cedar Swamp.

Q. Will you show us on the map about where you saw him?

A. I saw him south of this.

Q. I want to be sure you understand this map. Here is Somers Point.

A. Yes.

Q. Atkinson Avenue?

A. Yes.

Q. Here is some solid fill?

A. Yes.

Q. And here is a bridge over Drag Channel, and then there is a solid fill again, and then there is Walter Lloyd's ground out here.

A. In other words, that is what we know as the Creek Channel.

Q. Where did you see Lloyd working?

A. I seen Lloyd working here south of the bridge, within one hundred feet of it.

Q. And that was in June of this year?

A. June of this year, yes, sir.

Q. How many days did you see him out there?

A. Three that I recall.

Q. Did you see him gathering any oysters or clams?

A. He was catching clams.

Q. Was anybody with you at the time?

A. Yes, sir, a man by the name of Ike Robinson from Mays Landing.

Q. Do you know Jesse Thomas?

A. I do.

Q. Do you know where Jesse Thomas's leased ground is?

A. About. I don't just know the ground.

Q. It is lease 157. If you will look here I will show wou what he claims to own. This one over here. Have you seen Jesse Thomas out on his ground since this bridge has been built?

A. I seen him there last summer.

Q. What did you see him doing?

A. Wading clams.

Q. See him get any?

A. Yes, sir.

Q. Did you have any conversation with him?

A. Only when he brought them down to the point I talked with him.

Q. And you saw him bring the clams right down to the Point?

A. Yes, sir, and sell them to Mr. Sharp.

Q. You saw him sell them?

A. Yes, sir.

Q. And you saw him take them right off these leased grounds?

A. Saw him wading on the grounds, yes, sir.

Q. Did you have any experience with the grounds on which you planted your oysters as to the oysters growing and dying?

A. Yes, sir.

Q. Do you know what are the things that kill oysters sometimes?

A. Well, mud or sand settling from natural causes, freezing in the flats, ice shifting the mud from one place to another, sand, or whatever happens to be in that vicinity, whether it is mud or sand.

Q. Did you ever know that to happen in Great Egg Harbor Bay without a dredge working there?

A. Yes, sir.

Q. What caused the sand to move there, do you know?

A. Nothing more than the elements.

Q. Just shifts of the tide?

A. Yes.

Q. Do you know anything about starfish out there?

A. Yes, sir.

Q. Did you ever know of starfish to kill any oysters?

A. Yes, sir, I have known them to kill oysters.

Q. Did they ever kill any of yours?

A. Killed some of mine last year.

Q. What are the other things that you have found to have killed oysters?

A. Snail borers. Drumfish.

Q. It has been testified here that when you plant oysters you get two bushels for every bushel you plant. Have you ever had the experience of planting oysters and not getting any out of those you planted?

A. Yes, sir.

Q. Can you tell us where that took place?

A. On this particular piece of ground that I pointed out on this flat I planted seven hundred bushel, and we never got a shell, let alone an oyster.

Q. What happened to them, do you know?

A. Covered up with mud.

Q. What did it?

A. The winters. Presumably the winters. Something shifted the flat naturally, anyhow; the elements.

Q. There wasn't any dredge out there, was there?

A. No dredge in the bay, at that time, to my knowledge.

Q. Do you know anything about whether or not there has any sand appeared on the bottom around these lots since this dredge was there?

A. I do not.

Q. You haven't been there?

A. No, sir.

Q. Have you ever done any clamming?

A. Most of the time that is my business.

Q. I forgot to ask, Mr. Atkinson, how deep have you dug clams up?

A. Well, I use what the clammer probably knows as a tong that we call the gouger. The longest tooth tong that is made, which the tooth on them is five and a half inches. I have known them to be so deep in the bottom that I couldn't get them out in the winter time with that length of teeth.

Q. Well, if you couldn't get them out, how did you know they were there?

A. Feel them. Just feel the edge of them.

Q. Do you know whether they were living clams?

A. They were living clams, yes, sir.

Q. And you have known them to be in so deep that you couldn't get them out with a five-inch tong, or tine, on your rake?

A. Yes, sir. That applies principally on sand bottom.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Atkinson, where were you when you saw Mr. Lloyd working in the bay in this last summer, this June or last June?

A. This June.

Q. Where were you?

A. I was fishing a haul-frame.

Q. Where were you making the haul?

A. I were making the haul—the first day I seen him there I just cleared his stern when I laid my net off. I was making the haul in the mouth of Creek Channel.

Q. How far distant is that from Lloyd's ground?

A. Well, I don't just know where his lines is, because at the present time there is no particular stakes in any certain places, but we will imagine that I probably was fifty or a hundred fet below his line at that time.

Q. You were?

A. Yes.

Q. Making the haul?

A. Making the haul.

Q. One hundred feet below his line?

A. Yes.

Q. And you don't know where his line is?

A. I imagine. I don't know where his line is, because there is no stakes there.

Q. Then you were about one hundred feet distant from where you imagine his line was. That was in June of this year?

A. June of this year.

Q. How long was he there?

A. Well, he was there when I went there, and there when I went away, which would approximately take the amount of an hour.

Q. And the next time you saw him there was when?

A. The following day he and Japh Barrett was both there.

Q. He and Japh Barrett?

A. He and Mr. Barrett, yes, sir.

Q. That was in June also?
A. Also in June.
Q. Where were you? At the same place?
A. About the same place.
Q. And they were about the same place?
A. Somewhere about there.
Q. And the third day?
A. The third day he was closer to the bridge by at least fifty foot than he was the previous day.
Q. Where were you?
A. Making a haul about the same place.
Q. Who was with you?
A. A man by the name of Ike Robinson from Mays Landing.
Q. Is he here?
A. Not to my knowledge.
Q. And each time you were there about an hour?
A. Yes.
Q. And at what tide? What state of the tide was it when you were making these hauls?
A. Well, what we would call about half ebb tide. As soon as this bar begins to bare.
Q. Then each time it was ebb tide, was it?
A. Yes, sir.
Q. You are quite sure, are you, that he was on his ground doing that work?
A. To the best of my knowledge, he was on the lower edge of his ground.
Q. What did he get?
A. Clams.
Q. How many did he get?
A. I couldn't tell you that. I seen them dig them out and throw them in the boat, two or three at a time.
Q. How many did you see him dig out and throw in the boat?
A. From one to two to three.

Q. Now, Mr. Atkinson, you have stated that you have tonged with the longest prongs, that is, five and a half inch prongs?

A. Yes.

Q. They will bring up clams that are within what distance from the surface?

A. Well, I will say three inches from the surface.

Q. If they are more than three inches from the surface, that tong wouldn't bring them up, would it, the prongs wouldn't be long enough?

A. Wouldn't reach them.

Q. And you were tonging, as I understand, in the winter time, cold weather?

A. Yes, sir.

Q. What time of the year was it?

A. Well, I have tonged in every month in the year, both January, February and March, and all other months.

Q. I see. In hot weather and cold weather?

A. Hot weather and cold weather.

Q. With a five-and-a-half-inch prong?

A. Yes, sir.

Q. Always the same or sometimes a shorter prong than that?

A. The most of my use is long stales, and I used to use them very near all the time. I have shorter, too.

Q. How many feet depth of water?

A. My stales I have been using for the last three years, the shortest has been sixteen feet. And the longest is twenty-two foot.

Q. When you are using a 16-foot stale, I suppose you go in water that is maybe twelve feet deep?

A. Yes, and fourteen.

Q. How many years have you been tonging for clams during the cold weather as well as the hot weather?

A. Well, you can take eleven year from fifty-seven, and you will get it.

Q. That leaves forty-six?

A. Yes.

Q. During those forty-six years, have you found it pretty frequently that the mud under the bottom of the water was frozen so you couldn't use your tongs at all?

A. I have, indeed.

Q. You have found it so you couldn't use your tongs at all?

A. Couldn't catch the stuff.

Q. Then you wouldn't get anything at all those times?

A. That applies to different kinds of bottom. A sand bottom doesn't freeze much. A mud bottom is particularly the bottom I found frozen.

Q. Does it freeze or does it just get stiff, hard?

A. It freezes; ice.

Q. What?

A. When you have broken through it you will break up ice in it where it is in the mud.

Q. Beneath the bottom of the river you find frozen bottom?

A. Yes, sir.

Q. What happens to the clams that are in there in that frozen part? Can they live if they are frozen?

A. They live. If they are under the mud they will live.

Q. It doesn't freeze enough to kill the clams, to freeze them?

A. Not in deep water.

Q. Does it freeze at all? In deep water does it freeze at all?

A. Oh, yes, it freezes.

Q. In other words, if the mud freezes and the clams are in the mud, don't the clams freeze?

A. Very likely they will freeze, but they thaw out all right.

Q. In other words, when you catch them from frozen ground, they are frozen?

A. Yes, sir.

Q. And when they thaw out, you could eat them?

A. Yes, sir.

Q. Just as if they had been in cold storage? But they don't come to life again if you don't catch them, do they?

A. You can catch clams and freeze them and lay them in a pile and cover them with sand, froze comparatively solid, and lay them where the air doesn't hit them and they will thaw out and live.

Q. That is, if they are frozen on the outside?

A. Froze on the inside, not the outside.

Q. Do you mean to say there is anything you can freeze except some sorts of germs, that you can actually freeze and they will still live?

A. Yes, sir.

Q. You have talked about having a bed up near your home, I guess it is near your home.

A. It was at that time, yes, sir.

Q. And you have had it there for four years. You have been working the same place yourself for four years. Is that right?

A. I have had the oyster bed for four years.

Q. Your own oyster bed was covered over, you say, was covered over with mud?

A. It was covered over with mud, yes, sir.

Q. What year was it covered over with mud?

A. Well, it is somewhere about 1900.

Q. 1900? Then that is some thirty years ago?

A. Yes.

Q. What were you doing between the time your bed was covered over in 1900, and four years ago when you went down near the Longport Bridge?

A. I was tonging clams.

Q. Have any ground at all of yours?

A. I still held the ground for five year afterwards.

Q. That made it 1905?

A. Yes.

Q. Since 1905 have you clammed there at all, or oystered there?

A. I have never clammed there, no, sir.

Q. Where have you worked, if anywhere?

A. I have worked on the bay, clamming in different places.

Q. What bay?

A. Great Egg Harbor Bay.

Q. Principally where?

A. In the main Ship Channel of Great Egg Harbor Bay.

Q. Above or below the present bridge?

A. Below the present bridge.

Q. Have you ever worked up on the grounds of these various lessees?

A. Not since the leases was issued.

Q. That was in 1915, or maybe earlier than that. You don't know, then, whether there were ever any oysters or clams on their grounds that were injured by starfish or by snail borers or by drumfish, do you?

A. No, sir.

Q. Were you in the bay during the time the Hill Dredging Company was pumping the sand in this island there by Drag Inlet?

A. Yes, sir.

Q. How near to that part, to the bridge?

A. I tonged clams in what is known as the Drag Channel.

Q. At that time?

A. At that time, yes, sir.

Q. What part of Drag Channel?

A. On the southeast side of the bridge.

Q. How far away from the bridge?

A. Well, I didn't have any line on it. I should judge three or four hundred feet.

Q. How many clams did you gather there?

A. On the average of, I will say that I would average about six hundred a day.

Q. In how many hours?

A. About eight hours.

Q. Do you still go there?

A. Yes, sir.

Q. To fish for clams?

A. Yes, sir.

Q. When did you go there last?

A. In May.

Q. Of this year?

A. Of this year.

Q. Why not go after May? Any reason?

A. Why, in May I went to fish with the haul-frame and I fished up until the 15th of June, or the 14th of June, with the haul-frame.

Q. You say also that you saw Jesse Thomas out on his ground last summer?

A. Yes, sir.

Q. But previously you had said you didn't know where his lands were. That was right? In other words, you didn't know where his lands were?

A. Not the corners, no.

Q. I beg pardon?

A. Not the corners of his ground. That is, I didn't know his from others.

Q. And you don't know whether he was working on his land or somebody else's?

A. No.

Q. But you did see him out there?

A. He was working in that part.

Q. Who was with you at that time?

A. A man from Phildelphia by the name of McNally.
Q. Where were you at that time?
A. I was up there for the purposes of fishing.
Q. Up on this oyster ground?
A. Yes, sir.
Q. What were you fishing with, line or tongs?
A. With a line.
Q. How near to Thomas were you?
A. I went within fifty foot of him.
Q. Speak to him?
A. No, I didn't speak to him.
Q. You know him, don't you?
A. I just run by him with my power boat.
Q. What was he doing?
A. Wading clams.
Q. Do you know if he was getting any?
A. He was throwing something in the boat.
Q. How much did you see him throw in the boat?
A. Well, probably I seen him throw four or five while I was passing him.
Q. It may have been four or five clams or it may have been four or five oyster shells or dead clams. I see. All you know is that you saw him throw something in the boat? He has some occasion to be over there, doesn't he? Isn't he the watchman for the State over there?
A. So he says.
Q. You don't know?
A. No.

Re-direct examination.

By Mr. Hanstein:

Q. Did I understand you to tell Mr. Bourgeois that while the dredges were pumping, you were doing some clamming around there?

A. In the Drag Channel, yes, sir.

Q. Which is Drag Channel? That is this here, isn't it?

A. On the eastern side, yes, sir.

Q. Were you down in this direction?

A. I was on this side, yes, down in this direction.

Q. They were putting in a solid fill here?

A. They was, indeed.

Q. And you caught clams there?

A. I caught clams here in the Drag Channel.

Q. You had caught them before that, had you?

A. Yes, sir.

Q. And you caught them after that?

A. Yes, sir.

Q. Were they living?

A. They were.

Q. This Jesse Thomas business, you say you saw him throwing something in the boat?

A. Yes, sir.

Q. Was it Jesse Thomas whom you saw land a load of clams that same day?

A. Yes, sir.

Q. Mr. Bourgeois said you didn't know whether they were clams or oysters shells. Did you see him sell clams or oyster shells?

A. I saw him sell clams.

Re-cross examination.

By Mr. Bourgeois:

Q. Where did he sell them?
A. To Ephraim Sharp.
Q. Where, I say? Down in Somers Point?
A. Yes, sir.
Q. Of course you don't know whether they were the same clams he threw out of the water or not, or where they came from?
A. I couldn't take an oath on them.
Q. This Drag Channel is still open, isn't it?
A. Yes, sir.
Q. It has a channel with a depth of how much?
A. Well, it runs from four foot to forty at the present time.
Q. Where is it four feet?
A. In what is known as the northwest end of it.
Q. And the northwest end of it is where?
A. Up where it comes out into this Creek Channel.
Q. Can't you point out on the map, where that is? Is it above the bridge?
A. It is above the bridge, yes. It has no actual designation. This is the channel.
Q. Here is Creek Channel up here. Is that it?
A. It comes out—yes, it comes out into this Creek Channel up here.
Q. And the depth of the water up here is only four feet, and down below here, where you were, is forty feet?
A. Where they pumped out, it is forty, and where I was, I was using twenty-one-foot tongs.
Q. And you were four or five hundred feet below the bridge, you say?

A. About three hundred feet, I will say.

Q. Before they did the pumping there, how deep was Drag Channel?

A. About the same.

Q. About the same?

A. Yes, sir.

Q. In other words, there was a forty-foot hole where they dug out the sand to make this fill?

A. No, with the exception of the forty-foot hole which is over here along what is known as Jimmy's Island. They pumped along this island.

Q. To a depth of forty feet?

A. Yes, sir.

Q. And you think there was no difference in the depth of the channel after they had done the pumping from what there was before except where they made the hole?

A. To the best of my knowledge.

Q. And the tide ebbed and flowed over these clams that were down in this twelve or fourteen feet of water, did it not?

A. Yes, sir.

Q. You said something about your oysters being killed because the mud covered them over. How much mud does it take to kill oysters?

A. Well, I imagine three inches.

By Mr. Hanstein:

Q. You told Mr. Bourgeois that the tide ebbs and flows in Drag Channel. Does the tide ebb and flow over these leases, too?

A. Yes, sir.

By Mr. Bourgeois:

Q. Is there a pronounced current in Drag Channel?

A. There is a pronounced current in Drag Channel.

Q. There is in every channel, isn't there? That is what makes a channel?

A. Everywhere I was ever in in my life.

Q. In other words, it is this pronounced current that makes the channel?

A. Yes, sir.

Q. And the channel means nothing except a deeper ditch of water?

A. That is it.

HARRY SURRAN, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Surran, where do you live?

A. Somers Point.

Q. How long have you lived there?

A. About ten years.

Q. What is your business?

A. Clamming, working in the bay.

Q. What work do you do in the bay?

A. Clam.

Q. Have you been doing that work for ten years?

A. Yes, sir.

Q. How much longer than ten years have you been doing it?

A. Not any as I know of. Only just once in a while in the summer time, is all.

Q. Where do you do your clamming?

A. Do it all over the bay.

Q. Do you do any of it in Great Egg Harbor Bay?

A. Yes, sir.

Q. Are you out there frequently?

A. Yes, sir.

Q. Did you work out there before this bridge was built?

A. Yes, sir.

Q. Have you worked there since?

A. Yes, sir.

Q. Are you familiar with the waters in the neighborhood of these leases?

A. Yes, sir, the Drag Channel and Creek Channel. I know where they are.

Q. The leases are in Creek Channel, aren't they?

A. Yes, sir.

Q. Do you know Mr. Lloyd, one of the plaintiffs?

A. Yes, sir.

Q. I would like to show you the map here a moment.

A. I haven't got my glasses with me.

Q. All right. We will see what we can do by word of mouth. Do you know where Mr. Lloyd's leased ground is?

A. Well, I only know what they say. It is in Creek Channel.

Q. Do you know that it is down at that point of the ——

Mr. Bourgeois: I object to that.

The Court: It is leading.

Q. The map, Mr. Surran, shows the bridge running from Somers Point to Beesley's Point, and it

shows a fill between Drag Channel and Creek Channel?

A. Yes, sir.

Q. You are familiar with that fill, aren't you?

A. Yes, sir.

Q. And the map also shows that Walter Lloyd's lot 152 is partly covered by the end of the fill. Do you see?

A. This here is Creek Channel?

Q. Yes. That part of his lot 163 is covered by the end of the fill. Does that make it clear in your mind where the map shows Lloyd's land to be?

A. Yes, sir.

Q. Since that bridge has been built, have you ever seen Mr. Lloyd out there clamming?

A. Yes, sir.

Q. When did you see him there clamming?

A. Last week.

Q. Last week?

A. Yes, sir.

Q. How many times did you see him there?

A. Well, I was there three days last week, and he was there each day that I was there.

Q. What was he doing?

A. He was tonging.

Q. Did you see him catch anything?

A. Well, I didn't see him catch anything, but he was there when I went there, and he was there when I came away.

Q. Tonging all the time?

A. Yes, sir.

Q. And he did that on three successive days last week?

A. Yes, sir.

Q. How close to the bridge was he?

A. Well, he was, I should judge, fifty foot.

Q. Fifty feet away from the bridge?

A. Yes, sir.

Q. Have you clammed around the land covered by these leases?

A. Nothing any more than up to the Drag Channel, up along from the Drag Channel in towards the stakes, between the stakes and the Drag Channel.

Q. Have you clammed over in Creek Channel?

A. Below the bridge, that is, east of the bridge.

Q. Toward the ocean?

A. Yes, sir.

Q. Have you clammed landward of the bridge in Creek Channel?

A. On the eastern side, you mean?

Q. Well, up in Creek Channel, in this direction, over toward where these leases are?

A. Here is the start of Creek Channel, isn't it?

Q. Yes.

A. I worked in here on this side and then across on this other side.

Q. Did you ever work up this way from the bridge?

A. Not in Creek Channel.

Q. Not in Creek Channel, but you have over in Drag Channel?

A. In Drag Channel.

Q. Did you work over there before the bridge was built and since?

A. Yes, sir.

Q. Have you seen any difference in the bottom?

Mr. Bourgeois: I object. It is for him to tell what it was and is and let the jury determine whether it is different.

The Court: I will permit this question.

(Question repeated.)

A. No, sir.

Q. What kind of bottom was it before the bridge was built?

A. Well, it was mud and eel-grass and shells, dead shells along the grass.

Q. What kind of a bottom is it now?

A. Practically the same.

Q. Did you ever plant oysters?

A. No, sir.

Q. Did you ever plant clams?

A. No, sir. I have catched them. I have never planted them.

Q. How deep in the bottom have you caught clams?

A. Well, two inches, inch and a half, two inches maybe three inches, I suppose.

Q. What do you know about what clams do in winter and what they do in summer in regard to the depth?

A. Well, I know that it is harder in the winter to catch them than it is in the summer.

Q. Why is that?

A. The bottom seems to be harder.

Q. Do you know what the clams do in winter?

A. Well, they claim they go down. I don't know myself.

Q. You don't know that yourself?

A. No, I don't. But I know I can't catch as many in the winter as I can in the spring and summer.

Q. Do you know any of these other plaintiffs? Do know these other men who are the plaintiffs in these suits?

A. No, only by sight is all. I am not personally acquainted with them.

Q. Have you seen any of the other plaintiffs out on these grounds since the bridge was built?

A. Not that I can remember of.

Q. Do you know Mr. Martin Scull?

A. Yes, sir.

Q. Was he in court on Wednesday, the last day we had court?

A. I couldn't say.

Q. You don't know?

A. No.

Cross-examination.

By Mr. Bourgeois:

Q. You say that the bottom in Drag Channel was mud, eel-grass and shells. Is that right?

A. Between the stakes and Drag Channel. Between the stakes and Drag Channel there is a strip in there, you know, between the Drag Channel and the stakes, that was mud and eel-grass and old shells in there.

Q. That didn't mean on these grounds, however?

A. No, sir, I wasn't on the grounds.

Q. What was there on that bottom where there was mud and eel-grass and old shells?

A. Well, some clams.

Q. Some clams?

A. Yes, sir.

Q. Then that was a part of the bay where clams would grow, was it?

A. Yes, sir, grew some there.

Q. Did you go up there and do clamming?

A. Yes, sir.

Q. How many would you get—that is what you call natural privilege ground, I suppose?

A. Yes, sir.

Q. How many would you get a day up there?

A. That all depends. Some days—I waded up there, you know, and some days it was very deep and other days it wasn't so deep. When it wasn't so deep I would do better, but in deep water it drove me out, you know.

Q. Where was the deep water, over inside of the stakes or over next to Drag Channel?

A. I wasn't in the stakes.

Q. How close did you go up to them?

A. As close as from here to you, I would judge.

Q. To the line?

A. Yes, sir, to where the stakes was.

Q. And, of course, the stakes aren't along continuous like a picket fence?

A. No.

Q. They are two or three hundred feet apart. When you would be in between them, I suppose sometimes you got a little closer into the ground, didn't you, the leased ground?

A. I was very particular to see that I wasn't inside of them.

Q. In other words, you went as far as you could go without trespassing on the leased ground?

A. I didn't want to trespass.

Q. Could you tell when you got up near the line the difference between the clams that had been planted there and those that had grown there without planting, I mean naturally?

A. The clams that I caught along there all seemed alike to me.

Q. Did they? What size were they?

A. They run from what we call a neck to a large clam.

Q. That isn't natural propagating grounds for

clams, is it? You had to put them overboard or else they won't grow? Isn't that right?

A. No, they catch them there natural. I suppose they was natural. That is what I supposed they was, the same as any other part of the bay.

Q. You don't know what Lloyd was doing there at all, whether he was simply trying his grounds, or what he was doing?

A. I seen him there working with his tongs, and of course I supposed he was clamming.

Q. Trying to find something?

A. I didn't know.

By Mr. Hanstein:

Q. Did you see him land his boat after that?

A. No, sir.

Q. You don't know whether he brought any in or not?

A. No. sir.

Irwin Rice, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Rice?

A. Somers Point.

Q. What is your business?

A. Clamming.

Q. How long have you been a clammer?

Q. Where have you been doing your work?

A. I have been clamming for nine years.

A. I have been doing my work up in Drag Channel and out in the bay, Great Egg Harbor Bay.

Q. Is that Creek Chanel? Do you mean Creek Channel?

A. Drag Channel and Creek Channel.

Q. And that is where you did it, over that period of time?

A. Yes, sir.

Q. Were you familiar with the character of bottom there before this bridge was built?

A. Positively.

Q. What kind of a bottom was it before that?

A. It was kind of mud, shells, and up on that middle ground there, there was sand.

Q. Which middle ground?

A. That run the other side of the bridge, on the westerly side.

Q. Will you point out on the map what was sand?

A. Right over in here, the middle ground.

Q. It is in Drag Channel?

A. This is Drag Channel here. It is right in here.

Mr. Bourgeois: Won't you let him mark it with a pencil?

A. And over here is grass, eel-grass.

Q. Over there is eel-grass, and on this side of Drag Channel is sand?

A. Sandy over here, yes, sir, excepting up here is low grass.

Q. Have you worked out there since the bridge was built?

A. Yes, sir.

Q. Did you observe the character of the bottom out there?

A. Yes, sir.

Q. What was the character of the bottom after the bridge was built?

A. The same thing.

Q. The same thing?

A. Positively.

Q. Did you have occasion a few weeks ago to go out in a boat over these leased grounds?

A. Positively.

Q. With whom did you go?

A. I went with Mr. Garrison and I went with the engineer over there.

Q. And who else was there?

A. Both them gentlemen. All three of them over there. In fact, four.

Q. You mean Mr. Risley, Mr. Bell, Mr. Hackney, Mr. Collisson?

A. Yes, sir.

Q. Do you remember me being there?

A. Yes, sir, you was there.

Q. Do you recall when it was we all went there?

A. It was on—I couldn't call just the date.

Q. About how long ago?

A. It was about, I imagine, around three weeks.

Q. Did we go over the leased grounds?

A. Yes, sir, we went over them.

Q. Did you see anyone in the boat do any tonging along the bottom?

A. Yes, sir.

Q. Did you see the character of the bottom that was brought up?

A. Yes, sir.

Q. Did you see any clams that were brought up?

A. Yes, sir.

Q. Did you know whether or not those clams were alive?

A. Yes, sir, they was alive.

Q. Did you see me eat any?

A. Oh, yes, positively.

Q. Do you know anything about the habits of clams, as to the depth at which they can live?

A. Well, I have dug them about seven inches, digging for soft clams.

Q. You found hard clams in seven inches?

A. Yes, sir.

Q. Could you tell approximately how old these clams were that were dug up the other day, or when we were out there?

A. I guess they had been there quite awhile, to my knowledge.

Q. By that you mean how many years, about?

A. I couldn't say the number of years, but I know it was over seven or eight years.

Q. You would say they were seven or eight years old?

A. Yes.

Q. Have you done any clamming out in Creek Channel around the outside of this leased ground?

A. Yes, sir, on the outside.

Q. Has there been any change in that bottom?

A. No, sir. The same, to my knowledge.

Cross-examination.

By Mr. Bourgeois:

Q. How long were you out in the boat?

A. Out in the boat?

Q. Yes. I mean from the time you got on the grounds until you left the grounds?

A. Well, I imagine we was on there around two hours.

Q. Two hours? And how many times did they put their tongs down to gather oysters or clams?

A. I didn't count them.

Q. Well, can you give me some notion?

A. No, I cannot.

Q. More than once?

A. Positively more than once.

Q. More than twice?

A. More than twice.

Q. More than three times?

A. I don't know. I couldn't say. I seen it once that I know of.

Q. You saw it once?

A. Yes, sir, and twice.

Q. You are sure of that?

A. Yes, sir, and how many more grabs above that I don't know, but I know they went down several times.

Q. Are you sure they made three attempts?

A. I don't know how many attempts. I know there was three and more.

Q. Three and more?

A. Yes, sir.

Q. How many more?

A. I don't know. I couldn't tell you.

Q. Was there as much as six?

A. I couldn't tell you that.

Q. You don't know whether there were six or only five?

A. No, sir, I don't know whether there was six or ten.

Q. Are you prepared to say there weren't more than six?

A. I couldn't say that.

Q. Are you prepared to say there were six?

A. I couldn't say that.

Q. You don't know whether there were or not?

A. No, sir.

Q. Did you in your opinion make a fair trial to find out what the condition of that oyster ground was?

A. I was out there to see and to tell about the sand and the mud and also the sand that was on the bed and the mud that was on the oyster bed.

Q. In view of the fact that you went out there for that particular purpose, can't you tell me whether they made six attempts to find clams or oysters?

A. I never counted them.

Q. You didn't count them, but can't you tell me without counting whether there were as many as six?

A. No, sir, I can't tell you without counting. I don't pretend to say how many grabs were made.

Q. At any rate, after the two hours spent out there, you concluded, did you, that you had made a fair investigation?

A. To my knowledge.

Q. To your knowledge? To your judgment?

A. To my judgment.

Q. You thought it was a fair investigation?

A. Yes, sir.

Q. And you thought from what you saw them bring up those times when they brought the tongs up, whether it was two or three or four or five, or whatever number it was, that you had seen enough to give judgment here to this jury as to the character of that bottom?

A. To my knowledge.

Q. To your knowledge?

A. Yes.

Q. Can you tell the jury where those attempts were made?

A. Well, I can locate it. I don't know the ground, because they are not properly staked.

Q. Can you tell us where, with relation to the bridge? How close to the bridge, how far from the bridge?

A. Yes, sir.

Q. How close to the bridge?

A. I couldn't tell the distance, but I could show you on the map.

Q. How could you show on the map if you don't know the distance?

A. All I can go by is the stakes on the land what they are supposed to have as corner stakes, which I failed to see.

Q. How can you tell by the stakes? How do you know which is the one you saw out there?

A. I don't know which, but the location we was laying from the bridge. We laid all the way from there right in here, came up here and up here, and then down All the way down pretty near to the bridge.

Q. You made no investigation at all on going up, because you went up Drag Channel, and all the investigation you made was coming down over the land in practically a straight line?

A. We went all over it, up and down.

Q. How many times did you attempt to find out what the bottom was like or what the oysters and clams were like?

A. I couldn't say how many attempts was made.

Q. You were not sure there were six?

A. I don't know whether there was six or whether there was ten or whether there was a hundred and fifty. I couldn't say and wouldn't say.

Q. You were there for that purpose and can't tell?

A. I was there to look at the bottom, not the tongs, how many grabs they made.

Q. You couldn't see the bottom unless it was brought up to you, could you?

A. Positively not.

Q. Can't you tell, whether there were six different samples or fifty or a hundred brought up?

A. I don't know how many samples there was. I couldn't say.

Q. Where were you during all the time this was happening?

A. Right in the boat.

Q. And yet you don't know that?

A. No, sir, I didn't go out to count them.

Mr. Hanstein: He has told you ten times he doesn't know how many it was, and I object to that.

The Court: I think it is pretty definitely settled.

Q. At any rate, the six times, if it was, was the information that you got covering eighty-five acres of oyster ground?

A. I don't know how many.

Q. You don't know?

A. No, sir, that they tonged up. All I do know, I was out with them and tested the ground.

Q. How many clams did they catch during the time they were there?

A. I didn't count them.

Q. Was there a bushel?

A. I have no idea.

Q. How much did they bring up during the time you were there?

A. They brought up plenty.

Q. How much was plenty? That is something. How much was plenty?

A. Plenty of mud.

Q. Yes. You say it was plenty?

A. Yes, it was plenty of mud.

Q. How much?

A. There was one tongful was brought was pure mud.

Q. How much was in that tongful, would you think?

A. Of mud?

Q. Yes.

A. I don't know how much.

Q. Would there be as much as a gallon?

A. No, sir, I couldn't count the mud.

Q. Would it be as much as a gallon?

A. Yes, there would be a gallon.

Q. Would there be a half bushel?

A. I couldn't say how much it was, whether it was a bushel or two bushels.

Q. We have got some mud. The next time what did they bring up?

A. We brought up the same thing.

Q. Just mud again?

A. To my knowledge, once or twice.

Q. Once or twice you got mud, but you don't know whether it was once or twice?

A. No, sir. I was paying attention. How many more times I don't know.

Q. That is all you know about it?

A. Yes, sir.

Q. And you say that these clams they brought up were seven or eight years old?

A. To my knowledge.

Q. To your mind?

A. Yes, sir.

Q. How many of them were there that were seven or eight years old?

A. I don't know how many there were. There was quite a few laying there. I couldn't give no estimates how many clams there were there.

Q. Did you get as much as half a bushel of clams during the time you were there?

A. I couldn't say.

Q. In other words, you don't know whether after two hours of work you gathered as much as half a bushel of clams or not?

A. I couldn't say how many clams we had, because they was eating them and one thing and another, but I didn't count them. It wasn't none of my business how many clams they caught or how many they took up, only I just wanted to test the bottom.

Q. What part did you have in it? Were you steering the boat?

A. No, sir, I was setting down there.

Q. You didn't have anything at all except to observe?

A. No, sir, just to sit there.

Q. Just to sit there and see what was going on?

A. At times.

Q. Did you do the clamming yourself?

A. No, sir, I didn't.

Q. Who did do the clamming?

A. Morris—that gentleman right over there, I forget his last name.

Mr. Hanstein: Lashley, wasn't it?

A. Morris Lashley, yes.

CURTIS RISLEY, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Risley, where do you live?
A. Pleasantville.
Q. How long have you lived there?
A. Sixty-one years.
Q. What is your business?
A. Oysterman, bayman.
Q. How long have you been in that business?
A. Forty-five years.
Q. Do you know where Great Egg Harbor Bay is?
A. Yes, sir.
Q. Have you ever been there?
A. Yes.
Q. Very often?
A. Quite often.
Q. Did you ever do any clamming out there?
A. No, I have done no clamming.
Q. Did you ever plant any oysters?
A. Yes, sir.
Q. Have you had oyster beds of your own?
A. Yes.
Q. By the way, did you happen to be on this trip a short time ago with Mr. Rice and some more of us?
A. Yes.
Q. When we went over these leased grounds?
A. Yes.
Q. Are you familiar with the character of ground that is generally under the bays in Atlantic County?
A. Yes. Where I have worked.

Q. Did you see Mr. Lashley doing some tonging out there when we were along?

A. Yes.

Q. Did you observe the character of the bottom that he brought up?

A. Yes.

Q. What can you tell us about it?

A. Why, it was hard, putty mud, I would call it, fiddler bottom, what we call fiddler bottom, a lot of it.

Q. Was it covered over with sand?

A. No.

Q. Did you see any clams brought up?

A. Yes.

Q. Did we go over that entire area, to your knowledge?

A. We did. We went back and forth.

Q. Do you know how many grabs we made?

A. No, I didn't count them.

Q. Did we make many or few?

A. I should say that we made fifty, at least, that day. I was there before.

Q. Well, this day when I was along, we brought up some clams, didn't we?

A. Yes.

Q. What could you say about those clams? Were they living?

A. Oh, yes, all living.

Q. Were they edible?

A. You ought to be a good witness. I opened about a dozen and a half for you.

Q. Well, you did see me eat them, didn't you?

A. Yes.

Q. Could you tell how old these clams were?

A. No, I couldn't; not definitely.

Q. Well, could you say approximately how old they were?

A. Yes, there was some of them, the smaller ones, I should say was three years, and the others over five, most of them. They were different ages, of course.

Q. But you did see some of them as old as five years, in your judgment?

A. Yes.

Q. You say you had been over this ground before?

A. No.

Q. I understood you to say that ——

A. No. I have sailed over it, but I never tonged over it, never tried the bottom.

Q. Did you go over this ground with Mr. Hackney some time after the bridge work was started? Do you know Mr. Hackney here?

A. Yes.

Q. Do you recall going over the ground with him?

A. Yes.

Q. When was that, do you know, with relation to the building of the bridge?

A. It was this spring some time. It was in May, I think.

Q. What did you do then?

A. I tried it myself with tongs.

Q. Over this leased ground?

A. Yes.

Q. Did you find the character of the bottom then?

A. Yes.

Q. Was it the same as it was when you were out the last time?

A. Yes, just the same.

Mr. Bourgeois: All these questions are leading. The witness does not have to do a thing but say "yes."

Q. Had you been out before that?
A. No.
Q. Have you had experience in planting oysters?
A. Plenty.
Q. You have planted them on your own grounds?
A. Yes.
Q. How many years were you in that business?
A. Thirty. In it yet. Longer than that. I am in it yet, some. Not so much.
Q. What is your opinion as to the quantity of oysters that ought to be planted per acre for proper raising?

Mr. Bourgeois: I object. If he is going to be used as an expert I should like to ask him some questions.

The Court: You may ask him.

By Mr. Bourgeois:

Q. Where did you plant for over thirty years?
A. In the Delaware Bay. Maurice River Cove. Great Egg Harbor Bay, or Lake's Bay, rather. I have oysters in Great Egg Harbor River.
Q. I didn't ask you about that. Planting. Now, Mr. Risley, you planted more oysters in some localities than in others, didn't you?
A. According to the bottom.
Q. And according to the flow of the tide also?
A. Yes, but according to what kind of bottom it is, mostly.
Q. Where did you do your thirty years of planting?
A. Maurice River Cove, Delaware Bay.
Q. All of it.

A. No.

Q. How much did you do in ——

A. I plant oysters now. I have got some in Absecon Bay, Lake's Bay.

Q. But you have never done any planting in Great Egg Harbor Bay?

A. No.

Q. And this land where these oyster beds in dispute are is in Great Egg Harbor Bay, isn't it, a branch of it?

A. Yes.

By the Court:

Q. Having a knowledge of the bottom in Great Egg Harbor Bay at this particular locality, and the tidal conditions, water conditions, and so forth, are you able to judge as to how many oysters should be planted per acre on those pieces of ground?

A. Yes.

Mr. Bourgeois: I object, he not having had any experience at all in this locality, he is not competent as an expert.

The Court: I will overrule the objection.

(Exception noted for plaintiffs.)

By Mr. Hanstein:

Q. What, in your opinion, Captain Risley, would be the proper quantity of oysters to plant per acre in Great Egg Harbor Bay for proper and successful raising?

A. Well, that would be according to what kind of bottom you plant on.

Q. I am talking about the kind of bottom there is there.

A. I should plant about three hundred bushel. That is, that would be according to the size of the oysters, too. Small oysters. Any size small oysters up to that (indicating) I should plant about three hundred bushels to the acre.

Q. What is your experience as to the average yield of oysters from the bushel planted?

A. Why, my experience has been about bushel for bushel.

Q. What is it in your opinion that affects the living of oysters in Great Egg Harbor Bay?

A. Oh, well, that is something else. Might be lots of things.

Q. What?

A. That could depend a whole lot on the elements.

Q. Well, what do the elements have to do with it?

A. Well, a hard winter will kill oysters a lot.

Q. What else kills them?

A. Well, borers will kill oysters, and drumfish will kill oysters.

The Court: I don't believe there is any dispute but what drumfish will kill oysters, borers will kill oysters and winters will kill oysters. It seems to me the question is whether or not there were borers and drumfish and hard winters up there during this particular time. I don't think anyone contradicts that the other things will kill oysters. That is so, isn't it, Mr. Bourgeois?

Mr. Bourgeois: Yes. It is only a question if they go to these grounds.

Q. Have you done clamming?
A. Some.
Q. At what depth have you found clams?
A. I am not qualified as an expert clammer.
Q. You haven't done enough of that?
A. No.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Risley, was Mr. Elton Risley in the boat with you folks when you went up the bay?
A. The last time.
Q. And he is the Hill Dredging Company's man, isn't he?
A. Yes.
Q. What relation is he to you?
A. He is a cousin.
Q. You say you made fifty grabs during that two hours, if you were up there two hours?
A. Yes. I made more than fifty grabs myself.
Q. How many would you say you made?
A. I wouldn't say how many, but I will positively say I made more than fifty.
Q. You made more than fifty?
A. Yes, sir.
Q. That is when you went up?
A. Yes.
Q. The other time, when Mr. Lashley was along, how many grabs did he make?
A. Well, he made—I couldn't say that, but I know he made several grabs, because he caught thirty or forty clams or more, and you wouldn't catch them if they weren't there.

Q. I understood you to say in your direct examination that he made fifty grabs?

A. Yes, sir.

Q. And he got thirty or forty clams?

A. We got more than that.

Q. How many did you get?

A. I guess we got fifty or more.

Q. Fifty or more clams during the two hours you were up there; is that right?

A. Yes; we wasn't there two hours.

Q. How long were you there?

A. About an hour and three-quarters.

Q. Well, that isn't so much difference. When you were up there and made the fifty grabs, how many clams did you get?

A. That is the time I mean. I didn't say about the other, because I don't know how long we was there that time, the last time.

Q. Fifty clams in two hours would be twenty-five an hour?

A. We wasn't working steadily. We were just running from one place to another and making grabs.

Q. That is what you got, twenty-five an hour?

A. I could have made all those grabs, as far as that is concerned, in a little while.

Q. How large were those clams?

A. All sizes, from little-necks up to large clams.

Q. When it comes to oysters, they are different from clams?

A. Yes, sir.

Q. An oyster will increase in size and quantity, will it not?

A. Yes, sir.

Q. A little fat grows on the side of the oyster, and you have another oyster growing out of the side of the shell or from the shell?

A. Yes. Where they are propagating, yes.

Q. You do that down in Maurice River Cove?

A. Very seldom after they are planted.

Q. They do sometimes, don't they?

A. Occasionally. A good ways apart.

Q. That is what you do when you cull them, isn't it? You take the oysters up, a cluster of them, and you break the large ones off, and the small ones go back overboard again?

A. Yes.

Q. Those that go overboard are a sort of new growth. Doesn't that constitute an increase in quantity?

A. No.

Q. Why not?

A. They might be on them when they were planted; more than likely were.

Q. They go back again. They have increased in size?

A. Oh, yes, if they live.

Q. And all that go back again, they increase and become primes?

A. If they live.

Q. It is your notion that you only get a bushel for bushel?

A. When you consider the elements, the best I ever did was three bushel for one, and that was remarkable.

Q. I see. Then you have gotten as much as three bushels for one?

A. Yes, once.

Q. And these witnesses have testified two bushels for one.

A. Yes, that is pretty good.

Q. They were rather conservative, weren't they?

A. What?

Q. They were rather conservative, weren't they?

A. Conservative? I think it was pretty liberal. It would be for me. If they live maybe that is easy.

Q. How many oysters did you catch while you were up there hunting for clams?

A. Didn't catch an oyster.

Q. Not one?

A. Never saw one.

Q. Did your tongs bring up any oyster shells?

A. Brought up some old shells, yes.

Q. Where they had been oysters, but they had died?

A. Yes. They had been dead for years, that we caught.

Q. I beg your pardon?

A. What we caught had been dead for years.

Q. How deep down did you go? How long were the prongs on the tongs?

A. Went down below the top.

Q. You went up there to find out what that bottom was like?

A. Yes.

Q. Did you take any pole or any probe to go down through this mud to find the old bottom?

A. What I used was tongs.

Q. You didn't do that?

A. No.

By Mr. Hanstein:

Q. Could you tell whether that was old bottom that you were digging up?

A. Old bottom? It was natural bottom, yes.

RUDOLPH CHANCE, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live?
A. Pleasantville.
Q. How long have you lived there?
A. I don't just know. Five years.
Q. What is your business?
A. Clamming at the present time.
Q. How long have you been clamming?
A. Ever since I left the Hill Dredging Company.
Q. How long ago was that?
A. When we finished the bridge down there, in October I left them, and I haven't been with them since.
Q. You are not employed by them now?
A. No.
Q. Were you working on this particular job out here?
A. I was.
Q. Have you done any clamming around these waters since then?
A. No, sir.
Q. Did you do any clamming before?
A. Not up there.
Q. Where have you done your clamming?
A. All on the south side of the bridge, the main channel and the Drag Channel.
Q. You just worked on the south side of the bridge?
A. Yes.

Q. Do you know anything about the change in the bottom or whether or not it has changed up there?

Mr. Bourgeois: I object. How can he if he never worked up there?

Mr. Hanstein: I don't think he can.

(No cross-examination.)

(Recess taken until 1:30 P. M.)

AFTERNOON SESSION—1:30 P. M.

WALTER JOHNSON, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Johnson, where do you live?
A. Somers Point.
Q. How long have you lived there?
A. About twenty-three years.
Q. What is your business?
A. Bay man.
Q. What kind of work do you do in the bay?
A. Clamming.
Q. How long have you done that work?
A. About twenty years.
Q. Have you ever done any clamming in Great Egg Harbor Bay?
A. Yes, sir.
Q. How long have you clammed there?

A. About fifteen years.

Q. Are you familiar with the grounds that are covered by the plaintiff's leases?

A. Yes, sir.

Q. Have you ever clammed around there before the time when the bridge was built?

A. Yes, sir.

Q. Do you know the character of the bottom there?

A. Yes, sir.

Q. What was the character of the bottom?

A. Mud, sand, eel-grass, putty mud.

Q. What is that?

A. Mud, sand, putty mud, eel-grass.

Q. Have you clammed around these oyster leases since the bridge was built?

A. Yes, sir.

Q. What is the character of the bottom now?

A. About the same.

Q. Have you seen any sand pumped over the parts where mud was before, except right down by the bridge?

A. Haven't noticed any.

Q. How often do you work out there?

A. Whenever it is fit. Whenever there is a day fit to work.

Q. Have you noticed whether the clams up in the neighborhood of these oyster leases have been killed since the pumping?

A. Not to the best of my knowledge.

Q. Have you been able to find them around there?

A. I haven't looked for them, not on these lots.

Q. Around the lots?

A. Yes.

Q. You have found them?

A. Yes.

Q. Are they all right?

A. All alive.

Q. Have you seen any of these plaintiffs working out there since the pumping?

A. I have.

Q. Whom have you seen?

A. Mr. Thomas.

Q. Jesse Thomas?

A. Yes, sir.

Q. When did you see him out there?

A. Last summer.

Q. What was he doing?

A. Apparently wading clams.

Q. Did you see him get any clams?

A. I saw him clamming. I didn't exactly see him—wasn't close enough to him to see exactly what he caught, but I supposed that is what he was doing.

Q. Do you know how long he was wading around in the water?

A. Well, he worked a full tide, and as a rule a full tide is from three to four hours.

Q. Did you see him working out there that long?

A. Yes, sir.

Q. On his bed?

A. I couldn't say whether it was on his beds or not, but he was out in this area.

Q. He was right in that area?

A. Yes, sir.

Q. Have you dug clams up that were buried in the bottom?

A. Yes, sir.

Q. How deep have you dug clams that have been buried?

A. About four inches. That is about as deep as I ever found one.

Q. You have found them four inches deep?

A. I have, yes, sir.

Q. Living?

A. Yes, sir.

Q. Completely covered over and living?

A. Completely covered over.

Q. Have you ever seen any drumfish up in this part of the bay?

A. I have. Up in this area, up in these stakes, as we call them, yes, sir.

Q. When?

A. Last summer.

Q. Saw drumfish there last summer? Had you seen them before last summer?

A. The summer previous to that.

Q. Had you seen them previous to that?

A. Several times. I don't remember just exactly when, but I saw them occasionally pretty near every summer because I as a rule go out there to fish.

Q. Do you fish around these oyster beds?

A. Yes, sir, have for years.

Q. Did you ever find any snail borers up that way?

A. No, sir, I never found no borers.

Q. They relate to oysters mostly, don't they?

A. Yes, sir.

Q. Did you ever find any starfish?

A. Yes, sir.

Q. When?

A. Last summer; summer previous to that.

Q. Have you found them summers earlier than that?

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

Q. Did you see the effects of any damage done

last summer or the summer before by the drum-fish?

A. No, sir, I didn't notice any.

Q. Did you see any effect of any damage done by the starfish last summer or the summer before?

A. No, sir.

Q. Have you ever seen the effects of any drum-fish, of damage they have done up there?

A. No, sir, I never saw the effects on clams, but I have saw them kill mussels.

Q. Do they fish for mussels there?

A. No, sir, that is just a side line. Once in awhile we go after a bushel.

Q. You have confined your clam fishing to the parts that are outside of the leased grounds, haven't you?

A. Yes, sir.

Q. And not to the leased grounds?

A. No, sir.

Q. You say that the clams are alive up there now. That means the clams in Drag Channel and along the edge of it?

A. To the best of my knowledge. All that I caught were alive.

Q. And they were over in Drag Channel or along the edge of it?

A. Along the edges of it, yes, sir, around this area.

Q. The current of a channel keeps the edges of it scoured so that the sands don't gather there, doesn't it?

A. I suppose so, yes, sir.

Q. Have you found any clams out in Creek Channel?

A. Yes, some few.

Q. You have clammed out there, have you?

A. Yes, sir.

THOMAS B. SPRINGER, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Springer?
A. Somers Point.
Q. How long have you lived there?
A. Nine years.
Q. What is your business?
A. Bay man.
Q. What work do you do in the bay?
A. Tong clams, rake clams, and wade them.
Q. Are you familiar with the area covered by the leases of these plaintiffs?
A. Not very well.
Q. Where have you tonged clams?
A. Out in the main bay.
Q. Have you worked up in the neighborhood of these lots?
A. I have worked on Goose Bar on the east end of them stakes.
Q. Will you point out on the map where that is?
A. No, I can't point it out to you, but it is on the east end there, on Goose Bar.
Q. Doesn't it show on this map?
A. It does, but I couldn't show it to you on the map.
Q. You couldn't locate it?
A. No.
Q. When did you work there?
A. I worked there a couple of days when they were building the bridge.

Q. Were they pumping at the time you worked there?

A. Not on this side, they wasn't. The mud digger was over the other side.

Q. Over towards ——

A. The Beesley's Point side.

Q. Had they been pumping on this side?

A. They had been working there, yes.

Q. And they had pumped and gone over to the other side? You clammed there after they had pumped in that neighborhood; is that right?

A. A year after that I was there once.

Q. Did you find any clams?

A. A few.

Q. Can you point out where it was you were clamming?

A. It was about two hundred yards from the bridge east, on Goose Bar.

Q. Two hundred yards east of the bridge?

A. Yes.

Q. Do you know anything about the bottom in the neighborhood of these lots, around these leases, before the pumping?

A. Yes. It was sand and mud.

Q. Have you worked around those leases since the pumping?

A. No, sir.

Q. Haven't worked around there?

A. No, sir.

Q. Where do you do most of your clamming?

A. Out in the main bay.

Q. That is nearer the ocean; is that it?

A. Over towards Beesley's Point.

Q. Further away from this?

A. Yes.

Q. How deep have you found clams?

A. About the length of a four-inch tooth on a rake.

Q. You have found them buried in that deep, have you?

A. Yes.

Q. Living?

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

Q. I understood you to say that you had worked always in the main bay except two days that you worked on Goose Bar?

A. Yes.

Q. And that you had never worked up on the leased grounds at all?

A. No, I never worked on the leased grounds.

Q. Then, of course, you couldn't tell what the bottom was on those leased grounds, could you?

A. No, sir.

Q. You know nothing about that?

A. No, sir.

TONY LONG, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Long?

A. Pleasantville.

Q. What is your business?
A. I was clamming. I have been working for the Electric Light for about a year now.
Q. Prior to working for the Electric Light Company did you work out in the bay?
A. Once in awhile.
Q. Not very often?
A. No.
Q. Did you work out in the neighborhood of these leased grounds before the bridge was built?
A. Long before, yes.
Q. Did you work afterwards?
A. No, sir.
Q. You didn't work afterwards?
A. No, sir.
Q. How long were you a clammer?
A. How long has it been since I have been down there?
Q. No. How many years were you clamming?
A. About nineteen years.
Q. You clammed for nineteen years for a living?
A. Yes, sir.
Q. You haven't done any clamming since this bridge was built in this neighborhood, have you?
A. Not down there. I have in Pleasantville.
Q. No. I want to know down around here. You haven't done any around here?
A. I go out once in awhile here.

The Court: He means around the Beesley's Point bridge.

A. Oh, no.
Q. Not around the leases?
A. No, not around there.

(No cross-examination.)

DAVID REED, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Reed?
A. Somers Point.
Q. How long have you lived there?
A. Fourteen years.
Q. What is your business?
A. Clamming.
Q. How long have you been a clammer?
A. Since I have been to the Point. Fourteen years.
Q. Did you ever do any clamming out on Great Egg Harbor Bay?
A. Yes, sir.
Q. You are familiar with this neighborhood shown on that map as being leased grounds?
A. Yes, sir. That is, I know where the stakes are. As to the owners, I don't know.
Q. Have you ever clammed around there?
A. I have.
Q. Have you clammed around there before the bridge was built?
A. Yes, sir.
Q. Clammed around there since?
A. No, sir.
Q. Have you clammed around Drag Channel since?
A. No, sir.
Q. Where have you done your clamming since the bridge was built?
A. Out in the main bay.

Q. How deep have you dug clams?
A. I have found them as far as three and four inches.
Q. Were they living?
A. Yes, sir.
Q. Covered over you found them living at that depth?
A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

Q. You never clammed for them with a spade, then?
A. With a spade?
Q. Yes. You never tried to get clams with a spade?
A. Not hard clams, no, sir.
Q. You say you have been clamming for nineteen years?
A. No, fourteen years.
Q. That is right. But you haven't clammed around the neighborhood of these leased grounds since the bridge was built?
A. No, sir.
Q. How many years prior to the time when the bridge was built did you clam around there?
A. The summer of 1927 was the last I worked above the bridge.
Q. Why is it that you haven't worked around there since?
A. Because I have been tonging since that time. Then I was raking and wading.
Q. Where have you been tonging?
A. Out in the main bay.

Q. The fact that the clams aren't there didn't have anything to do with it?

A. No.

Q. Did the fact that the clams aren't on the grounds or around the grounds at the present time have anything to do with your not clamming around there?

A. No, sir.

JOHN SIMPKINS, sworn:

Direct examination.

By Mr. Hanstein:

Q. Where do you live?

A. Somers Point.

Q. How long have you lived there?

A. Fifteen years.

Q. What is your business?

A. Clamming.

Q. How long have you been a clammer?

A. About thirteen years.

Q. Have you ever clammed out on Great Egg Harbor Bay?

A. Yes.

Q. Have you ever clammed anywhere near these oyster leases?

A. Yes, sir.

Q. How near to them have you clammed?

A. I have been on them and off of them.

Q. What is that?

A. I have been in the stakes and off of them.

Q. Did you do that before the bridge was built?

A. Yes, sir.
Q. Did you do it since the bridge was built?
A. Yes, sir.
Q. What kind of a bottom was there before the bridge was built?
A. Shells, hard mud, a little sand.
Q. What kind of bottom was there after the bridge was built?
A. The same kind.
Q. Any change in the bottom?
A. I didn't see none.
Q. Do you still find clams around there?
A. Yes, sir.
Q. Are they still alive?
A. Yes, sir.
Q. How deep have you dug clams?
A. Three to four inches.
Q. They live all right at that depth?
A. Yes, sir.
Q. How do you catch your clams out there?
A. Wading.
Q. You wade for them?
A. Yes, sir.
Q. Have you ever waded on any of this ground?
A. Once.
Q. Since the bridge was built?
A. Yes.
Q. Where was it that you were wading, do you know?
A. On Mr. Lloyd's.
Q. Who?
A. Mr. Lloyd.
Q. Mr. Lloyd's ground?
A. Yes.
Q. That was near the bridge?
A. Yes, right under the bridge.
Q. With whom were you?

A. Lew Somers, Joe Steelman and two fellows I didn't know.

Q. Did you find any live clams?

A. Oh, yes.

Q. You were under the bridge?

A. Not exactly under the bridge.

Q. Near the bridge?

A. Right at the bridge, you might say.

Q. Have you seen any of these plaintiffs working out there since the bridge was built?

A. Oh, yes.

Q. Whom have you seen?

A. Jesse Thomas, for one, and John Henry Smith for another.

Q. Did you see John Henry Smith working out there?

A. Yes, sir.

Q. Did you see him catching any clams?

A. I did.

Q. Did you see him put them in his boat?

A. Yes, sir.

Q. Did you see him take them away with him?

A. Yes.

Q. That was since the bridge was built?

A. Since the bridge.

Q. You said you also saw Jesse Thomas, didn't you?

A. Yes.

Q. Did you see him catch clams?

A. Yes.

Q. Put them in his boat?

A. Seen him wade them.

Q. Did you see him put any in his boat?

A. Yes.

Q. And go away with them?

A. Yes, sir.

Q. When was it, do you know?

A. Last summer.
Q. When did you see John Henry Smith?
A. I won't say whether it was last summer or summer before last.
Q. But since the bridge?
A. Yes.

Cross-examination.

By Mr. Bourgeois:

Q. How many times have you been on these grounds?
A. I have been on Mr. Lloyd's once.
Q. When was that?
A. The season after the bridge was built.
Q. You were on there with Lew Somers ——
A. Yes, sir.
Q. —Steelman and somebody else?
A. Two fellows I didn't know.
Q. What was the occasion of your being on there?
A. What?
Q. What was the occasion? Why did you go on there?
A. I just went across it from one side to the other.
Q. You don't mean that you were clamming there?
A. Well, I picked them up as I went across it, yes. Whenever I found one I picked it up.
Q. By whose permission were you on this leased ground?
A. I knowed where his ground was.
Q. In other words, you hadn't any right to be there at all?
A. Well, I didn't know whether they was going to throw it out or not, because they got done a-pumping and Mr. Somers and I came down on the flat and he

said, "We might as well walk right across," so he and I walked across and the other fellows was there raking.

Q. On your way across you picked up what you could?

A. Sure.

Q. And he did, too?

A. Yes.

Q. And who else did?

A. I seen the rest of them raking.

Q. Whose ground were they on?

A. On the same piece.

Q. Sort of a general raid on it, was it?

A. No. They was there working when we went there.

Q. How many did you get on your way across?

A. I didn't count them.

Q. Can't you give me some notion?

A. No, I couldn't tell you.

Q. Was it as much as a peck?

A. We don't measure them.

Q. You know what a peck is.

A. I say we don't measure them by the peck or half bushel.

Q. Was it as much as fifty?

A. I might have got twenty-five off of there.

Q. And your partner might have got twenty-five?

A. I don't know how many he got. I didn't take a look at them.

Q. Or didn't you have any partner in that escapade?

A. We wasn't in partners, no.

Q. Each was responsible for his own efforts?

A. Yes.

Q. And you got maybe twenty-five?

A. I might.

Q. And maybe he didn't?

A. I don't know what he got.
Q. And that was the year 1928?
A. Yes.
Q. Where did you get them? What part of the ground did you get them from?
A. On the lower end on the eastward side. That is towards Ocean City, on the southeast side.
Q. How far was that from the channel?
A. What channel do you mean?
Q. Is there a channel there? Is there what they call Ship Channel or Creek Channel and Drag Channel? How far was it from those channels?
A. Drag Channel is away up toward Beesley's Point from that.
Q. Could you point out on the map to these jurors where this was that you gathered these clams? This is Mr. Lloyd's tract there.
A. Is this Mr. Lloyd's here?
Q. Yes.
A. On this end of it. This is the southeast end?
Q. That I would call the south end.
A. Well, the south end.
Q. That is where you were, was it?
A. Yes.
Q. And you were on his land, were you?
A. He had one corner staked and about half a dozen or maybe more in, and on the other side was one stake, on this side here.
Q. And you went where?
A. Across to the east side.
Q. Point out on the map. Started over here and came across where?
A. Up to Goose Bar.
Q. Where is Goose Bar?
A. One is on the west side and the other is on the east side.
Q. East side of what?

A. The channel. There is a bar on each side of the channel. A flat on each side of the channel.

Q. Which channel?

A. Creek Channel.

Q. Were you there in a boat?

A. I surely was. I couldn't float.

Q. Where had you come from?

A. From there?

Q. Yes.

A. We came off of the Horse Block.

Q. Where was that?

A. That is on the westerly side.

Q. Had you gathered clams?

A. Did I have any clams?

Q. Had you been out clamming?

A. Yes, that is what we were doing.

Q. This was in the line of your regular business?

A. That is my business, yes.

Q. And it is also in line of your regular business taking them up off of some one else's land?

A. I didn't know whether he had given it up or whether he hadn't, because they had been pumping in there and he wasn't there to work or nothing, and there was just a bunch of stakes there left, and one on the other side.

Q. After they pumped in there you thought maybe he had given it up?

A. Yes.

Q. What made you think he had given it up?

A. Just because he didn't work there, was all.

Q. Wasn't it because you knew that the pumping in had covered the ground over?

A. I couldn't say that. I don't know whether they covered it over. I walked across and all I found was shells and a little hard mud.

Q. And you don't think that because of the pumping in maybe he had given it up?
A. No, I didn't think about that.

Mr. Hanstein: I don't see how that is cross-examination.

The Court: I don't see what his thought has to do with it. However, it is in.

Q. You also saw Jesse Thomas Clamming?
A. Yes.
Q. How near to him were you? How near to Jesse were you when you saw him?
A. Oh, I should say three hundred, four hundred yards.
Q. That is twelve hundred feet. Where were you?
A. I was up on Job's Point, what they call Job's Point.
Q. That is on the land on the Atlantic County side of the Great Egg Harbor River, isn't it?
A. Up that way, northwest.
Q. Northwest of what? Northwest of the clam ground?
A. Yes, northwest of the stakes.
Q. And you were on the high ground?
A. No, I was in the bay.
Q. What were you doing there?
A. Wading clams.
Q. And you looked over the 1200 feet and you saw Jesse and saw he was wading clams?
A. Yes.
Q. You had, I suppose, no difficulty in telling who it was twelve hundred feet away?
A. Oh, no. I knew the man. I saw him when he

came there in his boat and undressed, the same as the rest does, and got overboard.

Q. I suppose you could see whether he got clams or oysters, couldn't you?

A. Sure.

Q. Which did he get?

A. Clams.

Q. Didn't get any oysters?

A. I didn't see any.

Q. You think you could tell the difference between a clam and oyster twelve hundred feet away?

A. Maybe I might if I had a glass.

Q. Didn't you have a glass with you?

A. I say if I had one, but I didn't have any.

Q. Then you couldn't tell, could you?

A. No.

Q. Then why do you say you saw the clams? Maybe he was getting oysters.

A. Because I went by him and the clams was on the stern of his boat.

Q. How many were there there?

A. On his boat?

Q. Yes.

A. I didn't count them.

Q. You could give me an idea?

A. No, I couldn't. If it was my boat, I could.

Q. Were there as many as a dozen?

A. I suppose he had maybe three or four hundred, maybe more. He might have had five hundred. I don't know.

Q. You saw them on the bow of his boat?

A. On the stern of his boat.

Q. Four or five hundred?

A. I should judge that many.

Q. Where were you going when you went past?

A. I was going home.

Q. Where was your home?

A. Somers Point.

Q. And you were coming down from Job's Point across this oyster ground, Somers Point?

A. Yes.

Q. In going across did you get out and wade again?

A. We went to Drag Channel to the bridge.

Q. You didn't wade across these oysters grounds on your way home?

A. No.

Q. This first time when you waded across Lloyd's ground, what did you do, drag your boat with you?

A. Don't we always do it when we are wading? How do we put the clams in the boat if we don't take the boat along with us?

Q. You get out purposely to gather the clams?

A. Yes.

Q. And that is what you did on Lloyd's ground?

A. Yes. We was on the Block, they call it, or Shoe, and Lew and I waded across to the Goose Bar.

Q. When was that?

A. The year after the bridge went there.

Q. Then you say you saw John Henry Smith either last summer or summer before clamming up on his ground?

A. He was tonging on his ground.

Q. What time of the summer was that?

A. I couldn't say what time of the summer it was. It was either in July or August. That might have been the first of June.

Q. Then it was either July or August of 1929 or ——

A. The last of July or the first—last of August or the first of July, I think.

Q. In other words, it was in July or August of 1928 or 1929 and you don't know which?

A. No, I won't say positively about that.

Q. You can't remember the month and you can't remember the year, but you do remember he was there?

A. He was there.

Q. How near to him were you? How near to John Henry were you?

A. I went by him in the boat.

Q. How close were you?

A. I suppose fifty or seventy-five yards, might have been a hundred.

Q. How many clams did you see in his boat?

A. I didn't look in his boat, for I couldn't see.

Q. What did you see him do?

A. I saw him make a grab, and he throwed, I think, two clams in the boat and dumped the rest of the shells overboard.

Q. That was a pretty good haul, wasn't it, to get two clams in one drag? Isn't that a pretty good haul?

A. You wouldn't catch many in a day if you didn't average over two.

J. M. Hilton, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Hilton, you live in Somers Point, don't you?

A. No, sir; Pleasantville.

Q. You are a bay man?

A. Used to be. I haven't bayed any for the last four or five years.

Q. What is your business?
A. Walking the streets at present.
Q. You are retired?
A. Well, no.
Q. Do you engage in the business of planting oysters?
A. That was my business when I done any.
Q. Where did you plant oysters?
A. In what we call Lake's Bay right over here at Pleasantville.
Q. Did you ever plant any oysters out in Great Egg Harbor Bay?
A. No, sir.
Q. Are you familiar with the conditions of tide and water and bottom in Great Egg Harbor Bay?
A. Supposed to be. That is, in certain places, you know. The ground that they are talking about, I have only sailed over it.
Q. You haven't done any clamming in a good many years? Is that right?
A. No, sir.

(No cross-examination.)

JAMES H. STEVENS, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Stevens?
A. Somers Point.
Q. How long have you lived there?
A. Since 1912, which is eighteen years.

Q. What is your business?

A. I am a clammer.

Q. How long have you been a clammer?

A. Ever since I was old enough to use a pair of tongs, at the age of twelve.

Q. Did you ever do any clamming out in Great Egg Harbor Bay?

A. Yes, sir, every day, very near, that is fit to work.

Q. How many years have you clammed there?

A. Ever since I was twelve years of age. I am now fifty-one.

Q. You have done all your work in the Great Egg Harbor Bay?

A. Not altogether. I worked in the Delaware Bay quite considerable.

Q. Are you familiar with the ground covered by these leases?

A. I should be. I have been running in and out there ever since I was seven years old, with my father. I learned under my father.

Q. Are you familiar with the character of the bottom before the bridge was built?

A. Well, I should think I ought to be. Before it was ever leased I used to wade over the bottom quite considerable.

Q. You knew what the character of it was then?

A. I did, yes, sir.

Q. What was the character of that bottom before the bridge was built?

A. There were parts of the bottom had hard fiddler mud with shells where oysters had been planted years ago by the old Steelman family, which is Captain Charles Steelman, his father and brothers ——

Mr. Bourgeois: That is objected to.

Q. There was some hard mud at the bottom? What other kind of bottom did you find?

A. On the point of the bar between the Drag Channel and the Creek Channel there is a long spit of sand that goes out way up pretty near to the mouth of the creek.

Q. That was sand?

A. Yes, sir.

Q. What else was there in this bottom?

A. Well, just follow that up about where the bridge is at at the present time and where the fill is, it did have quite considerable eel-grass, and sometimes very, very thick.

Q. What was the character of the bottom out here where the leases are? By the way, are you familiar with this map?

A. I know the bottom. I don't really have to look at the map. I wouldn't understand the map so well, but I can tell you any part you want to know about Creek Channel, all right.

Q. What kind of bottom was there in Creek Channel?

A. Why, Creek Channel, there were places where it was shells and mud; there were places where it was just plain fiddler mud, and there were other places where it was sand, and other places where it was clear sleek, black mud.

Q. Have you been over this ground since the bridge was built?

A. I wasn't over the ground any nearer than as near as I could tell Mr. Lloyd's line. I was very close to that about three weeks ago.

Q. I am trying to find out if you can tell us what the character of the bottom is under this leased ground since the bridge was built.

A. Well, I couldn't tell you just exactly under the bridge what it is.

Q. I don't mean under the bridge. That is, I don't mean particularly under the bridge, but I mean on these leased grounds, what is the bottom like now in comparison with what it was like before the bridge was built?

A. I haven't tried that.

Mr. Bourgeois: I object. I don't think he has any right to draw a comparison. He says he hasn't tried it, so I suppose it makes no difference.

Q. You started to say you had been over some parts of this ground?

A. I was next to Mr. Lloyd's ground, I believe they call it Mr. Lloyd's ground, at the lower end just below the bridge, and I worked there for a while. It has been about three weeks ago, and I found occasionally, now and then, a clam, and there was lots of places where I found eel-grass had died and turned black and was full of mud. Sometimes you would make a grab with your tongs and you couldn't hardly raise it off the bottom, and then other places would be clear.

Q. What I am trying to find out is have you found that there was more sand over this leased area now than there was before?

Mr. Bourgeois: I object. He says he has not been over it.

(Question withdrawn).

Q. Do you recall having been out in a boat with some men lately to test the ground there?

A. No, I wasn't with anybody to test the ground. No.

Q. Have you worked around this leased ground since the fill?

A. On the Drag Channel side I worked.

Q. Point out on the map where you worked.

A. I worked right just this side of the bridge, all the way up and down there before the diggers started to dig, and while it was digging I worked close enough that I could throw a clam aboard the digger, and two weeks ago I was up there on account of bad winds blowed so hard I couldn't work in the bay, so I went up there, being a harbor where I could make a day's work, and my sum that day was $5.87.

Mr. Bourgeois: I object.

The Court: We don't care about that.

Q. You were up in Drag Channel?

A. In Drag Channel, clean up to the bridge where the machine was pumping.

Q. Show us where you worked the other day .

A. I don't know as I could show you, but if you show me where the bridge is and Jimmy's Island, I can show you.

Q. Here is Somers Point and over here is Beesley's Point.

A. Where is Drag Channel?

Q. This piece in here is marked Drag Channel as that goes under the bridge, and here is a sand bar out here, and here is a sand bar, and here is eelgrass, and here is Creek Channel where these leases are.

A. I see it. That is right.

Q. Tell us where you worked.

A. I worked right in here down under this point

down here, all the way to the mouth, all the way to the main channel, up and down there.

Q. Did you work above the bridge?

A. No, just up to the bridge.

Q. You worked up to the bridge?

A. Yes, sir.

Q. Have you in your years of experience with clams observed how deep the clams are at various times?

A. Why, I have experienced—last winter I was digging some soft clams, and while digging the soft clams I had dug up about a dozen large clams that were almost the width of my shovel blade and also half that much again which would approximately make about eighteen inches, in first-class condition.

Q. Where did you dig them up?

A. I dug them just below the railroad bridge in the mouth of the harbor, along the Great Egg Harbor Bay, along the bank, along the side where we were digging soft clams.

Q. You dug them up, up to the sand bar?

A. Yes, sir. I didn't dig with tongs, because I looked at them, I saw them myself, and I looked the distance down and I thought to myself I never saw a clam that far down in the sand.

Q. You can't tell what you thought. So you found some clams that were living when they were eighteen inches deep?

A. Fully eighteen inches.

Q. In your clamming operations out on the water there, how deep have you dug them from the bottom?

A. Well, you know, when they are in the bottom and the water is over them, it is quite a job to tell how far, but you know sometimes they are very deep and you have to go down in the same place several times to get down to them, but how much mud you move you can't see; you can't tell.

Q. You dig them with what kind of tools?

A. I usually use what we call a shinneycock rig which takes sometimes an average from the length of eighteen feet all the way up to forty-five or -seven.

Q. How does that work?

A. That works just the same as a hand rig, only you have to use it this way and you pull it through the bottom and the tide helps you to work it.

Q. It doesn't work like scissors?

A. No, it doesn't work like tongs, but it will cover anywhere from six to eight inches in depth. If you are not careful, it goes down so you can't pull it up.

Q. And you have dug clams up with that?

A. Yes, sir, thousands of them.

Q. Could you tell how deep they were?

A. Well, the only way you could tell would be just by judging, and of course that is what you might say sight unseen. You can't tell. You can judge. You know they are down very deep or you can catch them much easier.

Q. In the winter time how deep have you found clams?

A. Well, I have found clams on the flat in places where I could reach them with about a two and a half or three-inch tooth on a rake, that is, where the blow-out tide would take the water off the flats, and I have found them at two and a half and three inches, and I have also found them fully eighteen inches deep. All depths, according to the bottom.

Q. Did you ever see any of these plaintiffs working out there since the bridge was built?

A. Last year I seen Mr. Smith out there, Mr. John Henry, on his ground—I presume it was his ground. Of course, I don't know one of their grounds from the other, but I seen him out there and I seen him using tongs, but whether he was catching clams and oysters to take away or whether he was trying them

or not I couldn't say, but I know that he was on the ground.

Q. Working?

A. Yes, working with his tongs, but what he was doing with them I couldn't say.

Q. How often did you see him there?

A. I wasn't by there but the one time to notice him there, but I have been down the bay further where I have noticed quite a lot of times a numerous lot of boats throughout that territory that had been stationed there for the time being.

Q. Where? Over these grounds?

A. Over the grounds, yes.

Q. Doing what?

A. What they were doing I couldn't say, for I would be so far away I couldn't exactly tell.

Q. Did you see any of the other plaintiffs out there?

A. Any of the other people? Not as I know.

Q. Did you ever see Jesse Thomas out there?

A. Why, I seen Mr. Thomas pass through there. I have seen him stop out there and I have seen him go off, but I never seen him to stop there any great length of time.

The Court: We will save time if you will answer that question yes or no.

A. Not very long, no.

Q. When clams dig in, what kind of arrangements do they have for getting oxygen?

A. Well, when a clam starts to bury—I worked for Mr. Sharp considerably at the clam house ——

The Court: We don't care about whom you worked for.

Q. Tell us how the clams work, about that little hole they make.

A. A clam buries in the bottom, and of course they are on hinges, and the water is their jet, they jet themselves up and they jet themselves down. They fill with water and wash up, and they go down considerably fast, and as they go down there is a little kind of a purple slick to the inside of the hole what hardens the sand so that the sand doesn't cave in on them and smother them. They make that themselves. Where they go down a distance where they want to be, they form a slick around their shell, and that is smooth and slippery like and they lay there, and every time the air hole at the top of the ground is covered over by mud or sand or anything like that, they open their shell, they take the water in through that breathing hole, and they quick give a push together, which causes a force just like a force pump, and it shoots the top of that hole clear again, and that is the way they get their air.

Q. They keep that clear, do they?

A. Yes, sir, and that is the way they keep it clear. I have watched them lots of times.

Q. I think I got the facts the other day as to the man for whom you worked. Did you work on some of these oyster beds for any of these men?

A. I worked for a gentleman by the name of Elijah Scull two days some years ago when they were first leased.

Q. Did you work for any of these plaintiffs on these oyster beds?

A. Not at the present time, not the people that own here now. Mr. Scull is dead now and his ground has been taken up by some other person.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Stevens, in this place where you dug a clam eighteen inches from underneath the surface, what was the character of the surface?

A. The surface was sand, all sand.

Q. You got that clam by going after him with a spade?

A. Precisely. Wasn't looking for it.

Q. Sort of mining for him?

A. Yes.

Q. Ordinarily you don't take a spade out in a boat when you go clamming, do you?

A. No.

Q. Just take tongs?

A. Yes, sir.

Q. You spoke about the little hole that they leave to get air through ——

A. Yes, sir.

Q. —when they go down, and they keep that open by this jet of water?

A. By the pressure of their own bodies.

Q. That is necessary, I suppose, for the life of the clam, isn't it?

A. No question about that.

Q. He has got to have a hole down there so the water can get to him and the air in that water, and if that for any cause is closed up so he can't open it, he dies?

A. Precisely.

Q. For instance, if you were to put an iron plate over the hole and keep it there, put your foot on it and keep it there, he couldn't live, could he?

A. Not without he made another hole.

Q. If the plate was wide enough so he couldn't make another hole he would die?

A. No question about that.

Q. Instead of having a plate there, if you were to run a layer of concrete over it, he would die?

A. No question about that.

Q. And if you would run a layer of sand over it deep enough so the force of the jet wouldn't go through the sand, then he would die?

A. I couldn't answer that question, for I haven't got that far experience. You probably might think that.

Q. If anything is placed over that hole that is heavy enough and thick enough so he can't force the jet of water through to get the air from above or water from above, he is going to die?

A. If it is completely air tight it is bound to stop the air.

Q. Without regard to what it is, whether it is mud or what it may be?

A. It doesn't make no difference.

MORRIS LASHLEY, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Lashley, where do you live?

A. Somers Point.

Q. How long have you lived there?

A. Twenty-six years.

Q. What is your business?

A. Bay man most of the time.

Q. Have you worked on Great Egg Harbor Bay?

A. Yes, sir.

Q. How often have you worked there?

A. Well, up to a year ago this past spring.

Q. Did you work there before the bridge was built?

A. Yes, sir.

Q. Are you familiar with the area of these oyster leases?

A. Yes, sir.

Q. Did you work around that neighborhood before the bridge was built?

A. Yes, sir.

Q. Have you worked in that neighborhood since the bridge was built?

A. Yes, sir.

Q. What was the character of the bottom before the bridge was built?

A. Well, starting down in the neighborhood of the bridge, it was putty mud, and then you get up to the head of Drag Channel, there was sort of a sand bottom up there, and then on over on the Horseshoe side it was putty mud, and at the head of Creek Channel it was putty mud.

Q. What is the character of the bottom now?

A. Practically the same.

Q. Have you seen any sand there since the bridge was built?

A. Only where it is pumped on the Goose Bar.

Q. Right directly where they pumped it?

A. Yes, sir.

Q. But all around this leased ground, I mean?

A. No, sir.

Q. You haven't seen any sand there?

A. No, sir.

Q. Have you gathered clams before the bridge was built in that neighborhood?

A. Yes, sir.

Q. Have you gathered any in this neighborhood since the bridge was built?

A. Yes, sir.

Q. Were the clams all right?

A. Yes, sir.

Q. Did you go out in a boat with Mr. Risley and Mr. Collisson, Mr. Hackney, Mr. Bell and me and a few others?

A. Yes, sir.

Q. Where did we go that day?

A. Well, we practically covered the entire area. We was on some of the lots—all of the lots, in different places. We took in the whole territory up there.

Q. What kind of boats did we use?

A. Two garvies.

Q. How were they fastened together?

A. Tied together.

Q. End to end?

A. Side by side.

Q. Did anybody have any tongs there?

A. Yes, sir.

Q. Were those tongs used?

A. Yes, sir.

Q. Who used them?

A. I did.

Q. Whereabouts did you use them?

A. Well, all over the entire Creek Channel on the leased grounds.

Q. Over the leased grounds?

A. Over the leased grounds.

Q. What was the character of the bottom that he brought up?

A. Putty mud, shells.

Q. Were any clams brought up?

A. Yes, sir.

Q. Did you observe whether they were alive or dead?

A. Alive.

Q. Do you know whether we covered all of this leased ground?

A. Yes, sir.

Q. Did we?

A. Yes, sir.

Q. When was the last time you were on this ground?

A. Yesterday.

Q. What did you do there yesterday?

A. Well, I sampled the bottom, some of the shells, some of the clams.

Q. Do you have them in court with you?

A. Yes, sir. Setting right back there in a box.

Q. Will you show us some of the clams that you dug up yesterday?

A. Yes, sir. There they are.

Q. Are those clams alive?

A. Yes, sir.

Q. And you got them off the leased ground yesterday?

A. Yes, sir.

Q. Could you tell by looking at these large clams how old they were?

A. No, I don't believe I can.

Q. Well, could you tell whether they are a year old or two years old?

A. At a rough guess I would say they are seven and over.

Q. You would say they are seven years old?

A. Seven years and over.

Q. Did you bring some eel-grass here?

A. Yes, sir. There it is right there.

Q. Is that what they call eel-grass?

A. That is eel-grass.

Q. Where did you get that from?

A. That came right off of the northward side of the leased ground, better known as Creek Channel.

Q. Can you show us on the map the neighborhood from which you got it?

A. Yes. Here is Creek Channel going up through here. This eel-grass came from right in here, right along in here.

Q. Is there any way for you to tell whether those clams that you have there were clams that grew there naturally or whether they were clams that had been planted?

A. Well, them big ones you can truthfully say was natural growth clams right there.

Q. How could you tell that?

A. Well ——

Q. You say they were all alive, these clams?

A. Yes, sir, all except one.

Q. You found one that was dead?

A. I brought you one dead one to show you.

Q. Where is that?

A. There is the gentleman right there.

Q. Tell us about the dead one. Where did you get that?

A. Got that up on Oscar Somers' ground.

Q. Up at the top there?

A. Yes, sir, up in here.

Q. Where was that? Deep down or on the top?

A. Well, that one, I would say, was five inches or so in the bottom.

Q. Could you tell what had killed that?

A. No. Just died a natural death.

Q. That happens to clams, I suppose?

A. Yes, sir.

Q. Did you say you brought a sample of the bottom along?

A. Yes, sir. This is Walter Lloyd's, down next to

the bridge. That is what we call putty mud or fiddler bottom. There it is. That is fiddler bottom, putty mud.

Q. And you found that down near Lloyd's ground?

A. Yes, sir, right next to the bridge. Here is some came from Oscar Somers', practically the same kind of bottom.

Q. Show that to the jury.

A. There is the same stuff off of Oscar Somers'. Here is a piece here that came from off Tallman's ground, right there, the same kind of stuff.

Q. That is what you call fiddler bottom?

A. Putty mud or fiddler bottom.

Q. And that is regular stuff for growing clams and oysters, is it?

A. Yes, sir.

Q. I notice you have got some oyster shells. Where did you get them?

A. Some came off of Lloyd's ground, started at Lloyd's and continued on up and stopped up at Oscar Somers'.

Q. You just picked them up as you went along?

A. Yes, sir.

Q. You found only one dead clam; is that it?

A. One dead clam.

Q. These oyster shells, could you tell how long those oyster shells had been there?

A. No, I can't. They have been there a number of years.

Q. How many years would you say?

A. Well, they haven't been an oyster for the last ten years, I know.

Q. You could tell they haven't been living for ten years?

A. Yes, sir.

Q. Could you by examining those oyster shells tell what killed them?

A. No, you can't. I can't.

Q. There was an oyster shell around here with a borer hole in it. Didn't you have one of them?

A. Yes, sir, there is one in the box.

Q. Get that out, will you? Show it to the jury.

A. We have got live ones back there where borers has been working on them.

Q. Will you get them?

A. There is an oyster where the borers has been working on it, but the shell is too thick for the borer to get through and kill the oyster. You can see where he has been drilling on it.

Q. Those holes show where the borer has been working?

A. Yes, sir.

Q. Do you know where that came from?

A. Yes, sir, it came up Creek Channel, or main Ship Channel, rather. Not Creek Channel.

Q. Not off of this leased ground?

A. No, sir.

Q. You didn't bring it here, did you?

A. No, sir. Mr. Chance brought them oysters.

Q. Will you tell us how deep you have dug clams?

A. Well, I have got clams, some of them would be out a half inch, and some of them half of the clam will be out of the bottom, and I have caught them down as high as twelve inches in the bottom.

Q. You have found clams twelve inches down?

A. Yes, sir.

Q. Were they living?

A. Yes, sir.

Q. Did you see Jesse Thomas out there when you were there yesterday?

A. Yes, sir.

Q. Where did you see him?

A. Right down on Walter Lloyd's ground next to the bridge.

Q. What was he doing?
A. Going to the bay.
Q. In his boat?
A. Yes, sir.
Q. Did you have a conversation with him?
A. Yes, sir.
Q. What did you say to him?
A. He wanted to know what I was doing. I told him.
Q. Did you ask him anything about dead oysters, dead clams?
A. Yes, sir.
Q. What did you say to him?
A. I asked him if he would tell me or show me where they was catching fifteen or twenty dead clams at a grab, that I would bring some of them to the court.
Q. What did he say?
A. He told me he had no right to show me.
Q. That was Jesse Thomas said he had no right to show you where they were?
A. Jesse Thomas himself.
Q. And he never did show you, did he?
A. No, sir, and I never found them.
Q. Have you ever observed any change of stakes out there?
A. Yes, sir.
Q. Tell us about it.

Mr. Bourgeois: What has this got to do with it?

Mr. Hanstein: The point I want to show is that these men planted their stakes at certain points and then would move them around to take in other points, and it all has to do with the question of what land they were in actual possession of.

The Court: I think it is permissible.

(Exception noted for plaintiffs).

(Question repeated).

A. One time we was wading on the bar known as the Horseshoe. That is on, I would say, the southwest side of Creek Channel, and we waded there the same as today and want back tomorrow and the stakes was moved over farther on the Horseshoe where we had waded the day previous.

Q. Is the Horseshoe included in this leased area?

A. No, sir.

Mr. Hanstein: I concede if it does not relate to the leased area it has nothing to do with it. I move this be stricken myself, after we find out about it.

Q. Was it the stakes that had been marking these leased grounds?

A. What was that?

Q. What stakes were moved over on the Horseshoe?

A. I would say on the easterly end of it.

Q. Easterly end of which?

A. The southeast end, over here, right down in here.

Q. Those stakes had been moved over, you say?

A. Yes, sir.

Q. Where you had been clamming the day before?

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

Q. On whose ground had the stakes been moved over?

A. I would say it was Walter Lloyd's, if they run clear across.

Q. Do you know in fact that they were moved ——

A. Positive that they were moved.

Q. —or is it just your impression?

A. Positive that they were moved.

Q. How do you know?

A. We take a range, the same as today we was working here, so we could go back on the same clamming tomorrow, and you go back the next day and take the same ranges and find stakes there, you are pretty sure they are moved.

Q. Then you would feel you had a right to clam inside of where the stakes were?

A. Well, sometimes.

Q. In other words, they could plant their clams, and by imagining they had moved the stakes, you thought you had a right to go on that planted ground and gather clams?

A. No, not if it is properly staked, you have no right on the ground.

Q. How could you take a range with the naked eye so as to attempt to fix with any degree of certainty the location of a stake?

A. Easy.

Q. A stake out there in the water?

A. You can take a range on shore.

Q. Beg pardon?

A. You can take a range on shore. Ask any of these gentlemen who works the bay whether they carry ranges in their head or not.

Q. Then you took your range in your head, did you? You carried it in your head?

A. Yes, sir.

Q. And a surveyor when he comes along has to have a telescope in order to get a range?

A. He is running his ground out with the map.

Q. In other words, you figure from your own judgment about the matter that they had moved the stakes?

A. Positively.

Q. And that is all you know about it? You didn't see anybody move stakes, did you?

A. No, I didn't see them move them.

Q. They have shell corners, don't they, where these stakes go down?

A. Not as I know of.

Q. And you didn't take pains to find out?

A. No. I have been all around them up to the corners and inside of them and around.

Q. You just concluded they had moved the stakes and proceeded to clam on their ground, that is, within the stakes; is that right?

A. What is that?

Q. You just concluded they had moved the stakes and you proceeded to clam within the stakes?

A. Yes, sir.

Q. That prevented you in your judgment from being a trespasser? You would have been a trespasser if they hadn't moved the stakes, wouldn't you?

A. Yes, if they hadn't moved the stakes I would have been a trespasser.

Q. And if you had made a mistake about their moving them, then you were in fact a trespasser, but you didn't feel that you were because you thought they had moved the stakes?

A. Yes, sir.

Q. When did you gather these clams and oysters that you have in this box?

A. I gathered the clams and shells yesterday.

Q. When did you gather the oyster shells?

A. Yesterday.

Q. Take these small clams, how old are they, do you think? That one, for instance?

A. I would say that clam is somewheres in the neighborhood of three years old.

Q. Then it must have been planted about 1927?

A. Yes, sir.

Q. And the others in there are of what age?

A. Well, they are anywhere from seven years on.

Q. How long were you out gathering those clams yesterday?

A. Well, I guess I was somewheres in the neighborhood of two hours going over the ground.

Q. In a boat?

A. Yes, sir.

Q. And you say you met Jesse Thomas under the bridge or near the bridge on Lloyd's ground?

A. Yes, sir.

Q. Did he ask you to do some tonging for him to see what you could get?

A. No, sir, I showed him of my own free will.

Q. How long did you tong under there?

A. Well, I made a grab on the westerly side of the bridge, and I told him, I says, "There is no mud here, these shells are setting right up."

Q. What did you get? Did you get any clams?

A. I am pretty sure I caught a clam.

Q. Then you came on the easterly side of the bridge, and how many grabs did you make there?

A. I made one there and showed him.

Q. How much did you get there?

A. I am not sure whether I caught a clam on that side or not.

Q. Didn't you do more? Didn't you work there for about half an hour trying to get something, and didn't get a clam off of the bottom?

A. Not for Jesse Thomas, I didn't.

Q. Who was it you did that for?

A. Nobody that I know of. He wasn't there a half hour.

Q. You were not there a half hour?

A. Jesse Thomas wasn't there a half hour.

Q. You were?

A. I were there over a half hour.

Q. Did you get any clams after he left?

A. Yes, sir.

Q. In other words, you could find them after he had gone, but couldn't find them while he was there; is that right?

A. Well, I tried them in different places.

Q. Had you found any clams before?

A. Yes, sir.

Q. Did you tell him you had found them before and take him and show him?

A. No, sir, I didn't show him where I caught them. He seen them right in that same box right there.

Q. But didn't know where they came from?

A. I told him where I got them, over on Tallman's ground, and I was working on Walter Lloyd's then.

Q. And you worked there for how long? Two hours or more?

A. Not on Walter Lloyd's.

Q. How much did you work all together?

A. I said I was two hours or over going over the entire tract there.

Q. And going over the entire tract, the result of what you got is in this box; is that right?

A. Yes, sir.

Q. And not all of that, because some of these oysters you speak of came from some other ground?

A. Well, them oysters, another man brought them here. I didn't bring them.

Q. This bottom you speak about, mud bottom, is that the kind of bottom that is in Ship Channel?

A. No, sir.

Q. Creek Channel?

A. Creek Channel.

Q. Creek Channel?

A. Yes.

Q. Mud bottom is in Creek Channel?

A. Yes, sir.

Q. What kind of bottom is in Drag Channel?

A. There is all kind of bottom there. There is putty mud, fiddler bottom, hard sand, shells.

Q. Does this kind of mud bottom change? I mean the particular kind. If you have a piece that is mud bottom now and nothing covers over it, does it continue to remain mud bottom?

A. No, sir, not necessarily.

Q. What does it do?

A. At certain times of the season the bottom will change. It will get hard and it will get soft.

Q. If there is this putty mud in Drag Channel and the Hill Dredging Company dredged out a forty-foot hole there and pumped some of that putty mud over on Lloyd's ground, because admittedly they did pump over there, it would still remain putty mud, wouldn't it?

A. Sometimes.

Q. And you couldn't tell whether that mud that you gathered up is mud that had been there years ago or whether it is mud that came from Drag Channel by being pumped over there, could you?

A. Yes, sir.

Q. How?

A. Well, that putty mud in Drag Channel, that

won't run so far. It comes out in lumps. It will come out of the pipe in lumps, that putty mud.

Q. Will you tell me how you know that?

A. Because I worked on a mud digger long enough to know.

Q. You worked on it there?

A. Yes, sir, I happened to be working on it at the time.

Q. Were you working for the Hill Dredging Company at that time?

A. Yes, sir.

Q. And you remember the kind of mud they pumped up out of Drag Channel?

A. Yes, sir.

Q. What kind was that?

A. Some of it was putty mud and the majority of it sand.

Q. The putty mud I don't suppose they deposited down where you gathered this putty mud but put that some place else?

A. That putty mud ran right down between the fence for the fill and the bridge.

Q. You think it was all confined there?

A. The biggest majority of it. There may have been what we call slush mud leaked out, but no great extent.

Q. There may have been some putty mud pumped down in there before you put the fence down, mightn't there?

A. Some, possibly.

Q. In other words, when you first commenced to pump there, you simply let the water and the mud and the sand all go through that pipe and right into the bay, the bottom of it, didn't you?

Mr. Hanstein: I object to that because that is not within the scope of the direct examination.

The Court: It is within the scope when he testified this putty mud was putty mud that he got on certain portions of the ground. The purpose of the cross-examination is to show that it may not have been from that ground, but came from somewhere else, and to that extent it is cross-examination.

(Question repeated).

A. I don't know. I can't answer that question, simply because I wasn't working there at the time.

Q. When did you go there to begin to work?

A. I went there—I don't know the exact date, but we started to pump right down through the fence. The bulkhead was already up.

Q. It was bulkheaded up?

A. Yes, sir.

Q. How high was the sand then above the high tide?

Mr. Hanstein: I object to that as not being proper cross-examination.

(Objection sustained).

Q. Well, you did pump while you were there, you pumped through that pipe from the steam pump, you pumped sand and mud, didn't you?

A. Yes, sir.

Mr. Hanstein: I object to that. I submit that has nothing to do with the direct examination.

The Court: I will permit it.

(Exception noted for defendants).

Q. And you pumped it in the direction of the place where you found the mud bottom yesterday, didn't you?

A. Yes, sir.

Re-direct examination.

By Mr. Hanstein:

Q. And at the time you saw that pumping being done, there was a bulkhead up; is that correct?

A. Yes, sir, there was a retaining wall.

Q. Could you tell the difference between the natural mud bottom and mud that had been pumped on to a bottom?

A. Yes, sir.

Q. Explain to the jury how the natural mud bottom is?

A. Well, the natural mud bottom is hard.

Q. Is it smooth, also?

A. Not altogether smooth. It is lumpy. Bottom that has been pumped there is practically level and soft.

Q. Soft?

A. Yes, sir.

Q. And what was this mud that you brought to court from the bottom?

A. That was from the natural bottom.

Q. You could tell that?

A. Yes, sir.

Q. Have you seen drumfish working in Great Egg Harbor Bay?

A. Yes, sir.

Q. When?

A. Last summer I seen some, and the summer before.

Q. What did they do, that you know of?

A. Well, they will root up a bar, catch the clams, they will kill oysters, grind them up.

Q. Did you see signs of their work?

A. Clams. Not oysters.

Q. What signs did you see of their working on clams?

A. Why, I seen them on the Hog Hole Bar. I seen them ground up over there by the thousands, little-neck clams.

Q. That was last summer?

A. Summer before and last summer I seen the works of them on the Horseshoe.

Q. That is across from Lloyd's?

A. Across from practically all of it.

Q. What did you see on the Horseshoe?

A. I was over there wading on the Horseshoe and found holes where they had been drilling for the clams.

Q. Did you see them where they had killed any?

A. No, sir, not on the Horseshoe. They wasn't very thick there.

MARK RISLEY, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Risley?

A. Pleasantville.

Q. What is your business?

A. Well, I am a bay man. Clamming most of the time.

Q. Do you ever do any oyster planting?

A. Some.

Q. Have you had your own grounds upon which you planted?

A. Used to have, yes.

Q. Have you done any clamming out in Great Egg Harbor Bay?

A. Not lately. I used to clam around there a good bit.

Q. Are you familiar with the conditions around where these oyster leases are?

A. Well, not just at present. I haven't been around there of late years.

Q. Were you familiar with the conditions there?

A. Why, I used to be pretty well acquainted around there about fifteen year ago and so on back.

Q. Where have you planted oysters?

A. Around Lake's Bay and in Great Bay.

Q. Do you know if the conditions in Lake's Bay are similar to the conditions in Great Egg Harbor Bay?

A. Do I know the conditions?

Q. Do you know if the conditions in Lake's Bay are similar to the conditions in Great Egg Harbor Bay?

A. Why, yes. There is times, you know, that the bottom changes and we lose all of our oysters. I planted oysters here in Lake's Bay, planted a load of oysters and never got one of them. They were covered up with sand and died.

Q. What caused them to cover over with sand?

A. The sand just simply changed. These here thorofares and bays, they keep changing all the time.

Q. And you have planted oysters and didn't get any?

A. Yes, sir.

Q. What do you consider a good yield of oysters?

A. Well, if you will get a bushel for every bushel you plant, it is good. It is better than ever I got.

Q. It is better than you have gotten?

A. Ever got. I never got as many bushels as I planted.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Risley, your oysters were covered by sand?

A. Yes, sir.

Q. And it killed them all?

A. Yes, sir.

Q. And if the oysters of these plaintiffs were covered by sand that had been pumped in there by the Hill Dredging Company, that would have killed them too, wouldn't it, all?

A. If they was covered deep enough.

Q. And you had a load that you planted and never got one, and they say they had hundreds of bushels that they planted together and they never got one, so that is perfectly reasonable, isn't it?

A. Sure, if the sand covered them up.

Re-direct examination.

By Mr. Hanstein:

Q. There wasn't any dredge that pumped sand on your oysters, and they died anyway? Isn't that so?

A. No, there was no dredge. They often do that, you know.

Q. Just the operation of nature?

A. There is lots of things kills oysters. Tape mud, sometimes it comes over your oysters and kills them, what we call a tape mud.

Q. What is that?

A. It is kind of a streaky mud that grows and comes over them oysters and kills them and comes over clams, but it won't kill clams, because they will raise up, and sand won't kill clams. A clam will raise and an oyster won't.

Q. How deep have you found clams?

A. Well, I don't know as I can tell you exactly. I never measured that, to come right down to it, but the ordinary clams are from two to four inches down, but sometimes they are more than that, sometimes not so much.

Re-cross examination.

By Mr. Bourgeois:

Q. If they are more than four inches down they can't be gathered profitably, can they?

A. No.

Q. It takes too long to get them?

A. You can't make any headway.

Q. If they are eighteen inches down, where you have to go after them with a spade, you can't make any money at all?

A. We don't work at them that way.

Q. It doesn't really make any difference where the sand comes from or where the mud comes from, if it covers the oysters over, it kills them?

A. If it comes thick enough to cover them up.

Q. If you cover an oyster a couple of inches it is gone, isn't it?

A. An oyster is a thing that stands up three or

four inches and it takes quite a lot of mud to kill all of those.

Q. If you cover them over enough, for instance, if you were to cover over oysters or clams, either, with a foot or more of sand or mud, they will all die?

A. Clams wouldn't.

Q. Would they go through a foot?

A. Yes, indeed, and more, too.

Q. How much would they go through, do you think?

A. If it is put on with a mud digger, it ain't all put on in a day, it is only just fine sand and mud that runs and settles maybe half an inch a day or something like that, and the clam will raise right up through that.

Q. Mr. Risley, if the sand was put on there by a mud digger and was put on enough so as to cover that little vent hole they have for breathing, then the clam goes, doesn't he? He dies?

A. They will spurt that right out.

Q. If it is thick enough so he can't spurt it out, then he dies?

A. But it wouldn't be.

Q. I am asking you if it were.

A. Well, if it would, yes, but it won't be.

Q. You have had experience in planting oysters and gathering clams?

A. Yes, sir.

Q. What experience have you had with a mud digger?

A. Well, I ain't had any experience, but I have worked where they have pumped, and I have worked on the bottom that they have pumped mud and sand on?

Q. Where?

A. Around—I have done it here this summer right down here in Risley's Channel.

Q. In Risley's Channel?

A. Yes.

Q. What were they pumping there for?

A. They are building a new road across to Margate.

Q. You have clams in there?

A. Yes, sir.

Q. And they didn't kill your clams?

A. No.

Q. What?

A. No.

Q. How close were your clams to where they were filling in?

A. The Thorofare, right close by.

Q. How close?

A. I even clammed under the bridge.

Q. And you have clams there?

A. Yes, sir.

Q. All right, are they?

A. Yes, sir.

Q. The testimony in this case is that they pumped about eight feet of sand on Mr. Lloyd's property there, and he says it killed the clams. Do you think it would or do you think it would benefit them?

A. Well, it generally makes good clamming. Us clammers tries to follow these mud-suckers, and where the mud and water runs in it makes it soft and raises the clams above the hard bottom and shells, and we catch more clams.

Q. It is a benefit to the clams?

A. We get the clams and then they are gone then. I don't know as it is any benefit to us in the end, but it is at the present time.

Q. In other words, if you had a mud-digger, instead of going down on the clam grounds with a

pair of tongs to get them out, you would use a mud-digger and let it float them up; is that the idea?

A. Well, I will tell you what I have seen ——

Q. You can tell me the other, can't you? What is the answer to that, yes or no?

The Court: I dont think you have any right to have that answered. I don't think the question calls for an answer.

CARL RISLEY, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live?

A. At present in Pleasantville.

Q. How long have you lived there?

A. About a year.

Q. Are you employed by the Hill Dredging Company?

A. Yes, sir.

Q. You are some relation to Mr. Elton Risley, aren't you?

A. Yes, sir.

Q. What relation?

A. He is my uncle.

Q. You are familiar with this Somers Point-Beesley's Point bridge operation, aren't you?

A. Yes.

Q. What was your position with the Hill Dredging Company at that time?

A. I was captain of the machine that started the work.

Q. That was one of your dredges, you mean?

A. Yes.

Q. What was the name of your dredge?

A. The Brigantine.

Q. Where did you start to work? Can you show us on the map?

A. Yes.

Q. You might look at that map and be sure you are familiar with it.

A. We started to pump on this flat to the northeast of Drag Channel and pumped into the main land. That is just the foundation for the board fence constructed from here in this way.

Q. This is marked "Bridge" in here. This is Somers Point over here and this line indicates the high water line and this indicates fill. Out there the map says "Bridge."

A. This line down here is the higher water line and this is the flat?

Q. Yes.

A. We started to pump here at the edge of the flat and pumped in to the high water line.

Q. What kind of a dredge did you use for that?

A. Hydraulic dredge.

Q. Is that the type of a dredge usually used for that kind of work?

A. Yes, generally.

Q. Then after you got that piece filled, was it your dredge that started work on the other side of Drag Channel?

A. Then we started on this side of Drag Channel and pumped out this way for, I think, around seven hundred feet, and then the machine was moved to another job and this job was left to be finished by another dredge.

Q. You say you started to pump sand there. Was that done in the usual way?

A. Yes, sir.

Q. Have you worked on bridge building and road building work before?

A. Yes, sir.

Q. For how many years?

A. At that time I had been captain of a dredge for two years and I had been an operator for several years before that, three or four, I don't remember just which.

Q. And you had worked on other similar operations?

A. Yes, sir.

Q. Was this one carried on in the usual way?

Mr. Bourgeois: I object. It is a conclusion. It is not for him to say. It is for the jury.

The Court: I will permit it.

(Exception noted for plaintiffs.)

(Question repeated.)

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Risley, Drag Channel is how deep or was how deep when you first went up there to dredge, below low water?

A. I think around seven or eight feet below low

water. That is, at the bridge. It gets deeper, I think, down towards the ocean.

Q. And was this first fill that you made above or below high water mark at the time that you started to fill?

A. At the time we started to fill, it was below high water mark.

Q. Was it above or below low water mark?

A. It was above low water mark.

Q. How much above low water mark was it?

A. I couldn't say.

Q. Well, was it a foot, two feet, six inches, or what?

A. I would guess around six to eight inches, maybe a foot.

Q. Above the low water mark?

A. Yes, sir.

Q. And the rise of the tide there was about four feet, as I understand?

A. Four feet.

Q. So that that was covered with water when your tide was one-quarter high?

A. Yes.

Q. Where did you place your dredge when you first started to fill?

A. When we first started or when we started to pump sand?

Q. When you started to pump sand or pump whatever you did pump. I don't know what you pumped.

A. When we first started, we tried to pump in here and couldn't pump, and we moved away down on Drag Island down in here, somewhere, down below that, away down here, before we started to pump sand.

Q. How did you carry your pipe up to the place where you were going to discharge it?

A. We had pontoons from down here up there.

Q. Right up Drag Channel until you came to the bridge area now, and then what about it?

A. We put the pontoon line right here. Stopped right here with our pontoon line.

Q. Then how would the sand be discharged? Through the pipe?

A. Yes, sir.

Q. What size pipe did you use?

A. Sixteen-inch.

Q. What size engine did you use? How many horse power?

A. The engine was 450 horse power.

Q. And that engine would discharge that pipe; what proportion filled with water, mud and sand, or whatever the material was?

A. I have no idea.

Q. Would it be seven-eighths full or full?

A. The pipe was full of the material.

Q. It would be filled with material, either water or sand or mud combined?

A. Whatever it was, yes.

Q. Then you pumped that what part of the time of the day? All day?

A. We were running—that is, we were working twenty-four hours.

Q. Night and day continuously?

A. Yes.

Q. Then you put your end on the pipe, as I understand it, didn't you, pointing north, and that would discharge the material from the end of the pipe?

A. Yes.

Q. How high did you build that fill before you changed your pipe?

A. About a foot above high water.

Q. Then when you had gotten it above high water, a foot above high water, what would you do to the end of the pipe?

A. Add pipes to it to carry it on towards the bridge.

Q. Gradually carry it on this way towards the bridge?

A. Yes.

Q. What, if any, precaution did you make about confining the material within any given area?

A. It wasn't necessary to make very much precaution about confining it.

Q. I ask you what, if any, you made?

A. We made none.

Q. None at all? After you had made the fill on the easterly end that we have been speaking about, what then did you do about making the fill over on the westerly end, that seven or eight hundred feet that you spoke of?

A. Shifted our pipe line over to the westerly end and started to pump.

Q. Where did you have your machine at that time?

A. At the same place.

Q. What depth did you pump the sand or material from?

A. Around forty or fifty feet, maybe deeper.

Q. What proportion of that fill that you pumped up was sand and what proportion was mud?

A. It was practically all sand.

Q. Some mud, but mostly sand?

Mr. Hanstein: He did not say some mud.

The Court: He said practically all sand, and Mr. Bourgeois's question is "What else?"

Q. Some mud and some sand?

A. The percentage of mud wasn't large enough to talk about.

Q. And not large enough to clog your pipe?

A. No.

Q. When you started to pump here, I mean pump over the seven—or eight hundred foot strip, what was the elevation of that tract before you started to fill, with relation to the low water mark? Was it above or below low water?

A. I think that was below low water, all except a very small island on the end we started on.

Q. How much below low water was it, if you can tell me?

A. I think about a foot.

Q. Then you reversed the operation, as I understand it. You had the pontoon running up to the bridge line?

A. Yes, sir.

Q. Then you turned the pipe towards the south; is that right?

A. Yes.

Q. What precaution, if any, did you make to withhold the fill as you pumped it on this land, pointing to the south, that was then under low water?

A. May I explain something in regard to that?

Q. If you will answer this first, then you may.

A. We made no precaution.

Q. Now, what was it you wanted to explain?

A. It isn't necessary to make any precaution in regard to keeping the fill from spreading when we pump in water, because as soon as the flow of material strikes the water, the velocity is killed. The velocity of the small stream running into the large body is killed, and the said immediately drops.

Q. What precaution, if any, did you take to overcome the force of the tide where you were pumping?

A. We made none there.

Q. In other words, you pumped into the water

there without making any precaution at all to retain it, simply left the sand to take care of itself?

A. Yes, sir.

Q. To what elevation did you pump the sand on that side?

A. About the same as the first side.

Q. About a foot above? How many cubic yards of sand or sand and mud did the machine that you had pump in twenty-four hours?

A. I couldn't answer that.

Q. Don't you know the capacity of it, how many cubic yards it will pump in a day?

A. No.

Q. Who would know that?

A. I don't know of anyone that would. It would all depend on the material that was being pumped, the distance it was being pumped and several variable factors in there that you couldn't state the capacity definitely.

Q. Can you, having knowledge of it all, give me a reasonable estimate of the number of cubic yards of material that machine would discharge in twenty-four hours in making the 800-foot fill?

A. In that particular place I imagine the machine would discharge around four or five hundred yards per hour.

Q. Four or five hundred cubic yards per hour?

A. It wasn't possible, however, to make twenty-four hours running time a day.

Q. How many hours did you make a day?

A. About half running time.

Q. About twelve?

A. Yes.

Q. There came a time when you did take precaution to retain the sand or material that you were pumping, did there not?

A. Yes.

Q. When was that day?

A. After we had established a foundation or a base for the fill that we intended to put there.

Q. And that was done by sinking short piling along the line that you wanted to maintain and sheath piling in front of it, or putting piling down in front of it?

A. Yes.

Q. And did that withhold or confine the sand that you afterwards pumped within the limits of that bulkhead?

A. Yes, sir.

Q. And if a bulkhead had been similarly established when you began to pump, all the material would have been confined within that limit, wouldn't it?

A. Yes.

Q. Do you know how many cubic yards of sand were pumped in this 800-foot space, that fill?

A. No, sir.

Q. You don't know the width of it nor the elevation of it; is that the idea?

A. No.

Q. How long were you pumping? How many days did it take you to pump in the shorter of these two fills, that is, the one at the northerly side of Drag Channel?

A. I don't remember definitely. I think we were about two weeks.

Q. You work Sundays and all, don't you?

A. No.

Q. Only fourteen days in two weeks?

A. Twelve days in two weeks. Six days a week.

Q. I mean twelve days in two weeks. How long were you in making the fill on the southerly side of Drag Channel?

A. About three weeks more.

Q. How much?
A. About three weeks more, as near as I can remember.
Q. That would be eighteen days? I think that is all.

JOSHUA B. RICKARTS, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Rickarts, where do you live?
A. Philadelphia.
Q. What is your business?
A. Dredging.
Q. What company are you connected with?
A. Delaware Dredging Company.
Q. How long have you been in the dredging business?
A. Since 1907.
Q. Are you familiar with the operation of dredges?
A. Yes, sir.
Q. Are you also familiar with the methods of filling land?
A. We have done lots of it. Yes, sir.
Q. Are you familiar with the method of building crossways for roads across water?
A. Yes, sir.
Q. Have you seen the roadway and bridge over from Beesley's Point to Somers Point?
A. Yes, sir.

Q. Are you familiar with the type of construction that was used there?

A. I have been over it and seen it.

Q. You are familiar with that type of construction?

A. Yes.

Q. Is that a type of construction that is usually used?

Mr. Bourgeois: I object. This man is put on as an expert, and in the case of Shoemaker versus Elmer, our Court distinctly said you had by a hypothetical question to give the jury the foundation on which the question is going to be determined. How do they know? What do they know about the construction that is used there?

Mr. Hanstein: There are two defendants here with different relationships and different duties. It may be that if we went along and did something extraordinary about the dredger, that they could say that we had no business to do any such thing.

The Court: From that standpoint it might be admissible. That is the only standpoint, it seems to me, on which it could be admitted.

Mr. Bourgeois: As between the two defendants I have no argument to make, but as far as the plaintiffs are concerned, that argument has no force whatever.

The Court: I will permit it under that theory. I hold that it does not make any difference whether you built this bridge in the usual manner or in an

extraordinary manner, that the question is for this jury to decide whether the manner you did it ——

Mr. Bourgeois: As to the plaintiffs?

The Court: As to the plaintiffs. ——was negligent in that you failed to perform a duty that you owed to the plaintiffs, and that is going to be the ultimate question, in my mind.

Mr. Hanstein: I do not want to be in the position of acceding to a limitation of the application of the testimony that comes in.

The Court: I am admitting it. Of course, I do not suppose there is any reason for me at this time to limit it to anything, but eventually it seems to me it is going to have a limit.

Mr. Bourgeois: If it is not limited now, let me have an exception.

(Exception noted for plaintiffs.)

(Question repeated.)

Mr. Hanstein: I will prove it in a little more detail while I am doing it.

Q. Will you describe the type of construction used out there?

Mr. Bourgeois: How does this man know the type of construction that was used there if he was not there?

By the Court:

Q. Do you know the type of construction that was used there?

A. Only by looking at it from a view in driving over it.

Q. Can you tell the construction that was used by driving over it?

A. Partly, I can.

By Mr. Hanstein:

Q. Can't you tell how that work was done, that is, the method adopted?

A. It was pumped in up to somewheres about high water, from the looks of it.

Q. Then what?

A. A small bulkhead built and then filled in between the bulkheads.

Q. What I want to know from you is whether or not you have seen that same method used at other places?

Mr. Bourgeois: That is objected to as immaterial, irrelevant and res inter alias, as far as we are concerned.

The Court: I will sustain the objection. I do not think it makes any difference. I now rule it makes no difference whether that is the usual form of construction or not.

(Exception noted for defendants.)

Q. Is that method of filling across waterways, of pumping in sand first and then erecting bulkheads

and fences to retain the sand subsequently pumped, is that method a method in common use?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: I will sustain the objection.

(Exception noted for defendants.)

Mr. Hanstein: I take it, your Honor, that I am barred from further proof that the method adopted is a method in general use?

The Court: I do not see that it makes a bit of difference whether it is the method in general use or not.

(No cross-examination.)

Mr. Bell: I want to offer at this time contract and specifications between the Ocean City Automobile Bridge Company and Hill Dredging Company, dated March 5, 1928.

Grant from the State of New Jersey, by the Board of Commerce and Navigation, to the Ocean City Automobile Bridge Company, recorded in Atlantic County Clerk's office in Book of Deeds 888, page 486, dated March 10, 1928.

Cancelled grant from the State of New Jersey, by the Board of Commerce and Navigation, to the Ocean City Automobile Bridge Company, dated June 20th, 1927, recorded in the Atlantic County Clerk's Office in Deed Book 872, page 363.

Permit from the War Department of the United

States to the Ocean City Automobile Bridge Company, dated October 27, 1927.

Permit from the Board of Commerce and Navigation to the Ocean City Automobile Bridge Company, dated May 16, 1927.

Deed from Mabel Clay to Ocean City Automobile Bridge Company, dated August 31st, 1927.

Deed from Mabel Clay to Ocean City Automobile Bridge Company, dated January 30th, 1928.

Deed from the Township of Upper to the Ocean City Automobile Bridge Company, dated March 24th, 1928.

Deed from Mathias Robinson Realty Sales Corporation to Ocean City Automobile Bridge Company, dated February 10th, 1928.

(The papers referred to were marked Exhibits D3 to D11, inclusive.)

PRESTON RISLEY, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Risley, what is your business?
A. Captain of a dredge.
Q. Work for the Hill Dredging Company?
A. Yes, sir.
Q. Did you during the time the roadway was being built across Great Egg Harbor River?
A. Yes, sir.
Q. What dredge were you captain of?
A. Pioneer.

Q. When did you go to work on that operation?
A. May 8th, 1928.
Q. Where did you start doing the work?
A. March 8th, 1928.
Q. Where did you start doing your work? Where did you start pumping?
A. Want me to show you on the map?
Q. Yes, please.
A. I will have to read this first so I can understand it.
Q. Be sure you do. Here is Somers Point here, Beesley's Point on the other side, here is Drag Channel, there is a sand bar, here is more sand bar, there is eel-grass, this part is solid fill, and this is bridge.
A. What scale is this?
Q. One inch to 150 feet.
A. I started right at this point here in back of the abutment, the bridge abutment.
Q. Indicating the abutment on the sand fill nearest to Somers Point; is that correct?
A. That is correct.
Q. What work did you do there?
A. I worked there ——

Mr. Bourgeois: The abutment nearest to Drag Channel?

Mr. Hanstein: The abutment nearest to Drag Channel and the nearest abutment to Somers Point. It is this to which I now point. There is one on the other side of the channel.

(Question repeated.)

A. I done all of the work from that time on.

Q. At that time how much sand had been pumped on? To what height was it?

A. I can't say exactly, because there was quite a lot of settlement.

Q. You can't tell how high it was when you went to work?

A. Not exact.

Q. Had any bulkheads been built when you went there?

A. Yes, sir.

Q. Had the outside fence been built, too?

A. No, no outside fence was built when I went there, but the abutments was built on the north side of Drag Channel, and on the south side of Drag Channel.

The Court: That is, the bridge abutments?

A. The bridge abutments.

Q. Had any bulkheads been built paralleling the road?

A. No, sir.

Q. Were they built while you were there?

A. I built them.

Q. I wish you would explain to the jury how you built those bulkheads.

A. That is a long story.

Q. Well, I think they ought to know it.

A. First we started to pump on the north side of Drag Channel. We ran our pipe one foot above high water and that was about thirty-five feet outside of the original bulkhead and forty feet outside of the original bulkhead we built a smaller bulkhead to retain the sand fill, and we kept on in that manner until we hit the high ground.

Q. You mean fast shore?

A. Yes, towards Somers Point. On both sides equal. On Jimmy's Island ——

Q. Before you get to Jimmy's Island, after you got these bulkheads up running the length of the road and then a fence outside of that—is that correct?

A. Yes, sir.

Q. What did you do with regard to filling that in?

A. The small fence that we put up, I would say five feet on the outside of our pipe line, to retain the sand, we kept on until we hit the high ground in the same manner all the way through from the abutment to the high ground, which is, I don't know just how many feet. The blueprint will tell you.

Q. What I am trying to find out is did you fill in after you made this bulkhead?

A. Oh, yes, we filled in to grade.

Q. Did you operate the same way over on the south side of Drag Channel?

A. No, sir.

Q. How did you work there?

A. I took precaution on that side in particular, because of the oyster grounds. In the beginning I surveyed the land to know the conditions of the water there. I surveyed it, sounded it, and I came to a lot of oyster stakes, which I didn't know what they meant. There was no numbers or any names on none of them. I looked at every stake and I assumed that it was leased ground, but I wasn't positive, so I took precautions to run the job so that no sand nor mud would go on the leased grounds.

Q. What did you do?

A. I run the north or the west pipe line first, which shut off the sand and mud from going toward the oyster grounds.

Q. What do you mean by you ran the north or west pipe line first? What does that mean?

A. That means that the ridge of sand that we pumped stopped the sand from the left-hand, I would say, from going across the ridge.

Q. Then what did you do?

A. After the ridge was pumped, following along the pipe line a bulkhead was built five feet outside of the pipe line, which was thirty-five feet from the main bulkhead.

Q. What was thirty-five feet from the main bulkhead?

A. Our pipe line.

Q. Inside?

A. Inside of the small bulkhead. There was two bulkheads there, two retaining walls.

Q. Then you filled it in; is that right?

A. Yes, sir.

Q. Did you carry on some tests to determine whether any sand was getting over towards these oyster beds?

A. Yes, sir.

Q. What did you do?

A. I placed two steel liner plates on those oyster grounds.

Q. What do you call a steel liner plate?

A. A steel liner plate is what we use on the dredge. It is bolted fast to the runner. The runner, in other words ——

Q. I don't care how it works. When you get all through giving it a name, it is a flat piece of steel?

A. It is a flat piece of steel with a hole in it, measuring twenty-two inches.

Q. What measures twenty-two inches?

A. The hole that is in the center.

Q. How big was this piece of steel?

A. I would say six foot in diameter.

Q. What did you do with it?
A. I laid it down on the bottom of the oyster ground.
Q. While you were pumping, was that?
A. Before I started to pump.
Q. Did you go back and look at this steel plate afterwards?
A. Yes, sir.
Q. How soon afterwards?
A. I think a week after the job was completed.
Q. You went back a week after the job was completed?
A. Yes, sir.
Q. What did you find with regard to it?
A. We found nothing on the plates.
Q. No sand whatever?
A. No, sir.

(Recess taken until 10 A. M., June 28, 1930.)

Atlantic City, N. J., Saturday, June 28, 1930.

(Trial of the cause resumed at 10 A. M.)

PRESTON RISLEY, resumed.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Risley, what did you do with the iron plate?

A. I placed two on the leased grounds in Creek Channel.

Q. You say you looked at them a week after you finished the work. What did you do with them?

A. I left it there, left both of them there.

Q. Left them there?

A. Yes, sir.

Q. And they were both plates about six feet long?

A. Six feet in diameter. They are round.

Q. And had a hole in the middle of them?

A. Twenty-two inch.

Q. What was the object of that?

A. That is what we use for our runners. We call them runners, but maybe you can understand better if I say propellers in the pump, and it was a plate, two plates, that was partly worn out, and we took them up there, Rudolph Chance and I took them up there and placed them.

Q. Where were they placed?

A. One was placed about here and the other was placed about here.

The Court: Indicating what, for the record?

Mr. Hanstein: Name the leases on which you placed them.

A. Theodore Smith's lot number 154, and John H. Smith's lot 156.

Q. And you say you found them both when you went back there and left them there?

A. After the pumping was all completed, yes, sir.

Q. Were you over in the boat when they were gathering clams about two or three weeks ago?

A. Yes, sir.

Q. Did you go to find if they were there?

A. No, sir.

Q. Didn't bother to see if they were still there?

A. No, sir.

Q. What did you mean by the pipe line? You spoke with relation to the fill yesterday, about the pipe line. What did you mean to indicate by that?

A. It is customary in our line of work to ——

Q. I don't care about the custom. Tell me what you mean by the pipe line.

A. They take the pipe line in order to get the sand where you want it.

Q. It just means a line of pipe? Is that what you mean by the pipe line, a line of pipe, continuous pipe?

A. A line of pipe that carries the material to the point where you want it.

Q. Is that what you mean by the pipe line?

A. Yes, sir.

Q. That is the successive joints of pipe that are

fastened together, leading to the place where you want to discharge the material?

A. That is the pipe line.

Q. And you began pumping when?

A. March 8th, 1928.

Q. And that was the first of the pumping that was done there?

A. No, sir.

Q. What pumping had been done there prior to that time?

A. I don't know exactly. I did not do the work.

Q. Who did the work that was done before then?

A. Another boat.

Q. What one was that?

A. The Brigantine.

Q. Is that the one young Risley said he was captain of?

A. Yes, sir.

Q. When did he begin, if you know?

A. I do not know.

Q. And you came after him and continued where he left off?

A. Yes, sir.

Q. At that time he had gotten all of the fill above the high water mark, as I understand?

A. I do not know.

Q. What was it when you came there? Was it all above high water mark or not?

A. No, sir.

Q. What was the condition of it?

A. Well, it was below high water mark.

Q. How much below high water mark on the northeasterly side or northerly side of Drag Channel?

A. I don't remember.

Q. How much was it below high water mark on the southwesterly side of Drag Channel?

A. I can't recall.

Q. But it was some?
A. It was some, yes.

By the Court:

Q. I don't recall that you said what you put those plates there for. What were they there for?
A. The plates was put there to show and prove that we did not put any sand or mud on those leased grounds.
Q. What were they supposed to do, catch the sand or mud?
A. If there had been any sand or mud that flowed up there, it would have settled on those plates equally around that area.

By Mr. Bourgeois:

Q. Whom did you take up there to look at them with you?
A. Rudolph Chance and I placed the plates before we started to pump sand, and after the pumping was all completed, pumped all in, then we went up and found the plates and know that there was nothing on them but salt water.
Q. How much were they above or below tide, below the water?
A. They were in, I would say, about two and a half feet of water, at an ordinary low water.
Q. How did you mark them?
A. With ranges.
Q. And with your ranges you were able to go out there and find them under water?
A. Yes, sir, absolutely.
Q. Have a glass?
A. No, sir.

Q. Just the naked eye?

A. Yes, sir.

Q. How long did you pump sand there?

A. From March 8th, and we stopped pumping, completed the work, May 31st, 1928.

Q. All in the same year?

A. Yes, sir.

Q. What was the pumping capacity of your dredge? How many cubic yards a day?

A. I couldn't tell you that. I don't know.

Q. How large a pipe did you have in the pipe line?

A. 16-inch I. D.

Q. How much of the time did you pump?

A. I couldn't tell you. I don't know.

Q. Did you pump continuously twenty-four hours?

A. No, sir.

Q. How much?

A. I don't know exactly.

Q. Do you know anything about it?

A. Oh, well, I can give you a fair idea.

Q. That would do.

A. I suppose about forty per cent of the time of the twenty-four hours.

Q. Forty per cent of the twenty-four hours?

A. Yes, sir.

Q. That would be about nine hours a day?

A. Approximately, yes.

Q. Nine and six-tenths hours a day?

A. Yes.

Q. Did you pump Saturdays?

A. Yes, sir.

Q. Sundays?

A. No, sir.

Q. What was the length of the fill that you made on the northeasterly side of Drag Channel?

A. The length of the fill?

Q. Yes, what was the length of that fill?

A. The blueprint will show it. No, it doesn't either, not here. The fill was made from the abutment to the high ground.

Q. Was it about seven hundred feet? 730 feet?

A. Somewheres like that, yes, sir.

Q. What was the length of the fill on the southwesterly side of Drag Channel? That is the one that went out to the lots there, the grounds?

A. That don't show it, either.

Q. Was that about 1200 feet?

A. I don't think it was that much. I don't know.

Q. Might it have been as much as 1220 feet?

A. I couldn't say.

Re-direct examination.

By Mr. Hanstein:

Q. Mr. Risley, I don't know whether I asked you this or not before. Did you recently go over these oyster grounds in a boat with some of the baymen and some more men?

A. Yes, sir, I think three times.

Q. You have been over it three times?

A. With other men. I have been over it, I guess, in the neighborhood of seventy-five times.

Q. Before you did any filling?

A. No; during the operation.

Q. During the operation?

A. Yes, sir.

Q. Did you on any of those occasions rake up any of the bottom?

A. No, sir.

Q. On this last trip did you?

A. I didn't rake it up.

Q. Maybe I used the wrong term?

A. We tonged.

Q. That is what I want to get. On how many of these seventy-five trips which you took was there any tonging to look at the bottom?

A. Three different times.

Q. All since the bridge was built?

A. Yes, sir.

Q. What did you find as to the bottom?

A. The bottom was what I would call excellent bottom for clams and oysters.

Mr. Bourgeois: I move that be stricken out as a conclusion.

The Court: Yes.

Q. Tell us what it was like.

A. The bottom was putty mud and meadow bottom, hard mud.

Q. Did it show any signs of having on it materials that had been pumped in by a dredge?

A. No, sir.

Q. And the last time you went out in the two boats that were lashed together, did you go over the entire ground?

A. Yes, sir.

Q. And the condition was as you have described it?

A. Yes, sir.

Q. Did you find any clams that time?

A. Yes, sir.

Q. Living?

A. Yes, sir. You ought to know. You ate some of them.

Q. How thick was this steel plate that you put over it?

A. This steel plate when it was new was five-eighths of an inch thick, but I suppose when we placed it out on the oyster grounds—I don't think it was over a quarter of an inch thick at that time.

Q. On which side of Creek Channel does the flood tide run the strongest?

A. On the southwest side.

Q. That is the side away from where you were working?

A. Yes, sir, the opposite side.

Q. At the westerly end of your fill over by the leased grounds there, which tide runs the strongest, the flood or the ebb tide?

A. The ebb tide will run, I would say, twice as strong as the flood tide. There is an eddy there.

Q. Do you know whether there is any physical evidence of that fact out there at your fill? Can you by looking at the fill and the position of it at the present time tell which way the tide runs the strongest?

A. Absolutely, yes, sir.

Q. What shows it?

A. The movement of sand.

Q. How does the sand move? Can you point it out on the map?

A. It shows you right here. It shows you the ebb tide coming down Creek Channel has carried the sand from here and deposited it there. It shows you right there.

Q. It shows it has washed it as it went out?

A. Yes, sir.

Q. Away from these beds?

A. Yes, sir.

Re-cross examination.

By Mr. Bourgeois:

Q. Mr. Risley, concerning the movement of the sand here, if the tide has carried this sand from up here, that is, the sand down on the Point, on the southeasterly side of the bridge from the northwesterly side, then when filling was stopped, there must have been more sand up here on Tallman's ground than there is now there, wasn't there?

A. Yes, sir.

Q. And less sand down on Lloyd's ground than there is now?

A. Yes, sir.

Q. So that there is a movement of the sand by the edge of these channels, is there?

A. Where there is no eel-grass, yes, sir.

Q. Where there is no eel-grass?

A. Yes, sir.

Q. Well, if the channel is there, will the eel-grass prevent the sand from moving?

A. The eel-grass came all the way out here and there was all eel-grass all here and eel-grass all here, and it was impossible for the sand to move.

Q. What I have in mind is this: If the tide will shift the sand at the place you filled it in, it will also shift the sand or have a tendency to shift the sand in the place where it settled from the filling, if it did settle, wouldn't it?

A. The tide ——

Q. Answer the question.

(Question repeated.)

A. Providing the same strength of tide.

Q. How wide is Creek Channel?

A. I couldn't tell you. I never measured it.

Q. And you say that the tide is stronger on the southwesterly side than it is on the southeasterly side?

A. On the flood tide, yes, sir.

Q. That is the tide running up?

A. Yes, sir.

Q. From what you have said, it is the ebb tide that has shifted the sand from Tallman's lot over on Lloyd's lot, isn't it?

A. Yes, sir.

Q. The ebb tide?

A. The ebb tide. In all my experience, ebb tide moves sand more than the flood tide does.

Q. It would be the flood tide, though, that would carry the sand in a northwesterly direction there, wouldn't it, if it did carry it?

A. If it did, yes.

Q. And you say it would be the ebb tide that would carry it to the southeasterly direction?

A. Yes.

Q. You made three trips across that land, those grounds, in boats, when you had somebody with you?

A. Yes, sir.

Q. And on none of those three trips did you go and locate those plates, did you?

A. No, sir.

Q. Why didn't you? As long as the people were with you, why didn't you go to the plates and show them?

A. We did not have time.

Q. Wouldn't that have been the best evidence? If the plates were there, they would show whether there was any sand gathered on them or not, wouldn't they?

A. We didn't have time at the present time.

Q. And you didn't think it was of enough importance for those other people out there, half a dozen of them, to locate those plates and show them that there was nothing on them?

A. We didn't go out for that purpose. We went out to get the bottom.

Q. Well, wouldn't that give you the bottom you are talking about?

A. Not the top of those plates, no, sir. That would only give you the thickness of mud or sand that was possibly pumped up there.

Q. Did they know those plates were placed there by you, the people in the boat with you?

A. I don't think all of them did.

Q. Who did?

A. Mr. Elton Risley knew they were there.

Q. He was in charge of the expedition, wasn't he?

A. Yes, sir.

Q. Did he suggest that you go and examine those plates and see what the condition was there?

A. I don't think so.

By Mr. Hanstein:

Q. After your work had been finished, you did go back and examine the plates?

A. Yes, sir.

Q. And there was no sediment on top of them?

A. No, sir. Rudolph Chance and I went up and found the plates ——

The Court: You testified to all that.

Q. Is Rudolph Chance in court?

A. Yes, sir.

Q. He was the man who went up with you; is that so?

A. Yes, sir.

Mr. Hanstein: I want to offer this letter in evidence. I don't know whether you will want strict proof of the signature or not, Mr. Bourgeois.

Mr. Bourgeois: I think that is the signature.

(The letter referred to was marked Exhibit D12.)

Carl Risley, recalled.

Direct examination.

By Mr. Hanstein:

Q. You were on the stand yesterday and testified you were in charge of the dredge that first started to work there. Do you know how far your work had progressed on the 12th day of September, 1927?

A. Not exactly how far the work had progressed on the 12th. I know that we finished the northern section of that road on the 15th.

Q. What do you mean by the northern section?

A. This section here, from the edge of this flat in to the high water line. We finished that on the 15th.

Q. And you hadn't started to work over here, nobody from the Hill Dredging Company had started to work on the westerly side of Drag Channel on the 12th of September; is that right?

A. No, sir.
Q. Nobody had started?
A. No, sir.

(No cross-examination.)

Mr. Hanstein: I should like to read Exhibit D12 to the jury. It is on the letterhead of M. V. B. Scull, real estate broker, Somers Point, N. J., Mr. Scull being one of the plaintiffs here. "Scullville, N. J., September 12, 1927. At a meeting of the oyster planters and leaseholders, held at the home of Walter Lloyd, the following men were present: Theodore Smith, Chairman, acres leased, 6; Smith Hickman, 2; Japhet Barrett, 8¼; Theodore Smith, 25; John H. Smith, 14; Jesse Thomas, 12½; Walter Lloyd, 10; Martin Scull, 2; Risley Somers, 6½. The purpose of the meeting was to take action against the Somers Point-Beesley's Point Bridge Company for damages to their oyster ground. Motion made by Walter Lloyd, seconded by Smith Hickman, that the secretary make arrangements for a meeting with the authorized parties. Martin V. B. Scull, Secretary." Addressed to Ocean City Bridge Company, dated September 12th, 1927.

Rudolph Chance, recalled.

Direct examination.

By Mr. Hanstein:

Q. Did you go out with Captain Risley to find these plates that had been put overboard?

A. I did.
Q. Did you find them?
A. We found them.
Q. Was there any sand deposited on them?
A. Not a bit.
Q. Any mud?
A. None.
Q. Was that after the work of dredging was finished?
A. After the work.

Cross-examination.

By Mr. Bourgeois:

Q. Were you in the boat with Mr. Elton Risley and Preston Risley about three weeks ago that went out over these grounds to find out about the mud?
A. No, sir.
Q. You were not there?
A. I haven't been with them for two years, since the work was done. I don't even work for them.

E. Penn Hackney, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Hackney, where do you live?
A. Ventnor City.
Q. What is your business?

A. Chief Engineer for the Hill Dredging Company, and land surveyor.

Q. Were you working for the Hill Dredging Company at the time of this dredging operation?

A. I was.

Q. Did you receive this notice, D12?

A. I received that some time after that date, yes.

Q. Did you subsequently have an appointment with any of these plaintiffs?

A. I had an appointment with Jesse Thomas, but Walter Lloyd substituted in his place on that day.

Q. What happened at that meeting?

A. We were taken over the grounds and shown the bottom in several places.

Q. Well, you say "we." Who of the plaintiffs went with you?

A. Mr. Lloyd himself.

Q. Who went on behalf of the defendants?

A. C. I. Collisson.

Q. Who is Mr. Collisson?

A. Mr. Collisson, the engineer.

Q. He is the engineer of the Bridge Company?

A. Yes, sir.

Q. Who else? You and who else?

A. And Mr. Risley.

Q. Elton Risley?

A. Yes, sir.

Q. You went with Walter Lloyd. Where did he take you?

A. In various parts over the tract.

Q. What did he do?

A. Portions were tonged up. He endeavored to show us primarily where the sand had been deposited.

Q. Did he show you any sand?

A. He showed us some sand, yes, in one place.

Q. Whereabouts?

A. In one place. It was up in this vicinity here. There were no stakes at the time, so it was impossible to locate exactly where he was standing.

Q. He showed you some sand up there?

A. Some sand.

Q. Was that a sandy bottom?

A. It was a hard, sandy bottom at the time, yes, sir.

Q. As he got down nearer the bridge, did he show you any sand?

A. Nothing but a sticky mud.

Q. That is all he showed you there?

A. Yes, sir.

Q. Did you people in your tonging raise any oysters or clams?

A. We did.

Q. What did you raise?

A. Raised a few oysters and a few clams.

Q. Were they living?

A. They were.

Q. Were they eaten?

A. I ate them both, oysters and clams, myself.

Q. Was Mr. Lloyd present?

A. Mr. Lloyd was present.

Q. Did Mr. Lloyd take you on his own ground?

A. We were there in the vicinity of the bridge. I am not familiar enough with the stakes to know exactly where we were.

Q. What complaint did he make to you with regard to the damage you were doing?

A. He said the bottom had been ruined for planting oysters and clams.

Q. And he didn't show you any sand?

A. Except in that one spot.

Q. And there is a sand bar there?

A. And, of course, in the vicinity of the bridge where we had actually pumped it, yes.

Q. Where it was piled up high, you mean?
A. Yes.

Cross-examination.

By Mr. Bourgeois:

Q. When was it that Mr. Lloyd took you out on these grounds?
A. October 27th, 1927.
Q. And that was after you had finished pumping the sand on the northeasterly side of Drag Thorofare, wasn't it?
A. Yes, sir.
Q. Now, Mr. Hackney, Drag Thorofare passes up about westerly right up in the neighborhood of where you found the sand, doesn't it?
A. That is correct.
Q. If the sand had been pumped on this easterly section into the water and the tide of the Channel had carried it along, it might readily have settled up there?
A. If it had, yes.
Q. That is the natural place where it would have settled, isn't it? It would have gone right up there and stopped?
A. I am not an expert on tides and the movement of sand, and I can't answer that.
Q. You don't know where it would stop, and I don't either.
A. No, sir.
Q. That is the direction it would go? The tide would carry it right up there to Martin Scull's land and to—well, I don't know the others.
A. If the velocity was strong enough to carry it that far.

Q. I beg pardon?

A. If the velocity of the tide was strong enough to carry it that far.

Q. And if the impetus given to the sand in the first place was strong enough?

A. All "ifs," yes.

Q. At any rate, you found sand up there?

A. There was some sand up there.

Q. After the filling had been done on the northeasterly side of Drag Channel?

A. But none in between.

Q. I say, you did find it up there?

A. Yes.

Q. What was there between this space that you speak of as where you found the sand and the bridge in the way of a bar or anything of that kind? It is marked eel-grass now. What was there along that edge, the northeasterly edge of these oyster grounds?

A. There was eel-grass.

Q. At that time?

A. Yes, sir.

Q. When did they begin pumping in the sand on the southwesterly side of Drag Channel?

A. I haven't the log on that, and I can't answer the definite question.

Q. You don't know when it was?

A. I can tell you approximately when it was.

Q. Approximately, yes.

A. The middle of September.

Q. And as early as the 12th of September, and before you had finished the pumping on the easterly side of Drag Channel, these oyster men wrote you and told you that the sand was destroying their beds?

A. No, sir, they didn't write me.

Q. I mean they wrote the company and you got word of it?

A. The letter was transmitted to me.

Q. Who gave it to you?

A. It came through the mail from Mr. Collisson's office.

Q. And finally you got it. When did you get it, do you remember?

A. Some days after the 12th, I don't remember.

Q. How long after you got this letter was it before you went up with Mr. Lloyd and found this sand deposited on the grounds up by Martin Scull's?

A. You take September 12th and add perhaps three days, that would make it September 15th, and it was October 27th when we went up there. A little over a month.

Q. You had a month you didn't do anything at all about it, but then you did go?

A. We were waiting for an appointment.

Q. Can you tell me if in the meantime you started pumping on the southwesterly side?

A. There was an interval in shifting from one side to the other. If we stopped pumping on the northeasterly side around the middle of September, it was some few days after before they started on the other side.

Q. And you were present when they were pumping on both sides?

A. I was down there occasionally. I wasn't the engineer on the job.

Q. And the same method of pumping the sand which was used on the easterly side, of pumping the sand right into the water and paying no further attention to it, was used after you had made the fill on that side and after the letter had been written to you, in making the fill on the southwesterly side, wasn't it?

A. The same method was used.

Q. In other words, you had pumped the sand in here on the northeasterly side and you had gotten word that the sand was carrying up over these oyster grounds, and notwithstanding that you went up on the other side right in close proximity to them and continued the same sort of pumping?

A. If I may explain ——

Q. I didn't ask you for that. Is that a fact?

(Question repeated.)

A. That is correct.

Re-direct examination.

By Mr. Hanstein:

Q. Mr. Hackney, Mr. Bourgeois has brought out that the Hill Dredging Company had pumped along here and that is as far as it had gotten on September 12th. Now, will you show me the course that the sand you pumped on this ground would have to take in order to get over, we will say, to the grounds of Walter Lloyd, who is one of the men who complained on September 12th? Just point out the course that sand would have had to take.

A. At the time of the pumping, the flow from the pipe line was in this direction, directly opposite Walter Lloyd's lot.

Q. When you say "in this direction," it doesn't mean anything on the record.

A. The pipe line came up here.

Q. It came up Drag Channel and pointed northeastwardly?

A. Northeastwardly, which means that the sand

from the end of the pipe would have to do this and have to do that in order to get over on him.

The Court: That does not mean a thing on the record.

Q. How would it get there?

A. The sand would have to turn around completely and run in the opposite direction.

The Court: From which it was being pumped?

A. Yes, sir.

Q. What do you think of the possibility of that sand going up Drag Channel with the tide that was flowing in and then waiting up there until the tide changed and then coming back to cover Mr. Lloyd's ground?

A. I am not an expert, but my opinion is that it is impossible.

Q. You don't think it would do that?

A. No.

Q. Do you happen to know the depth of Drag Channel down here?

A. I never sounded it.

CLARENCE I. COLLISSON, recalled.

Direct examination.

By Mr. Hanstein:

Q. Mr. Collisson, you have already proven this map. Did you make any investigation for the pur-

pose of determining whether the ebb tide or the flood tide in this neighborhood flows the stronger?

A. Yes, sir.

Q. When did you make that investigation?

A. 1927.

Q. Why did you make it?

A. At the request of the War Department.

Q. Did you use instruments for the purpose of determining that?

A. Yes, sir.

Q. Were any of the War Department representatives working with you at the time?

A. Yes, sir.

Q. Engineers from that department? What was your determination as to the rate of the flow of the tide on the flood tide, that is, when it goes in, and on the ebb tide, when it goes out?

A. Well, I have a map here that will show it, if you will permit me to.

Q. I don't know as we need the map. Can you tell the number of feet per second?

A. Yes, I have that.

Q. You have it on a map?

A. Yes.

Q. Does it change in different places?

A. Yes.

Q. Can you tell us in the neighborhood of this fill? If you need to use your map, use it.

A. On the ebb tide in the main channel over here ——

Mr. Bourgeois: I object. What do we care about the main channel?

The Court: I don't think that has a thing to do with it.

Q. Show us Drag Channel.

A. Well, the tide in Creek Channel ——

Q. I want to show it in Drag Channel. That is where we did some pumping.

A. The ebb tide in Drag Channel was 80 feet per minute.

Q. The ebb tide?

A. Yes, sir.

Q. That is, going out?

A. Yes, sir.

Q. And going in was how much?

A. 92.3 feet per minute.

Q. How was it in Creek Channel?

A. Flood tide was 41.1 feet per minute. The ebb tide was 49.2 feet per minute.

Q. That is, it flows out of Creek Channel faster than it flows in; is that it?

A. Yes, sir.

Q. With regard to this trip of Walter Lloyd in the boat with Mr. Hackney, were you with Mr. Lloyd?

A. Yes, sir.

Q. Will you tell us where you went?

A. Well, we covered Mr. Lloyd's ground and tried to reach all the way to the top one, number 161, in several places.

Q. What did you do?

A. Tried the bottom with tongs.

Q. What did you ascertain with regard to the bottom?

A. That it was the same as usual.

Q. Had you been over the ground before?

A. Yes, sir.

Q. Were you familiar with this bottom?

A. Yes, sir.

Q. Was he able to show you any sand that had been deposited?

A. No, sir.
Q. He didn't show you any?
A. No, sir.
Q. Were any clams or oysters dug up?
A. Yes, sir.
Q. Were they living?
A. Yes, sir.
Q. Do I understand that you went out there on some occasion and took some more specimens of the bottom, that time using an instrument to locate your position?
A. Yes, sir.
Q. When did you do that?
A. March 15th.
Q. What year?
A. 1930.
Q. Did you make a record of it?
A. Yes, sir.
Q. When did you make the record? At the time?
A. At the time that the work was done.
Q. March 15th, 1930? Can you tell us where you went, indicating on the map?
A. Yes, sir.
Q. Indicate on the map where you went these various times and what you found.
A. We tried twenty-five different places, had two instruments on the shore here turning the angles to the places where we tried. On the map here I have a little circle with a number on it, indicating each shot that I took, and each place I tried the bottom. We will start right up here with one, from one to twenty-five.
Q. Just point them out to the jury.
A. That is number one. Number one was there. Hard sand bottom. No clams or oysters. Number 2, right here, hard sand bottom, no clams or oysters. Number 3, right here. I found a hard mud bottom,

no clams or oysters. Number 4, on Mr. Scull's ground, I had a hard mud bottom, no clams or oysters. Number 5, still on Mr. Scull's ground, I still found the hard mud bottom; found some dead oyster shells and live clams. Number 6, right here on Hickman, found a hard mud bottom there. Opened clams and ate them. No oyster shells and no oysters. Number 7, up on lot number 161, found a hard mud bottom, clams and oyster shells. Number 8, still on number 161, medium hard bottom, clams and oyster shells. Number 9, right in here, still on the same piece, began to sight hard mud bottom again, no signs of oysters, and picked up some clams. Number 10, still on lease number 161, a hard mud bottom, no oysters and a few clams. Number 11, back on Mr. Hickman's ground again, what we call a fiddler mud bottom, clams and oyster shells. Number 12, down on Mr. Smith's, John H. Smith's, hard mud bottom, found clams and old oyster shells. Number 13, right in there, still in John Smith's, fiddler bottom again, and clams and oyster shells. Number 14, just below on the far side of John H. Smith's, a soft mud bottom, found clams and oyster shells. 15, on the lower corner of Mr. Smith's ground, hard mud bottom, and found clams and oyster shells. Number 16, down on Theodore Smith's ground, a hard mud bottom, and found clams. Number 17, down on Mr. Tallman's, we found hard mud bottom and dead oyster shells. Number 18, down on Mr. Lloyd's ground, a hard mud bottom, nothing but old oyster shells. Number 19, still on Mr. Lloyd's ground, a hard mud bottom, found clams and oyster shells. Number 20, just below Mr. Lloyd's ground, over on the corner, we found eel-grass and no shells or clams. Number 21, back on lot 151, we found eel-grass and some clams. Number 22, still on lot 151, a soft mud bottom, no clams or oyster shells,

23, over on Mr. Lloyd's land again, on the northwest side, we had a hard mud bottom, and found some clams. Number 24, back on Mr. Smith's ground, a hard mud bottom and found some clams. Number 25, over on John H. Smith's ground, we found a hard mud bottom and found some clams. That is the twenty-five different places we tried.

Q. Were you out in a boat with Mr. Lloyd?

A. Yes.

Q. The time when Mr. Hackney and Mr. Risley were along?

A. Yes.

Q. Did he show you any sand that had been deposited there?

A. No, sir.

Q. Do you know whether or not there is a sand bar up above there?

A. Yes, sir.

Q. Where is the sand bar?

A. The sand bar lays about in the center of this place here where this creek comes out here.

Q. That doesn't appear on the map. It is about at your number one shot?

A. Yes, sir.

Q. You say that there is a sand bar there?

A. Yes, sir.

Q. Was that sand bar there before you started—before the dredging started?

A. Yes, sir.

Q. Did he show you sand on any of the other parts of the leased ground?

A. No, sir.

Q. Did you find natural bottom?

A. Yes, sir.

Q. Taking into consideration that on September 12, 1927, the date when these oyster men, including Lloyd, complained, that there was fill deposited only

on the easterly side of Drag Channel, could you explain to the jury the course the sand would have to take in order to get on Lloyd's ground? How could it get there?

A. It couldn't get there.

Q. Well, how could sand fill pumped over on this easterly side of Drag Channel, assuming it was thrown right in the water, in an improper manner, even, how would it get around to this part? What course would it have to pursue?

A. In the first place, it was pumping this way and the flow was coming towards the mainland, and it would have to come out this way and go up around and come down here this way, which would be impossible.

Q. Why would it be impossible?

A. It would pass the channel and just as soon as the sand would hit that channel or the water, it would stop and fall.

Q. It would settle right down?

A. Sand won't run.

Q. While you are on your feet, you have shown on this map sand fill at low water line February 25th, 1930, as being right around here. You say that this area marked "eel-grass" is in fact all eel-grass?

A. Yes, sir.

Q. How did you determine that the sand fill actually stopped right there?

A. By a survey.

Q. Could you see where the sand stopped?

A. Yes, sir.

Q. You could absolutely see it right on the ground?

A. Right before your eyes, yes, sir.

Q. And there was no sand out here, then?

A. No, sir.

Q. It was during 1927 that work was being done out there, wasn't it?

A. Yes, sir.

Q. Did you keep a record of the temperatures out there during 1927?

A. Yes, sir.

Q. Do you have a record of it?

A. Yes, sir.

Q. Will you produce it?

(The witness produced a book.)

A. Here is February, 1928.

Q. February when?

A. 1928, during the work.

Q. Don't you have it earlier than February, 1928?

A. No, because it was in warm weather then. Northwest winds, two below zero.

Q. Suppose you give us the record for February, 1928. Read into the record what the temperatures were around that time.

Mr. Bourgeois: What is the object.

A. That is all I have, just the temperature of that day.

Q. Just one day?

A. That is all.

Q. I thought you kept a record of it.

A. No.

Mr. Hanstein: I don't think that means anything particularly.

Q. I thought you had a complete record of all the time?

A. No, sir.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Collisson, what was your position in this work that you were doing over near the oyster grounds in 1927 and 1928?

A. Engineer in charge for the Bridge Company.

Q. You were what?

A. I was engineer in charge for the Bridge Company.

Q. As engineer in charge for the Bridge Company, what work did you have to perform?

A. Well, I had to locate and take all necessary soundings, give all necessary grades for establishing the line across, and also the grades for the bridge and the fill.

Q. For the bridge and the fill?

A. Yes, sir.

Q. You went out there and made some soundings to ascertain the character of the bottom, twenty-five of them, you say. When was it you made those soundings?

A. March 15th, 1930.

Q. As early as September 12th, the Bridge Company had notice that these oyster men claimed their grounds were being ruined. You made no investigation prior to that time?

A. Yes, sir.

Q. Prior to March? All right. What soundings did you make then and when were they made? When were the soundings made?

A. Well, I was out with Mr. Lloyd in 1927, and Mr. Hackney, and we tried soundings then.

Q. When after that?

A. Then I was out again in 1928.

Q. What time in 1928?
A. In June, 1928.
Q. With whom?
A. With two of my men.
Q. Where did you go then?
A. On both sides of the bridge.
Q. For what distance?
A. For about 300 feet either side.
Q. For what purpose?
A. To see whether there was any change in the bottom.
Q. What part of June was it?
A. June 18th.
Q. Was the fill that was made on the southwesterly side of Drag Channel made at that time?
A. Partly.
Q. Did you find any change in the bottom?
A. No, sir, only where the fill is up here.
Q. Only where the fill is? You did find some change there?
A. Oh, yes.
Q. Will you tell the jury how wide Creek Channel is?
A. No, I could not.
Q. How wide do you estimate it to be?
A. I should say not over two hundred feet wide, at the most.
Q. And where is it? Will you locate as nearly as you can the center of it for me?
A. Approximately I should say Creek Channel is there, about, and runs on through here.
Q. Creek Channel?
A. Yes.
Q. Were these soundings that you took made in Creek Channel?
A. Some.
Q. Some in Creek Channel? What is the effect

upon the gathering of sand or upon the bottom of a channel—what is the effect of a current upon it?

A. I don't quite see what you mean.

Q. I want to know whether the current has a tendency to scour the bottom of a channel or does it leave it as other land?

Mr. Hanstein: I have not qualified this witness as an expert in that regard.

A. I couldn't say.

Q. You couldn't say?

A. No, I could not.

Q. You don't know whether the current scours the bottom or not?

A. Oh, yes.

Q. It does?

A. Yes.

Q. Then if these plates that were put down had been put down in Creek Channel and subjected to the tide for a year or so that was running forty-one feet a minute in flood and forty-nine feet a minute ebb, would you expect to find anything on them or would you expect to find them—I will strike that out. Would the current have a tendency to keep them clean?

Mr. Hanstein: I object to it because he has not testified anything whatever about plates.

The Court: And there is no testimony that they were put in Creek Channel. The testimony is that they were over on the flats, were they not?

Mr. Bourgeois: No, he just pointed out two places.

The Court: As I understand his testimony they were covered by about two and a half feet of water at low tide.

Mr. Bourgeois: Well, I will withdraw that, if that is so. I do not recall it.

Q. Now, Mr. Collisson, how deep was this thin mud, soft mud that you found before you came to the hard mud?

A. Well, that was in different places, as I stated.

Q. Well, did you measure it? Did you go through the soft mud to find out how far you had to go before you came to the deep mud?

A. We used tongs.

Q. You didn't use a probe or anything of that sort?

A. We tonged and brought the bottom up.

Q. What was the length of the prongs on the tongs?

A. I should say they were close to four and a half inches.

Q. Did you get through the soft mud with the tongs or not, down to the hard mud?

A. No, there wasn't any hard mud.

Q. How deep did you go?

A. Well, we went the depth of those tongs.

Q. In other words, there was no hard mud within four inches of the surface of the mud?

A. No, sir.

Q. But you didn't find any oysters and practically you found no clams over any of this ground, did you?

A. We found some clams and no oysters.

Q. How many clams did you find all together? A bushel?

A. I don't remember if I kept count or not.

Q. Well, was there as much as a bushel, do you think?

A. No.

Q. Not as much as a bushel over all of this land, and no oysters?

A. No oysters whatever.

Q. But you did find oyster shells?

A. Oyster shells.

Q. In other words, there had been a time when oysters had been growing there?

A. Yes.

Q. Now, Mr. Collisson, I have this exhibit, which is Exhibit D3, and it contains a contract between the Ocean City Automobile Bridge Company and the Hill Dredging Company, and one clause of it reads as follows: "It is further mutually agreed that the party of the second part"—that is, the Hill Dredging Company—"will save the party of the first part" ——

Mr. Hanstein: Just a moment. I don't like to interrupt him before he has asked a question, but I am entirely familiar with that clause, and it seems to me I would like your Honor to see it. Perhaps it ought to be argued at side bar.

The Court: The contract is in evidence, anyhow, and the entire contract must be in evidence.

Mr. Hanstein: But it seems to me that any question directed at all to the particular paragraph that he is starting to read is bound to do nothing more nor less than to inject something foreign to the issue and possibly to confuse the jury.

(The following occurred at side bar).

Mr. Bourgeois: The question I want to ask is whether or not he is the proper person under whose direction this fill was to be made.

The Court: You don't have to read that paragraph to ask that question.

Mr. Bourgeois: I have a right to read it.

The Court: I don't see any reason for reading it, because it has no bearing on your clients' right to recover at all. It is proper to ask the question whether or not he was the person designated by the Bridge Company as the person to direct the work.

Mr. Bourgeois: I am directing this question to him for the purpose of showing his interest in this suit. He is the engineer under whom this work was done and there is another clause like this afterwards. That is the clause I am reading now, and then over here there is another clause which says that the party of the second part further agrees that the sand so deposited shall be pumped so as to conform to the grade given by the engineer. I am trying to find out whether that was done. If it was not done, the company itself may be liable.

The Court: Whether he gave them the proper grades?

Mr. Bourgeois: Yes.

The Court: That is perfectly proper.

Mr. Hanstein: That is all right.

The Court: But it seems to me it is ridiculous to read that whole paragraph and get to the jury the proposition that there is an indemnity contract, when that indemnity contract has nothing whatever to do with your right to recover. If you recover, you do not recover by virtue of that indemnity contract: you recover by virtue of the proof. It is the same as telling the jury that one party is insured. You can ask him whether or not he was the engineer appointed by the bridge company for the purpose of giving directions to carry out the contract work, and that answers that whole question.

(The question was repeated in open court).

Mr. Bourgeois: Is there an objection to it or a ruling on it?

The Court: I have suggested that that clause contains subject-matter which does not concern your right to recover one way or the other.

Mr. Bourgeois: Does Mr. Hanstein object to it?

The Court: Yes, and I have suggested that the question you want to propound will be just as easily propounded by eliminating the reading of that matter as by the reading of it.

Mr. Bourgeois: I had in mind two things. I want to show the witness's interest in the subject-matter and, if possible, to show he is prejudiced. I think that question is valid for that purpose, but if it is ruled against me ——

The Court: Are you pressing the question?

Mr. Bourgeois: Yes.

The Court: I am going to permit the reading of this paragraph by Mr. Bourgeois, and I instruct the jury that that paragraph has absolutely nothing to do with the right to recover on the part of the plaintiffs in this case; that it is a contract as between the Hill Dredging Company and the Bridge Company on indemnity, and has absolutely nothing to do with the right to recover or the failure of right to recover on the part of the plaintiffs. I am allowing it to be read because it is being pressed.

Mr. Bourgeois: I am willing to admit that it has nothing to do with our right to recover.

(Exception noted for defendants).

(Question repeated).

Q. —"harmless from all actions at law or otherwise resulting to or from the work embraced herein and will conform to the laws of the State of New Jersey pertaining to employers and employees, and to do all the work in conformity with the laws of the State of New Jersey at the regulation of the War Department and under the proper direction of the party of the first part." Are you the person, Mr. Collisson, who was to determine on the ground the proper direction of the party of the first part?

A. No, sir.

Mr. Hanstein: I object to it on the grounds previously stated.

The Court: Yes.

Q. You were the engineer in charge?
A. Yes, sir.
Q. Who gave the stakes for the pumping in of this sand?
A. I did.
Q. For whom did you give them?
A. For the Hill Dredging Company.
Q. For the Hill Dredging Company?
A. To fill by, yes, sir.

Mr. Hanstein: I ask that be stricken as not being responsive.

Mr. Bourgeois: Yes, I am willing to have that stricken.

The Court: It is stricken.

Q. Who was your employer when you gave the grade for those stakes?
A. My brother.
Q. For whom were you working?
A. My brother.
Q. Then you were not the engineer in charge?
A. Yes, sir.
Q. For whom?
A. For my brother.
Q. And your brother was in charge for whom?
A. He was chief engineer of the Bridge Company.
Q. Then you were employed indirectly by the Bridge Company? Is that right?
A. Yes, sir.
Q. That is what I thought. And you gave those stakes to the Hill Dredging Company as engineer for the Bridge Company?
A. That is right.

Q. Under the specifications there is this clause: "Sand fill. Upon the area shown in red shall be placed by hydraulic dredges or other means sand fill to the grades shown on the attached plan and as set by the engineer." Are you the person who set those grades?

A. Yes, sir.

Q. —"All sand fill shall conform to the grades and will be completed without depression, discharge or holes, and so forth." Were you the person to see to that?

A. Yes, sir.

Q. Were you the person who was to see that the land was placed on these plots that are marked red, as I recall it, shown in red on the plans?

A. Yes, sir.

Q. I show you this plan and ask you if that shows the bridge area with the plan shown in red, the plot shown in red?

A. Yes, sir.

Q. Which of those plots, if either of them, is shown on the map on the easel on the easterly side of Drag Channel?

A. That would be this along here.

Q. That is the one at the bottom of the map?

A. That is right.

Q. Of this draft here?

A. Yes, sir.

Q. And which is the plot on the diagram attached to the specifications that is shown on the map to the southwesterly side of Drag Channel?

A. In here.

Q. That is the middle one?

A. That is right.

Q. Now, will you tell me what is the length of the first plan or plot marked in red?

A. About 730 feet.

Q. What is the width of that plan that is marked red on the diagram attached to the specifications?

A. It doesn't show any width.

Q. Can't you tell me? You were the engineer in charge.

A. Well, the main part of the roadway is thirty feet wide.

Q. I didn't ask you that. I asked you to tell me the width of the part that is marked red.

A. Well, the only way I could tell you would be to scale it.

Q. Won't you do that for me, please?

A. I should say that was 60 feet.

Q. And 60 feet only?

A. Yes, sir, on this map.

Q. On that map? Well, how much was it—all right. What is the length of the second f the red plots on that diagram which is shown on the map to be southwesterly of Drag Channel?

A. About 1220 feet.

Q. And what is the width of the red tract or parcel?

A. The same as the other, 60 feet.

Q. What is the width of the fill shown on the map to the northeasterly of Drag Channel? That is, the map on the easel. Will you scale it for me, please?

A. As shown there, 60 feet.

Q. As shown there, 60 feet?

A. Yes, sir.

Q. What is the width of the part on the southwesterly side of Drag Channel? What is the width of that part?

A. That is also shown 60 feet.

Q. When you were out there making investigations, did you measure to find out what the actual width of the sand fill was?

A. Yes, sir.

Q. What was the actual fill of the sand at low-water mark, the width of it?

A. It will vary.

Q. Varies from what?

A. It will vary from 250 feet to maybe 450 feet.

Q. And on the other side, did you measure that, also?

A. I just showed the edge on the side.

Q. And the measurements you have given me for the width of the fill as it appears on the ground, is the width of the fill that is above low-water mark?

A. Yes, sir.

Q. You made no measurement to ascertain how far it would extend out beyond low-water mark?

A. Yes, sir.

Q. Can you tell me?

A. That is as far as the fill has run.

Q. I beg pardon?

A. In other words, that is as far as the sand fill has run, to there.

Q. That is the low-water mark?

A. Yes, that is right.

Q. And you say it didn't run any beyond low-water mark?

A. No, sir.

Q. What formed the foundation for it at low-water mark?

A. The water that stopped the flow of that sand. When it hit the water the sand would settle.

Q. Well, is that a fact?

A. Yes, sir.

Q. Then why, if that is so, when we go in bathing, when we go out into the ocean and it comes low-water mark, don't we go right straight down? That is what you say this does.

A. This was pumped in by a dredge. The force of that water from the dredge hitting the water ——

Q. Your understanding is, what you want us to understand, is that this has a gradual slope between high- and low-water mark?

A. That is right.

Q. And when it gets to low-water mark it goes right straight down?

A. Oh, no, this is all flat down here. It will start off with maybe nothing and go out here two foot, two and a half foot of water, understand, not sand; water.

Q. In other words, it goes gradually?

A. That is right.

Q. The sand goes gradually from the low water on out as far as it extends?

A. That is right.

Q. That is what I thought. But you made no measurements to ascertain how far that sand extended beyond low-water mark?

A. That is what I was trying to explain to you, that this sand didn't run any further than to there. There is no indication beyond this point of any sand fill.

Q. I understood you to say ——

A. There is water there.

Q. You say that you run from here to low-water mark, and then there is more water and more water and more water, which indicates there is less sand, less sand, less sand, as you go further out?

A. Not necessarily.

Q. What would it indicate?

A. That is natural bottom there.

Q. What is natural bottom?

A. That is the natural bottom of sand or mud, whatever it may be.

Q. Mr. Collisson, was that below low-water mark, what you call the natural bottom?

A. Before?

Q. Yes.

A. Yes.

Q. How much below?

A. I should say it would vary from four-tenths to maybe six feet.

Q. Did I understand you to say that sand pumped into water would drop right down?

A. Yes, sir, as soon as it hits that water it stops its force and it will settle right down.

Q. Does that have an effect upon anything else except sand, that same effect? Does water have the same effect on anything else except sand?

A. Just what do you mean?

Q. If a piece of iron were shot into water, would that drop down, too?

A. Yes. It would lessen its speed, wouldn't it?

Q. It would go on, or wouldn't it go on?

A. It would go down until it struck bottom.

Q. And as soon as it struck the water, it would go down and not straight ahead?

A. That is right.

Q. That would also be true, I suppose, of a charge from a submarine where they shoot them out under water, a torpedo?

Mr. Hanstein: I object to that. There is no proof we used torpedoes on this land.

Mr. Bourgeois: It is the same principle.

The Court: He says the energy is the same except it has less speed.

Q. Would that be true of a torpedo, too?

A. Yes, but they are propelled by a motor.

Q. In this instance this was propelled by the tides, wasn't it?

A. Yes.

Q. That would have some effect, wouldn't it?

A. Yes.

Q. Let us go back to this filling again just a little. Mr. Collisson, you probably know—I don't. What do they have at the bottom of the pipe they sink down to gather the sand? I guess they call it a sucker, maybe. What do they have, in fact?

Mr. Hanstein: I object to this. I do not see that this is cross-examination.

The Court: I don't know on what point it is cross-examination.

Q. You were the person in charge to see that this bridge was built in accordance with these plans and specifications, weren't you?

A. Yes, sir.

Q. And according to your plans and specifications, you were required to fill in Tallman and Lloyd's land, weren't you?

A. Yes, sir.

Q. According to the plans and specifications you were required to do that. Then, in addition to that fill, there was other fill put in there that wasn't within the limit of your 60 feet?

A. No, sir.

The Court: You mean there wasn't any fill beyond the 60 feet, or do you mean there was?

A. There was fill, yes.

Q. And beyond the fill, Mr. Collisson, what did you have to support your bridge? What did you have to support the bridge beyond the fill?

A. We had steel caissons filled with concrete.

Q. How were those caissons settled? How were they sunk?

A. They set over a cluster of piling that is driven.

Q. How were the pilings settled? How were they sunk?

A. By a pile-driver.

Q. How were the caissons settled?

A. By a crane lifting them up and setting them down.

Q. Any hydraulic pumping there for them?

A. No.

Q. Not any place along there?

A. No.

Q. But you did go across Lloyd's land?

A. Yes, sir.

Q. Are these red portions of that driveway for that bridge shown on the maps attached to this in more detail than you have given it to me?

A. Yes, sir.

Q. Will you refer to it, please.

Mr. Hanstein: I have permitted this to go on, but I do not really think it is cross-examination of this witness.

(Objection sustained.)

(Exception noted for plaintiffs.)

Re-direct examination.

By Mr. Hanstein:

Q. Mr. Collisson, Mr. Bourgeois asked you a question. I don't know whether your answer was ambiguous or whether I didn't quite understand you. With regard to your going down and testing the character of the bottom, he asked you whether or not that was the way you determined how deep the water was, or something to that effect.

The Court: How deep the mud was.

Q. Well, the question related to whether or not you had ascertained the depth of the water by soundings, or whether you merely used a tong.

A. Well, I think what Mr. Bourgeois meant was at the time I took those twenty-five readings.

Q. That is what you were referring to?

A. Yes.

Q. And at those times you didn't undertake to ascertain the depth of the water?

A. No.

Q. All you were doing at that time with the tongs was gathering bottom?

A. That is right.

Q. There was another question that he asked you, and I am not sure how clear your answer was. He directed your attention to a map which I now show you, which has a red portion, being the roadway, and showing a width of 60 feet. What is that red portion that is 60 feet wide?

A. That portion is the main part of the roadway.

Q. When you say the main part of the roadway, you mean the road bed itself?

A. That is right.

Q. Under these plans I guess you testified that there was to be fill outside of that in order to support that?

A. Yes, sir.

Q. Is that correct?

A. That is right.

Q. And that was put in in accordance with the plans and specifications?

A. Yes, sir.

Q. And upon the grades given by you; is that correct?

A. That is right.

Q. Did you ascertain the location of these corner stakes of the oyster beds? Did you locate some of them?

A. Some of them.

Q. Did you make a subsequent survey and find out whether or not there had been any changes in those stakes?

A. Yes, sir.

Q. Had there been any changes?

A. Yes, sir.

Q. Did you show them on your map, these changes?

A. Yes, sir.

Q. Will you point out to the jury by reference to location where stakes were changed?

Mr. Bourgeois: I object to it unless it is shown that some of our people changed them. If they changed them it is all right for him to show it.

By the Court:

Q. When was the examination made that you made?

A. This year.

The Court: I sustain the objection.

By Mr. Hanstein:

Q. Both of your examinations made this year?
A. Oh, no. 1928 and this year.
Q. 1928 and 1930?
A. Yes.

Mr. Hanstein: I think we would be entitled to show that they were changed between 1928 and 1930?

The Court: They claim that whatever damage was done was in 1929 when you did your pumping, and it may well be that the stakes were changed after that. Then, again, you don't show that they had anything to do with the change of the stakes. I will sustain the objection.

(Exception noted for defendants.)

By Mr. Bourgeois:

Q. Now, Mr. Collisson, just a couple of questions following up what Mr. Hanstein asked you. Referring to the map attached to the contract, I show you what appears to be a cross-section of this road. That shows the main roadway of how much?
A. Sixty feet.

Mr. Hanstein: I object to this as not being a part of the direct examination.

The Court: Yes, it is. On re-direct you asked him whether or not the roadway was sixty feet and whether in addition to that roadway there was not

more fill beyond the sixty feet. He has a right to cross-examine on that question.

(Exception noted for defendants.)

Q. That appears to show 60 feet for the main roadway; is that right?

Q. It shows an abutment on either side of it. What is that abutment or whatever it may be, a fill?

A. Yes, sir.

Q. What is the width of that fill on either side?

A. Forty feet.

Q. That makes sixty and eighty is 140 for that distance?

A. That is right.

Q. Beyond that fill there seems to be another fill extending out. Is that a fill?

A. Yes, sir.

Q. What is the width of the fill on either side there?

A. 100 feet.

Q. On either side?

A. Yes, sir.

Q. Then it makes the total width of that fill 340 feet?

A. Yes, sir.

Q. As you go across into that land?

A. That is right.

ELTON RISLEY, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Risley?
A. Ventnor.
Q. What is your business?
A. Hydraulic dredging.
Q. What is your connection with the Hill Dredging Company?
A. Vice-president and general manager.
Q. Are you in charge of the operations of the work of the Hill Dredging Company?
A. I am.
Q. What work does the Hill Dredging Company do?
A. Hydraulic dredging and some bulkheading and pile-driving, but hydraulic dredging is the principal business.
Q. What is hydraulic dredging?
A. The pumping of sand through pipes with a hydraulic dredge.
Q. Pumping sand through pipes and filling in land; is that it?
A. Yes, sir.
Q. How long have you been engaged in that business?

The Court: Won't you admit his qualifications as a hydraulic engineer in this kind of construction?

Mr. Bourgeois: Yes.

A. Thirty-four years.
Q. How many years?
A. Thirty-four years.
Q. Have you during that time done the work of filling in for roadways?
A. At various places on the Jersey coast.
Q. And you are familiar with the method of doing that?
A. Yes, sir.
Q. And know the method used at other places and by other people?
A. Yes, sir.
Q. Did you examine this ground over which you placed your fill?
A. I had it examined.
Q. Did you do it personally?
A. Not very much.
Q. You were over it somewhat, were you?
A. A little bit.
Q. Was this work done under your direction?
A. Yes, sir.
Q. Are you familiar with the tides out in this neighborhood?
A. Somewhat, yes, sir.
Q. Are you familiar with the effects of tides on the carrying of sand and other material?
A. Oh, yes.
Q. Did you receive notice of this—or see this letter of September 12th, 1927?
A. Yes, sir.
Q. Did you, subsequent to that, have an appointment with Walter Lloyd?
A. I did.
Q. Did you go out?
A. No, the appointment was with Jesse Thomas.
Q. What is that?

A. The appointment, as I recall it, was with Jesse Thomas, and I remember Walter Lloyd being along.

Q. And not Jesse Thomas?

A. I don't remember Jesse Thomas.

Q. Did you go over these grounds?

A. Yes, sir.

Q What conversation was had with Walter Lloyd?

A. He claimed that mud had killed oysters and clams on this ground, and I asked him to show me where, and he couldn't show me.

Q. Did you try the ground at various places?

A. We did at various places.

Q. What kind of bottom did you pick up?

A. Found loose shells, some very few oysters, perhaps four or five, and some clams. Mostly loose shells on the bottom. No signs of mud of recent deposit or any deposit of sand.

Q. Could you tell by examining the mud that was brought up whether or not it had been recently deposited?

A. Oh, yes.

Q. What would you say would be the difference between mud recently deposited and the natural mud buttom?

A. When we brought up the oysters and shells, they were clean, and if there had been any recent deposit of mud, they would have been muddy.

Q. And they were not muddy?

A. They were not muddy. Of course, they were some muddy, as they always are, but I mean they didn't show any evidence of a recent deposit of mud.

Q. What would you say as to the pieces of the bottom that were brought up?

A. They were hard mud of various kinds, hard mud, and there was some not quite so hard, but all hard enough to have been there for a long period.

Q. Did you see any sand on this mud bottom?

A. Very, very little.

Q. Where did you see any sand at all?

A. I don't recall that we brought up sand. We found sand up in this vicinity. I wouldn't be so sure if we found any sand on this leased ground or not, but Mr. Lloyd took us up, he said that there had been sand deposits up here, and I wanted to know, because I couldn't conceive it to be possible, and he took us up in the vicinity of this piece of ground and there was sand there, but it was not deposited by us.

Q. Could you tell whether it was natural sand there?

A. No, only that it couldn't have been carried there from our work. I couldn't tell from any examination of the ground whether it had been a recent deposit or not. That is a conclusion, really.

Q. But over the rest of the area you found mud; is that correct?

A. Yes.

Q. For sand to have been carried there from the fill which you did on this easterly side of Drag Channel, what course would it have had to take?

A. Well, Drag Channel shortly above the bridge and at the bridge is about seven or eight feet of water in the deepest part of Drag Channel, and this is the edge of Drag Channel on the eastwardly side, and here is the extent of our filling, from there to the shore, on the flat where the tide was very, very sluggish, and the tide as it passes the bridge and passes the island here spreads a little bit, of course, that way, but very, very little. It begins to spread and sweep around this way to go up the Patcong Creek. You see, this is a broad body of water here, narrowing as you go on up, drawing that water or flowing to it on the flood tide, and you can detect a

little tendency of the low-water line here to swing around this way, and that becomes more prominent, that is, the tendency of the tide to swing around this way becomes more prominent as you get up here, and it lessens in velocity very materially, which is evidenced by the lessened depth of the channel. It is almost all dry there. This always falls dry here and this is shallow water up through here.

Q. And the trend of the tide that runs through Drag Channel is to flow into Patcong Creek?

A. Yes.

Q. What would be the effect of sand from your fill, assuming that it went out there into Drag Channel, what happens to this sand as it pumps?

A. It falls just as soon as it reaches sluggish water and drops to the bottom. If you fire a cannon ball into water, it will soon drop to the bottom, because it loses its velocity very quickly when it hits the water.

Q. You have had experience with that sort of thing for a great many years, haven't you?

A. Thirty-four years.

Q. The fill that you put in on the westerly side of Drag Channel was put on what sort of ground?

A. On the westerly side there is eel-grass out to this line, and from here out to here.

Q. Eel-grass is this long grass that we had in court yesterday, isn't it?

A. Yes, sir.

Q. What is the effect of pumping sand on top of eel-grass, so far as the sand running is concerned?

A. It can't run through eel-grass, because the eel-grass won't permit the tide to run fast enough to carry sand.

Q. So that it acts as a retardant, does it?

A. Yes, sir.

Q. And it slows up?

A. Very decidedly. You can go into eel-grass and almost always the water is clear in the eel-grass a little distance, showing that any deposit of mud or color, even, of the very lightest color, will drop to the bottom, showing that the water—all of the solid materials will drop from the water.

Q. Does eel-grass generally grow at a place where there is a strong tide?

A. It will grow where there is considerable tide, but it has a very decided effect in slowing the tide up, and as a consequence where it grows the bottom is likely to shoal up.

Q. Was there a strong tide across this bed of eel-grass where you deposited your fill?

A. No, there was not.

Q. Was the tide as strong there as it was in Drag Channel or in the other channel? Creek Channel?

A. No, very much less. As a matter of fact, on flood tide the island down here held the tide off of this section here, anyhow. Away out to this edge of Creek Channel, on the flood tide there was comparatively little tide, due to the breaking offects of the island and the fact that the flood tide sweeping up from the inlet naturally tended to hug the westwardly side of that channel. The ebb tide would flow as much one place as another.

Q. This island you refer to is shown here as Ledge or Drag Island?

A. That is it.

Q. That has a tendency to retard the flow of the tide?

A. It acted as a shield to the eastwardly side of Drag Channel to some extent. It gets wide as you go down.

Q. Which tide would have the tendency to carry the most sand, the ebb tide or the flood tide?

A. The ebb tide.

Q. That is the tide running out?

A. Yes, sir.

Q. Can you tell us why that is?

A. Why it is stronger or why it carries sand more? It carries sand more because it is stronger.

Q. Why is the ebb tide stronger?

A. Well, that is a very difficult and intricate question, but it is ——

The Court: It is agreed that it is by both sides, so what is the difference why?

Q. Can you say whether or not this sand as deposited by you was carried by the tides as you deposited it?

A. It was not.

Q. Has it been carried since?

A. Very, very little. At the westwardly end of this fill it has been carried to some extent.

Q. Which way?

A. On the ebb tide. Toward the ocean. That fill when made was about approximately a rounded shape, and the ebb tide hit this corner of the fill, and it would always hit—when you project a fill out into a channel or the tide, the tide, of course, comes down and hits here and glances off like. Here the eel-grass kept it from running back here, but it ran off here, while the tide would follow down the edge of the eel-grass and glance off this edge like and carry this sand down with the ebb tide. It is shown there quite much, and even more than that would show were the tide much lower. There it has been sometimes carried beyond where that line shows on the ebb tide.

Q. At what stage of the moon was that fill put in on the end there of Creek Channel?

A. On the apogee moon.

Q. In what way does that affect the tide?

A. With an apogee moon, the tides run with much less force, because they raise and fall less.

Q. And there was less force then when you put that fill in?

A. That was the last fill we put in. We finished that on May 31st, 1928, and the moon went into apogee on the first of June, as I recall it. And it was in perigee on the 18th, as I recall it.

Q. Will you explain to us the method of construction that was used here?

A. We first pumped the sand up to or above high water. We then allowed it to settle, and some of it was repumped where it settled too much, before the fence was built. Then there was a board fence, temporary board fence, constructed forty feet outside of the bulkhead, creosoted bulkhead that was three feet above high water.

Q. What was three feet above high-water?

A. The top of the fence which was put there for a temporary retaining wall for the plans or for the fill, up to that height.

Q. You first put in this fill and put a fence up on each side?

A. Yes, sir.

Q. Then what did you do with regard to the filling in between the fences?

A. We constrcuted a creosoted bulkhead to an additional height and made a fill inside of that sixty feet wide.

Q. Then did you fill in outside of the bulkhead?

A. We filled between the fence and the bulkhead to a height of three feet at high tide.

Q. From whom did you get the grades and stakes for the doing of that work?

A. The engineers, Mr. Collisson.

Q. Was this work done in the usual manner of doing this sort of work?

A. Yes, the same as ordinary method.

Q. The ordinary type of construction?

A. Yes.

Q. With regard to the width of the fill that was first put in, was that done under the direction of the engineer?

A. Yes.

Q. Was that full width put in by reason of his direction?

A. Yes.

Q. Was this work accepted by the bridge company?

A. Yes, and paid for.

Q. With regard to the bridges, did you build any of the bridges?

A. We did not.

Q. All you did was the filling and the bulkheading and the erection of the fences?

A. That is it.

Q. And this bridge that goes out here ——

A. The gravel work was under our contract. Gravel and fence was under our contract, too.

Q. This bridge that goes across Drag Channel and the bridge that crosses from the end of your abutment at Creek Channel over to Beesley's Point was done by some other contractor?

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Risley, what do you have at the bottom of your pipe that goes down into the water—I think

you call it the sucker, maybe; I don't know—to agitate or loosen the sand?

A. We have an auxiliary down-flow conduit attached to the pipe to allow the water to go down that, independent of the mud that may accumulate around the pipe, and that is stopped slightly short of the main upward conduit. The upward conduit is flared out, and the downward conduit is diminished in size or tapered down, and the vacuum that exists down there when the dredge is running draws water down this conduit and it hits the bottom and stirs it up. It can be done without that.

Q. How do you do where you have no sand to dredge and you are dreding in mud?

A. We use this downward draft conduit in sand and mud, both.

Q. Do you have anything except this hydraulic water or line down there?

A. Not on this job. We sometimes use a cutter dredge to cut the material up when we ——

Q. What is that? What kind of material do you use for that, what kind of a machine?

A. We do that for mud, or when we are making a channel and want to produce a level bottom.

Q. That is the for the purpose of cutting it up even so it will go through your pipe?

A. Yes.

Q. But for mud such as you found over there, and sand such as you found over there, just water going down there was sufficient to break it up to enable you to pump it?

A. Yes, sir.

Q. How large a clot of mud can you pump through one of those pipes?

A. As big as your head.

Q. To what depth did you pump while you were over there?

A. The suction pipe went down over forty feet, but just how much water we left I am not so sure.

Q. What was the size of the suction pipe?

A. 16-inch.

Q. The same as the other?

A. Yes.

Q. The same as the discharge pipe?

A. Yes.

Q. Where did you have your dredge in Drag Channel? Where was it located?

A. I think perhaps it would be off of this map, but, anyhow, down in this vicinity along the flats on this side of the channel down there. There are no flats shown on here.

Q. On the southerly side of the channel?

A. Yes.

Q. Did you do any pumping when you had your dredge up near the bridge, what is the bridge now?

A. No. We first placed the dredge there, but there was too much mud and we moved it down to the other place.

Q. Which did you pump the more of, sand or mud?

A. Sand.

Q. You pumped more sand than you did mud?

A. Oh, yes. In fact, it was nearly all sand. Very little mud.

Q. You say you pumped in the sand in nearest Creek Channel on the apogee moon?

A. Yes, sir.

Q. That is when the tides were running low?

A. Yes, when they are in slow motion. They don't raise so much nor fall so much. Therefore, they are in slow motion.

Q. There isn't so much water, and consequently not so much motion?

A. Yes, that is it.

Q. Did you select that time for the pumping in of

the sand there, or did it just happen when you got there?

A. It was that way when we were there, anyhow. We aimed to get there when the tide was running slow, so that there could be no question.

Q. You realized that when the full tides came in, that there would be more movement of the sand?

A. We didn't think there could be any movement in any case, but we were taking all precautions.

Q. And it does follow that you have these full tides once a month?

A. Yes, about that, about once a month. It don't —in other words, they don't perigee and apogee exactly once a month.

Q. Every twenty-eight days they do, don't they?

A. Well, no.

Q. Thirteen times a year?

A. Not exactly. Sometimes there is more than a month that they don't perigee at all, and sometimes—well, I guess maybe they always apogee once a month, maybe. I don't know about that, but it is the swing of the moon out of the true ——

The Court: I think that is enough on that, is it not?

Mr. Bourgeois: I guess we can agree they are once a month.

A. Approximately, yes.

Q. Now, Mr. Risley, you have said that the fill in the main roadway, the 60 feet in width, was put in under the direction of the bridge company's engineer?

A. Yes, sir.

Q. And also the fill on either side of the main roadway, 40 feet in width, out to the fence?

A. Yes, sir.

Q. You didn't say anything about the fill beyond the fence at all, the fill, for instance ——

The Court: The base fill you are talking about?

Mr. Bourgeois: The base fill.

Q. You didn't say anything about the fill beyond the fence. I don't know what the distance is, but it appears as if it might be 150 or maybe 200 feet on the northwesterly side of the bridge.

A. It is easily a hundred feet there. We pumped that to high-water mark. It was approved that the fill could extend beyond one hundred feet.

Q. Could extend beyond?

A. Beyond one hundred feet.

Q. By whom was that approved?

A. The bridge company's engineers.

Q. That you might pump more than a hundred feet beyond the fence?

A. Yes.

Q. In other words, you might pump—is this right, that you might pump until the sand by its natural tendency found a bearing?

A. Yes, sir.

Q. And that happened to be or was northwesterly of the bridge something like 150 or 200 feet, wasn't it?

A. Yes, at that point.

Q. And southerly of the bridge maybe up to 325 feet in one place?

A. That is not sand that far out, I think. There is an accumulation of mud in there, due to a trap.

Q. Was that fill made beyond the 170 feet that you say was approved by the engineer, was directed by him?

A. I wouldn't say it was directed by him.

Q. Just what did happen about it, Mr. Risley?

A. We asked if there was any—if it was all right to allow the fill to extend beyond the 100 feet, and they said yes, that there was no objection to that, that it was a benefit to the road and could harm no one.

Q. In other words, so far as the construction of the bridge was concerned, he raised no objection?

A. No objection.

By Mr. Hanstein:

Q. You say he raised no objection. Did he approve of it?

A. Yes.

Q. I don't know if I asked you what kind of sand was pumped there. Was it fine or coarse sand?

A. Well, there was some fine sand that we pumped. That is part of the reason why it is wider here, because the sand was finer, and partly because the tides were lower there.

The Court: The question was simply what kind of sand it was.

A. It was fine and coarse. On this portion over here we went down deep to get coarse material that couldn't be easily moved by the tides.

By Mr. Bell:

Q. Mr. Risley, who designed the plans for the sand fill and bulkhead?

Mr. Hanstein: I object to that.

The Court: They show for themselves. The plans are in evidence, and they show that they were prepared by so and so.

Mr. Hanstein: And it is immaterial who prepared them.

The Court: I don't know that it would be immaterial, but they speak for themselves.

(Exception noted for defendant, Ocean City Automobile Bridge Company.)

Q. Mr. Risley, you have testified that the stakes were given to you by the bridge engineer for the main roadway, and that the other pumping outside of the main roadway for forty feet, on each side, was also under the direction of the engineer?

A. They gave us the stakes for the forty feet.

Q. They gave you additional stakes for the forty feet outside of the main roadway?

A. Yes, sir.

Q. Just how much direction did the engineer have over your work? Did he show you where to place your dredges to do the pumping?

A. He did not.

Mr. Hanstein: I want to object to the question. Now I don't see how it is material.

The Court: I will permit it.

(Exception noted for defendant, Hill Dredging Company.)

Q. Were any stakes given to you for the fill, the base fill?

A. Not to my recollection.

DEFENDANT RESTS.

(Recess taken until Monday, June 30, 1930, at 10 A. M.)

Atlantic City, N. J., June 30, 1930.

(Trial of the cause resumed at 10 A. M.)

PLAINTIFFS' TESTIMONY IN REBUTTAL.

LEWIS SOMERS, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Somers, you live where?
A. Scullville.
Q. John Simpkins testified that last summer you walked across Lloyd's oyster ground with him.

Mr. Hanstein: I object to that on the ground that Mr. Simpkins did not testify that way. I have a note of Mr. Simpkins' testimony, and it was not that. Mr. Simpkins' testimony was that he walked across this ground in 1928.

Mr. Bourgeois: With Lewis Somers.

Mr. Hanstein. Yes.

Q. Mr. Somers, did you walk across Walter Lloyd's ground with John Simpkins in 1928?
A. Not that I know of.
Q. You would know it if you had, wouldn't you?
A. I suppose so.

Q. Did you walk across there with him last summer?
A. No, sir, I did not.

Cross-examination.

By Mr. Hanstein:

Q. You have clammed in that neighborhood in 1928 and 1929, haven't you?
A. 1929, no, sir. I was down to Corson's Inlet last season all summer.
Q. Did you clam around there in 1928?

Mr. Bourgeois: I object. It is not a question of clamming.

The Court: It goes to the question of whether or not his testimony is reliable. It goes to the credibility of his present testimony.

Q. Mr. Somers, you clammed around there in 1928, didn't you?
A. Well, part of the time, but I always tonged most of the time.
Q. You waded some of the time, didn't you?
A. Very little.
Q. Some of the time, though, didn't you?
A. Not all summer I never waded at all.
Q. In 1928 didn't you do any wading?
A. I don't know. Very little, if I did.
Q. You know Mr. John Simpkins, don't you?
A. I suppose I do.
Q. Well, you are sure you know him, aren't you? There isn't any doubt but what you know him, is there?

A. I know him, sure.

Q. And you have been in the bay with him, haven't you?

A. I have, yes, sir, in his presence.

GIDEON SCULL, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Scull, where do you live?

A. Steelmanville.

Q. What is your employment, your vocation?

A. Fishing.

Q. Where do you fish? Where did you fish in 1925, 1926 and 1927?

A. I fished in Egg Harbor Bay.

Q. And 1928, where?

A. Egg Harbor Bay.

Q. How near the vicinity of the present Somers Point-Longport Bridge?

A. Well, in that neighborhood. Below and above.

Q. How far above and how far below were the fishing grounds? How far below were they?

A. The fishing grounds ranged, I suppose, to the best of my judgment—why, you can fish from the bridge on down. We usually fish from where the bridge comes across on down to the point of bar.

Q. That would be about how far below the bridge?

A. I should judge it would be in the neighborhood of a quarter of a mile.

Q. Where did you fish above the bridge?

A. Well, we fished right on the bed that they have made there at the present time.

Q. You mean the oyster beds?

A. No, the road bed. We fished, hauled and landed right on the bed that they had made.

Q. What about above?

A. That is above.

Q. Above the bridge, you mean?

A. Yes.

Q. How far above is that?

A. Why, that is right by the road. Landed there so that the automobile people came there to see us land our fish if we catched any.

Q. How near to the juncture of Drag Channel and Creek Channel was your fishing bed?

A. Why, we fished all the way down from the mouth of Patcong Creek Channel down to the lower end of what is called Goose Bar. That is the neighborhood of a quarter of a mile below where the bridge is.

Q. When you came out of Patcong Creek, the first channel you struck is what?

A. Creek Channel.

Q. Then as you come down Creek Channel, is there another channel joins into that?

A. Drag Channel.

Q. Then Drag Channel as you go up—if you go up Drag Channel you first come into Drag Channel and then you go on and come into Patcong Creek?

A. Yes.

Q. How long have you been fishing at these fishing grounds prior to 1927 and 1928?

A. About fifty-eight years.

Q. Do you remember fishing there at the time they did the pumping?

A. I do.

Q. What effect, if any, did the pumping have upon your fishing?

Mr. Hanstein: I object to that. I did not understand they were going to prove that we killed any fish.

The Court: Of what is it rebuttal?

Mr. Bourgeois: Mr. Risley and some of the others say that when this sand and mud was pumped in, it dropped right there and stayed. I propose to show that that drifted down past where they were fishing and filled it up there.

The Court: I think you may show that.

Mr. Hanstein: May I say a word with regard to the rebuttal feature of this? In their main case they assumed the burden of proving that we deposited sand on their grounds. That was their case. Our defense was that we did not. It seems to me that to come along and again prove that we deposited sand there calls on us to again call witnesses to prove we did not, and we are doing the whole thing over again.

The Court: No, they are not saying that. They are merely trying to disprove one portion of your testimony, to wit, that when the sand came out of the pipe and struck the tides, that it dropped. That is the only portion they are trying to disprove, as I understand it.

Mr. Bourgeois: That is all.

The Court: I think it is rebuttal of just that one proposition and that is all.

(Exception noted for defendants.)

Mr. Bourgeois: I can ask a direct question and avoid this general question.

The Court: That is what I think you ought to do.

Q. Did you continue to fish on those grounds?
A. Yes.
Q. How long?
A. Well, I have fished since.
Q. I beg pardon?
A. I have fished since that bridge has been put there.
Q. While they were pumping in there, what was the effect upon the fishing ground?

Mr. Hanstein: I object to that.

The Court: I will sustain the objection, what was the effect upon the fishing ground.

Q. What went down there?
A. Mud came down there, mud and sand came in great lumps the size of a baseball, larger and smaller, and the water was just as thick as it could be, and of course our fishing was ruined.

Mr. Hanstein: I ask that be stricken.

The Court: The latter part may be stricken.

Q. What about the upper part, up above the

bridge, up where Creek Channel and Drag Channel meet?

A. Sand and mud.

Q. It came up there?

A. Yes.

Q. Were you there after they stopped pumping?

A. Sure.

Q. After they stopped pumping, what was it then? What was the water like then?

A. The water was all right.

Q. Clear then?

A. It came clear after a while, yes.

Q. But the time when you say it was muddy there was when they were pumping?

A. Yes.

Cross-examination.

By Mr. Hanstein:

Q. Where were you fishing when you saw all this?

A. I was fishing right below there.

Q. Right below where?

A. Below where they were pumping.

Q. When you say below, you mean nearer the ocean?

A. I mean below, yes. I mean south.

Mr. Hanstein: I move that all his testimony be stricken in so far as it is designed to show that we caused any sand or mud to be pumped on the plaintiffs' grounds.

The Court: The testimony was not admitted for that purpose. The testimony was admitted for the purpose of his describing the conditions he saw at

the time the pumping was going on, and I will not strike it. I will let it stand for that purpose.

(Exception noted for defendants.)

Q. Now, Mr. Scull, where was the dredge at the time all this took place?

A. Over in Drag Channel.

Q. The dredge was in Drag Channel? Where was it pumping?

A. Where was it pumping?

Q. Yes.

A. Pumping on the road bed.

Q. Which bed?

A. On the south side of Drag Channel.

Q. South of Drag Channel, it was pumping?

A. Yes.

Q. All the time it was doing that pumping, you were fishing between the bridge and the ocean; is that correct?

A. Yes.

Q. So that you don't know whether there was any sand or mud up where Creek Channel and Drag Channel come together, do you?

A. I know since.

Q. At the time you were fishing you didn't see any at Creek Channel and Drag Channel?

A. I wasn't fishing up there at that time.

Q. And of course you continued to fish there, didn't you?

A. I did.

Q. How many days were you fishing there while that dredge was working?

A. Every day it was fit to be there.

Q. Every day you fished?

A. Yes, sir, excepting Sundays.

By Mr. Bourgeois:

Q. Who was with you?
A. Mr. Charles Somers.

By Mr. Hanstein:

Q. Did this mud and sand affect the fishing?
A. It affected our fishing.
Q. It kept the fish away, didn't it?
A. No, it didn't. It filled the ground in so you hadn't water there to catch fish in.
Q. While it was going on ——
A. Fish will run to high water.
Q. While the sand was being pumped it affected the fishing, didn't it?
A. Certainly it did.

By Mr. Bourgeois:

Q. Did the filling in of the ground affect the fishing after they stopped pumping?

Mr. Hanstein: I object to that.

The Court: I don't see how that makes any difference, whether the fishing was hurt or not.

CHARLES SOMERS, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Somers, you live where?
A. Mays Landing at the present time.
Q. Did you during 1927 and 1928 do fishing along with Mr. Scull?
A. I did.
Q. What was the result touching the water, that is, the sediment in the water of the Hill Dredging Company's dredge pumping up in Drag Creek?

Mr. Hanstein: I object to that. The question is not what is the effect of it.

The Court: It calls for a conclusion. He may testify as to what he saw.

Q. You fished down on the fishing grounds, did you, below the bridge, that summer?
A. Yes, sir.
Q. And did you fish on the fishing grounds above the bridge?
A. Yes.
Q. Did you notice any difference in the water when the pump was pumping, that is, that sand dredge was pumping, from when it wasn't pumping?
A. I did.
Q. What was the difference?
A. The water was riley.

Mr. Hanstein: What is "riley"?

A. Muddy. They filled it in where there was four feet of water, when they had done pumping, and other places were we had fished, there wasn't over two.

Q. What did you see come down there besides the muddy water?

A. Well, we caught hard lumps of mud and sand, wire, pieces of wood, coal, cinders.

Q. All ran down?

A. All came down with the tide.

Q. What did you find above the bridge up there where Drag Channel runs into Creek Channel?

A. Pretty soft mud.

Q. What was the state of the water there when they were pumping?

A. Well, it were thick when they were pumping.

Q. What about when they didn't pump?

A. Clear.

Cross-examination.

By Mr. Hanstein:

Q. Are you related to any of these plaintiffs?

A. No, sir.

Q. Where did you do your fishing? In the same boat as Mr. Scull?

A. I did.

Q. So the fishing you did was all between the bridge and the ocean?

A. No, sir.

Q. Mr. Scull says he did all his fishing between the bridge and the ocean. You don't agree with his testimony?

A. Above the bridge and below the bridge.

Q. Where did you fish above the bridge?

A. Mouth of Drag Channel, all the way down to the bridge.

Q. The mouth of Drag Channel?

A. Where it comes out into Creek Channel.

Q. And you fished up there during the pumping?

A. Yes.

Q. How many days?

A. Every day it was fit.

Q. So, although the water was full of mud and cinders and all this stuff you describe, you fished there anyway, didn't you?

A. Yes, I fished there.

Q. Did that muddy water affect the fishing? It drives the fish away, doesn't it?

A. Yes.

Q. Even though the fish were driven away by all this mud, you kept on fishing, didn't you?

A. Yes, we fished. Not all the time in one place.

Q. You have seen the waters muddy out there before, haven't you?

A. Only when the wind blows very hard.

Q. So when the wind blows very hard it is muddy, anyway?

A. To a certain extent.

By Mr. Bourgeois:

Q. Was the wind blowing hard all the time when you saw this muddy water?

A. No, sir.

By Mr. Hanstein:

Q. Mr. Somers, you didn't keep any record of how the wind was blowing on those days?

A. No.

Q. How long a time would you spend up there fishing? All day long?

A. Generally spend from four to five hours.

Q. Every time you were up there the water was muddy; is that it?

A. No.

Q. I mean while the Hill Dredging Company was pumping there?

A. When they was pumping, yes.

Q. No matter which way the tide went, it was muddy, wasn't it?

A. It was always muddy when they was pumping.

Q. Always muddy while they would pump?

A. Yes.

Q. Did you know that these dredges were oil-burning and not coal-burning?

A. Yes.

Q. You knew that?

A. Yes.

Q. These cinders that you talk about were from coal, weren't they?

A. Sure.

Q. How big lumps of mud did you see?

A. Oh, I judge we saw them as big as that pitcher there, and some smaller.

Q. Were they floating on top?

A. No, sir; on the bottom. Pulled them ashore with the net.

Q. You pulled them in with the net?

A. Yes.

JOHN H. SMITH, recalled:

Direct examination.

By Mr. Bourgeois:

Q. Mr. Smith, will you explain to the jury whether or not there was eel-grass on the oyster grounds in 1927 and 1928?

A. There was not.

Q. Where does eel-grass grow?

A. On the—the same as this is a straight line up here ——

Q. You can tell me without pointing on the map.

A. Just as you go up, it is a straight line up, and on the inside, I suppose from here to you, likely, and in some places a little bit closer, there is eel-grass grows up next to the stakes, and that is all.

Q. I don't care about that. Does eel-grass grow on the top of a bar?

A. On each bar, on each side, yes.

Q. Is it heavy, strong grass or not?

A. No, it will fall right down.

Q. What would be the effect of mud or sand being pumped on it?

A. Cover it up.

Q. If it were covered up, would it grow again, or other grass grow?

A. It would in time.

Q. Where will it grow?

A. On the edge of the bars and on top of the bars.

Q. Would it grow in four or five years?

A. Yes.

Q. What is the nature of the land on the northerly side of Drag Channel?

A. Northerly side of Drag Channel?

Q. Yes.

A. A mud bar and sand.

Q. What is on the southeasterly side? What is on the lower side, the southerly side, marked "Bar"? Is there bar there?

A. Yes, sir.

Q. Almost up to that ground?

A. Yes, sir.

Q. Then do I understand that Drag Channel goes up there between two bars?

A. Goes up between two bars.

Q. Does it turn around after it passes through the bridge to the north, to go into Patcong Creek?

A. It used to run up there before they started to pump, through the oyster grounds, and then took a southeast course out.

Q. Then went into what?

A. Into Cedar Swamp Creek Channel or Creek Channel, we call it.

Q. And Creek Channel went into what?

A. Into Patcong Creek, and another division went by Job's Point, the bay shore.

Q. Since that time has there been any change in Drag Channel?

A. The channel has shifted. Where it used to go before a southwest course, it goes about a west, northwest.

Q. Does it still go into Creek Channel?

A. Yes.

Q. Then Creek Channel goes into what?

A. Into Patcong Creek or Cedar Swamp, we call it nowadays.

Q. How high are those bars on the sides of Drag Channel?

A. Fall dry on good low water.

Cross-examination.

By Mr. Hanstein:

Q. I understand you to say that if you pump sand on eel-grass, it covers it over?
A. It surely will.
Q. And it kills it?
A. Sure.

Jesse Thomas, recalled.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Thomas, were you in the boat with Elton Risley and some of the others, I don't know who else—one of them was Mr. Lloyd, at the time Mr. Lloyd was taking them around in his boat along in September or somewhere about that time of 1927?
A. Yes, sir.
Q. When was it with relation to the time they commenced pumping, before or after?
A. I don't know. It was afterwards. I don't know just the time, though.
Q. Did you make some soundings up there?
A. Yes, sir, he did.
Q. Did Mr. Risley himself make some soundings, Mr. Elton Risley?
A. He done it all himself.
Q. What, if any, statement did he make about what he found when he was making those sound-

ings? There was one place, I think, up on Martin Scull's ground or somewhere there, where there was a sounding made?

A. He said he wanted to see some sand, so we run the boat up on Martin Scull's ground and anchored it, and he took a pole and punched through the sand, and he said, "There is a foot of sand here or more." He said, "This is all there is in it." I says, "Want to see some more?" And he says, "Yes," so I took him up on my piece just above Scull's, and he found the same, and I said, "Do you want to see some more?" And he said, "No, we will go home."

Q. How much sand did he find?

A. Foot or foot and a half, he said.

Q. How did he know there was a foot or foot and a half?

Mr. Hanstein: That is objected to.

A. He punched with a hole until he got through it.

Cross-examination.

By Mr. Hanstein:

Q. Who else was along?

A. Lloyd.

Q. Who besides Lloyd?

A. Mr. Risley, and I think there was them two fellows that sits on the end.

Q. You are talking about Mr. Hackney?

A. Yes.

Q. And Mr. Collisson?

A. Yes, I think they are the ones. I am pretty nigh sure it is.

Q. You didn't do any tonging then, did you?

A. No, sir.

Q. You don't know whether this sand that was brought up was sand that had ben there before the pumping or that got there after the pumping, do you?

A. It wasn't there before the pumping, I know that.

Q. How do you know it?

A. Because I tonged there before they pumped. That is how I know.

Q. You say that you know that there wasn't any sand there before?

A. Yes.

Q. Well, now, wasn't there a sand bar up here in the neighborhood of Somer's ground?

A. Yes.

Q. And Mr. Risley says that is where they were, up in there. Is that where you think they were?

A. I know where we was. I don't think nothing about it. I know where we was. We wasn't on the sand bar. We was in the channel.

Q. That sand bar extends out for some distance, desn't it?

A. Not in the channel.

Q. Not in the channel at all?

A. No, sir.

GIDEON SCULL, recalled.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Scull, Mr. Simpkins testified that on one occasion he saw Mr. Lloyd clamming when Mr.

Lloyd interfered with his hauling of a fish-net. Were you present when that happened, when Mr. Lloyd interfered with his hauling?

A. No, I wasn't present.

Q. Where were you?

A. I came down after.

Q. After?

A. After that happened.

Q. Where did it happen? How near to Mr. Lloyd's oyster grounds that are crossed by this bridge were Mr. Lloyd and Mr. Simpkins at that time?

Mr. Hanstein: I object to that. The witness testified he was not there.

The Court: He says he came down afterward, so that he can't testify as to where they were before he came down.

Q. You don't know whether there was interference with his ——

A. I wasn't there at the time they were there, and they just ——

Q. That is all.

CLARENCE I. COLLISSON, recalled.

Direct examination.

By Mr. Bourgeois:

Q. I wish you would scale from the low water mark on the southerly side of the bridge, this island here, to the northerly side, at right angles to high

water, at the northerly end of it, and then about midway, and then the narrow neck part that is on the southerly end.

Mr. Hanstein: I object to any such scaling as that. The only thing that could have any relevancy in this case would be the distance from the center of the roadway right and left.

Mr. Bourgeois: I want to know how much sand there is there.

The Court: It is not rebuttal of anything, but, on the other hand, I suppose he is entitled to know how much sand is there. The map is in evidence, and he is simply asking this gentleman to scale it for him so he will know what the scale shows. I would like to know what the scaling shows myself. Just scale it.

A. 540 feet at this point.
Q. How much of that 540 feet is on the southeasterly side of the middle of the roadbed?
A. 320 feet.

Mr. Hanstein: On which side?

A. Southeasterly side.
Q. How much on the northwesterly side?
A. 230 feet.
Q. Now go about the middle of the island. What is the distance across it?
A. 470 feet.
Q. And on the southerly side of the roadbed, the middle of it?
A. 240.

Q. And on the northwesterly side?

A. 230.

Q. Now, will you go on further to this little neck part, the narrow part, and tell me what is the distance there?

A. 310.

Q. How much on the southeasterly side?

A. 155.

Q. How much on the northwesterly side?

A. 165.

PLAINTIFF RESTS.

TESTIMONY CLOSED.

MOTION TO DIRECT VERDICT FOR DEFENDANTS.

Mr. Hanstein: My motion is for the direction of a verdict as to the defendant, Hill Dredging Company, on the ground first that there is no proof of negligence on the part of the Hill Dredging Company. The two counts of the complaint are, first, that we negligently pumped sand, and in the next place that we trespassed on their land and negligently pumped sand.

The Court: Right there, as I understand it, both sides agree that in so far as Tallman and Lloyd are concerned, you did pump sand on their soil directly, and therefore the count for trespass is all right.

Mr. Hanstein: So far as entering is concerned. The legal propriety of that presents a different ques-

tion, but in that respect those two plaintiffs stand in a somewhat different position. The only showing of negligence that has been made is that we pumped sand in without a retaining wall. The testimony shows that this is the usual way of doing that sort of work. The proof shows that the Hill Dredging Company was working under a contract with the Ocean City Automobile Bridge Company and that we did this work in accordance with plans and specifications of the Bridge Company, and all of it was done under the direction of the engineer of the Bridge Company. The fact that we built this bridge by pumping sand in without a retaining wall, pursuant to the plans, is something for which only the Bridge Company can be held liable. There was nothing shown in the filling of this contract that resulted in damage. Furthermore, any proof that they have as to the killing of clams or oysters does not exclude the possibility of them being killed from natural causes. Another phase of the case is that these plaintiffs base their right upon certain leases made by the State of New Jersey. I contend that the right these people had from the State is not a right of ownership, but a mere exclusive right to have oysters and clams from the beds. They take it subject to the sovereign right of the State to do something else, and they take it subject to the sovereign right of the State to build a road, for which it would not be liable. The State in this case gave a deed to the Bridge Company and gave a permit for the doing of this work, and the State cannot be held liable. The Bridge Company went in there with a grant from the State for lands and a license from the State for the doing of this work, the obvious effect of which was to subordinate these leases and subject them to the consequential injury which resulted from the doing of this particular

work unless, of course, we did this work in a negligent manner, which is not proven. Furthermore, it is quite obvious, it seems to me, that any injuries suffered by the plaintiffs in this case it is just as reasonable to believe were caused by the action of the tides as by the pumping of sand, and for that there would be no responsibility on the part of these defendants. As to Lloyd, it was shown that he knew of this bridge coming, he removed his two thousand clams, he never removed the rest of them, did not bother because it was just as easy to leave them there if somebody else was going to pay for them. He failed in the mitigation of damages, which was his duty. The count in trespass must fall because the appropriate remedy in cases of this kind is case.

Mr. Bell: If your Honor please, I want to make a motion for a direction of a verdict for the Ocean City Automobile Bridge Company, first on the same ground that M. Hanstein has urged, that there has not been any negligence shown. Secondly, that the permits from the War Department and from the Board of Commerce and Navigation, together with the grant, supersede the oyster leases, which were merely leases for the taking of oysters from these grounds. Third, as to the trespass, that case would lie, instead of trespass.

In addition to that, I want to make a motion in the Tallman case, because of the fact that Tallman testified that he had not made a grab or any test since 1925, and consequently there is no evidence that there were any oysters there for more than two years preceding any pumping, and with all the evidence in the case that there are other causes which could destroy oysters, and, further, the fact

that he made no test even after the sand was pumped, there is absolutely no evidence that there were oysters or clams there or that they were dead after the sand was pumped.

As to the other proposition, concerning the independent contractor, I would like to call attention to the case of Mann v. Max, 107 Atlantic, 417, which case held that where an employer engaged a contractor to do a certain piece of work, if the work in itself was not a nuisance, that for any damage resulting from acts of the contractor independent of the contract, the contractor alone is liable, and I respectfully submit that in this case there is nothing in the work itself which shows that the work is a nuisance. If the plans and specifications as shown were carried out to the full extent of 340 feet, the only two pieces of land that would be covered would be Lloyd's and Tallman's, and I would like to show your Honor the map here which shows that the bridge bulkhead ended right inside of Lloyd's piece of land. The map shows that the fill ran for several hundred feet in on Lloyd's land past this bulkhead. The only thing that shows that the pumping was to be on either side does not show that there was to be any at the end. If they pumped sand out here, that was an act independent of the contract.

Another thing I would like to call to your attention is that this type of construction was not the Bridge Company's design. It was the design of the Hill Dredging Company. The contract speaks for itself as to that.

(Recess taken until 1:30 P. M.)

AFTERNOON SESSION—1:30 P. M.

Mr. Bell: I add, as an additional ground on my motion for a direction, that where a contractor does work under a separate contract with an employer, which work in itself the contractor can reasonably know would cause damage, that the contractor is liable as well as the employer.

The Court: I am dealing now with the motions to direct verdicts, and in so far as the motions to direct verdicts are concerned in the cases of Lloyd and Tallman, I refuse both motions and will submit them to the jury under the trespass count as against both defendants, it being conceded that the fill was made directly on their lands or portions of their lands.

In so far as the motions to direct with reference to the other plaintiffs are concerned, it seems to me that under the evidence in these cases, if there is liability, it is the Bridge Company which must be held, and not the Hill Dredging Company. The latter was simply executing a contract in accordance with the plans and specifications of the Bridge Company, and in a mode provided for by the contract and by the instrumentality also provided for by the contract. If any duty existed as to third persons with respect to the contract work, that duty was the obligation of the Bridge Company and it would be liable for damages for the breach of the duty, as decided by the Leydecker case, by the Marven State Company case and other cases of that kind.

(An exception was noted for the plaintiffs to the

Court's directing verdicts in favor of the defendant Hill Dredging Company.)

(An exception was noted for the defendant Hill Dredging Company to the Court's refusal to direct verdicts with reference to the Lloyd and Tallman cases.)

(An exception was noted for the defendant Ocean City Automobile Bridge Company to the Court's refusal to direct verdicts for that defendant.)

The Court: I think I should state to the jury that under certain motions that have been made, the Court has ruled that in so far as the Hill Dredging Company is concerned, there will be a direction of verdicts in favor of the Hill Dredging Company as to all plaintiffs excepting Lloyd and Tallman, and that in reference to those cases the matter will be submitted to the jury under the second or trespass count, and the case therefore proceeds as against the Ocean City Bridge Company as defendant in all suits and as against the Ocean City Bridge Company and the Hill Dredging Company as defendants under the second count of the Tallman and Lloyd suits.

(Mr. Bourgeois offered in evidence the map that had been in evidence by him, and it was marked Exhibit P9.)

(The case was argued to the jury.)

COURT'S CHARGE TO JURY.

Sooy, J.: Ladies and gentlemen of the jury: It seems to me that these cases do not require an extended charge on the part of the Court, and I will make it as brief as I possibly can. In the first place, you are trying eight separate suits, and will have with you when you go out the transcript of the pleadings in each separate suit, and if your verdict is for all of the plaintiffs, there would be eight separate verdicts. If your verdict is in favor of the defendants, there would be eight verdicts of no cause of action. In other words, there must be a separate verdict in each case. You will not have any trouble in distinguishing the different cases, by reason of the fact that you will have the transcripts with you.

In so far as the plaintiffs Lloyd and Tallman are concerned, a little different situation exists with reference to them as distinguished from the other plaintiffs. Lloyd and Tallman happened to be in possession of land over which the approaches to the bridge were built. They call them approaches. I call the whole roadway and the bridges the bridge, but they were in possession of those lands covered by the approaches in part, and the defendants admit as to them that there was sand fill pumped on a portion of the Lloyd land and a portion of the Tallman land. With that admission before you, Tallman and Lloyd would be entitled to recover in their cases such damages as they have proved they sustained by reason of pumping in and filling in of their lands. And if the evidence is not sufficient for you to ascertain definitely and accurately, that is, with

reasonable certainty, the damage sustained by Tallman and Lloyd, they would be entitled to recover at your hands nominal damages, that is, six cents each.

What I have said with reference to damages in regard to the Lloyd and Tallman situation is not all I expect to say with reference to damage. I simply want to call your attention to the fact that of the proof is not sufficient upon which to award compensatory damages, that they would be entitled to nominal damages of six cents each.

Now with reference to the rest of the plaintiffs. Each one of them contends that he has been damaged because the defendant in this case—the only remaining defendant being the Bridge Company, and in the other cases both defendants still being in the case—the plaintiffs contend that they sustained their damage by reason of the fact that the Bridge Company, through its agent in that behalf, the Hill Dredging Company, negligently filled in the approaches to this bridge so that the materials used in the fill escaped from the places where they were designated to be put and overflowed or overran the land of the plaintiffs, covering oysters and clams which they had there planted, and resulting in the death of the clams and oysters.

The burden of proving each allegation in each one of the plaintiffs' complaint is on the plaintiff. They must establish by the greater weight of the believable evidence first that the Bridge Company failed in some duty which it owed to these plaintiffs. When the plaintiffs set forth in their complaint a cause of action, they said that that failure of duty on the part of the defendant was this: that they negligently caused said sand so pumped to cover the oyster grounds of the plaintiffs and that, by reason of their so doing, all of the oysters and clams of plaintiffs

died by reason of the covering thereof with the sand aforesaid. If there is a recovery on the part of the plaintiffs, it will be because they have established that the defendant Bridge Company, through its contractor, the Hill Dredging Company, negligently pumped this sand so that it escaped from the place where the fill was to have been put and either flowed or got on the lands of the plaintiffs in sufficient quantity to kill the clams and oysters which the plaintiffs had there planted.

The first question, therefore, for you to determine, is, do you find from the greater weight of the believable evidence that the sand and fill material pumped by the Hill Dredging Company was negligently pumped so that it got on to the lands of the plaintiffs in sufficient quantity to kill their clams and oysters?

The plaintiffs say that they had planted oysters and clams there, and that after the pumping by the Hill Dredging Company for the Bridge Company, they went to their lands and they found no clams or oysters; that the bottom which had theretofore been mud or other material that you will remember was sand bottom; that that which was formerly mud was covered with sand and covered to an extent which killed the clams and oysters. The witnesses for the defendant say that is not true; but that soundings made by the Bridge Company and the Hill Dredging Company disclosed that the bottom after the pumping was and still is the same as it was prior to the time the pumping operations began. That testimony, together with all the other testimony in the case will be considered by you in determining first whether or not, by reason of the negligence of the Bridge Company through its agent, the Hill Company, these lands were covered over with sand

which escaped from the filling operation in such quantities as to kill the clams and oysters.

If you find that the plaintiffs have failed to carry the burden of proof in that respect, then there could be no verdicts for the plaintiffs; if, on the other hand, you find that the defendant did negligently pump the sand and that it got on to the adjacent lands of the plaintiffs, in such quantities as to kill the oysters, you come to the next problem for your consideration: have the plaintiffs by the greater weight of the believable evidence established first that on these lands which they have described in their complaints, they had living at the time that the sand was pumped over or got on to that land, through the action of the Hill Dredging Company, clams and living oysters? And have they proved that at that time there was sufficient sand pumped on these lands to kill the clams and oysters that were there at that time? And if so, have they established to a reasonable certainty by the evidence the number of clams or oysters that they had there at the time that they were killed, if they were killed?

It has been said that you cannot guess damages, and neither you can. Damages can only be awarded upon evidence from which you may calculate to a reasonable certainty the actual damage sustained, and if the testimony is not sufficient, the facts adduced by the evidence are not sufficient, so that you can calculate with reasonable certainty the damage sustained by each one of these plaintiffs, they would not be entitled to recover a verdict, because you cannot merely guess a verdict.

If the defendant is guilty of the negligence alleged, and the plaintiffs have suffered the resultant damage, are you able from the testimony with reasonable certainty to calculate the damage? The plaintiffs say that they planted on each one of their

particular pieces of ground a certain number of bushels of oysters and that experience such as they had had and such as they have related to you justifies you in finding that for each thousand bushels of oysters there will be a death, as I remember it, of one hundred bushels per thousand bushels. That is what I understand them to say. On the other hand, the defendant says that that is not true at all; that the result of experience shows that ofttimes oysters are planted and no crop at all ensues; that you have to take into consideration the starfish, the drumfish, the borers, and so forth, and that if you do take that into consideration you cannot in this case estimate the damage. The plaintiffs say, however, through some of their witnesses, that there never has been a time on these particular lands where there has been any appreciable damage by drumfish, by starfish or by borers or other common enemies to the oyster industry, and that when they say there is a loss of one hundred bushels in a thousand bushels, they take into consideration the losses that come from all sources in the growing of oysters. They also say that out of one thousand clams planted they expect to harvest and the result of their experience is that they will harvest in these particular waters nine hundred clams.

It is for you under the evidence to ascertain whether or not from the facts as they have been proved before you, if you find that the defendant is liable, you can calculate with reasonable certainty the loss sustained by each one of these plaintiffs. If you can so calculate it to a reasonable certainty, each one of the plaintiffs would be entitled to recover the amount that you found they have sustained in loss by reason of their oysters or clams being killed by reason of the negligent acts of the defendant company.

As to any case where you find that the proof is insufficient, as to the case of any plaintiff where you find that the plaintiff's proof is insufficient, you would be justified and should refrain from bringing in any verdict in favor of that particular plaintiff. I recall to mind at the present time that one Tallman could not testify as to any amount of oysters he had on his ground at the time of this alleged occurrence. I therefore charge you that in so far as Tallman is concerned, you could not bring in any verdict in his favor for any loss of oysters. That same charge would apply to any other case of like character which has been presented before you.

I call your particular attention to this, that you are the sole judges of the facts and I am not supposed to charge on the facts of any particular case, and therefore I am leaving that question, together with all questions, for your consideration.

Inasmuch as I have been requested to charge several requests, I think I will leave the rest of the charge for the requests rather than to go into several features that might otherwise be taken up.

I will first take the requests of the plaintiff for charge.

I refuse to charge the first request.

Number 2 I refuse to charge.

Number 3 I refuse to charge.

Number 4: "In performing the work under the contract in this case, defendant was bound to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine." I so charge you, because the testimony in the case, as

I remember it, on the part of Mr. Risley was that he understood the conditions of the currents of the river and the effect of pumping sand into tidal streams.

Number 5: "The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in question, were notice to defendant of some right in plaintiff in said lands." I charge you that the stakes were notice in so far as they were noticeable, and my recollection of the testimony is that Mr. Risley testified that he observed the stakes prior to the time of the pumping. However, the last part is for your consideration.

Six: "If defendant caused mud or sand to be pumped upon plaintiffs' land, or agitated the mud and sand in his pumping, so that the mud and sand were carried by the natural currents of the river upon plaintiffs' oyster or clam beds, and killed or damaged his oysters or clams, defendant is liable in damages." I so charge.

I am requested to charge for the Hill Dredging Company numerous requests, most of which I consider not necessary to charge, by reason of the fact that I have already directed that no verdict can be brought in against the Hill Company except in favor of Lloyd and Tallman with reference to the trespass count.

The first request to charge is the law, but is inapplicable inasmuch as the Hill Dredging Company is not now a defendant.

Number two is refused because the Hill Company is out.

Number three is refused because the Hill Company is out.

Number five I refuse.

Number six I refuse.

Number seven I refuse.

Number eight I refuse.

Number nine I charge: "Negligence must be proven. It is never presumed. If there is any uncertainty as to a given act, the presumption favors it being free from negligence rather than being negligent." I so charge.

Number ten I refuse to charge.

Number eleven I refuse to charge.

Number twelve: "In the event that the jury is of the opinion that the plaintiffs are entitled to recover, then they are only entitled to recover for such loss as has been established with reasonable certainty." I so charge, and have already so charged.

Number thirteen I refuse to charge.

Number fourteen: "If the plaintiffs are entitled to recover, they would only be entitled to recover such damages as have been proven in this case with

reasonable certainty as to amount and with reasonable certainty as to the cause from which they resulted. The burden of proving both of which facts is upon the plaintiffs." I so charge you.

Number fifteen: "The burden is upon the plaintiffs Lloyd and Tallman to establish with reasonable certainty that the oysters and/or clams, which they allege were damaged, were, in fact, upon their respective grounds, and living at the time of the alleged injury by the defendants." I so charge and have already charged.

Number sixteen I refuse to charge because it calls for a charge on the result of evidence. That is to say, a conjecture as to what the proof is.

Number seventeen I refuse to charge.

Number eighteen I refuse to charge.

Number nineteen I refuse to charge.

Number twenty I refuse to charge.

I have requests of the defendant Bridge Company, and I refuse to charge the first request.

Number two I refuse to charge.

Number three: "If the jury find from the evidence that the sand fill on Tallman and Lloyd's leases did not damage any oysters and clams owned by said Tallman and Lloyd, then only a nominal damage has been sustained." I so charge you. I did charge that once before.

I think there is nothing else that requires any charge from the Court. The jury may retire and take with it the pleadings in each one of the cases, and the exhibits.

If in any part of my charge in reference to proving damage I said anything other than that the plaintiff must prove to a reasonable certainty the various elements of damage, that the plaintiff must prove to a reasonable certainty that he had clams and oysters, that the plaintiff must prove to a reasonable certainty that the clams and oysters were there at the time of the alleged damage, if I said anything else than that, I want you to disregard it and to take that as the instruction with reference to the character of proof necessary in order that recovery may be sustained.

DEFENDANT OCEAN CITY AUTOMOBILE BRIDGE COMPANY'S EXCEPTIONS TO CHARGE.

Mr. Bell: The defendant Ocean City Automobile Bridge Company excepts to the Court's refusal to charge the defendant's first request in the language following:

"If the jury find from all the evidence that the roadway could have been filled in without permitting any sand to go on the property of the plaintiffs then the jury should find a verdict of no cause of action as to this defendant."

(Which exception is hereby noted.)

Mr. Bell: Defendant Ocean City Automobile Bridge Company excepts to the Court's refusal to charge the defendant's second request, in the language following:

"If the jury find that the Ocean City Automobile Bridge Company used diligence in selecting the Hill Dredging Company to do the pumping and they find the sand going on plaintiffs' property is not a direct result of the contract, then the jury should find a verdict of no cause of action as to this defendant."

(Which exception is hereby noted.)

Mr. Bell: Defendant Ocean City Automobile Bridge Company excepts to the Court's charging of the plaintiffs' fourth request, in the language following:

"In performing the work under the contract in this case, defendant was bound to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine."

(Which exception is hereby noted.)

Mr. Bell: Defendant Ocean City Automobile Bridge Company excepts to the Court's charging plaintiffs' request number five, in the language following:

"The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in question, were notice to defendant of some right in plaintiff in said lands."

(Which exception is hereby noted.)

Mr. Bell: Defendant Ocean City Automobile Bridge Company excepts to the Court's charging plaintiffs' request number six, in the language following:

"If defendant caused mud or sand to be pumped upon plaintiffs' land, or agitated the mud and sand in his pumping, so that the mud and sand were carried by the natural currents of the river upon plaintiffs' oyster or clam beds, and killed or damaged his oysters or clams, defendant is liable in damages."

(Which exception is hereby noted.)

Mr. Bell: Defendant Ocean City Automobile Bridge Company excepts to that portion of the Court's charge to the jury wherein the Court said:

"With that admission before you, Tallman and Lloyd would be entitled to recover in their cases such damages as they had proved they sustained by reason of pumping in and filling in of their lands."

(Which exception is hereby noted.)

DEFENDANT HILL DREDGING COMPANY'S EXCEPTIONS TO THE COURT'S CHARGE.

Mr. Hanstein: Defendant Hill Dredging Company excepts to that portion of the Court's charge to the jury in which the Court said:

"With that admission before you, Tallman and Lloyd would be entitled to recover in their cases

such damages as they had proved they sustained by reason of pumping in and filling in of their lands. And if the evidence is not sufficient for you to ascertain definitely and accurately, that is, with reasonable certainty, the damage sustained by Tallman and Lloyd, they would be entitled to recover at your hands what we call nominal damages, that is, six cents each."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the Court's charging the plaintiffs' fourth request, in the language following:

"In performing the work under the contract in this case, defendant was bound to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the Court's charging the plaintiffs' fifth request, in the language following:

"The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in question, were notice to defendant of some right in plaintiff in said lands."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the Court's charging the plaintiffs' sixth request, in the language following:

"If defendant caused mud or sand to be pumped upon plaintiffs' land, or agitated the mud and sand in his pumping, so that the mud and sand were carried by the natural currents of the river upon plaintiffs' oyster or clam beds, and killed or damaged his oysters or clams, defendant is liable in damages."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number one of that defendant, in the language following:

"If the jury finds that the work which the Hill Dredging Company did in Great Egg Habor Bay was done pursuant to a contract between it and the bridge company, then the Hill Dredging Company owed no duty to the plaintiffs Lloyd and Tallman arising out of that contract."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number two of that defendant, in the language following:

"If the work contracted for between the Hill Dredging Company and the bridge company be such as that a duty exists towards the plaintiffs Lloyd and Tallman with respect to it, the Bridge Company, which contracted to have the work done, will be liable for damages arising from a breach of the duty."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number three of that defendant, in the language following:

"If the plaintiffs, Lloyd and Tallman, suffered any damages by reason of sand settling upon their leased grounds, there could be no recovery against the defendant, Hill Dredging Company, if the said sand was pumped under the terms of its contract with the bridge company."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number five of that defendant, in the language following:

"If the work that was done by the Hill Dredging Company was done under a permit from the agency of the State of New Jersey that had control of the same, namely, the Board of Commerce and Navigation, the plaintiffs, Lloyd and Tallman, are not entitled to recover against the Hill Dredging Company."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number six of that defendant, in the language following:

"The deed, or grant, made by the State of New Jersey to the bridge company, gave to the bridge company the title to the land under water covered by that deed, or grant, and the Hill Dredging Com-

pany, acting under a contract with the bridge company, was entitled to carry out the terms of its contract with the bridge company upon said land."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number seven of that defendant, in the language following:

"In so far as the deed covered part of plaintiff Lloyd's ground, the bridge company was entitled to cause the Hill Dredging Company to enter upon said ground, and such entry would be without any liability in so far as the Hill Dredging Company was concerned."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number eight of that defendant, in the language following:

"The leases made by the State of New Jersey to the various plaintiffs were made subject to the right of the State of New Jersey to permit the building of a bridge and roadway across Great Egg Harbor Bay, and for the doing of that there would be no liablity on the part of the defendant, Hill Dredging Company, acting under a contract with the bridge company."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Com-

pany excepts to the refusal of the Court to charge request number ten of that defendant, in the language following:

"The Hill Dredging Company cannot be held liable in damages for damage flowing to the plaintiffs, Lloyd and Tallman, from the work in connection with the building of the bridge and roadway, if the damage alleged to have been suffered by the various plaintiffs arose merely from the carrying out of a plan or building adopted by the bridge company."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number eleven of that defendant, in the language following:

"If the Hill Dredging Company did its work pursuant to its contract with the bridge company, and the type of construction called for by the bridge company was the usual type of construction, there can be no liability under this case as against the Hill Dredging Company."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number thirteen of that defendant, in the language following:

"If the injury complained of by the plaintiffs was done through the intervening agency of the tides and currents of Great Egg Habor Bay, there could be no liability upon the defendants."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number sixteen of that defendant, in the language following:

"If the plaintiffs have only established that they planted oysters and/or clams upon their respective grounds, there is no presumption that said oysters and/or clams continued to be there, and to live up until the time of the happening of the acts complained of by the plaintiffs."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number seventeen of that defendant, in the language following:

"The loss of the value of clams and oysters which, if planted, would depend upon the contingencies of weather and season, must be excluded as incapable of estimation with that degree of certainty which the law exacts in the proving of damages."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number eighteen of that defendant, in the language following:

"The plaintiffs' leases from the State are not leases in the ordinary sense; they are merely exclusive fishing privileges on land the ownership of which is in the State of New Jersey."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number nineteen of that defendant, in the language following:

"Since defendant Lloyd had knowledge that the bridge was to cross his land, it was incumbent upon him to take such reasonable steps to protect his oysters and clams as were proper under the circumstances, and if he failed to do so he cannot recover for the value of the oysters and clams destroyed."

(Which exception is hereby noted.)

Mr. Hanstein: Defendant Hill Dredging Company excepts to the refusal of the Court to charge request number twenty of that defendant, in the language following:

"If you believe that defendant Tallman did not make a grab upon his land since 1925, there is no presumption that his oysters and clams previously planted were there and alive at the time of the filling."

(Which exception is hereby noted.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE THOMAS,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

EUGENE TALLMAN,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

OSCAR SOMERS,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

THEODORE SMITH,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

MARTIN V. B. SCULL,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

JOHN H. SMITH,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

WALTER J. LLOYD,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

SMITH HICKMAN,
Plaintiff-Appellee,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

BRIEF OF BOURGEOIS & COULOMB, ATTORNEYS FOR PLAINTIFFS-APPELLEES.

As stated in Brief of Appellants, these eight cases were tried together, and are being briefed together.

STATEMENT.

The State of New Jersey, by the Board of Shell Fisheries, demised to each of the appellees clam and oyster grounds, situate in Great Egg Harbor River, for the period of one (1) year, beginning January 1st, 1927. The same tenants had been lessees of the same grounds for a number of years prior thereto, and from a period prior to 1924 to 1928, inclusive.

Sometime after the 1st of January, 1927, but during that year, the Ocean City Automobile Bridge Company, a private corporation of the State of New Jersey, commenced the erection of a bridge across Great Egg Harbor River from Somers' Point to Beeseley's Point.

In the line of the route of this bridge lay the oyster and clam grounds leased by the State to Walter J. Lloyd and Eugene Tallman, and in close proximity thereto, and lying northwestwardly thereof, were the oyster and clam grounds leased by the State to the other appellees, to wit: Martin V. B. Scull, Smith Hickman, Theodore Smith, John H. Smith, Oscar Somers and Jesse Thomas, for said year.

These clam and oyster grounds were at all times covered by water, on the low tide to a depth of about 3 ft., at high tide about 3½ ft. more.

It requires from three (3) to four (4) years for small clams, such as are planted, to wit: the size of the thumb nail or thereabouts, to grow to market-

able size, to wit: little necks, medium size, and large.

During the years 1924 and 1925, these appellees planted large quantities of clams and oysters on their respective leased grounds.

Appellee, John Henry Smith, during 1924 and 1925, planted 393,000 clams and 1000 bushels of oysters.

Appellee, Martin V. B. Scull, during 1924 and 1925, planted 50,000 clams and 2,000 bushels of oysters.

Appellee, Smith Hickman, during 1924 and 1925, planted 396,000 clams.

Appellee, Walter J. Lloyd, during 1924 and 1925, planted 480,000 clams and 1,000 bushels of oysters.

Appellee, Theodore Smith, during 1924 and 1925, planted 132,000 clams and 500 bushels of oysters.

Appellee, Oscar Somers, during 1924 and 1925, planted 240,000 clams and 150 bushels of oysters.

Appellee, Jesse Thomas, during 1924 and 1925, planted 720,000 clams and 500 bushels of oysters.

Appellee, Eugene Tallman, during 1924 and 1925, planted 600,000 clams and 200 bushels of oysters.

The Ocean City Automobile Bridge Company engaged the Hill Dredging Company to make the fill, a considerable amount of which was required in the construction of this bridge. The plans and specifications call for a typical fill to be of the width of at least 170 ft. on each side of the center line of the bridge, as follows: A 60-ft. strip coinciding with the riparian grant to be bulkheaded on either side and filled to a point about 6 ft. above the ordinary high water; on either side of that fill, a 40-ft. strip, likewise retained by bulkheading, to a point 3 ft.

above the high water; and on either side of that fill, a further fill of 100 ft. on either side, with no bulkhead to retain it.

There were two areas to be filled, one from the Atlantic County shore line, a distance of 735 ft. southwestwardly to Drag Channel; the other from Drag Channel, still southwestwardly 1,220 ft. to Main Channel, as will appear on the profile map (p. 615, Vol. II), which map is attached to the riparian grant. The grant is marked Exhibit D5 (p. 603, Vol. II), and on p. 605, the description shows the grant to be 60 ft. in width. This grant, however, was afterwards superseded by a second grant (p. 591, Vol. II), and by the description of that grant (pp. 592, 593 and 594, Vol. II), it shows that the width of the grant was 60 ft.

In addition to the riparian grant from the State, there was also given to the Bridge Company a permit, found on p. 623, Vol. II, which was the usual permit granted by the Board of Commerce and Navigation, authorizing owners of riparian grants to fill in the lands granted to them. This permit (p. 624, Vol. II) provided:

> "The granting of this permit shall not be construed to in any way affect the title or ownership of property, and shall not make the Board or the State a party in any suit or question of ownership of property. * * *
>
> The granting of this permit shall in no way make the Board or the State responsible for the sufficiency or correctness of the design of any structure or structures. The Board or the State shall in no way be responsible or become

> a party to any action for loss of life or property, or for damage to persons or property which may occur by the carrying out of the work covered by this permit."

Before entering upon the construction of the fill, the Hill Dredging Company, by its authorized agents, went upon the oyster grounds of these various plaintiffs-appellees, and made a survey thereof, ascertaining, or apparently ascertaining, what was upon the ground, and the nature of the bottom. Before the work by the Dredging Company was started, these oystermen held a meeting and notified the Dredging Company of the existence of their oysters and clams, and the danger thereto in making the fill.

The Great Egg Harbor River at this point runs northwest and southeast, and the bridge runs southwest and northeast. All of the oyster lands, excepting the lands of Eugene Tallman and Walter J. Lloyd, which are crossed by the bridge, lie northwesterly thereof, and in close proximity thereto.

The entire width of the fill is shown by the testimony of Clarence I. Collisson, representing the engineer in charge, in his testimony, on p. 436, l. 35, Vol. I, as follows:

> "Q. When you were out there making investigations, did you measure to find out what the actual width of the sand fill was?
>
> A. Yes, sir.
>
> Q. What was the actual fill of the sand at low-water mark, the width of it?
>
> A. It will vary.

Q. Varies from what?

A. It will vary from 250 feet to maybe 450 feet."

On p. 436, l. 24, Vol. I, he testified:

"Q. What is the width of the fill shown on the map to the northeasterly of Drag Channel? That is, the map on the easel. Will you scale it for me, please?

A. As shown there, 60 feet."

On p. 445, l. 5, Vol. I, the question was:

"Q. It shows an abutment on either side of it. What is that abutment or whatever it may be, a fill?

A. Yes, sir.

Q. What is the width of that fill on either side?

A. Forty feet.

Q. That makes sixty and eighty is 140 for that distance?

A. That is right.

Q. Beyond that fill there seems to be another fill extending out. Is that a fill?

A. Yes, sir.

Q. What is the width of the fill on either side there?

A. 100 feet.

Q. On either side?

A. Yes, sir.

Q. Then it makes the total width of that fill 340 feet?

A. Yes, sir."

The mud and sand was pumped from Drag Channel on the southeasterly side of the bridge and piped to the location of the fill. The fill was made by 450 h. p. hydraulic pump (p. 382, l. 10, Vol. I), with an agitator at the bottom of the pipe to cut or break up the solid portions of the bottom (p. 455, l. 35, Vol. I). So that, the solid portions as well as the sand could be forced through the pipe by hydraulic pressure to the place of fill. At the discharge end of the pipe, the contents thereof consisted of about seven-eighths of solid matter and one-eighth water (p. 382, l. 15, Vol. I). The tides in Drag Channel, both ebb and flood, at this point are quite strong, the water travelling 80 ft. per minute on the ebb tide, and 92.3 ft. per minute on the flood tide. The tide in Creek Channel was 49.2 ft. on the ebb and 41.1 ft. on the flood (p. 420, l. 10).

The effect of the pumping within the limits of the bulkheads except as to the lands of Lloyd and Tallman, was practically negligible upon the plaintiffs-appellees' lands, they being affected only by the agitation of the cutter at the bottom of Drag Channel, loosening the sand and mud, some of which was carried by force of the tides onto plaintiffs-appellees' lands. The effect, however, of pumping the sand on the 100-ft. strips lying outside of the bulkheads, with nothing to confine it, and having back of it the force of the pump, pumping it into the water, and the force of the currents carrying it under the water, was particularly disastrous.

The testimony of Mr. John Henry Smith, at p. 56, l. 20, Vol. I, is as follows:

"Q. Mr. Smith, I want to ask you what, if

anything, happened to your oyster and clam grounds in 1928?

A. As soon as they commenced to pump, the land commenced to fill, and it commenced to cover the oysters and clams."

At p. 57, l. 15, he testified:

"Q. What was done when that sand commenced to come there? What did you do? Anything?

A. We notified the people that they were doing damage there.

(Stricken.)

Q. They want you to be more specific. You say you notified the people. What did you do? Whom did you notify?

A. We went to work and called a meeting at Mr. Scull's, and we got Mr. Scull to come and see you, I think.

Q. What was done with regard to the people who were doing the pumping?

A. They kept on pumping."

At p. 58, l. 2, Vol. I, he testified:

"Q. What was the effect of their pumping?

A. It was the sand and the washing that went over and killed the clams and oysters, buried them up.

Q. How deep were they buried under the sand?

A. Take the oysters on the new leased side, they are covered up so you can't find a shell, even, and the same way with the clams."

At p. 59, l. 1, Vol. I, he further testified:

"Q. Was all your land covered?

A. It was all covered with either the sand or mud. On the western side there, the mud went across and got on the oysters and covered them up and smothered them in the winter. We went down after the oysters, and when we went there the meat was running right out of them. We couldn't handle them. Wouldn't put them on the market because they wasn't fit to eat.

Q. Did they pump mud as well as sand?

A. There is always more or less mud comes through a machine when they are pumping.

Q. Then they did?

A. Sure.

Q. How far up the river, if you know, did that sand drift? Not drift, but how far was it pumped?

A. Well, I should judge it went up there for a half mile, maybe three-quarters in that particular place."

At p. 95, l. 35, Walter Lloyd testified:

"Q. How was it affected?

A. Well, there was more or less mud settled, mud and sand together settled over it.

Q. To what depth did it settle over it?

A. Well, I couldn't say exactly. On the eastern side it is five times as much as it is on the western side.

Q. That is, on the eastern side of the bridge?

A. No, on the eastern side of my ground.

Q. How much is there on the easterly side?

A. Oh, anywhere from two feet to twelve or fourteen feet.

Q. And how much on the westerly side?

A. Oh, it isn't so much over there. Might be two, or three or four inches."

Touching the depth to which the lands were covered on the northwesterly side of the bridge, John Henry Smith, at p. 56, l. 20, testified as follows:

"A. As soon as they commenced to pump, the land commenced to fill, and it commenced to cover the oysters and clams."

At p. 58, l. 25, Vol. I, he further testified:

"Q. Your land is how far distant from the bridge?

A. There is my corner there, and there is the sand at the corner where I had two foot and a half of water, and I can go around now with a low pair of shoes on without getting my feet wet.

The Court: He asked how far your land is from the bridge.

A. It ain't over two hundred feet, I think, from the bulkhead."

The quantity of oysters on the various grounds was testified to by several of the parties, it being agreed, however, that the testimony taken in one case should be considered relevant and applicable to each of the other cases; and the testimony of John H. Smith, a witness produced by the plaintiffs-appellees, was particularly valuable, he having had

vast experience in oyster and clam culture. He testified (p. 49, l. 12, Vol. I) as follows:

> "Q. What is the natural growth of them? How do they come along?
>
> A. Take three to four years to make a prime clam. From three to four years."

As to oysters, he testified (p. 52, l. 10, Vol. I) as follows:

> "Q. Is there a general recognized rule of increase in oysters after they are planted?
>
> A. There is.
>
> Q. Have you ever observed what the increase is from your own experience?
>
> A. I have.
>
> Q. What is the increase per year in oysters after they are planted?
>
> A. Well, they will double each year in size."

So that, the quantity of oysters and clams on the various grounds was accounted for satisfactorily to the plaintiffs-appellees and the jury, but not to the defendants-appellants.

There is no denial as to the leases held by the respective plaintiffs-appellees, nor that they held previous leases from the time of the planting of their oysters and clams until the destruction thereof.

ARGUMENT.

Defendant-appellant, Hill Dredging Company, under the heading of "The Court erred in refusing to direct a verdict as to both Lloyd and Tallman," argues, first, that Lloyd is not entitled to damages, because he knew defendants-appellants intended to build the bridge, and it, therefore, devolved upon him to go and remove his oysters from his leased ground, so they would not be destroyed in the construction of the bridge.

It is submitted that no such obligation devolved upon him. His grant from the State was prior to the grant by the Board of Commerce and Navigation, and prior to the permit to make the fill, granted to defendant-appellant, Hill Dredging Company, by said Board of Commerce and Navigation, which said permit clearly placed upon the defendants-appellants the responsibility of damages that might result to private property in making the fill; besides an inspection of the second map (p. 552, Vol. II) shows the location of the riparian grant barely touching the edge of Tallman's land, and extending only a short distance upon Lloyd's land. The width of that grant was 60 feet, 30 feet on either side of the center line. The fill made by defendant-appellant was 140 feet on either side of the riparian grant. In the making of this fill of 140 feet on either side thereof, the defendant-appellant was without any authority, whatever, and in making that fill it created a public nuisance, *Stevens v. Patterson* (34 L. 532), at p. 553, for which the plaintiffs-

appellees, being specially and peculiarly injured, were entitled to recover. *Sayre v. Newark* (60 N. J. Eq. 361), at p. 384.

The second matter discussed under that heading is that the State retains its sovereign power over the premises in question, to wit: the riparian grant, with the right to use or authorize the use of the water for any other public use; and that the authorizing of such other public use abrogated the rights of the plaintiffs-appellees under their leases.

Plaintiffs-appellees cannot accede to this proposition of law, or fact, and submits that the riparian grant conferred upon the grantee no exclusive right in the use of the waters overflowing the grant. It conferred a right to improve the lands under water, but no exclusive use, whatever, in the waters. The permit gave the defendants-appellants the right to make a fill on the lands granted, thus excluding the water therefrom, but went no further.

It is submitted that a lease by the Board of Shell Fisheries is just as forceful and as sacred, within the scope of its powers, as is a riparian grant or permit to fill made by the Board of Commerce and Navigation, within its powers. Both are agencies of the State, of equal authority and force, and a subsequent grant by either is taken subject to a prior grant by the other, and plaintiffs-appellees, being in possession of land under water by virtue of a valid lease from the Board of Shell Fisheries, are entitled to recover damages from a subsequent grantee from the Board of Commerce and Navigation for damage done.

The cases cited by defendant-appellant, Hill Dredging Company, are cases growing out of the

pollution of waters, by a municipal corporation, and are not controlling in the present cases, where no pollution is complained of, and where the damage done was the removal of sand by a hydraulic dredge or pump by defendant-appellant from one portion of Great Egg Harbor River and deposited on the oyster beds of plaintiffs-appellees beyond the bounds of the riparian grant, and where defendant-appellants were without a vestige of authority to make such deposit, said sand being either in part pumped directly upon said grounds of Lloyd and Tallman, or pumped into the tidal waters, where the flow of the tides and force of the pump carried it and deposited it on the grounds of all plaintiffs-appellees, there being two counts in the complaints, one in trespass, the other in case; and in every instance, the pumping and depositing of said sand, except as to the 60 ft. strip covered by the riparian grant, was a public nuisance, for which the defendants-appellants were liable to anyone specially and peculiarly damaged thereby.

In the case of *Jenne v. Sutton* (43 N. J. L. 257), at p. 258, this Court, speaking by Chief Justice Beasley, concerning a public nuisance said:

> "All the participants in the creation of a public nuisance are liable to answer for its ill-effects, without regard to the fact that they, in such affair, were but the agents of other persons."

Defendant-appellant, Hill Dredging Company, apparently argues its case upon the theory that the plaintiffs-appellees acquired no greater right by rea-

son of their leases than to fish in the waters of Great Egg Harbor River, apparently assuming that their leases gave them a sort of exclusive privilege in the waters for fishing. We submit, however, that no claim to any exclusive right in the waters over these beds is claimed, but that by reason of the various Acts of the Legislature, providing for the granting of lands under water for the planting of oysters and clams; the various Acts of the Legislature passed for the purpose of increasing and enlarging the oyster and clam industry; the Acts of the Legislature making it a crime for any person to trespass upon lands thus granted and planted or removing oysters and clams therefrom, shows a definite policy on the part of the State to not only encourage and protect the industry, but to recognize and protect the property in the oysters and clams so planted in the lessees of said oyster and clam grounds. It is a private property, which the policy of the State is to protect, and of which the owner may not be deprived without redress.

In the case of *Paul v. Hazleton* (37 N. J. L. 106), our Supreme Court held:

> "The Legislature may grant the right to plant oysters in the bed of navigable streams, to the exclusion of others.
>
> An action of trespass will lie for an invasion of this right."

This case was cited with approval by the Court of Errors and Appeals in the case of *Miller v. Township of Greenwich* (62 N. J. L. 771-772), to the effect that injury by a stranger to the exclusive possession of lands of a mere licensee is actionable.

In the case of *Grace, et al. v. Willets, et al.* (50 N. J. L. 414), the Court of Errors and Appeals held that oysters planted on staked ground belong to the plaintiffs and they could maintain an action against the defendants for the removal and conversion of them.

The third point argued by the defendant-appellant, Hill Dredging Company, is that the Court erred in refusing to strike the testimony of plaintiffs, Lloyd and Tallman, as to the quantity of oysters and clams that they had on their grounds.

Plaintiffs-appellees contend that there was sufficient evidence in the case to justify the Court in refusing.

Defendant-appellant, Hill Dredging Co., argues that the Court erred in refusing to strike the testimony of plaintiffs, Lloyd and Tallman, as to the quantity of oysters and clams that they had on their ground (p. 11 of Brief), and bases its first objection upon the fact that the trial Court struck out certain testimony, but refused to strike out other testimony, which it concludes was similar.

The testimony complained of was the testimony of Walter J. Lloyd, found on p. 89, l. 20, Vol. I. The question was:

> "Q. Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?
>
> A. It is rather a hard question to answer, but I had taken up the majority of my oysters, but I should say a fair estimate I probably had a thousand bushel.
>
> Q. Of oysters?
>
> A. Yes."

That testimony was not objected to. Immediately following, the question was asked (p. 89, l. 27, Vol. I):

"Q. How large were they?
A. I said I probably had a thousand bushel."

The witness thus repeated a portion of the answer previously given. It was objected to on the ground that it was not responsive, and a motion to strike was made on the ground that it was purely speculative and encumbent upon plaintiffs to make proof, and that it did not constitute proof. The Court struck the answer out as not being responsive. Below (p. 90, l. 10), the question was asked:

"Q. How many?
A. About a thousand bushel, I should say, to the best of my ability."

A motion was made to strike that out as not being proper proof. It is submitted that the proof was proper. Judgments are based upon probabilities, *Francis v. Gas Co.,* 83 L. 704-6, and there is no way of ascertaining the exact number of oysters planted upon a ground, except by removing them and counting them. However, the Court refused to strike it out, and in that refusal the defendant-appellant was not injured, because the same question had been previously asked and answered without objection (p. 89, l. 20).

Defendant-appellant, Hill Dredging Co., further complains of lack of proof to support a judgment based upon Lloyd's testimony on pp. 92 and 93, as follows (l. 20):

"Q. How many of them did you do that to? How many bushels did you throw in the water in the manner you have mentioned?

A. Forty.

Q. How large clams were they?

A. Anywhere from the size of your little fingernail up to the size of your thumbnail.

Q. How many of those clams would be in a bushel?

A. Average about twelve thousand."

On p. 93, l. 1, Vol. I, he testified further as follows:

"Q. When did you plant these forty bushels of clams?

A. Some time in September, 1924."

On p. 93, l. 35, Vol. I, the question was:

"Q. Now, Mr. Lloyd, did you sell any of the clams off of your ground in the winter of 1927 and 1928, spring of 1928?

A. Yes, I sold two thousand."

On p. 94, l. 10, Vol. I, he was asked:

"Q. Why did you sell only two thousand?

A. Well, I understood they were going to pump into that bridge, and my understanding was that they was going to pump from Jimmy's Island to the Horse Shoe, in other words, fill the Creek Channel up and bulkhead it. If they did, everything I planted there would be gone, so I says, 'I will tong up some.' I went there and tonged one hour. I took them down to

> Somers Point and sold them to Mr. Sharp, two thousand, and he says, 'Have you got any more?' "

Defendant-appellant, Hill Dredging Co., argues that this testimony was not legal evidence of the quantity of oysters and clams that were on the ground at the time the defendant started pumping, and, although the plaintiff would, upon that showing, if there is no merit to its other contention, have been entitled to a nominal verdict, he was certainly not entitled to a substantial verdict on any theory of his, having proved by legal evidence, the amount of oysters and clams that were destroyed.

The testimony of Lloyd and John H. Smith showed (p. 92, l. 35, p. 49, l. 15, Vol. I), that it took from three to four years for these small clams to develop into marketable size—little necks. That period of time had elapsed, and it is respectfully submitted that the evidence clearly showed the right of the plaintiffs to recover at the hands of the jury some amount of damages. No objection was taken to the testimony above referred to, and whether the verdict was excessive or not cannot be litigated in this court.

Defendant-appellant, Hill Dredging Co., also argues that plaintiff-appellee, Tallman, was under legal obligation to remove all his clams from his oyster grounds to prevent the defendant-appellant from destroying them. This proposition, we submit, is without support in law.

Under the same heading, defendant-appellant, Hill Dredging Co., argues that the testimony of Tallman should have been stricken. This testimony is found

on p. 149, Vol. I, where Tallman testified as follows:

"Q. For what purpose did you lease it?
A. Plant oysters and clams on.
Q. What mark—are the corners of it marked?
A. Yes, sir.
Q. How is it marked?
A. By stakes and shell corners, down to the bottom, on the bottom.
Q. What, if anything, did you plant on that ground prior to 1927?
A. Oysters and clams, both.
Q. When did you plant your clams?
A. 1924, the 11th September, I planted fifteen bushels.
Q. What size clams were they?
A. They went all the way from twelve to fifteen thousand in the bushel.
Q. Fifteen bushels?
A. Yes."

At p. 150, l. 35, he testified:

"Q. Did you put any more on there besides that?
A. Yes, sir."

At p. 151, l. 1:

"Q. How many others did you put on there?
A. All together I had about fifty bushels."

At p. 151, l. 8:

"Q. Then you had all together fifty bushels instead of fifteen?

A. Yes. I planted fifteen the first day.

Q. And then followed them up until you planted fifty?

A. Yes.

Q. After they were planted on there in 1924, did you ever go to try them to find out whether they were growing or not?

A. Yes, sir.

Q. How frequently?

A. Oh, two or three times in the summer.

Q. You say you had some oysters on there?

A. Yes, sir.

Q. When you would tong for the clams, would you try your oysters, too?

A. I planted oysters right over the clams.

Q. When you tried the clams, could you form any notion of how many oysters you had there?

A. Yes, sir, I can give you some idea. I should have about five hundred bushels there."

The latter part was stricken out.

On p. 155, l. 10, Vol. I, Tallman further testified:

"Q. How many did you plant in 1925? How many oysters?

A. Couple of hundred bushels.

Q. Two hundred bushels? Did you gather any of those oysters in 1926 or 1927?

A. Not a one."

On the same page, at l. 30, he testified:

"Q. What quantity would those 200 bushels in 1925 make in 1927?

A. Well, they should double themselves in growth."

It was stipulated that these cases should be tried together, and the testimony of one witness should apply to all the cases insofar as pertinent. The testimony of John H. Smith (p. 49, l. 15, Vol. I), shows the growth of oysters and clams. He testified that 90% of the clams planted would mature.

The objection to Tallman's testimony was because Tallman testified (p. 156, l. 35, Vol. I), that he hadn't made a grab there since July, 1925. The request, based on this testimony, that:

> "If you believe that defendant (plaintiff) Tallman, did not make a grab upon his land since 1925, there is no presumption that his oysters and clams previously planted, were there and alive at the time of the filling."

This was refused, and, it is submitted, properly refused, because it was a question for the jury to determine.

Answering the brief of defendant-appellant, Ocean City Automobile Bridge Company:

Their first contention is that defendant-appellant's motion for non-suit should have been granted, because there was no evidence of faulty machinery and no evidence of faulty workmanship; but there was evidence that the defendant-appellant, Ocean City Automobile Bridge Company, purchased a riparian grant 60 ft. in width, and entered into a contract with the defendant-appellant, Hill Dredging Company, to pump sand into Great Egg Harbor River for a width of 340 ft., 140 ft. on either side of the strip of land they purchased. They were entirely without right to pump sand upon these two

strips 140 ft. in width on either side of their lands, and were liable for the damage they did. They contracted with the Hill Dredging Company for it to commit a nuisance.

They also claim that the motion for non-suit should have been granted because plaintiff-appellee, Lloyd, testified it was not possible to tell exactly how many oysters and clams were on his ground without taking up and counting them, which he did not do. This was an action in tort, and judgments in such actions are founded upon probabilities. It is not necessary to be able to demonstrate the extent of the injury to a certainty.

The next point that they argue is that six of the plaintiffs are not entitled to maintain their actions, because the 60-ft. strip of land which they filled in did not pass over any of the oyster grounds of those six plaintiffs; but, the complaint was that the defendants-appellants negligently caused the sand that they pumped to be deposited on the grounds of those six plaintiffs-appellees, thereby killing their oysters and clams. They, without making provision to confine it, pumped the sand into the ebb and flow of the tides, the currents of which, aided by the force of the pump, caused the sand to cover over plaintiffs-appellees' property, and killed the oysters and clams, for which they were liable, and the refusal of non-suit was proper.

Their next point is that the six plaintiffs could not maintain a suit against the Ocean City Automobile Bridge Company for the trespass of the Hill Dredging Company, it being an independent contractor. The answer is that the contract made by the Ocean City Automobile Company with the Hill

Dredging Company was to commit a public nuisance, as to which every person taking part in it is liable. Therefore, the Ocean City Automobile Bridge Company, who made the contract, as well as the Hill Dredging Company, who performed the work, is liable. *Jenne v. Sutton* (43 N. J. L. 257, at p. 258).

The next point made against the refusal to direct a verdict is that there was no negligence shown on the part of the Ocean City Automobile Bridge Company, defendant-appellant. However, they became liable for the negligence of the defendant-appellant, Hill Dredging Company, because they contracted with them to commit a public nuisance, which specially damaged these plaintiffs-appellees. The cases cited by the defendant-appellant on this point are not controlling, because the rule which they establish is all based upon the theory that the work is not itself a nuisance.

They next contend that if the Hill Dredging Company had done all its work in accordance with the plans and specifications, there could not have been any injury to the lands of the plaintiffs-appellees. We cannot accede to that proposition, because their contract provided for making a fill in the waters of Great Egg Harbor River on land to which they held no title or right, whatever; and their contract and specifications also show that they did not provide any bulkhead or retaining wall to prevent this sand and mud, which they contracted to have pumped, from being deposited upon the oyster grounds of the plaintiffs-appellees.

Their next point is that the Court erred in refusing to strike the testimony of plaintiffs, as to the

quantity of oysters and clams that each had on his ground. This has been answered above.

Their next point is that the damages are speculative. The testimony of each witness showed the number of bushels of clams and oysters that were planted. The further testimony was that there were from twelve to fifteen thousand seed clams in a bushel. The number did not increase, but the size did. As to the oysters, the testimony showed that they double in size and quantity each year. Oysters are sold by the bushel, clams are sold by the hundred. They showed the prices of these clams and oysters. Each of the plaintiffs-appellees showed the condition of their clams and oysters immediately preceding the covering of them by the defendants-appellants' fill. The one case where the condition was not shown was that of Tallman, but his lands were in the vicinity of and immediately between the grounds of Theodore Smith and Walter J. Lloyd. All had planted oysters and clams at the same time, and the jury had a right to infer from the testimony that plaintiff-appellee Lloyd's oysters and clams were in good condition just prior to the fill, on the one side, and that plaintiff-appellee Theodore Smith's oysters and clams were in good condition just before the fill, on the other side of plaintiff-appellee Tallman's ground, that the oysters and clams on his ground would be in like state of health. It was a question for a jury, and they decided against the defendants-appellants. The amounts of the verdicts returned by the jury were approximately 50% of the amount of the damage testified to.

The next point is that the Court erred in refusing

to charge the jury that: "If the jury find that the Ocean City Automobile Bridge Company used diligence in selecting the Hill Dredging Company to do the pumping, and they find the same going on plaintiffs' property was not a direct result of the contract, then the jury should find a verdict of no cause of action as to this defendant." That request was properly refused, because the contract provided for the making of a fill 60 ft. in width, directly over the grounds of two of the plaintiffs-appellees, and for a fill of 40 ft. on either side of the 60-ft. strip in the waters of Great Egg Harbor River, where the defendants-appellants had no right, and a further fill on either side of the 40-ft. strips, 100 ft. in width, pumped into the Great Egg Harbor River, where they had no right, and with nothing whatever to retain the sand, but simply pumped into the currents of the river, with the force of a 450 h. p. hydraulic pump, and allowed to go wherever the force of the pump and currents carried it.

The next point was that the Court erred in refusing to charge the jury that "If the jury find from all the evidence that the roadway could have been filled in without permitting any sand to go on the property of the plaintiffs, then the jury should find a verdict of no cause of action as to this defendant." The Court properly refused this, because there was no basis in fact on which to support it, and second, because their own contract provided for the filling of sand outside of their 60-ft. strip.

The next point was that the Court erred in charging as follows: "In performing the work under the contract in this case, defendant was bound to know the effect of the currents of the river upon

the sand pumped and agitated by the pumping machine." This charge is justified by reason of the fact that the two defendants-appellants were implicated in the pumping of sand into the currents of Great Egg Harbor River, and the depositing of sand therein outside the 60-ft. strip, was a public nuisance for which both defendants-appellants were liable.

The next contention is that the Court erred in charging: "The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in question were notice to defendant to some right in plaintiff in said land." This is justified by the case of *Paul v. Hazleton* (37 N. J. L. 106) and other cases above cited.

Respectfully submitted,

BOURGEOIS & COULOMB,
Counsel for Plaintiffs-Appellees.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE THOMAS,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

EUGENE TALLMAN,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

OSCAR SOMERS,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

THEODORE SMITH,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

MARTIN V. B. SCULL,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

JOHN H. SMITH,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

WALTER J. LLOYD,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

SMITH HICKMAN,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

ON APPEAL FROM NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

BRIEF OF DEFENDANT-APPELLANT, OCEAN CITY AUTOMOBILE BRIDGE CO.

STATEMENT OF FACTS.

In the year 1927, the eight plaintiffs above mentioned were the holders of certain leases from the Shell Fisheries Commission of the State of New Jersey, which leases entitled them to the exclusive right to plant oysters and clams on the grounds leased to each plaintiff. The plaintiffs contend that they had planted thousands of bushels of oysters and clams on the leased grounds in the few years previous to 1927, and that in 1927, there were thousands of bushels of oysters and clams growing on the leased grounds. In the same year, the Ocean City Automobile Bridge Company, a corporation of the State of New Jersey, started to build a bridge from Beesley's Point, in Cape May County, to Somers Point, in Atlantic County, which bridge was of a construction of concrete and steel with certain areas over meadowland, being filled in with sand pumped from the bay. The bridge crossed the leased ground of Walter J. Lloyd, one of the plaintiffs, all of which is shown in plaintiff's Exhibit P9, and also in defendant's Exhibit D1. The Ocean City Automobile Bridge Company entered into a contract with the Hill Dredging Company, a corporation of the State of New Jersey, under which contract the Hill Dredging Company agreed to pump in and fill the portions of the bridge which were to be constructed of sand fill. According to the contract and plans, the sand fill was to extend on the leased ground of Walter J. Lloyd, a very short distance, and said sand fill was not, according to said plans and specifications, to cover any of the other leased area. According to the Exhibit of the defen-

dant D1, the sand fill actually made by the Hill Dredging Company covered a portion of Walter J. Lloyd's ground as well as a part of Eugene Tallman's ground. The plaintiffs claim that from the pumping of the sand by the Hill Dredging Company, the oysters and clams on all of the plaintiffs' grounds were covered with sand, and as a result of the ground being covered with the fresh sand, all of the oysters and clams planted were killed, and plaintiffs suffered a great damage by reason thereof. The Ocean City Automobile Bridge Company obtained a grant from the State of New Jersey, June 20, 1927, and a further grant from the State of New Jersey dated March 10, 1928, together with a permit from the Board of Commerce and Navigation of the State of New Jersey, to build the said bridge from Beesley's Point to Somers Point. The above grants and permits are set forth in the record as Exhibits D4, D5 and D7. The bridge company also had the approval of the War Department of the United States to build the bridge, which approval permit is shown in the record as Exhibit D6. The bridge company also had deeds for the ripa at Beesley's Point adjoining the riparian grant given by the State of New Jersey, which ripa was shown by deeds from Mabel Clay, and from the township of Upper, which are shown in the record as Exhibits D8, D9 and D10, and a deed for the ripa at the Somers Point side as shown by deed from Mathias-Robinson Realty Sales Corporation, shown as Exhibit D11. The eight cases of the plaintiffs against the bridge company and the Hill Dredging Company were tried together, and as a result of the trial, verdicts were rendered by the jury in the cases of Walter J. Lloyd and Eugene Tallman against both of the defendants, and in the six other cases, verdicts were

returned against the Ocean City Automobile Bridge Company. The different plaintiffs were unable to state the exact number of oysters and clams on their respective grounds, and could only state the number of oysters and clams planted on the grounds prior to the dredging done by the Hill Dredging Company.

At the close of the testimony, both defendants made motions for directed verdicts, and the Court denied the motions of both defendants as to the cases of Walter J. Lloyd and Eugene Tallman, on the ground of trespass, and the cases of Lloyd and Tallman were submitted on the trespass ground to the jury, and the motions on the negligence count were granted. As to the six other cases, the Court denied the motion for directed verdict on the part of the defendant Ocean City Automobile Bridge Company, but directed a verdict in the six cases in favor of the Hill Dredging Company.

By agreement of counsel of the respective parties, the proceedings of only one suit have been printed in the State of the Case, due to the fact that all of the complaints filed were identical in substance, except the description of the property, names of the plaintiffs and the ad damnum clause. The answers filed in all cases, by both the Hill Dredging Company and the Automobile Bridge Company were identical, as well as all other pleadings and notices.

I.

DEFENDANT'S MOTION FOR A NON-SUIT SHOULD HAVE BEEN GRANTED.

The basis of the motion to non-suit as to the various cases was the fact that in the plaintiff's com-

plaints it was alleged that the sand pumped to cover the oyster lands was negligently pumped. Defendant claims there was no proof of negligence, in that the plaintiffs' proof failed to show that the defendant Hill Dredging Company, the contractor of the Ocean City Automobile Bridge Company, used faulty machinery, or that they pumped the sand in a negligent manner, and further the non-suit should have been granted on the ground that the testimony produced by the plaintiffs was not sufficient to warrant the case going to the jury, as all the damages shown were highly speculative, and were not of sufficient certainty to warrant the jury in finding that any plaintiff had a certain number of oysters or clams upon his leased ground at the time the dredging was done.

The motion for non-suit as to Tallman should have been granted, due to the fact that Tallman in his own testimony showed that he had not been on his leased ground to make a grab or investigation since 1925, or more than two years prior to the time that the Dredging was done by the Dredging Company.

The defendant's motion for non-suit should have been granted in the case of Walter Lloyd, Lloyd having testified that he could not tell the exact number of oysters on his land, but that the only certain way of telling how many oysters are on a certain piece of ground, under water, is to dig them up, and that any other way is a guess.

Lloyd further testified that he knew the bridge was coming, and that he took up the majority of his oysters, and that he left the remainder of his oysters on the ground, feeling that whoever did the pumping would have to pay for them.

In the two cases of TALLMAN and LLOYD, this defendant respectfully contends that the plaintiffs

failed by their testimony to prove that they had any oysters or clams on their land which were damaged by anything done by either of the defendants. The Court should have given a non-suit to this defendant.

On the remaining six cases, due to the fact that according to the map in the evidence, the bridge did not cover any of the lands of any of the plaintiffs, other than Lloyd and Tallman, and for any sand to go on any of the others lands, of the remaining plaintiffs, it would mean that the defendant, Hill Dredging Company, would have to pump sand on property outside the limit called for by the contract, for instance, the map showed that the lands of Oscar Somers, who occupied the leased ground No. 161, was twenty-one hundred and ten (2110′) feet away from the bridge; that the lands of Smith Hickman were eighteen hundred and twenty (1820′) feet away from the bridge, and that the lands of all the plaintiffs, with the exception of Lloyd and Tallman, were several hundred feet away from the bridge and bulkhead line, as shown by the plans and specifications attached to the contract between the Bridge Company and the Hill Dredging Company. In other words, it was quite evident that if any injury was done to the plaintiff's land by the pumping of sand, it must have been by the pump, which was outside the scope of the construction.

In addition to all of the above argument, as to why a non-suit should have been granted to this defendant, this defendant refers also to the testimony set forth in detail under the point taking up the argument concerning the "Court's Refusal to Strike Out As to the Quantity of Oysters and Clams that each had on his Ground," which testimony shows that the plaintiffs failed to prove any definite amount of

damages but merely were guessing as to the number of oysters and clams that each had on their respective grounds.

II.

THE COURT ERRED BECAUSE IT REFUSED TO DIRECT A VERDICT AGAINST THE PLAINTIFFS AND IN FAVOR OF THE DEFENDANT, OCEAN CITY AUTOMOBILE BRIDGE COMPANY.

In the defendant's argument for a directed verdict, there were two separate motions, one for a directed verdict in the cases of Lloyd and Tallman, where the case was submitted to the jury on the trespass count, and the other motion was directed to the negligence counts in the other cases, as the Judge had previously ruled that as to the six remaining cases, he would not submit the case to the jury on the trespass count. This defendant contends that in the Lloyd and Tallman cases, this defendant could not be held for the trespass of the Hill Dredging Company, an independent contractor, for any injury that was done to the plaintiffs', Lloyd and Tallman's, land was not as a result of the contract being fulfilled within its terms, but any injury done was caused by actions outside the scope of the contract, the independent contractor alone could be liable. There is no question in this case that the Hill Dredging Company was an independent contractor, as an independent contractor is well defined by Justice Katzenbach, in the case of *Kappertz v. Jerseyman,* 121 Atlantic, 718. On page 720, the Justice said:

> "In the case of Reisman against the Public Service Corporation of New Jersey, 82 Law, 464; 81 Atlantic 838, this Court approved the definition of an independent contractor given in 26 Cyc. 1546, in the following words: 'An independent contractor is defined to be one who carries on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.' "

In the cases at bar, this was the exact state of facts, as the bridge company had decided to build a bridge partly of concrete and steel, and partly of sand fill and gravel. The Hill Dredging Company was awarded the contract for the pumping of the sand, and gravel work. They used their own employes in doing the work, their own machinery, and even made their own plans, and the only thing to be supervised by the bridge company engineer, was the fact that the work when finished, would be according to the plans and specifications originally given, and the company had absolutely no control over where the dredging company placed its dredge to do the pumping, or how far the sand would run after being pumped, and, in fact, had no way of checking up and discovering what distance, if any, the sand would run. In view of the fact that the plans and specifications called for an exceedingly short fill on Lloyd's land, and no fill at all on the land of Tallman, this defendant claims that any further trespassing on Lloyd's and Tallman's land should be chargeable only to the contractor, as it was done without the scope of the employment by the bridge company.

It is further argued from the proof submitted, that neither Lloyd nor Tallman had any definite idea as to the number of oysters and clams on their ground, as Lloyd admitted in his testimony (State of Case, page 107, line 19, and also State of Case, page 90, line 7), that he did not know the exact number of oysters and clams on his land, and he further admitted that after having obtained knowledge that the bridge was about to be built, that he went on the land and took off some two thousand oysters, and when asked why he did not remove more of the oysters, he stated that he knew someone would pay for them. This testimony, coupled with Tallman's testimony, which showed that Tallman had not been on the ground since 1925, as is shown in his testimony (see State of Case, page 156, line 31):

> "Q. Since 1927, or since they built the bridge, and made that fill, have you been down there to try your grounds to find if there are any oysters or clams you can get?
>
> A. I have not made a grab there since July, 1925."

This defendant contends that the above testimony on the part of Tallman distinctly shows that he had not been on his leased ground to make any investigation since July of 1925, which was more than two years previous to the building of the bridge, and the alleged damage by the dredging. This, the defendant contends, purely shows that the speculative answers made by Tallman show clearly that he did not regard his ground of sufficient value to go and make tests or to catch oysters or clams. And it further shows, that since he did not make an investigation for more than two years previous to the time

of the alleged damage, it is not reasonable to suppose that the oysters and clams were still on his ground, when there are so many other agencies including tides and rising waters that could wash out and damage the oyster and clam beds, at least Tallman could not testify that the oysters and clams were on the ground and alive.

The other grounds, for the motion for a directed verdict, are that so far as the Ocean City Automobile Bridge Company is concerned, no negligence was shown to the bridge company. The bridge company made a contract with the Hill Dredging Company, a company that does a large dredging and filling business, and which company is regarded as one of the best dredging companies in Southern New Jersey. Nothing was shown at the trial that the bridge company was negligent in selecting its contractor. The contract under which the work was done clearly showed that if the contractor did the work according to the plans and specifications, the fill would cover only a very small portion of Lloyd's ground, and would not have run on or covered any of the other leased grounds. The plans and specifications attached to the contract were made by the Hill Dredging Company, as is shown by the plans themselves. Nothing in the contract gave the bridge company the right to supervise or govern the method by which the work was done. The result of the filling was the only thing that was determined by the bridge company. If, therefore, there was any negligence on the part of the bridge company, such negligence was not shown, and a directed verdict should have been given for this defendant. As to all of the plaintiffs' cases, with the exception of Lloyd and Tallman, it is clearly established that this defendant was not negligent because it did not fail to exercise

any degree of care demanded by the circumstances.

The Judge should have directed a verdict for the Ocean City Automobile Bridge Company, because the work was being done by an independent contractor, and if any damage was done to the lands of the plaintiffs, such damage had to be caused by acts of the independent contractor which were outside the scope of the actual contract. The Court, however, decided that this case came within the doctrine laid down in the case *Lydecker v. The Board of Chosen Freeholders of Passaic County,* 91 New Jersey Law 622 (103 Atlantic Reporter, 251):

> which case was the result of an infant attempting to recover for injuries caused by being thrown from his bicycle while riding along a public highway covered by oil. The Standard Oil Company had contracted with the Freeholders for the placing of oil. The action was brought against the Freeholders and the oil company. The facts showed that the oil company agreed to oil the roads, one-half at a time, to protect it from traffic for six hours after the oil was applied. The contract also provided that the oil was to be applied by a sprinkler satisfactory to the County Engineer, and not more than one-quarter gallon to the square yard. The evidence showed that the oil had been applied in accordance with the terms of the contract, and the Court held that the oil company owed the plaintiff no duty because the contractor was liable only for injuries to third person because of negligence in the execution of his contract. The Court further held it is true that when the work in itself is not a nuisance, and the injury results from the negligence in its execution, the contractor alone is liable, but in the

> Lydecker case, the work was designed by the County Engineer, the quantity of oil to be placed on the road was set up by the County Engineer, and the engineer in making his design had made a mistake, in the amount of oil placed on the road would make it unsafe for travel even after six hours.

This defendant contends that this case is not analogous to the cases at bar, for in these oyster cases, we find that according to the plans attached to the contract, the method of doing the work was designed and arranged by the contractor, Hill Dredging Company. We also find, according to the Exhibits P9 and D1, that the sand fill adjoining the leased grounds, was only to extend to the land of Walter J. Lloyd to a distance of approximately 100 feet, and that there was no provision in the contract that the sand should be allowed to run onto the leased area of the other plaintiffs. According to Exhibit D1, the sand fill at low water covered approximately 130 feet of Eugene Tallman's land, and approximately 250 feet of Walter J. Lloyd's land. This was not in accordance with the contract, and the Hill Dredging Company when it pumped the sand onto the grounds of Lloyd and Tallman, was going without the scope of the contract and any damage caused was a result of its negligence, and not any negligence on the part of the bridge company. In the Lydecker case, the damage was caused because the oil was put on the road too thick, but it was in accordance with the County Engineer's design; here, the pumping of the same was not in accordance with the bridge company engineer's design, but any pumping that covered the land of the plaintiffs, with the exception of Lloyd, was without the scope of the con-

tract, and, therefore, the case would not fall within the rule laid down in the Lydecker case.

The rule of law is well established in this State that where one employs a contractor exercising an independent employment, and hiring his own servants to do the work, not in itself a nuisance, the contractor alone is responsible for the injury resulting from the negligence of himself or his servants in the manner of executing the contract, unless the employer is in default in selecting an unskillful or improper person as contractor. The following cases in this State were decided upon this principle:

Mann v. Max, 107 Atlantic 417, decided June 20, 1919, and *Bush, et al. v. Margolis,* 130 Atlantic 525, decided October 19, 1925.

In the *Mann v. Max* case, 107 Atlantic 417,

> An owner of land abutting a public street, employed a contractor to build a building thereon. The contractor employed a certain sub-contractor for the mason work, and the sub-contractor erected a scaffold projecting from the sidewalk against which scaffold the plaintiff passing at night, struck his head and was injured. The Court held that a reasonable and proper scaffold being permissible, it was presumably lawful to erect one, and a scaffold cannot be a nuisance *per se,* but a legitimate appliance for building purposes, and that, therefore, the work not being a nuisance *per se,* the owner of the property was not liable for any damage sustained by the plaintiff.

This principle of law also has been held in the cases of *Cuff v. Newark and New York Railroad Company,* 35 N. J. Law, 17.

In the case of *Bush, et al. v. Margolis,* 130 Atlantic 525,

> The owner of a property contracted with a contractor for the repairing of the sidewalk in front of his property. The contractor, while engaging in the repair of the sidewalk, made the repairs and placed planks over the fresh concrete, and did not guard them by lights or any other method of warning to pedestrians. The plaintiff tripped over the planks and fell, sustaining injuries the night of the day when the planks had been placed over the repair. The Court held that the protection of the work by the contractor was as much a part of the work of the contractor as the laying of the concrete itself, and that as the work of repair and protection was not in itself a nuisance, the contractor alone was liable for the injury resulting from the negligence of himself and his servants.

The Judge, in addition to citing the Lydecker case, also cited the Marvin Safe case as the basis of his decision. This case was reported in 46 New Jersey Law, 19,

> and was a case where a bridge over the Passaic River had become unsafe, and the Board of Freeholders entered into a contract for the erection of a new bridge, and the contractor entered upon the performance of the work and constructed a temporary bridge. This temporary bridge gave way while a team of horses of the plaintiff was being driven over it, whereby the plaintiff's team was thrown into the river and sustained serious injuries. The Court held in

> that case that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. The Court also held, however, that where a person performing services or doing work under a contract may be held in damages for injuries to a third person, the damage or injury must be occasioned by negligence or misconduct in the execution of the contract, and the duty and liability arises independent of the contract.

In the case at bar, there was negligence on the part of the Hill Dredging Company in dredging and filling the roadway for the bridge company, if it allowed or permitted the sand to run over the bulkheads provided, and onto the property and lands of the plaintiffs. If the Hill Dredging Company had done all of its work in accordance with the plans and specifications attached to the contract, which plans and specifications were made by them, there could not have been any injury to the lands of the plaintiffs. This defendant fails to see how either the case of *Lydecker v. The Board of Freeholders,* or the Marvin Safe Company case apply to the facts in this case, and for these reasons above discussed, this defendant respectfully submits that the judgments appealed from should be reversed.

The bridge company had secured a permit from the State of New Jersey, and from the War Department of the United States for the building of the bridge, and was building the bridge in a way that it could not be construed to be a nuisance, as the plaintiffs had only an exclusive right for fishing, and they did not have a lease for the premises in the sense that they had exclusive right to possession

of the land. They only had possession of the land for the purpose of planting oysters and clams, and the State reserved the right to make any other use of the land that it might see fit. The State in giving the grant to the Ocean City Automobile Bridge Company for the building of a bridge, constituted a retaking of the land insofar as the rights granted to the bridge company were concerned. In support of this contention we have the cases of *Newport News Shipbuilding Co. v. Jones,* Vol. 26, *Corpus Juris,* page 621, 6 L. R. A. (N. S.) 247, and *Darling v. Newport News,* 249 U. S. 540.

III.

THE COURT ERRED IN REFUSING TO STRIKE THE TESTIMONY OF THE PLAINTIFFS AS TO THE QUANTITY OF OYSTERS AND CLAMS THAT EACH HAD ON HIS GROUND.

In each of the eight cases, the defendants made a motion to strike the testimony of the plaintiff as to the quantity of oysters and clams that each had on his respective ground, except in the case of Martin V. B. Scull, in which case the defendants moved to strike the testimony of John H. Smith, who was the only witness that testified that he knew the number of oysters and clams on Scull's tract. (See State of Case, page 200, line 13.) In each of the cases except the Scull case, the plaintiffs each testified as to the number of oysters and clams that they had planted some years before, and that they had made inspection of their ground from time to

time, and that at the time of each inspection, they found that the oysters and clams were living, and then testimony was offered to show that oysters and clams grew a certain amount each year, which increased the number of bushels on each tract. The presumption of law upon which theory this testimony was admitted, was that once a state of fact is proven, it is presumed to continue to exist until it is proven to the contrary. This defendant claims that such a presumption is not applicable to the case at bar, first, because there is a question of life involved. It would be presumed that if the oysters and clams were planted, that the shells would remain for a certain period of time or until it was proven that they had been removed, but it would not be presumed that all of the oysters and clams that had been planted years before, would still be alive. The only case upon which we have anything to base our opinion is the case of *Vreeland v. Vreeland,* 78 Equity 256, in the dictum on page 261, the Court says:

> "It cannot be disputed that the presumption of continuing life grows weaker as time passes; it is stronger the day after a person disappears than it is a year after; stronger after the expiration of a year than at the end of two years; stronger then than at the expiration of five or six years."

This would seem to indicate that where the plaintiffs are depending upon the presumption that the life of the oysters and clams would continue for a period of several years, that they are depending on a very weak link, as the lives of oysters and clams are much more hazardous than the lives of human beings, and the case above cited was dealing with

human beings, and not with oysters and clams or any other animal matter. Especially is this true in view of the evidence and testimony in these cases to the effect that there are many natural causes and conditions which kill oysters and clams.

In all of the cases, the plaintiffs were very uncertain as to the number of oysters and clams that they had on their grounds, and Eugene Tallman's testimony was of such a nature that certainly the Court erred in not striking all of his testimony regarding the oysters and clams that he had on his land.

In the case of Martin V. B. Scull, John H. Smith was called to the stand and asked to testify as to the number of oysters and clams on Scull's tract, at some period previous to the building of the bridge. Mr. Smith came to the stand and testified that he had made an agreement with Scull to work his oyster and clam beds, and that before going on the land to work, he made an investigation of the ground, and that in doing so he took tongs and made grabs on the land of Scull, and from the use of these tongs, determined the number of bushels of oysters and clams on the land of Scull. This defendant claims that this method of finding the number of oysters and clams on any piece of ground is not testimony, but purely guessing. In Smith's testimony (State of the Case, page 202, line 30):

> "Q. How many, in your opinion, were there on the area that you tried?
>
> A. On the area that I tried, I would say, on the area that I tried, somewheres about one-quarter of the ground, would be in the neighborhood of fifty or seventy-five thousand clams."

This, the defendant claims, is purely speculative testimony, when a witness could not estimate better

than a difference of twenty-five thousand clams in a seventy-five thousand estimate. The defendants objected to the admission of this testimony, and moved that the testimony be stricken as to the number of oysters and clams on Scull's ground, on the ground that the testimony was purely speculative. This motion was denied. See State of the Case, page 203, line 7.

A similar motion to strike the testimony was made at the close of each plaintiff's case, on the ground that the testimony was purely speculative, and was based on the presumption that the oysters and clams planted in 1924 and 1925 were still alive and growing in 1927 and 1928. The plaintiffs made no move to try to prove their loss of profit for any one year, which seems to be the only proper way of proving the damage to these leases, and each of the plaintiffs practically admitted on the stand that there were still oysters and clams on their ground even after all the pumping was done. See testimony of Theodore Smith, State of Case, page 130, line 10. The only argument which the different plaintiffs had, was to the effect that the pumping of the sand had covered their ground to such an extent that the oyster and clam business was not profitable. This defendant contends that the only measure of damages which could have been recovered for such a loss was the loss of profit for the year 1927, and possibly 1928, instead of for the whole number of clams and oysters on each separate tract, as there was nothing to prevent the plaintiffs from still using their beds, and in fact, some of the plaintiffs admitted that they still go on the ground and take off oysters and clams.

In Volume 8, Ruling Case Law, page 649, under Section 192, loss of profits, it is stated that:

> "Where a regular established business is injured, the average profits that the business is then earning and has earned, are competent proof as to the loss of profits, and even in cases where no recovery for loss of profits as such may be had for injury to a business * * *. A witness cannot give his opinion as to the amount of profits that could have been made, or that the profits lost were a specified sum, nor is the mere statement by one in charge of a business as to the net profits per month, before and after the injury, with nothing to show on what the estimate is based sufficient to warrant a submission to the jury of the question of loss of profits because of such injury."

This defendant contends that the testimony hereinafter set forth, taken as parts of the testimony from different plaintiffs' cases, shows how speculative the evidence was, as to the number of oysters on the ground and shows how the plaintiffs were merely guessing as to the number of oysters on the ground in 1927, when the pumping started. This also shows that none of the plaintiffs knew the number of clams to the bushel and there was a wide variance in answers made by each plaintiff as to the question of how many clams there were to the bushel.

The Tallman testimony especially showed that he did not have the slightest knowledge as to the number of oysters and clams on his land as he had not been on the leased area for more than two years previous to the pumping. See State of the Case, page 156, line 31. The same situation is shown to be true in the other cases from the testimony hereafter set forth.

In the JOHN H. SMITH CASE, the testimony is as follows:

See State of the Case, page 47, line 23:

"Q. How large are those clams that you gathered to plant on these leased grounds?

A. Well, the ones that I bought run about twelve thousand to the bushel.

Q. What is the usual quantity of clams in a bushel?

A. Well, at that size, they run from that down to six or seven hundred, that is, small clams.

Q. But the clams that you plant out?

A. They run from ten to twelve thousand to the bushel. Twelve thousand to fifteen, sometimes."

Also, see State of the Case, page 50, line 16, as to how many oysters were on his land prior to the pumping:

"Q. Can you determine how many oysters you had on your land at that time, in January, 1928?

A. *As near as I can tell,* there was about 1500 bushels between Theodore Smith and I.

Mr. Hanstein: I ask that be stricken.

The Court: The answer should have been yes or no.

Q. Answer that yes or no. The question is can you determine approximately how many clams you had on the ground at that time?

A. I could.

Q. How many?

A. How many I had at that time?

Q. How many oysters first.

A. How many oysters on the ground?

Q. You said about 1500 bushels between you and ——

A. Theodore Smith, yes.

Q. What quantity of oysters did you have on your ten acres, twenty acres

A. I planted one thousand bushels.

Mr. Hanstein: I ask that be stricken.

The Court: That will be stricken.

Q. You planted a thousand bushels? How many did you plant there? How many did you say you planted?

A. Fifteen hundred bushels together.

Q. That is a thousand, you said, for yourself?

A. Yes, sir.

Q. When did you plant them?

A. 1923 and 1924."

JOHN H. SMITH in his testimony, see State of the Case, page 66, line 15:

"Q. Is there any way that you know of that a person can tell how many oysters are in a given area under water without taking them up and counting them?

A. Without taking them up and counting them? You can tell by the bushel what you plant there.

Q. If they don't all grow you can't tell, can you?

A. Certainly you can tell what you have got left.

Q. You can tell by what?

A. What you have left on the ground when you take them up.

Q. When you take them up?

A. Yes.

Q. So that the best way to tell how many oys-

ters you have, or clams, is by taking them up, isn't it?

A. No. If you know how many clams you planted, you know how many you have there, if nobody don't take them or kill them."

THEODORE SMITH in his testimony, see State of the Case, page 117, line 28:

"Q. How many clams would there be in a bushel that you planted there?

A. From twelve to fifteen thousand."

Also see State of the Case, page 131, line 7:

"Q. Well, the ones that you dug up from underneath the bottom were living, weren't they?

A. Not all of them.

Q. Some of them were, weren't they?

A. Some was living.

Q. And for all you know, some of them that were down there were living, too?

A. Well, I couldn't reach them with the tongs.

Q. You couldn't get them with the tongs?

A. Couldn't get them, nothing but dead ones.

Q. What is the best way of telling how many oysters are on a piece of ground?

A. The best way of telling?

Q. Yes.

A. Why, you plant so many bushel on the acre and then you judge what the percentage will be, and then you can tell that way. Go over the bottom and feel. *You, of course, couldn't be accurate.*"

All of this testimony goes to show that not only Smith found clams and oysters on the leased ground

after the bridge was completed but also admitted in his testimony that the method employed by the plaintiffs in these cases, to determine the number of clams and oysters on the ground, could not be accurate, but merely a guess.

JESSE THOMAS testified as follows: See State of the Case, page 167, line 29:

"Q. When did you plant the clams?

A. 1924.

Q. On how many acres did you plant those clams that year?

A. Well, you couldn't tell how many acres.

Q. Beg pardon?

A. You couldn't tell how many acres you planted them on.

Q. You had ten acres and three and eighty hundredths; 13.80 acres all together.

A. Yes.

Q. Did you plant them on those grounds?

A. Sure.

Q. All on one?

A. No. Part on one and part on the other.

Q. How many clams did you plant?

A. Sixty bushels was what I catched and bought.

Q. How many clams would there be to the bushel?

A. Twelve thousand. Twelve to fifteen."

Which goes to show that JESSE THOMAS did not know how he had planted his oysters and clams, or on what part of his land he had planted them, nor did he know how many clams there were to the bushel; all of which goes to show that Thomas' testimony, as well as the other plaintiffs was of a very questionable nature.

SMITH HICKMAN, see State of the Case, page 180, line 23, as follows:

"Q. How many clams were there to the bushel?

A. Well, from eight to twelve thousand. From eight thousand to twelve thousand to the bushel.

Q. On your land, from eight to twelve?

A. Yes.

Q. And did you go on the ground to find out the condition of them in 1925?

A. I did not.

Q. 1926?

A. I did in 1926.

Q. *What did you find there in* 1926?

A. They was all right, but they was hardly large enough for market.

Q. Growing, were they?

A. Yes, sir, seemed to be.

Q. Did you go on the ground in 1927?

A. I did not.

Q. When did you next go on the grounds?

A. October, 1928."

This testimony not only shows that HICKMAN did not know how many clams there were to the bushel, but that when he went to look at his clams in 1926, they were not large enough for market and that he did not examine clams from 1926 until 1928, which meant that a period of more than a year elapsed between the time that he examined his oysters and clams and the work on the bridge started. It seems especially peculiar that any of the plaintiffs should have failed to go on their land rights, previously to the starting of our pumping on the bridges, because all of the plaintiffs knew of the

proposed bridge. This is shown from the fact that these people wrote to the bridge company, stating that their oysters and clams had been ruined before the pumping actually started.

HICKMAN'S further testimony was to the effect that he did not know whether he had planted the clams on his lot or not, that he had aimed to. See State of the Case, page 182, line 1, which is as follows:

"Q. But you did have the thirty-three bushels on your ground?

A. I planted the thirty-three bushels and I aimed to put them on my own land.

Q. And those clams, what happened to them, did you say?

A. I can't find them. They are buried up or something. I can't find them."

OSCAR SOMERS, in his testimony, see State of the Case, page 191, line 3, as follows:

"Q. You indicated there from a half inch to an inch, I suppose?

A. Yes, and over that sometimes. That is just the size. They run from that size on up. Plants and on up.

Q. That was in 1926?

A. 1926.

Q. In 1927 they weren't fit for market, yet, were they?

A. No, sir. They wasn't.

Q. How many years does it take before they are fit for market?

A. Around three and four years."

Which testimony is to the effect that SOMERS planted little clams, which were known as plants, in

1926, and further testified that they were not ready for market in 1927, and were of a very questionable size when the pumping started. In view of this, this defendant contends that it would have been according to SOMERS' own testimony three or four years before the oysters or clams would be of any considerable value.

In the case of WALTER J. LLOYD, this defendant contends that the testimony was especially speculative, for Lloyd testified as follows: See State of the Case, page 89, line 18:

> "Q. Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?
>
> A. It is a rather hard question to answer, but I had taken up the majority of my oysters, but I should say a fair estimate I probably had a thousand bushel.
>
> Q. Of oysters?
>
> A. Yes.
>
> Q. How large were they?
>
> A. I said I probably had a thousand bushel.
>
> Mr. Hanstein: I ask that that be stricken. I make my motion to strike this on the ground it is purely an estimate, it is purely a speculation and it is encumbent upon them to make proof, and it does not constitute proof.
>
> The Court: I will strike the answer as not being responsive to the question. The answer should be yes or no.
>
> (Exception noted for plaintiffs.)
>
> (Former question repeated as follows: Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?)

A. Yes.

Q. How many

A. About a thousand bushel, *I should say, to the best of my ability.*

Mr. Hanstein: I ask that be stricken as not being proper proof.

The Court: No. That was a competent question, there was no objection made, and the answer will not be stricken."

Also see State of the Case, page 101, line 26, as follows:

"Q. The only certain way of telling how many oysters you have is by digging them up, isn't it?

A. *That is the most sure way.*

Q. Any other way is a guess; isn't that true?

A. *More or less.*"

Which testimony makes it quite clear that LLOYD did not know the number of clams and oysters on his land and was simply guessing as to the number of bushels of oysters and clams.

In view of the testimony above recited, as well as the other testimony of the various plaintiffs, this defendant contends that the testimony as to each of the separate plaintiffs, should have been stricken, and that the Court erred in not striking this testimony upon defendant's motion.

IV & V.

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS FOLLOWS:

(a) This defendant requested the Court to charge the jury as follows:

> "If the jury find that the Ocean City Automobile Bridge Company used diligence in selecting the Hill Dredging Company to do the pumping, and they find the sand going on plaintiff's property was not a direct result of the contract, then the jury should find a verdict of no cause of action as to this defendant."

It is contended that under the cases previously cited, of *Mann v. Max,* and *Bush v. Margolis,* and others, it has been held in this State to be the law that if an owner uses diligence in selecting a contractor the contractor alone is liable for negligence, unless the work to be done is in itself a nuisance. In view of this line of decisions, there may have been a question for the jury to decide as to whether the bridge company used diligence in selecting the Hill Dredging Company, but under the evidence, if the jury should find that the bridge company did use diligence in selecting the Hill Dredging Company, and that as a result of the work done by the Hill Dredging Company, damage was done to plaintiffs' property, which was not a direct result of the contract, and if the jury should find these facts to be true, then there should have been a verdict for no cause of action as to this defendant. The Jury in looking over the contract, specifications and plans,

could easily have ascertained that the work prescribed under the contract would not have constituted an injury on any of the lands of the plaintiffs.

(b) This defendant requested the Court to charge that

> "If the jury find from all the evidence that the roadway could have been filled in without permitting any sand to go on the property of the plaintiffs, then the jury should find a verdict of no cause of action as to this defendant."

The Judge should have so charged the jury, because that would have allowed the jury to pass on the question as to whether the work could be done without injuring plaintiffs' property, and if it could have been done without injuring said property, then the defendant Ocean City Automobile Bridge Company should not have been held liable, for the Hill Dredging Company was an independent contractor, entirely independent and responsible for the method of doing the work, and the bridge company should have been liable only in case the plans and specifications called for work to be done which would have proven injurious to plaintiffs' property.

VI & VII.

THE COURT ERRED BECAUSE IT CHARGED THE JURY UPON PLAINTIFFS' REQUEST AS FOLLOWS:

(a) The plaintiff requested the Court to charge the jury that:

> "In performing the work under the contract in this case, defendant was bound to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine."

The defendant, Ocean City Automobile Bridge Company contends that this was an improper charge to the jury so far as the cases against the Ocean City Automobile Bridge Company were concerned, because the bridge company had no control over the pumping machine. It had no control over the places from where the Hill Dredging Company was to pump, and it would have been impossible for the bridge company even upon investigation prior to the award of the contract, to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine. In making this charge to the jury, it prejudiced the minds of the jury into believing that the bridge company should have known the effect of the pumping and dredging and that therefore if they did not know the effect, they should be held liable. If the bridge company had had control over the Hill Dredging Company as to the method of doing the work and full supervision, then this charge might have been proper, but under the facts as proven, it was not shown that there was any liability on the part of the bridge company to know the effects of the currents of the river upon the sand pumped.

(b) The Court further charged the jury at the plaintiffs' request, as follows:

> "The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in ques-

tion were notice to defendant to some right in plaintiff in said land."

It is contended that the stakes which were alleged to have been upon the land of the plaintiffs were irregular in their position; they were of no particular design, but merely sticks sticking up in the air, sometimes covered by the tides, and that the stakes were not such as would call the attention of anyone to the fact that someone might have an interest in the lands. See State of the Case, page 395, line 23, as to the testimony of Preston Risley, as to the type of stakes placed in the ground, and also as to the number that were placed on the ground. Defendant contends that by so charging the jury, the Court prejudiced the jury in that the jury would feel that this defendant had full knowledge as to all of the plaintiffs' rights and claims and should have made a full investigation before having the Hill Dredging Company go on the ground to do the pumping. Defendant contends that the charges of the Court to the jury as above outlined, were prejudicial and would have great weight with the jury in making its decision.

For the reasons above discussed, I submit that the judgments appealed from should be reversed.

ROBERT K. BELL,
Solicitor for and of Counsel with Defendant Ocean City Automobile Bridge Company.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WALTER J. LLOYD,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE CO. AND HILL DREDGING CO.,
Defendants-Appellants.

EUGENE TALLMAN,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE CO. AND HILL DREDGING CO.,
Defendants-Appellants.

ON APPEAL.

BRIEF OF DEFENDANT-APPELLANT, HILL DREDGING CO.

The defendant, Hill Dredging Co., and defendant, Ocean City Automobile Bridge Company, were sued

New Jersey State Library

jointly by eight different plaintiffs, in eight separate suits, all of which were tried together, and resulted in judgments against the Ocean City Automobile Bridge Company in eight suits, and in directed verdicts in favor of the defendant, Hill Dredging Company in six of those suits, and in verdicts against the Hill Dredging Company in the suit of Eugene Tallman and in the suit of Walter J. Lloyd.

By stipulation of counsel, the pleadings of only one suit are printed in the state of the case, inasmuch as they are all identical, with the exception of the description of the property, names of the plaintiffs, and the addanum clause. The answers throughout are identical.

The various plaintiffs were individually holders of oyster leases for ground in Great Egg Harbor River. The defendant, Ocean City Automobile Bridge Company, was the owner and builder of a bridge and roadway extending across Great Egg Harbor River from Somers Point, in Atlantic County, to Beasley's Point, in Cape May County. The defendant, Hill Dredging Company, was the contractor for the doing of the work under the terms of the contract, Exhibit D3.

The various plaintiffs claimed that by reason of the doing of the filling entailed in the construction of the bridge and roadway their oysters and clams were damaged and destroyed. The lands of all of the plaintiffs, except Tallman and Lloyd, were more or less remote from the point at which the actual pumping of sand was done. Some sand was concededly pumped on part of the lands of Tallman and Lloyd. The answers of the defendant, Hill Dredging Company, denied any negligence, alleged

that it did the work in accordance with a contract with and under the direction of the Ocean City Automobile Bridge Company, and that the work was done in the usual manner. The answers further set up that the work was done by virtue of a permit from the State of New Jersey, and in accordance with the requirements of the State of New Jersey, and upon land conveyed to the bridge company under a riparian grant from the State of New Jersey.

The defense proved all of these things, and showed that there had been a riparian grant by the State of New Jersey to the bridge company, over the Tallman and Lloyd leased areas, and that the Board of Commerce and Navigation of the State of New Jersey, and the United States War Department gave permits for the doing of this very work. The bridge was actually built at the point designated by the Board of Commerce and Navigation, and by the Ocean City Automobile Bridge Company in its contract with the Hill Dredging Company. The defendant, Hill Dredging Company, contends that the verdicts of Lloyd and Tallman against it are erroneous.

ARGUMENT.

I.

THE COURT ERRED IN REFUSING TO DIRECT A VERDICT AS TO BOTH LLOYD AND TALLMAN.

These two plaintiffs claimed possession of land under water, which belonged to the State of New Jersey, by virtue of leases made to them by the Board of Shell Fisheries of this State. Subsequently, the State of New Jersey conveyed this very land by a deed executed and delivered by its agency, the Board of Commerce and Navigation, unto the bridge company, and thereafter, the State, through that same agency, issued a permit to the bridge company for the building of the bridge in question. The Hill Dredging Company, acting under a contract with the bridge company erected the bridge at the place, and in the manner directed by its contract, and did the work under the direction of the bridge company's engineer.

Plaintiff, Lloyd, testified that he knew that the bridge was to be built, and that the building of it would destroy everything that he had planted, so he gathered up a couple of thousand clams (p. 94).

It is our contention that the character of the lease made to the plaintiff was such that the State retained its sovereign power over the premises in question, with the right to use, or authorize the use of the waters for any other public use, and that the authorizing of such other public use abrogated the

rights of the plaintiff under his lease, insofar as that would be necessary for the carrying out of the other use to which the State might direct the waterway to be put. In support of that we refer to the following authorities:

Darling v. Newport News, 249 U. S. 540, 63 Law Ed. 759;

Tinicum Fishing Co. v. Carter, 90 Pennsylvania State 85, 35 American Reporter 632;

Newport News Shipbuilding Co. v. Jones, 6 L. R. A. (Ns) 247, 26 Corpus Juris 621;

Stevens v. Paterson and Newark R. R. Co., 34 N. J. L. 532, at 553.

The last cited case is referred to merely to show the application in New Jersey of the familiar canon of construction that grants by the State must be construed strictly. In the cited case, at page 553, Chief Justice Beasley expressed this rule as follows:

> "The State is never presumed to have parted with any part of its property in the absence of conclusive proof of an intention to do so."

With this canon of construction in mind the appellant submits that the leases, upon which the respondents rely and which are taken to afford the whole basis for their actions, are not leases in the ordinary sense, do not grant to the respondents exclusive possession of the land in question, and do not grant to the respondents such possession as to prevent the appellants from exercising the privileges granted to the appellants by the State of New

Jersey. The appellants submit that the respondents' so-called leases create in fact merely exclusive fishing privileges. The granting clauses of the respondents' leases are in the following language:

> "The State of New Jersey, by the said Board of shell fisheries—does hereby demise, lease and let unto the said lessee and to his heirs and assigns for the term of one year—all that certain land of the State of New Jersey, lying under the tidal waters of * * * to be exclusively used and enjoyed by the said lessee for taking, planting and cultivating of oysters, clams or shell fish, that is to say * * * "

These leases were made pursuant to the statute (Laws 1917, ch. 116; 1 C. S. Supp., Sec. 40-67-a (29)), which provides for leases of "lands of the state under the tidal waters thereof to be exclusively used and enjoyed by such lessee for the planting and cultivating of oysters and clams." It is the appellants' contention that the words "to be exclusively used and enjoyed by the said lessee for taking, planting and cultivating of oysters, clams or shellfish" limit the effect of the grant made by the State so as to create not an exclusive right of occupancy of the land demised, but simply an exclusive right of fishery over that land. In other words, the State by its lease agrees with the lessee that he, and he alone, may use the land described for the purpose of taking oysters or clams from it during the period of the lease, but the State does not agree that the land shall not be used for any other purpose which, in the judgment of the State, may be for the best interest of its citizens. Several considerations persuade one toward this construction in addition to the canon of construction above mentioned.

In the first place, if the plaintiffs' leases are to be regarded as leases in the ordinary sense, that construction must be applied against the State as well as against grantees from the State. It must be remembered that the Riparian Act expressly provides that a conveyance by the Riparian Commissioners (or by the Board of Commerce and Navigation, the successors of the Commissioners) "shall vest all the rights of the State in said lands in said lessee or grantee" (4 C. S., page 4390, Section 21). If the plaintiffs' construction is right, then the State itself may not build roadways or bridges across lands under water if oyster leases are outstanding affecting those lands, nor may it even use the waters for the passage of boats. Is it conceivable that such a result was intended? Could it possibly have been thought that the plan of leasing oyster lands by the State would involve depriving the State of putting those lands to any other use during the term of the so-called lease? Did the State intend to give up all control over these lands for the term of the leases? The appellants submit that such an intention cannot be ascribed to the State, and that it ought not to be ascribed to it in the absence of express words for that purpose. The leases in question did not contain such express words, and, on the other hand, they contain words clearly limiting the privileges which the lessees may exercise.

A second consideration is the amount of rent which the State has reserved in these leases. Two dollars per acre is the amount which the lessees pay annually, obviously a purely nominal sum. The rent reserved shows that the leases are granted with the idea that the State will benefit from them in a way entirely apart from the amount of rent col-

lected. But can these leases be said to be a benefit to the State if they are construed to grant exclusive rights of occupancy of the lands described therein for any purpose? Does not the State suffer a very serious detriment if it has entered into agreements by which the lessees may prevent the State from using the lands at all during the terms of the lease? Is $2.00 per acre adequate compensation for such an agreement? The appellant submits that this consideration also leads to the conclusion that the oyster leases grant merely exclusive fishing rights.

In *Darling v. Newport News,* above cited, involving an oyster lease granted by the State of Virginia a construction similar to the one that is here urged was adopted by the Supreme Court of the United States in reaching its conclusion. Justice Holmes, speaking for a unanimous Court, said, in part:

> "We agree with the Court below that when land is let under water of Hampton Roads even though let for oyster beds, the lessee must be held to take the risk of pollution of the water. It cannot be supposed that for $1.00 an acre, the rent mentioned in the code, or whatever the plaintiff paid, he acquired a property superior to that risk or that by the mere making of the lease the State contracted, if it could, against using its Legislative power to sanction one of the most important public uses of the water. * * * It is unnecessary to cite the cases that have affirmed so frequently that the construction of public grants must be very strict."

Tinicum Fishing Company v. Carter, above cited, seems to the appellant to be very close on its

facts to the present case. A person having a conceded right of fishery in the Delaware River sued for damages against the defendant who had constructed a pier in the river under a license from the State which pier concededly damaged the plaintiff's fishery. The Court held that the plaintiff had no cause of action, and in its opinion it said, in part:

> "As the State, says Justice Sharswood, might itself have erected, or caused to be erected the wharf and pier built by the defendant below without any responsibility to the plaintiff for any consequential damages to his easement or right of drawing of seine on the shore, so neither is the grantee or licensee of the State liable for such damage."

Two other authorities of a more general nature are favorable to the appellant's contention. In the note accompanying *Newport News Shipbuilding Company v. Jones,* above cited, in 6 L. R. A. (NS) 247, the following conclusion is expressed:

> "The right to grant exclusive fishery rights in tide waters being recognized (see Farnham, Waters, p. 1368), it would seem that a license to cultivate oysters on State land must be regarded simply as a temporary grant of the public right of fishery, and in the absence of express legislation conferring greater privileges, the rights of the licensee are simply those of the owner of a several fishery in a public water."

As the owner of a several fishery in a public water, the plaintiffs had no course of action against

this appellant for work done under a grant from, and a license from, the State.

Tinicum Fishing Company v. Carter, above cited.

In 26 *Corpus Juris,* at page 621, it is said:

> "Damages cannot be recovered for consequential injuries caused by erections constructed under a license from the State, unless the damage results from the careless manner in which the construction is done."

Upon the principles above set forth and the authorities above referred to, the appellant contends that the plaintiffs' so-called leases afford no basis for the actions brought against appellant for the doing of work under a grant and a license from the State of New Jersey, and that the Court's refusal to direct a verdict in favor of the appellants was therefore erroneous.

It should be remembered that the verdicts rendered against this appellant are in no sense based upon negligence (for none was shown and the Court withdrew the negligence count from the jury's consideration), but are based solely upon an alleged unlawful trespass which we say was authorized by the State's grant and permit.

If it should be argued that even though the State did retain the sovereign power, with the right to make further and other uses of the waterway, still that would not justify the defendants in entering upon the plaintiffs' land without giving them notice, and an opportunity to remove their clams and oysters to a place of safety, then we say, in answer to that, that plaintiff, Lloyd, knew of the coming

of the bridge, and of its likely danger to his products, and removed some of them to safety and failed to remove the remainder of his oysters and clams, because he knew, as he thought, that he could make some one pay for destroying them (see Lloyd's testimony, page 101).

II.

THE COURT ERRED IN REFUSING TO STRIKE THE TESTIMONY OF PLAINTIFFS, LLOYD AND TALLMAN, AS TO THE QUANTITY OF OYSTERS AND CLAMS THAT THEY HAD ON THEIR GROUND.

Plaintiff, Lloyd, was one of the plaintiffs across part of whose land the bridge was actually built. By way of proving damages as to his oysters, the following testimony was offered by the plaintiff:

"Q. Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?

A. It is a rather hard question to answer, but I had taken up the majority of my oysters, but I should say a fair estimate I probably had a thousand bushel.

Q. Of oysters?

A. Yes.

Q. How large were they?

A. I said I probably had a thousand bushel.

Mr. Hanstein: I ask that that be stricken. I make my motion to strike this on the ground it is purely an estimate, it is purely a speculation, and it is incumbent upon them to make proof, and it does not constitute proof.

The Court: I will strike the answer as not being responsive to the question. The answer should be yes or no.

(Exception noted for plaintiffs.)

(Former question repeated as follows: 'Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?')

A. Yes.

Q. How many?

A. About a thousand bushel, I should say, to the best of my ability.

Mr. Hanstein: I ask that be stricken as not being proper proof.

The Court: No. That was a competent question, there was no objection made, and the answer will not be stricken." (Pp. 89-90.)

It is quite apparent that the latter part of this testimony, as to the thousand bushel, should be stricken, just as surely as the first testimony as to the thousand bushel was stricken.

The plaintiff was asked, as will be observed:

"Q. Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?"

That was an entirely competent question, and had it been directly answered by one with knowledge, it would have constituted legal proof. The answer, however, was:

"A. About a thousand bushel, I should say, to the best of my ability."

A motion was immediately made to strike it, but the Court refused on the ground that no objection

was made to the question. No valid objection could have been made to that question. The answer is highly objectionable as proof, however, for the reason that the "about" clearly qualified it, and the "I should say, to the best of my ability," clearly showed that the plaintiff had no definite or accurate information.

It does not seem to the writer to be any different whatever from the previous answer, which was stricken, which was that he "probably had a thousand bushel."

This same witness testified as follows:

"Q. You told Mr. Bourgeois it is a pretty hard question to answer as to how many oysters you have on your ground, didn't you?

A. I think I did.

Q. The only certain way of telling how many oysters you have is by digging them up, isn't it?

A. That is the most sure way.

Q. Any other way is a guess; isn't that true?

A. More or less." (P. 101.)

This clearly showed that his estimate of a thousand bushel of oysters should not stand as legal proof.

With regard to clams, the witness was asked how many clams he had, and he answered that he had planted forty bushel, which answer was stricken as not being responsive (page 91). Later the witness testified that in September of 1924 he planted forty bushel of clams. In the fall of 1928 he sold two thousand of those clams (page 93). The witness was asked if he knew how many clams he had on the ground at the time the filling started, to which he

answered "no" (page 107). This was certainly no legal evidence of the quantity of oysters and clams that were on the ground at the time defendants started pumping, and, although the plaintiff would, upon that showing, if there is no merit to our other contentions, have been entitled to a nominal verdict, he was certainly not entitled to a substantial verdict on any theory of his having proved by legal evidence, the amount of oysters and clams that were destroyed.

Further than that, it seems to us that the plaintiff disabled himself from any right of recovery in this case, because he testified as follows:

> "Q. Why did you sell only two thousand?
>
> A. Well, I understood they were going to pump into that bridge, and my understanding was that they was going to pump from Jimmy's Island to the Horse Shoe, in other words, fill the Creek Channel up and bulkhead it. If they did, everything I planted there would be gone, so I says 'I will tong up some.' I went there and tonged one hour. I took them down to Somers Point and sold them to Mr. Sharp, two thousand, and he says, 'Have you got any more?' " (P. 94.)

On cross-examination, the plaintiff testified as follows:

> "Q. Well, you gathered up some clams?
>
> A. Yes, sir.
>
> Q. Why didn't you gather up all of your clams?
>
> A. Simply because I was going to lose too much money by doing it.
>
> Q. You wouldn't lose any more money by taking them up than by leaving them lay, would you?

A. I would unless somebody paid for destroying them.

Q. So that you stood by, knowing that there was going to be a bridge, and thinking it important to take up two thousand of them, but you didn't take up the rest of them; is that it?

A. I stopped when I got that many up.

Q. And you got them up in an hour, didn't you say?

A. I worked one hour.

Q. And you got up two thousand in one hour?

A. Yes, sir." (Pp. 100-101.)

It is submitted that a plaintiff, who has knowledge that something is to be done, under lawful authority, which may injure his property, has no right to stand by merely because he believes that he can collect damages for the injury, without doing something to minimize his loss. There was no proof whatever in this case, that had the plaintiff taken up all of his clams, at the time he took up the two thousand, that he would have suffered any loss by so doing, and we submit that by reason of that conduct on the part of the plaintiff, he was not entitled to recover. The proof that he was able to sell two thousand clams shows that his clams were marketable, and since they were, they all could have been sold as well as those that he took up. We think that in the light of that situation the defendant was entitled to have charged its request, which is embodied in the sixteenth ground of appeal, which was:

"Since plaintiff, Lloyd, had knowledge that the bridge was to cross his land, it was incumbent upon him to take such reasonable steps to

protect his oysters and clams as were proper under the circumstances, and if he failed to do so he cannot recover for the value of the oysters and clams destroyed."

The Court refused to charge as requested, and an exception was allowed. The failure to so charge permitted the case to go to the jury without any suggestion that Lloyd owed any duty whatever in the premises and the defendant was thereby seriously prejudiced.

The testimony of the plaintiff, Tallman, as to damage of his clams should also have been stricken. He testified that he had leased certain of the land in question. He offered some proof as to the oysters which he had on his ground, but the Court considered that his testimony as to the quantity was so clearly a guess that it was not permitted to stand. However, the testimony as to clams was permitted to stand, which we believe to be error.

His testimony as to clams was that he planted 15 bushel of clams in 1924, and subsequently planted more, so that altogether he had about 50 bushel, all of which were planted in 1924. The witness testified that he had not been on his ground since 1925.

"A. I haven't been there since the summer of 1925. I haven't catched an oyster or a clam off of there" (page 156).

He further testized:

"I haven't made a grab there since July, 1925" (page 156).

The Court interrogated him as follows:

"I do not know that he says that. He says

that he has not dredged there since 1925. Have you been there on the ground since the bridge was put up?

The Witness: I haven't made a grab there since.

Q. Have you personally been on the ground?

A. I have been over it, but not to catch anything. Never tried it. Where I put the stuff in, it is all covered over'' (page 158).

Here we have the case of a witness who testified to planting 50 bushel of clams in 1924. He was not on his land since the summer of 1925. The testimony showed that the pumping for the bridge was started in September, 1928. For a period of three years he had no knowledge whatever as to whether or not his clams were still on the ground; nor did he produce any testimony whatever that they were on the ground, or living at the time the work for the bridge started. There was ample proof in the case that drumfish, snail borers, star-fish and various other elements affected clams and oysters, not to mention the possibility of the clams being removed by some one other than the plaintiff himself. There was certainly no presumption in the face of the hazards of the industry as proven that the clams that were planted continued to be there, and to thrive up until the time the work on the bridge started. To permit the jury to guess that they were still there was speculation such as is not permitted in the finding of a verdict.

Defendant undertook to take care of the situation by its request to charge, which is embodied in the seventeenth ground of appeal, and which read as follows:

> "If you believe that defendant, Tallman, did not make a grab upon his land since 1925, there is no presumption that his oysters and clams previously planted, were there and alive at the time of the filling,"

but which was refused by the Court. In the absence of proof that plaintiff, Tallman's, clams were on the ground, and alive, at the time the dredging was started, there could be no verdict for damages predicated upon their death being caused by the defendant.

The refusal to charge as requested was clearly prejudicial.

As to both the plaintiffs, Lloyd and Tallman, the appellant contends that the proof of damages was so speculative, so indefinite and of so vague a nature, as to be entirely insufficient to permit verdicts to be based upon it. The plaintiffs' actions were to all intents and purposes designed to secure a recovery for alleged loss of profits in their businesses, caused, as plaintiffs alleged, by the appellants' tortious acts. It has been expressly held in this State that loss of profits are recoverable in actions of tort only when they are capable of being estimated with reasonable certainty, *Bartow v. Erie Railroad Company,* 73 N. J. L. 12, 62 Atl. 489 (Supreme Court), followed by this Court in *Mason v. Erie Railroad Company,* 75 N. J. L. 521, at 524, 68 Atl. 105. The appellant's exceptions to the trial Court's charge and its refusals to charge raise the question whether on the proofs submitted in this case, there was a reasonable certainty of the amount of damages which the plaintiffs suffered; and the appellant submits that that question must be an-

swered in the negative. In the case of plaintiff, Tallman, there was no proof whatever, covering a period of over three years before the defendant's work was commenced, to show that during any part of that time Tallman's clams were on his ground at all and *a fortiori* there was no proof of the quantity or condition of said clams. In the case of the plaintiff, Lloyd, and in fact of all the plaintiffs, it clearly appeared that the testimony simply represented the best guess of the various witnesses and that they could not say with any degree of positiveness that any certain quantity of clams or oysters were damaged by the defendants' acts. The testimony at most only showed what the witnesses' expectations of profits were. They did not and could not show that in any given case those profits were reasonably certain of realization.

As a precedent for the contention here made, the appellant relies on the celebrated case of *Wolcott v. Mount,* 36 N. J. L. 262, affirmed by this Court in 38 N. J. L. 496. The case involved a claim for damages for the difference between the value of a crop of turnips actually produced, from inferior seeds sold to the plaintiff by the defendant, and the value of such a crop as would have been produced by a higher grade seed. In permitting recovery by the plaintiff to stand, the Supreme Court, speaking by Justice Depue, said (page 272):

> "The loss of the value of a crop for which the seed had not been sown, the yield from which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with that degree of certainty which the law enacts in the proof of damages. * * * In this case * * * The

> ground was prepared and sowed and a crop produced. The uncertainty of the quantity of the crop, dependent upon the condition of weather and season was removed by yield of the ground under the precise circumstances to which the seeds ordered would have been exposed. The difference between the market value of the crop raised and the same crop from the seed ordered would be the correct criterion of the extent of the loss."

Wolcott v. Mount has been consistently followed not only in this State but also in other States, and has been everywhere regarded as a well-reasoned opinion. The appellant has found no case in New Jersey, departing from the rule there established or permitting the recovery of loss of profits from an unproduced crop.

The appellant submits that the facts in the case of *Wolcott v. Mount* are entirely analogous to the facts in the present cases on the question here discussed. The proofs showed that the oysters and clams, for which the plaintiffs claimed, were "planted"; that a period of years was required for them to come to full growth; that during all of that period the oysters and clams were under water, just as growing turnips are, during some of the period of their development, under ground, that their development could therefore not be observed except by actually digging them up, and that their number could not be counted until they were dug up; that their existence and their quality depended "upon the contingencies of the weather and season," and that for reasons sometimes entirely hidden and unknown to the planter, the oysters and

clams planted would be completely lost. The plaintiffs' testimony showed perhaps an average expectation among oystermen and clammers of profits from oyster-beds and clam-beds. The same thing could no doubt be shown as to turnips; yet it has been held in the case above cited that such a showing would be too indefinite to permit a jury to assess damages upon it. After all, testimony showing average profits shows only that the plaintiffs might have lost. It does not show what, if anything, they actually did lose.

Appellants have found the same rule as was expressed in *Wolcott v. Mount* to be applied to the business of fishing, of which, in a general way, oystering and clamming are a part. In *Wright v. Mulvaney,* 78 Wisconsin 89, 46 N. W. 1045, 9 L. R. A. 807, the plaintiff sought damages for loss of profits caused by the defendant's destruction of the plaintiff's fishing net. The Court held that the plaintiff was entitled to, as damages, the cost of repairing the net, plus the value of the plaintiff's labor in re-setting the net, and the value of its use for the time during which it was idle; and it further held that the plaintiff's alleged profits could not be allowed as damages for lack of certainty, the Court saying (9 L. R. A. 810):

> "* * * but we are of the opinion that prospective profits cannot properly be awarded as damages in this case. The reason therefor has already been suggested, which is that under any state of the testimony, in view of the character and conditions of the business, the jury could have no sufficient basis for ascertaining such prospective profits. At best, the assessment thereof must necessarily rest largely upon conjecture."

In answer to the appellant's contentions the respondents will no doubt rely upon the case of *Allgor v. Monmouth County Water Co.,* 3 Misc. 514, 128 Atl. 864, a case decided on rule to show cause in the Supreme Court. Although in that case a lessee of oyster beds was permitted to recover damages for the destruction of his oysters by acts of the defendant, it does not appear from the report of the case that any of the contentions here relied on were presented to the Court; and appellant therefore submits that that decision is not an authority against it.

The respondent may also contend that the appellant's argument on the matter of damage would leave the respondents without remedy even for a conceded injury. Not so. There are two replies to such a contention. The first is that there is an alternative measure of damages which might be employed, to wit, the one which was employed in the Wisconsin case, above cited. The second is, that assuming the defendant to have caused damage to plaintiffs of such a nature as that it could not be proved with sufficient definiteness to submit to a jury, then the wrong done by the defendants would afford a perfect case for the invoking of equity jurisdiction and the obtaining of an injunction. The plaintiffs knew, as the testimony discloses, that the appellants proposed to build a roadway and bridge, and they knew the course that that roadway and bridge was to take. The plaintiffs also say they knew that this work was damaging and would damage their oyster beds. Nevertheless they sat by and permitted the work to be completed without taking any steps to protect their property, apparently preferring to take their chances on the verdict of a

jury, rather than to take advantage of the preventive jurisdiction of the Chancery Court. If the appellant's contention is sound, that the plaintiffs' proof of loss of profits is not such as will permit judgments in the plaintiffs' favor, it does not result that the plaintiffs are left thereby without a remedy for a wrong done. The result is merely that the plaintiffs had their remedy, by injunction, and chose not to exercise it.

It is submitted that the judgments of plaintiffs, Lloyd and Tallman, against the Hill Dredging Company should be reversed.

THOMPSON & HANSTEIN,
Attorneys for and Counsel with Appellant, Hill Dredging Company.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE THOMAS,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

EUGENE TALLMAN,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

OSCAR SOMERS,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

THEODORE SMITH,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

MARTIN V. B. SCULL,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

JOHN H. SMITH,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

WALTER J. LLOYD,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

SMITH HICKMAN,
Plaintiff-Respondent,
v.
OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

ON APPEAL FROM NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

BRIEF OF DEFENDANT-APPELLANT, OCEAN CITY AUTOMOBILE BRIDGE CO.

STATEMENT OF FACTS.

In the year 1927, the eight plaintiffs above mentioned were the holders of certain leases from the Shell Fisheries Commission of the State of New Jersey, which leases entitled them to the exclusive right to plant oysters and clams on the grounds leased to each plaintiff. The plaintiffs contend that they had planted thousands of bushels of oysters and clams on the leased grounds in the few years previous to 1927, and that in 1927, there were thousands of bushels of oysters and clams growing on the leased grounds. In the same year, the Ocean City Automobile Bridge Company, a corporation of the State of New Jersey, started to build a bridge from Beesley's Point, in Cape May County, to Somers Point, in Atlantic County, which bridge was of a construction of concrete and steel with certain areas over meadowland, being filled in with sand pumped from the bay. The bridge crossed the leased ground of Walter J. Lloyd, one of the plaintiffs, all of which is shown in plaintiff's Exhibit P9, and also in defendant's Exhibit D1. The Ocean City Automobile Bridge Company entered into a contract with the Hill Dredging Company, a corporation of the State of New Jersey, under which contract the Hill Dredging Company agreed to pump in and fill the portions of the bridge which were to be constructed of sand fill. According to the contract and plans, the sand fill was to extend on the leased ground of Walter J. Lloyd, a very short distance, and said sand fill was not, according to said plans and specifications, to cover any of the other leased area. According to the Exhibit of the defen-

dant D1, the sand fill actually made by the Hill Dredging Company covered a portion of Walter J. Lloyd's ground as well as a part of Eugene Tallman's ground. The plaintiffs claim that from the pumping of the sand by the Hill Dredging Company, the oysters and clams on all of the plaintiffs' grounds were covered with sand, and as a result of the ground being covered with the fresh sand, all of the oysters and clams planted were killed, and plaintiffs suffered a great damage by reason thereof. The Ocean City Automobile Bridge Company obtained a grant from the State of New Jersey, June 20, 1927, and a further grant from the State of New Jersey dated March 10, 1928, together with a permit from the Board of Commerce and Navigation of the State of New Jersey, to build the said bridge from Beesley's Point to Somers Point. The above grants and permits are set forth in the record as Exhibits D4, D5 and D7. The bridge company also had the approval of the War Department of the United States to build the bridge, which approval permit is shown in the record as Exhibit D6. The bridge company also had deeds for the ripa at Beesley's Point adjoining the riparian grant given by the State of New Jersey, which ripa was shown by deeds from Mabel Clay, and from the township of Upper, which are shown in the record as Exhibits D8, D9 and D10, and a deed for the ripa at the Somers Point side as shown by deed from Mathias-Robinson Realty Sales Corporation, shown as Exhibit D11. The eight cases of the plaintiffs against the bridge company and the Hill Dredging Company were tried together, and as a result of the trial, verdicts were rendered by the jury in the cases of Walter J. Lloyd and Eugene Tallman against both of the defendants, and in the six other cases, verdicts were

returned against the Ocean City Automobile Bridge Company. The different plaintiffs were unable to state the exact number of oysters and clams on their respective grounds, and could only state the number of oysters and clams planted on the grounds prior to the dredging done by the Hill Dredging Company.

At the close of the testimony, both defendants made motions for directed verdicts, and the Court denied the motions of both defendants as to the cases of Walter J. Lloyd and Eugene Tallman, on the ground of trespass, and the cases of Lloyd and Tallman were submitted on the trespass ground to the jury, and the motions on the negligence count were granted. As to the six other cases, the Court denied the motion for directed verdict on the part of the defendant Ocean City Automobile Bridge Company, but directed a verdict in the six cases in favor of the Hill Dredging Company.

By agreement of counsel of the respective parties, the proceedings of only one suit have been printed in the State of the Case, due to the fact that all of the complaints filed were identical in substance, except the description of the property, names of the plaintiffs and the ad damnum clause. The answers filed in all cases, by both the Hill Dredging Company and the Automobile Bridge Company were identical, as well as all other pleadings and notices.

I.

DEFENDANT'S MOTION FOR A NON-SUIT SHOULD HAVE BEEN GRANTED.

The basis of the motion to non-suit as to the various cases was the fact that in the plaintiff's com-

plaints it was alleged that the sand pumped to cover the oyster lands was negligently pumped. Defendant claims there was no proof of negligence, in that the plaintiffs' proof failed to show that the defendant Hill Dredging Company, the contractor of the Ocean City Automobile Bridge Company, used faulty machinery, or that they pumped the sand in a negligent manner, and further the non-suit should have been granted on the ground that the testimony produced by the plaintiffs was not sufficient to warrant the case going to the jury, as all the damages shown were highly speculative, and were not of sufficient certainty to warrant the jury in finding that any plaintiff had a certain number of oysters or clams upon his leased ground at the time the dredging was done.

The motion for non-suit as to Tallman should have been granted, due to the fact that Tallman in his own testimony showed that he had not been on his leased ground to make a grab or investigation since 1925, or more than two years prior to the time that the Dredging was done by the Dredging Company.

The defendant's motion for non-suit should have been granted in the case of Walter Lloyd, Lloyd having testified that he could not tell the exact number of oysters on his land, but that the only certain way of telling how many oysters are on a certain piece of ground, under water, is to dig them up, and that any other way is a guess.

Lloyd further testified that he knew the bridge was coming, and that he took up the majority of his oysters, and that he left the remainder of his oysters on the ground, feeling that whoever did the pumping would have to pay for them.

In the two cases of TALLMAN and LLOYD, this defendant respectfully contends that the plaintiffs

failed by their testimony to prove that they had any oysters or clams on their land which were damaged by anything done by either of the defendants. The Court should have given a non-suit to this defendant.

On the remaining six cases, due to the fact that according to the map in the evidence, the bridge did not cover any of the lands of any of the plaintiffs, other than Lloyd and Tallman, and for any sand to go on any of the others lands, of the remaining plaintiffs, it would mean that the defendant, Hill Dredging Company, would have to pump sand on property outside the limit called for by the contract, for instance, the map showed that the lands of Oscar Somers, who occupied the leased ground No. 161, was twenty-one hundred and ten (2110′) feet away from the bridge; that the lands of Smith Hickman were eighteen hundred and twenty (1820′) feet away from the bridge, and that the lands of all the plaintiffs, with the exception of Lloyd and Tallman, were several hundred feet away from the bridge and bulkhead line, as shown by the plans and specifications attached to the contract between the Bridge Company and the Hill Dredging Company. In other words, it was quite evident that if any injury was done to the plaintiff's land by the pumping of sand, it must have been by the pump, which was outside the scope of the construction.

In addition to all of the above argument, as to why a non-suit should have been granted to this defendant, this defendant refers also to the testimony set forth in detail under the point taking up the argument concerning the "Court's Refusal to Strike Out As to the Quantity of Oysters and Clams that each had on his Ground," which testimony shows that the plaintiffs failed to prove any definite amount of

damages but merely were guessing as to the number of oysters and clams that each had on their respective grounds.

II.

THE COURT ERRED BECAUSE IT REFUSED TO DIRECT A VERDICT AGAINST THE PLAINTIFFS AND IN FAVOR OF THE DEFENDANT, OCEAN CITY AUTOMOBILE BRIDGE COMPANY.

In the defendant's argument for a directed verdict, there were two separate motions, one for a directed verdict in the cases of Lloyd and Tallman, where the case was submitted to the jury on the trespass count, and the other motion was directed to the negligence counts in the other cases, as the Judge had previously ruled that as to the six remaining cases, he would not submit the case to the jury on the trespass count. This defendant contends that in the Lloyd and Tallman cases, this defendant could not be held for the trespass of the Hill Dredging Company, an independent contractor, for any injury that was done to the plaintiffs', Lloyd and Tallman's, land was not as a result of the contract being fulfilled within its terms, but any injury done was caused by actions outside the scope of the contract, the independent contractor alone could be liable. There is no question in this case that the Hill Dredging Company was an independent contractor, as an independent contractor is well defined by Justice Katzenbach, in the case of *Kappertz v. Jerseyman,* 121 Atlantic, 718. On page 720, the Justice said:

> "In the case of Reisman against the Public Service Corporation of New Jersey, 82 Law, 464; 81 Atlantic 838, this Court approved the definition of an independent contractor given in 26 Cyc. 1546, in the following words: 'An independent contractor is defined to be one who carries on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.' "

In the cases at bar, this was the exact state of facts, as the bridge company had decided to build a bridge partly of concrete and steel, and partly of sand fill and gravel. The Hill Dredging Company was awarded the contract for the pumping of the sand, and gravel work. They used their own employes in doing the work, their own machinery, and even made their own plans, and the only thing to be supervised by the bridge company engineer, was the fact that the work when finished, would be according to the plans and specifications originally given, and the company had absolutely no control over where the dredging company placed its dredge to do the pumping, or how far the sand would run after being pumped, and, in fact, had no way of checking up and discovering what distance, if any, the sand would run. In view of the fact that the plans and specifications called for an exceedingly short fill on Lloyd's land, and no fill at all on the land of Tallman, this defendant claims that any further trespassing on Lloyd's and Tallman's land should be chargeable only to the contractor, as it was done without the scope of the employment by the bridge company.

It is further argued from the proof submitted, that neither Lloyd nor Tallman had any definite idea as to the number of oysters and clams on their ground, as Lloyd admitted in his testimony (State of Case, page 107, line 19, and also State of Case, page 90, line 7), that he did not know the exact number of oysters and clams on his land, and he further admitted that after having obtained knowledge that the bridge was about to be built, that he went on the land and took off some two thousand oysters, and when asked why he did not remove more of the oysters, he stated that he knew someone would pay for them. This testimony, coupled with Tallman's testimony, which showed that Tallman had not been on the ground since 1925, as is shown in his testimony (see State of Case, page 156, line 31):

> "Q. Since 1927, or since they built the bridge, and made that fill, have you been down there to try your grounds to find if there are any oysters or clams you can get?
>
> A. I have not made a grab there since July, 1925."

This defendant contends that the above testimony on the part of Tallman distinctly shows that he had not been on his leased ground to make any investigation since July of 1925, which was more than two years previous to the building of the bridge, and the alleged damage by the dredging. This, the defendant contends, purely shows that the speculative answers made by Tallman show clearly that he did not regard his ground of sufficient value to go and make tests or to catch oysters or clams. And it further shows, that since he did not make an investigation for more than two years previous to the time

of the alleged damage, it is not reasonable to suppose that the oysters and clams were still on his ground, when there are so many other agencies including tides and rising waters that could wash out and damage the oyster and clam beds, at least Tallman could not testify that the oysters and clams were on the ground and alive.

The other grounds, for the motion for a directed verdict, are that so far as the Ocean City Automobile Bridge Company is concerned, no negligence was shown to the bridge company. The bridge company made a contract with the Hill Dredging Company, a company that does a large dredging and filling business, and which company is regarded as one of the best dredging companies in Southern New Jersey. Nothing was shown at the trial that the bridge company was negligent in selecting its contractor. The contract under which the work was done clearly showed that if the contractor did the work according to the plans and specifications, the fill would cover only a very small portion of Lloyd's ground, and would not have run on or covered any of the other leased grounds. The plans and specifications attached to the contract were made by the Hill Dredging Company, as is shown by the plans themselves. Nothing in the contract gave the bridge company the right to supervise or govern the method by which the work was done. The result of the filling was the only thing that was determined by the bridge company. If, therefore, there was any negligence on the part of the bridge company, such negligence was not shown, and a directed verdict should have been given for this defendant. As to all of the plaintiffs' cases, with the exception of Lloyd and Tallman, it is clearly established that this defendant was not negligent because it did not fail to exercise

any degree of care demanded by the circumstances.

The Judge should have directed a verdict for the Ocean City Automobile Bridge Company, because the work was being done by an independent contractor, and if any damage was done to the lands of the plaintiffs, such damage had to be caused by acts of the independent contractor which were outside the scope of the actual contract. The Court, however, decided that this case came within the doctrine laid down in the case *Lydecker v. The Board of Chosen Freeholders of Passaic County,* 91 New Jersey Law 622 (103 Atlantic Reporter, 251):

> which case was the result of an infant attempting to recover for injuries caused by being thrown from his bicycle while riding along a public highway covered by oil. The Standard Oil Company had contracted with the Freeholders for the placing of oil. The action was brought against the Freeholders and the oil company. The facts showed that the oil company agreed to oil the roads, one-half at a time, to protect it from traffic for six hours after the oil was applied. The contract also provided that the oil was to be applied by a sprinkler satisfactory to the County Engineer, and not more than one-quarter gallon to the square yard. The evidence showed that the oil had been applied in accordance with the terms of the contract, and the Court held that the oil company owed the plaintiff no duty because the contractor was liable only for injuries to third person because of negligence in the execution of his contract. The Court further held it is true that when the work in itself is not a nuisance, and the injury results from the negligence in its execution, the contractor alone is liable, but in the

> Lydecker case, the work was designed by the County Engineer, the quantity of oil to be placed on the road was set up by the County Engineer, and the engineer in making his design had made a mistake, in the amount of oil placed on the road would make it unsafe for travel even after six hours.

This defendant contends that this case is not analogous to the cases at bar, for in these oyster cases, we find that according to the plans attached to the contract, the method of doing the work was designed and arranged by the contractor, Hill Dredging Company. We also find, according to the Exhibits P9 and D1, that the sand fill adjoining the leased grounds, was only to extend to the land of Walter J. Lloyd to a distance of approximately 100 feet, and that there was no provision in the contract that the sand should be allowed to run onto the leased area of the other plaintiffs. According to Exhibit D1, the sand fill at low water covered approximately 130 feet of Eugene Tallman's land, and approximately 250 feet of Walter J. Lloyd's land. This was not in accordance with the contract, and the Hill Dredging Company when it pumped the sand onto the grounds of Lloyd and Tallman, was going without the scope of the contract and any damage caused was a result of its negligence, and not any negligence on the part of the bridge company. In the Lydecker case, the damage was caused because the oil was put on the road too thick, but it was in accordance with the County Engineer's design; here, the pumping of the same was not in accordance with the bridge company engineer's design, but any pumping that covered the land of the plaintiffs, with the exception of Lloyd, was without the scope of the con-

tract, and, therefore, the case would not fall within the rule laid down in the Lydecker case.

The rule of law is well established in this State that where one employs a contractor exercising an independent employment, and hiring his own servants to do the work, not in itself a nuisance, the contractor alone is responsible for the injury resulting from the negligence of himself or his servants in the manner of executing the contract, unless the employer is in default in selecting an unskillful or improper person as contractor. The following cases in this State were decided upon this principle:

Mann v. Max, 107 Atlantic 417, decided June 20, 1919, and *Bush, et al. v. Margolis,* 130 Atlantic 525, decided October 19, 1925.

In the *Mann v. Max* case, 107 Atlantic 417,

> An owner of land abutting a public street, employed a contractor to build a building thereon. The contractor employed a certain sub-contractor for the mason work, and the sub-contractor erected a scaffold projecting from the sidewalk against which scaffold the plaintiff passing at night, struck his head and was injured. The Court held that a reasonable and proper scaffold being permissible, it was presumably lawful to erect one, and a scaffold cannot be a nuisance *per se,* but a legitimate appliance for building purposes, and that, therefore, the work not being a nuisance *per se,* the owner of the property was not liable for any damage sustained by the plaintiff.

This principle of law also has been held in the cases of *Cuff v. Newark and New York Railroad Company,* 35 N. J. Law, 17.

In the case of *Bush, et al. v. Margolis,* 130 Atlantic 525,

> The owner of a property contracted with a contractor for the repairing of the sidewalk in front of his property. The contractor, while engaging in the repair of the sidewalk, made the repairs and placed planks over the fresh concrete, and did not guard them by lights or any other method of warning to pedestrians. The plaintiff tripped over the planks and fell, sustaining injuries the night of the day when the planks had been placed over the repair. The Court held that the protection of the work by the contractor was as much a part of the work of the contractor as the laying of the concrete itself, and that as the work of repair and protection was not in itself a nuisance, the contractor alone was liable for the injury resulting from the negligence of himself and his servants.

The Judge, in addition to citing the Lydecker case, also cited the Marvin Safe case as the basis of his decision. This case was reported in 46 New Jersey Law, 19,

> and was a case where a bridge over the Passaic River had become unsafe, and the Board of Freeholders entered into a contract for the erection of a new bridge, and the contractor entered upon the performance of the work and constructed a temporary bridge. This temporary bridge gave way while a team of horses of the plaintiff was being driven over it, whereby the plaintiff's team was thrown into the river and sustained serious injuries. The Court held in

> that case that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. The Court also held, however, that where a person performing services or doing work under a contract may be held in damages for injuries to a third person, the damage or injury must be occasioned by negligence or misconduct in the execution of the contract, and the duty and liability arises independent of the contract.

In the case at bar, there was negligence on the part of the Hill Dredging Company in dredging and filling the roadway for the bridge company, if it allowed or permitted the sand to run over the bulkheads provided, and onto the property and lands of the plaintiffs. If the Hill Dredging Company had done all of its work in accordance with the plans and specifications attached to the contract, which plans and specifications were made by them, there could not have been any injury to the lands of the plaintiffs. This defendant fails to see how either the case of *Lydecker v. The Board of Freeholders,* or the Marvin Safe Company case apply to the facts in this case, and for these reasons above discussed, this defendant respectfully submits that the judgments appealed from should be reversed.

The bridge company had secured a permit from the State of New Jersey, and from the War Department of the United States for the building of the bridge, and was building the bridge in a way that it could not be construed to be a nuisance, as the plaintiffs had only an exclusive right for fishing, and they did not have a lease for the premises in the sense that they had exclusive right to possession

of the land. They only had possession of the land for the purpose of planting oysters and clams, and the State reserved the right to make any other use of the land that it might see fit. The State in giving the grant to the Ocean City Automobile Bridge Company for the building of a bridge, constituted a retaking of the land insofar as the rights granted to the bridge company were concerned. In support of this contention we have the cases of *Newport News Shipbuilding Co. v. Jones,* Vol. 26, *Corpus Juris,* page 621, 6 L. R. A. (N. S.) 247, and *Darling v. Newport News,* 249 U. S. 540.

III.

THE COURT ERRED IN REFUSING TO STRIKE THE TESTIMONY OF THE PLAINTIFFS AS TO THE QUANTITY OF OYSTERS AND CLAMS THAT EACH HAD ON HIS GROUND.

In each of the eight cases, the defendants made a motion to strike the testimony of the plaintiff as to the quantity of oysters and clams that each had on his respective ground, except in the case of Martin V. B. Scull, in which case the defendants moved to strike the testimony of John H. Smith, who was the only witness that testified that he knew the number of oysters and clams on Scull's tract. (See State of Case, page 200, line 13.) In each of the cases except the Scull case, the plaintiffs each testified as to the number of oysters and clams that they had planted some years before, and that they had made inspection of their ground from time to

time, and that at the time of each inspection, they found that the oysters and clams were living, and then testimony was offered to show that oysters and clams grew a certain amount each year, which increased the number of bushels on each tract. The presumption of law upon which theory this testimony was admitted, was that once a state of fact is proven, it is presumed to continue to exist until it is proven to the contrary. This defendant claims that such a presumption is not applicable to the case at bar, first, because there is a question of life involved. It would be presumed that if the oysters and clams were planted, that the shells would remain for a certain period of time or until it was proven that they had been removed, but it would not be presumed that all of the oysters and clams that had been planted years before, would still be alive. The only case upon which we have anything to base our opinion is the case of *Vreeland v. Vreeland,* 78 Equity 256, in the dictum on page 261, the Court says:

> "It cannot be disputed that the presumption of continuing life grows weaker as time passes; it is stronger the day after a person disappears than it is a year after; stronger after the expiration of a year than at the end of two years; stronger then than at the expiration of five or six years."

This would seem to indicate that where the plaintiffs are depending upon the presumption that the life of the oysters and clams would continue for a period of several years, that they are depending on a very weak link, as the lives of oysters and clams are much more hazardous than the lives of human beings, and the case above cited was dealing with

human beings, and not with oysters and clams or any other animal matter. Especially is this true in view of the evidence and testimony in these cases to the effect that there are many natural causes and conditions which kill oysters and clams.

In all of the cases, the plaintiffs were very uncertain as to the number of oysters and clams that they had on their grounds, and Eugene Tallman's testimony was of such a nature that certainly the Court erred in not striking all of his testimony regarding the oysters and clams that he had on his land.

In the case of Martin V. B. Scull, John H. Smith was called to the stand and asked to testify as to the number of oysters and clams on Scull's tract, at some period previous to the building of the bridge. Mr. Smith came to the stand and testified that he had made an agreement with Scull to work his oyster and clam beds, and that before going on the land to work, he made an investigation of the ground, and that in doing so he took tongs and made grabs on the land of Scull, and from the use of these tongs, determined the number of bushels of oysters and clams on the land of Scull. This defendant claims that this method of finding the number of oysters and clams on any piece of ground is not testimony, but purely guessing. In Smith's testimony (State of the Case, page 202, line 30):

> "Q. How many, in your opinion, were there on the area that you tried?
>
> A. On the area that I tried, I would say, on the area that I tried, somewheres about one-quarter of the ground, would be in the neighborhood of fifty or seventy-five thousand clams."

This, the defendant claims, is purely speculative testimony, when a witness could not estimate better

than a difference of twenty-five thousand clams in a seventy-five thousand estimate. The defendants objected to the admission of this testimony, and moved that the testimony be stricken as to the number of oysters and clams on Scull's ground, on the ground that the testimony was purely speculative. This motion was denied. See State of the Case, page 203, line 7.

A similar motion to strike the testimony was made at the close of each plaintiff's case, on the ground that the testimony was purely speculative, and was based on the presumption that the oysters and clams planted in 1924 and 1925 were still alive and growing in 1927 and 1928. The plaintiffs made no move to try to prove their loss of profit for any one year, which seems to be the only proper way of proving the damage to these leases, and each of the plaintiffs practically admitted on the stand that there were still oysters and clams on their ground even after all the pumping was done. See testimony of Theodore Smith, State of Case, page 130, line 10. The only argument which the different plaintiffs had, was to the effect that the pumping of the sand had covered their ground to such an extent that the oyster and clam business was not profitable. This defendant contends that the only measure of damages which could have been recovered for such a loss was the loss of profit for the year 1927, and possibly 1928, instead of for the whole number of clams and oysters on each separate tract, as there was nothing to prevent the plaintiffs from still using their beds, and in fact, some of the plaintiffs admitted that they still go on the ground and take off oysters and clams.

In Volume 8, Ruling Case Law, page 649, under Section 192, loss of profits, it is stated that:

> "Where a regular established business is injured, the average profits that the business is then earning and has earned, are competent proof as to the loss of profits, and even in cases where no recovery for loss of profits as such may be had for injury to a business * * *. A witness cannot give his opinion as to the amount of profits that could have been made, or that the profits lost were a specified sum, nor is the mere statement by one in charge of a business as to the net profits per month, before and after the injury, with nothing to show on what the estimate is based sufficient to warrant a submission to the jury of the question of loss of profits because of such injury."

This defendant contends that the testimony hereinafter set forth, taken as parts of the testimony from different plaintiffs' cases, shows how speculative the evidence was, as to the number of oysters on the ground and shows how the plaintiffs were merely guessing as to the number of oysters on the ground in 1927, when the pumping started. This also shows that none of the plaintiffs knew the number of clams to the bushel and there was a wide variance in answers made by each plaintiff as to the question of how many clams there were to the bushel.

The Tallman testimony especially showed that he did not have the slightest knowledge as to the number of oysters and clams on his land as he had not been on the leased area for more than two years previous to the pumping. See State of the Case, page 156, line 31. The same situation is shown to be true in the other cases from the testimony hereafter set forth.

In the JOHN H. SMITH CASE, the testimony is as follows:

See State of the Case, page 47, line 23:

"Q. How large are those clams that you gathered to plant on these leased grounds?

A. Well, the ones that I bought run about twelve thousand to the bushel.

Q. What is the usual quantity of clams in a bushel?

A. Well, at that size, they run from that down to six or seven hundred, that is, small clams.

Q. But the clams that you plant out?

A. They run from ten to twelve thousand to the bushel. Twelve thousand to fifteen, sometimes."

Also, see State of the Case, page 50, line 16, as to how many oysters were on his land prior to the pumping:

"Q. Can you determine how many oysters you had on your land at that time, in January, 1928?

A. *As near as I can tell,* there was about 1500 bushels between Theodore Smith and I.

Mr. Hanstein: I ask that be stricken.

The Court: The answer should have been yes or no.

Q. Answer that yes or no. The question is can you determine approximately how many clams you had on the ground at that time?

A. I could.

Q. How many?

A. How many I had at that time?

Q. How many oysters first.

A. How many oysters on the ground?

Q. You said about 1500 bushels between you and ——

A. Theodore Smith, yes.

Q. What quantity of oysters did you have on your ten acres, twenty acres

A. I planted one thousand bushels.

Mr. Hanstein: I ask that be stricken.

The Court: That will be stricken.

Q. You planted a thousand bushels? How many did you plant there? How many did you say you planted?

A. Fifteen hundred bushels together.

Q. That is a thousand, you said, for yourself?

A. Yes, sir.

Q. When did you plant them?

A. 1923 and 1924."

JOHN H. SMITH in his testimony, see State of the Case, page 66, line 15:

"Q. Is there any way that you know of that a person can tell how many oysters are in a given area under water without taking them up and counting them?

A. Without taking them up and counting them? You can tell by the bushel what you plant there.

Q. If they don't all grow you can't tell, can you?

A. Certainly you can tell what you have got left.

Q. You can tell by what?

A. What you have left on the ground when you take them up.

Q. When you take them up?

A. Yes.

Q. So that the best way to tell how many oys-

ters you have, or clams, is by taking them up, isn't it?

A. No. If you know how many clams you planted, you know how many you have there, if nobody don't take them or kill them."

THEODORE SMITH in his testimony, see State of the Case, page 117, line 28:

"Q. How many clams would there be in a bushel that you planted there?

A. From twelve to fifteen thousand."

Also see State of the Case, page 131, line 7:

"Q. Well, the ones that you dug up from underneath the bottom were living, weren't they?

A. Not all of them.

Q. Some of them were, weren't they?

A. Some was living.

Q. And for all you know, some of them that were down there were living, too?

A. Well, I couldn't reach them with the tongs.

Q. You couldn't get them with the tongs?

A. Couldn't get them, nothing but dead ones.

Q. What is the best way of telling how many oysters are on a piece of ground?

A. The best way of telling?

Q. Yes.

A. Why, you plant so many bushel on the acre and then you judge what the percentage will be, and then you can tell that way. Go over the bottom and feel. *You, of course, couldn't be accurate.*"

All of this testimony goes to show that not only Smith found clams and oysters on the leased ground

after the bridge was completed but also admitted in his testimony that the method employed by the plaintiffs in these cases, to determine the number of clams and oysters on the ground, could not be accurate, but merely a guess.

JESSE THOMAS testified as follows: See State of the Case, page 167, line 29:

"Q. When did you plant the clams?

A. 1924.

Q. On how many acres did you plant those clams that year?

A. Well, you couldn't tell how many acres.

Q. Beg pardon?

A. You couldn't tell how many acres you planted them on.

Q. You had ten acres and three and eighty hundredths; 13.80 acres all together.

A. Yes.

Q. Did you plant them on those grounds?

A. Sure.

Q. All on one?

A. No. Part on one and part on the other.

Q. How many clams did you plant?

A. Sixty bushels was what I catched and bought.

Q. How many clams would there be to the bushel?

A. Twelve thousand. Twelve to fifteen."

Which goes to show that JESSE THOMAS did not know how he had planted his oysters and clams, or on what part of his land he had planted them, nor did he know how many clams there were to the bushel; all of which goes to show that Thomas' testimony, as well as the other plaintiffs was of a very questionable nature.

SMITH HICKMAN, see State of the Case, page 180, line 23, as follows:

"Q. How many clams were there to the bushel?

A. Well, from eight to twelve thousand. From eight thousand to twelve thousand to the bushel.

Q. On your land, from eight to twelve?

A. Yes.

Q. And did you go on the ground to find out the condition of them in 1925?

A. I did not.

Q. 1926?

A. I did in 1926.

Q. *What did you find there in* 1926?

A. They was all right, but they was hardly large enough for market.

Q. Growing, were they?

A. Yes, sir, seemed to be.

Q. Did you go on the ground in 1927?

A. I did not.

Q. When did you next go on the grounds?

A. October, 1928."

This testimony not only shows that HICKMAN did not know how many clams there were to the bushel, but that when he went to look at his clams in 1926, they were not large enough for market and that he did not examine clams from 1926 until 1928, which meant that a period of more than a year elapsed between the time that he examined his oysters and clams and the work on the bridge started. It seems especially peculiar that any of the plaintiffs should have failed to go on their land rights, previously to the starting of our pumping on the bridges, because all of the plaintiffs knew of the

proposed bridge. This is shown from the fact that these people wrote to the bridge company, stating that their oysters and clams had been ruined before the pumping actually started.

HICKMAN'S further testimony was to the effect that he did not know whether he had planted the clams on his lot or not, that he had aimed to. See State of the Case, page 182, line 1, which is as follows:

"Q. But you did have the thirty-three bushels on your ground?

A. I planted the thirty-three bushels and I aimed to put them on my own land.

Q. And those clams, what happened to them, did you say?

A. I can't find them. They are buried up or something. I can't find them."

OSCAR SOMERS, in his testimony, see State of the Case, page 191, line 3, as follows:

"Q. You indicated there from a half inch to an inch, I suppose?

A. Yes, and over that sometimes. That is just the size. They run from that size on up. Plants and on up.

Q. That was in 1926?

A. 1926.

Q. In 1927 they weren't fit for market, yet, were they?

A. No, sir. They wasn't.

Q. How many years does it take before they are fit for market?

A. Around three and four years."

Which testimony is to the effect that SOMERS planted little clams, which were known as plants, in

1926, and further testified that they were not ready for market in 1927, and were of a very questionable size when the pumping started. In view of this, this defendant contends that it would have been according to SOMERS' own testimony three or four years before the oysters or clams would be of any considerable value.

In the case of WALTER J. LLOYD, this defendant contends that the testimony was especially speculative, for Lloyd testified as follows: See State of the Case, page 89, line 18:

"Q. Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?

A. It is a rather hard question to answer, but I had taken up the majority of my oysters, but I should say a fair estimate I probably had a thousand bushel.

Q. Of oysters?

A. Yes.

Q. How large were they?

A. I said I probably had a thousand bushel.

Mr. Hanstein: I ask that that be stricken. I make my motion to strike this on the ground it is purely an estimate, it is purely a speculation and it is encumbent upon them to make proof, and it does not constitute proof.

The Court: I will strike the answer as not being responsive to the question. The answer should be yes or no.

(Exception noted for plaintiffs.)

(Former question repeated as follows: Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?)

A. Yes.
Q. How many
A. About a thousand bushel, *I should say, to the best of my ability.*
Mr. Hanstein: I ask that be stricken as not being proper proof.
The Court: No. That was a competent question, there was no objection made, and the answer will not be stricken."

Also see State of the Case, page 101, line 26, as follows:

"Q. The only certain way of telling how many oysters you have is by digging them up, isn't it?
A. *That is the most sure way.*
Q. Any other way is a guess; isn't that true?
A. *More or less.*"

Which testimony makes it quite clear that LLOYD did not know the number of clams and oysters on his land and was simply guessing as to the number of bushels of oysters and clams.

In view of the testimony above recited, as well as the other testimony of the various plaintiffs, this defendant contends that the testimony as to each of the separate plaintiffs, should have been stricken, and that the Court erred in not striking this testimony upon defendant's motion.

IV & V.

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS FOLLOWS:

(a) This defendant requested the Court to charge the jury as follows:

> "If the jury find that the Ocean City Automobile Bridge Company used diligence in selecting the Hill Dredging Company to do the pumping, and they find the sand going on plaintiff's property was not a direct result of the contract, then the jury should find a verdict of no cause of action as to this defendant."

It is contended that under the cases previously cited, of *Mann v. Max,* and *Bush v. Margolis,* and others, it has been held in this State to be the law that if an owner uses diligence in selecting a contractor the contractor alone is liable for negligence, unless the work to be done is in itself a nuisance. In view of this line of decisions, there may have been a question for the jury to decide as to whether the bridge company used diligence in selecting the Hill Dredging Company, but under the evidence, if the jury should find that the bridge company did use diligence in selecting the Hill Dredging Company, and that as a result of the work done by the Hill Dredging Company, damage was done to plaintiffs' property, which was not a direct result of the contract, and if the jury should find these facts to be true, then there should have been a verdict for no cause of action as to this defendant. The Jury in looking over the contract, specifications and plans,

could easily have ascertained that the work prescribed under the contract would not have constituted an injury on any of the lands of the plaintiffs.

(b) This defendant requested the Court to charge that

> "If the jury find from all the evidence that the roadway could have been filled in without permitting any sand to go on the property of the plaintiffs, then the jury should find a verdict of no cause of action as to this defendant."

The Judge should have so charged the jury, because that would have allowed the jury to pass on the question as to whether the work could be done without injuring plaintiffs' property, and if it could have been done without injuring said property, then the defendant Ocean City Automobile Bridge Company should not have been held liable, for the Hill Dredging Company was an independent contractor, entirely independent and responsible for the method of doing the work, and the bridge company should have been liable only in case the plans and specifications called for work to be done which would have proven injurious to plaintiffs' property.

VI & VII.

THE COURT ERRED BECAUSE IT CHARGED THE JURY UPON PLAINTIFFS' REQUEST AS FOLLOWS:

(a) The plaintiff requested the Court to charge the jury that:

> "In performing the work under the contract in this case, defendant was bound to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine."

The defendant, Ocean City Automobile Bridge Company contends that this was an improper charge to the jury so far as the cases against the Ocean City Automobile Bridge Company were concerned, because the bridge company had no control over the pumping machine. It had no control over the places from where the Hill Dredging Company was to pump, and it would have been impossible for the bridge company even upon investigation prior to the award of the contract, to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine. In making this charge to the jury, it prejudiced the minds of the jury into believing that the bridge company should have known the effect of the pumping and dredging and that therefore if they did not know the effect, they should be held liable. If the bridge company had had control over the Hill Dredging Company as to the method of doing the work and full supervision, then this charge might have been proper, but under the facts as proven, it was not shown that there was any liability on the part of the bridge company to know the effects of the currents of the river upon the sand pumped.

(b) The Court further charged the jury at the plaintiffs' request, as follows:

> "The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in ques-

tion were notice to defendant to some right in plaintiff in said land."

It is contended that the stakes which were alleged to have been upon the land of the plaintiffs were irregular in their position; they were of no particular design, but merely sticks sticking up in the air, sometimes covered by the tides, and that the stakes were not such as would call the attention of anyone to the fact that someone might have an interest in the lands. See State of the Case, page 395, line 23, as to the testimony of Preston Risley, as to the type of stakes placed in the ground, and also as to the number that were placed on the ground. Defendant contends that by so charging the jury, the Court prejudiced the jury in that the jury would feel that this defendant had full knowledge as to all of the plaintiffs' rights and claims and should have made a full investigation before having the Hill Dredging Company go on the ground to do the pumping. Defendant contends that the charges of the Court to the jury as above outlined, were prejudicial and would have great weight with the jury in making its decision.

For the reasons above discussed, I submit that the judgments appealed from should be reversed.

ROBERT K. BELL,
Solicitor for and of Counsel with Defendant Ocean City Automobile Bridge Company.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE THOMAS,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

EUGENE TALLMAN,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

OSCAR SOMERS,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

THEODORE SMITH,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

MARTIN V. B. SCULL,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

JOHN H. SMITH,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

WALTER J. LLOYD,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY and HILL DREDGING COMPANY, jointly and in the alternative,
Defendants-Appellants.

SMITH HICKMAN,
Plaintiff-Respondent,

v.

OCEAN CITY AUTOMOBILE BRIDGE COMPANY,
Defendant-Appellant.

ON APPEAL FROM NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

BRIEF OF DEFENDANT-APPELLANT, OCEAN CITY AUTOMOBILE BRIDGE CO.

STATEMENT OF FACTS.

In the year 1927, the eight plaintiffs above mentioned were the holders of certain leases from the Shell Fisheries Commission of the State of New Jersey, which leases entitled them to the exclusive right to plant oysters and clams on the grounds leased to each plaintiff. The plaintiffs contend that they had planted thousands of bushels of oysters and clams on the leased grounds in the few years previous to 1927, and that in 1927, there were thousands of bushels of oysters and clams growing on the leased grounds. In the same year, the Ocean City Automobile Bridge Company, a corporation of the State of New Jersey, started to build a bridge from Beesley's Point, in Cape May County, to Somers Point, in Atlantic County, which bridge was of a construction of concrete and steel with certain areas over meadowland, being filled in with sand pumped from the bay. The bridge crossed the leased ground of Walter J. Lloyd, one of the plaintiffs, all of which is shown in plaintiff's Exhibit P9, and also in defendant's Exhibit D1. The Ocean City Automobile Bridge Company entered into a contract with the Hill Dredging Company, a corporation of the State of New Jersey, under which contract the Hill Dredging Company agreed to pump in and fill the portions of the bridge which were to be constructed of sand fill. According to the contract and plans, the sand fill was to extend on the leased ground of Walter J. Lloyd, a very short distance, and said sand fill was not, according to said plans and specifications, to cover any of the other leased area. According to the Exhibit of the defen-

dant D1, the sand fill actually made by the Hill Dredging Company covered a portion of Walter J. Lloyd's ground as well as a part of Eugene Tallman's ground. The plaintiffs claim that from the pumping of the sand by the Hill Dredging Company, the oysters and clams on all of the plaintiffs' grounds were covered with sand, and as a result of the ground being covered with the fresh sand, all of the oysters and clams planted were killed, and plaintiffs suffered a great damage by reason thereof. The Ocean City Automobile Bridge Company obtained a grant from the State of New Jersey, June 20, 1927, and a further grant from the State of New Jersey dated March 10, 1928, together with a permit from the Board of Commerce and Navigation of the State of New Jersey, to build the said bridge from Beesley's Point to Somers Point. The above grants and permits are set forth in the record as Exhibits D4, D5 and D7. The bridge company also had the approval of the War Department of the United States to build the bridge, which approval permit is shown in the record as Exhibit D6. The bridge company also had deeds for the ripa at Beesley's Point adjoining the riparian grant given by the State of New Jersey, which ripa was shown by deeds from Mabel Clay, and from the township of Upper, which are shown in the record as Exhibits D8, D9 and D10, and a deed for the ripa at the Somers Point side as shown by deed from Mathias-Robinson Realty Sales Corporation, shown as Exhibit D11. The eight cases of the plaintiffs against the bridge company and the Hill Dredging Company were tried together, and as a result of the trial, verdicts were rendered by the jury in the cases of Walter J. Lloyd and Eugene Tallman against both of the defendants, and in the six other cases, verdicts were

returned against the Ocean City Automobile Bridge Company. The different plaintiffs were unable to state the exact number of oysters and clams on their respective grounds, and could only state the number of oysters and clams planted on the grounds prior to the dredging done by the Hill Dredging Company.

At the close of the testimony, both defendants made motions for directed verdicts, and the Court denied the motions of both defendants as to the cases of Walter J. Lloyd and Eugene Tallman, on the ground of trespass, and the cases of Lloyd and Tallman were submitted on the trespass ground to the jury, and the motions on the negligence count were granted. As to the six other cases, the Court denied the motion for directed verdict on the part of the defendant Ocean City Automobile Bridge Company, but directed a verdict in the six cases in favor of the Hill Dredging Company.

By agreement of counsel of the respective parties, the proceedings of only one suit have been printed in the State of the Case, due to the fact that all of the complaints filed were identical in substance, except the description of the property, names of the plaintiffs and the ad damnum clause. The answers filed in all cases, by both the Hill Dredging Company and the Automobile Bridge Company were identical, as well as all other pleadings and notices.

I.

DEFENDANT'S MOTION FOR A NON-SUIT SHOULD HAVE BEEN GRANTED.

The basis of the motion to non-suit as to the various cases was the fact that in the plaintiff's com-

plaints it was alleged that the sand pumped to cover the oyster lands was negligently pumped. Defendant claims there was no proof of negligence, in that the plaintiffs' proof failed to show that the defendant Hill Dredging Company, the contractor of the Ocean City Automobile Bridge Company, used faulty machinery, or that they pumped the sand in a negligent manner, and further the non-suit should have been granted on the ground that the testimony produced by the plaintiffs was not sufficient to warrant the case going to the jury, as all the damages shown were highly speculative, and were not of sufficient certainty to warrant the jury in finding that any plaintiff had a certain number of oysters or clams upon his leased ground at the time the dredging was done.

The motion for non-suit as to Tallman should have been granted, due to the fact that Tallman in his own testimony showed that he had not been on his leased ground to make a grab or investigation since 1925, or more than two years prior to the time that the Dredging was done by the Dredging Company.

The defendant's motion for non-suit should have been granted in the case of Walter Lloyd, Lloyd having testified that he could not tell the exact number of oysters on his land, but that the only certain way of telling how many oysters are on a certain piece of ground, under water, is to dig them up, and that any other way is a guess.

Lloyd further testified that he knew the bridge was coming, and that he took up the majority of his oysters, and that he left the remainder of his oysters on the ground, feeling that whoever did the pumping would have to pay for them.

In the two cases of TALLMAN and LLOYD, this defendant respectfully contends that the plaintiffs

failed by their testimony to prove that they had any oysters or clams on their land which were damaged by anything done by either of the defendants. The Court should have given a non-suit to this defendant.

On the remaining six cases, due to the fact that according to the map in the evidence, the bridge did not cover any of the lands of any of the plaintiffs, other than Lloyd and Tallman, and for any sand to go on any of the others lands, of the remaining plaintiffs, it would mean that the defendant, Hill Dredging Company, would have to pump sand on property outside the limit called for by the contract, for instance, the map showed that the lands of Oscar Somers, who occupied the leased ground No. 161, was twenty-one hundred and ten (2110′) feet away from the bridge; that the lands of Smith Hickman were eighteen hundred and twenty (1820′) feet away from the bridge, and that the lands of all the plaintiffs, with the exception of Lloyd and Tallman, were several hundred feet away from the bridge and bulkhead line, as shown by the plans and specifications attached to the contract between the Bridge Company and the Hill Dredging Company. In other words, it was quite evident that if any injury was done to the plaintiff's land by the pumping of sand, it must have been by the pump, which was outside the scope of the construction.

In addition to all of the above argument, as to why a non-suit should have been granted to this defendant, this defendant refers also to the testimony set forth in detail under the point taking up the argument concerning the "Court's Refusal to Strike Out As to the Quantity of Oysters and Clams that each had on his Ground," which testimony shows that the plaintiffs failed to prove any definite amount of

damages but merely were guessing as to the number of oysters and clams that each had on their respective grounds.

II.

THE COURT ERRED BECAUSE IT REFUSED TO DIRECT A VERDICT AGAINST THE PLAINTIFFS AND IN FAVOR OF THE DEFENDANT, OCEAN CITY AUTOMOBILE BRIDGE COMPANY.

In the defendant's argument for a directed verdict, there were two separate motions, one for a directed verdict in the cases of Lloyd and Tallman, where the case was submitted to the jury on the trespass count, and the other motion was directed to the negligence counts in the other cases, as the Judge had previously ruled that as to the six remaining cases, he would not submit the case to the jury on the trespass count. This defendant contends that in the Lloyd and Tallman cases, this defendant could not be held for the trespass of the Hill Dredging Company, an independent contractor, for any injury that was done to the plaintiffs', Lloyd and Tallman's, land was not as a result of the contract being fulfilled within its terms, but any injury done was caused by actions outside the scope of the contract, the independent contractor alone could be liable. There is no question in this case that the Hill Dredging Company was an independent contractor, as an independent contractor is well defined by Justice Katzenbach, in the case of *Kappertz v. Jerseyman,* 121 Atlantic, 718. On page 720, the Justice said:

> "In the case of Reisman against the Public Service Corporation of New Jersey, 82 Law, 464; 81 Atlantic 838, this Court approved the definition of an independent contractor given in 26 Cyc. 1546, in the following words: 'An independent contractor is defined to be one who carries on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.' "

In the cases at bar, this was the exact state of facts, as the bridge company had decided to build a bridge partly of concrete and steel, and partly of sand fill and gravel. The Hill Dredging Company was awarded the contract for the pumping of the sand, and gravel work. They used their own employes in doing the work, their own machinery, and even made their own plans, and the only thing to be supervised by the bridge company engineer, was the fact that the work when finished, would be according to the plans and specifications originally given, and the company had absolutely no control over where the dredging company placed its dredge to do the pumping, or how far the sand would run after being pumped, and, in fact, had no way of checking up and discovering what distance, if any, the sand would run. In view of the fact that the plans and specifications called for an exceedingly short fill on Lloyd's land, and no fill at all on the land of Tallman, this defendant claims that any further trespassing on Lloyd's and Tallman's land should be chargeable only to the contractor, as it was done without the scope of the employment by the bridge company.

It is further argued from the proof submitted, that neither Lloyd nor Tallman had any definite idea as to the number of oysters and clams on their ground, as Lloyd admitted in his testimony (State of Case, page 107, line 19, and also State of Case, page 90, line 7), that he did not know the exact number of oysters and clams on his land, and he further admitted that after having obtained knowledge that the bridge was about to be built, that he went on the land and took off some two thousand oysters, and when asked why he did not remove more of the oysters, he stated that he knew someone would pay for them. This testimony, coupled with Tallman's testimony, which showed that Tallman had not been on the ground since 1925, as is shown in his testimony (see State of Case, page 156, line 31):

> "Q. Since 1927, or since they built the bridge, and made that fill, have you been down there to try your grounds to find if there are any oysters or clams you can get?
>
> A. I have not made a grab there since July, 1925."

This defendant contends that the above testimony on the part of Tallman distinctly shows that he had not been on his leased ground to make any investigation since July of 1925, which was more than two years previous to the building of the bridge, and the alleged damage by the dredging. This, the defendant contends, purely shows that the speculative answers made by Tallman show clearly that he did not regard his ground of sufficient value to go and make tests or to catch oysters or clams. And it further shows, that since he did not make an investigation for more than two years previous to the time

of the alleged damage, it is not reasonable to suppose that the oysters and clams were still on his ground, when there are so many other agencies including tides and rising waters that could wash out and damage the oyster and clam beds, at least Tallman could not testify that the oysters and clams were on the ground and alive.

The other grounds, for the motion for a directed verdict, are that so far as the Ocean City Automobile Bridge Company is concerned, no negligence was shown to the bridge company. The bridge company made a contract with the Hill Dredging Company, a company that does a large dredging and filling business, and which company is regarded as one of the best dredging companies in Southern New Jersey. Nothing was shown at the trial that the bridge company was negligent in selecting its contractor. The contract under which the work was done clearly showed that if the contractor did the work according to the plans and specifications, the fill would cover only a very small portion of Lloyd's ground, and would not have run on or covered any of the other leased grounds. The plans and specifications attached to the contract were made by the Hill Dredging Company, as is shown by the plans themselves. Nothing in the contract gave the bridge company the right to supervise or govern the method by which the work was done. The result of the filling was the only thing that was determined by the bridge company. If, therefore, there was any negligence on the part of the bridge company, such negligence was not shown, and a directed verdict should have been given for this defendant. As to all of the plaintiffs' cases, with the exception of Lloyd and Tallman, it is clearly established that this defendant was not negligent because it did not fail to exercise

any degree of care demanded by the circumstances.

The Judge should have directed a verdict for the Ocean City Automobile Bridge Company, because the work was being done by an independent contractor, and if any damage was done to the lands of the plaintiffs, such damage had to be caused by acts of the independent contractor which were outside the scope of the actual contract. The Court, however, decided that this case came within the doctrine laid down in the case *Lydecker v. The Board of Chosen Freeholders of Passaic County,* 91 New Jersey Law 622 (103 Atlantic Reporter, 251):

> which case was the result of an infant attempting to recover for injuries caused by being thrown from his bicycle while riding along a public highway covered by oil. The Standard Oil Company had contracted with the Freeholders for the placing of oil. The action was brought against the Freeholders and the oil company. The facts showed that the oil company agreed to oil the roads, one-half at a time, to protect it from traffic for six hours after the oil was applied. The contract also provided that the oil was to be applied by a sprinkler satisfactory to the County Engineer, and not more than one-quarter gallon to the square yard. The evidence showed that the oil had been applied in accordance with the terms of the contract, and the Court held that the oil company owed the plaintiff no duty because the contractor was liable only for injuries to third person because of negligence in the execution of his contract. The Court further held it is true that when the work in itself is not a nuisance, and the injury results from the negligence in its execution, the contractor alone is liable, but in the

> Lydecker case, the work was designed by the County Engineer, the quantity of oil to be placed on the road was set up by the County Engineer, and the engineer in making his design had made a mistake, in the amount of oil placed on the road would make it unsafe for travel even after six hours.

This defendant contends that this case is not analogous to the cases at bar, for in these oyster cases, we find that according to the plans attached to the contract, the method of doing the work was designed and arranged by the contractor, Hill Dredging Company. We also find, according to the Exhibits P9 and D1, that the sand fill adjoining the leased grounds, was only to extend to the land of Walter J. Lloyd to a distance of approximately 100 feet, and that there was no provision in the contract that the sand should be allowed to run onto the leased area of the other plaintiffs. According to Exhibit D1, the sand fill at low water covered approximately 130 feet of Eugene Tallman's land, and approximately 250 feet of Walter J. Lloyd's land. This was not in accordance with the contract, and the Hill Dredging Company when it pumped the sand onto the grounds of Lloyd and Tallman, was going without the scope of the contract and any damage caused was a result of its negligence, and not any negligence on the part of the bridge company. In the Lydecker case, the damage was caused because the oil was put on the road too thick, but it was in accordance with the County Engineer's design; here, the pumping of the same was not in accordance with the bridge company engineer's design, but any pumping that covered the land of the plaintiffs, with the exception of Lloyd, was without the scope of the con-

tract, and, therefore, the case would not fall within the rule laid down in the Lydecker case.

The rule of law is well established in this State that where one employs a contractor exercising an independent employment, and hiring his own servants to do the work, not in itself a nuisance, the contractor alone is responsible for the injury resulting from the negligence of himself or his servants in the manner of executing the contract, unless the employer is in default in selecting an unskillful or improper person as contractor. The following cases in this State were decided upon this principle:

Mann v. Max, 107 Atlantic 417, decided June 20, 1919, and *Bush, et al. v. Margolis,* 130 Atlantic 525, decided October 19, 1925.

In the *Mann v. Max* case, 107 Atlantic 417,

> An owner of land abutting a public street, employed a contractor to build a building thereon. The contractor employed a certain sub-contractor for the mason work, and the sub-contractor erected a scaffold projecting from the sidewalk against which scaffold the plaintiff passing at night, struck his head and was injured. The Court held that a reasonable and proper scaffold being permissible, it was presumably lawful to erect one, and a scaffold cannot be a nuisance *per se,* but a legitimate appliance for building purposes, and that, therefore, the work not being a nuisance *per se,* the owner of the property was not liable for any damage sustained by the plaintiff.

This principle of law also has been held in the cases of *Cuff v. Newark and New York Railroad Company,* 35 N. J. Law, 17.

In the case of *Bush, et al. v. Margolis,* 130 Atlantic 525,

> The owner of a property contracted with a contractor for the repairing of the sidewalk in front of his property. The contractor, while engaging in the repair of the sidewalk, made the repairs and placed planks over the fresh concrete, and did not guard them by lights or any other method of warning to pedestrians. The plaintiff tripped over the planks and fell, sustaining injuries the night of the day when the planks had been placed over the repair. The Court held that the protection of the work by the contractor was as much a part of the work of the contractor as the laying of the concrete itself, and that as the work of repair and protection was not in itself a nuisance, the contractor alone was liable for the injury resulting from the negligence of himself and his servants.

The Judge, in addition to citing the Lydecker case, also cited the Marvin Safe case as the basis of his decision. This case was reported in 46 New Jersey Law, 19,

> and was a case where a bridge over the Passaic River had become unsafe, and the Board of Freeholders entered into a contract for the erection of a new bridge, and the contractor entered upon the performance of the work and constructed a temporary bridge. This temporary bridge gave way while a team of horses of the plaintiff was being driven over it, whereby the plaintiff's team was thrown into the river and sustained serious injuries. The Court held in

> that case that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. The Court also held, however, that where a person performing services or doing work under a contract may be held in damages for injuries to a third person, the damage or injury must be occasioned by negligence or misconduct in the execution of the contract, and the duty and liability arises independent of the contract.

In the case at bar, there was negligence on the part of the Hill Dredging Company in dredging and filling the roadway for the bridge company, if it allowed or permitted the sand to run over the bulkheads provided, and onto the property and lands of the plaintiffs. If the Hill Dredging Company had done all of its work in accordance with the plans and specifications attached to the contract, which plans and specifications were made by them, there could not have been any injury to the lands of the plaintiffs. This defendant fails to see how either the case of *Lydecker v. The Board of Freeholders,* or the Marvin Safe Company case apply to the facts in this case, and for these reasons above discussed, this defendant respectfully submits that the judgments appealed from should be reversed.

The bridge company had secured a permit from the State of New Jersey, and from the War Department of the United States for the building of the bridge, and was building the bridge in a way that it could not be construed to be a nuisance, as the plaintiffs had only an exclusive right for fishing, and they did not have a lease for the premises in the sense that they had exclusive right to possession

of the land. They only had possession of the land for the purpose of planting oysters and clams, and the State reserved the right to make any other use of the land that it might see fit. The State in giving the grant to the Ocean City Automobile Bridge Company for the building of a bridge, constituted a retaking of the land insofar as the rights granted to the bridge company were concerned. In support of this contention we have the cases of *Newport News Shipbuilding Co. v. Jones,* Vol. 26, *Corpus Juris,* page 621, 6 L. R. A. (N. S.) 247, and *Darling v. Newport News,* 249 U. S. 540.

III.

THE COURT ERRED IN REFUSING TO STRIKE THE TESTIMONY OF THE PLAINTIFFS AS TO THE QUANTITY OF OYSTERS AND CLAMS THAT EACH HAD ON HIS GROUND.

In each of the eight cases, the defendants made a motion to strike the testimony of the plaintiff as to the quantity of oysters and clams that each had on his respective ground, except in the case of Martin V. B. Scull, in which case the defendants moved to strike the testimony of John H. Smith, who was the only witness that testified that he knew the number of oysters and clams on Scull's tract. (See State of Case, page 200, line 13.) In each of the cases except the Scull case, the plaintiffs each testified as to the number of oysters and clams that they had planted some years before, and that they had made inspection of their ground from time to

time, and that at the time of each inspection, they found that the oysters and clams were living, and then testimony was offered to show that oysters and clams grew a certain amount each year, which increased the number of bushels on each tract. The presumption of law upon which theory this testimony was admitted, was that once a state of fact is proven, it is presumed to continue to exist until it is proven to the contrary. This defendant claims that such a presumption is not applicable to the case at bar, first, because there is a question of life involved. It would be presumed that if the oysters and clams were planted, that the shells would remain for a certain period of time or until it was proven that they had been removed, but it would not be presumed that all of the oysters and clams that had been planted years before, would still be alive. The only case upon which we have anything to base our opinion is the case of *Vreeland v. Vreeland,* 78 Equity 256, in the dictum on page 261, the Court says:

> "It cannot be disputed that the presumption of continuing life grows weaker as time passes; it is stronger the day after a person disappears than it is a year after; stronger after the expiration of a year than at the end of two years; stronger then than at the expiration of five or six years."

This would seem to indicate that where the plaintiffs are depending upon the presumption that the life of the oysters and clams would continue for a period of several years, that they are depending on a very weak link, as the lives of oysters and clams are much more hazardous than the lives of human beings, and the case above cited was dealing with

human beings, and not with oysters and clams or any other animal matter. Especially is this true in view of the evidence and testimony in these cases to the effect that there are many natural causes and conditions which kill oysters and clams.

In all of the cases, the plaintiffs were very uncertain as to the number of oysters and clams that they had on their grounds, and Eugene Tallman's testimony was of such a nature that certainly the Court erred in not striking all of his testimony regarding the oysters and clams that he had on his land.

In the case of Martin V. B. Scull, John H. Smith was called to the stand and asked to testify as to the number of oysters and clams on Scull's tract, at some period previous to the building of the bridge. Mr. Smith came to the stand and testified that he had made an agreement with Scull to work his oyster and clam beds, and that before going on the land to work, he made an investigation of the ground, and that in doing so he took tongs and made grabs on the land of Scull, and from the use of these tongs, determined the number of bushels of oysters and clams on the land of Scull. This defendant claims that this method of finding the number of oysters and clams on any piece of ground is not testimony, but purely guessing. In Smith's testimony (State of the Case, page 202, line 30):

> "Q. How many, in your opinion, were there on the area that you tried?
>
> A. On the area that I tried, I would say, on the area that I tried, somewheres about one-quarter of the ground, would be in the neighborhood of fifty or seventy-five thousand clams."

This, the defendant claims, is purely speculative testimony, when a witness could not estimate better

than a difference of twenty-five thousand clams in a seventy-five thousand estimate. The defendants objected to the admission of this testimony, and moved that the testimony be stricken as to the number of oysters and clams on Scull's ground, on the ground that the testimony was purely speculative. This motion was denied. See State of the Case, page 203, line 7.

A similar motion to strike the testimony was made at the close of each plaintiff's case, on the ground that the testimony was purely speculative, and was based on the presumption that the oysters and clams planted in 1924 and 1925 were still alive and growing in 1927 and 1928. The plaintiffs made no move to try to prove their loss of profit for any one year, which seems to be the only proper way of proving the damage to these leases, and each of the plaintiffs practically admitted on the stand that there were still oysters and clams on their ground even after all the pumping was done. See testimony of Theodore Smith, State of Case, page 130, line 10. The only argument which the different plaintiffs had, was to the effect that the pumping of the sand had covered their ground to such an extent that the oyster and clam business was not profitable. This defendant contends that the only measure of damages which could have been recovered for such a loss was the loss of profit for the year 1927, and possibly 1928, instead of for the whole number of clams and oysters on each separate tract, as there was nothing to prevent the plaintiffs from still using their beds, and in fact, some of the plaintiffs admitted that they still go on the ground and take off oysters and clams.

In Volume 8, Ruling Case Law, page 649, under Section 192, loss of profits, it is stated that:

> "Where a regular established business is injured, the average profits that the business is then earning and has earned, are competent proof as to the loss of profits, and even in cases where no recovery for loss of profits as such may be had for injury to a business * * *. A witness cannot give his opinion as to the amount of profits that could have been made, or that the profits lost were a specified sum, nor is the mere statement by one in charge of a business as to the net profits per month, before and after the injury, with nothing to show on what the estimate is based sufficient to warrant a submission to the jury of the question of loss of profits because of such injury."

This defendant contends that the testimony hereinafter set forth, taken as parts of the testimony from different plaintiffs' cases, shows how speculative the evidence was, as to the number of oysters on the ground and shows how the plaintiffs were merely guessing as to the number of oysters on the ground in 1927, when the pumping started. This also shows that none of the plaintiffs knew the number of clams to the bushel and there was a wide variance in answers made by each plaintiff as to the question of how many clams there were to the bushel.

The Tallman testimony especially showed that he did not have the slightest knowledge as to the number of oysters and clams on his land as he had not been on the leased area for more than two years previous to the pumping. See State of the Case, page 156, line 31. The same situation is shown to be true in the other cases from the testimony hereafter set forth.

In the JOHN H. SMITH CASE, the testimony is as follows:

See State of the Case, page 47, line 23:

"Q. How large are those clams that you gathered to plant on these leased grounds?

A. Well, the ones that I bought run about twelve thousand to the bushel.

Q. What is the usual quantity of clams in a bushel?

A. Well, at that size, they run from that down to six or seven hundred, that is, small clams.

Q. But the clams that you plant out?

A. They run from ten to twelve thousand to the bushel. Twelve thousand to fifteen, sometimes."

Also, see State of the Case, page 50, line 16, as to how many oysters were on his land prior to the pumping:

"Q. Can you determine how many oysters you had on your land at that time, in January, 1928?

A. *As near as I can tell,* there was about 1500 bushels between Theodore Smith and I.

Mr. Hanstein: I ask that be stricken.

The Court: The answer should have been yes or no.

Q. Answer that yes or no. The question is can you determine approximately how many clams you had on the ground at that time?

A. I could.

Q. How many?

A. How many I had at that time?

Q. How many oysters first.

A. How many oysters on the ground?

Q. You said about 1500 bushels between you and ——

A. Theodore Smith, yes.

Q. What quantity of oysters did you have on your ten acres, twenty acres

A. I planted one thousand bushels.

Mr. Hanstein: I ask that be stricken.

The Court: That will be stricken.

Q. You planted a thousand bushels? How many did you plant there? How many did you say you planted?

A. Fifteen hundred bushels together.

Q. That is a thousand, you said, for yourself?

A. Yes, sir.

Q. When did you plant them?

A. 1923 and 1924."

JOHN H. SMITH in his testimony, see State of the Case, page 66, line 15:

"Q. Is there any way that you know of that a person can tell how many oysters are in a given area under water without taking them up and counting them?

A. Without taking them up and counting them? You can tell by the bushel what you plant there.

Q. If they don't all grow you can't tell, can you?

A. Certainly you can tell what you have got left.

Q. You can tell by what?

A. What you have left on the ground when you take them up.

Q. When you take them up?

A. Yes.

Q. So that the best way to tell how many oys-

ters you have, or clams, is by taking them up, isn't it?

A. No. If you know how many clams you planted, you know how many you have there, if nobody don't take them or kill them."

THEODORE SMITH in his testimony, see State of the Case, page 117, line 28:

"Q. How many clams would there be in a bushel that you planted there?

A. From twelve to fifteen thousand."

Also see State of the Case, page 131, line 7:

"Q. Well, the ones that you dug up from underneath the bottom were living, weren't they?

A. Not all of them.

Q. Some of them were, weren't they?

A. Some was living.

Q. And for all you know, some of them that were down there were living, too?

A. Well, I couldn't reach them with the tongs.

Q. You couldn't get them with the tongs?

A. Couldn't get them, nothing but dead ones.

Q. What is the best way of telling how many oysters are on a piece of ground?

A. The best way of telling?

Q. Yes.

A. Why, you plant so many bushel on the acre and then you judge what the percentage will be, and then you can tell that way. Go over the bottom and feel. *You, of course, couldn't be accurate.*"

All of this testimony goes to show that not only Smith found clams and oysters on the leased ground

after the bridge was completed but also admitted in his testimony that the method employed by the plaintiffs in these cases, to determine the number of clams and oysters on the ground, could not be accurate, but merely a guess.

JESSE THOMAS testified as follows: See State of the Case, page 167, line 29:

"Q. When did you plant the clams?

A. 1924.

Q. On how many acres did you plant those clams that year?

A. Well, you couldn't tell how many acres.

Q. Beg pardon?

A. You couldn't tell how many acres you planted them on.

Q. You had ten acres and three and eighty hundredths; 13.80 acres all together.

A. Yes.

Q. Did you plant them on those grounds?

A. Sure.

Q. All on one?

A. No. Part on one and part on the other.

Q. How many clams did you plant?

A. Sixty bushels was what I catched and bought.

Q. How many clams would there be to the bushel?

A. Twelve thousand. Twelve to fifteen."

Which goes to show that JESSE THOMAS did not know how he had planted his oysters and clams, or on what part of his land he had planted them, nor did he know how many clams there were to the bushel; all of which goes to show that Thomas' testimony, as well as the other plaintiffs was of a very questionable nature.

SMITH HICKMAN, see State of the Case, page 180, line 23, as follows:

"Q. How many clams were there to the bushel?

A. Well, from eight to twelve thousand. From eight thousand to twelve thousand to the bushel.

Q. On your land, from eight to twelve?

A. Yes.

Q. And did you go on the ground to find out the condition of them in 1925?

A. I did not.

Q. 1926?

A. I did in 1926.

Q. *What did you find there in* 1926?

A. They was all right, but they was hardly large enough for market.

Q. Growing, were they?

A. Yes, sir, seemed to be.

Q. Did you go on the ground in 1927?

A. I did not.

Q. When did you next go on the grounds?

A. October, 1928."

This testimony not only shows that HICKMAN did not know how many clams there were to the bushel, but that when he went to look at his clams in 1926, they were not large enough for market and that he did not examine clams from 1926 until 1928, which meant that a period of more than a year elapsed between the time that he examined his oysters and clams and the work on the bridge started. It seems especially peculiar that any of the plaintiffs should have failed to go on their land rights, previously to the starting of our pumping on the bridges, because all of the plaintiffs knew of the

proposed bridge. This is shown from the fact that these people wrote to the bridge company, stating that their oysters and clams had been ruined before the pumping actually started.

HICKMAN'S further testimony was to the effect that he did not know whether he had planted the clams on his lot or not, that he had aimed to. See State of the Case, page 182, line 1, which is as follows:

"Q. But you did have the thirty-three bushels on your ground?

A. I planted the thirty-three bushels and I aimed to put them on my own land.

Q. And those clams, what happened to them, did you say?

A. I can't find them. They are buried up or something. I can't find them."

OSCAR SOMERS, in his testimony, see State of the Case, page 191, line 3, as follows:

"Q. You indicated there from a half inch to an inch, I suppose?

A. Yes, and over that sometimes. That is just the size. They run from that size on up. Plants and on up.

Q. That was in 1926?

A. 1926.

Q. In 1927 they weren't fit for market, yet, were they?

A. No, sir. They wasn't.

Q. How many years does it take before they are fit for market?

A. Around three and four years."

Which testimony is to the effect that SOMERS planted little clams, which were known as plants, in

1926, and further testified that they were not ready for market in 1927, and were of a very questionable size when the pumping started. In view of this, this defendant contends that it would have been according to SOMERS' own testimony three or four years before the oysters or clams would be of any considerable value.

In the case of WALTER J. LLOYD, this defendant contends that the testimony was especially speculative, for Lloyd testified as follows: See State of the Case, page 89, line 18:

> "Q. Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?
>
> A. It is a rather hard question to answer, but I had taken up the majority of my oysters, but I should say a fair estimate I probably had a thousand bushel.
>
> Q. Of oysters?
>
> A. Yes.
>
> Q. How large were they?
>
> A. I said I probably had a thousand bushel.
>
> Mr. Hanstein: I ask that that be stricken. I make my motion to strike this on the ground it is purely an estimate, it is purely a speculation and it is encumbent upon them to make proof, and it does not constitute proof.
>
> The Court: I will strike the answer as not being responsive to the question. The answer should be yes or no.
>
> (Exception noted for plaintiffs.)
>
> (Former question repeated as follows: Do you know how many oysters you had growing on it in the fall of 1927 and the first of January, 1928?)

A. Yes.
Q. How many
A. About a thousand bushel, *I should say, to the best of my ability.*
Mr. Hanstein: I ask that be stricken as not being proper proof.
The Court: No. That was a competent question, there was no objection made, and the answer will not be stricken."

Also see State of the Case, page 101, line 26, as follows:

"Q. The only certain way of telling how many oysters you have is by digging them up, isn't it?
A. *That is the most sure way.*
Q. Any other way is a guess; isn't that true?
A. *More or less.*"

Which testimony makes it quite clear that LLOYD did not know the number of clams and oysters on his land and was simply guessing as to the number of bushels of oysters and clams.

In view of the testimony above recited, as well as the other testimony of the various plaintiffs, this defendant contends that the testimony as to each of the separate plaintiffs, should have been stricken, and that the Court erred in not striking this testimony upon defendant's motion.

IV & V.

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS FOLLOWS:

(a) This defendant requested the Court to charge the jury as follows:

> "If the jury find that the Ocean City Automobile Bridge Company used diligence in selecting the Hill Dredging Company to do the pumping, and they find the sand going on plaintiff's property was not a direct result of the contract, then the jury should find a verdict of no cause of action as to this defendant."

It is contended that under the cases previously cited, of *Mann v. Max,* and *Bush v. Margolis,* and others, it has been held in this State to be the law that if an owner uses diligence in selecting a contractor the contractor alone is liable for negligence, unless the work to be done is in itself a nuisance. In view of this line of decisions, there may have been a question for the jury to decide as to whether the bridge company used diligence in selecting the Hill Dredging Company, but under the evidence, if the jury should find that the bridge company did use diligence in selecting the Hill Dredging Company, and that as a result of the work done by the Hill Dredging Company, damage was done to plaintiffs' property, which was not a direct result of the contract, and if the jury should find these facts to be true, then there should have been a verdict for no cause of action as to this defendant. The Jury in looking over the contract, specifications and plans,

could easily have ascertained that the work prescribed under the contract would not have constituted an injury on any of the lands of the plaintiffs.

(b) This defendant requested the Court to charge that

> "If the jury find from all the evidence that the roadway could have been filled in without permitting any sand to go on the property of the plaintiffs, then the jury should find a verdict of no cause of action as to this defendant."

The Judge should have so charged the jury, because that would have allowed the jury to pass on the question as to whether the work could be done without injuring plaintiffs' property, and if it could have been done without injuring said property, then the defendant Ocean City Automobile Bridge Company should not have been held liable, for the Hill Dredging Company was an independent contractor, entirely independent and responsible for the method of doing the work, and the bridge company should have been liable only in case the plans and specifications called for work to be done which would have proven injurious to plaintiffs' property.

VI & VII.

THE COURT ERRED BECAUSE IT CHARGED THE JURY UPON PLAINTIFFS' REQUEST AS FOLLOWS:

(a) The plaintiff requested the Court to charge the jury that:

> "In performing the work under the contract in this case, defendant was bound to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine."

The defendant, Ocean City Automobile Bridge Company contends that this was an improper charge to the jury so far as the cases against the Ocean City Automobile Bridge Company were concerned, because the bridge company had no control over the pumping machine. It had no control over the places from where the Hill Dredging Company was to pump, and it would have been impossible for the bridge company even upon investigation prior to the award of the contract, to know the effect of the currents of the river upon the sand pumped and agitated by the pumping machine. In making this charge to the jury, it prejudiced the minds of the jury into believing that the bridge company should have known the effect of the pumping and dredging and that therefore if they did not know the effect, they should be held liable. If the bridge company had had control over the Hill Dredging Company as to the method of doing the work and full supervision, then this charge might have been proper, but under the facts as proven, it was not shown that there was any liability on the part of the bridge company to know the effects of the currents of the river upon the sand pumped.

(b) The Court further charged the jury at the plaintiffs' request, as follows:

> "The stakes marking the oyster and clam grounds at the time of the defendant commencing the pumping and agitating of sand in ques-

tion were notice to defendant to some right in plaintiff in said land."

It is contended that the stakes which were alleged to have been upon the land of the plaintiffs were irregular in their position; they were of no particular design, but merely sticks sticking up in the air, sometimes covered by the tides, and that the stakes were not such as would call the attention of anyone to the fact that someone might have an interest in the lands. See State of the Case, page 395, line 23, as to the testimony of Preston Risley, as to the type of stakes placed in the ground, and also as to the number that were placed on the ground. Defendant contends that by so charging the jury, the Court prejudiced the jury in that the jury would feel that this defendant had full knowledge as to all of the plaintiffs' rights and claims and should have made a full investigation before having the Hill Dredging Company go on the ground to do the pumping. Defendant contends that the charges of the Court to the jury as above outlined, were prejudicial and would have great weight with the jury in making its decision.

For the reasons above discussed, I submit that the judgments appealed from should be reversed.

ROBERT K. BELL,
Solicitor for and of Counsel with Defendant Ocean City Automobile Bridge Company.