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BILL.

IN CHANCERY OF NEW JERSEY.

To the Honorable, Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, Seacoast Real Estate Company, a body corporate of the State of New Jersey, with its principal office in the City of Asbury Park, Monmouth County, New Jersey, respectfully shows:

1. That on or about May 31st, 1912, the American Timber Company and Henry H. Yard were indebted to Charles S. Hinchman and Lydia S. Hinchman, his wife, in a large sum of money, upwards of the sum of $50,000, and in order to secure the said Charles S. Hinchman and Lydia S. Hinchman for the payment for such moneys, the said American Timber Company executed and delivered unto the said Lydia S. Hinchman a certain deed of conveyance, bearing date the 31st day of May, 1912, and recorded August 29th, 1912, in the Monmouth County Clerk's office in Book 934 of deeds, page 342, and by said deed conveyed to the said Lydia S. Hinchman all the following described tracts of land and premises, to wit:

All that certain block or tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Manasquan, in the County of Monmouth and State of New Jersey, Bounded (1) on the north six hundred or more feet by Jackson Avenue between First Avenue and the Atlantic Ocean, said Jackson Avenue being eighty feet in width and being the southerly boundary of lands owned by the United States and

used for life saving station; (2) bounded on the south by an unnamed avenue eighty feet in width and parallel with and distant five hundred feet southerly from the said Jackson Avenue; (3) easterly by the Atlantic Ocean; (4) westerly five hundred feet by the easterly side of First Avenue.

Also, All that tract or parcel of land hereinafter particularly described, situate, lying and being in the Borough of Manasquan, in the County of Monmouth and State of New Jersey, Beginning at a point in the high-water mark of the Atlantic Ocean, where the centre line of the road from Brielle to the sea, intersects the same; thence (1) southerly along the high-water mark of the Atlantic Ocean, to where the Manasquan River empties into the ocean, known as Manasquan Inlet; thence (2) north and northwesterly, along the Manasquan River, and the various courses thereof, to where the said river or branch thereof, crosses said Brielle Road, to the center of said road; thence (3) easterly along the center line of said Brielle Road to the point or place of beginning.— That said deed was duly proven by Samuel L. Gillen, secretary of said company before Charles R. Holton, a notary public of San Francisco County, State of California, whose certificate of such proof is endorsed on said deed.

2. For the purpose of securing the said Charles S. Hinchman and Lydia S. Hinchman for said moneys, the said Henry H. Yard, claiming to have an interest in said lands and premises, and Catharine A. Yard, his wife, also executed and delivered unto the said Lydia S. Hinchman a deed for the same premises, dated June 1st, 1912, recorded August 29th, 1912, in said Clerk's office, in Book 934 of deeds, page 345. Which said deed was duly acknowledged

by the said Henry H. Yard and Catharine A. Yard, his wife, before the said Charles R. Holton, July 23rd, 1912, whose certificate is endorsed on said deed.

3. Said Lydia S. Hinchman and Charles S. Hinchman, her husband, by deed of conveyance dated June 22nd, 1914, conveyed all the right, title and interest in said lands and premises unto complainant, which deed was recorded June 24th, 1914, in said clerk's office, in Book 976 of deeds, page 458.

4. Since the execution of said last mentioned deed complainant has been in the possession of said premises, and has received the rents, issues and profits thereof.

5. That since the execution of said deeds, the said Henry H. Yard has departed this life, leaving him surviving his wife, the said Catharine A. Yard and a child, Carl Ammon Yard, who is an infant under the age of fourteen years.

6. That said deeds made by the said American Timber Company and Henry H. Yard and wife to the said Lydia S. Hinchman were executed and delivered, with the agreement that said lands were conveyed as security for the payment of said indebtedness of the said company and said Yard to said Hinchmans, and were in effect a mortgage.

7. That on the first day of December, 1915, complainant stated an account which it furnished to defendants, of the amount of said indebtedness, secured by said conveyances, which at that time was the sum of $40,384.53, and which has increased since that time, because of the accumulation of interest,

and payment of taxes, and other expenses in connection with said property.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That the American Timber Company, body corporate, Catharine A. Yard and Carl Ammon Yard, who are the defendants to this suit, may answer this bill of complaint without oath, and each statement therein made:

2. That an account may be taken of the amount due on complainant's deed or indenture of mortgage:

3. That the defendants, or one of them, may be decreed to pay complainant the amount so found due, with interests and costs, by a short day, to be appointed by this Court; and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands: or

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainant the amount so found due upon its deed or indenture of mortgage, with interest and costs:

5. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

DURAND, IVINS & CARTON,
Solicitors and Counsel with Complainant.

ANSWER AND COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between SEACOAST REAL ESTATE COMPANY, body corporate, *Complainant*, and AMERICAN TIMBER COMPANY, body corporate, *et als.*, *Defendants.*	On Bill to Foreclose. Answer and Counter-claim.

The answer of the defendants, American Timber Company, a corporation of the State of New Jersey, Catharine A. Yard, and Carl Ammon Yard, an infant, by his guardian *ad litem,* Catharine A. Yard; and the counter-claim of American Timber Company, Catharine A. Yard, Catharine A. Yard, Administratrix, c. t. a. of the estate of Henry H. Yard, deceased, and Carl Ammon Yard, by his mother and next friend, Catharine A. Yard, against the complainant, Seacoast Real Estate Company, a corporation of the State of New Jersey, and against the third parties, Lydia S. Hinchman and Charles Russell Hinchman and Lydia S. Hinchman, executors of Charles S. Hinchman, deceased.

These defendants, American Timber Company, Catharine A. Yard and Carl Ammon Yard, by his guardian *ad litem*, Catharine A. Yard, answering the bill of complaint, say that:

1. They deny that on or about May 31st, 1912, the American Timber Company or Henry H. Yard were indebted to Charles S. Hinchman or Lydia S. Hinchman, his wife, in any sum whatever. They admit that in order to secure the said Charles S. Hinchman and Lydia S. Hinchman for any moneys which might be due by the said Henry H. Yard to them or either of them, the said American Timber Company executed and delivered unto Lydia S. Hinchman the deed of conveyance as set forth in said paragraph.

2. Answering paragraph 2 of said bill defendants deny that the said Henry H. Yard and Catharine A. Yard claimed to have any interest in said lands and premises. They admit that for the purpose of further securing the said Charles S. Hinchman and Lydia S. Hinchman for any moneys which might be due to them or either of them from the said Henry H. Yard, the said Henry H. Yard and Catharine A. Yard, his wife, executed a quit-claim deed for the said premises as set forth in paragraph 2 of said bill.

3. These defendants have no knowledge or information sufficient to form a belief as to the facts set forth in paragraphs 3 and 4 of said bill. They aver, however, that if any such deed was accepted by complainant it was done with full knowledge of all the equities of the various parties. They deny that complainant was ever in possession of said premises. but aver that Charles S. Hinchman, or his estate, has always been in possession of same since the said conveyance and has received the incomes therefrom.

4. As to paragraph 5 of said bill, defendants admit the facts as therein set forth, and aver that Henry H. Yard departed this life on the 2nd day of Octo-

ber, 1914, testate, a resident of San Francisco, California. That by his last will and testament all his property, real and personal, was devised and bequeathed to his widow, Catharine A. Yard, and his only child, Carl Ammon Yard, and that letters of administration, c. t. a. were granted on his estate by the Probate Court of San Francisco County, California, to his widow, Catharine A. Yard.

5. Answering paragraph 6 of said bill, defendants deny that the American Timber Company was indebted in any sum whatever unto the said Charles S. Hinchman or Lydia S. Hinchman. They admit, however, that the said deeds were executed and delivered to the said Lydia S. Hinchman with the agreement that said lands were conveyed as security for the payment of any indebtedness which might be due by said Henry H. Yard to the said Charles S. Hinchman and Lydia S. Hinchman, and that they in effect constituted a mortgage given by the American Timber Company to secure same whatever it might be.

6. Answering paragraph 7 of said bill, defendants deny that complainant ever rendered any account to defendants or any of them. They admit that on December 1st, 1915, a statement was made by certain persons, Charles S. Hinchman and Lydia S. Hinchman, his wife, to defendants setting forth as due by the American Timber Company and Henry H. Yard to said persons the sum of $40,384.53. Defendants deny that any account was ever stated between defendants and any person. They deny that any amount is due by the American Timber Company to complainant or to Lydia S. Hinchman or the estate of Charles S. Hinchman except as security for said Henry H. Yard. They deny that $40,384.53 or any

sum was due by Henry H. Yard or his estate to complainant or to Lydia S. Hinchman or to the estate of Charles S. Hinchman on December 1st, 1915, and deny that said sum has been increased since that date.

Defendants aver that either the estate of Charles S. Hinchman or Lydia S. Hinchman or complainant is largely indebted to the American Timber Company or the estate of Henry H. Yard or to his devisee, Catharine A. Yard and Carl Ammon Yard, by reason of their receipts of rents, etc., which have greatly exceeded the amount of the debt and expenditures made by these parties on said lands occupied by them as mortgagees in possession, and for which defendants are properly liable.

COUNTER-CLAIM.

By way of counter-claim against complainant and the third parties, Lydia S. Hinchman, and Charles Russell Hinchman and Lydia S. Hinchman, executors of the estate of Charles S. Hinchman, deceased, the defendants, American Timber Company, Catharine A. Yard, Catharine A. Yard, administratrix c. t. a. of the estate of Henry H. Yard, deceased, and Carl Ammon Yard, by his mother and next friend and guardian *ad litem,* Catharine A. Yard, say that:

1. On or about the 31st day of October, 1904, Henry H. Yard, being indebted to the said Charles S. Hinchman in a certain sum of money, made and delivered unto him as security for same a certain promissory note in the sum of $22,452.13. Defendants have no knowledge as to the amount then due or still owing on said note.

2. At the time of making said note the said Henry H. Yard delivered to the said Charles S. Hinchman as collateral security for the said debt, deeds for and possession of certain lots at Belmar and Como, New Jersey, and for and of a tract of land in West Virginia, certificates for 200 shares of stock of the Spring Lake Beach Improvement Company, and for 25 shares of stock of the Sea Girt Land Improvement Company. And also at the same time or some other time the said Henry H. Yard delivered to the said Charles S. Hinchman certificates for 50,000 shares of stock of the Montana Gold Dredging Company as collateral security for said debt.

3. That much other collateral security was given by the said Henry H. Yard to said Charles S. Hinchman, either as his own or that of other individuals or corporations, as security for said debt. That defendants have not at this time information which will enable them to state what such collateral were, and aver that complainant and the third parties can state this collateral and pray that they should do so.

4. That on or about October 1st, 1904, the said Henry H. Yard became indebted to one Joseph M. Gazzam, in the sum of $3500 and to one, A. O. Granger, in the sum of $3500, and made and delivered to each of them respectively, as collateral to such debt, a note, each in the sum of $3500 and dated October 1st, 1904.

5. That in order to secure the payment of the said indebtedness by the said Henry H. Yard to the said Joseph M. Gazzam and to the said A. O. Granger, on or about October 1st, 1904, the American Timber

Company conveyed by deed to Joseph M. Gazzam, said deed being dated October 18th, 1904, acknowledged October 21st, 1904, and recorded October 26th, 1904, in the Monmouth County Clerk's Office in Book No. 678 of Deeds, page 306, all that tract of land firstly described in the bill of complaint, and firstly described in paragraph 8 hereinafter set forth. Said deed was a mortgage to secure the amount due on said notes.

6. That said Gazzam and Granger notes were subsequently assigned by the holders thereof to Lydia S. Hinchman.

7. At the time of the assignment of the said Gazzam and Granger notes to the said Lydia S. Hinchman, the said Joseph M. Gazzam conveyed the aforesaid tract of land, thus mortgaged by conveyance by the American Timber Company to Joseph M. Gazzam, as security for said indebtedness, to the said Lydia S. Hinchman, said deed being dated October 25th, 1911, which deed was recorded in the Clerk's Office of Monmouth County, in Book No. 914 of Deeds, page 128. The said Lydia S. Hinchman accepted said conveyance with full knowledge that the same was the assignment of a mortgage and not a conveyance in fee.

8. That on or about May 31st, 1912, the American Timber Company, in order to secure any sums which might be due by the said Henry H. Yard to the said Charles S. Hinchman and to the said Lydia S. Hinchman on the debts secured by the said note of $22,452.13, and the said Gazzam and Granger notes, and any other indebtedness there might be between said persons, mortgaged by deed of conveyance to the

said Lydia S. Hinchman, said deed bearing date May 31st, 1912, and recorded August 29th, 1912, in the clerk's office of Monmouth County in Book No. 934 of deeds, page 342, the following described tracts of land:

All that certain block or tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Manasquan, in the County of Monmouth and State of New Jersey, Bounded (1) on the north six hundred or more feet by Jackson Avenue between First Avenue and the Atlantic Ocean, said Jackson Avenue being eighty feet in width and being the southerly boundary of lands owned by the United States and used for life saving station; (2) bounded on the south by an unnamed avenue eighty feet in width and parallel with and distant five hundred feet southerly from the said Jackson Avenue; (3) easterly by the Atlantic Ocean; (4) westerly five hundred feet by the easterly side of First Avenue.

Also all that tract or parcel of land hereinafter particularly described, situate, lying and being in the Borough of Manasquan, in the County of Monmouth and State of New Jersey, beginning at a point in the high-water mark of the Atlantic Ocean, where the center line of the road from Brielle to the sea, intersects the same; thence (1) southerly along the high-water mark of the Atlantic Ocean, to where the Manasquan River empties into the ocean, known as Manasquan Inlet; thence (2) north and northwesterly, along the Manasquan River, and the various courses thereof, to where the said river or branch thereof, crosses said Brielle Road, to the center of said road; thence (3) easterly

along the center line of said Brielle Road to the point or place of beginning.

That said deed was duly proven by Samuel L. Gillen, secretary of said company before Charles R. Holten, a notary public of San Francisco County, State of California, whose certificate of such proof is endorsed on said deed.

9. On the said 31st day of May, 1912, the said Henry H. Yard and Catharine A. Yard, his wife, in order to further secure any sum which might be due by the said Henry H. Yard to the said Charles S. Hinchman and the said Lydia S. Hinchman, his wife, as aforesaid, released by quit-claim deed any interest which they or either of them might have in the said lands mortgaged by way of deed of conveyance by the said American Timber Company to the said Lydia S. Hinchman and heretofore described in paragraph 8 hereof, said quit-claim deed being dated June 1st, 1912, and recorded August 29th, 1912 in the clerk's office of Monmouth County in Book No. 934 of deeds, page 345.

10. That the said Charles S. Hinchman and Lydia S. Hinchman have since conveyed, by deed dated June 22nd, 1914, recorded June 24th, 1914, in said clerk's office in Book No. 976 of deeds, page 458, said tracts of land described in paragraph 8 hereof to the Seacoast Real Estate Company, but defendants aver that the said Seacoast Real Estate Company had full knowledge of the equities and rights of defendants in said tracts and that said title was held by said Lydia S. Hinchman as security for said debts and was in fact a mortgage.

11. That possession of all the real estate and personal property so conveyed and assigned by the said Henry H. Yard and the American Timber Company and other parties, as set forth in paragraphs 2, 3, 5, 7 and 8 hereof, was taken by the said Charles S. Hinchman as trustee and mortgagee in possession to secure the payment of said debts due to him and to his wife, Lydia S. Hinchman. All the incomes, rents, issues and profits arising from same or any of them have been received by him as such. That some of said collateral has been sold by him without any right so to dispose of same. That the West Virginia tract alone was returned to the American Timber Company at a later date. That defendants have no knowledge of the sums which have been received by the said Charles S. Hinchman from same, and ask that the estate of said Charles S. Hinchman shall render an account as trustee, of his handling of such real estate, securities, collateral, etc., so that the assets may be marshalled, the proper amounts credited on the mortgages and any excess repaid to the proper parties. Defendants tender themselves as able and willing to pay any amount which may remain due on said mortgages, if any, and redeem all of said collateral from said estate of Charles S. Hinchman, Lydia S. Hinchman or the Seacoast Real Estate Company.

12. Defendants further say that on October 4th, 1914, the said Henry H. Yard departed this life a resident of San Francisco, San Francisco County, California, testate, leaving a will by which all of his property, real and personal, went to his widow, Catharine A. Yard and to his only child, Carl Ammon Yard. That the said will was duly probated in the Probate Court of San Francisco County, California,

and letters of administration c. t. a. were issued to Catharine A. Yard. That she has entered upon her duties as administratrix c. t. a. of said estate.

13. That on or about June 3rd, 1916, the said Charles S. Hinchman departed this life, testate, a resident of the City and County of Philadelphia, State of Pennsylvania, and letters testamentary were duly issued by the register of wills of that county, on said estate, to Charles Russell Hinchman and Lydia S. Hinchman as executors, and that they have entered on their duties as such.

Defendants therefore pray:

1. That the said complainant, the Seacoast Real Estate Company, and said third parties, Lydia S. Hinchman, and Charles Russell Hinchman and Lydia S. Hinchman, executors of Charles S. Hinchman, deceased, may answer this counter-claim, without oath, and each statement herein made.

2. That the said third parties shall render an account showing all securities which were received by them or any of them or by Charles S. Hinchman from Henry H. Yard, the American Timber Company and from any other person or corporation as collateral security to the said debts of said Henry H. Yard.

3. That the said complainant and third parties shall render an account showing all receipts from any of the collateral security held by them or any of them or Charles S. Hinchman for said debts.

4. That the said complainant and third parties shall render an account showing the amounts due on

said indebtednesses secured by such collateral security.

5. That the Court shall marshal the assets of the said Henry H. Yard or of third parties who went his security.

6. That the said complainant and third parties may be decreed to pay to such of the defendants as may seem proper to the court, any amount in excess of the amount of the indebtednesses which may have been received by complainant and said third parties or Charles S. Hinchman.

7. That the said complainant and third parties may be decreed to return by proper conveyances, assignments or otherwise to the defendants, or such of them as is proper all property conveyed or assigned to them as collateral security for such indebtednesses upon payment to them of any amount which may be found due to them.

8. That the said complainant and third parties shall deliver up to the defendants or such of them as is proper, the notes and other evidences of indebtedness of the said Henry H. Yard held by them or any of them.

9. That a writ of subpoena may issue, commanding the said third parties, Lydia S. Hinchman and Charles Russell Hinchman and Lydia S. Hinchman, executors of Charles S. Hinchman, deceased, to answer this counter-claim and to abide by such decree as this Court may make in the premises.

MARTIN V. BERGEN,
Solicitor of and Counsel with Defendants.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between
SEACOAST REAL ESTATE COMPANY, body corporate,
Complainant,
and
AMERICAN TIMBER COMPANY, body corporate, *et als.*,
Defendants.

On Bill, &c.
Replication.

The complainant joins issue on the answer of the defendant.

As to the counter-claim contained in said answer, complainant and Lydia S. Hinchman, and Charles Russell Hinchman and Lydia S. Hinchman, as executors of the estate of Charles S. Hinchman, deceased, say,

1. October 31st, 1904, Henry H. Yard was indebted to the said Charles S. Hinchman in at least the sum of $22452.13, and gave him his promissory note, dated that day, for that sum, a copy of which is hereto annexed, marked Schedule A.

2. Paragraph 2 is admitted, and Schedule B is a list of said collateral securities.

3. Paragraph 3 is denied.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted, and on the 26th day of October, 1911, said Lydia S. Hinchman filed her bill of complaint in this Honorable Court for the foreclosure of said deed, wherein the said Henry H. Yard and the American Timber Company were defendants, who appeared and answered, and such proceedings were had in said cause that the same was referred to one of the Vice Chancellors of this court for hearing, when an arrangement staying said foreclosure was made, as is hereinafter stated.

8. Paragraph 8 is admitted.

9. Paragraph 9 is admitted.

10. Paragraph 10 is admitted.

11. They admit the property transferred as collateral, under said arrangement, with the said Henry H. Yard, was taken possession of by the said Charles S. Hinchman, and that he received the rents, issues and profits thereof, but they deny that any of said collateral was sold by him without right or authority so to do, and they say that Schedule C hereto annexed shows the terms under which said lands were conveyed by the said American Timber Company to the said Lydia S. Hinchman, and Schedule D is a full and complete account of all the moneys received

from said properties conveyed as collateral security, as aforesaid, and also showing amount of said indebtedness, for which said properties were conveyed as collateral security, and the receipts and disbursements in connection therewith, and the balance justly due as of the 15th day of May, 1916.

12. Paragraph 12 is admitted.

13. Paragraph 13 is admitted, and they say that Schedule D hereto annexed is a full and correct account showing the balance due on said indebtedness, after the application of the moneys received from securities deposited and conveyed as collateral, and that there is due to the complainant on the mortgage set forth in complainant's bill, as of the 15th day of May, 1916, the sum of $42,360, as appears by said account; that the Schedules hereto annexed show all securities received by the said Charles S. Hinchman, or any of them, from the said Henry H. Yard, or the American Timber Company, or any other person, as collateral securities, to the debts of the said Henry H. Yard, and show all receipts from all of said collateral security held as aforesaid, and show the amount due on said indebtedness, secured by said collateral security.

DURAND, IVINS & CARTON,
Solrs. for and of counsel with Complt. and Lydia S. Hinchman and Exceptions of Charles S. Hinchman, dec'd.

SCHEDULE A.

$22,452.13 Phila., Octr. 31st, 1904.

One year after date I promise to pay to the Order of C. S. HINCHMAN, Twenty two thousand, four hundred and fifty two 13/100 Dollars, for Value Received, without Defalcation, with interest, Along with the foregoing obligation, I have delivered deeds for certain lots at Belmar and Como and West Virginia, as per list attached, showing redemption am'ts and 200 shs. Spring Lake Beach Impt. Co. & 25 shs Sea Girt Land Impt. Co., as collateral security for the prompt payment, at maturity, of this and of any other liability or liabilities of the undersigned, due or to become due, or of any that may be hereafter contracted with the holder of this Promissory Note; which collaterals, either the whole or any part thereof, I hereby authorize and empower the holder of this Promissory Note (provided the same or any other liability of the undersigned, as before described, be not paid at maturity) to sell at public or private sale at any time or times thereafter, without further reference or notice to me, and with the right on the part of the holder of this obligation to become the purchaser, at such sale or sales, of the whole or any part of said collaterals (freed and discharged of any equity of redemption) and to transfer, assign and deliver up the same; and, after deducting all legal and other costs, attorney fees and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said holder shall deem proper, returning the overplus, if any, to me; and should any deficiency occur, I further promise and agree to pay the same to the holder hereof, on demand.

Payable at 902 Provident Bldg., Phila., Pa.
No. Due Octr. 31, 1905.
(Signed) Henry H. Yard.

ENDORSEMENT.

$1,347.13. Int. pd. at 6% Nov. 1, 1905 to Oct. 31,05 and extended for 1 yr. (Sgd) C. S. H.

Credits for sales of any coll. to be made hereon as soon as taxes are paid up on all the collateral property by H. H. Yard and receipts furnished *furnished* to sd. C. S. H. to show payments.

(Sd) H. H. Yard. (Sgd.) C. S. Hinchman.

SCHEDULE B.

PROPOSITION FOR SETTLEMENT BETWEEN H. H. YARD AND C. S. HINCHMAN, OCTOBER 19, 1904.

Notes to be given by H. H. Yard and Collateral to be released within one year from date upon the payment of the following amounts + 20%.

Belmar Lots 2143-46,	$1,200.
Como Lot 2, Block 2,	1,000.
25 shares of stock of Sea Girt Land Impt. Co.,	750.
200 shares stock Spring Lake Beach Impt. Co.,	2,000.
Lands in Hardy County, West Va.	4,500.
Lands at Como near Railroad Station,	1,500.

Belmar lots 2952-59,	3,000.
Como tract, Gillin,	3,000.
Como tract, Muhr, North of Lake and Lot 9 Block 3,	4,000.
	$20,950.

SCHEDULE C.

MEMORANDUM OF AGREEMENT between AMERICAN TIMBER COMPANY and H. H. YARD, of the first part, and C. S. HINCHMAN and LYDIA S. HINCHMAN, of the second part,

AMERICAN TIMBER COMPANY to deliver warranty deed to Lydia S. Hinchman for the following described premises:

ALL that certain block or tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Manasquan in the County of Monmouth and State of New Jersey.

BOUNDED (1) on the north six hundred or more feet by Jackson Avenue between First Avenue and Atlantic Ocean, said Jackson Avenue being eighty feet in width and being the southerly boundary of lands owned by the United States and used for living saving station; (2) bounded on the South by an unnamed avenue eighty feet in width and parallel with and distant five hundred feet southerly from the said Jackson Avenue; (3) easterly by the Atlantic Ocean; (4) westerly five hundred feet by the easterly side of First Avenue.

ALSO, all that tract or parcel of land hereinafter particularly described, situate, lying and being in the Borough of Manasquan, in the County of Monmouth and State of New Jersey.

BEGINNING at a point in the high water mark of the Atlantic Ocean, where the center line of the road from Brielle to the Sea, intersects the same; thence (1) southerly along the highwater mark of the Atlantic Ocean, to where the Manasquan River empties into the Ocean, known as Manasquan Inlet; thence (2) north and northwesterly along the Manasquan River and the various courses thereof, to where the said river or branch thereof crosses said Brielle Road, to the center of said road; thence (3) easterly along the center line of said Brielle Road to the point or place of beginning.

Henry H. Yard and wife to deliver a quit claim deed to Lydia S. Hinchman for the premises above described.

All leases and rentals affecting said premises to be assigned to said Lydia S. Hinchman to apply on moneys advanced or to be advanced for payment of taxes or other proper charges against said premises.

(It being understood that the above described lands shall be substituted as collateral to secure claims due individually by H. H. Yard to C. S. Hinchman and Lydia S. Hinchman, the American Timber Company receiving in exchange therefor 1800 acres of timber land located in Hardy County, West Virginia, and hereinafter referred to.)

It is agreed that the minimum price at which the Manasquan Beach properties may be sold shall be Fifteen Thousand ($15,000) Dollars, less a commission of ten (10%) percent.

If the Manasquan Beach properties have not been disposed of within two years from May 1st, 1912, the same shall be sold at public auction at the Philadelphia Bourse by Barnes and Lofland to the highest bidder. Provided, that upon payment on May 1st, 1914, of accrued interest at six (6%) per cent, upon

the debt of said H. H. Yard from May 1st, 1912, and $1,000 on account of principal (without release of collateral) the sale at auction shall be postponed to May 1st, 1915.

C. S. Hinchman and wife to deliver a Special Warranty Deed to the American Timber Company or its nominee for a certain tract of 1800 acres of land located in Hardy County, West Virginia, formerly owned by H. H. Yard, said transfer being in exchange for the interest of the American Timber Company in the Manasquan Beach lands.

C. S. Hinchman to procure and deliver to S. L. Gillin a release from the attachments and lis pendens affecting the block of land located at the Northwest corner of Monmouth and Railroad Avenues, Spring Lake N. J., said block of land being involved in the attachment proceedings of the Spring Lake Beach Improvement Company vs. H. H. Yard et als.,

C. S. Hinchman to deliver H. H. Yard certificates for 50,000 shares of the Montana Gold Dredging Company, held by C. S. Hinchman as collateral, but not mentioned as collateral in any note.

C. S. Hinchman to loan to S. L. Gillin $2000 on mortgage on the premises mentioned as located corner Monmouth Avenue and Railroad at Spring Lake, said mortgage to be for the period of one year with interest at 6% per annum, payable semi-annually. Said block of land to be clear of all taxes and encumbrances.

AMERICAN TIMBER COMPANY,
by H. H. Yard
President.
by S. L. Gillen,
Secretary.

WITNESS AS TO H. H. YARD,
S. L. Gillen
WITNESS AS TO CSH and LSH
Wm. C. Arrison.

H. H. YARD, (SEAL)
C. S. HINCHMAN (SEAL)
L. S. HINCHMAN (SEAL)

SCHEDULE D.

STATEMENT OF BALANCE DUE DECEMBER 1, 1915, on AMERICAN TIMBER CO., and H. H. YARD OBLIGATIONS.

Balance due on $22,452.13 note,	$15,626.32	
Balance due on Gazzma-Granger note,	11,690.00	
		$27,316.32
Add taxes, expenses, etc., and interest,		22,869.84
		50,186.16
Less rentals received and interest,		9,492.95
Balance, December 1st, 1915		$40,693.21

NOTE: 1915 taxes and the compensation to the Supervising Engineer on work at the dyke in the Summer and Fall of 1915 are not included in above, and will increase the balance by about $1,500 when paid.

10-31-04	Note H. H. Yard,	$22,452.13	
10-31-05	Interest, one year	1,347.13	23,799.26
11- 1-05	Interest paid to 10-31-05		1,347.13
	Balance due		22,452.13
1-24-05	Taxes 1904 Belmar 2143-6	9.09	
	Taxes 1904 Belmar 2952-7	36.36	
	Interest to 6-20-05	1.30	46.75
			22,498.88
6-20-05	By % sale lot 2, Blk. 2 Como		200.00
			22,298.88
7-26-05	Balance sale lot 2, Blk. 2 Como		800.
	Balance due		$21,498.88
10-17-05	1905 Taxes 2952-7 Belmar	36.58	
12-30-05	1903-4 Taxes Lot 2, Blk. 2 Como	49.65	
5- 6-06	1905 Taxes Hardy Co., West Virginia,	23.42	
10-12-06	1905 Taxes 2143-6 Belmar	16.40	
11-10-06	1906 Taxes Hardy Co., W. Va.	41.86	

12-10-06	1905 Taxes Como, on Blkd. 29, 72, 73, 63, 75, 77, 84, 90	134.73	
12-17-06	1906 Taxes Belmar 2952-7	43.38	
12-19-06	1906 Taxes Como, Blk. 29, etc.,	95.19	
	Interest on above to 12-29-06	7.66	
	Interest on $22,-452.13 from 10-31-05 to 12-29-06	1,564.17	2,013.04
	Balance due		23,511.92
12-20-06	Wood sold from Como 6.69 acres		10.34
	Balance due		23,501.58
12-31-06	1906 Taxes 2143-6 Belmar,	21.68	
4-18-07	Interest on mortgage 6.69 acres,	180.	
6- 3-07	Recording Gillen deed,	1.31	
9-16-07	Interest on mortgage on 6.69 acres,	60.00	
	Interest on balance due and on above to 9-16-07	1,011.13	1,274.12
	Balance due		24,775.70

9-16-07 % sale 6.69 acres (sub. 2,000)		500.00
Balance due		$24,275.70
Interest to 10-3-07		68.78
Balance due		$24,344.48
10- 3-07 % sale 6.69 acres (sub. 2,000)		4,500.
Balance due		$19,844.48
Interest to 10-19-07		52.92
		$19,897.40
10-19-07 Balance sale 6.69 acres (subj. 2,000)		257.10
Balance due		$19,640.30
11-27-07 1907 taxes Hardy Ci., W. Va.	51.07	
12- 1-07 1907 taxes 2952-7 Belmar,	42.54	
1907 taxes Como	28.47	
1907 taxes 2143-6 Belmar	21.12	
Interest on balance due and on above to 4-15-08	579.01	722.21
Balance due		20,362.51
4-15-08 $3. per share on S. G. L. I. Co.,		75.00
Balance due,		20,287.51

	Interest to 6-2-08	158.91
	Balance due,	20,446.42
6- 2-08	Proceeds und. 1-2 tract n. s. Lake Como	2,100.
	Balance due,	$18,346.42
	Interest to 7-2-08	91.73
	Balance due,	$18,438.15
7- 2-08	% sale n. s. Lake Como,	500.00
	Balance due,	$17,938.15
Forward	Balance due	$17,938.15
	Interest to 8-18-08	143.50
	Balance due	$18,081.65
8-18-08	% mtg. n. s. Lake Como,	900.
	Balance due	$17,181.65
	Interest to 9-4-08	45.81
	Balance due	$17,227.46
9- 4-08	% mortgage n. s. Lake Como,	500.
	Balance due	$16,727.46
	Interest to 9-17-09	36.24
	Balance due	$16,763.70

9-17-08 acct. mtg. n. s. Lake Como,	825.	
Balance due	$15,938.70	
Interest to 9-23-08	15.93	
Balance due	$15,954.63	
9-23-08 % mtg. n. s. Lake Como,	412.50	
Balance due	$15,542.13	10
Interest to 10-10	42.96	
Balance due	$15,585.09	
10-10-08 % mtg. n. s. Lake Como,	350.	
Balance due	$15,235.09	
Interest to 10-22-08	30.47	
Balance due	$15,265.56	20
10-22-08 Net, proceeds 2143-6 Belmar	1,200.	
Balance due	$14,065.56	
Interest to 11-14-08	51.57	
Balance due	$14,117.13	
11-14-08 % mtg. n. s. Lake Como,	267.	30
Balance due	$13,850.13	
Interest to 12-31-08	108.49	
Balance due	$13,958.62	

12-31-08	proceeds 2952-7 Belmar	2,297.51	
	Less Brown mtg. & Int. fr. 9-15-06	1,402.30	895.21
	Balance due		$13,063.41
1-19-09	Taxes 1908 Hardy Co., W. Va.,	47.52	
	Int. on bal. due 7 & on above to 6-2-09	290.62	338.14
	Balance due		$13401.55
6- 2-09	$3. per share on S-GLICo.,		75.00
	Balance due,		$13,326.55
	Interest to 7-6-09		75.50
	Balance due		$13,402.05
7- 6-09	% und. ½ lot 9, Blk. 3 Como,		25.00
	Balance due,		$13,377.05
	Interest to 8-3		60.19
	Balance due		$13,437.24
8- 3-09	Bal. on und. ½ lot 9, Blk 3, Como,		950.00
	Balance due,		$12,487.24
	Interest to 6-1-10		620.20
	Balance due,		$13,107.44

6- 1-10	$3. per share on S-GLICO.,		75.00	
	Balance due,		$13,032.44	
6- 3-10	Taxes 1909 Hardy Co., W. Va.	35.06		
	Taxes 1910 Hardy Co., W. Va.	29.16		
	Int. on balance due to 4-1-11	651.62		10
	Int. on above,	2.45	718.29	
	Balance due,		$13,750.73	
4- 1-11	$3. per share on S-GLI Co.,		75.00	
	Balance due,		$13,675.73	
	Interest to 7-1-11		205.13	
	Balance due,		$13,880.86	20
7- 1-11	$3. per share on S-GLI Co.,		600.	
	Balance		$13,280.86	
Forward	Balance due,		$13,280.86	
12-27-11	Taxes 1911 Hardy Co., W. Va.	33.84		
	Interest on balance due	340.87		
	Interest on above,	.94		30
	Balance due,		$13,656.51	
6- 1-12	$3. per share on S. G. L. I. Co.,	75.		

	$3 per share on S. L. B. I. Co.,	600.	675.
	Balance due,		$12,981.51
	Interest to 5-1-13		713.98
	Balance due,		$13,695.49
5- 1-13	$3. per share on S. G. L. I. Co.,		75.
	Balance due,		$13,620.49
	Interest to 7-8-14		969.31
			$14,589.80
7- 8-14	$3. per share on S. G. L. I. Co.,		75.
	Balance due,		$14,514.80
	Interest to 6-1-15,		781.38
	Balance due		$15,296.18
6- 1-15	$5. per share on S. G. L. I. Co.,		125.00
	Balance due,		$15,171.18
	Interest to 12-1-15		455.14
	Balance due,		$15,626.32
	Balance on "Gazzam Granger" obligations.		
	Amount of debt,	$7,000.00	
	Int. 10-1-1904 to 12-1-1915,	4,690.00	
			$11,690.00

* * * * * * * * *

Rents:			
Gazzam-Granger		$2,609.30	
Below Brielle Road		6,146.20	
		8,755.50	
Interest to December 1, 1915			
On Gazzam-Granger		310.60	
Below Brielle Road		426.85	
			$9,492.95

12-10-15

TAXES EXPENSES etc.,

Taxes paid			
		Int. to 12-1-15	
10- 5-12	102.60	19.02	
10-10-12	163.62	30.83	
12-18-12	9.25	1.75	
12-17-13	9.70	1.83	
Apportioned to SCRE Co.,			
12-18-14	500.	29.00	
	785.18	82.43	867.61
General Expense (Stat. Printing etc)			
8-22-13	4.15	.38	
8-14-14	4.00	.31	
5- 5-14	7.50	.45	
8- 3-14	7.50	.57	
8- 3-14	3.25	.25	
8-21-14	2.00	.16	
9- 2-14	.55	.04	
10- 5-14	3.50	.21	
12- 2-14	23.72	1.39	

5-19-15	5.00	.15	
7- 1-15	2.00	.04	
	227.60	4.89	
7-21-15	290.77	8.84	299.61
Commissions and Collections.			
5- 6-15	225.	7.65	
8- 6-14	50.	3.95	
9-12-14	50.	3.65	
7-22-15	265.	5.65	
	590.	20.90	610.90
Surveying			
8- 2-13	50.	6.99	
12-26-14	76.	4.23	
	126.	11.22	137.22
Legal Expenses (in defence of title)			
11- 2-14	250.	16.17	
11- 5-14	1.50	.10	
11-13-14	500.	31.42	
12-12-14	5.	.29	
2- 8-15	33.	1.61	
5-29-15	68.	2.05	
6-15-15	140.	3.85	
7-21-15	65.	1.40	
11-27-15	250.	.13	
	1,312.50	57.02	1,369.52
Renewing Dyke at Inlet.			
8- 4-14	1,500.	119.	
8-19-14	2,000.	157.	

9- 2-14	2,000.	149.38	
9-14-14	3,500.	254.33	
9-26-14	2,970.	209.88	
9- 7-15	1,000.	13.83	
10-22-15	1,500	9.50	
11-18-15	4,182.08	8.36	
	18,652.08	911.28	19,563.36
Rentals over-paid,	19.	2.62	$ 21.62
			$22,869.84

The $500 item of taxes is a part of the item of over $800 which was assessed against the entire beach, and has been apportioned on what appears to be a fair basis as to its application to the tracts covered by this statement.

1915 taxes now due—not included.

The legal expense covers a lot of litigation, with people claiming title to portions of the property, and include attorneys' fees, court costs, printing, etc. In the Rice case, which affected property both above and below the Brielle Road, the expense has been divided, only a portion of it appearing in this statement. In the Lockwood case, which affected the property below the Brielle Road, the entire expense is included.

ORDER FOR AMENDMENT TO ANSWER.

IN CHANCERY OF NEW JERSEY.

Between SEACOAST REAL ESTATE COMPANY, body corporate, *Complainant*, and AMERICAN TIMBER COMPANY, body corporate, *et als.*, *Defendants.*	On Bill to Foreclose, &c. Order.

This matter being opened to the Court by Martin V. Bergen, solicitor for defendants, it is on this day of November, 1917, ordered that the counter-claim filed by the defendants in the above-stated cause be amended as follows:

On page 4, of the answer and counter-claim, by the elimination of the 4th paragraph and the insertion of the following in lieu thereof:

4. (a) That on or about October 9th, 1901, the said Henry H. Yard borrowed from Joseph M. Gazzam and A. O. Granger, from each, the sum of $300, giving to each of them a note for $375.00 bearing date on that day and payable in one year with interest and drawn to their respective orders. That on or about October 21st, 1901, the said Henry H. Yard borrowed from the said Joseph M. Gazzam and

A. O. Granger, from each the sum of $500, giving to each of them a note for $625 dated on that day and payable in one year with interest. That on or about October 25th, 1901, the said Henry H. Yard borrowed from the said Joseph M. Gazzam and A. O. Granger, from each, the further sum of $800 and gave to each of them a note for $1,000 dated on that day and payable in one year with interest; and that on December 11th, 1901, the said Henry H. Yard borrowed from the said Joseph M. Gazzam and A. O. Granger, from each, the further sum of $800 and delivered to each of them a note dated on that day for the sum of $1,000 payable in one year with interest. That therefore, the said Henry H. Yard had borrowed from each of them the sum of $2,400 and gave to each of them notes in the amount of $3,000.

4. (b) That on or about October 1st, 1904, the said Henry H. Yard took up the foregoing notes by delivery to the said Joseph M. Gazzam and A. O. Granger, to each of them, a note for $3,500 dated on that day and payable one year after date, with interest.

4. (c) That after the maturity of said notes and with full knowledge of the amount advanced by the said Joseph M. Gazzam and A. O. Granger respectively, to the said Henry H. Yard for which debts the said notes had been given, the said Lydia S. Hinchman purchased same from the said Joseph M. Gazzam and A. O. Granger who were then the holders thereof.

4. (d) That all of said transactions mentioned in this paragraph occurred in the City of Philadelphia, State of Pennsylvania; that the said money was

loaned in that state, the original notes were given in said state and the renewals were given in said state, and the said notes were purchased by the said Lydia S. Hinchman in said state, and that the contracts are therefore, controlled by the laws of that state.

4. (e) The Act of May 28th, 1858, P. L. 622 (2 Purden's Digest, 13th Edit., p. 1987), provides as follows:

"1. The lawful rate of interest (a) for the loan or use of money (b) in all cases where no express contract shall have been made for a less rate, (bb) shall be six per cent. per annum; and the first and second sections of the Act passed 2d March, 1723, entitled 'An act to reduce the interest of money from eight to six per cent per annum,' be and the same is hereby repealed. (c)

"2. When a rate of interest for the loan or use of money exceeding that established by law shall have been reserved or contracted for, the borrower or debtor shall not be required to pay the creditor the excess over the legal rate, (d) and it shall be lawful for such borrower or debtor at his option, to retain and deduct such excess from the amount of any debt; (e) and in all cases where any borrower or debtor (f) shall heretofore, or hereafter, have voluntarily paid the whole debt, or sum loaned, together with interest exceeding the lawful rate, (g) no action to recover back any such excess shall be sustained in any court of this Commonwealth, unless the same shall have been commenced within six months from and after the time of such payment; (h) Provided always, that nothing in this

act shall affect the holders of negotiable paper taken bona fide in the usual course of business."

That this act was in force at the time of the giving of these notes and controlled same.

4. (f) That the Act of the State of Pennsylvania of May 16th, 1901, P. L. 202 (3 Purdon's Digest, 13th Edit., p. 3272) provides as follows:

"61. A holder in due course is a holder who has taken (gg) the instrument under the following conditions:

"(1) That it is complete and regular upon its face. (i)

"(2) That he became the holder of it before it was overdue, (k) and without notice that it had been previously dishonored, if such was the fact. (l)

"(3) That he took it in good faith (m) and for value. (n)

"(4) That at the time it was negotiated (o) to him he had no notice of any infirmity in the instrument or defect in in the title of the person negotiating it. (p)

"63. Where the transferee receives notice of any infirmity in the instrument, or defect in the title of the person negotiating the same, before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. (r)

"65. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, (x) or knowledge of such

facts that his action in taking the instrument amounted to bad faith. (y)

"66. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves (z) any may enforce payment of the instrument for the full amount thereof (zz) against all parties liable thereon. (a)

"67. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable; (aa) but a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument (b) has all the right of such former holder in respect of all parties prior to the latter."

That such sections of such act were in force at the time of the giving of these notes and controlled the said contracts.

4. (g) That therefore, these notes are usurious and the amounts due on said $3500 notes under the said Pennsylvania statutes is the sum of $2400 on each with interest calculated to October 1st, 1904, being the sum of $2817.25; and that the said amount is the amount due in this case on these notes.

SPECIAL REPLICATION TO AMENDMENT TO COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between SEACOAST REAL ESTATE COMPANY, body corporate, *Complainant,* and AMERICAN TIMBER COMPANY, body corporate, *et als.*, *Defendants.*	On Bill, &c. Special Replication to Amendment to Counter-Claim.

In reply to the defense stated in the amendment to defendants' counter-claim, under order made November 23, 1917, and not anticipated in the bill of complaint, complainant by leave of court, says that,

1. It has no knowledge or information sufficient to form a belief as to the statements contained in said amendment except as hereinafter stated.

2. On or about October 1st, 1904, said Henry H. Yard made and delivered to said Joseph M. Gazzam and A. O. Granger each a note for $3500, dated that day, and payable one year after date.

3. To secure the payment of said note, the defendant, American Timber Company made, executed and

delivered to said Joseph M. Gazzam, a deed dated October 18, 1901, recorded in the clerk's office of Monmouth County, October 26th, 1901, in book 678 of deeds, page 306, by which said American Timber Company conveyed to said Joseph M. Gazzam the tract of land firstly described in complainant's bill.

4. On or about June 1, 1910, said Lydia S. Hinchman purchased said notes from said Gazzam and Granger, paying to said Gazzam and Granger the full value therefor, and that at the time of such purchase by her of said notes, said Lydia S. Hinchman had no knowledge, information or belief that less than the full amount of the notes had been advanced thereon by said Gazzam and Granger.

5. At the time of the purchase of said notes and the delivery thereof to said Lydia S. Hinchman, the said Gazzam by deed dated June 1, 1910, and recorded in said clerk's office, October 25, 1911, in Book 914 of deeds, page 128, conveyed said tract of land firstly described in complainant's bill to the said Lydia S. Hinchman.

6. On or about September 28, 1911, the said Lydia S. Hinchman brought an action on contract, in attachment, in the Circuit Court of the County of Monmouth, against the said Henry H. Yard, then a non-resident debtor, for the sum of $9933, being the amount then due on said notes; that said Yard appeared in said attachment, and the said Lydia S. Hinchman filed her declaration therein, and the said Yard appeared and filed a plea of the general issue in said suit. (A copy of which is hereto annexed and marked "Schedule A.")

7. On or about October 26, 1911, the said Lydia S. Hinchman filed her bill of complaint in this court, for the foreclosure of said deed, alleging that the same had been given to secure the payment of said notes, making the said American Timber Company and Henry H. Yard parties defendant in said action and which defendants appeared and filed answers to said bill, (copies of which answers are hereto annexed and marked "Schedules B and C"). To which the complainant filed its replication and said cause was referred to one of the Vice Chancellors of this court for hearing.

8. On or about December 13, 1911, the said Lydia S. Hinchman filed her bill of complaint in this cause, to enforce the lien by said attachment, against certain lands and premises herein described, the title to which was in the defendants, Catharine A. Yard, Clara Tatu, Cecelia Ammann Little and the American Timber Company, alleging that said defendants held title to the property described in said bill merely to oblige the said Henry H. Yard, and as trustees for him, and that the same was the property of the said Henry H. Yard, and was held by them in fraud of the creditors of the said Henry H. Yard, for the purpose of enforcing said attachment against said lands, and at the same time filed a notice of *Lis Pendens* in said cause in the clerk's office of the County of Monmouth.

9. That on or about June 1, 1912, said American Timber Company and Henry H. Yard made a settlement with said Lydia S. Hinchman of said actions, brought for the collection, enforcement and recovery of said notes and the amount due thereon, and in

execution of such settlement made and delivered to said Lydia S. Hinchman the two deeds set forth in the complainant's bill in this cause, and said Lydia S. Hinchman delivered to the attorney and solicitor of said American Timber Company and Henry H. Yard, decrees of dismissal of said actions in this court, and a discontinuance of said attachment suit in the Monmouth County Circuit Court, and discharges of *Lis Pendens* filed in said causes in this court.

10. That said American Timber Company and Henry H. Yard did not in the pleas and answers filed by them in said actions set up or plead usury.

11. That the said American Timber Company and Henry H. Yard by their pleas and answers in said actions, and the settlement of said actions made by the execution and delivery of said deeds, and the dismissals and discontinuance of said actions, and discharges of said *Lis Pendens,* and the abandonment by the said Lydia S. Hinchman of the enforcement by said actions of the amount due her on said notes, and the collection thereof by said actions waived the said alleged usury, and the defendants in this action are precluded from setting up said alleged usury in this action, as a defense to complainant's deeds or indentures of mortgage, sought to be foreclosed by its bill of complaint in this cause, and complainant prays that said alleged defense of usury may be dismissed.

DURAND, IVINS & CARTON,
Solrs. for & of counsel with Complainant.

SCHEDULE "A."

Monmouth County Circuit Court of the twentieth day of October in the year nineteen hundred and eleven.

Henry H. Yard ads. Lydia S. Hinchman.	}	On Contract. In Attachment Plea.

And the said defendant by Halsted H. Wainright his attorney comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, etc.

Att'y of Defendant

SCHEDULE "B."

In Chancery of New Jersey.

Between Lydia S. Hinchman, Compl't, and American Timber Company, et. als. Deft's.	On Bill to Foreclose. Answer.

The answer of American Timber Company, body corporate, to the bill of complaint of Lydia S. Hinchman.

This defendant for answer unto the said bill of complaint or unto so much and such parts thereof as it is advised it is material for it to make answer unto answering says, that while neither admitting nor denying the allegations in the said bill of complaint contained relative to the alleged indebtedness of the said Henry H. Yard and of the execution and delivery by him of the said promissory notes in said bill of complaint particularly mentioned and referred to, but leaving the said complaint to make such proof thereof as she may be advised to be necessary, it admits that it is true as stated in said bill of complaint that this answering defendant executed and delivered unto the said Joseph M. Gazzam a deed of conveyance of such date, describing the lands and premises in said bill of complaint particularly mentioned and described, and of such purport and effect as is mentioned and set forth in said bill of complaint.

And this defendant in further answering admits it to be true that the said deed of conveyance was duly acknowledged and recorded as in the said bill of complaint mentioned and set forth.

And this defendant in further answering admits it to be true as stated in said bill of complaint that afterwards the said Henry H. Yard and wife by deed of conveyance of such date and of such purport and effect as is stated in said bill of complaint, granted and conveyed the said premises unto the said complainant, and that the said deed was duly executed and acknowledged as mentioned in said bill of complaint.

And this defendant in further answering admits it to be true as stated in said bill of complaint that the said deed of conveyance from this answering defendant to the said Joseph M. Gazzam for said premises was, and is in effect a mortgage, subject to the equity of redemption of this answering defendant.

And this defendant consents that a decree be made by this Honorable Court for the sale of said land and premises in the said bill of complaint mentioned, for the payment of the debt and interest due to the said complainant as set forth in said bill of complaint.

And this defendant expressly avers and says that the said premises consist of a valuable tract of land situate on the Ocean Front in the Borough of Manasquan, and that the said premises will sell for a higher and better price if the same be sold in lots or parcels of the size of ordinary building lots in that locality, and therefore this defendant prays that the matter may be referred to a master with authority vested in such master by the order of this Honorable Court to take evidence and report to this Honorable Court as to the manner in which said land should be sold.

SCHEDULE "C."

In Chancery of New Jersey.

Between

Lydia S. Hinchman,
Compl't,

and

American Timber Company, et als.
Deft's.

} On Bill to Foreclose. Answer.

The answer of Henry H. Yard, one of the defendants to the bill of complaint of Lydia S. Hinchman, complainant.

This defendant for answer unto the said bill of complaint or unto so much and such parts thereof as he is advised it is material for him to make answer unto, answering says, that he denies the making and delivery of the promissory notes in the said bill of complaint mentioned, and the execution and delivery by the said the American Timber Company of the deed in said bill of complaint referred to.

And this defendant in further answering says that while neither admitting nor denying any of the remaining allegations in said bill of complaint contained, this defendant leaves the said complainant to make such proof thereof as she may be advised to be necessary in the premises.

And he prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

SEACOAST REAL ESTATE COMPANY, body corporate, *Complainant*,

and

AMERICAN TIMBER COMPANY, body corporate, *et als*, *Defendants*.

Transcript of shorthand notes of testimony and proceedings in the above entitled cause before Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Long Branch, New Jersey, on Friday, November 23, 1917, at 2 P. M.

APPEARANCES:

MESSRS. DURAND, IVINS & CARTON and MR. JOHN D. McMULLIN for complainant.

MR. MARTIN V. BERGEN, JR., and MR. DEWITT ROBINSON (of the Pennsylvania Bar) for defendants.

Mr. Carton: I offer in evidence a deed of the American Timber Company, a body corporate, to Lydia S. Hinchman, dated May 31, 1912, recorded August 29, 1912, in Book 934, page 342, covering both tracts mentioned and described in the bill.

(Marked Exhibit C1.)

Mr. Carton: I also offer in evidence deed from Henry H. Yard and wife to Lydia S. Hinchman, dated the first day of June, 1912, recorded 29th of August, 1912, in Book 934, page 345 &c., which is a quit claim deed, quit claiming the premises in question.

(Marked Exhibit C2.)

Mr. Carton: There is an account attached to the replication filed by the complainant, and counsel have gone over the matter and the account has been slightly revised with some corrections. I have here a corrected account brought down to date, which I think counsel have seen, which for the purpose of expediting the matter I will offer and ask counsel if they will point out the items questioned or disputed in this account, so that the testimony may be limited to those matters.

Mr. Bergen: That is the same account as our account attached to the replication, except bringing it down to date?

Mr. Carton: It has been brought down to date and there has been some refiguring of the interest items.

Court: Suppose you offer it reserving to the defendants the right to point out such items as they take exception to and wish testimony taken about.

(Account marked Exhibit C3.)

Mr. Carton: This account which has been offered and marked Exhibit C3 should be qualified by deducting from it a certain credit which we have taken of $227.60, which we charge up in the expense item, which is improperly in the account, and there will be deducted that amount and interest thereon from July 21, 1915.

One of the principal items disputed is an expense account of nine thousand and odd dollars for rebuilding the dike which adjoins this property on the Manasquan River. We have experts here and a number of witnesses, and I believe the other side have also, on that question; and I suggest that we take up that item at this time,—the matter of the propriety or correctness of a claim that we have for expenses.

I offer in evidence an agreement made by the American Timber Company, H. H. Yard, president, S. F. Gillen, secretary, of the first part, and also H. H. Yard, individually, and Charles H. Hinchman and L. S. Hinchman, of the other part; it is without date; it is suppose to have been executed simultaneously with the deed.

(Marked Exhibit C4.)

Mr. Bergen: I now ask to amend my counterclaim by setting up a usurious contract.

Court: That will be granted, and if you need to file anything in answer to it, Mr. Carton, you may do so.

Mr. Durand: Mr. Bergen notified me that he would use me as a witness.

Mr. Bergen: That will not preclude Mr. Durand from taking part in the case.

Court: I see no objection to Mr. Durand taking part in the hearing of the cause.

S. Bartley Pearce, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Mr. Pierce, where do you reside?
A. Brielle.
Q. You have lived there for some time?
A. Yes, all my life.
Q. What is your business?
A. I am a shipwright.
Q. Is your place of business located on the Manasquan River?
A. Yes.
Q. Brielle is located on the northern side of the river?
A. Yes.
Q. Are you actively engaged in the boat building business there?
A. Yes.

Q. And have been for a number of years?

A. Yes.

Q. Do you also rent boats and make boats for sale?

A. Yes.

Q. I suppose you are familiar with the condition of the Manasquan beach and the river?

A. Yes.

Q. How long have you known of the situation down there?

A. All my life.

Q. How far back would your recollection take you, would you say?

A. About forty-five years ago.

Q. Do you remember when the dike was erected at the Manasquan River?

A. Yes.

Court: When was that?

Witness: That was about thirty-eight years ago, as near as I can remember.

Mr. Durand: Is there any dispute about it?

Mr. Bergen: It was 1882.

Q. You were familiar, I suppose, with the condition of the river at its outlet to the ocean prior to the time the government dike was erected?

A. Yes, sir.

Q. You say you were familiar with the situation down there before the dike was erected?

A. Yes.

Q. Describe the location of the dike generally; that is, where it begins at the point of the ocean, and how far back it extends.

Mr. Bergen: It seems to me that to answer such a question as that by this gentleman, when we have the government record so easily accessible, showing maps and what they did, it seems to me it is hardly competent evidence.

Court: Is there an official record?

Mr. Carton: It is simply to explain the physical situation which is there which he observes every day.

Court: It would not have relation to the exact location of the dike as placed by the government. If there are official records which are evidential, they should be offered.

Mr. Carton: We haven't the official records.

Mr. Bergen: I have copies of them here.

Mr. Carton: Will you produce them?

Mr. Bergen: Yes.

Mr. Durand: We have an original tracing of the government map. The purpose of the evidence is to show the shifting of that beach before the dike was put in, and the necessity of establishing a dike there.

Court: That is the purpose of this evidence now.

Mr. Carton: I offer in evidence the official map of the Government, entitled, "Manasquan River, N. J. Surveyed under the direction of Colonel J. N. Macomb Corps of Engineers, U. S. A., by Captain Wil-

liam Ludlow Corps of Engineers. Brt. Lt. Col. U. S. A. Dated September 17, 1898. Scale 1: 3600."

(Marked Exhibit C5.)

Mr. Carton: It is agreed by counsel that the copies of this map, or the portions of it relating to the inlet and the dike made by Mr. Payne and Mr. Conover may be used in place of the original.

Mr. Bergen: We consent to it.

Q. Captain Pearce, I ask you to look at this map, a copy of which is before you, and indicate upon it, if you can, the Manasquan inlet and the government dike, on this map which will be marked Exhibit C6.

A. There is where the dike commenced (indicating) and ran down to the ocean.

Court: In what direction?

Witness: In a southeast course.

Court: Down to the ocean as indicated on the map?

Witness: Yes.

Court: By these black lines?

Witness: Yes. The reason that dike was put there ——

Court: He hasn't asked you that.

Mr. Bergen: Is this on the original map, because the dike was built in 1882 and the map made in 1878.

Court: On Exhibit C5 the location of the dike is indicated, and it is noted there that the dike is now building—"Government jetty now building." It is admitted by counsel that the dike was built—complainants claim in 1878, and defendants claim in 1882.

Q. Where is your place of business; is it shown on this map Exhibit C6?

A. Yes (indicating at a point on the map, known as stump point), on the western end of the tract, right next to the railroad, on the west side of the railroad.

Q. What was the construction generally of the dike when erected in 1882, if that was the time?

A. The lower part of it was cribbed.

Mr. Bergen: I object; here are the reports of the government, which will tell exactly what they did.

Mr. Carton: As to the exact composition of the materials, it is not important any more than generally, whether it was a wooden dike or put in with cement or concrete.

Court: What is the purpose?

Mr. Carton: To show the general nature of it.

Court: That wouldn't be binding on you, Mr. Bergen. You can describe it generally as you observed it.

A. (Continuing.) The lower part of it was crib work and it was filled with stone and built out of yellow pine, and that was about, I should say, 200

to 250 feet of it. Then coming inland it was a single dike and piling and the planking was four inches thick, and that was on the outside of the string pieces and pulled out through; there were two string pieces.

Court: How far above the surface was it?

Witness: About four feet, that is mean tide.

Q. Was it your observation of the dike that it continued westward to the point of solid filling or the solid land known as "stump point"?

A. Yes.

Q. Is it a fact, then, from the point where you said the cribbing was made westward, the dike consisted of piling, stringers and upright planks?

A. Yes.

Q. At the time that was erected did you observe the situation from year to year?

A. Yes.

Q. What have you to say as to the condition of the dike, that is, as to whether it remained intact or became damaged or otherwise after it was erected?

A. After a number of years the iron fastening gave way, and of course that let the planks loose west of the crib work.

Q. What was the result of that, from your observation?

A. The water coming out of a short creek there; the creek is there but it is not—the end of it—on the map.

Mr. Bergen: That is the creek by stump point?

Witness: Running down by stump point.

Q. Does the creek extend northeasterly from stump point, what you call short creek?

A. Yes.

Q. Where did you observe these uprights were loosening?

A. Just northwest of the crib work.

Court: You distinguish then between the crib work where it is single and where it is double?

Witness: Yes, it is on the single part of the dike.

Q. Will you indicate on the map, if you can, the location of the shacks on the beach, which I think will be admitted are on the tract south of the Brielle road?

A. Brielle road comes down on the north side of deep creek shown on this map. Brielle road is located north of deep creek.

Q. Where are the shacks on this map as near as you can indicate them?

A. The shacks are located from the station house on down to the inlet. The shacks are located on the beach extending from the life saving station southerly along the beach down to the point of the dike, and where the water is indicated on map Exhibit C6, is now solid filling and constitutes part of the beach.

Court: And is occupied in part by some of these so-called shacks?

Witness: Yes, built up solid.

Q. Where is the inlet to Manasquan River at this time?

A. Immediately south of the dike.

Q. This map shows the inlet prior to the building of the dike some distance north of the present inlet, does it not?

A. Yes.

Q. And is this portion of the inlet shown on this map north of the dike now filled up and solid land?

A. Yes, sir, solid land to the dike.

Q. What is the character of the land immediately back of where the shacks are located?

A. It is all filled in now at the present time, except short creek.

Q. And is it meadow land or upland?

A. No, the land is sand.

Court: It was a marsh?

Witness: It was, yes.

Q. Were you instrumental, or did you have anything to do with the repairing of this dike?

A. No, sir, I didn't have anything to do with the repairing; I had the government engineers down on the dike.

Q. When was that?

A. The last time I had them there, as near as I can remember, was about, I think, four or five years ago.

Q. Do you remember when Mr. Hinchman caused this dike to be repaired?

A. Yes.

Q. When was that?

A. The last time, it will be three years ago next spring.

Q. It was repaired and rebuilt on two different occasions?

A. Yes.

Q. When was the former occasion; was it about 1914?

Mr. Bergen: 1914 and 1915.

Q. With reference to the time when you took the government engineers there, was it before or after that period?

A. It was before that period.

Q. Did you take the goverment engineers there to show them the condition of this dike?

A. Yes.

Q. Were repairs made to it by the government engineers?

A. No.

Q. Were you interested in having the dike repaired?

A. Yes, I was.

Q. What was your interest?

A. My interest is in the river, of course, and if the dike broke through, it would be detrimental to my business and every one else that lived along the river banks. It would make a tumble dam and stop all communications; and furthermore, it would cut the beach up there, the same as it used to.

Mr. Bergen: I object to this witness giving testimony as to that and I ask that that be struck out.

Court: It will be stricken out unless he qualifies later on that phase of the case.

Q. Were you made apprehensive that that might take place because of what had taken place prior to the erection of the dike?

Mr. Bergen: I object.

Court: I will allow it for the present until I get a better grasp of the situation.

Q. You say, Captain Pearce that you were familiar with the condition of the inlet and the point where this dike was erected, prior to its erection?

A. Yes.

Q. And what conditions did you apprehend or fear, if this dike was not repaired in 1914 or 1915, when you took the government engineers there?

Mr. Bergen: I object.

Court: It should be supplemented by the following question: "Why did you have such apprehension?" I think he should be qualified first before he attempts to express an opinion.

Q. You say you have lived there a great many years; were you as familiar with this point of the beach and the inlet prior to the erection of the dike as you are now?

A. Yes, sir.

Q. And did you observe before the dike was erected the action of the tides and winds on the shifting of this inlet?

A. Yes.

Q. What was your observation? This is before the erection of the dike.

A. It all depends on the elements.

Court: As the result of the elements, what did you observe; what effect did they have on the beach?

Witness: If you will allow me to explain, I can explain it.

Mr. Bergen: How old a man are you?

Witness: Fifty-four years old.

Mr. Bergen: When was this dike built?

Witness: This dike was built, as near as I can remember, about thirty-eight or thirty-nine years ago.

Mr. Bergen: And therefore you are testifying to your recollection of things which occurred when you were the difference between thirty-eight and fifty-four, that is sixteen years?

Witness: I sailed a sloop yacht when I was sixteen; I sailed parties on the Manasquan River.

Q. You wanted to make some explanation of the shifting of the inlet at that time; you say that befor the dike was erected you sailed a sloop?

A. Yes.

Q. In and out of this inlet?

A. Yes.

Q. And where was the inlet then, as you recall, as indicated on the map?

A. This inlet used to work up and down the beach; of course, you cannot recall it at this time or two years afterwards, after it happened, just exactly the location of that inlet.

Q. You mean it would shift from year to year and time to time?

A. Yes; I have seen it out here. (Indicating.)

Court: You indicate considerably north of the inlet indicated on the map.

Witness: When this dike was building, this inlet went out in the northeasterly direction, and the south winds and north winds of course would have a tendency to move the sand one way or the other, and that would move the channel one way or the other.

Court: Did that occur frequently?

Witness: Yes.

Q. How often would there be a noticeable shift in the location of the inlet?

A. You take a south wind—this point is caused by the south variable winds; the sand kept working up this way until it worked—until the inlet indicated was all filled up.

Q. How many feet would you say that was?

A. That would work—every tide I cannot specify the number of feet; it would work every time, but it would keep working week after week, and if a hard gale would come along and take this point off again and work it south, and that is the way this inlet kept working as the elements would take it from one point to the other.

Court: And that was a matter of frequent occurrence?

Witness: Yes, all times.

Court: You observed it?

Witness: Yes.

Q. And what effect did the shifting of that inlet, as you have described it, have upon the location of the land where the shacks now are located?

Mr. Bergen: I object.

Court: Why?

Q. Were the shacks there then?

A. No.

Q. Where the shacks are now located what effect did it have; what has been the result of closing up the inlet and opening another one?

A. When this south point would work up the beach, this would work around here (indicating) until it filled up; then we would have to open this again here (indicating).

Court: Where the inlet is marked on the map now?

Witness: Yes.

Q. When this inlet would shift north would one of the effects be to cut through the land here and take it away?

A. To cut the whole beach away.

Q. And as the inlet shifted further north would it cut other portions of the land away?

A. Yes; I have seen a vessel come in here at a point marked "mouth of deep creek."

Q. There is marked on this map "inlet 1868," and in dotted lines; do you remember the inlet going as far north as this location on the map?

A. I remember the time that the inlet was here where it is marked "Inlet 1868" on the map.

Court: You were about five years old then?

Witness: Yes, but I do remember when this vessel came in here and her bones lie there yet under a wreck.

Q. How do you recall the inlet being at that point at the time to which you refer, by its being so marked on the map or its location at the foot of deep creek?-
A. I remember by this vessel coming in there and sinking inside of the mouth of deep creek.

Court: Do you wish to cross-examine him, Mr. Bergen?

Mr. Bergen: I want to cross-examine him on his remembrance.

Cross-examination.

By Mr. Bergen:

Q. Do you say that this beach cut right straight off here directly north from the dike?
A. Yes; I didn't say that it cut straight north; I said it would work up north.
Q. Did you not say that as soon as it got a little bit up north it would fill up?
A. Yes.
Q. Would it keep on working up after it filled up?
A. Yes, it would work up the beach until the point would meet around and close up.
Q. How far would it go then before it closed up?
A. Not in my time, but it has gone as far as the station house, a mile.
Q. Therefore you don't know anything about it?

A. No.

Q. You don't know anything about it at all?

Court: Only what he has been told.

Q. You say that this beach would come up and cut this whole beach away?

A. Yes.

Q. How far is the extreme point that you ever know that it went up?

A. About half a mile.

Q. When you remember this opening which occurred where it is marked "Inlet 1868," had that been a steady cutting up of this beach?

A. Yes.

Q. Had that not been a cutting through of deep creek?

A. No.

Q. You are testifying to that as a fact?

A. Yes.

Q. Do you recall that this worked up all that way?

A. Yes.

Q. You recall the steady progressive stages of it?

A. Yes.

Q. How long did it take to do that?

A. Sometimes it would take two or three years.

Q. You cannot recall many instances of two or three years; you were sixteen when the dike was built.

A. I am not saying since the dike was built that it ever worked up the beach.

Q. Do you remember of your own knowledge that this did work up to that point of the inlet in 1866 prior to the building of the dike?

A. No, sir, I don't remember that time, 1866.

Q. Can you fix the date when you remember this ship coming in?

A. No, sir, I cannot.

Court: Do you recall the name of the ship?

Witness: I cannot just at the present time. I recollect when the inlet went out of there, of this ship coming in and sinking inside opposite deep creek.

Q. When that inlet came far north was the land between it and the balance of the inlet open below; how had it come; had it cut off this point which is marked on this map in green and running along that marked with government dike?

A. When the inlet got up to the mouth of deep creek, then it cut through the short creek up to that point.

Q. Did it continue to wash up this way, straight north, following the inlet as marked on C6?

A. The inlet would work up and keep working up and keep working up, and the beach would make up behind it, just the same as this south point is making up here (indicating), and when this got up far enough here (indicating), this water would work off here and come out short creek.

Q. Did it ever cut into deep creek in your recollection, so that the easterly green piece of marsh became an island?

A. Yes.

Q. An island separated by Manasquan River, which flowed into the deep creek?

A. Yes, sir.

Q. Was not this piece of marsh at that time then attached to the shore?

A. No, sir, not when it was an island.
Q. When did that occur?
A. I cannot tell you just the dates.
Q. Yes, you can, you were sixteen years of age.

Court: Your best recollection.

A. It happened before the dike was put in there; I might have been ten years old when that happened.
Q. You were about ten years old then?
A. Yes.
Q. And you recall these facts?
A. I do, yes, sir.

Further direct examination.

By Mr. Carton:

Q. Were you older than ten years when you ran the sloop out the inlet?
A. I was sixteen years old.
Q. As the inlet would work north as you have described, what would be the effect on the south; would it make up on the south and cut away on the north?
A. The sand would make up as it worked up the beach, behind it.
Q. South of the Manasquan River is Point Pleasant City?
A. Yes.
Q. So that would be solid land back of the inlet?
A. Yes.
Q. You say that sometime prior to 1914 you sought the government engineers about the repairing of this dike, when you say it was breaking away?
A. Yes, sir.

Q. And they did not make the repairs?
A. No.
Q. State to you the reason why at that time?
A. There was no money available at that time to make any repairs.
Q. And was there any question raised as to whether the Manasquan River was or was not at that time a navigable stream?

Mr. Bergen: I object; he is not qualified to answer such a question as that.

Q. Did the government engineers whom you waited upon raise any question as to this Manasquan River being a navigable stream at that time?

Mr. Bergen: That is hearsay and I object.

Court: It may have created the necessity; that is part of the complainant's contention. I will allow it and your objections will be noted.

A. As I said before, they didn't have no money.

Court: Whom did you see; do you recall the name of any of the officials you saw, and where were they?

Witness: His last name was Mayhew from the New York District.

Court: Do you know what his official position was?

Witness: He was then government engineer.

Q. Where did you see him?

A. At my place; I wrote a letter to the Government in regard to the dike and they sent me down this engineer.

Q. You went over the ground with him?

A. I did.

Q. You say that the question was raised then that this was not a navigable stream?

Mr. Bergen: I object.

Court: That doesn't make it so, and it won't be binding on you unless he came here and gave his reasons why.

A. I don't recall his saying that it wasn't a navigable stream, because we all know ——

Court: What is your recollection about it?

Witness: I don't remember his saying it.

Q. What was the fact at that time, was or was it not a navigable stream?

Mr. Bergen: I object.

Court: You may answer it.

A. He said this, that the ——

Mr. Bergen: I object.

Court: I am giving you the benefit of it.

Q. What was the fact at that time, was or was it not a navigable stream?

A. Yes.

Q. Was anything said about commerce or navigation in connection with this?

Mr. Bergen: I object for the same reason.

Court: I make the same ruling.

A. Yes.

Q. And the result was that the government did not make the repairs?

A. That is the fact.

Q. Did this dike—its condition, become better or worse thereafter?

Court: I think your last question is objectionable; it is argumentative; you say the result was; I don't see how he can possibly know that it was because of the conversation he had with this engineer that the government did not make the repair.

Q. You have indicated one reason that the government had no appropriation for the work?

A. Yes.

Mr. Bergen: I object to that as hearsay.

Court: The record of Congress would tell whether there was or not.

Q. This dike was repaired?

A. Yes.

Court: Not by the government?

Mr. Carton: No.

Q. By whom, if you know?

A. By Mr. Hinchman, as far as I can understand.

Q. Was Hinchman then in possession of the property on the Manasquan Beach?

A. As far as I know, yes, sir.

Q. And this property, was it built up and used by Mr. Hinchman from the Brielle road south to the dike?

Court: At and prior to the time of the repairing?

A. Yes, that is what they said, he had control of the beach.

Court: Did you see him occasionally in possession of it; did you see him exercise any ownership over it?

Witness: Yes, I saw him down at the dike.

Q. Did he appear to be in charge of this property, the overseer and collecting of the rents and looking after the property?

A. Yes, he was at my house and told me that he had given this contract out.

Q. You talked with him about the repairs to this dike?

A. Yes.

Q. Can you tell us at the time the repairs were made just what the condition of this dike was, with regard to being out of repair?

Court: Take the first section from the ocean in and describe that.

A. The lower part of the crib work next to the ocean was in very bad shape; the plank had washed off of it; the iron strips and iron rods running through was rusted off, and there had to be new ones and new timber put in it.

Mr. Bergen: Was that the crib itself?

Witness: Yes.

Court: What about the remainder of the work; continuing west what was the condition of the dike?

Witness: Just north west of the crib work the plank was off.

Q. Were these planks off to any extent?
A. Quite a distance.

Court: The condition you have described beyond the crib work extending westerly, with the planking off, does that correctly describe the entire length of it, about 1500 or 1600 feet?

Witness: They wasn't off the whole length of it.

Court: To what extent?

Witness: It was off different parts of it; some places it would be off 25 feet, some 100 feet, and so on.

Court: Would you say about half of it was in that dilapidated condition you have described, or more?

Witness: Yes, half of it was in a dilapidated condition; in fact, the whole thing was in bad condition.

The Court: I mean at the time Mr. Hinchman made these repairs?

Witness: Yes.

Q. More than half?

A. The whole dike was in bad condition, the whole thing.

Q. Was it then, when these repairs were made, serving its purpose in acting as a barrier to the tides and the sea, or was it cutting in on the north?

Mr. Bergen: I object to it.

Court: And preventing the washing away of the material?

Mr. Carton: Yes.

Mr. Bergen: I object to "serving its purpose."

Court: What did you observe with the dike in the dilapidated condition as you have described it before Mr. Hinchman repaired it?

Witness: Can I explain it?

Court: Yes, in your own way tell just what you saw there.

Witness: You take from short creek on the east side of it, as these planks come off (indicating the face of the dike north west of the crib work), this water came down on the inside of the dike,—the

water from the small creek, and when it came down on the inside of the dike, it had a tendency to wash the sand away and undermine the dike at the point where the—northwest of the crib; if that thing was kept eating away and undermining it, the channel would come through the beach.

Court: That is your argument of it, but what did you observe?

Q. What progress, if any, was it making to that end, as you observed?

A. That is why I had the engineer there.

Court: Why did you do that; was it doing any damage?

Witness: Yes.

Court: Tell us what damage you saw.

Witness: It broke through the dike; it would make a tumble dam with the stone there.

Court: Don't tell what you apprehended, but what you saw it was doing.

Witness: With those planks off and this tide coming down, it syphoned the sand out.

Court: Did you see that being done?

Witness: Yes, at every tide it did the same thing, flood and ebb both. If it continued it would syphon this sand out behind this crib work.

Court: And that is why you made your complaint to the engineer?

Witness: Yes.

Q. So you were desirous of having this done from the standpoint of a boat man on the river, irrespective of any association with Mr. Hinchman?

A. Yes, I had the engineers there several times; not only that work, but other work along the river.

Q. You had nothing to do with the doing of this work?

A. Not at all, and had no interest in it.

Q. You observed it being done?

A. Yes.

Q. Do you know who did it?

A. No, sir, I cannot recall his name.

Q. Have you observed since the work has been done what effect it has had, if any, on the north of the dike, as to preventing the land being cut out if there was one being filled in?

A. Since the dike was repaired they went to work and straightened the short creek about 100 feet as near as I can remember, and it cuts that tide off; there is no tide coming down inside of the dike at all.

Court: And therefore no wash out?

Witness: No wash out since.

Cross-examination.

By Mr. Bergen:

Q. Captain Pearce, won't you describe to me the nature of the soil along that government dike when it was built?

A. Yes, sir.

Q. What was it?

A. Along the westerly end of the dike this is all meadow land, and this was meadow land (indicating), but now it is mostly covered up with sand, where it has washed in.

Q. And that meadow land ran practically from short creek one-half the distance to the ocean?

A. No, from the east side of this short creek, I should say it ran down there about 200 feet and then the rest was sand; this would fill up and when the end would come out here (indicating), it would be all open water and leave this all an island.

Q. The map shows that in 1878 deep creek was not a narrow creek, but had a deep bay off of it toward the ocean; is that correct?

A. It was a very small bay, cutting into the sand beach.

Court: Is the bay correctly shown on Exhibit C6?

Witness: Part of this (indicating) he calls the bay, in here.

Q. It would flow way around the station house?

A. Farther north, about as far again north.

Q. Is that filled up?

A. That is all filled up.

Q. So that now, as shown on this map, the westerly boundary of short creek is practically the same, bounding on what they now call the isle of sedges?

A. Yes. It is all filled in there now; there is only a narrow stream of water running up.

Q. And that therefore the beach since 1878 has become a solid wide thing, running from the ocean through to short creek, which is now a very narrow creek?

A. Yes.

Q. That is correct?

A. Yes.

Q. And all this bay which is shown on this map of 1878 is not existent now?

A. No.

Q. Was it that way in 1914 and 1915 when these repairs were made—filled up when these repairs were made?

A. What do you mean, the bay?

Q. Yes.

A. Oh, no.

Court: Was it there or was it filled up?

Witness: It has been filled up for years.

Court: How many years has that been filled up as it is today?

Witness: Brielle road running down here, there used to be a bridge there (indicating).

Court: How many years is it since that bay has been filled up?

Witness: It has been filled up for years and years; I cannot recall.

Court: Ten years, fifteen years?

Witness: It has been filling up ever since the dike was put in there.

Q. It has been a gradual filling up?
A. Yes, where the sea would run over the top and run the sand in the rear.
Q. Has the beach filled up along there?
A. Yes.
Q. The beach is higher now than it was in 1878?
A. Yes.
Q. Is it higher from the dike up?
A. Yes.
Q. All the distance?
A. Yes.
Q. It is higher today right at the crib than it was in 1878?
A. Yes.
Q. And it is higher now than it was right after the government job was built?
A. Yes.
Q. There has been a steady filling up there?
A. Yes.
Q. Since 1878 has the water back of the dike ever cut through to the ocean?
A. North of the dike?
Q. Yes.
A. No.
Q. And it has steadily grown higher and stronger, the beach has?
A. Yes; what made the beach low was because the inlet worked up the beach; every high storm would run over the top of the beach years ago before the dike was put there.
Q. And it is true that that is going steadily higher?

A. Yes.

Q. And stronger?

A. You stick up a brace in the beach and in a year's time you will have a swell hill where the sand blows and catches in this brace.

Q. In other words, had they built a fence right along there, a crib along that dike, it would have filled that up with sand?

A. I don't say that.

Q. That is true, though, isn't it, that sand dunes come from such action as that?

A. If the dike had been properly taken care of and hadn't been no break through the dike, it would have been solid filling all the way on the north of the dike.

Q. The beach unquestionably, in your opinion, is higher today from the crib up than it has ever been?

A. That is true.

Q. And there is no question but that it has steadily grown higher?

A. Yes.

Q. All the way from the crib up?

A. Yes.

Q. Steadily grown higher?

A. Yes.

Q. Now, then, this water which was back of the dike; when the government built that dike was there any water back of the dike?

A. Yes.

Q. When the government first built it?

A. Yes.

Q. How near to the crib was that water at that time?

A. Right to it.

Q. Where is that water today?

A. I cannot tell you; it is like some of the wood land—is cut off and dried up, I suppose.

Q. How far west of the crib is it today?

A. There is no water there, only short creek.

Q. How far west of the crib is the water today which is back of the government dike?

A. You are speaking of west?

Q. Yes.

A. West is the inlet.

Q. As I understand it, there was water back of the government dike, north of the government dike?

A. That is, on the northeast side of the dike?

Q. Yes; when the government built this dike, where was it; how near the crib?

A. At that time there was only a narrow strip of beach.

Q. Therefore the water was almost down to the creek?

A. Yes.

Q. How far is it in relation to the crib?

A. There is no water there; I told you it all filled in; it has been filling in ever since the dike was built.

Q. As I understand it, when the government built the dike, there was water to the northeast of it, as shown on this map right there (indicating)?

Court: Water to the northeast where you are pointing.

A. There is a little water there where they cut across.

Court: Is that what you are referring to, Mr. Bergen?

Q. Now, when the government dike was built can you tell me where that water stood?

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Court: In this little cove you are referring to?

Mr. Bergen: Yes.

Q. In other words, there was water to the northeast of the dike?

A. Yes, at times the whole thing was covered over.

Q. How near the crib was that water?

A. It was up to the crib because the storm and tide would cover the dike up.

Q. Where is that water now; has it gone westward or eastward?

A. I explained that to you awhile ago; there is nothing now but the short creek; all the rest is filled in.

Q. There is water today to the north of the government dike, is there not?

A. Not where they repaired it, no, sir.

Q. Not today?

A. No, sir.

Q. How lately have you seen it?

A. You mean right close to the dike—yes.

Q. There is water there now?

A. You were speaking awhile ago ——

Court: Listen to his question now.

Q. There is water today to the north of the government dike, is there not?

A. A very small area.

Q. How deep?

A. I suppose it ranged from two feet to six.

Q. How wide?

A. I should imagine—you must remember when I speak about the width now, it varies according to the elements; you might go there tomorrow and you

would see it twenty feet wide, and the next day you would only see it ten; it is according to the tide coming in that makes it wider.

Q. That water today runs how far down to the crib, how near the crib?

A. I cannot tell you that because I haven't been there in a week.

Q. How far was it a week ago?

A. I should say it ran from short creek down almost abreast of the road that comes down back of the beach.

Q. Abreast of the road that runs through there?

A. Yes.

Q. How far did it run down that way when the government dike was built?

A. That I cannot answer.

Q. Was it further down that way fifteen years ago than it is now?

A. Yes, because conditions was different.

Q. Was it further down twelve years ago than now?

A. I have seen the water down at the lower end of the dike way below the dike.

Q. Isn't the fact that that water which is to the northeast of the dike has been steadily diminishing in dimensions as far as being near the ocean is concerned?

A. Oh, no, that is the conditions of the dike; that water is caused by the breakage of the dam.

Q. Won't you answer my question?

A. I cannot answer it no different than that.

Q. Is it getting less than it was formerly?

A. Since they closed it up.

Q. How about ten years ago?

A. Ten years ago it wasn't so bad as it was before they fixed the dike.

Mr. Durand: He means in 1914.

Q. Was it getting worse or better?
A. What year are you speaking of?
Q. For the last twenty-five years.
A. You mean dike?

Court: No, this water he is speaking about.

Witness: As the dike got poorer, that got worse.

Q. You mean it got nearly out to the ocean?
A. Yes, I have seen it below the west end of the crib where it was only fifty feet from there to the lower end.
Q. When did you see that?
A. I cannot recall that to memory.
Q. How many years ago?
A. I cannot recall that to memory.
Q. Twenty years ago?
A. I cannot tell you.
Q. Fifteen years ago?
A. I cannot tell you the date; I wouldn't speak as far as dates goes, because a thing occurs so often you don't try to remember.
Q. Certainly this is true, that the sand beach has filled up to the north of the crib, isn't it?
A. Yes.
Q. Isn't it true also that that sand beach has been steadily growing westward?
A. No, sir, not westward.
Q. Along the dike?
A. North and northwest.
Q. Isn't it true that the sand beach has been steadily widening out and cutting down this water which is lying to the north east of the dike?

A. That is what I stated before, that has been filling in ever since the dike was built.

Q. In 1882 you mean?

A. Ever since the dike was built there has been filling in.

Q. You mean it was built or repaired recently?

A. You asked me a question about how long it has been filling in; I said ever since the dike was built.

Mr. Carton: I have a witness here who has come from a distance, and I would like very much to take his testimony, so that he will not have to return.

Court: I will make an order that you take his evidence before Mr. Bindseil as special master.

(Adjourned to Friday, December 7th, 1917, at Chancery Chambers, Long Branch, at 11 A. M.)

(Transcript of testimony of Addison John Howland, taken before Nicholas W. Bindseil, one of the Special Masters in Chancery of New Jersey, at the Chancery Chambers, Long Branch, New Jersey, on Friday, November 23rd, 1917, at 4 P. M.)

APPEARANCES:

MESSRS. DURAND, IVINS & CARTON and MR. JOHN D. MCMULLIN for complainant.

MR. MARTIN V. BERGEN, JR., and MR. DEWITT ROBINSON (of the Pennsylvania Bar) for defendants.

It is stipulated and agreed by and between the counsel for the respective parties that the testimony of the witness may be taken stenographically by the Master and afterwards reduced to typewriting, the signature of the witness to his said testimony being waived.

Mr. Bergen: I offer in evidence the records of the two cases, in the Circuit Court and in the Common Pleas Court.

I also want to offer in evidence map of the addition of ocean beach of H. H. Yard, made by Irons, Surveyor, filed in Drawer 36 in the County Clerk's office.

ADDISON JOHN HOWLAND, sworn on behalf of complainant, on his oath testified as follows:

Direct examination.

By Mr. Carton:

Q. Are you the son of Jesse Howland, the bulkhead contractor at Seabright?

A. Yes.

Q. How old are you at this time?

A. Twenty-three.

Q. And you are now in the service of the government?

A. Yes.

Q. Had you prior to joining the colors been associated with your father in his contracting work?

A. Yes.

Q. For how long?

A. About eight years.

Q. In what capacity or capacities have you been acting?

A. I was foreman the last four years.

Q. Your father's work generally in which you have helped him is the bulkheading and ocean work?

A. Yes, sir.

Mr. Bergen: It is admitted that the figures in the record of the Court of Common Pleas which has been offered in evidence, in the notice to the defendants attached to the declaration in the case of Charles S. Hinchman against Henry H. Yard, in the Monmouth Common Pleas Court—this paper filed April 16, 1910, appears the following: "Judgment will be claimed for $22,452.13 with interest thereon from October 31, 1905." The following language, by changes appearing in Mr. Durand's handwriting: "Judgment will be claimed for $9,301.59 with interest and costs."

Q. Were you in your father's employ in the business you have stated in 1914?

A. I was.

Q. And did your father do some work at the Manasquan River, on the so-called Manasquan dike, at that time?

A. Yes, sir.

Q. And were you in charge of that work or some portion of it?

A. Yes, sir.

Q. And was it in 1914 that this work was done?

A. Yes, sir.

Q. Can you tell me the time of the year or the period it covered?

A. About July.

Q. Along in the summer of 1914?

A. Yes, summer of 1914.

Q. Was the work you did the making of repairs to the dike on the north side of the Manasquan River?

A. Yes, sir.

Q. Did you observe the condition of the old dike at the time you made these repairs; that is, just prior to the making of them?

A. I did.

Q. And what was its condition with regard to repair?

A. It need repair very badly.

Q. In what way?

A. The planking were off; the stringers or whalers were rotted in places, and the piling, part of them were practically eaten off, and some were eaten off.

Q. Did this condition of the dike permit of the waters of the Manasquan River to go through and extend north of the dike?

A. It did.

Q. What was the construction of the old dike at that point?

A. The point I began at it was just the piling and two top stringers and occasionally a few planks. In my judgment, I should imagine it was all sheathed up at one time, but when I was there there were only a few planks.

Q. It is your idea that the construction at the time it was made consisted of this piling, the stringers, and upright sheathing planks?

A. Yes.

Q. But most of those had gone when you went there?

A. Yes, sir.

Q. What was the nature of the repairs that you did for your father?

A. I pumped in piling on the north of the dike, put whalers on the top and bottom.

Q. Will you explain what they are?

A. String pieces and sheathing.

Q. The string pieces were fastened to the whalers?

A. Yes.

Q. Were they extended or imbedded into the bottom of the river?

A. They were pumped in.

Q. Do you recall the depth of this piling or the length of them?

A. The contract was twenty-three feet, and the sheathing was sixteen feet in length.

Q. Was the sheathing extended into the bed of the river?

A. They were.

Q. To what extent, do you recall?

A. At some places seven feet, and at other places, I should imagine they didn't penetrate over three or four feet.

Q. Do you recall about how long this work was in course of construction; that is, weeks or months?

A. I should judge it took about four months.

Q. And your recollection is you started in July?

A. Yes, sir.

Q. And worked at it continuously until the work was completed?

A. Yes.

Q. Did you have occasion to observe whether there was any current or any considerable volume of water going through those planks, or the openings where these planks had been, at the time you went there?

A. Yes, sir.

Q. And while the work was under construction, did you observe the action or the result of this water going through,—the result it had on the cutting away?

A. As we progressed with the plank it always left quite a large hole in front of it; by that, I mean it scoured the bottom out as we continued along with the plank.

Q. Was there a considerable flow of water, through there?

A. Yes, sir, very strong current.

Q. What were your observations as to the extent that this cut out would be from time to time?

A. Just what do you mean?

Q. Will you explain to us what you mean by the cutting away of the water at the point where you were doing the work as you progressed from time to time?

A. It would come in around the plank and take the sand entirely away from the place.

Q. And when would you observe that particularly?

A. On the ebb tide.

Q. So when you would leave the work on Saturday night, if you did leave it on Saturday night, what would you observe had happened when you returned to the work, say, on Monday morning, by this cutting away?

A. It would leave a hole there and would cut out along some of the plank we had already put in, say about ten feet back.

Q. A cut north or back of the dike?

A. Yes, that is on ebb tide.

Q. And you completed this work and erected all the piling there?

A. I did.

Q. And that had the effect of stopping this cutting through?

A. It did to my knowledge; there wasn't any current inside.

Q. That was the purpose of your work as you understood it?

A. Yes.

Q. I don't suppose you entered into the contract or into the cost of the construction; you had nothing to do with that?

A. No, sir; I just followed out my ——

Q. Your father was the contractor?

A. Yes.

Q. And you had charge of a portion of the work?

A. Yes.

Cross-examination.

By Mr. Bergen:

Q. Who was the engineer that planned this work?

A. I cannot say; I don't know.

Q. Was there an engineer?

A. Not to my knowledge.

Q. Did you have blue prints and specifications and directions as to the work?

A. I personally, no.

Q. You were in charge of the work?

A. Yes.

Q. And you know that there were no such things?

A. Not to my knowledge.

Q. You know there were not?

A. I say there wasn't to my knowledge.

Q. From whom did you take your directions as to what to do?

A. My uncle.

Q. Who is your uncle?

A. My father's brother.

Q. Who is he?

A. Curlis Howland.

Q. What is that?

A. My father was in Europe at the time, and of course he having more experience, come down to help me occasionally.

Q. Who gave him directions as to what to do?

A. He used his own knowledge.

Q. What is his occupation?

A. He is a foreman for my father.

Q. And Mr. Curlis Howland, your uncle, came down and consulted with you as to what to do?

A. As the work progressed, yes.

Q. What were you ordered to do by your plans and specifications?

A. I had nothing to do, only verbal.

Q. Who gave you verbal directions as to what to do?

A. Curlis Howland.

Q. Who gave him verbal directions?

A. He had full charge of the work when my father was in Europe.

Q. What kind of plans did he have?

A. None as I know of.

Q. Did he have any plans, any specifications?

A. Not to my knowledge.

Q. By that you mean that he had none?

A. I say not to my knowledge; I cannot say that he didn't have it, because I didn't know.

Q. You didn't see any such thing?

A. No, sir.

Q. What were his instructions; did he ever tell you?

A. He was to act as superintendent or foreman.

Q. For whom?
A. My father.
Q. Then what were your father's directions?
A. That was between my uncle and father.
Q. But you know what you were doing; were there any real directions as to what you were doing, except just verbal instructions from your uncle?
A. That was all, and my own judgment and past experience.
Q. Were there any plans for this work?
A. Not to my knowledge.
Q. Did your father have any plans for it?
A. I could not say; I didn't see any.
Q. Don't you know that he didn't have plans for it?
A. I know I never saw any plans, nor I never heard him say he had plans.
Q. Did you ever hear him say he didn't have plans?
A. I don't think I ever heard him suggest or speak of any plans in regard to the Manasquan work.
Q. Who was the engineer who told him what to do, do you know?
A. No, sir.
Q. Who was the engineer who directed this work; do you know whether there was any?
A. There was no engineer on the job.
Q. And your father is a contractor?
A. Yes.
Q. He is not an engineer for this kind of work?
A. No, sir.
Q. And your uncle is not an engineer for this kind of work?
A. No, sir.
A. No, sir.

Q. And you are not an engineer for this kind of work?

A. No, sir.

Q. What were your father's directions, do you know, to do there?

A. He told me how he wanted the work to be done; he ordered the plank and the material and he told me just how he wanted it constructed, and I constructed it according to his ideas.

Q. What did you answer Mr. Carton about the purpose of this work as you understood it?

A. I understood it was to keep the current from going out on the north side of the dike.

Q. Did anybody ever tell you the purpose was to fill in the bank out to the dike?

A. To fill in out to the dike?

Q. Yes, fill in the bank out to the dike?

A. I think Mr. Hinchman spoke once or twice that the purpose of it was to fill out level with the plank.

Q. What did he mean by that?

Mr. Carton: I object to what he meant.

A. He told me he was going to have it level right out to the top of the plank, the top of the sheathing.

Q. To have what level out to the sheathing?

A. The sand.

Q. Why did you put the sheathing on the inside of the dike that you built rather than on the outside of the dike that you built?

A. I heard my father speak about it, that it was on account of the rocks and the old pieces of sheathing that had been eaten off, on the outside—that had already been on the outside.

Q. You have built a number of dikes have you not?

A. Yes, sir, I built a few.

Q. When you expect to keep water out from a dike, you put the sheathing on the outside, do you not; if you expect to keep land in, you put the sheathing on the land side of the piles; and if you expect to keep water out, you put the sheathing on the water side of the piles?

A. Yes.

Q. On this work which you did you put the sheathing on the inside, on the shore side, did you not?

A. I did.

Q. And was that purpose explained to you by Mr. Hinchman?

A. No, it was explained to me by my father.

Q. What did he say about it?

A. He told me that it was impossible to penetrate through the stone and rock that had already been previously dumped there and oak twigs that had been thrown in there to stop the scurrying out of the sand.

Q. Then you didn't penetrate below these things with your sheathing?

A. On the inside of this dike you remember there were no rocks whatsoever, because the piling we put in, the new piling and stringers, set far enough to clear these rocks that it dropped through.

Q. You put your piling and sheathing far enough out from the government work to clear the rocks which they had put in for a foundation?

A. No, I mean I butted my piling and made them fast to the government work, but by doing that it threw us far enough out from the stone that had shoved out in the inlet; the stones didn't shove inside, they shoved out.

Q. You came into a hole when you did this work there?

A. Yes, a hole three-quarters of the way of the work I had done.

Q. How deep did you penetrate the bottom of that hole?

A. About four feet. Of course, I never saw the plank; I imagine, to the best of my knowledge, about four feet.

Q. What do you mean you never saw the plank?

A. I never saw the plank after they were once pumped in.

Q. Did you use a pumping machine to do that work?

A. Yes, sir, a pressure pump.

Q. And you put these down four feet in that place?

A. I should judge about four feet.

Q. Four feet in the bottom?

A. Yes.

Q. You did not put them through the rock, you put them into the sand on the inside?

A. Sure.

Q. You put them in four feet?

A. About four feet.

Q. At the hole?

A. At the hole. The contract called for sixteen foot plank, and there was sixteen foot plank to be used, and it wasn't our fault, because there was a hole there; I was instructed to build this work and this thing should have been looked into before.

Q. What should have been looked into before?

A. The conditions of the bottom.

Q. What were the conditions right at this spot; did the sixteen foot plank reach into the bottom?

A. Yes.

Q. At the hole?

A. Yes.

Q. That should have been investigated at the time?

A. To give the plank more penetration, I should imagine.

Q. How much penetration do you think it had at that spot?

A. Four feet.

Q. How much did it have further up than that?

A. Anywhere from seven feet to four.

Q. Were they driven at all?

A. The majority of the plank were driven with a heavy string piece.

Q. How; won't you describe what you mean by that?

A. I mean by that a string piece set off and raised and dropped on top of the plank.

Q. You mean a couple of people lifted this plank and banged it on top of it?

A. No, I mean five or six men.

Q. How would they do that? I don't know.

A. They would raise it up and drop it; four would get on one end and two on the scaffold, that is, on the float.

Q. And lift this up and shove down?

A. Lift it up and let it drop with its full force, and on some occasions we would set the string piece on to the planking, and the man would stand on it and jump on it.

Q. You didn't use any pile driver at all?

A. No.

Q. How did you get your piling down?

A. We pumped and jigged them. Jigging and pumping are two different things; pumping is with the water, and jigging is twisting and working further in.

Q. How long were the sheathing?

A. Sixteen foot.

Q. How long were the piling?

A. Twenty-three feet.

Q. Did you cut any of the top of this piling off in this work?

A. On one or two occasions probably a foot or two feet.

Q. Did you cut any of the sheathing off?

A. Yes, on the extreme east end of where the cribbing begins the plank were cut.

Q. Do you know how many sheating piling you put on?

A. I think 1200 feet.

Q. How many round piles?

A. The piling were to be five foot centers; you can figure that up.

Re-direct examination.

By Mr. Carton:

Q. You have said that no plans were presented to you when you went on this job, but that your father had given you general instructions of what was to be done; that is a fact?

A. Yes.

Q. It is a fact, also, that this was not new work, which you did, but consisted of making repairs to the old dike?

A. Yes.

Q. You followed the line, I suppose, of the old dike?

A. Yes.

Q. And is it a fact that as you say, the uprights, the planking, were placed on the inside rather than the outside, to have the bottom more ready of access or penetration?

A. Yes, sir.

Q. To avoid the old stubs and stones on the river side?

A. Yes, which were impossible to penetrate.

Q. And could not have been done only at a great expense?

A. Yes, it could have been done at great expense.

Q. You do not use a pile driver for inserting stringers in sand, do you?

A. No, sir.

Q. And is the method ordinarily pursued by you that which you have described here?

A. It is.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } *ss.*

I Hereby Certify that the foregoing testimony of Addison John Howland was taken before me as Special Master, pursuant to order made in open court by the Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Long Branch, on Friday, November 23rd, 1917, at 4 P. M., in the presence of Messrs. Durand, Ivins & Carton and Mr. John D. McMullin for complainant, and Mr. Martin V. Bergen, Jr., and Mr. DeWitt Robinson (of the Pennsylvania Bar) for defendants; that it was stipulated and agreed by and between the counsel for the respective parties, that the testimony of the witness should be taken stenographically by me and afterwards reduced to typewriting, the signature of the witness to his said testimony being waived; and I further certify that the foregoing is a true and correct tran-

script of my shorthand notes of the testimony of the witness given before me.

Dated November 28th, 1917.

NICHOLAS W. BINDSEIL,
Special Master in Chancery of New Jersey.

Continuation of testimony in the above entitled cause, before Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Long Branch, New Jersey, on Friday, December 7th, 1917, at 11 A. M.

PRESENT:—Counsel as before stated.

S. BARTLEY PEARCE, recalled for further

Direct examination.

By Mr. Carton:

Mr. Durand: There was an order made permitting the other side to amend their answer, and we have prepared a reply to that amendment and sent a copy to Mr. Bergen, and I would like to have my reply marked Filed.

Q. The last day, in giving your testimony, you referred to the beach north of the Manasquan inlet at and prior to the erection of the government dike in 1882. I believe you are familiar with the physical conditions existing at the point of the beach where

these shacks are located, immediately north of the Manasquan inlet, are you not?

A. Yes.

Q. Will you describe generally what its condition is, its extent, and so forth?

A. What it is now and what it was then?

Q. What it consists of now; take the tract from the Brielle Road south to the inlet, on the beach.

A. The conditions are there now that the beach has been all built up with small shacks, we call them.

Q. And the ground or the sand upon which these shacks have been erected, is it high or low or what is its condition?

A. It is high, because every building goes up there, the wind blows the sand and makes the beach still higher.

Q. Does it run at about the same grade or height from the Brielle Road south to the inlet?

A. Just about, yes, sir.

Q. And its width, from say the high water mark back to where it is built up, about how wide is this strip of land that runs down there?

A. You mean back to what we call the short creek?

Q. Yes.

A. Where the stream of water running through from stump point up to Brielle Road, I should say it was about 100 yards, or it might be a little more than that, as near as I can remember.

Q. Is there a public street running down through this strip from the Brielle Road to the inlet?

A. There is a street running about half way from short creek to what we call the undertow of the ocean.

Court: Where is that?

Witness: That runs parallel with the beach, from the dike up.

Court: And there is no road running down the beach?

Witness: Yes, I mean running up and down the beach.

Q. You mean running from the Brielle Road parallel with the ocean to the dike?

A. Yes.

Q. There is a road through there?

A. Yes.

Q. A gravel road?

A. Yes.

Q. And these buildings on this land, are there a number of them?

A. I don't know exactly, but I should say about 100.

Q. Is the whole strip of land built up?

A. Yes.

Q. Between the road and inlet?

A. Yes, on top of the beach there is no room for a building to be built, it is all occupied.

Q. Did I ask you at the last hearing the condition or the extent of this strip of the beach prior to the erection of the dike?

Court: In what respect?

Mr. Carton: That is, its extent or the difference between the extent of this strip of land now and what it was at the time the dike was built.

Court: You mean in width?

Mr. Carton: In width, height and so on.

A. The beach at that time was a very low beach; there were no sand hills or nothing, because the inlet—

Court: Don't give the reasons, but give the facts.

Q. It was a low strip or stretch of beach?
A. Yes, the inlet would work up and down and wash the beach away, and make it a low beach.
Q. Was it so low that at high tide the sea would wash over it?
A. Every real high storm tide the sea would wash over the top of the beach.
Q. Were there buildings on it at that time?
A. No.

Court: At which time, before the building of the dike?

Witness: There were no buildings on there before the building of the dike.

Court: On this beach strip?

Witness: Yes.

Cross-examination.

By Mr. Bergen:

Q. You mean the government dike?
A. Yes.
Q. And you mean that that was the condition of the beach before the government dike?
A. Yes.
Q. When you say it was very low?
A. Yes.

Q. When you say it is 100 yards wide, where do you run your 100 yards from, back to deep creek?

A. I have never measured it; it might have been more than that, but somewhere near 100 or 150 from the ocean back to deep creek.

Q. The deep creek is the one that runs parallel with the ocean?

A. The short creek I am speaking of runs parallel with the ocean, and deep creek runs at right angles.

Q. When the tide was ebb tide, did it flow back of the dike?

A. That is before the dike was built, do you mean?

Q. Not before the government dike, but 1914, on the ebb tide, did it flow back of the dike, north of the dike?

A. At ebb tide, the tide would naturally flow down through deep creek to the inlet.

Court: What would that be, back of the dike or north of the dike?

Witness: That was all stopped up at that time after the dike was built.

Court: Then it wouldn't go back or north of the dike?

Witness: No, it would have to go the other way.

Q. Therefore the water would flow back of the dike on the flood tide?

A. After the dike was built—

Q. I am talking about 1914.

A. After 1914 that is different.

Q. Tell us about 1914.

A. In 1914, before this repair was made, it flowed

back and forward through the dike and went up through the creek and so on.

Q. Did it ever cross over the land north of the crib, did you ever see it cross over since the government dike, that is, the land on the beach?

A. You are speaking of the current?

Court: The water.

A. Storm tides ran over the beach there right close to the dike.

Q. Did you ever see it flow over on an ebb tide?

Court: Over the beach north of the creek?

A. Yes, because the damage to the dike was beyond that crib work.

Q. You say you saw it flow over the beach at the crib?

A. Not over the beach, through the dike.

Court: He is asking over the beach.

Q. Did you ever see the ebb tide flow over the beach north of crib?

A. No.

Q. Since 1914?

A. No.

Q. Or before 1914?

A. No, it couldn't, it was impossible.

Q. Why is it impossible?

A. The beach is so much higher than the level of the tide, the water cannot get over the beach.

Q. That is true ever since the government dike?

A. That would be true ever since the world was created.

JESSE HOWLAND, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. What is your business?
A. Bulkhead, dock and dredging.
Q. Are you located in business at Seabright?
A. Yes.
Q. How long have you been engaged in the bulkheading business?
A. About twenty-six or twenty-seven years.
Q. Have you been engaged continuously during that time?
A. I have.
Q. Where have your activities taken you to in doing the work along the Atlantic Coast, this section?
A. From Bayhead to Sandy Hook.
Q. Has your experience in doing this sort of work been considerable, Mr. Howland?
A. Yes.

Court: Personally I know of Mr. Howland's qualifications. Do you wish to test his qualifications?

Mr. Bergen: Will your Honor pass on him as an expert?

Court: I have seen him actually at work so I do not have much doubt as to his qualifications.

Mr. Bergen: All right.

Q. You did some repair work to the dike at the Manasquan inlet, did you not?
A. I did.

Q. And when did you do that work?
A. Summer of 1914.
Q. Generally, what did your work comprise?
A. It was to replank the old government dike.
Q. Who procured you to do this work?
A. Mr. Hinchman.
Q. You examined the situation there, I assume, prior to doing the work?
A. I did.
Q. And when did you first make your examination of the dike?
A. I should say about three weeks before—about probably two weeks before the work was started.

Court: And when was the work started?

Witness: The work was started about—I wouldn't be absolutely clear on it, but I should say the work was started about the first of July, 1914; it might have been a couple of weeks one way or the other.

Q. Did you look the situation over at the request of Mr. Hinchman?
A. I did.
Q. And after you examined the situation did you advise him what in your opinion should be the nature of the repairs?

Mr. Bergen: I object; I think that is leading.

Court: It is leading.

Q. After you examined the situation with Mr. Hinchman, did you reach any conclusion as to what should be done?

Mr. Bergen: I object.

Court: He hasn't said yet what he found there.

Q. Will you with more detail explain to the Court just what you found the condition of this dike to be?

A. I met with Mr. Hinchman on the ground and I found that the dike—the sheathing part of the dike starting back from the stone crib work—

Court: Starting westerly?

Witness: Starting westerly—that the sheathing was practically all gone, and leaving nothing but the piling and the timber framing.

Q. Did you observe what, if anything, was the result of the beach or the land north of the dike because of this condition of bad repair?

Mr. Bergen: I object.

Q. Irrespective of the cause, what was the condition of the premises immediately north of the dike?

A. From the stone part of the crib running westerly I should say perhaps 200 feet, starting at the crib, the current had cut out the sand in back of the cribbing to an extent in the widest part, perhaps sixty or seventy feet.

Q. Was the condition in which you found the dike at that time—did it then permit of the current to go through what was the dike, north?

A. It did.

Q. You observed, of course, the location of the dike at the time you examined it, Mr. Howland?

A. Yes, sir.

Q. You had been familiar with the location of the dike, I assume, some time prior to that time?

A. Only from casual observation; I never made any particular study of it or anything.

Q. From your experience, in your long line of work along the beach front, protecting the beach from encroachments by the ocean, can you tell us why the dike was constructed in the location in which you found it?

Mr. Bergen: I object.

Court: What is the purpose of that?

Mr. Carton: I wanted to show by Mr. Howland whether the dike was located in the proper position according to his view of it.

Court: It might have been at that time. I said I could vouch for some of Mr. Howland's qualifications. I don't mean to say that I regard him as an engineering expert, as I do a man who is a practical director and builder in the construction of bulkheads of that kind. Whether he is qualified to plan work, you gentlemen must develop that by your examination.

Q. Did Mr. Hinchman ask you for your opinion as to the best method of protecting his property after you looked that situation over?

A. Yes.

Q. Did you give it to him?

A. I did.

Q. What did you advise him?

A. I advised him to plank the government jetty at the dike.

Court: That is the dike?

Witness: Yes.

Q. You call this sometimes a jetty as well as a dike?

A. Yes.

Q. How far out was this government dike, or jetty, as you call it, damaged?

A. It was damaged the entire length of it, with the exception of about what we call the stone crib, under which is about 200 feet; I should say probably 900 or 1000 feet was damaged.

Q. How far out was the sand washed from behind this dike, and to what extent was it washed out?

A. I answered in the width; it was deep enough so that it undermined the sheet piling and the stone rip-rap that lay in front of the sheet piling; it scoured it and allowed the stone to drop down.

Q. After reporting to Mr. Hinchman and advising the repairs which you deemed necessary, did you enter into a contract with him for doing the work?

A. Yes, sir.

Q. Do you recall the amount of that contract at this time?

A. Somewhere in the neighborhood of $9,000.

Q. Was the contract in writing?

A. Yes.

Q. Did Mr. Hinchman pay you for doing your work?

A. Yes, sir.

Q. You did not actually have supervision of the doing of the work?

A. No, sir, I did not.

Q. Who did the work?

A. My son Addison.

Q. What did you do with your son, with regard to informing him as to what was to be done, the nature of the repairs that you were to make?

A. Before I went away I took him down and showed him how I wanted the work constructed.

Q. Were you there when the work was started?

A. No, I was not.

Q. You took your son, you say, on the job, and outlined the nature of the repairs that were to be made?

A. Yes, sir.

Q. Had your son been doing work for you for some years prior to that time?

A. He had been bossing a gang of men, I should say, about two and one-half or three years at that kind of work.

Court: Did you inspect the work on your return?

Witness: I did.

Q. Did you observe whether it was constructed according to your direction or not?

A. It was. The work was not completed when I returned.

Court: Did you take any part in its completion?

Witness: I did.

Q. From the time you returned you took a part in overseeing the completion of the work?

A. Yes, I went down practically every day.

Court: When was it completed?

Witness: I wouldn't be positive.

Court: About?

Witness: I should say it was completed somewhere around October.

Court: 1914?

Witness: Yes.

Q. Your son who had charge of this work, stated that in putting down the planks or sheathing in repairing this dike, he placed them on the north side of the dike; was that work done in accordance with your instructions?

A. It was.

Q. And why?

A. Because of the stone rip-rap that had been washed down in front of the jetty against the sheet piling, which would have made it practically impossible to penetrate with new sheet piling and put them in the same location; it would have cost perhaps two or three times as much, on account of having to put the sheet piling in with a pile driver, and also put steel shoes on the plank in order to drive them through the rip-rap.

Q. Your son stated that there had been some rip-rap or old stone or something lodged on the south side of the dike, which would make it difficult of penetration; is that what you observed?

A. Yes; we found also that the stone in settling down, that they had spread back to some extent, so that there were some places there where it was impossible to get the sheet planking through; that was out near the stone cribbing.

Court: How deep were they to be placed?

Witness: The plank was to be sixteen feet in length.

Q. And that would admit a penetration of how much below the bottom?

A. It would admit of a penetration—the plank had from four to eight foot penetration.

Q. When you were supervising the job did you notice whether or not the currents would eddy around the end of the new work and cut in off of the dike?

A. Yes, that would occur from day to day; where we would leave off, the water would be deep, just around the plank, where the current would work around.

Q. To what extent would that cut in from day to day?

A. From Sunday to Monday it perhaps might lower down two to two and one-half feet, just around that particular point.

Q. After examining that situation in 1914, could you have performed any other work there for less money than your charge to Mr. Hinchman that would have had this same result?

A. That is a question.

Q. What is a question?

A. There might have been other work done there in a different way, but it is a question whether it would have had the same result.

Court: At less expense with the same result?

Witness: I don't think hardly then it would have obtained the same result.

Court: It would have cost less?

Witness: Yes, it would have cost less money, but it would only have been in the nature of an experiment.

Q. What you advised Mr. Hinchman to do was what you believed the proper thing to do because of your experience in doing that kind of work?

A. Yes.

Q. What would have happened, in your judgment, if this dike had not been repaired; would the sea have broken through the jetty and cut into the north—

Mr. Bergen: I object.

Court: I think it is a matter largely of speculation, but I think he can state what happened as the result of the absence of the plank and what he saw there when working there.

Q. Have you had any familiarity with the various inlets to the ocean along the north Jersey coast?

A. Not with Manasquan, but with the Shark River end I have.

Q. Have you observed the conditions that existed from time to time with particular reference to storms and currents?

A. Yes.

Q. And the fact that these storms and currents had opened the inlets?

A. Yes, sir.

Q. In view of the experience you gained in that way, what do you say would be the likely or logical result to the point of the beach north of the dike at the Manasquan inlet, if this dike had not been repaired?

Mr. Bergen: I object.

Court: Do you wish to cross-examine?

Mr. Bergen: Yes.

Cross-examination.

By Mr. Bergen:

Q. What other inlets are you familiar with besides Shark River?
A. Wreck Pond.
Q. What others?

Court: Did you do any work at the inlet at the government observation?

Witness: No, but I noticed the workings of the inlet when it broke through at Sandy Hook, and also an inlet that broke through between Normandie and Seabright, about thirty-five years ago.

Q. You are familiar, therefore, with those three inlets, or two inlets, and that one work—Shark River, Wreck Pond or Normandie, and the government work?
A. Yes.
Q. Are you an engineer?
A. No, sir.
Q. You are qualified as an engineer?
A. Sometimes I think I am qualified as an engineer. Sometimes questions are put to me to answer as engineer, although I never studied to be one.

Court: You have resided along the coast all your life?

Witness: I have.

Court: At Seabright?

Witness: Forty-seven years.

Mr. Carton: The inlets that Mr. Bergen has just directed your attention to comprise about all the inlets to the ocean from Manasquan River to Sandy Hook.

Q. You are familiar just at these few inlets on this beach right here?

A. Just on the north Jersey beach from Bayhead north.

Q. That doesn't reach down as far as Manasquan?

A. Oh, yes, Bayhead is the other side.

Q. And your training has been right here?

A. I am familiar with the currents from Bayhead to Sandy Hook. And that comprises all the inlets between Manasquan and Sandy Hook.

Q. Your education was not a university training or a training such as a regular engineer's training?

A. It was not; a high school education.

Q. You are just a practical first-class wharf and dock and dike builder?

A. I wouldn't say first-class, but I claim to be practical.

Further direct examination.

By Mr. Carton:

Q. Your education, I assume, was obtained in the school of experience?

A. Yes.

Q. In view of the experience you gained in that way, what do you say would be the likely or logical result to the point of the beach north of the dike at the Manasquan inlet, if this dike had not been repaired?

Court: Do you object to it?

Mr. Bergen: I am willing to let your Honor pass on it.

Court: You may answer it, Mr. Howland.

A. If the dike had not been repaired, there was a grave danger of the river breaking out through on the north side of the jetty, after the beach wearing down—the crest of the beach wearing down a little, in an extreme high tide or very bad storm.

Q. What effect would that have had on the land north of the beach or the constructions built upon it?

A. The entire strip would have been washed away down to a point where the inlet would have closed itself up again by natural causes.

Q. Mr. Howland, have you been down to the Manasquan Beach at the point where this work was performed, recently?

A. Yes, sir.

Q. How recently?

A. A few days after I was subpoenaed on both sides of the case I thought I had better go down and see what the conditions were.

Q. When was that?

A. About a week before the last hearing.

Q. You have been subpoenaed on both sides?

A. Yes, sir.

Q. So that you went down there with a view of looking at the situation now?

A. So I would know what the condition was.

Q. Had you been there prior to that since you did the work in 1914?

A. Yes, I was down there with Mr. Hinchman once

before that in regard to repairs to the dike, the following year.

Court: In 1915?

Witness: 1915.

Court: What time of the year?

Witness: I cannot say.

Court: Summer, fall or winter?

Witness: I think it was in the summer; I am quite sure it was.

Q. When you were there recently did you observe whether there had been any change in the filling in or cutting out, or otherwise, of the land north of the dike?

A. I noticed that the sea had run over the embankment on the north side of the dike and had washed the sand out in behind the dike—washed it down in behind the dike perhaps 75 feet, maybe 100 feet, from the crib west.

Q. You mean to say from the crib west there had been more filling in than was true when you were there in 1914?

A. Yes.

Q. And with regard to the ocean and of the dike, did you observe whether that had been filled in, a made-up beach around there?

A. The ocean end of the dike—when the work was started down there, the ocean end of the dike, the piling and stone crib dike, that was all filled behind it and the cut-out had only extended to that point; but when I was down just before the other hearing, I observed that the storm seas had come over and

had run the sand from the crest of the beach—had run it down in behind the dike and filled in perhaps 75 to 100 feet behind the new work that had been put in, but I don't know when that condition occurred, between that time and the time that I was there with Mr. Hinchman in 1915.

Q. Do you know from your experience what conditions caused the sand to cut away along any particular section and undermine this work at the time or prior to the time of doing the work in 1914?

A. When I was doing the work there, when I came home, I noticed on the south side of the Manasquan River, where a point had built out from the south side—a considerable point had built out, so that when the tide came out on the ebb tide on the Manasquan River, it threw a very strong current right off—I would say off towards the northeast.

Q. That would be toward the dike?

A. Yes—so that it gouged it from the top on the north side next to the dike.

Q. Was that caused, in your judgment, because of the building up of the sand?

A. A sort of a bar on the south side of the river.

Q. And that had the effect of throwing the current more strongly against the dike?

A. It was more built up on the south side and kept encroaching north.

Q. Without any dike at all, that is exactly what would happen, building up on the south and cutting to the north?

A. That point would keep increasing north all the time, in my judgment.

Q. And would that point you speak of continue to form and force the channel further north, had it not been stopped by the reconstruction of the dike that you made?

A. I think it would.

Cross-examination.

By Mr. Bergen:

Q. Where is that crib; how long a thing is that?
A. I didn't measure it, but I should say about 200 feet.

Court: How wide?

Witness: I should say perhaps 90 feet.

Q. What is the construction of that crib?
A. It is piling, very heavy sheet piling on the south side of it, filled with stone.
Q. In what condition was that when you went there in 1914?
A. It was in fairly good condition when I went there, as good as could be expected after a great many years of use.
Q. What was built directly north of that; describe the dike as you come up; what was directly northwest?
A. As you leave the stone and crib dike, it was constructed of piling and heavy timbers, and then had been faced with sheet piling about five inches thick, single sheet piling.
Q. Immediately next to the crib this is?
A. Yes.
Q. And running westerly for a distance of about 1000 feet?
A. Yes.
Q. Were there not two types of dike there?
A. There was a stone crib dike and then the timber dike.
Q. Was there not a double timber dike for a ways there; was there not first a crib, then a piece of

heavy work, and then the balance of the piling dike coming on up above?

A. No, the way the dike was constructed, the sheet piling part of the dike, there was first a row of piling driven and the heavy timber on the outside; then there was another timber on the north side of that row of piling, and then another row of piling; that is what you would call double construction.

Q. Did that go all the way up?

A. All the way west from the stone cribbing.

Q. Was the sheet piling heavier near the crib?

A. The fact of the matter is that there wasn't very many sheet piling on there next to the crib, but I didn't notice any particular difference—at the crib the sheet piling I should say it was ten or twelve inches thick, the stone crib, but on the other, if I recollect rightly I think I put a rule on, I think they were five inches thick.

Q. And there were two of them, as you have described, two planks?

A. One thickness of plank on what we would call just the sheet piling.

Court: Then was there another thickness of plank against the piling?

Witness: No, there were two lines of timbers and two lines of piling, and the work that we did, we put in new piling in between the old ones on the rear, put on stringers, and then sheet piling in back.

Q. The government construction up above the crib then first on the river side was the sheathing?

A. Yes.

Q. Then were wales or stringers?

A. Yes.

Q. And then one line of posts?
A. Yes.
Q. And then another line of wales?
A. Yes.
Q. And then another line of posts?
A. Yes.
Q. And that was government construction?
A. Yes.
Q. Then what did you do?
A. I put a board in between each one of the government piling on the north side; I put on stringers and put in the sheet piling on the north side.
Q. That is the government had two lines of piling, you put your piles on the northern line of piles?
A. On the north line, between each of the government piling. It was attached to the government work.
Q. You put them up in the north row of the government piling?
A. Yes.
Q. Then you put on a line of wales?
A. Yes.
Q. Attached to all the posts of the government?
A. I think we only made them fast—I wouldn't be positive, but I think we only made them fast to our new piling, but they were fast through the government wales; they were connected to the government dike by bolts.
Q. And then you put your sheathing on the inside?
A. Yes.
Q. How many sheathing, or how big were those sheathing, how long?
A. They were 3 x 12's wide; they were 16 feet; I haven't any records; my records of my work were burned up last March.

Q. What were your piles?

A. The piles I think were 22 or 23 feet in length.

Q. What size?

A. 12 inches on the butt.

Q. Was this work all done in accordance with your advice to Mr. Hinchman?

A. We talked the work over, Mr. Hinchman and I, on the ground there, and Mr. Hinchman's idea was that 16 foot plank was long enough for the work, and he was desirous of keeping the expenses down as much as possible; he wanted to get results.

Q. Did you examine the bottom there to see how far the bottom had sunk or how deep it was?

A. As we walked along—we didn't take any measurements, but as we walked along, we could see the difference; it was low tide when we were there and the water was clear, and in most cases we could see the bottom along.

Q. Where this hole was, how deep was that hole below the other part of the bottom?

A. I should say perhaps three or four foot.

Q. Did you make any allowance by lengthening out the sheathing for that place?

A. No, there was no allowance made for it; we used the same sheathing; we had about four foot penetration at that point.

Q. Was that the place you saw on Sundays that it would cut out with the tide flowing in there?

A. When I came home from Ireland, they had just about reached the point where that deep hole was, when I came back, and after we put the planks across that hole, after we got across that hole; then I noticed that that condition would happen from day to day, that the current would come down and cut in there, and the tide going out again would form that scour around that plank.

Q. Just around the plank as you progressed in the work?

A. Yes.

Q. And that would scour out two or three feet?

A. Yes.

Q. So that at that hole it reduced the penetration to about two feet or two and one-half feet?

A. They went across that hole in one operation in one day; they put the plank across there; the top part of the hole was, I should say, perhaps 40 or 50 feet across it.

Q. Did Mr. Hinchman ask you your advice as to whether four feet penetration was sufficient for that sheathing?

A. No.

Q. He did not ask you that?

A. No, sir.

Q. Then you did not state to him that in your opinion that was a proper penetration?

A. No, I didn't think there was anything said about how much penetration the plank would have; we just talked there and decided that sixteen feet was long enough.

Q. Who decided that?

A. I cannot say positively as to that.

Q. In your judgment was that penetration sufficient, four feet?

A. I thought so at the time.

Q. Do you think so now?

A. No, I know so now, that it was not, at that point, because there is where it went out.

Q. Did you make any plans or any drawings in reference to this construction?

A. No, sir.

Q. Was there any engineer there other than yourself on it?

A. No, sir.

Q. Was there any advice of any other person taken as to this than yourself and Mr. Hinchman in this consultation?

A. Not to my knowledge.

Q. Did you make any contract in reference to the work?

A. Not in writing.

Q. Did you make any estimate of contract price as to what it would cost?

A. Yes.

Q. What kind of a contract was that?

A. Verbal.

Q. What were the figures in it; can you give that?

A. About $9,000.

Q. Do you know how much it did cost in the end?

A. I don't know what the additional work they had done in another year—I don't know what that cost.

Q. In the completion of your contract?

A. I cannot give the figures, because I have no records. In the neighborhood of $9,000.

Court: That represents the amount you were paid by Mr. Hinchman?

Witness: I think I was paid a little over $9,000 by Mr. Hinchman.

Q. How did you arrive at that figure?

A. It was based on so much a foot. We did the work for—I am not positive, but I think it was $10 a foot, $9 or $10.

Q. A running foot?

A. Yes, sir.

Q. Did you contract to do any work on the crib?

A. No, sir.

Q. Do you know whether any work was done on the crib by you?

A. Not to my knowledge.

Q. You mean by that that you don't think any was done?

A. I don't think any work was done by me or by my men on the crib, because they never told me of any and I never billed for any.

Q. As you went down toward the crib or doing the crib part, what was the shore—how high was the beach at the western end of the crib?

A. Right at the crib the sand was the height of the crib, but as you left the crib, going towards the sand dunes,—

Q. That is toward the west?

A. Toward the northwest,—the beach increased in height.

Q. As you came up the beach, you mean, away from the crib?

A. Yes.

Q. What was the condition of the beach east of the western end; in other words, starting at the western end of the beach, as you come eastward?

A. That was good high beach all the way across.

Q. To the ocean?

A. Yes, sir.

Q. Starting from that point and going westward, what was the condition of the island along the dike?

A. Right from the stone crib west it was all water behind the dike where the hole was.

Q. How far from the western end of the crib did that water begin?

A. Right at the western end, right where we started our new work.

Q. How wide was the water there?

A. The water right at that point there wasn't no

width to it at all; it took a circular course and worked off towards the sand dune; it started from nothing and increased as it went west, to a width of perhaps 60 or 70 feet, right opposite where the new road is now.

Q. How far was that extreme width of 60 or 70 feet from the western end of the crib?

A. I should say that was probably a couple of hundred feet.

Q. In other words, in a couple of hundred feet, this water north of the crib had increased—

A. From nothing—

Q. To 60 or 70 feet?

A. Yes, sir.

Q. What was the condition of the beach inside this water; was it a steep slope?

A. No, it ran off kind of flat.

Q. Whereabouts?

A. Right behind the dike, right at the stone crib. I should say that it ran off from a bank four or five foot high, a slope at perhaps ten or fifteen feet. At low tide it was bare right at the stone crib, at the western end of the stone crib, and then the beach shelved up.

Q. Toward the sand hills?

A. To its natural height, and then right at the sand dunes, it come in there so that I should say perhaps it was anywhere from eight to ten foot in height, pretty steep.

Court: The dunes were above the water?

Witness: Yes, but at low tide along in there there was a little flat beach in there, but when the tide was up, it was right against the bank.

Q. That low place you are talking about is the place that starts at nothing at the west of the crib and runs up in 200 feet, to 70 foot wide?

A. I should say about 200 feet; it might have been 150; it might be 250.

Q. That is the place you talk about, and the beach directly north of that line which is obliquely coming from the crib, was high land?

A. Yes.

Q. And this was just low land right there?

A. It was covered in there with water at high tide, and where the wide place was, I should say the men would have to work there in water up to their knees along the dike at that point, at low tide, and when they went a little further west the water kept getting deeper, so they had to build a raft out of the new timber to work off of, to get across this deep hole.

Q. How high was that beach at the north of this hole, if you call it so?

A. The low land north of the stone crib?

Q. I mean up here (indicating) we have our stone crib, and directly west of the stone crib begins this water which was north of the dike?

A. Yes.

Q. At that spot it came down to nothing and then it ran in practically a straight line?

A. No, circular, sort of a circular or curved line.

Q. A small curve, was it not?

A. Yes, a small curve; it didn't come in sharp and cut away.

Q. So that about 200 feet west of that point it was about 70 feet wide?

A. Yes.

Q. As I understand your description, the land sloped off practically steeply?

A. At the wide part where it cut into the bank.

Q. Did that steep bank continue up practically to the crib along this line?

A. Where the sand dunes are proper and houses are built on the sand dunes there, I should say anywhere from eight to ten or twelve feet above the level of the low tide and the government dike is about perhaps between four and five feet above the low tide, and from the government dike to the sand dunes it would run up.

Court: The beach?

Witness: It would increase the height as it went back.

Q. In other words, the beach along there is eight or ten feet higher than the crib?

Court: Except at the crib.

A. I said I should say that the average beach there, the crest of the beach, the sand dunes, is about eight or ten feet above low tide.

Court: Except, as he says, at the crib, where he thinks it is about four or five feet high and greatly increases in height as it goes up the beach.

Witness: Up the beach to the sand dunes.

Q. How high is the road; the road doesn't reach all the way down there?

A. Yes, right to the embankment. There is a space of water they filled in there some in order to build the road a little further out.

Court: Is the road on the crest of the beach?

Witness: The road is not on the crest of the beach; the road is west of the crest of the beach and I should say that it is 75 or 80 feet west of the crest of the beach, and it is about perhaps two foot to two foot and a half above the elevation of the dike.

Q. What would have been the effect of a short dike connecting the crib and running obliquely over into the high land?

Mr. Carton: I object.

Court: Objection overruled.

Q. Suppose a dike had been built connected with the western end of the stone crib and running obliquely northwest to run into this high ground, which you say was on the northern side of this hill, what effect would that have had on protecting this point?

A. It might have answered the purpose of protecting it; a great deal would depend upon how deep it would cut alongside of that work, and whether or not that circular movement would continue north and go beyond that point.

Q. Was not the beach high enough at that point to protect it?

A. Where it would have ended, it was high enough to protect it, but it wouldn't have been high enough to protect it at the dike. Storm sea has been over that beach since I did the work and has been running the beach in there. I found that by observation a few days ago.

Q. But did your dike prevent that?

A. It didn't prevent the sea from running over, no.

Q. Wasn't that exactly what you did with your dike and the intention of your dike?

A. What?

Q. To do that specific thing which I have named. At the western end of the dike as you built it, did you not put an oblique dike exactly similar to those which I have mentioned, which ran into the high land at that spot?

A. A return I call it.

Court: Calling it a return.

Witness: We built a return bulk dike into the crib at the western end of the dike.

Q. Would that return dike not answer just as well if it had been built down at the crib?

A. It didn't, it washed around it; it washed around the other return and they had to continue it on back further, I saw by observation a couple of weeks ago when I went down.

Q. Was the land high there?

A. No, it was meadow.

Q. Was it as high as it was up near the crib?

A. No.

Q. Therefore it would have been better at the crib—

Court: You are arguing with him.

Q. There would it have been better at the crib?

A. The conditions would have been better at the crib providing this point that I speak of that was on the south side of the river hadn't continued to make and keep forcing that cut over.

Q. What could have happened which would have endangered such a construction as the one I suggested?

A. A sea could have run over from the beach and could have upset it, it could have been possible.

Q. Can it not do that now?

A. The only think you can do now when it runs across, is to level the beach, flatten the beach out behind the present dike, and that holds the sand from cutting out into the channel and scouring away.

Q. What is your opinion of such a construction as that to protect that point, my suggested construction?

A. My opinion is that there is a possibility that it might have answered the purpose; and there is a possibility that it might not have answered the purpose.

Q. How much would such a construction as that have cost?

Mr. Carton: Objected to as immaterial.

Court: I will allow it.

A. You could put a construction across there 150 to 200 foot, I suppose, anywhere from $1500 up as high as you want to go.

Court: According to the nature of the construction?

Witness: Yes.

Q. Take one similar to that which you placed for Mr. Hinchman; what would that sort of construction have cost?

A. That construction would cost about $2,000. That I don't think would have answered the purpose at that point.

Q. Why?

Court: For the reasons he has already stated.

Q. Have you any additional reasons?

A. There is a reason why it would not, because there were no anchors and no braces in that work, and if a bulkhead had been put behind it in that way, there would have to be additional work put on to hold it up; that would have been included.

Court: If you include it in the cost of $2,000 right here, wouldn't that answer the purpose?

Witness: The reason that it might not have answered the purpose is because of the continual scouring of the channel, that it would have kept on coming behind it.

Q. Could you have prevented that scouring by brush or any such construction?

A. It might be possible to. I never used any brush construction myself; I have seen it used along the beach in places, and for some tides it has answered the purpose, and when tides and currents didn't come right, it didn't answer.

Q. If you had added braces and tides back to make that a strong proper construction to protect that, how much would it have cost?

A. You could have added another thousand dollars to it and made it a stronger structure and it might have answered the purpose, and as I say, it might not. Unless you continue that back there is a possibility—it is an open possibility that unless you continue that back and keep on continuing it back, as that current keeps sweeping around the end of it, you may have to continue it back.

Q. Surely there is some place that you could have constructed such a thing, this oblique dike there,

starting from your crib and running back into high land, is there not, which would have been safe?

A. It might have been possible to run it back into that sand dune, and it might have stayed there for a good many years.

Court: Is all this speculation helping us a great deal? Could you have constructed any kind of a dike at any price as indicated by Mr. Bergen in his question, that would have stayed there and been as effective, or more so, than the one you did construct for Mr. Hinchman?

Witness: I doubt it.

Court: I make my question broad enough, any kind of a dike at any place along the line suggested by Mr. Bergen?

Witness: I don't think so, because I believe in my judgment that the logical lines of the control of that river was on the lines that the government built their dike on.

Q. How about for the protection of the beach and not the control of the river?

A. In controlling the river and controlling the beach.

Q. Did Mr. Hinchman ever state to you the purpose of that construction of that dike which he asked you to build?

A. Yes.

Q. When did he state to you was its purpose?

A. He said he wanted to protect that beach; he wanted to keep the dike up in shape because he intended to fill in behind it, he intended to dredge a

channel from the western end of the dike on down towards—I think they call it the Brielle Road, and fill that meadow up and develop new property.

Q. Where did he intend to dredge this channel, do you know?

(Objected to.)

Court: I will let him state, if he knows.

A. He didn't give no lines on it, he said he intended to dredge out on the west side and fill the meadow up and make another tier or two of lots.

Q. Was that dredge to go through the Isle of Sedges, do you know?

A. I don't know where it was; I don't know where the lines of the property ran; I didn't know but what he might own all the sedges all the way to Manasquan.

Re-direct examination.

By Mr. Carton:

Q. This short dike to which Mr. Bergen has referred, did that dike, according to your understanding of Mr. Bergen's suggestion, extend from the point of the cribbing in a northwesterly direction to the sand dune? A dike to what extent, did you have in mind; this short dike, what would be its length, taking now the short dike that Mr. Bergen interrogated you upon?

Court: You need not go into that now; if it develops in the case that a dike of that kind is as effective as Mr. Howland said it would not be, no

matter what it cost, you may recall him. I would say, from Mr. Howland's statement, it is purely a speculation as to what the effect would be. If they put in the affirmative proof in their case, you may go into it on rebuttal.

Q. The dike suggested by Mr. Bergen, at any rate, would be east of where the ebb current would strike the government dike?

A. Yes.

Q. And it wouldn't have any protection at all to that current, would it?

A. No, I cannot say that it would.

Q. If that condition you referred to, the building of the sand bar on the south side of the river, continued, it would force that ebb tide current through this broken dike north of this short dike that Mr. Bergen referred to?

A. That is a question I had in mind when I—

Q. You had that question in mind because of your observation and your experience of the condition of the tides along the Atlantic Ocean at these inlets?

A. Yes.

Q. The purpose in taking back this government dike westward was to hook it on to solid land in the meadows, was it not?

Court: Who is testifying, you or the witness?

Q. In your judgment wasn't it necessary to have extended that dike westward to a point where it tied up to solid land, in order to stop the current from breaking through it and cutting north?

A. That is the object in running all work, is to tie it to fast land if it is possible and keep the currents from going around it.

Q. And if this short dike was erected it wouldn't keep the currents from going around it at all?

A. It wouldn't hardly keep the channel of the Manasquan River in proper control.

Q. The effect or the likelihood would be what?

A. You would have to keep on extending your work from year to year, until you didn't have any decent shaped land left at all.

Q. And eventually it took all the land?

A. You might put in work strong enough there to build a barrier behind your sand dunes.

Court: I don't see that we are getting anywhere with this.

Q. You have said that after you went there and examined the situation, you advised Mr. Hinchman to do what you did?

Court: He has already said that.

Q. You have stated that after the 1914 work was done, you understood that some part of it went out during the winter of 1914-1915, is that so?

A. Yes.

Q. Is it not a fact that there were unusual storms that winter?

A. Yes.

Q. And isn't it a fact that those storms took out work similarly situated other than this Manasquan work?

A. All along the coast.

JOHN C. PAYNE, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Where do you reside?
A. Jersey City.
Q. What is your business or profession?
A. Civil engineer.
Q. How long have you been engaged in that profession?
A. All my life, although not privately practising. I practised civil engineering up to 1897, but from 1876 up to last October I was connected with the State Riparian Commissioners, first in the capacity of assistant engineer, and finally chief engineer until I resigned.

Court: Do you want to test Mr. Payne's qualifications?

Mr. Bergen: No.

Court: We all know him, I think.

Mr. Bergen: Are you an engineer, as a matter of fact?

Witness: Yes.

Mr. Bergen: A construction engineer?

Witness: Yes.

Mr. Bergen: Building dikes and things like that?

Witness: Yes, commencing with city engineering, railroad service, and all the branches of civil engineering.

Mr. Bergen: As well as your work in the riparian work?

Witness: Yes, over a period of forty years.

Q. Has your activity taken you to the location known as the Manasquan River inlet?

A. Yes.

Q. How long have you known that situation?

A. Since 1878 about.

Q. Did you have anything particular to do with the situation around the Manasquan River at that time?

A. Yes, sir, the State Riparian Commission at that time fixed exterior lines for the development of the shores of the river, and I was sent down by the board to instruct or inform the residents of Point Pleasant and Manasquan, the owners of shore front property, as to the operation of the riparian administration and to show where these lines were, and from that on directly connected with the making of grants under water on that river.

Q. So that your familiarity with this river extends back to 1878?

A. To '78.

Q. That was prior to the erection of the government dike?

A. Yes.

Q. Were you familiar with the mouth of the Manasquan River there at the time to which you refer and before the erection of this dike?

A. Yes, I remember going down there; I remember distinctly its conformation.

Q. And what was its conformation at the time you went there in 1878 before this dike was erected?

A. Its conformation was typical, its mouth was then some distance north of the present location, and it had the typical spur running up from the south on the outer side, the ocean side of the outlet of the river, and inside or west of that across that waterway was the dunes or sand bar, and inside of that was the meadow. It was a typical formation of ocean inlets.

Q. Have you been familiar with other inlets than the Manasquan inlet along the Atlantic Coast?

A. Yes, sir.

Q. And when you say this one was typical, you mean it conformed to your observation of the condition of inlets at other places?

A. Yes. I would like to say, what of course is known, that at Barnegat there is a bend in the coast of New Jersey, and from Barnegat south, the action is south; whereas, from Barnegat north the action is north; the working up of the spit is north, north of Barnegat inlet, and south, south of Barnegat inlet, that is the only difference.

Q. What has been your observation of the shifting or the working of the inlets north of Barnegat?

A. It is quite typical; they all, even around the Raritan, work up in the same way; the currents and the winds in conjunction with the currents running out of the inland body of water from this sand spit from the south, and the waterway endeavoring to force its way out, follows along in that direction until it goes so far north, that the conjunction of the forces closes up the inlet.

Q. Was it your observation when you went to Manasquan in 1878 that that is what was or had been taking place there?

A. My recollection is quite distinct that it was—I noticed the situation, and my future experience confirms me, and that is the typical situation and the typical action of all the ocean inlets of the coast of New Jersey.

Q. Have you been down to the Manasquan inlet recently to look the situation over there?

A. Yes, sir.

Q. And are you familiar with the present condition of the beach front property where the shacks are located north of the Manasquan inlet?

A. Yes, sir, from the observations made on that visit.

Court: When was that?

Witness: About two or three weeks ago.

Q. How does that compare now, in dimensions, height, &c., with your recollection of its extent in 1878, before the erection of the dike?

A. It differs materially from the situation as I recall it at that time.

Q. Had you ever seen it from 1878 until a few weeks ago?

A. Oh, yes; I have owned property down there and lived practically down there all through the years between 1878 and the present time, and my connection with the Riparian Commission led me to have constant associations with the river, and I surveyed and laid out Brielle in 1880 and Hanover Point.

Q. Will you tell us the difference, Mr. Payne?

A. At the present time, as has been very clearly testified to by the witnesses, there is a high sand dune covered with moderate priced cottages, and

a gravel road running parallel with the beach, about 200 or 300 feet back of the ocean, and a stable condition of affairs, and still west of that road there is sand filling, and back of that is a creek or the water way that I remember was a great deal wider, is now reconstructed or contracted to a narrower stream.

Q. Is that what has been described as short creek?

A. Yes.

Q. That runs parallel with the ocean?

A. With the beach.

Q. What is this you have before you?

A. This is Exhibit C6, maps of Manasquan River used the other day.

Court: This is a copy of the government map relating to that portion of it which was admitted should go in as well as Mr. Conover's maps.

Q. What is the date of the map?

A. 1878.

Q. Does that map represent the situation of the beach front there in 1878 as you now recall it?

A. Yes.

Q. Can you indicate where the property in question is, where these moderate priced cottages are built and where the road extends in the rear of them?

A. Beginning at the government dike which is shown on the map, at about the section on which the word "buildings" is printed, and running slightly northeast through what was in 1878 the river outlet, for a distance of I should think a thousand feet, perhaps, the sand is made up and is now an elevation of some ten or twelve feet above the level of the water, and is continuous from the ocean

beach westward to the road, and still westward to the present creek, and on that land are the shacks or moderate priced houses now existing, and that condition extends pretty nearly to the dike; my recollection is some 100 or 150 feet, something like that.

Q. Before the erection of the dike, Mr. Payne, did you observe this inlet to shift or change from that shown on the map here?

A. The dike was constructed about the time that I first observed the inlet, and the inlet has not changed materially since that time. It was maintained with more or less change in the surrounding territory, but the actual outlet is about in the position which is shown at that time.

Q. Mr. Payne, you have referred wih some familiarity to Manasquan and Brielle, having owned and laid out property there; have you observed after this dike was erected, whether it had gotten out of repair or not?

A. Yes, through the years during which I was familiar with the locality, I noticed the dike had gotten out of repair, and I was more or less familiar with the efforts of the people interested to have the government restore it.

Q. Will you tell us what you know about any efforts that were made to have the government restore it?

Mr. Bergen: I object.

Mr. Carton: It is only offered for the purpose of showing the necessity existing in 1914 and prior thereto for the repair of this dike.

Court: Is that disputed?

Mr. Bergen: Not disputed entirely that there was any protection to the ground to repair this dike.

Court: No, on account of the condition of the dike, it was necessary to repair it; but whether the condition of the dike was such as to necessitate the repairs to it.

Mr. Bergen: We concede that.

Court: You don't dispute the physical condition of the dike itself?

Mr. Bergen: No.

Court: It is admitted that the dike in 1914 and some time prior thereto was in bad repair?

Mr. Bergen: Yes.

Q. Were you in court the first day of this hearing when Mr. Pearce described the condition of the dike prior to its repair in 1914?

A. Yes.

Q. Were you in court this morning when Mr. Howland testified to the same condition and to the repairs he did?

A. Yes, sir.

Q. Assuming, Mr. Payne, that this government dike in question was out of repair or needed repairs in that the bolts had loosened and the upright planking had given way for a considerable distance, allowing the currents of the Manasquan River to go through on the north, do you say that the repairs made by Mr. Howland in 1914 were necessary

and proper repairs, in your judgment, keeping in mind your experience of the action of the tides on the inlet of the Manasquan River?

Mr. Bergen: I object to that.

Court: The question is framed in a very general way, and I am not sure that it embodies all the conditions described by the two witnesses who have been referred to.

Your contention is that this dike was repaired for the purpose of enabling Mr. Hinchman to fill in some land for some private purposes?

Mr. Bergen: Under the law of New Jersey, a mortgagee in possession, which was Mr. Hinchman's status, has no right to make repairs at all except those which are absolutely necessary to protect the property; secondly, he cannot make improvements under any condition; he cannot build up his mortgage so that we cannot redeem; that is a well settled principle.

Court: You claim that the repairs made by Mr. Howland in 1914 were in the nature of improvements?

Mr. Bergen: Yes.

Mr. Carton: We claim they were necessary to absolutely protect the property.

Court: What do you say, in view of the testimony of Mr. Howland that Mr. Hinchman told him when he inspected the property that one of the purposes in having the dike repaired was to dig a channel and fill in back?

Mr. Carton: If the building of this dike was necessary, if one of its incidental benefits was to protect some other property, it would simply be an incident and would still involve the necessity and expense of building the dike for the first purpose. The fact is that Mr. Hinchman owned no other property there, except the property in the deed, and if he was protecting any other property, he was protecting the property of the defendants here.

Court: I think in view of the announcement of Mr. Bergen before recess as to the grounds of his objection to the expenditure of money by you as the mortgagee in possession, that you ought to at least embody in that question the purpose for which the repairs were made.

Q. Mr. Payne, assuming that in 1914, this dike was out of repair, in that the bolts had rotted off and permitted the upright planking to be rotted and washed away; and assuming that because of that condition the tides cut through the dike, cutting in on the north of the dike, and assuming that Mr. Hinchman procured Mr. Howland, the contractor, to repair that dike by putting in additional piling, putting back additional stringers and additional uprights for the repair of the dike, so that it would not permit the water to go through and cut in north of the beach, would you say, in your judgment, as an engineer, and from your knowledge of the local conditions there, that the repairs made by Mr. Howland for Mr. Hinchman were necessary to preserve what we might call the locus in quo, the land in question, immediately north of the dike, and so that the shacks or constructions thereon might be retained?

Mr. Bergen: We have experts and maybe these gentlemen have others. That question, of course, does not state the hypothetical question, in that it does not state it in full. I have no objection to it, if your Honor says that is proper, but I shall reserve——

Court: Do you object if Mr. Bergen deos not embody in his question all the details?

Mr. Carton: If my question is objectionable, he should state his objection, so I may reframe it.

Court: He objects on the ground that the question does not give all the facts given in the testimony of Mr. Howland, his son and Captain Pearce, to which you have directed the witness's attention, and on which you ask him to base his opinion. Mr. Bergen says he is willing to withdraw that objection, if he be accorded the same privilege by you, that if he should not embody the same facts in his hypothetical question to his experts, you will not object.

Mr. Carton: This is my notion; these witnesses are here and they heard the testimony and the experts are intelligent men.

Court: If you and Mr. Bergen are in accord, then it may go in.

A. I firmly believe that the maintenance in its integrity of the dike put down by the government extending back to the fixed island at Stump Point, is absolutely necessary for the permanency of the situation north of the dike.

Court: The property, in other words, as it has been outlined by counsel, covered by this mortgage?

Witness: Yes, sir.

Q. And by the permanency, do you mean the preservation of the beach front on the premises in question?

A. Yes, sir.

Q. And if that dike were permitted to get out of repair, as has been intimated, the condition of repair in which it was in 1914, and had not been repaired, what do you say with regard to whether or not there would have been a recurrence of conditions existing prior to the erection of the dike in 1882?

Court: 1878 as they claim and 1882 as you claim.

A. I think there would have been such recurrence, dependent upon the extent to which the dike was allowed to become ineffective.

Q. Have you examined the premises and the dike recently?

A. Yes, sir.

Q. Did you observe or have pointed out to you the repairs made by Mr. Howland in 1914?

A. Generally.

Court: What was pointed out?

Witness: I think not so much pointed out, as referred to in the general conversation between the counsel in the case and Mr. Howland.

Court: Mr. Durand and Mr. Carton?

Witness: Yes; attention was called, however, to the intervening new piling between the old piling as testified to by Mr. Howland, and to the general form of construction.

Q. Keeping in mind those repairs as pointed out by Mr. Howland and in this conversation with counsel, and keeping in mind the situation that has been testified to here by the preceding witnesses, what do you say with regard to whether or not the repairs made by Mr. Howland were proper repairs made at that time for the preservation of this beach front?

A. The results convinced me that they were proper repairs and effective.

Court: And those results are what?

Witness: The maintenance of the beach front and the preservation, which is a corollary to the maintenance of the inlet in its present shape and position.

Court: If the inlet were not cared for in its present shape and condition, would it be of any advantage or injury to the property covered by this mortgage?

Witness: It would result in its disappearance.

Court: It would be washed away?

Witness: Yes, by the river taking its typical course and washing away, and then recurring through the years.

Q. It has been inquired in this case of a witness whether or not a repair which would act as a preservation of this beach could not have been made by Mr. Hinchman in 1914, by having Mr. Howland extend a short jetty, as so called, from the west end of the cribbing northwesterly to the sand dune; what have you to say with regard to the advisibility or practicability of making any such repair at that time?

Court: Aren't you really anticipating their case? Isn't it properly rebuttal?

Mr. Carton: I don't want to bring him back.

Court: Then I will receive it now.

Mr. Carton: Unless Mr. Bergen will put his experts on after we get through.

Mr. Bergen: That is satisfactory to me.

Q. In your employment as secretary of the former Riparian Board, did you make any investigation of any reports of the government in connection with this dike?

A. Yes, sir, my duties required that I should be conversant with the reports of the government on the various waterways of the state, and in that connection I became acquainted with reports on this particular project.

Q. Were there reports made on behalf of the government concerning this particular project?

A. A great many.

Q. Have you those reports with you?

A. Yes, sir.

Q. When was this matter taken up by the government in such a way that it resulted in the making of the reports?

A. I think it was in 1878.

Court: Were there any others?

Witness: There are reports from 1878 to 1914.

Court: Annually?

Witness: Not annually; there are intervals between; there are perhaps some fifteen or sixteen reports during that interval.

Court: All in relation to this inlet?

Witness: Yes.

Q. Do you acquire those reports in connection with your duties as secretary of the Riparian Board?

A. Yes.

Q. And do these reports treat of the dike of the Manasquan inlet?

A. Yes, sir, with other improvements.

Q. Can you direct attention to any particular report beginning in 1878 covering this matter?

A. The report of 1878, makes reference to the survey, under the River and Harbor Act of June 18, 1878, and in 1879, Colonel McComb made a report on the same, and on page 463 of that report, he describes the inlet.

Mr. Bergen: I would raise the question that these are not admissible in this case.

Court: I will have to sustain the objection.

Mr. Carton: May I first inquire if Colonel McComb is the same Colonel McComb whose name appears as the engineer on the map, Exhibit C6?

Witness: I regard it so; I am taking it for granted that these are both government reports.

Mr. Carton: My position in regard to these reports is this: Mr. Payne is in possession of these reports, which seem to cover directly on the necessity for this dike, what it was supposed to do, and reports on what it had done.

Court: It appears from my view of the situation, that he is in possession of printed copies of the reports, is that right?

Mr. Carton: They are printed copies. It was our idea that they could be established as evidential, which I think we can, and might become evidential, and therefore helpful.

Court: If you so establish it, I will put them in. I would assume, like Mr. Payne, that they are government reports, but you will have to show it, before I can accept them.

Q. What is the title of the pamphlet before you?

A. "Annual Report upon the improvement of rivers and harbors in New Jersey, Pennsylvania and Delaware, in charge of J. N. Macomb, Colonel of Engineers, U. S. A., being Appendix E. of the annual report of the Chief of Engineers for 1879. Washington, Government Printing Office, 1879."

Court: You were reading that legend from a printed pamphlet?

Witness: Yes.

Mr. Bergen: I do not want to be technical on this kind of thing. If these are the records at Washington, and General Payne can tell, I don't want them to bring the records up.

Court: If you insist on your objection, there is nothing for me to do but to sustain it.

Mr. Bergen: I do not insist on technical proof. I withdraw by objection.

Court: Then I will accept the testimony.

Mr. Carton: I offer the one he has just read from, and pointing out the paragraph which appears on page 463—paragraph 6 and 7.

Q. Do those paragraphs treat ef the conditions that we are now inquiring about, Mr. Payne?
A. Yes, sir.
Q. Treat of Manasquan inlet?
A. Yes.
Q. Read them.

Court: That is all you wish from the pamphlet?

Mr. Carton: Yes.

A. "The inlet at the date of the survey had the position shown on the chart, with about 1 foot to 18 inches of water at low-water on the bar; and was

slowly working to the northward by wearing away the main beach on the north side of the lowest bend, the south beach following.

"Subsequent to the heavy storm of October 23, ultimo, the inlet broke out nearly in the position of the proposed jetties. This action is entirely characteristic of the habit of the inlet. Its normal and effective position is the present one, viz.: On the prolongation of the inner neck which does not vary. At such times the low-water depth on the bar is from 3 to 4 feet, or more. The inlet does not, however, remain in this position but gradually forms the S shown on the chart from the northward movement of the sands along the front beach."

Court: Can you indicate on Exhibit C6 the inner neck referred to in that paragraph?

Mr. Carton: I was about to inquire whether there was a chart or survey attached to this report.

Witness: It relates to the survey of 1878, of which C6 is a copy. The inner neck is the section of the river from Stump Point running west; it is the fixed regimen of the river.

Q. Have you any additional reports?

A. In the report of 1883, page 584, there is a reference to the situation at that time. Third paragraph: (Reading) "The dunes north of the inlet have increased in height and the beach line has advanced outwards; and the lagoon north of the north jetty has very materially diminished in depth and extent, thereby increasing the probability of the future maintenance of the inshore part of that jetty. The inlet is in a very encouraging condition, and

I would recommend a continuance of the construction of the north jetty, which appears to be the more important one."

Q. What is that report?

A. That report, reading from the outside cover: "Annual Report upon the Improvement and Rivers and Harbors on Western Long Island, in the vicinity of New York City, and in Northern New Jersey, in charge of George L. Gillespie, Major of Engineers, BVT. Lieut. Colonel, U. S. A., being Appendix F. of the Annual Report of the Chief of Engineers for 1883."

Q. Is the jetty referred to in that extract the government dike we have been talking about?

A. Yes, sir, they call it the north jetty.

Q. Can you point out on the map before you the lagoon referred to in the report?

A. The lagoon is the body of water shown on Exhibit C6, lying between the ocean beach and the main island to the west, which the southern point of is marked as Stump Point.

Q. Have you any further reports on this subject?

A. Yes, sir, there is a report in 1900; there is a general report issued by the United States Government Engineer's Office, entitled, "Manasquan River, New Jersey, March 21, 1914," which report is a general history of the examinations and activities at Manasquan inlet and on page 5 of that report, as part of the fifth paragraph, it states: "A project for expending the balance of funds was submitted April 28, 1904, and approved by the Chief of Engineers, April 30, 1904 (Annual Report of the Chief of Engineers for 1904, p. 1156). This project was modified in October, 1904, as a result of a survey, the map of which is printed in Annual Report of the Chief of Engineers for 1905, between

pages 1056 and 1057. The north dike was repaired under this project in 1906 (Annual Report of the Chief of Engineers for that year, p. 1017). Nothing further was done. In 1909 the unexpended balance, $4,945.89, was carried to the surplus fund of the Treasury.''

Q. I direct your attention to a further reference in the report from which you have last read, covering this project, at the bottom of page 10, at the foot of the single space type in the center; will you read from there on?

A. ''It will be noted that while there is a very general local desire to have the United States undertake the work, navigation proper, commercial navigation especially, seems to hold second place to other advantages desired by the writers.

''13. Commerce.—There is no existing commerce entering or leaving via the inlet.

''14. Survey.—There is no need of a survey. The inlet and adjacent beach is continually shifting, and nothing could be learned from a survey beyond a knowledge of conditions temporarily existing. A real improvement, resulting in a permanent Atlantic mouth for Manasquan River, would require jetties, of which the cost would be out of all proportion to the benefits secured. I am constrained to report that Manasquan River is not worthy of further work by the United States for its betterment or of the cost of a survey on which to base well-considered plans and estimates of cost of jetties for the purpose.

Frederic V. Abbot,
Colonel, Corps of Engineers.''

Q. Have you any other reports bearing on this situation?

A. Yes, sir.

Q. Dealing with the conditions there?
A. Yes, sir, there are eleven other reports.

Court: From what source?

Witness: From the same source,—reports to the United States Government by the government engineers.

Mr. Carton: I haven't seen these additional reports; we have the reports treating of the report at the time and again in 1914, and without knowing what they cover, I offer them.

Court: You can reserve the right, on examining them, to offer them, if you find it necessary.

Cross-examination:

By Mr. Bergen:

Q. Have you got the report of 1882 there?
A. No, sir, I have not. It is referred to in the index which I have, but my file is incomplete as to that. The index refers to "S. A. Kelly timber jetty construction, 1883. 585."
Q. General Payne, what was the purpose of the government building that dike there?

Court: If you know, you may state.

A. I could only state from my knowledge of what the purpose of the government in all such general improvements is.

Court: Does he know any more about it than we do?

Mr. Bergen: I don't suppose so.

Q. Have you from these reports gathered how much that dike cost the government when it was erected in 1882?

A. No, sir; it is contained in the report I last read from, but I haven't calculated the amounts and cannot say.

Court: The report you last read from being marked "J. P. C. 1914?"

Witness: Yes.

Q. Can you tell from that report? (Witness shown report.)

A. Distributed through this report are the costs at different times; for instance, on page 3, paragraph 2, "work already done," it proceeds to state the amount appropriation and cost estimated.

Court: Have you got it somewhere?

Mr. Bergen: No.

Witness: On page 584 of the report of 1883, at the bottom of the page it appears: "Original estimate (revised) $72,000.00; Amount expended exclusive of outstanding liabilities $32,874.46; Amount appropriated from March 3, 1879, to August 2, 1882, both inclusive, $39,000.00."

Court: Is that the pamphlet marked No. 2?

Witness: No. 2, the same page.

Mr. Bergen: In the book of 1883.

Q. Then as it goes on and states "Amount (estimated) required for completion of existing project $33,000.00," does that mean for the completion of the dike?

Court: How can he say anything more than what is stated there? He didn't compile this report.

Q. Does that report not show—you can help me on this—that more money was expended than $32,000 for that work?

A. I wouldn't like to answer.

Q. Has the State of New Jersey ever determined the riparian lines at this entrance of the Manasquan River?

A. No, sir.

Q. Then what rights have the adjoining owners who have not purchased riparian rights to go out and construct out on the dike line of the government?

Court: That is a question for the Court to determine.

Q. Was the land in front of this land in the river ever taken up by the owners of this ripa?

A. No, sir.

Court: In front of this particular land?

Mr. Bergen: In front of this particular land.

Q. Does the establishment of a government bulkhead line conclusively conclude the State of New Jersey in this establishment of this bulkhead line?

(Objected to. Objection sustained.)

Q. Would the preservation of this government dike, not in its entirety running into Stump Point, but only part of that distance, have insured the protection, in your judgment, of this land north of it?

A. No, sir.

Q. Then in your judgment, the work done by Mr. Howland was not sufficient to protect this land?

A. In that I understand the work done by Mr. Howland was a repairing of the government dike which ran to Stump Point, which was effective.

Q. Did he run his repairs to Stump Point?

A. I don't know; I am only speaking of the integrity of the government dike to Stump Point as having been effective in preserving the status of the land north of it.

Q. Suppose that government dike was not preserved to Stump Point, but was preserved on the eastern shore of Short Creek, what would be the effect?

A. I should apprehend that in time the waters of the Manasquan River would find their way back of the dike and would render the part built ineffective and would finally follow its natural progress to the north, as has been stated.

Q. Therefore, such a construction as that would not, in your judgment, protect this land—not going to Stump Point?

A. No, sir.

Q. Where do you fear in your opinion the water affecting this land?

Court: In the absence of the bulkhead or with the present bulkhead?

Mr. Bergen: In the absence of the bulkhead, with the old bulkhead as it was in 1914.

Witness: What is that?

Q. Where would you fear the water attacking this land?

A. I would fear both from the ocean front and from the attacking of the river flowage in the rear of the dike.

Q. Where would that flowage in the rear of the dike go, in your judgment and fear?

A. Where would it be effective?

Q. Where would it affect this land?

A. It would overflow the land and would gradually eat out the support of the bulkhead and tend to restore its natural condition and render the bulkhead or jetty ineffective and of no account.

Q. Had it done that since 1882 when it was erected?

A. Not while it was in its integrity.

Q. Had it done so while in its integrity?

A. To the extent that its being out of repair allowed the water to eat in; it had impaired the uses or the purpose of the bulkhead by taking away the sand back of it.

Q. What were the uses and purposes of that bulkhead as established by the government?

Court: If you know.

A. That is the same purpose you asked before. I can only say what the general purpose of such improvements are, as his Honor has indicated, that it was not for the protection of the land, but for the——

Court: Isn't that what you will have to contend for and argue?

Q. What part of the land was attacked by this flowage back of the bulkhead?

A. That part of it that came in contact with the water and with the effect of the water that was allowed contact with the land back of it.

Q. That is the western part of that land?

A. I don't understand the reference; it is the part of the land adjacent to the bulkhead or jetty which had failed, and a part of the part that the water so getting in by reason of the failure, had access to.

Court: In other words, where the old bulkhead was rotted or broken away, it gave access to the water and washed away part of the land?

Witness: Yes, and that water still may continue its effect.

Q. You say that the work done by Mr. Howland would not be of value for this purpose unless it reached over to Stump Point, as I understand it?

A. No, sir, I didn't intend to say that. I don't think I specified Mr. Howland's work. I don't want to be captious, but my idea is that the general plan devised by the government extending a continuous effective bulkhead back to Stump Point in line with the main line of the fixed river, was absolutely necessary to preserve the status of the land north of the bulkhead or jetty.

Q. Suppose instead of running it across the creek to Stump Point, it ran at right angles into the meadow land of the beach property at Short Creek, what effect would that have?

A. I should think it would invite the waters of the river to flow through there and erode or cut away the beach, and attack the beach in the rear.

Q. In other words, in your judgment, if the government dike had been repaired by by Mr. Howland or anybody, not reaching across Short Creek or to Stump Point, but cutting across on the eastern side or back of Short Creek into the meadow land of Short Creek, that would not be effective in protecting this land, but would naturally invite trouble?

A. I think so, yes, sir.

Court: In the situation supposed by Mr. Bergen's question, there would be nothing to prevent the main neck of the river going through Short Creek, would there?

Witness: No, sir.

Court: To strike the beach north of the jetty or bulkhead?

Witness: Yes, sir; the river and outlet might then find its way through Short Creek instead of going on to the natural outlet.

Court: And would then come in contact with the beach?

Witness: Yes, sir, and might flow out where it went out in 1868, as shown on the map.

Q. Is that the reason you considered it would merely be apt to invite trouble, General Payne?

A. I don't quite understand your question "merely". In answering your question, I think that would invite the flow of the river through that natural channel, the first channel that it would

meet, and the action of the southern spot, the natural action of the beach front being to make up, there would be the attack, and the water would get out the first place it came to, and that would seem to be about the first place it would come to to get out.

Court: It would be in fact; there isn't any other place?

Witness: Yes, sir, that would be the first outlet it would meet.

Q. In the present condition of that where would this place be where it would have this outlet?

Court: In the present condition now?

Witness: In the present condition.

Q. In the condition of 1914, before it was repaired?

A. To the extent that the jetty was allowed to get out of repair, its first outlet was through the disintegrated jetty.

Court: Through any break in the jetty?

Witness: Yes, sir, but that was a limited quantity, and to only the extent that it was out of repair, was that disastrous.

Q. Would that have been sufficient, in your judgment, to have cut through the beach to the north of the crib?

A. That is a question that would be largely a matter of opinion, and it would be a matter—the

extent of the disintegration of the bulkhead. The action of the ocean front, as we who live on it know, is very serious and hard to define.

Court: I suppose it would depend also on the volume of the river that went through the break?

Witness: Yes, it would depend upon how much of an opening there was there, how much you allowed the government jetty to fall into disrepair.

Court: If it were 10 feet or 100 feet opening it would be a greater danger?

Witness: Yes.

Q. Was not the beach high enough to preclude any danger there?

A. It does not when a force of that kind is exerted there.

Q. Would not the crib prevent that force being exerted?

A. You are talking of a situation where there is no crib; you are talking of west of the crib and where the jetty has failed. My answers are directd to that situation.

Court: That is my understanding, because Mr. Howland did not repair the crib, and only west of the crib, and your examination relates to the Howland repair.

Mr. Bergen: That is correct.

Q. You state that if the government dike had not been repaired all the way over to Stump Point, but had been repaired——

Court: He hasn't said that because he said he doesn't know whether Howland's repairs extended to Stump Point, but if the government dike had not been constructed and maintained to Stump Point; that is correct?

Witness: Yes, it depends on the integrity of the jetty being maintained from the ocean to Stump Point.

Q. If it is not maintained across the Short Creek but is allowed to get in disrepair there and go out there, do you consider it would be effective to this point of land?

A. Yes, sir.

Q. What effect would it have there?

A. It would have the effect to the extent that it operated force enough to wash it away, and to restore, as I have said, the natural conditions. If you open up the way for Manasquan River to the north, whether it is going where it naturally went out before the jetty, or whether you let it out at Short Creek, the effect would be the same, to destroy the status of the land to the north of the jetty.

Q. What do you mean by "let it out at Short Creek"?

A. What you have said: practically leaving an opening at the mouth of Short Creek, practically leaving that for the river to find its way out there, it would restore the natural conditions of working the inlet to the north instead of going a little farther to the east as it does naturally.

Q. Where would it run; would it run out at the inlet which is marked on this map "Inlet of 1868"?

Court: Where it would break through the beach.

A. You could take the experience of the years and make up your mind to guess at it, but you cannot tell where the ocean will break through.

Q. I really do not understand you. Do you mean that it would break out by flowing along the north side of the jetty and then the north side of the crib, and then gradually eating up the beach, establishing a current just north of the jetty; or do you mean there would be a separate break out above where the inlet was in 1868?

A. The river might find its way out, there might be two outlets, with the jetty in its integrity from the east side of Short Creek to the ocean; I might work out through the Short Creek and find its own way out by eating the land to the north of the jetty and find its way out north of the jetty; and there might be two outlets for Manasquan River; there might easily be.

Q. Would it not eliminate that danger if you put a cross dike across from the government dike into the marsh land to the east of Short Creek?

A. No, because, Mr. Bergen, when you decrease the current, the flow of the body of water of Manasquan River has a tendency to keep the inlet open. The reason this point of spit of sand makes up to the south is, the flow of the Manasquan River keeps the inlet, but the action of the currents and winds carry the spit up along the ocean front; but if you decrease the flow out of that natural inlet by diverting it into Short Creek, then you increase the tendency to close up the natural outlet, and it would find its way out where no one can tell.

Court: The point of least resistance?

Witness: Yes, sir, the weakest place.

Q. But is there another outlet of Short Creek which would thus reduce the flow?

A. It would find its way gradually out somewhere in the weakest place, and the Manasquan River would find its outlet into the ocean somewhere.

Q. Is it not a fact that at the present time, that beach—that those sand dunes have become so high that it couldn't break through?

A. No, sir, the ocean could break it through in two or three storms; in perhaps one storm.

Q. Has it done so since 1882?

A. No, sir; because the jetty has been practically intact and kept the water going out in one continuous flow, but it has since 1882 washed away a much greater extent of beach front in Monmouth County and Sandy Hook where I live, and washed over into our homes; washed away two or three hundred feet of beach, and washed way into our homes.

Q. Was not this jetty in ill repair in 1908, according to the report you read?

A. Yes, sir, it needed repair.

Q. Has this broken through since 1908?

A. No, sir.

Q. Do you know how far before that this jetty has been in bad repair?

A. No, sir.

Q. Do you know how long it has been since this jetty did preclude water flowing between the Isle of Sedges, which is Stump Point, to the beach property?

A. Only from the reports, when it became necessary, when it seemed to the government engineers that repairs seemed necesary; that is the only information I have on the subject.

Q. You have been familiar with that beach for many years, have you not?

A. Yes, sir, since 1878.

Q. How long is it since you recall that that government dike has not been a good dike across Short Creek?

A. A great many years, but varying in extent—degree, I mean. The fact of being out of repair is in degree; at first there would be a plank here and there off, and then several, and finally—and then you must take into account the conditions that were set up by the integrity of that dike; it would take years to overcome that barrier. The construction of that dike allowed the beach to build up, and it would take some time for the river water, not so long for the ocean water, but it would take some time for the river finding its way through this dike, which was more or less out of repair, to have much effect on the western side of the high dunes that it built up.

Q. In your judgment, the repairing of this government dike, putting it in first class A-1 shape until you came to the eastern shore of Short Creek and connecting it to the eastern short of Short Creek, but not crossing Short Creek, would have no value to this property, is that correct?

A. I didn't say so, and I don't believe so. I think it would have a limited value, and by "limited," I mean its effect would be limited in time; it would be some time before you would be diverting the flow of Manasquan River—some time perhaps before the natural outlet would be closed up and you would set up a new outlet, but I firmly believe in time you would restore the ordinary natural action of ocean front inlets.

Q. It certainly would therefore not eliminate the danger, in your judgment, to this place?

A. Following the short spur dike, no, sir.

Q. Or building a dike over to the east side of Short Creek and spurring that over to connect into the meadow of the east shore of Short Creek?

A. It would not eliminate the danger to the property in question.

RODERICK A. CLARK, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Where do you live, Captain?

A. Point Pleasant.

Q. Lived there for some years, have you?

A. About 68.

Q. How old are you?

A. 74.

Q. What is your business?

A. I am in the boat business, boat builder and renting of boats.

Q. On the Manasquan River?

A. Yes.

Q. And in addition to building boats, have you sailed boats in and out of the Manasquan River?

A. Yes, sir, sail boats, launches and everything of that kind.

Q. Were you familiar with the mouth of the Manasquan River before the government built the dike in 1882?

A. Yes, sir, I was acquainted with that when I was ten years old.

Q. Is there any difference in the location of the inlet now or say after the dike was built, from where it was originally?

A. The inlet is now a trifle south of where the dike is now. Before the dike was built, when the inlet was open, the inlet almost at once commenced working northerly, and would work northerly until I have see it as far north as the Bailey pavilion; I have never seen it any further, although I have been told that it went further.

Court: How far is Bailey's pavilion north of the present dike?

Witness: It must have been very close to half a mile.

Q. Up near the Brielle Road?

A. Yes.

Q. And as this inlet would work north, would the natural inlet or the permanent inlet fill in and close up?

A. Fill up on the south side.

Q. Spit up on the south side?

A. And the opening would work north, and as it worked north the inlet itself as it moved north, the sand would keep following from the south.

Q. Then how would the regular inlet relieve itself; would it open from natural causes or would it be dug out?

A. Of course it was only natural causes, because there was no dike or nothing to hinder it from going where it pleased, as the winds and water and currents would cut the sand away.

Q. And as this inlet worked north from where it is located now, what effect would it have on the strip of beach where these bungalows are now located?

A. What effect did it have?

Q. Yes.

A. At times it took it all away; there were times

when the inlet run over every portion of that beach —ran where every portion of that beach is now up as far as Bailey's pavilion.

Q. All the way from the dike up to about the point of the Brielle Road?

A. Yes, sir.

Q. The inlet has been over every point of that strip there?

A. Yes, sir, it has been to my knowledge.

Q. Before this dike was put in, Captain Clark, what sort of a strip of beach was that there from where the dike is located now north of the Brielle Road?

A. It is very much the same as it is now, very near; there is very little difference; it is a little wider than it was then.

Court: Was it as high?

Witness: It is as high on the beach side, but not so high on the inner side; there was low flat land on the inner side, but not so much of it; I think the strip of beach is now wider considerably than it was at that time.

Q. And you are not prepared to say whether it is any higher in your judgment?

A. I don't think there is any difference in the height, that is, in the main part, where the sand hills are, I don't think they are any higher.

Q. And when this inlet which you referred to would work north, I suppose these sand dunes would be wiped out?

A. Yes, they were at times and filled up on the other side.

Q. A constant shifting and changing of that strip of beach?

A. Yes, there would be no certainty where it would be.

Cross-examination.

By Mr. Bergen:

Q. Where is Bailey's Pavilion in reference to Brielle Road?

A. There is one road that goes exactly down— the Brielle Road comes right out by Bailey's Pavilion.

Q. To the north or south of it?

A. I think practically right at the road; I think the road that comes down from Brielle across the meadow comes out by Bailey's.

Q. Do you recall which side of the road the pavilion is on?

A. I think it is on the south side: I think it is just on the south side; that is my recollection of it.

Q. Did you ever know that this inlet came out by the life saving station?

A. No, I never did, but I have been told that it come there.

Q. Where is the life saving station in reference to Brielle Road?

A. That is probably two or three hundred yards further north.

Q. At the Brielle Road?

A. The Brielle Road I am speaking of; one comes down from Manasquan and the other one comes down from Brielle.

Q. Captain Clark, Short Creek used to have a big bay come in on the beach, a big inlet?

A. Bigger than it is now, but I wouldn't call it a big one.

Q. But it is now practically a big straight narrow creek?

A. As I say, there was more water there than there was land; where there is land now there was water a few years ago.

Q. And is it not true that the dunes have built quite high along that beach?

A. About the average height along the beach; I don't see any difference in that respect.

Q. Haven't they got a great deal higher since these houses were built there?

A. I don't know that I can say that they have; they may have done so; I didn't notice it.

FOREMAN BAILEY, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Where do you reside?

A. Manasquan.

Q. What is your business?

A. I followed the sea up until a few years ago.

Q. How old are you now?

A. Seventy-four.

Q. Have you in your occupation following the sea, sailed in and out of the Manasquan River?

A. Yes, years ago.

Q. It was really a harbor at one time?

A. There were a number of vessels trading on it.

Q. And went in and out of the mouth of the river?

A. Yes.

Q. How long would you say that you recall, or rather what is the first time that you recall the condition of the mouth of the Manasquan River, how many years ago?

A. I was quite a boy, a good many years ago; I might go back until I was twelve years old.

Q. And when you grew up into manhood did you follow the water at once?

A. Part of the year, not steady.

Q. At any rate you remember the condition there long prior to the erection of the government dike, I assume?

A. Yes, although I wasn't about the inlet much of the time when that was being built; I have been up and down there a number of times since.

Q. While the work was being done you were not there much?

A. Yes.

Q. You knew the condition of the inlet and its courses prior to the erection of the dike?

A. Yes, sir.

Q. What was your observation as to the permanency or shifting or moving of this inlet from time to time?

A. It would be open at times, a very good inlet, and other times it would be very poor.

Q. Would it change in its location?

A. Oh, yes.

Q. And what was your observation as to how it changed and in which direction?

A. North, and at one time there was an island in the inlet called Egg Island.

Q. Was the inlet then in the same location that the inlet is at this time?

A. Not all the time, because it would shift; at times it was north of this Egg Island.

Q. And as the inlet would shift from the point of the present inlet on its journey north, what effect would that have on the strip of beach front there?

A. It would cut it away very badly.

Q. So that at sometime would the inlet cover all of the land that now makes up that strip through there?

A. I cannot recall it washing it all away entirely, but it was a very low beach if it left any, it was very narrow.

Q. It wouldn't wash it all away?

A. No.

Q. But at sometime it would cut out the entire strip of beach there as it worked north?

A. Yes.

Q. The life saving station has been referred to; was the life saving station located originally where it is at the present time?

A. No, sir.

Q. Where was it located before its present location?

A. Considerably south; I should think near halfway from where it is now to the natural inlet.

Q. Toward the Manasquan River?

A. Yes, sir.

Court: How far is it from the river now?

Witness: I should think it was pretty near a mile.

Q. And it was how much farther, half a mile or more?

A. It was about where the life saving station is now; I sailed out of it when it was very near the point now that this——

Q. That was a great many years prior to the erection of the government dike?

A. Yes, it was before the government dike was built. I don't remember how long.

Court: How would you sail; out through Short Creek?

Witness: No.

Court: How?

Witness: We went down around what beach was left; there wasn't very much left, outside of a little strip of land beach, along South Sound Point, extending north, clear up very near to where we turned to go out over the bar.

Court: That you say was some distance above the present outlet?

Witness: Yes, sir. We were driven out the inlet, in fact, to keep from getting shut up in the inlet; we went out light, without any cargo, and went to Barnegat for the cargo.

Q. Do you recall about when that was?

A. I cannot come within several years of it; I should think it was thirty or forty years ago anyhow.

Q. After the dike was constructed, as years went by, did you notice whether there was any change in the making up or otherwise of that strip of land?

A. I am not very familiar with the changes of the inlet since the dike was built.

Q. I ask you whether there was any change in

the strip of land where the shacks are located north of the inlet?

A. There has been a great change, I should think.

Q. Has the strip of beach built up more?

A. Yes, sir.

Q. So that now it has buildings erected upon it?

A. Yes.

Court: Is it wider and higher than it formerly was?

Witness: It is wider, but the original beach as it was when it would stay open long enough for the wind to build up the sand dunes, the beach naturally would make up, but it would take a few years for those beach hills to make up. The grass that grew up on the beach would gather the sand.

Q. In recent years do you know whether or not the dike got out of repair?

A. I think I have seen it when some of the planking would be hanging loose from the frame work.

Q. Did you pay any particular attention to the extent of the damage?

A. No, I did not.

Q. I don't suppose you have spent much time down there in recent years?

A. No, I went down yesterday and looked over the beach; it has been leveled to build those houses, so that it is pretty hard telling just how it used to be and where it used to be.

Q. There is an entirely different situation there from what you observed when you sailed in and out at that point?

A. Yes, sir.

No cross-examination.

SAMUEL A. ALLEN, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Mr. Allen, where do you live?
A. Manasquan.
Q. You have lived there for some time?
A. Yes.
Q. How old are you, Mr. Allen?
A. Sixty-five.
Q. Are you familiar with the conditions of the beach front at Manasquan?
A. I think so.
Q. Has your attention been directed to it because of any official position you held in Manasquan?
A. Yes.
Q. What official position did you hold?
A. Councilman of the Board of Manasquan, and I am now.
Q. Did you have something to do with the beach front as councilman?
A. On the first avenue on the land, which was laid out on contract.
Q. Where is First Avenue?
A. That runs parallel to the beach, from the station house to the dike.

Court: And on the beach?

Witness: Yes.

Q. Does that run just back of the bungalows built on the beach?
A. That runs, I think, about 400 feet from what we call the tide-water mark.

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Q. And that is back or west of the bungalows?
A. West of the bungalows.
Q. And east of Short Creek?
A. East of Short Creek.
Q. You remember the station down there before the dike was built?
A. I was in the life saving service at the time.

Court: Do you remember it?

Witness: Yes.

Q. And were you connected with the station located on the Manasquan Beach, the life saving station?
A. Yes.
Q. How long were you in that service?
A. I think it was four years, either three or four.
Q. And was that before the dike was erected?
A. About that time.
Q. Did you observe the course of the inlet at the time you were there in the life saving service?
A. The inlet at that time was about where it is now, where the dike is now, the natural inlet. When that inlet was dug out, I helped dig that out. Of course it has closed at times since; it has closed since the dike has been there, it has been dug out also, but since the dike has been there it has been permanent where it is.

Court: The inlet has?

Witness: Yes, the inlet.

Q. When at the times it would be necessary to dig the inlet out, would the then inlet be north or south of the present point of the inlet?

A. It would be north.

Q. When you would dig the inlet out did you always dig it out at the point where it is now located?

A. Yes.

Q. Believing that I assume to be the natural outlet?

A. Yes, supposed to be.

Court: How many times did you help dig it out above the present inlet?

Witness: Since it has closed?

Court: Since the dike has been there?

Witness: Since the dike, I never have: I saw it dug out.

Court: Before the dike was there?

Witness: Once.

Q. Did you observe where the river found its outlet to the ocean when the inlet would fill up in its present location before the dike was built?

A. The time that I helped dig it out, that is at the present place, that has been near fifty years —I will say forty-five anyway; then I waded across —I took my shoes off and waded across out near where the station house is—south of where the station house is at the present time, and walked down the beach and dug this out there.

Q. That is, you waded across the inlet, which was then south of the life saving station?

A. Yes, that was about 1400 feet north of the present dike.

Q. And with reference to the Brielle Road where was this inlet you waded across?

A. The Brielle Road is about between half and three quarters of a mile.

Court: From the dike?

Witness: Yes.

Court: How close to the point where you waded across?

Witness: This inlet was north of the present Brielle Road, about fully a quarter of a mile anyway.

Q. You say you waded across the inlet at that point; was it your observation or experience that as the inlet proceeded northerly, it became more shallow?

A. It was more shallow up where the inlet was running out at that time; when it was closed we opened it up, because of the prevailing winds to the south, as the inlet ran up, formed the sand dunes back of it, and the inlet went on the inside, still north, and this sand dune coming up back of it, kept extending the inlet north.

Court: How many different points on the beach between the present dike and the life saving station have you known the inlet to break through?

Witness: I never knew it to break through any point.

Q. Did it shift?

A. It would naturally shift south and north, but

the prevailing winds from the south would naturally keep it working to the north until it finally closed, and then they would dig it out.

Court: Have you seen the inlet shift to various locations during the years that have elapsed since the time you helped dig it out?

Witness: No.

Court: Between the dike and the life saving station?

Witness: No.

Q. Have you seen it have its outlet to the ocean at other points than the point that you waded across?

A. Yes, it would make its inlet as it kept going to the north.

Court: Then it would change its position?

Witness: Yes.

Court: I thought you didn't understand my question.

Q. So that at some time it covered all that point of the beach from the dike north to where you waded across it?

A. Yes.

Q. At the points where this inlet did not cross the strip of beach at that time how high was the sand built up or what was the extent of that strip of land there?

A. To where the inlet is now?
Q. Yes.
A. That was all low.
Q. From the Brielle Road down was it low?
A. All low.
Q. And wide or narrow?
A. It ran all the way right across the beach.
Q. Was the beach wide or narrow?
A. It was wide, just as wide as it is now.
Q. Concerning its height at times of great storms, would the waves wash over this strip of land?
A. Yes.
Q. Right across it?
A. Yes, ran right across it.
Q. It is considerably higher at this time, in your judgment, is it?
A. I should think it is eight or ten feet higher all the way from the dike. Right at the dike it isn't, but after leaving the dike, even on First Avenue, I should think it was fully eight feet higher than it was at that time.
Q. Do you know anything about the condition of repair or disrepair of the dike before it was repaired in 1914?
A. I saw the dike was going to pieces, that is, the wing on the dike.

Court: That is distinguishing the part from the crib?

Witness: I don't mean the crib, I mean west of the crib, and the tide was cutting through and it was taking this off and the sand was working back of it. I know I was two years in the life saving service substituting in '12 and '13, and we were looking after a telephone wire, and it took the sand

all off the caissons I help put in; I think it was to the bottom of those caissons, and I found them, and I said, "Isn't that astonishing, that green stuff that is cut out of the woods is just as pure as the day it was put under there" and they cut it all back up to way behind the double dike.

Q. Did you work on the dike when it was being built?

A. Yes.

Q. Those caissons put in there were in their original condition; you saw the sand was cut away and you saw them exposed?

A. That is how I noticed them.

Q. Did your official position as an official in Manasquan have anything to do with your observation of conditions there with regard to improvements or otherwise?

A. First Avenue the contract was 4200 feet; we didn't finish it. I think we lacked some 100 feet or more, on account of the tide—of this tide coming in and taking the sand out. It would have cost us an awful amount of money; it was out of the contract and we cut that out of the contract.

Court: Because of the water coming around the dike?

Witness: Because of the water coming in on it.

Q. Have you reference to the southern end, the end nearest the dike?

A. Yes.

Court: You stopped that improvement then because you were fearful of the danger that the broken condition of the dike was likely to cause?

Witness: Yes, sir.

Court: When was that?

Witness: That was in 1914, I think.

Q. Did you not then learn that Mr. Hinchman or someone else repaired the dike?

A. I saw someone was repairing the dike; I didn't know or ask no qustions about that.

Q. Have you observed the conditions there at the point that you have just indicated, since the repairs were made in 1914, whether they have improved or bettered?

A. Since the repairs were made we took the brush from the town, the trimmings from the trees, and we ordered it all taken in this fill.

Q. The extension of First Avenue?

A. Yes, to save expense of filling it, and that summer and last summer it filled all up over the sand, and now we have graveled it, and that sand was, I considered, from the improvements on the dike.

Q. The repairs to keep the water from cutting through?

A. Yes.

Cross-examination.

By Mr. Bergen:

Q. You are familiar with the dike up there?

A. Yes.

Q. Do you recall when that dike was cut loose from Stump Point, the government dike?

A. That government dike from Stump Point, it was never, I don't think, run clean up to Stump Point.

Q. You think there was always a hole between the dike and Stump Point?

A. I can recall of stepping off of there on the dike.

Court: Stepping off where?

Witness: Off the marsh on to the dike.

Court: Couldn't you do that if the wing of the dike had run into Stump Point?

Witness: Yes.

Court: How does that help your memory that it didn't run to Stump Point?

(No answer.)

Q. Did anyone tear the dike down across Short Creek?

A. I don't remember.

Q. You don't recall that?

A. No.

Q. Was it torn down?

A. I don't recall it.

Q. How long has it been since it has been built across the creek? The government dike comes up from the shore and goes in—does it go into Stump Point?

A. No, sir, it does not go into Stump Point.

Q. Did it ever go into Stump Point?

A. I don't recall exactly whether it went into Stump Point or not.

Q. Is it there now?

A. No.

Court: How far from the Point is it?

Witness: Fifty feet or more; I cannot recall exactly, but it is fully fifty feet.

Court: What separates it from the Point?

Witness: The water.

Court: How did you step from the Point then on the dike, with fifty feet of water between you?

Witness: That is when the government dike was placed there.

Court: You said it never ran to the point?

(No answer.)

Q. Do you know where Stump Point is?
A. Yes.
Q. Stump Point is on the Isle of Sedges?
A. Yes.

(Map Exhibit C6 described to the witness.)

Court: Where did the dike end, on the east or west side of Short Creek?

Witness: On the east end.

Mr. Durand: Then where did it end?

Witness: On the west end.

Court: If it ends on the west end of Short Creek, wouldn't that land it on Stump Point?

Witness: Oh, yes, that is correct.

Court: Which did it do, land on Stump Point or didn't it?

Witness: It did.

Q. Did the government dike when built in 1882 run into Stump Point?
A. I recall that running up to Stump Point.
Q. Does it run up to it now?
A. No.
Q. Did it in 1914?
A. No.
Q. How long since it ran up to it?
A. That I cannot tell; I cannot recall.

Court: What happened to separate it from Stump Point?

Witness: The currents cut the points off.

Q. Didn't the fishermen cut it off?
A. I rode through it.

Court: Do you know that the fishermen cut it off?

Witness: I don't recall that.

Q. How long ago did you ride through it?
A. I cannot recall.
Q. Hasn't it been separated from Stump Point for twenty-five years?
A. Yes.
Q. For twenty-five years it has been cut off?
A. Yes.

Re-direct examination.

By Mr. Carton:

Q. Mr. Allen, your recollection is, having worked on the dike when it was being constructed, that at the time of its construction it extended westerly to Stump Point?

A. Yes, sir.

Q. There is now an opening just west of the dike; do you know who made that opening there?

A. I thought nature, I don't know.

Q. You don't know whether the fishermen opened it to get their boats through?

A. No.

WILLIAM BAILEY, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Where do you live?

A. Manasquan.

Q. How old are you?

A. Fifty-three.

Q. What is your occupation?

A. I am in the railroad work at the present time.

Q. Were you formerly interested in the Manasquan Beach?

A. Yes.

Q. In what way?

A. I ran a bathing pavilion.

Q. Bailey's bathing pavilion?

A. Yes.

Q. Where was it located?

A. That is north of the Brielle Road, between the Brielle Road and Main Street.

Q. Just immediately north or a considerable distance?

A. A matter of 100 feet or more.

Q. On the beach front, I assume?

A. Yes.

Q. On this line of the lands, the same line of lands where the shacks are erected?

A. Yes.

Q. When did you first become interested down there?

A. In 1892.

Q. How long did you continue to operate that place?

A. I was there about twenty-one years.

Q. Consecutive years?

A. Yes.

Q. How long have you been familiar with the Manasquan Beach prior to when you started your business activities down there?

A. I can remember back probably forty years.

Q. Do you remember its condition prior to the erection of the dike by the government?

A. Yes, the beach at that time was low, without any low sand dunes from practically where the life saving station is now to the present dike or inlet.

Q. And with regard to the inlet itself, do you know whether that changed its course from time to time?

A. It was changing at all times until the dike was built.

Q. You observed that yourself being down there?

A. Yes.

Q. Is there any point on that strip of beach from the Brielle Road south of the dike that hasn't been cut away at times by the inlet?

A. Not on the beach.

Q. The condition is different since that dike was erected?

A. Yes.

Q. What is the condition of the strip of beach there?

A. The beach is made up considerably; the width is probably the same; of course there is a variance there, but it is practically the same.

Q. Any higher, in your judgment?

A. Yes.

Q. And it is now occupied by buildings?

A. Yes.

Q. Prior to the erection of the dike would the high seas sweep over this strip of beach there?

A. Yes, sir.

Q. Do you remember the dike becoming in disrepair prior to 1914?

A. Yes, I have noticed that steadily.

Q. What has been the effect of the increasing condition of the disrepair of washing off the planking?

A. That is it was faced with heavy planks and would wash off, and it would cause the current to cut in back of the dike.

Q. And had it cut in back to any extent prior to——

A. Yes, quite a current there.

Q. Had a lagoon formed there, or a body of water north of the dike?

A. Yes, quite some.

Q. Do you remember the dike being repaired in 1914?

A. Yes.

Court: What portion of the plank had washed off at that time?

Witness: At that time half the planking was off that dike, that is from the bulk up.

Court: From the crib across to the west?

Witness: Yes.

Q. And the effect was, you state, to cut in the sand back?
A. Yes, the current would cut through it, cut down and strike right through it.
Q. Have you been down there since 1914?
A. Yes.
Q. And have conditions improved there?
A. Yes.
Q. What is the fact?
A. Shortly after the storm, that is near the crib, the cofferdam has about leveled over with sand.
Q. On the ocean end?
A. Yes.
Q. Has that the effect of filling in back of the dike?
A. Where the loose sand is.

Court: Did you ever notice the effect, if any, on First Avenue?

Witness: It is filled up to First Avenue pretty well, but not beyond that much, on account of that being hard, and meadow.

No cross-examination.

JOSEPH BROWN, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Where do you live?
A. Como.
Q. You lived down there for some time?
A. When I have been home I lived there for sixty-eight years.
Q. How old are you?
A. Sixty-eight.
Q. What is your business?
A. Fishing.
Q. Have you held any official position in Como or Wall Township?
A. Committeeman from Wall Township at one time.
Q. The point of the Manasquan Beach north of the inlet, is that now or was it at one time in Wall Township?
A. Sure.

Court: It is in Manasquan Borough now?

Mr. Durand: It is now.

Q. During what years were you on the township committee?
A. Three years ago, I guess Manasquan was in the Borough then.
Q. Before you became committeeman?
A. Yes.
Q. How long have you been familiar with the Manasquan Beach north of the dike?
A. I haven't been down there lately much since

about 1882; when I was a boy I used to be around there a lot, crabbing and clamming in Manasquan and Shark River.

Q. Before the dike was erected were you ever there enough to become familiar with the conditions existing there?

A. Yes, sir, there was crabbing in about 1870 and the inlet ran right straight down where Deep Creek is.

Q. A continuation of Deep Creek across this strip of land into the ocean?

A. Right straight down in Point Pleasant Beach and go right on up to it. In 1874 there was a lot of us from our place went down to fish, and we started down afoot and went to the Manasquan Life Saving Station when they had the old road house there, and I think that is the only time I have been around Manasquan since I was crabbing, and at that time the inlet went out to the east of the house and north a litle bit, but it went to the east; we sailed across the inlet and went across the beach on foot.

Court: You say to the east of the house, you mean the life saving station?

Witness: Yes, it was a red house there and it stood pretty near where the life saving station is now, possibly a mile from where the inlet is, and Point Pleasant Beach ran all the way up to there.

Q. Have you known the inlet to have any other inlet except that point?

A. Not particularly.

Q. You are simply describing its location when you were there at that time?

A. Yes.

Q. You were not there constantly thereafter?

A. No.

Q. And know nothing about its shifting?

A. No.

Q. You know where it is located now?

A. Yes, I have been around there some since the dike was put in, but not enough to——

Q. What have you to say as to the condition of this strip of land from the Brielle Road south of the dike prior to the inlet and when you were down there as a boy?

A. That strip of land, if anybody that is familiar with those inlets, what works the inlet along the beach washes in from one side and blocks it up and that keeps driving the inlet off, and it keeps working and working until it gets way off so far that there is no inlet.

Q. And then it comes back to its original position?

A. Then it closed up. I haven't seen Manasquan so much, but I have Shark River several times, and every time there come a big sea it will wash clear over, and that keeps washing sand in and washing it further back.

Q. And it goes so far sometimes that the sea laps it over and closes it?

A. Yes, and there will be no outlet to run out of. After it closed, most generally in the summer time, men that have their oyster beds there are afraid that the water will get through and kill their oysters, and they all get together and go down there sometimes two or three days with their horses and scoops and dig this inlet out straight open.

Q. Where is it located now?

A. Straight down where it ought to be located, and then sometimes when they start——

Court: He is giving us the way he handled inlets generally.

Q. You haven't been down there very much recently?
A. No.
Q. I don't think you answered my question as to just the condition of this strip of land between the life saving station down to the dike before the dike was erected; that is, as to its dimensions, height, width and so forth.
A. I wouldn't like to hardly say, because——

Court: Were there any houses on it?

Witness: No.

Q. Was it as high as it is today?
A. I don't suppose it was.
Q. You haven't any knowledge about it?
A. No, I don't suppose there was a spear of grass or anything on it, because in three years it hove in and made the beach an inlet.

Cross-examination.

By Mr. Bergen:

Q. Where was that inlet in 1870 in reference to the Brielle Road of today?
A. Right straight down Deep Creek; I don't know where the Brielle Road came down on the beach.
Q. And in 1870 it was right down Deep Creek?
A. In 1874 it was this side of where the life saving station is.

Court: And that was about a mile from the dike?

Witness: Yes.

Q. Is that where the present life saving station is?

A. Yes.

Q. Then the old life saving station you think was about in the same place as the new one is?

A. Yes.

Q. In a storm tide how deep does the water get on the meadows back of the beach?

A. That is according to how big a storm it is; sometimes they come clear up to the road and all over the road.

Q. What is the deepest you have ever seen it?

A. I don't know; I have seen it so deep I didn't want to see it no deeper.

Q. How about the meadows at Brielle?

A. I have known them to be all under water in a big storm tide.

Q. Two or three feet?

A. I wouldn't like to say; they are covered and nobody wants to go on there to see how deep it is.

(Adjourned to January 11th, 1918, at 11 A. M.)

IN CHANCERY OF NEW JERSEY.

Continuation of testimony in the above entitled cause, before Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Long Branch, New Jersey, on Friday, January 11, 1918, at 1 P. M.

PRESENT:—Counsel as before stated.

EUGENE LONGSTREET, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. Where do you live?
A. Brielle, New Jersey.
Q. How long have you lived there?
A. Sixty-six years.
Q. Is that your age?
A. I will be seventy-two the fifth of June.
Q. What is your business, Mr. Longstreet?
A. My main business in my life has been spent around the water.
Q. Sailor?
A. Connected with the water most of my lifetime.
Q. You have been familiar with the Manasquan Inlet and Manasquan Beach for a number of years, have you?
A. Possibly fifty-five years.
Q. You remember the Manasquan Beach before the dyke was erected?
A. Yes, sir.

Q. Is there any difference in the situation down there now of the Manasquan Beach than existed prior to the erection of the dike?

A. Yes, sir.

Q. What was the condition of the beach front there north of the dike prior to its erection?

A. The condition—the situation of the beach was at times—a number of times, in a great deal different state than it is now.

Q. Generally, what was the difference in the make-up of the beach then and now?

A. To start in, as the beach is now, as I see it, the beach probably from the inlet north to the life-saving station is from five to seven feet higher on a level, as I see it, than it was say forty years ago.

Q. It is that much higher now?

A. Yes, taking it generally, hills and all, the level beach is from five to seven feet higher.

Q. Were you familiar with the action of the inlet there before the dike was erected?

A. Yes, sir.

Q. And what did you observe about that as to any changes?

A. To get to the starting point, to give you an idea of what we are talking about. I have helped open the inlet six times since I was about twelve years old; I was probably between twelve and fourteen years old when I helped open it the first time. Then it had closed possibly 500 feet north of where it is running over the bar now, and I helped open it once, and I forget exactly when that was—I think somewhere in the seventies. That was closed up by my father to save a thousand or fifteen hundred oysters he had in the Manasquan River.

Q. Is that north of the Brielle Road?

A. Yes, north of the Brielle Road; I should think it ran out possibly 100 feet to the north of where

the station house stood. The station house has been moved north, but I don't know exactly how many feet, but the inlet ran out in a northeast course from the station house, making it possibly 100 feet from the station house. That is the furthest north that I remember helping open it.

Q. When you opened it, where would you open it, at the regular inlet where it is now?

A. It would be opened in the judgment of the citizens living on the river as near to the main channel to give it a strong cut to make it as deep as possible and stay as long as possible at the lowest point of the beach. As the inlet closed up, it generally ran a southeast course to the bar, if that was a low place, 200 feet north—possibly 300 feet north of that where they could dig it out in one-third less time. To save time, they would agree to dig it out there. Then I have seen it once, and I don't remember exactly the time, when it was 400 feet south of where it is now, what they call the Brant Hill. It set there since I was a boy, on the south side of the inlet. A party at that time owned the beach and lived there in a shanty, named Brant, and that hill was named Brant Hill.

Q. That would be on the Point Pleasant side as distinguished from the Manasquan side?

A. Yes, probably 400 feet south from where it is running out now. I went down to look at the inlet day before yesterday, and it runs out about east, northeast course over the bar, a little channel 50 feet wide, to sea.

Q. All these instances that you have described, when you helped dig it out, they all took place prior to the building of the dike, I suppose?

A. Yes, sir.

Q. What is your recollection as to how long after the inlet would be dug out it would take its course

north, if it did take its course north, before you were obliged to dig it out again?

A. There was no limit at all. The winds as we considered, from the first of May until September, are three-fourths south winds, in the summer; if it was a dry summer, that inlet would probably start at the dike. I have known it, I think in six weeks, to work between three and four hundred feet north, when there were very low tides and no rains.

Q. Where the dike is now?

A. Yes, the southeast end of the dike. The south wind would blow that sand so the south beach would always be in that shape.

Q. What shape are you talking about?

A. I am giving a north course, and then we would go out 150 or 200 feet to the south point of the beach. The south beach always extends out beyond the north beach, out to sea.

Q. It builds up back of the inlet?

A. Yes, the south winds being in the majority and the heaviest winds in the summer, would lap the sand over what we call a bar flat that would fall flat at low water, and if there were no rains, that would be kept lapping on, and I have seen it in four months going 400 feet north.

Q. The sand would shift more by being dry?

A. Yes, so you cannot describe it one month from another.

Q. And during this period when it would take this course north would it cover the whole point of the beach there now where the shacks are erected? As the inlet proceeded north would it cover over or go over the entire strip of land where the bungalows are located?

A. No, sir, this channel, as I say, would form—this flat would be formed out over the bar; possibly and generally from the undertow to the bar is 300

feet. That sand would follow right on north to the various little inlets closer to the beach. The channel would whittle the beach away from 200 to 300 or 350 feet from the sand hill to the undertow, the ocean; it would whittle the beach of sand where the sand dunes are and would bring it square as this ceiling, and that would zig-zag along like a snake possibly until it got so crooked so that there wasn't water enough to keep it open; a little swirl stream would come and lap this point on the beach, maybe run to Stump Point, which runs a southeast course eight or ten acres. This creek has been there ever since I was a boy; sometimes it covered five acres; sometimes you could jump across it. Sometimes we boys would go off of Stump Point and dive into seven feet of water and swim there.

Q. Is that what is referred to as Short Creek?

A. Yes; the outlet is forced into—

Q. The entrance of Short Creek from the river, you mean?

A. Yes, that would be forced into this small passage.

Q. Then what would happen?

A. That would cut this point of meadow away where the dike was attached to Stump Point and that would fill up and make a big pond. Your other beach is all lapped on; the appearance of the inlet is gone. It is all one solid body of land. Then this will fill up in there and make that deep creek, this Short Creek; the tide comes out of the creek through that. Then this would get so full and by and by there would come a storm; then that storm—I have seen the whole beach, except the high sand dunes, which are higher today than at that time; the water is so deep across there that a man wouldn't attempt to go to the inlet—from the old station house. Twice I know that they wouldn't go down to the inlet and

change signals, because the tide was sweeping over the beach. After that easterly gale ceases, the wind naturally would go off northwest and blow a gale. Wherever this little stream is made, the tide is raised from two to five feet over the meadows in the stream, you have a big body of water. The lowest part of the beach finds its way out to the beach and makes its way north. That is the way that beach was handled from start to finish for fifty-five years.

Q. Do you say the force of the tides would take the water from the ocean over this point of the beach where the cottages are now?

A. Yes, so you would be in danger in the time of walking in a gale. The beach was so bad that the little shacks like tumbled down, and some of them went to sea.

Q. When was that?

A. Ten or twelve years ago.

Q. Was that some unduly heavy storm?

A. Yes, it was a heavy storm, and the beach at that time back of the main sand dunes was washed down flat and allowed the sea to come and break up to the main hills.

Q. Since the dike was erected in 1880 or 1882, what has been your observation of the change that has taken place there and brought about by the dike?

A. Evidently the dike has held the beach practically in the same position; there have been changes, of course, but nothing like when the dike wasn't there.

Q. Was it your observation some years after the dike was erected, that this strip of land between Short Creek and the ocean where the cottages are now erected, began to fill up and make land?

A. Yes, sir.

Q. Until you say it is some five or six or seven feet higher now?

A. Yes, I am sure it is five, and I wouldn't be surprised if you measured, that it will be seven feet over what it was forty years ago.

Q. This deep water you referred to diving off in, in Short Creek, is that creek or lagoon filled up with sand and made-up land?

A. It may fill up, as I say.

Court: Have you observed it being filled?

Witness: Yes, I think it is 140 or 150 feet in the wider place, not much water, and there is not much of it at present, but a northeast storm would come and you could sail a good sized boat.

Mr. Bergen: You mean Short Creek?

Witness: Yes.

Mr. Bergen: How wide is that?

Witness: 75 or 100 feet; I looked at that by the eye.

Q. Have you reference to when the dike was built, that width?

A. 200 or 300 feet; about half way up to big creek is the widest part.

Q. That is the widest place at present?

A. Yes.

Q. Have the cottages that are on the Manasquan Beach been erected there since the dike was erected?

A. I am not positive; there might have been one or two, but I should think ninety per cent of them has been built there since that.

Q. Captain Longstreet, living down there at Brielle, did you observe whether or not this dike

got in bad repair, or got out of repair, some years ago?

A. Yes.

Q. What did you notice about that?

A. I didn't take particular notice; my main notice was brought to it by fishing down there nights; we used to in the fall of the year, haul bass in there and go up along to the dike and be forced to take our boats up against the dike; we walked along towing the boats and I saw it ragged and open more or less.

Q. So the tides from the river went through Short Creek and north of the dike?

A. Yes, sir, that is north of the double span.

Q. Did you notice what effect, if any, this tide coming through there had on the beach north of the dike?

A. It was making quite a cove there, or pond; it probably covered a couple of acres, washing out the sand.

Q. Did you notice whether the dike was repaired?

A. Yes, sir.

Q. It was repaired in 1914 or 1915, is that your recollection?

A. I cannot say exactly the time, but I know it was done, because I was tending the drawbridge, which I have been doing for five years, the Manasquan drawbridge, and the timber that was brought there to repair it, was brought there and landed right by my bridge and boated over there.

Q. Since those repairs were made have you been down there to observe the effect on the land back of the dike, and what has that been?

A. That has entirely relieved the pond of water, and is dry sand.

Court: It has filled up?

Witness: Yes.

Q. Do you know whether First avenue ran parallel with the beach down toward the dike, and has been extended further south since the dike was repaired two or three years ago?

A. I don't know that I have noticed that.

Cross-examination.

By Mr. Bergen:

Q. Do I understand you to say that there is no water north now of the dike?

A. Nothing, unless it might be at high water a little when the tide rises, but not on half tide or low tide. The sand is blowed over from the easterly walks, as it does very quick. Forty-eight hours will raise that sand as high as I am, and it has cut through the old dike where it was torn up in places as long as this table, which was all open, the tide coming very strong.

Q. So that there is now no water between where the bend of the dike comes out at Short Creek all the way down to the crib?

A. I think nothing, only as the tide may rise at high water and rise inside, which rises down there from three to four feet, and a good deal of the low ground would have water on it at high water, where it would be dry at two-thirds of the tides.

Q. So that at no time, there is absolutely no water there?

A. Only as I saw it day before yesterday.

Q. Did you see it low water?

A. It was about half tide, yes.

Q. And no water there?

A. No, I could walk in shoes on and put my hand against the dike.

Q. And all the way up to the point at Stump Creek?

A. Within possibly thirty feet of Short Creek, when it was dry. When that hole was in there, it was over my head next to the dike. Stump Point is the extreme west end of the dike.

Q. When was the inlet north of Brielle Road opened?

A. I cannot give you exactly the dates of hardly any of them times. I think this was only once when we opened it so far north that it brought my attention more closely to it, on account of my father—he closed the inlet practically, he worked three days to close it to save his oysters, and that was about the seventies, '72 or '73.

Q. There was therefore an inlet which broke out north of Brielle Road?

A. Yes.

Q. And that was about 1870?

A. Somewhere in the early seventies.

Q. There was an inlet which broke out on the Point Pleasant side of the inlet?

A. No, it didn't break out, it whittled the south beach away on the Point Pleasant side, and ran to sea, as I said, 300 or 400 feet south of where it is now, but it couldn't break out there, because it is a solid meadow of 50 or 60 acres. It whittled that big sand dune down, which is 20 feet high above the level, to a square surface, between 300 and 400 feet south, but it never cut through, to my knowledge, any part of the beach south of the inlet.

Q. It whittled it away until the inlet was actually opened about 300 or 400 feet south?

A. All of 300, yes, sir.

Court: Did you ever see the inlet shift to the south on more than one occasion?

Witness: I don't remember of ever seeing it go to that point but once.

Q. Do I understand you to say that within the last ten or twelve years you have seen the tide break over the beach north?

A. That gale I spoke of, it is within twelve years that that gale come.

Q. Then did it break over the beach north of the crib at any point?

A. Yes, I think there was three what we call glades at high water, where the sea ran through there into Short Creek, in the low place.

Court: North of the dike?

Witness: Yes, and that was a very high storm.

Q. And this was since 1882?

A. That is probably about twelve years ago, when it ran over the low beach at that time.

Re-direct examination.

By Mr. Carton:

Q. When the dike was erected by the government, do you know to what point westward it was extended, the most westerly end, where it went to, with relation to Stump Point?

A. The northwest end of it connected on the Stump Point meadow, but there was an opening, and I cannot say exactly how wide. They left one bent

of dike, as I understood it and saw it. I helped build the dike the first time the government worked there. I know the fishermen said they couldn't get out, and they said, "You are going to make stagnant water in here in the summer." They left a bent six or seven feet without sheathing it, for the tide to run through, and then as I understand it, in the near future some of the fishermen went there and kind of tore the meadow up a little, and the tide working through cut that off and made a place to row in and out.

Q. On the west end of the dike?

A. Yes, the northwest end.

Q. That is west of Stump Point?

A. Yes, that is Stump Point really that was cut through.

Q. Was the dike extended westerly into Stump Point, solid land?

A. Yes, with this opening for the tide to go in and out.

Q. At the extreme westerly end?

A. Yes.

Re-cross examination.

By Mr. Bergen:

Q. How wide was that opening?

A. I should think they left that six or eight feet opening there so that the current would go through it, as I remember it.

Q. The government left that opening?

A. Yes.

Q. And then the fishermen tore it down?

A. They tore the meadow; I don't think they interfered with the structure; they dug on the meadow to open their passageway out. It was opened by crabs or something; it got opened.

ALEXANDER MOSS, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. You live at Brielle, Mr. Moss?
A. Yes.

Court: How far is Brielle from this inlet and dike?

Witness: About three-quarters of a mile; that is, the portion of Brielle where I live, in sight of it always.

Q. And is Brielle located on the north side of the Manasquan River about three-quarters of a mile west of the dike?
A. That is the portion where I am, yes, sir; it extends for two or three miles up the river, and is still Brielle.

Court: The nearest point to the dike and the inlet is about three-quarters of a mile.

Q. Will you indicate on this map about where Bartley Pearce's place of business is (Exhibit C 6)?
A. In here—indicating about midway between the bridge and Trunk Point on the map; here (indicating) is where I am.
Q. Is your location known as the Three Bridges?
A. Yes.
Q. And where does Captain Longstreet live, the last witness?
A. In back of the wagon road.

Q. What is your business?

A. Boats to let and crabbing outfits.

Q. You conduct a small crabbing and boating business at Brielle?

A. Yes, on the Manasquan River.

Q. How long have you been there in that business?

A. About three years.

Q. What did you do before that time?

A. I am a master house painter by trade, but a great deal of my time I spent on the Manasquan River and on the Atlantic Ocean in fishing boats.

Q. Have you sailed to any considerable extent?

A. Only around the river. I have been to sea some.

Q. And is it true that you fished off the beach a number of years at one time?

A. Yes.

Q. Have you been intimately acquainted with the situation down there at the Manasquan Beach for any number of years?

A. Yes, I am quite familiar with it.

Q. For how many years would you say?

A. From the year 1869 at least, quite familiar.

Court: How old are you?

Witness: Sixty.

Q. Your father was a sailor, was he not?

A. Yes, sir.

Q. Will you describe your recollection of the Manasquan Beach north of the present dike in 1869, if that is the first you had any recollection of it?

A. In 1869 the inlet was about opposite deep creek.

Q. Is that about where the Brielle Road runs down?

A. Right to the south of the Brielle Road, and

about where Brielle Road is, it varied probably a distance of 300 or 400 feet there for nearly a year.

Q. Do you recall whether the inlet was opened artificially or naturally at any other point?

A. It didn't close there; the inlet worked on beyond that nearly 2000 feet past where the life saving station now sits; some say they helped close it; I don't remember the circumstances; I know I did not; but some say it closed itself.

Q. Do you remember of it having been opened after that time?

A. They opened it with a little help there; it wasn't really tight, it would let a stream of water out; that ran probably for three months and then closed again absolutely tight.

Q. And you are talking now about at the most northerly station?

A. At the life station.

Mr. Bergen: That is way north?

Witness: Yes, I should think 2,000 feet north of the Brielle Road.

Q. When is your first recollection after that time that it was opened at the regular point of the inlet?

A. 1871 or 1872, but 1871 I think.

Q. Where was it opened then?

A. About where it is now; probably a little farther south.

Q. And after it was opened on that occasion, did you observe whether it worked further north or further south?

A. It worked north; it worked south for a while and then started back north again.

Q. And what was its action as it went north; how did it work up the beach?

A. It cut the sand hills all away and everything that was with it.

Q. Did it cut away the land that is now occupied by the bungalows on the Manasquan Beach?

A. Yes, it did.

Q. And as far north as Brielle Road again?

A. No, it never got as far north as Brielle Road again.

Q. How far up the beach did it go?

A. Probably three or four hundred feet from where it is now, and then worked back again, and then the government put a jetty or dike in there and held it where it is now.

Q. Before the government did put the dike or jetty in, will you describe the land, the condition of the beach there north of the dike up, say, to the Brielle Road?

A. There was a narrow strip of beach probably five, six or seven feet lower than what it is now; back of that was a wide strip of water which has since filled in, nearly all of it.

Court: Nearly all the strip of water has been filled in?

Witness: Yes; it was caused by the old inlet being there.

Q. And is what is left of that strip of water now known as Short Creek?

A. Yes, a very narrow strip.

Q. What have you to say as to the force of the wind or the tides before the dike was erected, as to forcing the water across this strip of land north of the inlet?

A. At times it was impassable, especially after storms.

Q. Was that because water was forced over it?

A. Yes, over into the meadows, over the top of it.

Court: The sea would break through?

Witness: Yes.

Q. Did you observe that on more than one occasion?

A. Yes, several.

Q. Do you reember when the dike was constructed by the government?

A. I do.

Q. Did you work on it?

A. No, I did not.

Q. You were living down there at that time?

A. Yes.

Q. Did you observe the extent of the dike, how far it went eastward to the ocean and how far it went westward?

A. It went out in the ocean, but I don't remember just how far. It projected out probably 75 or 100 feet, to my recollection; it went west to the solid meadow with perhaps a foot or two around the end of it, to what is called Stump Point.

Q. Did it go all the way into Stump Point?

A. It went in solid, but there might have been a foot or two of water around the end of it.

Q. Did you have any occasion to use the water north of the dike for boats or other purposes?

A. I did.

Q. And were boats kept in that location north of the dike in the early days?

A. Yes, and in Deep Creek.

Q. And on up into Deep Creek?

A. Yes.

Q. How were the boats gotten into the ocean or into the river?

A. Another entrance to Deep Creek that went west, and at times we would pull them over the sand hills; it was narrow across right where Brielle Road is now; we could pull them over.

Q. Pull them over into the ocean?

A. Yes, that was right after the dike was built. And at other times, when the tide was low, we would go down and drag them over the dike.

Q. Near Stump Point?

A. Yes, at Stump Point.

Q. Someone has said that crabs or some other agency dug some entrance or opening around Stump Point; did you observe that had been done?

A. I was one of the crabs.

Q. Do you know why that was done?

A. Yes, to let the boats around; while they were light, we could handle them; but if they had plenty of fish in them, we couldn't do it. We were going to have a passage around there without having a detour around of about two miles.

Q. Referring a moment to the force of the water, if it had any force, going over this strip of land, do you recall an instance of anything happening to the life saving station located on this beach in one of those storms?

A. The old life saving station you have reference to? Yes.

Q. What happened to it?

A. The tide came across there from the ocean and in the inlet combined it made it so high that it lifted it right off its foundation and went over across the meadow and landed within 200 feet of where I now live.

Court: And that old station was located about how far north of the dike?

Witness: About a little over half a mile.

Q. Near the present location of the Brielle Road?
A. North of that yet, north of the main road, right alongside of Main street.

Court: And when did that happen?

Witness: I don't remember.

Q. About how many years ago?
A. Twenty years ago, I should think.
Q. Before the dike was erected?
A. Yes.

Court: Twenty years ago wouldn't be before the dike was erected. Was it before or after the dike was erected?

Witness: Before.

Court: The dike appears to have been erected about 1882.

Q. This dike was erected likely along about 1882; will you tell us what you observed in the way of changes to the land north of the dike from that time, if there were any changes.
A. At first the inlet stopped travelling north and held it there in its place.
Q. It had that effect?
A. Yes; the next was the accumulation of sand raising up the beach higher and filling in back of it, in the old strip of water that was left there, for

nearly 4000 feet of water in back of it was filled up by the wash and wind—the wash from the ocean and wind.

Q. Was that a gradual increase in raising the height of the land there?

A. Yes, and is up to now.

Court: Did it widen the beach there much?

Witness: Yes.

Q. And at the ocean point of the dike where this jetty extended eastward what effect did that have on making up the beach there?

A. It made out the beach as far as the jetty and beyond it.

Court: The jetty originally extended about 75 feet into the ocean below high water mark?

Witness: Yes, the sand made out to it.

Q. Is that all made up beach out to the east end of the jetty?

A. Yes, with the exception at times probably after storm there may be a little incut in there fifteen or twenty feet.

Court: Is there any bulkhead on the beach?

Witness: Not within a mile and a half of the jetty.

Court: There is none on this property?

Mr. Bergen: No.

Q. How much higher would you say the land is now than it was before the dike was erected?

A. Probably from five to seven or eight feet.

Q. Have all these summer bungalows been erected there since that time?

A. Every one of them.

Q. Do you know anything about this dike deteriorating or breaking away some years ago?

A. I know that many of the planks were off of it at times.

Q. Did you observe that from being down there?

A. Yes, I helped on a survey of the beach down there, making a map of it, with Mr. Potter; we couldn't get to the dike at the end where the avenue is now probably by 100 feet, for water.

Court: What do you call that?

Mr. Carton: First avenue.

Court: In going south along the beach from the Brielle Road, you can go down the entire distance to First avenue?

Witness: No, we had to go around the end to get our marks on the dike.

Court: Because the sand had washed away?

Witness: Yes.

Court: By reason of these openings in the dike?

Witness: Yes.

Court: About how long ago was that?

Witness: I think it is about six years ago when we made that survey; about that.

Q. Did you observe any other effect the water had cutting through these openings in the land north of the dike?

A. Nothing more than cutting the land away.

Q. To what extent was it cutting the land away?

A. Cutting away to the extent that they had to move some of the shacks that were there.

Court: When you speak of shacks and bungalows, do you mean the same thing?

Witness: Yes.

Q. You have reference to the string of shacks or bungalows or buildings from the dike north of Brielle Road?

A. Facing the dike.

Q. Was the dike repaired to your knowledge?

A. Yes.

Q. And did you notice what happened after the dike was repaired with regard to cutting in or filling in north of the dike?

A. It was repaired twice, to my recollection; after the first repairs it seemed that it held everything where it was, until it began to cut to pieces again, and then it cut out some more.

Q. And it was repaired a second time?

A. Yes.

Q. What has happened since it was repaired the second time?

A. I was down there Sunday and looked over the place, and I found that it had filled in considerable of the old hole that was cut out there.

Court: Between the end of the road and the side of the dike?

Witness: Yes, the road has been extended on out where it was water.

Q. You noticed that the road that yourself and Mr. Potter were on had been extended southward toward the dike?

A. Yes.

Court: Could you walk down entirely to the dike on the beach?

Witness: You could where there was water, but not the whole length of it; when I was there it was the very top of the tide, but how deep it was, I cannot say.

Q. How extensive was the area?

A. Probably a width of 50 or 60 feet and one-half the length of the dike.

Q. As to the quantity of water or the space that the water covered north of the dike, had that decreased?

A. The water space had decreased considerably, but depth of it I cannot speak for; it was at one time, I know, quite deep in there, ten or twelve feet in places, I should think, right close by the dike; it may be so yet, I cannot speak for that.

Cross examination.

By Mr. Bergen:

Q. There is a sedge deposit, sedge land, is there not, next to the dike, up toward Stump Point?

A. At the extreme west end.

Q. Has that ever been carried away, do you know?

A. I don't think so, not that I know of; that sedge is still there yet; it has been under water many times, but the solid meadow is there yet. I examined that when I was on the survey with Mr. Potter.

Q. How wide is that sedge meadow along the dike; could you say?

A. Probably 100 feet; I wouldn't say exactly about that, because our measurements were made in chain lengths.

Q. Therefore that never carried out when this inlet worked north?

A. It worked around that, east of that; that was one side of what is known as Short Creek, that piece of hard sedge.

Q. And that never changed?

A. Not to my knowledge.

Q. And therefore your testimony means that the whole of that point did not work away because the sedge always stayed there?

A. The top cut off of it, what we call the grass; there would be no grass, only some spears would grow into it, and it wore away on the top so that at normal high tide that was really under water, but still it was there, it had never cut out entirely.

Q. And it had been there many many years?

A. Yes.

Q. Was it 1850 or 1860?

A. Yes, beyond my recollection, and was there when I first remember it, and they used to have a name for it in my boyhood, they called it Egg Island.

Mr. Carton: What is now known as Stump Point?

Witness: No, just east of that. Short Creek divides it.

Q. Did you ever see that beach when a high tide had cut in the beach which has formed northeast of the jetty?

A. Not so but what it was passable between the waves.

Q. Did you ever see that cut away?

A. Not so but what it was passable.

Q. You said you thought it had cut away perhaps twety feet of it; you have never seen it in that condition?

A. Yes, I have seen it work up further than twenty feet, probably 300 feet up north of the dike, but that was before the dike was put there.

Q. Since the dike has been there you never saw the tide cut in at a storm so as to cut that beach which has formed to the northeast of the crib?

A. Not to make an ebb and flood tide flow through it, no, but I have seen the waves wash over it.

FRED R. HABERLE, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. The constructions on the Manasquan Beach have been styled by different names; do you live in one of these buildings?

A. Yes, sir.

Q. In the summer time?

A. Yes, sir.

Q. Where is the building that you live in the summer time located with reference to the dike?

A. 500 feet from the dike north.

Q. And is it south of the Brielle Road?
A. Yes.
Q. How long have you lived there?
A. On the beach four years, four summers rather.
Q. What is the fact with regard to the erection of the buildings from the dike north to Brielle Road, are there a number of buildings along there?
A. Yes.
Q. A row of them all the way up?
A. Yes.
Q. What happened, if anything, to your building, because of the action of the water cutting in there?

Court: When?

Q. And when?
A. In 1914 I was obliged to move on the beach front; I then lived within 50 feet of the dike, where First avenue now is.
Q. You had a building erected there?
A. I bought there.
Q. What obliged you to move; the water cutting in, you say?
A. Yes.
Q. Where did it cut in, from the ocean or back?
A. It was caused by the high tides coming from the ocean and rolled the water along the dike and then washed in.
Q. How far were you from the dike at that time?
A. About 50 feet.
Q. Were you in the building nearest the dike?
A. Yes, sir.
Q. How many years had you been there prior to that time? 1914?
A. 1904, ten years.

Court: Do I understand you had to move your house about that time because of this condition?

Witness: Yes.

Q. Do you know whether there was anything wrong with the dike or whether it had broken back of your building?

A. Yes, the boards kept coming off.

Q. What effect did that have on the water coming through there, if any?

A. The splash would wash up on the north side and gradually cut the sand and work it down.

Q. Did you observe how fast that cut in there or how slowly it did it?

A. In the course of ten years I was obliged to move away.

Q. Because of the constant cutting in of the sand?

A. Yes.

Q. And you moved your bungalow then where?

A. About 500 feet north of the dike.

Q. And you are living there at this time?

A. Yes.

Q. Do you remember this damage to the dike being repaired?

A. Yes.

Q. Do you know whether there has been any change with regard to filling in north of the dike back where your bungalow originally was?

A. It has filled in about from where I lived on First avenue—I lived right opposite where First avenue now is—toward the crib.

Q. And filled in toward the crib?

A. Yes.

Q. Do you know whether the Manasquan borough officials have extended First avenue further south since you lived there?

A. Yes, they have.
Q. You know that has been done?
A. Yes.

Court: How near is it to the crib now, the end of the street?

Witness: The outside or to the dike?

Court: To the dike?

Witness: 75 feet.

Cross-examination.

By Mr. Bergen:

Q. Where is the highest point of this beach from Brielle Road down to the dike?
A. Mr. Griffin's place, nearest the dike.
Q. How far is Mr. Griffin's place from the crib of the dike?
A. Most 100 feet.
Q. Within 100 feet of the crib?
A. Yes.
Q. How high is it there, would you say?
A. Ten feet from the road level.
Q. Ten feet above the road level?
A. Yes.
Q. How high is the road level above the dike?
A. Three feet.
Q. That is above the high dike or the low dike?
A. The low dike.

Court: This is the first time I have heard of any such distinction.

Q. Will you be kind enough to tell us what this dike is; first is the crib?

A. The height is all the same at the present time.

Court: Of the dike?

Witness: Yes.

Q. Is the single dike the same height as the double dike?

A. Yes, all the same.

Q. And the double dike the same height as the crib?

A. Yes.

Q. That is correct, is it?

A. Yes.

Court: Then there isn't any such thing as a high and low dike now?

Witness: Not at the present time, since it has been repaired in 1914.

Q. Won't you be kind enough to go on with your description of the old dike in comparison with the present dike?

A. The old dike, the outside cribbing—

Court: You mean the government dike?

Witness: Yes.

Q. Before the repairs this is?

A. Yes, the outside cribbing would probably be 250 or 300 feet long, which is ten feet wide.

Q. The cribbing was 250 or 300 feet long and

about ten feet wide, and how high above the ordinary water?

A. Low tide—six feet.

Court: And high tide?

Witness: High tide, sometimes usual ordinary high tide, it was almost level, about level, and sometimes washed over three feet, and then goes to the double part of the dike, which is 250 feet long.

Q. Was that the same level as the crib?

A. Yes, that is the same level as the crib.

Q. We are talking now about the old government dike?

A. Yes.

Q. How wide was that?

A. Three feet.

Q. What do you mean by a double dike?

A. There is plank on the outside and a rail post and then rail and then post again, which would make it about four feet.

Q. With the sheathing on the outside?

A. Yes, four feet, or four feet six.

Q. That was about 250 feet long, the same level?

A. Yes, then you stepped down from the rail probably twelve inches to the single dike all the way down to Stump Point.

Q. About twelve inches lower?

A. Yes, about the thickness of a rail.

Court: Since the repairs were made, or as the result of the repairs, what changes were made in the height?

Witness: These were all made even with the out-

side cribbing, a foot higher than the lower part of the dike.

Court: And is that their condition today?

Witness: Yes, the same condition today it was yesterday.

Q. When did the dike first begin to get out of repair?

A. About the time I started to live down there in the summer.

Q. When was that?

A. 1905—'4—1904 I lived there.

Q. About 1904 or 1905 it started to get out of condition?

A. Yes, the next year after I lived there.

Q. Was there any water back of it then?

A. No, only below, to the right of me, toward Stump Point.

Q. But there was water down that way?

A. Yes, sir, at high tide or the rising tide.

Q. What caused this water to get in there, if you know?

Court: This water you have just referred to.

A. Because the land was low.

Court: Where did the water come from, the ocean or the river?

Witness: It come through the dike all around Deep Creek where this overflowed the meadow, as well as right near the dike, which was all on about the same level.

Q. How did this water begin to come in there on the other side from where it was in 1904?

A. It overflowed the meadows.

Q. Did the dike begin to get out of condition; what effect did the lack of condition of the dike have on this sand?

A. Then the boards came off and it gradually worked in there.

Court: The water did?

Witness: Yes, where the boards came off it would make a cut in there and keep on cutting until gradually it had a stream on the inside.

Court: If the boards were off then there was nothing to keep the water off?

Witness: Yes.

Q. In 1914 or along there, can you tell me where the easterly hole was in the sheathing there?

A. It was west of the cribbing, about ten feet.

Q. How far west?

A. It started within a few feet; sometimes at very high tide it would wash out more than it would in ordinary tide, and would work through close probably three or four or five feet to that wide cribbing.

Q. How wide was this hole at its widest spot in 1914, any hole?

A. The first one near the ocean, near the cribbing? I should judge 75 feet.

Q. And how wide was the widest part toward Stump Point?

A. It wasn't much wider than it was there, probably 25 feet.

Q. Did this keep a whole width of 75 feet, this hole there?

A. No, where the boards were on the sand would probably stay there, and where they were off, it would cut in more with the wash of the flood tide.

Court: Was it all washed out behind the bulkhead, all the sand?

Witness: On low tide it was about even with low tide; some places it would cut in and some places it wouldn't.

Court: Did it affect the entire beach of sand behind the dike?

Witness: At flood tide it would wash out, but the ebb tide it would die off and have no force only in the current, strong current, which would then disappear on the inside of the dike.

Q. There was no current on the ebb tide, in other words?

A. Very little.

Q. But the damage was all done on a flood tide?

A. Yes.

Q. In other words, the tide coming from the ocean?

A. Yes.

Q. At one place you said near the crib this was about 75 feet in width?

A. It could be.

Q. Was that at high tide or low tide?

A. High tide.

Q. How wide would that be at low tide?

A. Ordinarily maybe a foot at the most.

Q. Running down to a foot at low tide?

A. Yes.

Q. That was near the crib?

A. Yes.

Q. Was there any wash out of the sand against the crib at all in 1914?

A. No.

Q. The sand stayed to the very top of the crib?

A. Yes.

Q. There is stone on the outside of the dike which are now just about even with the low tide, which holds the sand in there?

A. It don't go below the low tide mark, which you speak of, near the crib.

Q. How deep was that hole at low tide running on up towards Stump Point? It started at a foot wide, didn't it, at low tide, a little distance west of the crib?

A. In some places it would be closed up, and in some places it would have water in it, but from the cribbing on down to where the dike raised up in 1914 when they built it, there it was deep enough to drown anyone, six or eight feet of water.

Q. It got deep further back?

A. Yes.

Q. Did the sand go to the top of the dike at any places west of this eastern hole?

A. Did the sand come to the top?

Q. Yes, of the dike?

A. No.

Q. Was this hole a steady successive hole, a single hole all the way from near the crib west?

A. Yes, pretty much.

Q. And it was about a foot wide at low tide?

A. Yes.

Q. At that one place?

A. Yes.

Q. How wide was it, say, 100 feet west of that one spot?

A. About where I lived it was 75 feet.

Q. How wide was it 50 feet west of it?

A. It wasn't so much. This was irregular, because on account of the boards on there it wouldn't take the sand away; some of the boards are there yet.

Court: All the planking was not off, only in spots?

Witness: Yes, it would have a current there on the flood tide, but not on the ebb.

Q. Where the sheathing was on the dike, the hole would be very narrow?

A. Yes.

Q. Did you ever have any conversation with Mr. Hinchman in reference to why he built that dike or repaired that dike in 1914?

A. Yes, he was at the house one day and he told me to the west of there, where it was all water, he was going to make a boulevard down there, towards the end of the dike, Deep Creek, that way, down where he turned the L in, toward the northwest, toward Deep Creek.

Q. When did he tell you that?

A. A year before I moved away, in 1913.

Re-direct examination.

By Mr. Carton:

Q. As a matter of fact, the borough did put a boulevard down after that?

A. No, there is nothing there now but water.

Q. They extended First avenue down further?

A. They extended First avenue down in about 50 feet or 75 feet of the dike.

Court: Is that the territory Mr. Hinchman was speaking about to you?

Witness: Yes, he was speaking about on the northwest side of the dike. Where the water is now, he was going to fill that in.

Q. That is all sedge meadow over there?
A. No, it is water on low tide.

Re-cross-examination.

By Mr. Bergen:

Q. He told you he was going to fill it in?
A. Yes.
Q. And put a boulevard running parallel with the dike?

Court: That has never been done?

Witness: No, it is all water.

JOHN C. PAYNE, recalled for further

Direct examination.

By Mr. Carton:

Q. At the last hearing some reference was made to the omission to furnish a report, I think, of 1882, at the time we were producing certain government reports from the War Department. Have you made

any further examination or an effort to locate such report?

A. Yes, I would like to say, in explanation, if I may, that when I was preparing myself for this case, I had access to as complete a set of the reports on the Manasquan Improvement as I think there was outside of the government, and I was unable to secure the report of 1882. I made effort by mail with the United States Government, the Secretary of War, and under date of December 5th, 1917, the Chief of Engineers sent me a report which was used at the last hearing, and also a blue print map showing, as the letter says, "Map showing condition of the work June 30, 1882, with details of construction." I continued my efforts with the government authorities to secure the reports of 1881 and 1882, and under date of December 18, 1917, I have the information from the government that in compliance with my request, they are sending copies of these reports and stating that they are from the files of the office, as the public copies are exhausted. From this blue print map which I have spoken of, I have made a tracing, leaving out some of the hydrographic details, to show the conditions exhibited on the map of 1882, and I have with me the report of 1882, which has a very full description of the condition of the work and conclusions of the government at the time of the report.

Q. Is this the tracing that you have made from the map and report?

A. Yes, sir. I have left off of it the details of construction, simply showing the condition of the shore lines and of the dikes.

Mr. Bergen: Do you have to return the blue print?

Witness: No, sir, I have to return the reports.

Mr. Carton: I offer the tracing in evidence.

Mr. Bergen: I think we should have the blue print offered in evidence, so that I may be permitted to have a photographic copy made of it.

Mr. Carton: I then offer the blue print.

(Marked Exhibit A, January 11, 1918.)

Q. This paper which you have presented is a tracing of part of Exhibit A, as taken from the government report?

A. Yes.

Q. What does it show generally?

A. It is a tracing of part of Exhibit A, and states on it "Map compiled from U. S. Government Map of 1882," with my signature, which shows the outlines of the shore at Stump Point. It shows the beach on the Atlantic Ocean; it shows the tidal reservoir referred to in the report of 1882, and shows the inlet. There are certain letters on the tracing that do not appear on the blue print; they were put on to connect it with the report of 1882. Those letters are tidal reservoir, the word "beach" and the word "inlet," I think.

Court: Are those expressions used in the report?

Witness: Yes, and it is to connect the map with the report.

Q. And these additional letterings were put on by you?

A. Yes. May I also add that the details of construction shown on the blue print are omitted entirely from the tracing.

Mr. Carton: With that statement I now ask to have this tracing introduced in evidence.

Mr. Bergen: I object to the admission of that tracing; the blue print is so much more accurate, that we should not allow in evidence any tracing with any additional markings.

Court: It will be a convenience to me when I come to read this record in the future.

Mr. Bergen: I withdraw my objection.

The Court: I think it may be of some use in the case.

Mr. Carton: That is the purpose of offering it.

Court: I will be confined, however, to the official map.

(Tracing marked Exhibit B, January 11, 1918.)

Q. In examining this 1882 report of the government, have you found anything contained therein as to the necessity of extending this jetty westward to Stump Point?

A. Yes, sir.

Q. Will you tell us what it is, Mr. Payne?

A. The report is a very general description, and it is difficult to pick out one phrase that isn't connected with other matters, and it speaks on page 702, the beginning of the first paragraph on that page:

> "When the construction was begun the site of the projected jetty was quite shoal. After the inshore part was finished"—

and that indicates to me a projection of the jetty to the west,

"an increased velocity was given to the currents, which caused a deepening of the inlet in advance of the improvement."

Q. Were you present, Mr. Payne, in court when the young Mr. Howland testified to repairing the dike?

A. Yes, sir.

Q. Do you recall his making reference to a similar experience?

A. Yes, sir.

Q. Will you continue the reading of the report?

A. I will begin the reading from the report on page VI, section 8:

"8. Manasquan River, New Jersey.—The present project was adopted in 1879, and has for its object the opening of a direct channelway across the beach and protecting the same from the flow of the tidal currents between the river and the ocean so as to obtain and maintain a suitable depth for the passage of vessels similar to those now employed on the basins of the river above its mouth and for coasters of light draught. The construction of the north jetty, commenced by contract June 17, 1881, was continued till March 8, 1882, at which time the contract was closed. A length of 1,515 feet of the jetty has been completed. As a protection against undermining by the currents, a crib 130 feet long, and a revetment by fascine mats ballasted with stone, extending from the outer end of the completed work 850 feet toward the shore, have been added on the south side of north jetty, and a few spur dikes of plank, fascines, and sand-bags added to the north side to induce a growth of sand to relieve the work from the

pressure of the tidal reservoir behind it. The amount expended to June 30, 1882, was $30,-481.08."

I then go to page 701 of the report, and quote:

"E 8.

Improvement of Manasquan River, New Jersey."

And then follows practically the same description until we reach the bottom of the page, when it says:

"In accordance with the suggestion of the majority of the Board, and with the views of the local engineer expressed in his report submitted to the Chief of Engineers September 17, 1880, the idea of constructing a harbor of refuge was abandoned, and the object to be sought by the improvement confined to the 'opening of a direct channel-way across the beach, and protecting the same from the flow of the tidal currents between the river and the ocean.' In accordance with the above, contract was entered into with Henry DuBois & Sons for the construction of timber jetties at the mouth of the river, the north jetty to be first constructed, the construction of the south jetty being optional with the officer in charge. On July 1, 1881, the amount available for the work was $28,581.91, and operations under the above contract had just commenced. Work on the construction of the north jetty was continued to March 8, 1882, when the contract was closed, the total length of jetty built on the north side being 1,515 feet.

When the construction was begun the site of the projected jetty was quite shoal. After the inshore part was finished an increased velocity was given to the currents, which caused a deepening of the inlet in advance of the improvement, and, in addition, the entrance had moved

to the northward so that the line of the jetty crossed the gorge of the inlet, and it seemed impossible to make any work of the character adopted stand the force of the currents. It therefore became necessary, as the work progressed, to modify the construction of the outer section of the work. This was done by driving an extra row of round piles having greater penetration than was provided by the original specifications, and also by placing alongside the outer 200 feet of the jetty, as built, an equal length of diking of the kind described in the specifications as 'channel sections.' The injurious scour inshore and near the outer end continuing, a crib 130 feet long was placed in front of the outer end of the inshore piling and adjacent to the outer section, and the whole line from outside to inside was further protected by placing fascine mats with a pitching of stone along the river face of the jetty, and bags filled with sand on the inner side. Spur-dams of plank, fascines, and sand-bags were also built at right angles to the line of the works on the north side, with a view to arrest and hold the sand drifted by the winds and to relieve the north side of the sheet-piling from the pressure of the tidal reservoir against it by inducing a sand accumulation between the piling and the reservoir. The fascine mats and stone pitching on the south side extend back from the outer end of the jetty a distance of about 850 feet. The jetty is now believed to be stable and in a condition to withstand the further action of the elements. The effect of the jetty on the condition of the inlet has been so far beneficial; the present depth on the outer bar is 4 feet approximately at low-water, the crest of the bar being generally about 300 feet

seaward of the end of the jetty; the position of the line of deepest water across the bar is less changeable than heretofore, but considerable wanderings still take place in the same.

It is probable that the further extension of the north jetty, and the construction of the jetty on the south side of the inlet will tend to restrain this movement, and keep the crest of the bar at a lower level. The work, however, is of so experimental a nature that a prediction of definite results does not seem warranted at the present time.

To extend the north jetty 255 feet seaward to its full projected extent and to built 905 feet of jetty on the south side will require, it is estimated, the sum of $40,000."

Q. Do you find any other reference, Mr. Payne, in this report pertinent to the Manasquan situation?

A. I don't recall any, sir.

Q. Is there any reference anywhere in the report to the purpose of the dike; that is, the securing of the inlet and the permanent location; is there anything there that has reference to maintaining the beach?

A. I consider that the wording beginning at the bottom of page 701: "In accordance with the suggestion of the majority of this Board, and with the views of the local engineer expressed in his report submitted to the Chief of Engineers September 17, 1880, the idea of constructing a harbor of refuge was abandoned, and the object to be sought by the improvement confined to the 'opening of a direct channel-way across the beach, and protecting the same from the flow of the tidal currents"—I regard that as referring to the beach, because it speaks still further—

Court: What interest had the government in the beach?

Witness: To keep it from filling up the waterway between the river—it says "direct channel-way across the beach, and protecting the same"—"protecting the beach," if I may, "from the flow of the tidal currents between the river and the ocean."

Court: And that is used in connection with what precedes it there; that would be my view.

Witness: I took it that it stated that they abandoned the idea of a harbor of refuge.

Court: But not abandoned the idea of making a direct channel, and then to protect the same?

Witness: Yes, that is the proper reading of the reference.

Court: Not to protect the beach.

Mr. Carton: We claim it is not to protect our property, to protect our beach.

Q. There is some reference in your reading to a tidal reservoir north of the dike, and some work being deemed necessary to relieve the dike; what is your idea of there being any necessity of relieving the dike from the north; from what would the dike need relief?

A. It is stated in the report, to be relieved "from the pressure of the water from the tidal reservoir," and the additional wings were put in to collect the drifting sand, to fill that up, to relieve that pressure.

Court: Don't you think that is clearly put as Mr. Payne read it from the quotation?

Witness: I don't think it could be clearer.

Cross-examination.

By Mr. Bergen:

Q. General Payne, are those spur-dams still there?
A. I didn't see them, and if they are, they are buried under the sand that they have accumulated or caught.

Mr. Carton: On this feature of the case, that is about the extent of our testimony, other than Mr. Rogers, and as to his testimony, we find ourselves in this situation: Mr. Rogers was to have been here the last day, but he didn't get here; he was to be here today, but Mr. Rogers has for some weeks past been nursing a very sick wife, and he has been advised that he must take her away, and he had to postpone that beyond this time. I believe in the past day or two Mr. Rogers has gone south with his wife and probably will not be back for some few weeks, and we would like to reserve the right to produce Mr. Rogers at the next hearing or some future hearing. It may be recalled that Mr. Rogers is the witness referred to as the engineer employed by Mr. Hinchman at the time this work was done in 1915.

Court: With that exception and that reservation you rest on this branch of the case?

Mr. Carton: Yes.

Court: Is there any dispute about the amount paid Logan Construction Company?

Mr. Bergen: I don't think so.

Mr. Carton: I understood the necessity of doing the work was the only thing in question.

Court: With the exception of calling Mr. Rogers, I rest on this branch of the case.

WILLIAM ELWOOD ORAM, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. Where do you reside, Mr. Oram?
A. At present I am living at Singac, New Jersey.
Q. Where is your office?
A. New York.
Q. Where abouts in New York?
A. 13 Park Row.
Q. What is your business?
A. Construction engineer.
Q. Did you do any work at the Manasquan Inlet?
A. Yes, sir.
Q. When?
A. 1914, I believe, in the fall, or 1915.
Q. It was the second work done there?
A. Yes, it was the work done after Mr. Howland.
Q. Then it was 1915, wasn't it?
A. Yes, 1915.
Q. What work did you do there?
A. In 1915 we repaired the entire dike; the crib-

bing out at the end, we put in some concrete there and some new rods and then repaired the dike.

Court: Whom do you mean by "we"?

Witness: The Logan Construction Company; I was acting as superintendent of the work. And the rest of the way, there was a section of it that was lifted up or torn out entirely, we put in new work there, and the remainder of it, we drove an extra line of piles, and some of it we put in another row of sheathing.

Q. At the crib what work did you do?

A. We put in a small amount of concrete out at the end, on top of the stone rip-rap that was in there.

Q. Was that work necessary to preserve that cribbing?

A. No.

Q. What shape was that cribbing in when you did this work?

A. It was in very fair condition; there were three or four boards off there in one place, that let what sand would naturally wash into this back; during high tide it allowed that to wash out back in the current and go on. That was necessary to put that back in.

Q. Will you be kind enough to explain to me what the work was when you went on the job in 1915; what was its condition?

A. The cribbing part was in very good condition. The old dike, the government part, some of the boards were washed off; possibly, I should say, about one-third of the outside sheathing was washed off; the piling was in very good condition; the timbers were in good condition, except one section of about

190 feet, which had raised up, entirely raised up and was of no service at all.

Court: This is the cribbing you are talking about or the dike?

Witness: The dike; the cribbing was in very good condition.

Q. About how long was the cribbing?

A. As I remember it, about 1300 feet long.

Q. How long was the dike?

A. Oh, no, the cribbing was about 250 or 300 feet long, as I remember it, and the dike was 1200 or 1300 feet long.

Q. What was the cribbing, what was the nature of its construction?

A. The cribbing was, I should say, 6 x 8, or 8 x 8 timbers used for sheathing driven down, and about 12 feet wide. These were on both sides of it; then it was divided into pockets about every 12 feet, and these pockets were filled with stone rip-rap.

Q. That was in very good shape?

A. Very good condition.

Q. Had any repairs been put on that the year before by Mr. Howland? Could you tell?

A. Not that I could see.

Q. The old government work was in good shape?

A. In very good shape, that part of it.

Q. How about the dike back of the cribbing; how long was this dike?

A. As I remember it, it was about 1200 or 1300 feet long.

Q. Where did it reach to?

A. A point called Stump Point, up in the sedges, or about to that.

Q. Have you a plan which shows the work which

the government had done, plus the work which Mr. Howland had done, and plus the work which you did on that dike?

A. Yes, I have one on the table in there; that doesn't include any of the cribbing, the work that we did on the cribbing.

Q. Did you testify that part of the dike had been carried out?

A. About 200 feet, yes; 190 or 200 feet.

Court: Carried away, you mean?

Witness: It was raised up six or eight feet in the center and tipped over.

Q. It was testified to that there was a hole in the bottom, which this dike left there; is that where this hole was?

A. Yes. This wasn't anchored at the bottom; it wasn't driven down into where this hole was.

Q. What did you do where that condition existed?

A. We built an entirely new bulkhead or dike and pulled out the old stuff that was in there and built an entirely new dike.

Q. About how long was that?

A. About 200 feet long.

Q. Did you see evidence of work which had been done the year before there?

A. Oh, yes, there were timbers spiked together and piling onto them; a great deal of the sheathing was washed away, very few of those left; the wales were all there, but they were not in position.

Q. Did you pull up the piles which had been driven the year before, or any of them?

A. We pulled up some, yes, that were not already up.

Q. How long were those piles which had been driven the year before, as you saw them?

A. 18 to 19 feet.

Q. Were any of them 23 feet piling?

A. No, not that I remember, none as long as that.

Q. Have you a plan which shows the work which you did there at this hole?

A. No, I haven't at the hole.

Q. Will you be kind enough to draw roughly a plan at the hole?

A. Yes, sir. (Witness does so).

(Plan at hole marked Exhibit D 1.)

Q. In this diagram at the hole, which is marked "section at the hole," D 1, the river is on the upper part of the diagram and marked "river"?

A. Yes.

Q. Then comes a row of piling?

A. Yes, sir, six foot centers.

Q. Then to the other side comes your wales; how big were they?

A. 4 x 12, two lines, one out to low water and one out to high water, 4 x 12 wales.

Q. Then comes two thicknesses of sheathing, is that correct?

A. Yes, one row was 3 x 12, and the inside row was 2 x 12, and they were 24 feet long.

Q. Then comes another row of wales?

A. 4 x 12; they were directly opposite the wales on the other side. Then comes another row of piles, and they were six foot centers, 32 feet long.

Q. Have you a diagram drawn which shows your repairs, not at the hole, but where the dike of the government and Mr. Howland still stood?

A. Yes, it is at the top.

Q. Will you explain that to us?

A. First, on the river side was the old sheathing, which was possibly one-third of it washed off, and I should judge that was 4 x 6's put in there, although that was hard to tell.

Q. That was the government sheathing?

A. Yes; then came the timber wale 12 x 12, or 14 x 14, I forget which.

Q. Was that the government wale?

A. Yes, that was all government work; then a row of piling, six foot centers; then another 12 x 12 wale and another row of piling on the inside; that was all government work.

Q. What did Mr. Howland have there?

A. Mr. Howland put in a pile on the inside, on the north side of the dike, between each one of the government piles, that was six foot on centers.

Q. That is between the inside row of the government piles?

A. Yes.

Q. Did he put them between the outside row of the government piles?

A. No, just on the north row; then he put on two 4 x 12 wales, one out to low water and the other at high water, high tide, and then a row of 3 x 12 sheathing. They were what I found of them. Some of them were 13, 14 and some 16 feet long, and he simply nailed those to the ranger and the wales; they were simply spiked on with two spikes; they were not bolted, and no wale on the outside of them or on the north side.

Q. Then what did you do?

A. We put our wales, two lines of wales on his sheathing, one at high tide, and one at low tide, and drove an inside row of piling 32 feet long, six foot on centers; they were about 12 inch tops.

Q. This diagram shows all of that?

A. Yes.

(Diagram referred to offered in evidence and marked Exhibit D 2.)

Q. What is the purpose of sheathing in such a construction?

A. To prevent a current—in such a construction, to prevent the current from coming into the land.

Q. What gives it the strength to stand up, the sheathing or piling?

A. The piling gives it strength to stand up.

Q. Does the sheathing have to penetrate the bottom of the river?

A. Certainly, yes.

Q. Is the real strength of such a construction by the sheathings penetration into the bottom, or is it by the piling which gives it its strength to stand up?

A. By the piling; mostly by the piling; of course, the sheathing has a certain amount of strength, but the sheathing—when you figure the strength of a bulkhead, you simply take the piling, the strength of the piling, but not the strength of the sheathing at all.

Court: Wouldn't that depend on the size of the sheathing and also the extent of the penetration?

Witness: Extent of the penetration.

Court: If it was merely nailed on your wales or fastened down, the water would come along and wash it away?

Witness: Yes, it would have to be driven into the sand in order to stop the water from scouring.

Q. Was the construction there of 23 feet piling and 16 feet sheathing, the piles on six foot centers, strong enough to hold that dike?

A. No, not in places.

Q. In what places was it not strong enough to hold it there?

A. Where this hole was, where it had been washed out there, or where there was a very soft bottom.

Court: How much time elapsed between when you completed the work and the time Howland had completed his?

Witness: About a year, I believe.

Q. What was the purpose as evidenced to you by that construction by Mr. Howland, was it for the purpose of keeping the water out and draining the river, or was it for the purpose of holding soil in?

A. I can only judge by the type of construction that was put there, and with the sheathing on the inside and simply spiked to the rangers—was to keep the soil in instead of keeping water out, because any current coming against a board nailed up against another ranger would push it right out.

Court: Could the soil be kept in if the water were not kept out?

Witness: Yes.

Court: I don't understand how.

Witness: Of course you would have to have your sheathing tight so that there wouldn't be a current back and forth through your sheathing, but the water could get in from behind.

Court: Wouldn't the water gradually coming through the cracks of the sheathing and planking, gradually eat away the sand that was behind it?

Witness: No, not if your sheathing was driven tight enough to prevent that.

Court: Was this sheathing driven tight enough?

Witness: The sheathing that was put in there, all but in one place, it wasn't driven very tight, and it was not down to the bottom, so that the water scoured back and forth; so Mr. Rogers, who was the engineer, for a distance of about 90 feet, had us drive an extra line of two-inch sheathing 24 feet long against Mr. Howland's work, so as to stop this scouring underneath, and also prevent the water from coming in between the sheathing.

Court: Was that this so-called hole?

Witness: No, that was on the ocean side of the work, extending 90 feet where the old dike was still intact.

Q. Had Mr. Howland also made a cross dike there?
A. Yes.
Q. Had the government made a cross dike?
A. No.
Q. Where was the cross dike located?
A. I should say about 200 feet from Stump Point.

Court: Easterly of Stump Point?

Witness: Easterly, towards the ocean.

Q. Was it made at the most westerly end of the repairs which Mr. Howland had made on the government dike?

A. Yes.

Q. At the westerly end of it?

A. Yes, at the westerly end.

Q. Then he made a cross dike reaching from Stump Point to where?

A. Back in the sedges, I should say it was.

Court: How long?

Witness: 75 or 100 feet.

Court: And about how wide, this cross dike?

Witness: It was simply one row of sheathing with rangers on the outside towards the river, and then a row of piles six foot center on the outside.

Court: Do you charge for that in your accounting?

Mr. Carton: Yes.

Q. Did you have to do any work in reference to that?

A. Yes, we put on an extra row of wales, and the same type as we repaired the rest of the dike.

Court: On this cross dike?

Witness: Yes, an extra row of wales, and an extra row of piling six foot centers.

Court: What was the purpose for the construction of that cross dike?

Witness: I cannot tell you what it was built for.

Court: Was it at all a support or anything for the original dike?

Witness: The only thing that it could have been built for would be when they filled it in in back of it.

Court: And anticipating a filling?

Witness: That would hold it from going out into Deep Creek, from the winds and rains washing it out into Deep Creek; it made a back for it.

Court: Was it at all necessary to keep the beach or preserve the sand that was on the beach?

Witness: No, it was way back from that.

Court: How far from the beach?

Witness: About a thousand feet, I should say.

Court: Referring to this sketch, Exhibit B January 11, 1918, can you indicate it on that sketch?

Witness: Yes. (Indicating). This is different than the beach was when I was down there before.

Court: The dike then began where?

Witness: About 200 feet from Stump Point, and ran up here into the sedges 75 or 100 feet.

Court: The sedges being the point marked "tidal reservoir" on Exhibit B?

Witness: Yes, about there.

Q. On which side of the piling was the sheathing which Mr. Howland had constructed there?

A. On the inside.

Q. That is on the east side?

A. On the east side of the cross dike, and on the north side of the main dike.

Q. Did Mr. Hinchman ever tell you why he did this work there, the 1914 and 1915 work?

A. No, only to repair the dike and to keep it in shape, although there was considerable talk of filling it in, pumping the sand and filling it back in.

Court: By him?

Witness: Yes.

Court: Did he ever tell you why he had the dike repaired in 1914 or 1915, or both?

Witness: No.

Q. Who made the talk as to it being for the purpose of filling in?

A. Mr. Hinchman, and Mr. Rogers as well, who was the engineer.

Q. What do you mean by that talk; can you give any instance of it, what they told you about it?

A. Mr. Rogers said that he wanted us to be very careful and get the cracks all tight in the bulkhead; if it was just used as a breakwater, it wouldn't make very much difference, but they contemplated filling it in, and therefore he wanted it tight, so that water couldn't get back and forth through the cracks, so it wouldn't wash the sand and filling put in there out.

Q. Did you make a price to Mr. Hinchman of what you would charge for pumping and filling that in back there with sand?

A. We never made a written price. I did all my business, or practically all of it, with Mr. Rogers, as he was the engineer, and I had to take my orders from him; he asked about how much it would cost, and I told him it would cost him about fifty cents a yard to fill it in; then we were figuring on pumping from the Manasquan River—pumping the sand from the Manasquan River over the dike in back of it.

Q. Was this construction, after you had made your construction, was it heavy and strong enough to have held a sand bank there?

A. Mr. Rogers and I had some talk of reinforcing it by driving a pile on the inside, and either putting galvanized cable up to it or timbers to fill in, but as it was, it wasn't strong enough to fill in, although he thought that it would be.

Court: Was it strong enough to protect the beach there and the rest of the property?

Witness: After we got through.

Q. And these other things you suggested were in anticipation of a fill?

A. That was my view when we built it, that they were building it to fill in.

Q. That was the impression that you got?

A. That was the impression that I got, on account of they cautioned me so many times to keep the cracks tight.

Q. How would you proceed, or how should you proceed, to have made that so that it would have held a sand fill?

A. To pump in?

Q. Yes.

A. You drove a pile 12 or 15 feet back about 20 feet from it.

Q. Where do you mean back?

A. On the north side, and anchored the top of the dike to this pile with a twisted galvanized cable, so that it couldn't shift over, if some of the piles were weak, something like that, just as an extra precaution.

A. Was there any danger before it was repaired? 10
was made, of a cut-in by the water, which would cut an inlet north of the cribbing?

A. Was there any danger before it was repaired?

Q. Yes.

A. Before I repaired it or before Mr. Howland repaired it?

Q. Before any repairs were made?

Mr. Carton: I submit without having been on the premises and known the condition, that the witness 20
cannot answer the question, and I object to it.

Court: I think I will let him answer it if he can.

A. I think there might have been a chance of a cutting in directly north of the dike.

Q. How would have been the most economical way to have prevented such a thing?

A. Either to put a new plank where the government planks had been washed off, or building a spur or 30
cross dike on an angle of about 45 from the cribbing back up—I should call it a mound up there north of the cribbing.

Q. How much would such a construction as that have cost?

A. It would depend entirely on the type that they wanted; I should say twenty a foot.

Q. How long would such a construction have been?

A. I don't know as I remember—200 feet would run well up in there; 150 feet probably would have been long enough.

Q. That is $3000?

A. Yes.

Court: Are you talking of conditions as they were when Mr. Howland repaired or when you repaired?

Witness: Conditions as they were when I was down there on the ground.

Q. Would it affect your opinion in this matter if the government had put such a cross spur dike from the cribbing as you suggest?

A. I don't understand the question.

Court: He hasn't suggested cross spurs.

Q. Would such a construction be a cross spur?

A. Yes, I should call it that, on about an angle of about 45 degrees from the dike.

Q. From the dike or cribbing?

A. Cribbing—it would be 45 degrees from the dike, too.

Court: You said at a expense of about $3,000, covering 150 feet. Would you build something which you say would be a cross spur?

Witness: Yes.

Q. Where would it be located?

A. At the end of the cribbing, at the westerly end of the cribbing.

Court: And running in a northerly direction?

Witness: Running in a northerly direction—northwesterly.

Court: Up across the beach?

Witness: Not across the beach; it would be back of the beach, up to the mound there.

Court: Running on an angle of 45 degrees from the old crib?

Witness: Yes.

Q. Did you find any such cross spurs as that had been made by the government when it built this dike?

A. No.

Q. Was the condition of the beach such that you might not have seen such cross spurs?

A. If there had been a cross spur built there, I wouldn't have seen it, because the sand was high; it was higher than the top of the dike, two or three feet higher than the top of the dike at this particular point.

Q. In the government report, on page 702, which has been offered in evidence, the report states: "Spur-dams of plank, fascines, and sand bags were also built at right angles to the line of the works on the north side, with a view to arrest and hold the sand drifted by the winds and to relieve the north side of the sheet-piling from the pressure of the tidal reservoir against it by inducing a sand accumulation between the piling and the reservoir." Would that answer the purpose you speak of?

A. Yes, something of that nature is what I speak of, but on the ground there I saw nothing built there like that.

Court: You say it would have been covered by the sand by this time?

Witness: Yes.

Court: Such a construction as this was made by the government?

Witness: It says there that it was; I don't know only what it says there.

Court: Even if you had constructed that spur-dam you still would have had to repair the dike and the crib where the planks were off and broken?

Witness: No, if you had constructed the spur-dam, that would have eliminated repairing the rest of it.

Q. From the easterly end to the point where you began the construction of the spur, wouldn't you have to replank and repair?

A. That was right at the end of the crib.

Q. And that didn't need repairing?

A. No, that didn't need repairing there; the crib was in very good condition.

Cross-examination.

By Mr. Carton:

Q. How long have you been in the employ of Logan Construction Company?

A. I believe four years this spring; I have been a member of the company four years.

Q. Is your position that of engineer of the company?

A. Vice-president and outside manager.

Q. Are you an engineer?

A. Yes.

Q. Graduate of any technical school?

A. No.

Q. How long have you been acting in the capacity as outside manager and engineer?

A. For about five or six years I have been in that capacity; I have been on construction work since I was fifteen years old.

Q. What has been your experience in doing work similar to the work which you found at the Manasquan River, jetty work along the ocean?

A. How much experience have I had?

Q. Yes.

A. I have had two jobs at Coney Island similar to that.

Court: Prior to this work?

Witness: Prior to the Manasquan work, and I had one job at Bradley Beach prior to the Manasquan work.

Q. What was the job at Bradley Beach?

A. An outlet flume, two jetties and bulkhead.

Q. An outlet sewer?

A. I had a sewer outlet there in connection with the rest of the work.

Q. Were your jetties to protect the sewer outlet?

A. Yes.

Q. And that was the extent of your work there?

A. Yes.

Q. What was the character of the work you did at Coney Island?

A. Repairing jetties on the bulkhead.

Q. Ocean jetties?

A. Yes, to preserve the beach.

Q. Jetties that were out of repair?

A. Jetties that were out of repair, and new, yes.

Q. Were you the engineer on the job at Coney Island?

A. I was superintendent of construction.

Q. You don't mean to say that the work there was done under a plan and specification prepared by you as the engineer, do you?

A. No.

Q. You were simply in charge of the construction of the work?

A. Yes.

Q. And outside of being in charge of that work and the building of the sewer outlet with its protection at Bradley Beach, was that the extent of your experience up to the time you did this work in 1915?

A. That is the extent of my experience, more than work we figured on.

Q. Will you tell us the entire cost of the work you did for Mr. Hinchman in 1915?

A. I don't remember; I think it was seven or eight thousand, somewhere along there.

Q. You haven't the bill or the books before you?

A. No.

Q. As you recall it, it was in the neighborhood of seven or eight thousand dollars?

A. Yes.

Q. I understood you to say that you did some repairing to the cribbing at the ocean and of the dike?

A. Yes.

Q. What did that consist of?

A. We put in some concrete there in one of the sections, on the extreme outer section.

Q. Where it had been broken away?

A. Where some of the piles had broken away and the rip-rap was beginning to wash some.

Q. Did I understand you to say that the cribbing bore evidence of any work having been done on it by Mr. Howland the year prior?

A. None that I could see.

Q. I take it that the repairing of the cribbing was a very small portion of your work on the dike?

A. A very small portion; that wasn't in their original contract; that was an extra that they wanted me to do.

Q. Did the repairs you made to the cribbing seem proper and necessary work to be done at the time?

A. Mr. Rogers asked me to do it, and I did it; that was my part of the work.

Q. Mr. Rogers was in charge as engineer?

A. Yes.

Q. The principal part of your work consisted in repairing the dike from the cribbing westward?

A. Yes.

Q. And principally across this hole?

A. Yes, we repaired it the full length and the spur also.

Q. The spur at the westerly end?

A. Yes.

Q. Tell us just the state you found the dike to be in, with regard to state of repair, when you went there and when you did this work?

A. Part of the government dike was—

Q. Do you understand there is any other dike there than the government work?

A. The part they did on it.

Q. You distinguish the part done by the government and that done by Mr. Howland?

A. Yes.

Q. Go ahead.

A. That was in fair condition; there was very little of the sheathing that was washed off; I should say one-third of the entire amount of them up to the cross dam; from there on, I cannot say whether they were on or off—from there to Stump Point.

Q. This piling and sheathing were in good repair the year before, when Mr. Howland did the work; he didn't do any part of that work?

A. No.

Q. The principal part of the work was done up opposite this hole?

A. Yes.

Q. What did you find the condition of the work to be there at the hole?

A. This which was government work, and the work which Mr. Howland did were both out.

Q. And how just out; what was the condition?

A. Simply raised up and tipped over.

Q. Did it push in from the bottom like a gate and was fastened on top, or did the top push over and was it fastened at the bottom?

A. There was considerable of it that was entirely clear of everything; it wasn't fastened to anything, than at each end the piles and sheathing was in the ground, but tipped over.

Q. You mean had gone and broken from the piling altogether?

A. No, it was fastened at each end.

Q. You mean at top and bottom?

A. Yes,—no, at the westerly and easterly end.

Q. And in the center, where you say it was gone, was the piling or the sheathing there?

A. No, the sheathing were not gone, but the piling I think were all there; the government work was there.

Q. How large a space was it that the sheathing was gone altogether?

A. I should say 50 or 70 feet where the sheathing were entirely gone.

Court: In a continuous strip?

Witness: Yes.

Q. And did that seem to be through the center of this hole?

A. Yes, about the center.

Q. You found some of the old sheathing there, and measured them?

A. Yes, we also found some of them up on the sedges; the boys told us where they were and we went up and got them.

Q. You measured those sheathing and you found them to be 16 feet in length?

A. Some 13, some 14 and 16.

Q. Do you know where they came from or where they had been placed on the dike?

A. Some of them we pulled off of the dike; they were still nailed to the rangers.

Q. Were they penetrating in the ground, those you pulled off?

A. No, they had been washed clear of the ground.

Q. And you measured those?

A. We measured some of them, yes, sir.

Q. Can you tell us the length of those?

A. 14 and 16 feet long.

Q. Do you remember any particular instances of measuring any sheathing on any particular point in the dike?

A. They were pulled off, I cannot say what particular point they were pulled off; they were all pulled off and piled up, and we used the same sheathing for our wales on some of our work.

Q. Do you know whether any of this sheathing had been broken?

A. No, they were just as though they had been sharpened on the bottom.

Q. You put new sheathing on the walers at this point 24 feet long, is that right?

A. We put in new piles and wales, too, and also new sheathing.

Q. And the new sheathing were how long?

A. 24 feet.

Q. Across the center of the hole?

A. Yes.

Q. And what penetration did that give you?

A. Most of the places it had 12 to 14 feet penetration.

Q. Did you drive them or pump them?

A. We pumped and drove both; in other words, there was from ten to twelve feet of water there, medium tide.

Q. You took some measurements and you found that the penetration was some ten or twelve feet?

A. Yes.

Q. Under whose supervision did you do this work?

A. Nyatt Rogers.

Q. And it was in accordance with his specification?

A. His plans and specifications.

Q. The measurements of this sheathing were those prescribed by him?

A. Yes.

Q. Do you know whether Mr. Rogers was the engineer on the work the year before or whether there was an engineer or not?

A. I only know what Mr. Hinchman told me; Mr. Hinchman asked me—he said he wanted to repair the dike and asked me to give him a figure on it, and I looked it over, and he told me about what he wanted done, and I gave him a price on it, or my company did, and he told me that he thought that he would give me the work, and then it ran along a couple of weeks, and I went down and asked him about it, and he said he had changed his mind and decided to have an engineer on the job, as he wanted it under his supervision, and he got Mr. Rogers, and Mr. Rogers drew plans and specifications on identically the same thing that I had given Mr. Hinchman the prices on. I gave him another price and resubmitted our figures and was low on the job.

Q. At the time that Mr. Hinchman stated that he desired to have an engineer, did he make any reference to work having been done on it the year before?

A. Yes, I believe that he did.

Q. As a matter of fact, you were a bidder on this job and were a low bidder?

A. Yes, it was put out on competitive bids.

Q. After Mr. Rogers had made the plans and specifications?

A. Yes.

Q. You did your work during what month, Mr. Oram?

A. I believe it was in June when we started there, if I remember rightly, and we were there until the next November—into November sometime.

Q. Did you know when the work had been done the year before by Mr. Howland?

A. Nothing only by hearsay, from natives along there.

Q. You understood Mr. Howland's work had been done when?

A. About a year before.

Q. Had you known or had you had your attention called to the fact of the very unusual and heavy storm that had taken place during the winter of 1914-1915, subsequent to the doing of the work by Mr. Howland and prior to the doing of the work by you?

A. No, I hadn't had my attention called to any particular storm; they were always talking storm.

Q. You knew there had been a very unusual and very severe storm that winter prior to doing your work?

A. No.

Q. Hadn't you heard of damage done to jetties all along the Atlantic Ocean during that winter?

A. No, I hadn't; I wasn't down on the Atlantic Ocean that winter; I was in New York State.

Q. Hadn't you heard of the damage being done to jetties, bulkhead, &c., at Seabright and other places on the Atlantic coast?

A. I had heard of damages being done there, but whether I could say it was the winter before or not —in fact, I drove through Seabright, but I don't know whether those damages were done that winter or not.

Q. Didn't you know that jetties and bulkheading that had stood the test of years gave way under the stress of this storm in the winter of 1914-1915?

A. No.

Q. You knew nothing about that?

A. No, I did not.

Q. The fact is you have had very little experience in ocean jetty construction, have you?

A. Quite a little.

Q. Nothing outside of those two instances that you gave us?

A. Not actually doing anything outside of those that I have mentioned previously.

Q. You didn't keep yourself informed as to the storms or the effect storms had on jetties at that time, did you?

A. Yes, I have always been very much interested indeed, and always studied it.

Q. And being so interested, you say that you knew nothing about the storm during the winter of 1914-15, that took out jetties all along the Atlantic Ocean?

A. I wouldn't say that it was 1914-15; I heard rumors of storms down there.

Q. Assuming that that is the time that that severe sform happened, were you informed of it?

A. No.

Examination.

By the Court:

Q. Did you have in mind when you were doing this work in 1915 that the damage you saw at that time was due to that severe storm or storms to which your attention had been directed, the previous winter?

A. No.

Q. Did you do any work while you were working on this dike that was unnecessary?

A. Yes, sir, it was unnecessary, if you simply wanted to stop the river.

Q. From what?

A. From washing in there more than it had; it was entirely unnecessary.

Q. To do what you did?

A. To do all that I did.

Q. How much less would have accomplished the purpose?

A. You could have put your sheathing on the out-

side, on the river side,—one row of sheathing on the river side, instead of on the inside, and your current would come directly against your sheathing, instead of on the inside, where it would wash them off.

Q. If the purpose were to retain the beach and land there rather than to keep the channel open, this system of repairing would have been adopted that you now describe?

A. Yes—no, if it was to keep the channel open, it would have been put on the inside.

Q. But if it were not to keep the channel open, but to keep the land from being washed away, would the construction have been as you made it, or would it have been different?

A. As we made it.

Q. Then what part of your work, if any, was unnecessary?

A. It was all necessary, with that purpose in view.

Q. That is, the latter purpose that I have proposed, namely, preserving the land?

A. Yes.

Mr. Carton: You do say then that all the work you did was necessary, keeping in mind the preservation of the land, the beach front, is that true?

Witness: No, not the preservation of the beach front.

Q. I mean the entire strip of land there, whether beach or land, in on the reservoir, as you call it.

A. To preserve what land they pumped in there and what would make up.

Q. Which had made up at the time you found it there; you say you found land made up there as high as top of the dike itself?

A. Yes.

Q. Now, to preserve that, was what you did necessary?

A. No, sir; I misunderstood your question. To preserve what was to be pumped in there.

Q. I am not talking about what was to be done, but what was there.

A. What I did was not necessary to preserve what was there.

Q. How much was unnecessary expenditure then in your work for that purpose?

A. The difference of what it would have cost to build a short dike, a $3,000 dike, and my total bill.

Further cross-examination.

By Mr. Carton:

Q. You say that the work you did was unnecessary because in your judgment what you would have done would have been to lay a short dike over to the sand mound from the end of the cribbing?

A. Yes.

Q. And because you say that would protect the beach front, the repairing of the old dike on out to Stump Point was not necessary?

A. Not necessary to retain what was there.

Q. You have in mind that this construction should have only been extended by running the new dike from the end of the cribbing to the sand mound?

A. Yes.

Q. You say that would have been sufficient?

A. Yes.

Q. And because you say that would have been sufficient, the repairing of the old dike was not necessary, and an unnecessary expense?

A. Yes.

Q. Do you know the effect of the wind and tides of the Manasquan River on this gvernment dike as built?

A. The effect of the wind and tide on the dike?

Q. Yes.

A. All I can say is—the effect of the dike on the river has the tendency to turn it and keep it in one channel.

Q. (Last question repeated). Do you know the effect?

A. No.

Q. You haven't made any observation or haven't had any experience in that line, have you, either in the Manasquan Inlet or in any of the inlets along the Jersey coast?

A. I have, what I have observed at the Manasquan inlet while I was there.

Q. And did you observe that at times when there would be an ebb tide, the water would flow through those openings in the jetty to the territory north of the jetty?

A. There was a pond in there and the water would flow back and forth through the openings.

Q. And was there any force to the current there at times while you were there?

A. Very little.

Adjourned to February 20, 1918, at Chancery Chambers, Newark, New Jersey.

(Continuation of testimony in the above entitled cause, before Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Wednesday, February 20th, 1918, at 10 A. M.)

PRESENT: Counsel as before stated.

WILLIAM ELWOOD ORAM, recalled.

Mr. Bergen: This witness was under cross-examination at the last hearing; I wish to ask one or two more questions on direct.

Direct examination.

By Mr. Bergen:

Q. Mr. Oram, what is your business?
A. Construction engineer.
Q. What special education have you had in the institutions of learning on that line?

Mr. Carton: I object.

Court: I think we accepted him as qualified, and allowed him to testify, both as to the nature of the work Mr. Howland did and the way he thinks it should be done, and the work that was done under his supervision at the time, as I remember it, and expressed an opinion that it was a proper way to do the work.

Mr. Bergen: That is all I have in mind, simply to show the education of this gentleman.

Court: I was satisfied the gentleman was qualified, and I don't think the other side took any exception to it.

Further cross-examination.

By Mr. Carton:

Q. You testified, as I recall, that you were the outside man and superintendent of the Logan Construction Company?

A. Yes.

Q. And it was the Logan Construction Company that did the repairs to the dike in 1915?

A. Yes, sir.

Q. In looking over the testimony of last time, it appears that I asked if you knew the cost or the amount paid to you by the complainant here for the doing of this work, and you didn't just recall it, and you volunteered that you would ascertain and be able to tell us on the next hearing. I now ask you if you have made that inquiry and if you can now tell us the cost?

A. No, I didn't do any more than ask my partner in the business if he remembered, and he said it was somewhere between seven and eight thousand dollars, possibly only seven thousand dollars.

Court: For what?

Witness: For the total contract, the total amount paid to us.

Q. By the Seacoast Real Estate Company for the 1915 repairs?

A. Yes.

Q. There was a contract, was there not?

A. There was.

Q. You are unable to locate this contract?

A. I was unable to locate the paper pertaining to that; my partner has been away; he might be able to find those, but I could not.

Q. Your best judgment is between six and seven thousand dollars?

A. Around seven thousand dollars.

Q. May I call your attention to this reference: our memorandum in our account is that we paid you the sum of $6682.08 for the doing of that work; does that agree with your understanding of the amount?

A. My impression was that we got about $7,000, which was in different installments.

Q. As I recall, the day you were last on the stand, you described a spur dam—I think you called it—that you advised to be constructed from the jetty or the cribbing in a northwesterly direction; you did describe such a construction, did you not?

A. Yes, sir.

Q. Will you describe in detail the plan of this construction or what you would advise to build there?

A. What I would advise?

Q. Yes.

A. You mean as to length of piles and depth of construction?

Q. I understood you to say on your direct examination the other day, that all that would have been necessary in your judgment to have protected this beach would have been to erect a spur dam from the west end of the cribbing to an island mound 150 feet; you did state that?

A. Yes.

Q. Will you describe to us the sort of construction that you had in mind?

A. Piles and sheathing the same as—the same type of construction as we put across the portion of the old dike that was washed out, practically the same.

Q. This spur jetty would be similar in construction to that of the dike and not similar to the cribbing?

A. Not similar to the cribbing, no; similar to the dike.

Q. And what had you in mind as to the dimensions of the piling and planking, &c.?

A. About a 30 or 32 foot pile, the same as we drove on the dike, and 22 to 24 foot double sheathing.

Q. Double sheathing?

A. Yes.

Q. And how deep would you insert those?

A. At that point they had been inserted practically the full length.

Q. What would that be?

A. 22 to 24 feet for the sheathing and 30 feet for the piling; they had been driven practically level with the sand.

Q. How far westward or northwestward would you extend that spur from the crib work?

A. I should say, from memory, about 150 feet into that solid mound there of sand, a sand dune or whatever you call it.

Q. Where is that sand dune located?

A. It is about northeast of the in-shore end of the cribbing.

Q. And is it anywhere near the end of the street that runs down there?

A. Yes, very near the end of the street.

Q. Is this mound that you would carry this spur jetty over to, sand or firm land?

A. A good deal of it is sand, and there is a good deal of firm land and debris.

Court: Is there any firm land? Isn't it all either marsh or sand?

Witness: You mean by firm land, like ——

Q. I am trying to find out what the situation is; is there anything beside sand and marsh in the neighborhood of the jetty or dike?

A. There is an amount of timber and debris in there, filled with timber and sand, and when they become rotted, it becomes firmer than sand.

Q. Then it is not ordinary fast, firm land at all; it is land that has been made by the washing in?

A. I dare say that it is.

Q. Sand and paper and trash and so on?

A. Yes.

Q. Did you make any soundings or examination of the sand dune at all?

A. No, sir.

Court: Did you do this work under plans and specifications which your concern prepared?

Witness: Plans and specifications prepared by Mr. Rogers, who was the engineer in charge.

Q. Did you make any examination of this mound at all, as to it being a desirable point to tie up to?

A. No, nothing more than observation, and I lived right opposite all the time while I was there.

Court: Did you ever take up the question with Mr. Rogers that a lot of this work was unnecessary?

Witness: No.

Court: That you thought the same result could be accomplished with an expenditure of $3,000 instead of six or seven?

Witness: My part of the business was to get the six or seven, if I could; that is why I didn't take it up.

Court: When did you conclude that this work could have satisfactorily been taken care of by running this spur jetty to the mound?

Witness: I thought of it only perhaps three or four weeks, perhaps two months, before we took the contract. Mr. Hinchman and I were down there walking over the dike, looking it over, seeing the condition that it was in practically.

Court: At the time you were doing the work?

Witness: No, perhaps before I had taken it up, before we had even bid on the contract.

Court: There wasn't any suggestion made that that was the proper way of taking care of it?

Witness: No, none.

Court: By yourself or anyone else?

Witness: No.

Court: What is there about this mound that gives you assurance that it is of permanency and would not be washed away by a heavy sea washing over it, or storm,—this sand mound?

Witness: It is too high and too much; it would resist the sea washing over it; it is too much to be washed away.

Court: The bar of sand is so big that a sea couldn't ——

Witness: Yes, and there is grass and everything growing on it, so that it is full of roots.

Court: Grass growing on half of it?

Witness: Yes.

Q. Did you make any suggestion to Mr. Rogers as to the nature of the work at the time the plans and specifications were submitted to you or being prepared?

A. We gave Mr. Hinchman a price on the work that was to be done there, what he talked over—he and I talked over, and then he was going to give us the contract; then he decided—he changed his mind, and decided to have Mr. Rogers draw up the plans and specifications, and they are practically identical with what we had.

Court: Suggested?

Witness: Suggested in the first place; in fact, we gave them the same figures on Mr. Rogers' work that we had given him before.

Court: Why didn't you suggest to him a three thousand dollar contract instead of six or seven, if it would be just as effective?

Witness: There wasn't as much profit in it for us.

Court: Don't you consider your client's interest at all when you are dealing with a man; is it merely a question of taking advantage of him, because you have experience as an engineer, to make him pay all he can stand?

Witness: No, it seemed that he wanted to build it that way.

Court: He wasn't an engineer and you were; you made suggestions to him, as I understand it, which made that work cost anywhere from six to eight thousand dollars—to do this work?

Witness: Yes.

Court: Why were you so modest; why didn't you make it seventeen or eighteen thousand, instead of seven or eight?

Witness: His idea was, when he and I talked it over, to pump in sand from behind the present bulkhead and fill it up there, and of course, if he wanted to do that, the spur jetty was no good for that.

Court: It wasn't then to preserve what was there, but was to carry out some future development scheme?

Witness: Yes, carry out a future development and fill it in with sand.

Court: And that was the scheme of improvement that you outlined?

Witness: Yes.

Court: But the one for the preservation merely would have cost but $3,000?

Witness: Yes.

Court: Did you discuss that feature with him?

Witness: I did not.

Court: Or with Mr. Rogers?

Witness: No.

Q. According to your view, if this spur dam was erected as you had outlined, there would have been no purpose in repairing the dike at all for the purpose of preserving the beach, would there?

A. None.

Court: This would have been sufficient in itself?

Witness: Yes.

Court: But not for the purpose of carrying out the development plan which Mr. Hinchman had in mind?

Witness: That is it.

Q. Suppose this dike west of the cribbing had not been repaired would there not have been danger of

this mound having been washed away by the tidal reservoir that was in the rear of it?

A. West of the cribbing, that is toward the ocean?

Q. No, that is toward the inland; the ocean is east.

A. What is the question?

Q. I asked you if this spur dam, if the dike was not repaired, that is, west of the cribbing, if there wouldn't be danger of this mound which you referred to being washed away by the currents from the river and from this reservoir west of it?

A. No, not with the spur dam in there.

Q. What would the spur dam have to do with protecting the sand dune from the west or from its encroachment of this tidal reservoir there?

A. It would have been my idea, and was my idea at the time, not to run it directly up to the sand dune and stop, but to run it perhaps fifty feet by the sand dune, on the west side, just along the westerly edge of the sand dune.

Court: I don't understand yet why you considered that phase of the matter at all; that wasn't what you were there for, was it?

Witness: No.

Court: You were there to construct some improvement that Mr. Hinchman and his engineer Rogers had designed, more or less after suggestions from your concern?

Witness: Yes.

Court: Why did you consider the question as to whether a spur dam at a cost of $3,000 would have been effective for protecting the property, when that wasn't what you were there for?

Witness: All I considered that for was, simply from an engineering standpoint, and what suggested it to me was the people around there, the inhabitants, talking about it washing away, and all this and that, and why they couldn't have done this and why they couldn't have done something else to prevent it from washing away.

Court: Did you explain to them that that wasn't the purpose of it; it wasn't only to prevent washing it away but to develop it?

Witness: I cannot say for sure; I believe I suggested that to some of them.

Court: You didn't to Mr. Hinchman or Rogers?

Witness: No.

Q. Did you ever build a construction such as you outlined here, and observe whether it accomplished the purpose or not?

A. No, I have seen them built, though, practically in the same manner.

Q. Where?

A. At Coney Island there is one, between Coney Island and Brighton Beach.

Q. At a point where there is a river outlet to the ocean?

A. There wasn't a river outlet; there was a deep bay back in, though.

Q. Is that the work you referred to the first day you were on the stand?

A. No, I didn't do that work; it was simply under my observation.

Q. You did observe that there was a tidal reservoir or lagoon or body of water back of this sand dune, west of it, didn't you, at Manasquan Beach?

A. There was a small body of water between the sand dune and the present crib.

Q. Just north of the dike there is a body of water there?

A. Yes, just north.

Q. Would not, in times of unusual storms, the sea overflow the dike and level the sand down next to it for a depth sufficient for the tidal reservoir to make its way through to the ocean on an ebb tide?

A. No.

Q. What do you know about that; ever had any experience in observing a situation like that?

A. Nothing, only from observation, that is all, watching such things.

Q. What was there to have prevented the sand just north of the cribbing from washing out on an ebb tide, when the water came down the river and through the dike, in order to get out to the ocean?

A. Because it would have naturally followed down the current, that is all, there from the river.

Q. Don't you know that the natural current of the river is to go northeast when it comes down through the center of the river, where it strikes this dike, to go northeast toward the Short Creek, toward this location?

A. I understand that it has gone northeast.

Court: Do you know that that is the natural trend of the river?

Witness: Yes, I rather think that it is the natural trend of the river there.

Q. Assuming that the planks got off of this dike to a greater extent, wouldn't a considerable volume of water come down there on an ebb tide, and wouldn't it cut through north of the cribbing and take your sand point away with it?

A. I don't think so.

Q. What would stop it?

A. There are many old piles and debris in there, and there is a certain amount of vegetation on that point there by deep creek, right by this tidal reservoir just back of the crib.

Q. There is nothing there other than what has been washed up by the sea?

A. It has lain there so long that it has taken on a certain amount of root and it is very firm now, quite firm.

Q. It is not rock or clay or anything of that sort?

A. No.

Q. Its principal ingredient is sand, isn't it?

A. Yes.

Q. That is what makes the body of it, isn't it, and if there was a current of water against this sand, wouldn't it wash away?

A. It would wash it away to a certain extent, yes.

Q. When the sand washed away, wouldn't the sticks and stones go with it?

A. And when the tide came back in again it would fill it all up, and naturally throw the current south again.

Q. You don't think there would be any question but what the tide would come right back through the same course?

A. Yes, and deposit sand there where it washed out going out.

Q. Wouldn't that make an inlet there north of the

cribbing, if it did go in and out there, the tide, as you said?

A. It would if it did go in and out.

Q. Wouldn't that be the most likely thing, that the tide would go out that way and would come through that way?

A. No, I don't think so; with the mouth of the current already opened, it would go in and out there, but it would get some new place.

Q. You said on your direct examination that you found considerable force to the current at a point in the dike about midway, about 190 feet; you stated that on your direct examination, didn't you?

A. Considerable force to the river current?

Q. Yes.

A. I don't remember it.

Q. Didn't you say that about 190 feet the current was so strong that it pushed out the planking and piling completely?

Court: 190 feet from what point?

Mr. Carton: 190 feet wide, about the center of the dike, as I recall.

A. No, the water simply had gone back and forth under the boards, under the sheathing that Mr. Howland had put on there, and washed the sand out there under the dike, and it had raised up and tipped over inland.

Q. How did the water get back and forth under there?

A. The rise and fall of the tide.

Q. Just the ordinary rise and fall of the tide?

A. Yes, there was no other place for it to get in back of the dike.

Q. Wasn't there any other current there?

A. Yes, a certain amount.

Q. Wasn't there considerable scouring there; didn't you observe that when driving the piling?

A. Where the water went back and forth perhaps not; in fact, the bottom of the river there, I think down on the bottom was covered with three or four inches of mud at this particular place, and certainly if there was much current it wouldn't leave mud in behind the bulkhead.

Q. Were you ever working there at the time of any heavy storm?

A. Nothing more than the storms that they had that fall, which were quite heavy.

Q. Did you ever observe when there would be a heavy storm, whether there would be any current strike against the bulkhead at that point with any force?

A. No current to amount to anything.

Q. You were some two or three months putting this in?

A. I was up there from June until the latter part of November; I believe I worked on that particular job from August some time.

Q. In your opinion there would be no danger from the beach being cut away because of its attacking the beach from the back?

A. I do not.

Court: You don't think there would be any danger?

Witness: No.

Q. Why would you erect this spur piling across there if there would be no danger?

A. That in time the government bulkhead or the bulkhead that was in there before we repaired it, would wash away; that naturally would give it a slight chance. If you built this spur dam, that would make it 100 per cent safety.

Q. Do you think there would be still some danger after you made it 100 degree safety that you suggest?

A. If we had built the spur dam, there would be no danger.

Q. There would be no danger beyond that point at all?

A. No

Q. Why would you take the spur dam to the sand dune; why not take it only half way?

A. What water there would be would naturally get around it; the sand dune makes a place for it to stop; if you are going to run it at all, you have got to run it to some place and stop.

Q. Did you observe that the water did run in as far as the sand dune when it came in on the west of it?

A. Never when I was there.

Q. Then what was the necessity of building this spur dam at all?

A. It showed that there had been water there, because the sand was washed up there.

Q. That was simply the sand that was washed up from the ocean side?

A. Yes.

Q. It wasn't your purpose in building this spur dam, to act as a barrier to the encroachment of the ocean, was it?

A. Yes, as much as from the encroachment there from the other way. The current started running in

that way and then it would run back out again on a storm.

Q. You did observe that just north of the crib work the tides ran in from the ocean over this territory that you have now described, didn't you?

A. They never did, while I was there.

Q. It bore evidence of having gone in that way?

A. Yes.

Q. You thought you would stop that by building this spur dam there; that was the principal purpose of it?

A. Yes.

Q. Was it really necessary to build it to protect the sand from the encroachments of the lagoon or the tidal reservoir back of it at all?

A. No.

Q. That would only be an incident?

A. That is all.

Q. I don't know whether I asked you before whether you had any experience in observing the action of the tides on the hanging of the inlets along the Jersey coast?

A. Yes, I have some, I have always been interested in it, very much interested in it.

Q. And has it been your observation that these inlets if not protected had a tendency to shift northward?

A. None that I have ever seen. I have never seen an inlet shift northward.

Court: What section of the Jersey coast have you been familiar with?

Witness: Just from Seabright down to Manasquan.

Court: What direction, if any, have you seen them shift?

Witness: I have never seen them shift to amount to anything—more than half a rod, one way or the other.

Court: Which way would they go?

Witness: Sometimes north and then work back south again.

Q. What inlet south of the Manasquan River did you ever see?

A. Shark River has shifted.

Q. How did that shift?

A. Shift north and then shift back south again along the new government dike they are building there.

Q. Shift back to its original position?

A. Yes.

Q. You never saw it shift south, though, did you?

A. It bore evidence of shifting south sometime before they were building the government dike, ever since I have been acquainted with that territory.

Q. What did you understand they were building the government dike for at Shark River; what relation had that to the inlet?

A. To make some sort of a harbor there for small craft, I believe.

Q. Did it have anything to do with keeping the inlet from shifting northward?

A. I don't know.

Q. You haven't paid attention to these inlets, I guess, at all, have you, Mr. Oram?

A. Yes, I have always observed them and watched

them; that is about all; I have been interested in them.

Q. Were you in court the couple of days when this case was being tried at Long Branch?

A. Yes, for two days.

Q. Did you hear any of the witnesses describe the condition of the Manasquan Inlet before the dike was erected?

A. Yes, I heard them.

Q. Has the experience which you have had since that time coincided with the statements made by them—in your experience, has your observation of these inlets been in harmony with the action that these men stated?

A. They have a tendency to shift a little bit, but I have never seen them shift like what was sworn to.

Court: Like these witnesses have testified to?

Witness: Yes.

Q. Do you believe that is possible?

Court: Is it material what he believes?

Q. How far do you think, if the dike at the Manasquan Inlet was allowed to get out of repair, that inlet would shift north?

Court: Why take up time, Mr. Carton, unless you want to develop it, or Mr. Bergen? I don't think this witness has shown enough familiarity with the history of this coast between Barnegat and Sandy Hook to express an opinion about it. If you gentlemen think I am in error, I will give you liberty to develop it.

Mr. Bergen: You never saw any flowage to the north of the crib, did you?

Witness: None whatever.

NATHAN J. CONOVER, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. Where do you reside?
A. At present I am living in Camden County; Freehold is my legal residence.
Q. What is your business?
A. Civil engineer and surveyor.
Q. Will you be kind enough to qualify yourself as an expert in that subject.

Court: Is there any question about his qualification?

Mr. Durand: No.

Court: The defendants do not question his qualification; the Court is familiar with his qualifications.

Q. Are you familiar with the beaches along the Manasquan Inlet?
A. I am.
Q. How long have you known those beaches?
A. I have known them ever since I was a boy, and more familiar with them since 1882.

Q. Have you done much surveying and work around those beaches?

A. Somewhat.

Q. What was the character of that beach along from Brielle Road down to Manasquan Inlet in 1882 or about that time, if you can recall it?

A. A very low beach, scarcely above the strand, that is, scarcely above storm tide—a broad strand without dunes.

Q. Have you a map which shows that in 1882?

A. Yes, sir.

Q. Will you be kind enough to produce that map?

A. (Producing same.)

Mr. Bergen: I offer in evidence the photograph map, part of the report of 1882 on the Manasquan Inlet Improvement.

Court: Isn't that already in, in Mr. Payne's testimony? Withdraw the offer for the present, with the privilege of renewing it, if they are not in. The entire report may go in, or such portion as may have been omitted.

Q. Is that beach now the same as it was in 1882?

A. Very different.

Q. Describe to us, will you not be kind enough to, the changes which have occurred in that beach.

A. In 1882 it was a low beach, scarcely above the strand or storm tide. The beach has gradually built up, until now it is a succession of sand dunes along there, I should say eight to twenty feet above storm tide, and varying in width from 200 feet to 400 or 500 feet, possibly wider in some places.

Q. Have you a map which shows the character of that beach at the present time?

A. I have a map showing the beach and cross sections of the sand dunes at several points along the beach.

Q. Will you be kind enough to produce that map?

A. Yes, sir. (Producing same.)

Q. Does that correctly represent the height of the land with its cross sections and the beach, with the street, &c., as it is there?

A. Engineers will understand that cross sections are made on an enlarged scale; there is a horizontal scale and vertical scale. That is a correct map of the beach as I found it at that time.

Court: The scale of the cross section is not the same scale as you have used for the rest of it?

Witness: That is it.

Q. Do you know what the two scales are?

A. The scale is 100 feet to the inch, horizontal scale; vertical scale, 10 feet to the inch.

Mr. Bergen: I offer the map in evidence.

Mr. Carton: There is no objection.

(Marked Exhibit D3.)

Q. Where is the highest place on that beach, Mr. Conover, at the present time?

A. The highest point on that beach, it does not show on the map, is northwest of the end of the crib, leading into the ocean.

Q. How many feet?

A. About 150 feet or 200 feet from the end of the crib to the extreme highest point of the hill.

Court: And about what is the height there?

Q. Does your map show?
A. No, not just at that point. The highest section that I have shown is about 16 feet above what I took to be highest.

Court: And the point you have just indicated being 150 feet, would be ——

Witness: Several feet higher; I should say four feet higher.

Q. You say about 150 or 200 feet from the end of the crib; do you mean measuring at the western end of the crib?
A. Yes, the measuring at the western end of the crib.

Court: In your reference to the crib, you distinguish between the crib and the dike proper?

Witness: Yes, the single row of piling.

Court: So the point you have reference to is the end of the crib and beginning of the dike?

Witness: Yes.

Q. That map gives certain vertical sections at certain places; is there any land lower than those sections, in between where you have those sections pitched?
A. I endeavored to get the lowest section there was, which is at the road leading from Brielle to the sea.

Q. In other words, marked the "Brielle Road" on this map?

A. Yes.

Q. What is the height at that point?

A. The height at that point, without referring to my note book, would be 10½ feet.

Q. And it is all higher than that from the Brielle Road down to the Manasquan River?

A. I found no place lower than that. I will qualify that in this way: right at the dike the sand doesn't pile up vertically, the sand slopes from the dike to this hill, but after you reach that hill ——

Court: At the dike and crib is the sand at least on a level with the top of the dike?

Witness: Yes, and slopes up from the westerly end of the dike to this hill that I have spoken of.

Q. In a continuous straight slope?

A. In a continuous straight slope—I wouldn't say straight,—upward.

Court: Is there a growth there of bushes and grass?

Witness: Yes, beach grass growing over those dunes.

Q. What does that beach grass signify?

A. That the sand has been there in places several years.

Q. This map which is in evidence and it attached to the government report, shows Short Creek is cutting away into a sort of a reservoir comparatively close to the beach?

A. Yes.

Q. What is the character of Short Creek at the present time?

A. That body of water or pond has since filled in, drifted full of sand. (Referring to the map attached to the report of 1882, which is the same as the map Exhibit A in this case.)

Q. So that what is the width, can you tell us, of this inlet—of this beach front, at the present time, extending from the ocean back to Short Creek, and from Brielle Road down to Manasquan River?

A. I would have to get another map to show clear back to Short Creek at this time, because I didn't take the cross section clear back to Short Creek.

Q. Have you another map?

A. Yes.

Q. Will you be kind enough to produce that?

A. Yes, sir. This is a map made by Mr. Rogers himself and surveyed in 1916.

Q. Witness being shown map of land on the Manasquan Meadows, Wall Township, New Jersey, surveyed by Nyatt Rogers and N. B. Conover, January, 1916, is asked, does that map correctly show the land as it existed in January, 1916?

A. As to this part of the beach (indicating) that map is correct.

Q. What part do you refer to?

A. From "Inlet 1865" and the line from that point to the westerly end of the dike, that map I know to be correct.

Court: You mean running on an angle or right angles to the ocean, or how?

Witness: No, running diagonally from "Inlet 1865" to the westerly end of the dike; the land em-

braced within that territory to the north is correctly shown on the map, and is correct except that there is a body of water in behind the dike, to the north of the dike, between a point north of the end of the crib and the westerly end of the dike.

Q. That map correctly shows the position in 1916 of Short Creek?

A. It does.

Q. And these dunes come over between Short Creek as there shown and the ocean?

A. There are dunes between the Short Creek as there shown.

Q. Were you familiar with this land in 1914?

A. I was not on this land in 1914.

Q. Can you connect up this map to the other map which you have there in evidence as of 1914 in any way?

A. I have been on the ground at intervals from 1882 until the present year, but I think there was a time between 1905 and 1912 or 1914 when I was not on this beach.

Mr. Bergen: I offer this map in evidence.

Mr. Carton: I object to it; only this section is all that is correct, he says, and even that section, the most important thing, he says, it does not show; it does not show this so-called tidal reservoir, and I cannot see what it does show that helps us.

Court: It is only offered for that section, I suppose, Mr. Bergen? It will be permitted for the purpose of showing the territory embraced between "Inlet 1865" and the westerly end of the dike, from the diagonal line indicated by Mr. Conover in his testimony.

Mr. Bergen: And running to the north.

Court: He hasn't mentioned it yet; he says he knows that that is correct between the line he has indicated.

Witness: I said it was correct except as not showing the body of water behind the dike.

Court: What have you said about anything north of the inlet; does it correctly show the ——

Witness: It shows the shore line of the Atlantic Ocean at the date it was made north of the inlet, and shows the correct position of the dike.

Q. How about Short Creek?
A. Short Creek is correct.

Court: I am willing to admit the map, but I want to know what it refers to.

Q. Is that a correct delineation of the ground in January, 1916, to the north along the beach and Short Creek as far as Brielle Road, to the north of a diagonal line running from the place marked "Inlet 1865" and Stump Point, to the west end of the dike?
A. It is.

Court: It will be admitted for that as well as showing the land to the south of the diagonal line.

(Map referred to marked Exhibit D4.)

Q. Who made that map, Mr. Conover?
A. Nyatt Rogers did the drafting.

Q. Who is Nyatt Rogers?
A. Civil Engineer at Asbury Park.
Q. For whom did he make that map?
A. For Mr. Hinchman. There was a realty company, and Mrs. Hinchman and Mr. Hinchman were the real owners.

Court: Do you know anything about it?

Witness: No.

Court: Strike it out.

Q. Did you assist Mr. Rogers in making the map or survey from which it was made?

Witness: I assisted Mr. Rogers in making the map. The map of the Island of Sedges is a tracing from my work.

Court: You have a map of the Island of Sedges shown on the map?

Witness: Yes, the lines of Short Creek and Deep Creek are shown from my surveys.

Court: Did you assist in making the shore line?

Witness: I did, I ran the shore lines.

Court: And the Brielle Road?

Witness: Yes.

Court: The line of the dike and crib?

Witness: Yes.

Court: And the line of First Avenue, running parallel with the ocean?

Witness: Yes, practically running parallel with the ocean.

Q. What are these dotted lines on the map which are shown between Short Creek and the ocean?

Court: If he knows why they were put there, he may state it, but if he is assuming it, it doesn't help us any.

A. I did not put them there and had no part in putting them there, and did not see the map until a long time after they were put there.

Q. And aside from what you were told, you don't know?

A. A long time after the map was finished, Mr. Rogers sent me down this copy.

Q. With these lines on it?

A. Yes.

Q. This map is laid out on a scale, is it not?

A. Yes.

Q. And it correctly shows the width of the beach therefore?

A. It does.

Q. The scale is shown on the map?

A. Yes, 100 feet to the inch.

Q. Will you be kind enough to tell me how wide the beach is at its narrowest point between Short Creek and the Atlantic Ocean as shown on this map?

A. At a point about 600 feet southerly from the Brielle Road it would be almost exactly 600 feet from the easterly shore of the creek to the shore of the Atlantic Ocean.

Court: High water mark or ordinary tide?

Witness: Ordinary high water.

Court: How high is that beach at or near that point above the line of high water?

Witness: About 13 feet.

Court: That is the average height above?

Witness: That is the extreme height; about 11 feet is the average height.

Court: And that is above high water mark?

Witness: Yes.

Q. How does that beach compare with the beaches along the Atlantic Ocean; are they far behind them—the New Jersey beaches?

Court: I don't know that you have shown his familiarity with New Jersey beaches outside of this one.

Q. Are you familiar with the beaches running from Sandy Hook down to Barnegat?

A. I have some knowledge of all these beaches; I am more familiar with the beach from Three Corner Pond or Lake Como to Seaside Park than I am with other parts of the beach.

Q. Are you familiar with the beaches running from Bayhead down to Seaside Park?

A. I am.

Q. Are those beaches in general, in the sense of

having water behind them, similar to this beach in that respect?

A. At Mantoloking the formation is very similar, about the same width and same general character of the beach—just the beach blown up.

Q. How does this beach compare in height and width, and therefore in strength, with those beaches running from Bayhead to Seaside Park?

A. This beach is quite as strong as those beaches are in many places at Mantoloking and other places along the shore.

Q. Has the character of these beaches changed from January, 1914, to January, 1916, the time when this map was made?

A. Not materially.

Court: I don't remember that you stated that you knew anything about its condition in 1914.

Witness: In 1916 I was over the beach pretty thoroughly; 1914 I was not.

Q. When were you back on that beach so that you can tell the general characteristics?

A. I believe I walked up and down that beach in 1916, and I was along the beach more or less from 1890 to 1895.

Q. Between 1910 and 1916 has that beach changed materially?

A. I think the dunes, if anything, are higher; that is, that the beach has grown in height and width to some extent at that time, that is the sand hill, the dunes.

Q. Has it grown to any real extent?

A. I think it has materially.

Court: What do you base that opinion on?

Witness: The shore where the old inlet was is a sandy beach, and that is gradually working westerly, making Short Creek narrower.

Court: Have you any knowledge how long it takes for this growth to come on the beach, this grass—any actual knowledge of it?

Witness: I should say not less than three years; I should say five years, in my judgment.

Court: Is that from actual knowledge or experience or mere assumption?

Witness: I have watched it closely enough to say that.

Q. It has been testified to that there was a deep hole under the work that was done in 1914 by Mr. Howland; can you tell where that is on the map of 1882, Exhibit A?

A. It is at a point about 500 or 600 feet westerly from the west end of the crib, where there was a drift of sand when the jetty was built.

Court: That would bring it about how near to the westerly end of the dike, then; you say it is 500 or 600 feet from the westerly end of the crib; that would bring it about half way down the dike?

Witness: About half way down the dike.

Court: The dike is about 1200 feet?

Witness: About 600 feet from the end of the crib.

Q. Did the government riprap that part of their work in 1882 that you have just referred to?

A. The part of the dike that was rebuilt by Mr. Oram, you mean?

Court: He is asking now did the government riprap part of the dike where you have indicated this water or hole was?

Witness: There was riprap along the dike from the crib to about this point I have indicated, about 600 feet westerly from the crib. In sounding and working around there I found no indication that any riprap had been used for a space of two or three hundred feet.

Court: Suppose you tell me what you mean by riprap?

Witness: This work was protected by mats and heavy stone placed on the top of mats of brush tied together with wire.

Q. In other words, where this sand bar was in 1882 the government did not riprap?

A. That is true; I found no indication of riprap or protection.

Q. Was that where this hole came?

A. That is where the hole came.

Q. And where the dike was carried away?

A. Yes, where there was no riprap.

Q. What kind of construction is the crib which has been testified to here?

Court: What is it now?

Mr. Bergen: Yes.

Court: Does it appear when you were last on the premises?

Wtiness: I was there in the month of November, 1917.

Mr. Bergen: My question relates to 1917, what kind of construction is it.

Court: From your own observation can you tell?

A. You can simply see the top of the piles, the wales—the stone filling and the line of piling back about ten feet, as shown on the plan accompanying the report of 1882.

Court: And that is all you saw of that in November, 1917?

Witness: The front of it.

Q. And you could see that it had been constructed as shown in the report?

A. It is constructed as shown in that report, as far as you could see it was constructed.

Q. What was its condition?

A. Fairly good; some of the front planking was off; otherwise in good condition.

Q. When did you last examine the dike which was constructed there or which was referred to as repaired in 1914 and 1915?

A. I lost a note book and I cannot fix the exact date.

Q. About when?

A. Last fall, the fall of 1917.

Q. What was its condition then?

A. As I have explained it.

Q. I am talking about the dike where it was repaired by Mr. Howland and Mr. Oram.

A. The dike was in places as they rebuilt it. Where the sand had gotten in behind this dike, it was leaning outward toward the river considerably; it had not withstood the pressure of the sand drifting in behind it.

Q. Can you give in any approximate or direct way the angle in which that was leaning out?

A. Certainly not less than one foot in ten; I think greater than that; it varied at different points.

Court: That was due to the pressure of sand behind it?

Witness: Yes, I take it that it was due to the pressure of sand behind it.

Q. Is the location of Stump Point and the western location of Short Creek practically as it was in 1882, as shown by the map Exhibit A?

A. The end of Stump Point has changed considerably; the dike is in place to its extreme end and the ground has been washed away, or dug away, as some allege, to the west of the end.

Court: The ground of Stump Point?

Witness: I am now talking of Stump Point.

Q. How about the western shore line of Short Creek?

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A. The westerly shore line of Short Creek other than at this point is practically the same as it was at that date—as near as I can tell from maps that have come into my possession.

Q. Therefore the filling in which has occurred at Short Creek has been on the eastern side and not the western side of that creek?

A. It has come from the easterly side, yes, sir.

Court: The filling in of the lagoon or reservoir to which you referred?

Witness: Yes, the sand drifting over from the beach.

Q. What is the nature of the land at Stump Point?

A. We call it salt meadow, and sedge meadow.

Q. What is the nature of the land immediately across from Stump Point on this beach?

A. I take it that out where the dike crosses it, there is water there, right on the line of the dike now, and for 100 feet, and when you get back from the dike you can strike sedge meadow along Short Creek.

Court: On the easterly side?

Witness: On the easterly side of Short Creek.

Q. What is the character as to the durability of sedge meadow?

A. It will stand considerable current, and does not change readily from ordinary slow river currents.

Q. And it lasts for years?

A. Such maps as I have seen of the Island of Sedges would indicate that those lines are fairly permanent.

Mr. Bergen: May I ask the other side to allow me to use for a moment the map which was put in evidence by General Payne, the large map which shows the location of the dike?

(Map Exhibit C6 produced.)

Q. Witness being shown map, marked Exhibit C6, which is a map made by Colonel Macomb, and dated September 1878, is asked if the location of the government jetty which was built in 1882 is properly marked on that map?

A. In the report of 1878 the jetty as projected by the engineers at that time started, I take it, further south and ran up along the Manasquan River a long way and did not go into Stump Point.

Court: That is as projected; how was it built?

Witness: As projected and shown in the map of 1878; it was built as shown on Exhibit C6.

Court: And is that as reported in the report and map of 1882?

Witness: It is built on these lines as shown in the report of 1882, as near as I could tell. (Referring to Exhibit C6.)

Court: The report of 1882 being represented by Exhibit A?

Witness: The difference is that in the report of 1882, it shows a much considerably larger body of water behind the dike than Mr. Payne shows on this map.

Court: A larger body of water than is shown on the line which Mr. Payne has drawn on Exhibit C6, the map of Colonel Macomb?

Witness: Yes.

Q. So that the map of Colonel Macomb which has this line of the government jetty put on it, does not show the true state of affairs as they existed in 1882 when the government jetty was built?

Court: I don't think he should be asked to characterize it; he may state that it does not correspond with the map of 1882 shown in Exhibit C6.

Witness: The map of 1882 differs some in detail from C6, and shows a larger body of water behind the dike, or north of the dike, than is shown on C6.

Q. Will you be kind enough to compare the beach on the southern side of Manasquan Inlet, as to height and strength and width, with the beach to the north of Manasquan Inlet?

A. From the dike at Manasquan Inlet—from the south side of the inlet to a point near Blodgett's pavilion on the Cook property, which is a distance of several hundred feet, the beach is scarcely above storm tide, scarcely upon that sand, no sand dunes, no grass, and almost level stretch of sand.

Q. If the inlet were filled up what would be the character of the body of water which would be back of it?

A. Practically an inland lake.

Q. Would it have waves in it?

A. Very small.

Q. Would it have a tide in it?

A. Not at all.

Q. Would it have a current in it?

A. Very slight; no current at the lower end near the beach, except as induced by—a very slight current that might be induced by very heavy winds.

Q. In such an inland lake as that, without an outlet, but with water flowing into it, where would it get its outlet?

A. If it continually filled up, it would break out at the lowest point on the beach.

Q. Where would the lowest point on that beach be?

A. Between the crib and the pavilion on the Cook property, 600 or 700 feet south of it.

Q. Would it be to the north of the Manasquan River or would it be to the south of the Manasquan River?

A. It would break out to the south, under those conditions. It would break out to the south of the present position of Manasquan River.

Court: If I recall the testimony of all the witnesses for the complainant in giving a historical resume of affairs down there, they have all indicated that the break occurred north of the river; in every instance, that it was characteristic of the beaches, for the inlet to move north and make the break. Why do you think it would move south instead of north?

Witness: Because it is protected by this heavy crib work and there is a large bank of sand built up there, and water does not flow up hill. If the sand formed a dam and the river filled up this reservoir, it would naturally flow out at the lowest point.

Court: The point of least resistance?

Witness: The point of least resistance, which at present is south of the dike and crib.

Court: If the dike, however, were not maintained there at that point, and then the mouth of the river filled up, where would the tendency be for the opening, south or north of the present ——

Witness: North is the general tendency along that beach.

Q. Is not the beach sufficiently strong, even if that crib were to break out, to prevent a breaking out of such an inlet north of the crib?

A. It would not break out north of the crib. The inlet might gradually, without any protection there, wear northward, but it would not break out north as long as those sand dunes were there.

Q. What is the character today of the mouth of Short Creek?

A. Short Creek finds its way to Manasquan River at present by an opening to the westward of the dike, and the dike has been cut through here (indicating) for a distance of several feet, where this spur or cross dike goes over to the beach.

Q. Has Short Creek itself filled in any?

A. I don't know.

Q. Do you know whether its outlet has filled in—its mouth has filled in?

A. At present there is a very deep channel along the cross dike and a wide shallow channel going out to the westward of the original dike, and a small patch of sedge lay right in here (indicating).

Court: On the northerly side of the dike and near its westerly end?

Witness: Yes.

Court: To what do you attribute the creation of the sand dunes north of the dike, the existence of the dike?

Witness: The existence of the dike, the buildings, stopping the sand as it flowed down the beach.

Court: If it were not for the dike and buildings and improvements, it would be practically in the same condition as the land south of the river?

Witness: For a considerable distance.

Court: Down to Cook's place?

Witness: Yes.

Court: You mean if it had not been for the construction of the dike and other improvements and buildings which held the sand?

Witness: Yes.

Q. How long were those buildings there; were they there before 1914?

A. Yes.

Q. Were the sand dunes being created before 1914?

A. Yes.

Q. Was this water higher in 1914 than the beach south of the inlet?

A. Yes.

Q. Was it stronger in any way than the beach south of the inlet before 1914?

A. Yes.

Q. For how long a period of time had it steadily been increasing in height and width and strength?

Court: Isn't the complainant's testimony to the effect that from the time the dike was constructed practically ——

Witness: That would be created, is my answer.

Court: That must be so?

Witness: That is my answer, yes, sir.

Q. If this present inlet were to close up so that this would become an inland lake, is there any danger at the present time that Short Creek would cut through to the north, as it has been testified to it did on one or two occasions in times of old?

A. It would not break through under present conditions.

Q. Where would that break be under present conditions?

A. Between the dike and the pavilion on the Cook property, south of the present inlet.

Court: If this dike had not been repaired in 1913 or 1914, would there have been a tendency in your opinion for the land lying north of the dike to have gradually been washed away?

Witness: My own judgment is that the crib would have held the inlet.

Court: I assume if the crib and dike had not been kept in repair.

Witness: I do not think the dike was absolutely necessary to keep the inlet in its present position.

Court: But the crib was?

Witness: But the crib was.

Court: And if they had not been kept in proper repair, the land eventually would have returned to its original character, would it, the land north of the dike and crib?

Witness: In my judgment.

Q. Do you know whether any repairs were made on the crib in 1914 or 1915?
A. Very slight, I understand; that is ——

Court: Do you know anything about it?

Witness: No.

Q. Was the crib in the same condition in 1916 as it was in 1910, do you know that?
A. A few more plank were off, and I will qualify my other answer, that there was a bunch of cement placed in one of the other bents of the crib.
Q. Mr. Conover, do you know where the road which has been laid out on this property, First Avenue—do you know how high that is as compared with the dunes?
A. It is lower than the dunes.

Court: About how high above the tide level, approximately?

Witness: Six to eight feet; it has some grade.

Court: Above ordinary high tide?

Witness: Above ordinary high tide.

Q. Who built that road?
A. The Borough of Manasquan, I understand.

Court: If you don't know, say so. Do you know?

Witness: The Borough of Manasquan graveled it, put the gravel on the road.

Court: He doesn't undertake to say who built it.

Q. Were any other repairs made there or improvements made there along that road?
A. Sewers and water pipe were laid along that road by the Borough of Manasquan.
Q. And they were laid underneath the road?
A. Underneath the road.
Q. When were those improvements made, about what year?
A. I think it was 1915,—a short time ago.
Q. Were any of them made before 1914, do you know?
A. No, there were no sewers there in 1914; they were laid out practically the same time.

Court: No water pipe?

Witness: No water at the time, that is, prior to 1914; they were both practically laid at the same time.

Q. What comparatively is the value of the land lying along Short Creek and Manasquan River on this beach?

Mr. Carton: Objected to.

Court: You may qualify him.

Q. Are you familiar with values of real estate and building improvements?

A. I naturally would have some knowledge of the value of real estate in that section.

Q. What knowledge have you?

A. I know the rentals that the ground commands; I have seen land sold in the adjoining boroughs, and I am acquainted with values in Point Pleasant fairly well.

Q. Point Pleasant is how far from this point?

A. About a mile.

Court: Have you ever dealt in any real estate in this neighborhood at all?

Witness: I have not.

Court: Or in this kind of beach property in the neighborhood?

Witness: I have not.

Court: Aside from what you have been told or heard, have you any personal knowledge as to what it was buying or selling for, any such land?

Witness: Land of this character further down the beach I am qualified.

Q. How far?

A. Two or three miles.

Court: I think that is too remote. Go on and examine him as to his qualifications.

Q. Have you put through sales of such lands?
A. Not in recent years.
Q. Do you know the prices paid for such lands?
A. Yes, in one or two instances.

Court: How recently, within two or three years?

Witness: Within the present year, for that matter; 1917 I mean.

Q. What is the value of the land at the juncture of Short Creek and the river if it had been filled up or was filled up, compared with the value of the land on the ocean front?

Court: What difference does it make; why is it at all material?

Mr. Bergen: What I am trying to show is, that the theory of making an improvement there by constructing this dike with a cross dike for the purpose of filling was so absurd from a real estate standpoint.

Court: Why do you need to show that? They are not entitled to recover from you at all on that theory for making improvements; if they are entitled to recover at all, it is because the expenditure they made, was necessary to preserve their security; isn't that the real theory on which they are proceeding?

Mr. Carton: Yes.

Court: They cannot get a dollar from you on any other theory. You don't ask it, do you?

Mr. Carton: No, we do not.

Mr. Bergen: There is another phase of our argument. Their mortgage was reduced to ten or twelve thousand dollars, and for them to expend $22,000 to preserve that security, I claim is wrong. I want to show that they didn't give any measure of value to the property by doing it.

Q. From what source would a possible break north of the crib come?

A. Under present conditions, from ocean currents.

Q. Would it come from the river current?

A. No.

Q. Why not?

A. There is no wear or action of the river, as long as the inlet is confined to its present position, that would break the beach north of the present inlet.

Court: The volume of water of neither one being great enough?

Witness: Not being great enough.

Court: If you draw a distinction to the present inlet then there might be some effect from the volume of water?

Witness: If the land between the inlet and the pavilion to the south filled up so that it was higher than the land to the north, of course it would break out.

Court: Otherwise it would go out to the south?

Witness: Yes, as long as the present condition was maintained.

Q. Is there any danger of an ocean current or an ocean storm washing away and forming an opening to the north of the crib?

A. I think the danger is very remote.

Q. As long as the dike and crib were maintained?

A. As long as the dike and crib were maintained the danger is very remote.

Q. What has the dike got to do with the thing?

A. It is an obstruction and continues to throw the current over the beach for that entire distance.

Q. If the dike disappeared entirely, but the crib remained, would there be any danger of the river current washing to the north of the crib?

A. It would not.

Q. Does the fact that the dike remains, irrespective of the crib, protect the land lying to the north of the crib from the action of ocean currents?

A. Ocean currents will not reach that far inland.

Q. Therefore as long as the crib remains, whether or not the dike is existent, there is no danger of a cut to the north of the dike from either ocean currents or from river action?

A. That is right.

Court: At a point from the shore, the inlet, the crib extends westerly how much?

Witness: About 200 feet, 192 feet.

Court : If the dike extending westerly beyond that is removed, why wouldn't the action of the sea and

river combined cut away the land west of the end of the crib and lying north of it?

Witness: The dike remaining in its present condition?

Court: If the crib remaining in its present position holds this body of sand intact lying north of it?

Witness: Lying north of it; practically it holds this body of sand to the south of it in position.

Court: South of the inlet?

Witness: South of the inlet, in its present position.

Court: If the dike is removed and the crib only remains, you say that the action of the river ——

Witness: I think it would have very little action on this part of the shore. (Referring to the shore line.)

Court: That isn't what I am asking; what effect, if any, would the action of the ocean and river have on the land lying at the west end of the crib and north of the present dike line?

Witness: This land from the end of the cross dike to the road is sedge and will withstand considerable action from tides and winds and water, and I think the wearing away would be very slow.

Court: What do you say about the land lying be tween the easterly line of First Avenue and the west erly line of the crib, there being no dike there?

Witness: The body of water to the north of th dike would probably become greater and work ou in this shape gradually (indicating).

Court: And wash away part of this sand nov forming?

Witness: Wash away some of the sand north o the present dike.

Q. Would it ever wash away back of the dike?
A. I think not.
Q. I meant would it wash away the land back o the crib?
A. An eddy might break through in there and bor out a semicircle and find its way back into the Mana squan River, but I cannot imagine how water woul eat in there and then go way back here (indicating until it strikes the ocean.

Court: What would prevent the water of the rive flowing to the sea, the dike being removed, from get ting behind the westerly end of the crib?

Witness: If the crib was intact, tight, and n dike, the same thing would happen as happened up here (indicating); the water would come around and form an eddy like that and come out again to the west end of the crib.

Q. And would not go behind the crib?
A. No, and would not go behind the crib, but for a very short distance.

Q. Does this eddy and wash-out occur by reason of the ebb tide—the tide flowing out, or by reason of the flood tide—the tide flowing in?

A. In that case, behind here (indicating) I should say the ebb tide would have more effect than the flood tide.

Court: Referring to the location showing the body of water behind the present dike on this map.

Witness: After heavy southeast storms filling this tidal reservoir up to extreme high water mark—the storm water mark, a very large volume of water goes out of Manasquan Inlet and goes out very very swiftly.

Court: Wouldn't it have a tendency, in case the dike were not maintained there, to cut in behind the westerly end of the crib and cut that sand?

Witness: A short distance.

Court: It would do it gradually, but not all at once?

Witness: After it formed a semi-circle there, it would stop, if the crib were maintained in its place.

Q. If this crib were on the southern shore of the inlet instead on the northern shore of the inlet, would it have the same effect to protect the land to the south of it; in other words, is there not a lateral drift toward the north by the ocean winds and currents at that spot, which makes it so that the jetty will protect land to the north of it, where it wouldn't protect land to the south of it?

A. A jetty to the south of that, without any jetty or crib to the north, would probably be in the middle of a sand bank.

Court: Eventually?

Witness: Very quickly, on this part of the shore.

Q. If there was any danger of the river cutting in back of the crib in case the dike had entirely disappeared, how would you protect that situation on that land?

A. The cross dike or cross crib from the end of the present crib diagonally across to the meadow side would afford sufficient protection.

Q. Can you tell me whether the government made such a short crib or dike when it constructed this crib?

A. The report of 1882 shows that in constructing the crib they built short dikes across the sand to prevent the action of the currents as they were building —as they interfered with the construction.

Court: That was only because they interfered with the construction, you understand?

Witness: They simply said they are there.

Q. Does that fact of the construction of those cross dikes from the crib not preclude any possible danger of the river current cutting through?

A. As long as the dike were there, I think the dike itself ——

Q. As long as the crib ——

A. As long as the crib were there, it would be in itself sufficient protection.

Q. That is, the short cross spurs?

A. The short cross spurs.

Q. Do you know anything about the vertical height of the beach above Brielle Road?

A. It differs from the height to the south very little; possibly some of the dunes are slightly higher.

Q. How about the tract, the vertical height and the strength of the beach on what is known as the Gazzan Granger tract?

A. The dunes are quite as high and strong as they are to the south.

Q. Is there any danger of the Manasquan Inlet breaking out to the north therefore of the Brielle Road?

A. Not the remotest, under present condition.

Mr. Bergen: May I ask the other side to produce a map which was made for use in the Rice case in 1912 by Nyatt Rogers.

(Map produced by complainants entitled "Map made by Nyatt Rogers in 1913, compiled from various records and data supplemented by surveys. Map of Manasquan Beach.")

Q. Do you know anything about this map?

A. I have seen that map.

Mr. Bergen: Do you expect to call Mr. Nyatt Rogers?

Mr. Carton: Yes, we expect to produce him.

Mr. Bergen: I offer that map in evidence for the purpose of showing the location of Short Creek in reference to the beach in 1913, when that map was made.

Court: If there is no objection, it will be marked.

Mr. Carton: There is no objection.

(Map produced marked Exhibit D5.)

Mr. Bergen: May I ask the other side to produce the original of the map which has been offered in evidence and marked Exhibit D4, being the map of January, 1916, made by Nyatt Rogers and Mr. Conover?

Mr. Durand: We haven't it now.

Mr. Bergen: May I ask the other side whether we are not charged in this account for the making of that survey of January, 1916, from which that map is produced?

Mr. Carton: Yes, I think you are charged the amount paid Mr. Rogers for making this map, because it was used in the land suit.

Mr. Durand: I think that is a duplicate.

Court: You will have to renew your request.

Mr. Bergen: That is D4; how about D5?

Mr. Carton: We don't know about that.

Court: You admit as to D4 they are charged with it?

Mr. Carton: Yes.

Court: But you don't admit as to D5?

Mr. Carton: No.

Court: D4 you need not bother with; that is admitted.

Cross-examination.

By Mr. Carton:

Q. Mr. Conover, I understand you to say that the dike erected by the government in 1882 was not necessary for the preservation of the beach at Manasquan, or to restrain the currents there; is that so?

A. That was my testimony, yes, sir.

Q. You differ from the government engineers on that point?

Mr. Bergen: I object.

Court: I will take the evidence.

A. The original plan of the government was for a narrow channel; it wasn't for the protection of the beach or anything of the beach; it was to narrow the channel, to induce a current for the purpose of navigation.

Q. Do you differ in your judgment or conclusion with that of the engineers?

A. I do not remember whether the government engineers said anything about the protection of the land.

Q. The fact is that the government ——

Court: I thought we assumed that the government did not build the dike for the protection of the

property owners, but kept it open for the protection of the people who had occasion to use the river; I think that was agreed on the other day.

Q. The government did build the dike as well as the cribbing?

A. It did.

Q. You claim that work was unnecessary, the dike part?

A. Not for the river currents, not for deepening the river currents, it was necessary for that, to confine the river.

Q. As a matter of fact, wasn't the dike erected at that point to keep the inlet at a fixed given point?

A. The crib was erected to fix the inlet at this point, and the dike was built to give a direct straight current out to the ocean, to maintain the depth.

Court: It doesn't answer your question responsively; you asked him if it wasn't built for a certain purpose, and he hasn't answered that.

Mr. Carton: I am quite satisfied with his answer nevertheless.

Q. Then there was some purpose in erecting the dike?

A. Surely.

Q. What was its purpose now?

A. To give a direct course to the currents of the river to the ocean.

Q. If this dike had not directed the currents, what course would the currents have taken?

A. They would have spread out, as they had formerly, over a broad area, and it would have lessened the currents and sand bars formed over a large area.

Q. And what course would these currents take beyond the cribbing?

A. Sometimes one way and sometimes another; it is very hard to tell, the plan was never carried out.

Q. What plan was never carried out?

A. The plan of the government engineers in 1879.

Q. Do you think they made additional observations and from their experience decided to erect the present construction?

A. They simply said it was a benefit to navigation.

Q. Your first familiarity with the Manasquan Beach was at or about the time this dike was constructed?

A. Yes.

Q. Had you any knowledge of the condition of the Manasquan River prior to the erection of the dike?

A. As a boy I was occasionally on that beach.

Q. How far beyond 1882 do you remember the beach?

A. I was probably on the beach once or twice between 1870 and 1880, several times.

Q. And did you observe the condition there then?

A. Very slightly.

Q. Do you know what it was?

A. I know that it was this low strand, very similar to the beach south.

Court: How old were you then?

Witness: Ten or fifteen years old; I was out there quite often.

Q. Your recollection is it was a low strand there?

A. Yes.

Q. And a narrow strand?

A. Yes.

Q. Any recollection about the inlet, where it was at that time?

A. No, I haven't.

Q. When prior to 1882 had you last been to the Manasquan Beach?

A. I was out west in 1879—from 1879 to 1882, in Colorado.

Q. So the time you were there before 1882 was sometime prior to 1879?

A. Yes, and my recollection is that I was not there after 1879.

Q. So the dike was completed when you were there in 1882?

A. They were then completing it.

Q. Was the beach different then from what it is now?

A. Yes.

Q. Describe the difference between the beach now and the beach at the time they were erecting the dike.

A. As the map shows, these lagoons behind the beach were much larger, and the beach was simply a low strand at slightly above storm tide.

Court: About how wide was it on an average?

Witness: From five to six hundred feet. Short Creek wasn't there at that time; I think it went out to sea at that time.

Q. When was that?

A. 1882, when they were building the dike.

Q. You are now describing the condition of the beach at the time the dike was erected?

A. The inlet at that time was where it is now.

Court: You said to Mr. Carton it was a strip of low strand there, and I tried to find out about what the average width of that strand was between the Brielle Road and the crib or dike; about how wide was the sand itself?

Witness: There about four or five hundred feet, should say.

Q. You referred to Short Creek forming an inlet the ocean prior to that time.

A. Prior to that time.

Q. Do you remember that?

A. I have no distinct recollection of it.

Q. Did the situation there at the beach bear evidence of Short Creek, prior to the erection of the like, forming an inlet to the ocean?

A. Going down there as a boy, I cannot say my opinions are well fixed.

Court: He said in 1882 did the beach bear evidence that the creek at sometime prior thereto formed an inlet north?

Witness: Yes.

Q. Was that at the mouth of Deep Creek where the inlet was formed, as you understood?

A. I have always heard and know from reliable sources, that there was an inlet at the mouth of Deep Creek.

Q. How do you account for the inlet having gotten as far north as Short Creek?

A. There was nothing but the sand to fix the inlet, and the sand would wear away with the ocean and river currents gradually working northward.

Q. What course did you understand the river took from its bed to the ocean?

A. As far as I understand it, at a later date, the main body of the Manasquan River ran sometimes down Short Creek and sometimes to the westward of Egg Island, as it was called, sometimes to the eastward of Egg Island, the inlet working up and down the beach with the winds and currents.

Q. Did Short Creek form an inlet connecting the river and the ocean?

A. I understand so.

Q. And there was still a low strip of land intact on the beach between the inlet at Short Creek and the present inlet, was there not?

A. I never remember there being two inlets, but there was an inlet at the mouth of Short—I don't remember such an inlet, but there was an inlet to the mouth of Short Creek and the sand extended from there to the pavilion.

Q. And the course of that inlet from the mouth of Short Creek was through Short Creek to the Manasquan River, was it not?

A. At one time, yes.

Q. And that went through the point where the present dike is erected, Short Creek?

A. No.

Q. Didn't the river come out Short Creek at the point where the dike is erected?

A. When the river came down—the main stream of the river came right down its present channel, and when the inlet is in its present position, some water may have come through Short Creek into the river, and was part of the estuary, but the main body of water came directly down from the tidal reservoir straight out to the ocean.

Q. The present inlet, as a matter of fact, filled up completely before the dike was erected?

A. At times, yes, sir.

Q. And when it would fill up, would it go north or south?

A. It worked north.

Q. It always works north down there?

A. Always.

Q. That is the action of all inlets north of Barnegat Bay, working north?

A. That is right.

Q. And south of Barnegat Bay they work south?

A. Yes.

Q. Will you indicate on Exhibit D3 the course the inlet had took just prior to erection of the dike in 1882, as observed by you when you were there?

Court: Describing it as you draw your line, so we get it on the record.

A. As I remember, the dike was partly built and the water came down practically in the present position of the inlet, possibly cutting across the land where the crib now is.

Q. What evidence did the beach bear as to the course the inlet had taken prior to the erection of the dike?

A. I was on the side of the river and I do not know a great deal about it other than immediately along

---

Court: Did you see the beach bearing any evidence of the course?

Witness: The low beach—it would break out at different points along this low strand.

Q. And did you find that evidence there when you were there in 1882—evidence of that?

A. No, there was evidence of a channel up here (indicating) near the mouth of Deep Creek.

Q. And that is where Short Creek broke out into the ocean; there was evidence of that?

A. Yes.

Q. Will you trace on the map the course that this inlet took where Short Creek went into the ocean back to the river; indicate it on the map as you recall it now.

A. The inlet at the mouth of Short Creek filled up, as those inlets had occasionally; a large body of water formed in this tidal reservoir and it broke at this point.

Court: He is asking you to indicate the course the river took to make the outlet at Short Creek there, whether it went in a northerly and then northeasterly direction, or went diagonally across or what it did.

Witness: Other than the maps I could not say whether the main body of the river came down here or up here. (Indicating.)

Q. Didn't you observe evidence of Short Creek and the lagoon, the body of water, extending up to the inlet at Short Creek?

A. Yes.

Q. Did that indicate to you that that was the course that the river had taken to the ocean on this other inlet?

A. Yes, I think that is true.

Q. That is the fact, isn't it?

A. Yes, it must have been; it had to go up there o get to the ocean.

Q. Then if that is so, why do you say it is not ecessary to have this dike here west of the cribbing n order to stop the river from cutting through?

A. Because the conditions are very different today han they were in 18 ——

Q. What made them different?

A. The erection of this crib and these dikes.

Q. And the dike?

A. The erection of them.

Q. And their maintenance?

A. I don't think the maintenance of the dike has nything to do with that much under the present conitions.

Q. Why was the erection necessary?

A. It was necessary to turn the channel of the ver.

Q. And if you took it away it wouldn't turn the annel of the river?

A. It would spread out there, a wider channel.

Q. And before this dike was erected, it spread out that it carried this inlet to the north?

A. The inlet had been north.

Q. Why wouldn't it take the same course again if u took the dike away and got back to the original nditions?

A. Take all this sand away—these sand hills away, questionably.

Q. You say the actions of the storms on the beach re are to shift these inlets to the north?

A. Yes.

Q. And that was the experience of Shark River?

A. Yes.

Q. And at Manasquan River?

A. Yes.

Q. And all these inlets and outlets for the ocean?

A. Yes.

Q. Isn't it a fact that the body of the stream of the Manasquan River is in a northeasterly direction?

A. The tidal basin runs southwest and northeast.

Q. And at the time of heavy storms, after heavy storms, with ebb tide, hasn't it been your experience that the course it takes is down against this like, which serves as a dam and a break, and takes it out the regular inlet?

A. Naturally the water goes against this dike and finds its way.

Q. And if this dike was not there, wouldn't it go through near by it?

A. Not under present condition.

Q. Why not?

A. Because sand hills are built and are there.

Q. Wouldn't these streams cut in back of the sand hills and take them away eventually?

A. I think not.

Q. You think not?

A. The meadows are there.

Q. I know that; Deep Creek is there.

A. And the houses are there.

Q. And Short Creek is there?

A. Yes, very much narrower than it was in those days.

Q. There is a big lagoon of water there?

A. Not a big lagoon.

Q. There is a body of water there?

A. Yes.

Q. What would there be if this dike were taken away; to prevent the river current going down here and cutting in back of the houses that are erected there?

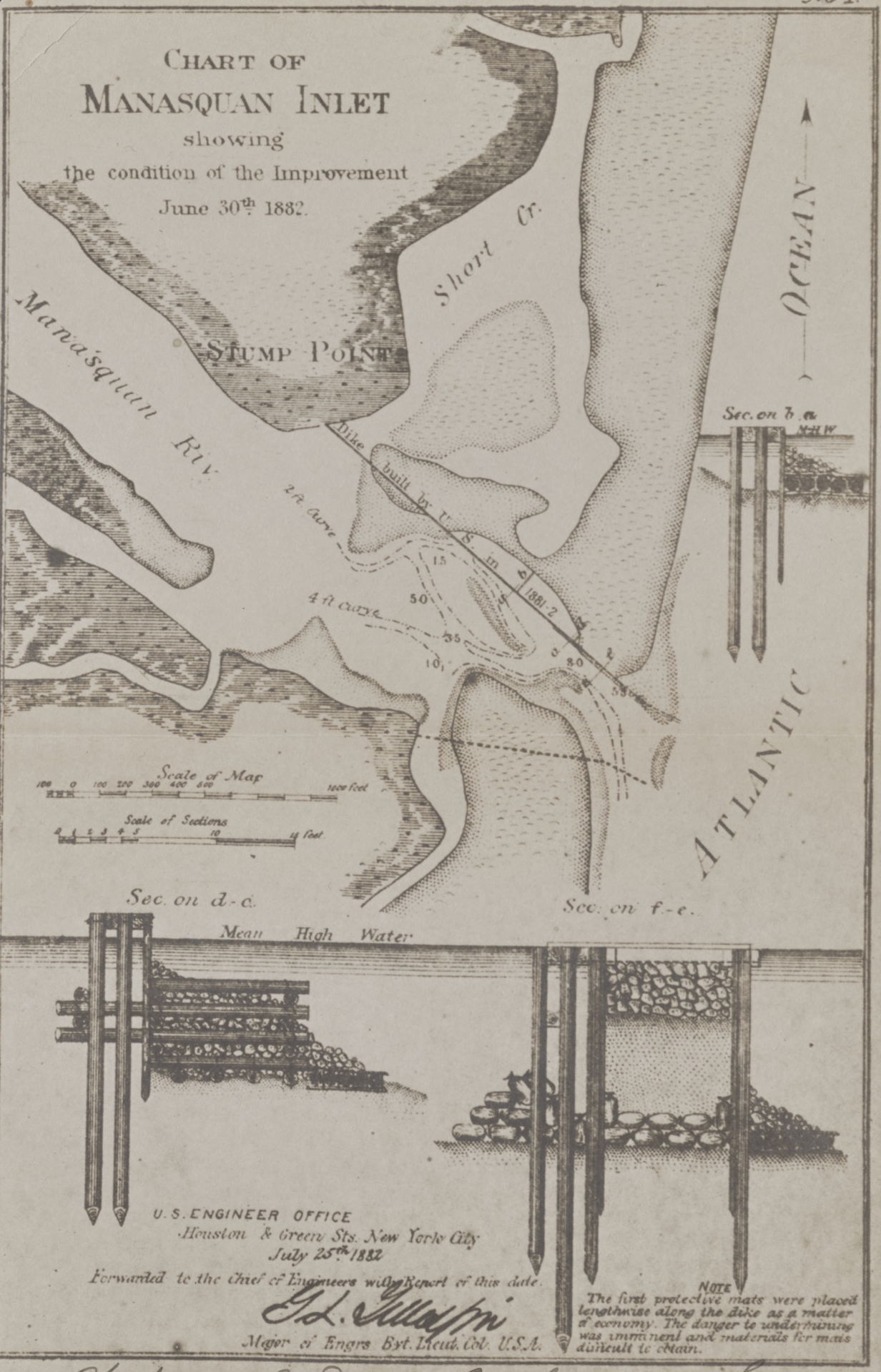
No 1.

CHART OF MANASQUAN INLET

showing

the condition of the Improvement

June 30th 1882.



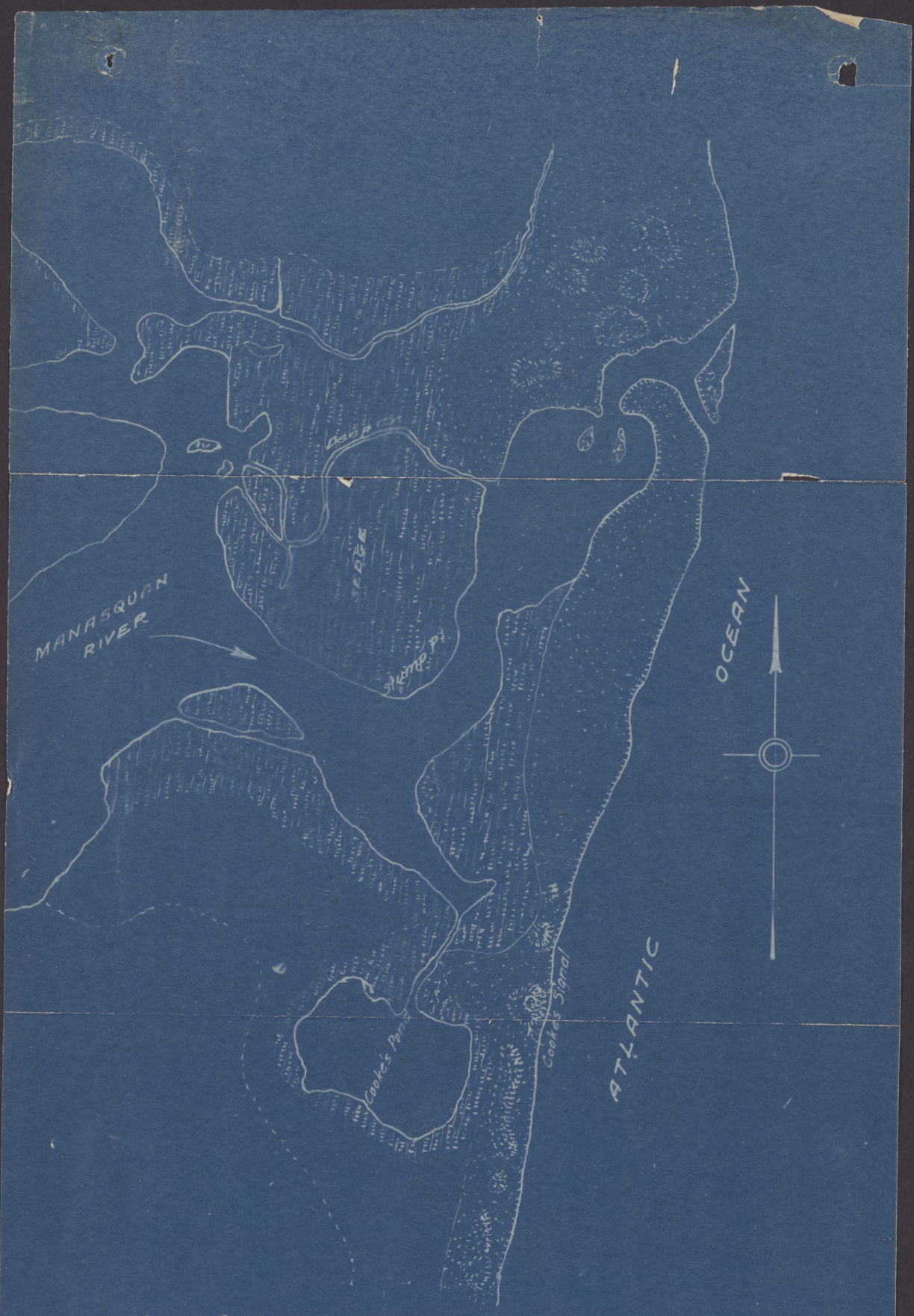
U.S. ENGINEER OFFICE
Houston & Green Sts. New York City
July 25th 1882

Forwarded to the Chief of Engineers with Report of this date.

G. L. Gillespie
Major of Engrs Byt. Lieut. Col. U.S.A.

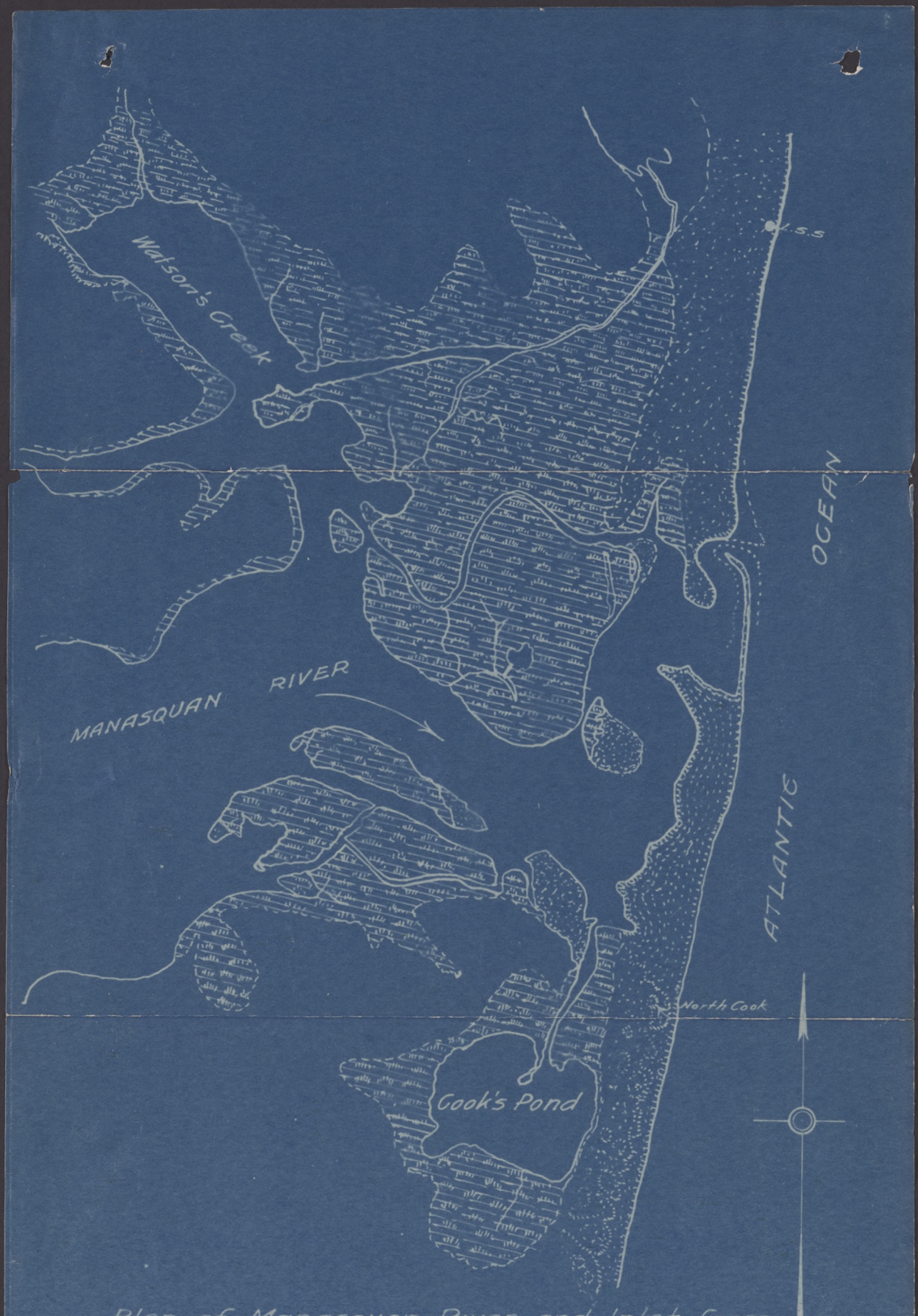
NOTE
The first protective mats were placed lengthwise along the dike as a matter of economy. The danger to undermining was imminent and materials for mats difficult to obtain.

Photograph & map contained in Government
of 1882 (Record page 235)
Martin V. Burgess
Sols.



Plan of Manasquan River and Inlet, copied from Sheet No. 116, Coast and Geodetic Survey, A.D. 1839
Scale 1 = 1/10,000

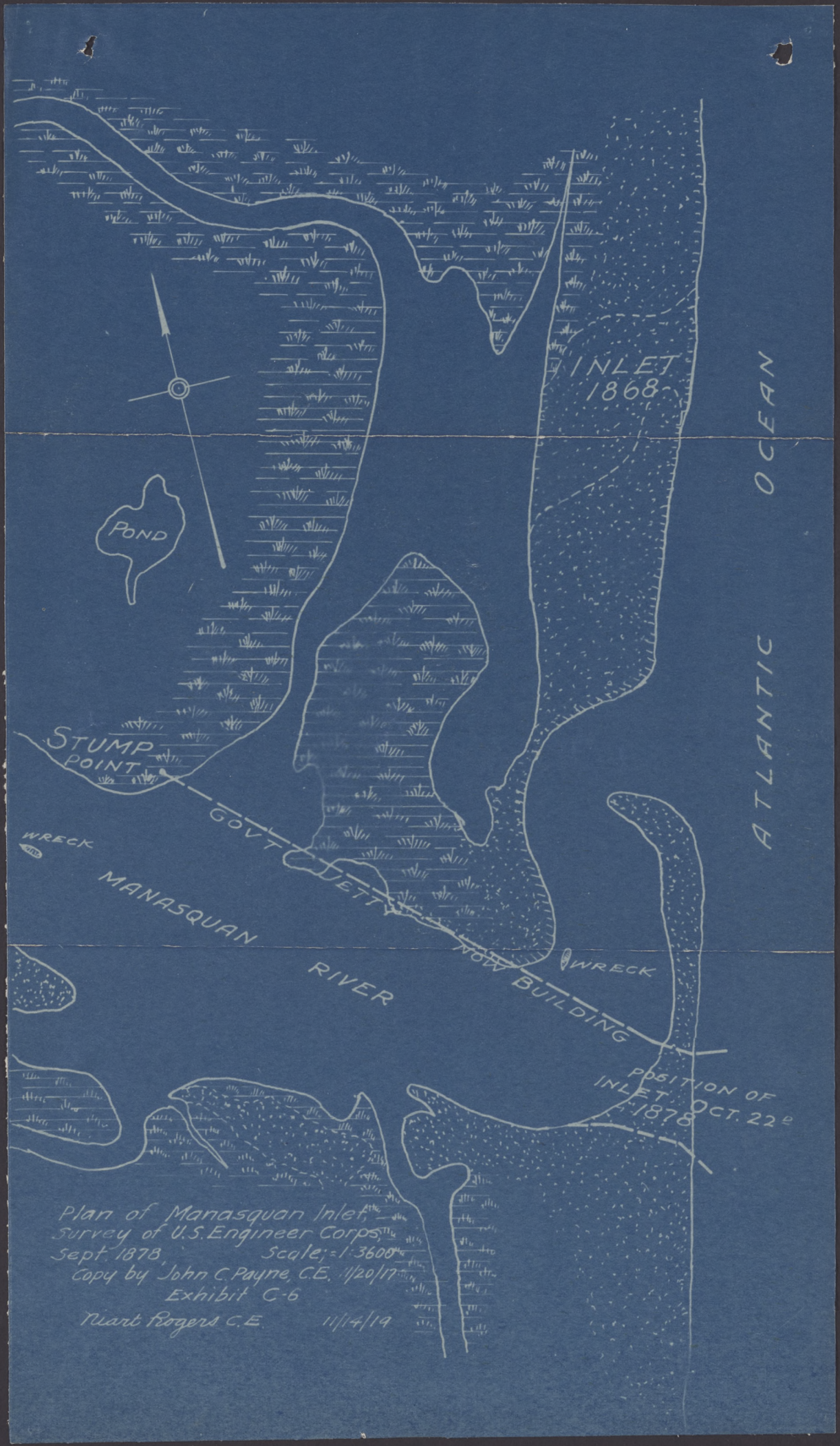
Niart Rogers C.E., 11-14-19

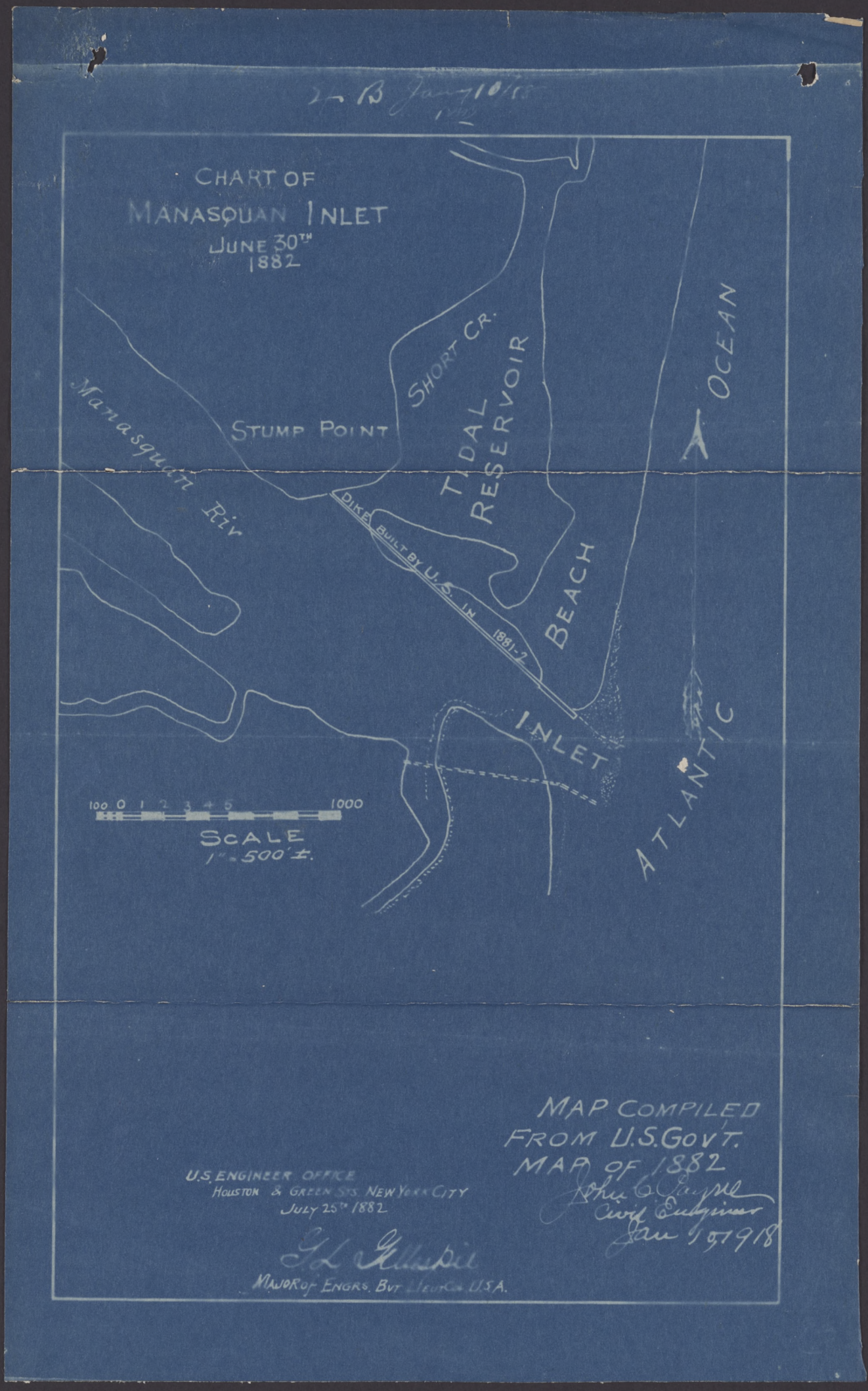


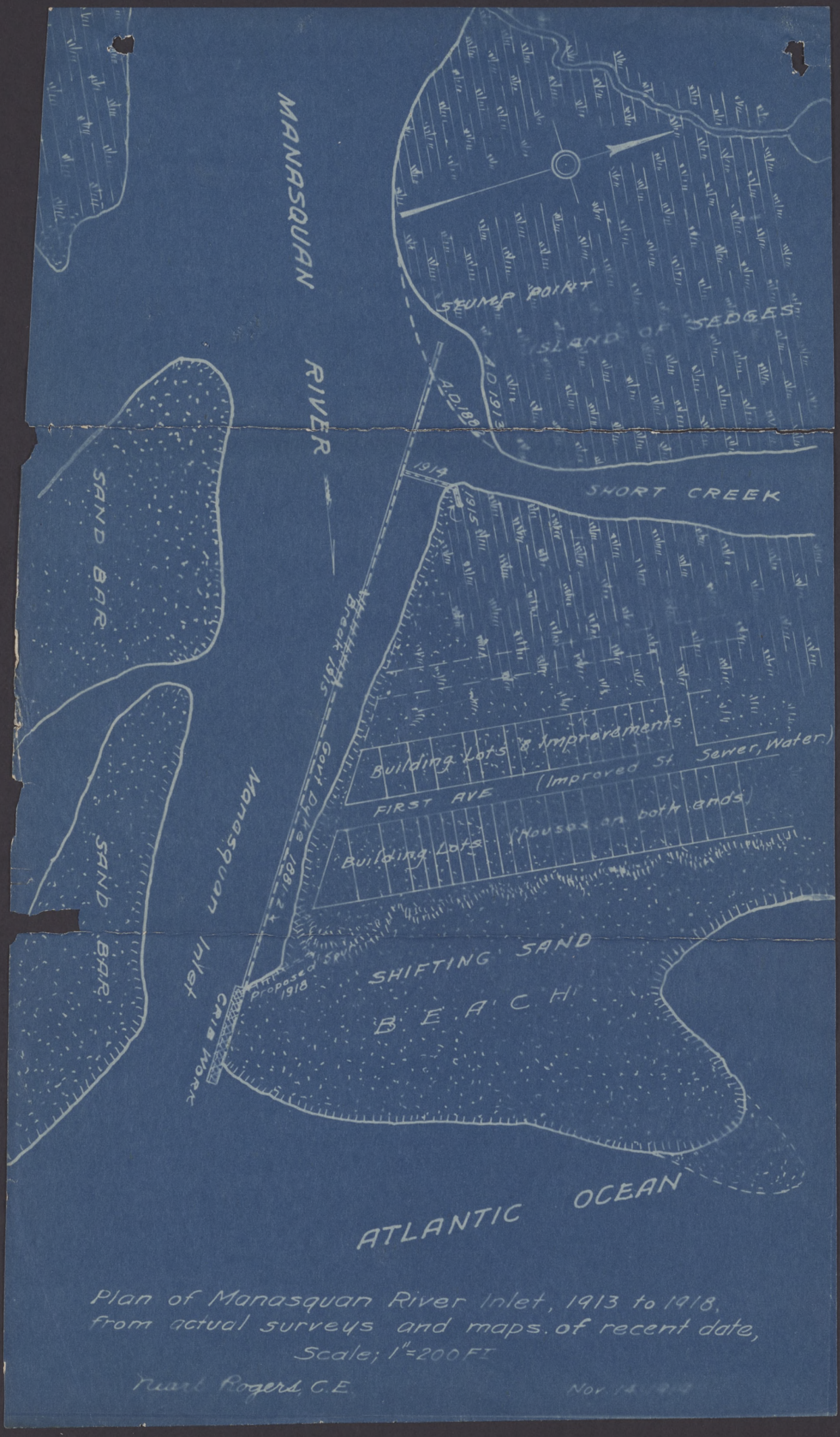
Plan of Manasquan River and Inlet, from Sheet No 1084 Coast and Geodetic Survey A.D. 1868.

Scale; 1/10,000

Copied by Nuart Rogers C.E., 11-14-19


INLET
1868
ATLANTIC OCEAN
POND
STUMP POINT
GOVT JETTY
NOW BUILDING
WRECK
WRECK
MANASQUAN
RIVER
POSITION OF INLET OCT. 22d 1878
Plan of Manasquan Inlet
Survey of U.S. Engineer Corps
Sept. 1878, Scale 1:3600
Copy by John C. Payne, C.E. 11/20/17
Exhibit C-6
Niart Rogers C.E. 11/14/19


CHART OF
MANASQUAN INLET
JUNE 30TH
1882
SHORT CR.
TIDAL RESERVOIR
OCEAN
STUMP POINT
Manasquan Riv.
DIKE BUILT BY U.S. IN 1881-2
BEACH
INLET
ATLANTIC
100 0 1 2 3 4 5 1000
SCALE
1" = 500' ±.
MAP COMPILED FROM U.S. GOVT. MAP OF 1882
John C. Trautwine
Civil Engineer
Jan 9, 1918
U.S. ENGINEER OFFICE
HOUSTON & GREEN STS. NEW YORK CITY
JULY 25TH 1882
G. L. Gillespie
MAJOR OF ENGRS. BVT. LIEUT. COL. U.S.A.



Plan of Manasquan River Inlet, 1913 to 1918,
from actual surveys and maps of recent date,
Scale; 1" = 200 Ft

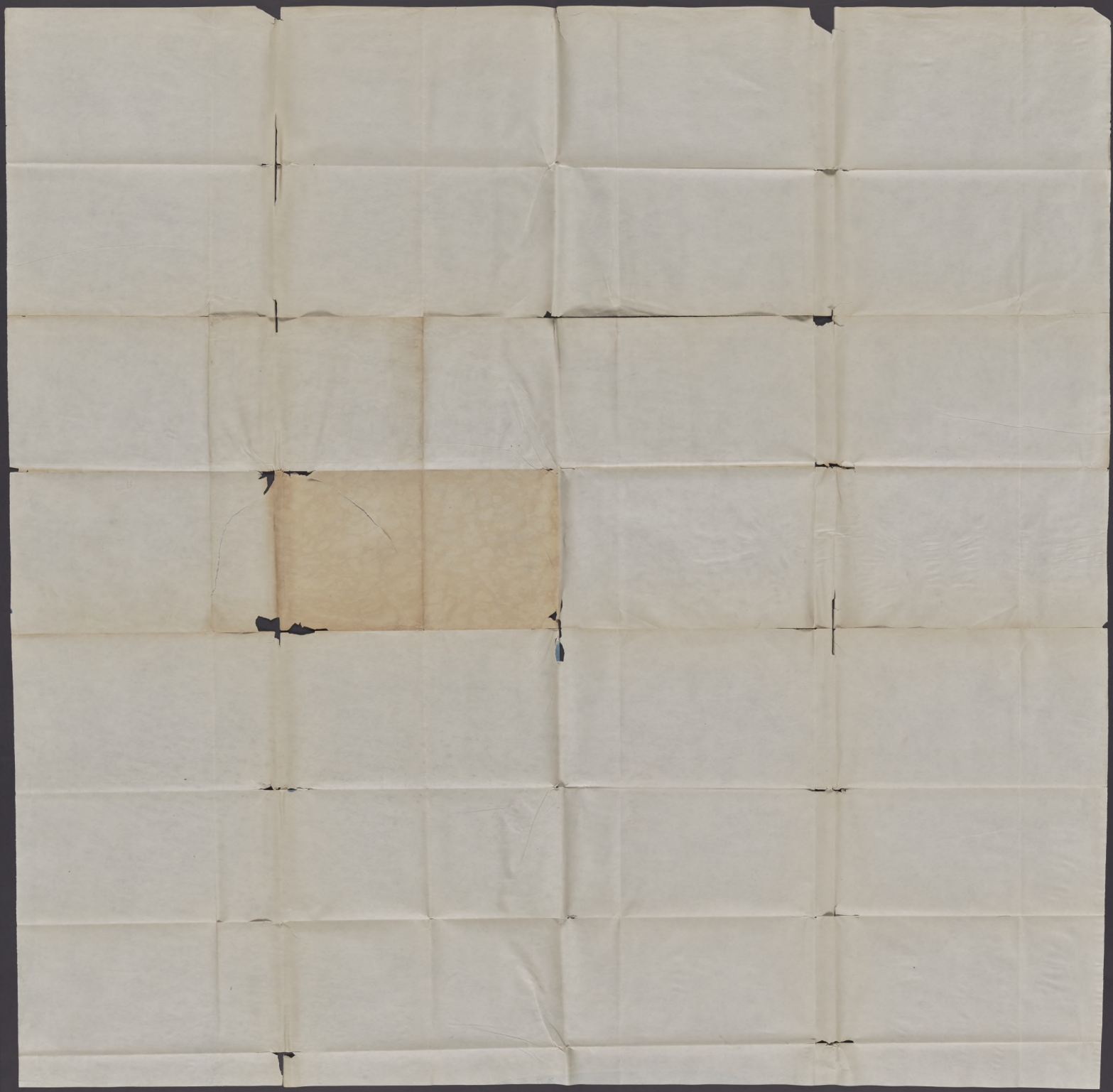
Nuart Rogers, C.E. Nov 14 1918



Copied from Report of Chief of Engineers U.S.A. for the year 1879 Part I (Inset opposite page 464. by N.J. Canover Nov 16 1917.

A3


"MORTON'S POINT" OR "ALLEN'S POINT"
WATSON'S CREEK
DEEP CREEK
SHORT CREEK
DEEP CREEK
BRIELLE ROAD
MAIN
EAST
MANASQUAN RIVER
Island of Sedges
ATLANTIC
"John Potter"
Saml. Brand
David Brand
David Miller
"Pearce's Land"
"George Pellet"
Garrett Rogers
Saml. Rogers
John Rogers
Susanna Rogers
"Pearce's Meadows"
Elihu Rogers, Jr.
"Thos. & Jas. Sherman"
"Head Line Of Lots"
John Morton to Jr. Holloway Apr. 4-1796
John Morton to Thos. Sherman, Apr. 27-1805 (Marked with Red line.)
This is a Blue Print of Plat over part of Tabula's D 14 (Record p. 297)
Martin B. Ferguson Surv.
Scale 1 inch = 100 ft.



A. The land, the sand dunes, and the fact that water without an outlet does not cut ——

Q. You mean to say that because the land is there now and been made up because of the erection of this dike and because the houses are constructed upon it, the river would not be able to cut in that sand and undermine it and take it away and take the houses away?

A. I say very emphatically that under present conditions of the sand dunes there solidly built, with no outlet to the sea, the wear there would be very slight and would not break through to the ocean.

Q. But wouldn't it cut through there and wouldn't it make an outlet to the ocean if there was nothing to protect it?

A. If the sand dunes were level and became lower than they are here and found an outlet to the ocean, it would undoubtedly go to the ocean.

Q. You say then that because it is built up there now with these sand dunes, that forms a sufficient barrier, in your judgment, to prevent the river from taking that course, if the dike was removed?

A. As long as this crib is here, maintaining the inlet at this point, there is no danger of the currents cutting out across these sand dunes, as the water lowered down on an ebb tide in the Manasquan River.

Q. Wouldn't it cut its way back of the cribbing and cut the sand away just north of it?

A. To some extent, not very far.

Q. And if there were wind storms, it would cut in further?

A. Not much.

Q. Wouldn't it eventually find its way out to the ocean?

A. Not under those conditions.

Q. And it wouldn't because there are sand dunes there?

A. Because there are large sand dunes.

Q. You know it did before the dike was erected?

A. Yes, before the dike was erected there were no sand dunes there; it was all one level from the Brielle Road to Cook's pavilion.

Court: Have you anything in your mind, Mr. Conover, or in your experience, on which you can base your judgment as to that being the fact, if the dike were removed, that the conditions would not revert more or less to what they were back in 1882; have you any parallel situation in your experience?

Witness: I haven't any.

Court: What I have in mind is this, whether it would be wise for a man who held a mortgage on that tract of land, to take your advice and speculate —"I won't rebuild this dike, and let it come down, and see whether Mr. Conover is right, and letting these sand dunes protect my security." I am trying to find out if you are basing your idea on any actual knowledge or information, or whether it is a pure speculation from your engineering experience?

Witness: It is my speculation from my engineering experience.

Q. What experience have you had as an engineer of conditions in work similar to the matter we are now talking about, that would justify you in drawing the conclusions that you have advanced here today?

A. I have had no direct experience with heavy work along the ocean front; I have had along fresh water rivers.

Q. So then it is a mere speculation, your suggestion now?

A. I think it is a well-founded speculation.

Q. Did you observe that when you were there in 1882 the crib work was then entirely in the ocean?

A. It was built out into the ocean beyond the beach line,—I will put it the other way, from the beach line to the ocean.

Q. It was practically all in the ocean; its westerly end was in the ocean?

A. I think not.

Q. It was not at that time?

A. No.

Court: When you say the beach line, what do you mean, the high water line?

Witness: The high water line.

Q. You said something in your direct examination about the erection of a jetty on the south side; what effect do you say that would have on the Manasquan inlet?

A. It would probably maintain a deeper inlet than we have now, and it would confine the waters and give a more direct outlet.

Q. Why do you suppose the government did not erect a jetty on the south side?

A. They erected a part of it and concluded—they did some work on the south side.

Q. They erected a jetty there?

A. Yes.

Q. And it washed out completely?

A. All gone.

Q. Then you say there could be a jetty there built

New Jersey State Library

practically, and do practical work, when the government's experience has been just the opposite?

A. They built much lighter work on the south side than the north and it was washed completely away.

Court: What I had in mind was, if your judgment is correct, that it would give a deeper channel and would retain the inlet in a better position, or in its true position, what reason had the government engineers for placing the dike and jetty and crib on the north side of the inlet instead of the south?

Witness: The practice at that time was to confine the river between two dikes of jetties.

Court: Was the building on the south side, which was washed away, as extensive as the one on the north side?

Witness: Not at all; very much lighter in construction.

Court: Why do you suppose a more substantial construction was placed on the north side?

Witness: The tendency of the inlets was to go to the north; as Mr. Carton has explained it, the body of the water lay to the southwest of this, and the currents would naturally flow up against this and then find ~~its~~ way into the ocean by their direct force.

Q. Do you admit that there was some reason in the government extending this dike beyond the cribbing?

A. I think there was every reason in that from a navigation standpoint.

Q. From a navigation standpoint only?

A. Yes.

Q. And for the purpose of preserving the beach or holding the inlet, you think it had no purpose?

A. I don't think that was the purpose at all.

Q. You made some reference to a similar situation down at Mantoloking; there is no inlet there?

A. That was as to flats.

Q. Prior to that you made some reference to a body of water lying back of the ——

A. As to flats and a narrow beach between the ocean and another body of water.

Q. You do not compare the situation at Mantoloking or anywhere on the Barnegat Bay, to the situation at Manasquan Beach, as to the body of water back of the main land?

A. At Mantoloking, where the beach is only a few hundred feet wider than here, with the great body of water going to the southwest, the situation is very similar.

Q. There is no inlet there at all?

A. No.

Q. Never has been?

A. Never has been.

Q. Nature has never put one there?

A. No.

Q. The next inlet is at Barnegat?

A. There is a high sand bank there.

Court: Your argument is that notwithstanding the large body of water at the back of the beach, it doesn't cut an inlet through?

Witness: A large body of water does not cut the inlet through.

Q. Is there a river feeding that large body of water?

A. Toms River covers probably three times the body of water that Manasquan does.

Q. And it produces the water that forms this lagoon back of the Mantoloking beach?

A. Yes.

Q. Where did you suggest the erection of a cross dike at the point of the cribbing?

A. Either here or at this point here (indicating); my suggestion was at that time, from the end of the crib ——

Q. Indicating on the map the west end of the crib?

A. The west end of the crib to a northerly direction into the sand banks and meadow.

Court: For a distance of about how far?

Witness: Two or three hundred feet, and carry it to the meadow.

Q. Where in the meadow would you anchor the end of it?

A. At a distance of about 300 feet from the end of the crib in a northwesterly direction.

Q. Would that bring it to a sand dune or in the meadow?

A. I think you would find sand on the surface, but the old meadow sod underneath.

Q. That would be the east line of Short Creek?

A. Quite a long distance.

Q. What special purpose do you say that the erection of that spur dam would accomplish?

A. It would simply prevent—it wouldn't answer any good purpose, but it would be in the nature of a

preventive, in my opinion; it wouldn't do any good, but I could put it in ——

Court: As a precaution?

Witness: Yes; I think it would be a waste of money.

Q. You wouldn't advise it then?
A. No, I wouldn't advise it; for the protection of this beach I wouldn't advise it.

Court: What would you advise it for, if anything, spending money?

Witness: It might be advisable for the protection of land that has some value along this point.

Court: Along the dike?

Witness: Along the dike from the road to the end of the ——

Court: From First Avenue to the end of the crib?

Witness: Yes.

Q. That land has no value or is not being used in any way at this time?
A. No.
Q. It never has been?
A. No.
Q. All the use that is being made of the land on the beach where the houses are erected is north of that up to the Brielle Road?
A. The land is being used from there continuously

up to the camp ground; the houses are erected along the beach from the crib to the Brielle Road.

Court: How close is the nearest house to the crib?

Witness: About 150 or 200 feet.

Q. East and southeast of the end of your spur dam to the cribbing there are no houses, no construction at all?

A. No construction at all.

Q. Then there wouldn't be any purpose in constructing that spur dam at all?

A. I don't think it would have any good purpose.

Q. I mean using the beach as it is used now?

A. There are houses back here (indicating a point on the map about 150 feet east of First Avenue) that might be threatened.

Q. And threatened in what way?

A. By the working down of this body of water lying to the north of the dike. You mean with the dike in its present condition?

Court: No, in the absence of the dike.

Witness: No, with the dike in the condition that it was in 1913 or 1914 north of the river.

Q. And assuming that the dike would get in greater disrepair, might not the danger increase by water getting in back there?

A. I don't think it would get any further materially.

Q. You don't think it would even though the entire dam west of the cribbing was taken out altogether?

A. I do not.

Q. You referred to some spur dams that the government plan indicated; do you say that the spur dam you suggest is one of those they indicated?

A. The report says they were built.

Q. Weren't there spur dams built all the way up the dike?

A. Not that I know of.

Q. You never made any investigation of that?

A. I never investigated.

Q. You read the report, didn't you?

A. I did.

Q. You got photographic copies of it?

A. Yes.

Q. Didn't you learn from that that there were spur dams built all the way up the dike for the purpose of holding the sand?

A. I did not.

Q. That is a fact, is it not?

A. I think not; there are points marked A, B, C and D, referring to the construction.

Q. What spur dam do you say the government engineers referred to in the report?

A. As I understand the report, in building this work, they built a dam from the crib work to the north across to the sand, to prevent the action of the tide from interfering with their work.

Court: But you don't understand that they built such cross dams from the dike itself?

Witness: No.

Court: But only to the crib?

Witness: Yes.

Q. That is your interpretation of the specification and reports, that they built cross dams at the cribbing?

A. That is my interpretation of the report.

Q. That isn't a fact, though?

A. I don't know anything about it.

Q. You didn't make any soundings or observations to ascertain whether they had been built?

A. I did not do it; the weather has been too severe this winter.

Q. Were you in court during the two or three days that this case was being tried?

A. Nearly all the time.

Q. Do you remember the witnesses who were working on the job at the time referring to the spur dams extending all the way up here along the dike?

A. I did not hear that testimony.

Q. The drawings on the cross sections of the map, Exhibit D3, they show these cross sections much higher and steeper than they really are, because of the scale?

A. They are exaggerated by the usual engineering designing; they are ten times higher than they really are; the scale is exaggerated ten times, and it is usual in all profiles to do this, and it is plainly indicated.

Q. The horizontal is 100 feet to the inch and the vertical is ten to one?

A. Yes.

Re-direct examination.

By Mr. Bergen:

Q. Is the State of New Jersey in connection with its inland water ways constructing a connection between the water at Bayhead and the water of the Manasquan River?

Mr. Carton: I object.

Court: The official records from the proper state authorities is the proper evidence to show the fact; at the same time, I don't wish to be overtechnical about it, and I will hear what the witness has to say, reserving a ruling on whether I will strike it out.

A. It is.

Q. Do you know when that work was begun?

A. I think the preparation was made for the plans as early as 1912—I am not sure of the year; no work was done; I think the plans were made in 1914, and I think no work was done until 1915; I speak entirely from recollection, and had very little connection with it, other than to know that the work was going on.

Court: Do you claim that there is anything of a physical character that would indicate an intention on the part of the state to do this work which the complainants claim was necessary for them to do?

Mr. Bergen: I cannot carry my contention back to a logical conclusion on it, but I do say that in such a status as this, the burden is on them to show a repair which was a necessity, and not for us to contradict it.

Court: I assume that they show a necessity, for the moment, and that they were obliged, because of that necessity, to repair, and I understand your claim is that was unnecessary, because had they waited a reasonable time, the state had perfected a policy where it was going to do this reconstruction work.

Mr. Bergen: That is about it. I do know that the state had started an examination on the subject, which was before 1914, which Mr. Conover has testified to.

Court: I shall not receive Mr. Conover's statement, but I will leave the door open, if you wish to offer any evidence from any official or proper department of the state, whereby it will appear specially that it was the intention and policy of the state—which I will assume was generally known to everybody, including the complainants—to make repairs such as might be necessary in a case of this kind.

Mr. Bergen: I cannot go that far.

Court: Then you may offer any such proof of that character, but I do not think the examination of Mr. Conover should be taken as establishing any such policy as was adopted on the part of the state.

Mr. Bergen: We can show that back in 1915 the state had actually begun work on such a thing.

Court: It may be a special instance, it may be an exceptional case.

Mr. Carton: I do not care to cross-examine. It may appear, it is true, that the state has established some policy for an inland water way, but I do not understand that that project contemplates the repairing of the inlets.

Court: Mr. Bergen may offer anything in the way of a special document or record or testimony that

would show any such policy or intention on the part of the state.

Q. What was the nature of the land which lay back of the dunes and within say 200 or 300 feet of the dike and of Short Creek?

Mr. Carton: I object; the witness on his direct examination explained the situation as to the grass and sand and bed of the creek.

Mr. Bergen: If it is in, I don't want it repeated, but I want to expatiate on that very point.

Court: Can you elaborate your answer on that phase of the case? Add anything to it in any way you can, or qualify it.

Q. Will you add anything or explain in greater detail the character of this land, the height of it &c. running along the dike and along Short Creek.

Court: If you can say anything more than you have already done, but don't repeat.

A. A short distance back of First Avenue there is a low meadow unsuitable for building or other such purposes.

Q. Did that run all the way from First Avenue over to Short Creek?

A. It does.

Q. That is in this point?

A. It shows plainly on these other maps, D4 and 5; the body of land on map marked D5, west of the yellow line, is low marsh.

Q. It is sedge marsh?

A. It is a sedge; that is another name for it.

Q. Then the dunes are to the east of that yellow line?

A. They are.

Q. Is that land suitable for any building purposes?

A. It is not.

Q. What kind of structures are built on the land running along the sand dunes?

A. Cheap frame structures, usually called shacks, sometimes dignified by the name of bungalows.

Q. How much would they cost to build?

A. From $200 apiece to $1,000; two or three of them may possibly have cost $1,000. Nearly all are cheap wooden structures.

Q. Running from what figure did you say to $1,000?

A. From $200 to $1,000.

Re-cross examination.

By Mr. Carton:

Q. Have you had any practical experience at all in knowing the cost of such construction as you have described?

A. You mean the shacks?

Q. Yes.

A. I have had occasion to build barns and houses.

Q. They are all built on stilts, aren't they, puncheons?

A. Yes.

Q. No foundations?

A. No foundations.

Q. This land that you see west of the yellow lines

and up to the east side of Short Creek shown on D5, you say that is low land?

A. Yes.

Q. And at one time that was a part of the bed of Short Creek before it narrowed, was it not?

A. In some parts; part of that was marsh and part of it was the bed of Short Creek which has since been built up.

Q. This low land you now describe was at one time the bed of Short Creek; that is, at the time that Short Creek found its outlet to the ocean up at Brielle Road; that is a fact?

A. Yes.

JAMES H. MOUNT, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. Where do you reside, Mr. Mount?

A. Jamesburg, New Jersey.

Q. Are you familiar with the beach at Manasquan north of the inlet?

A. I am.

Q. Have you a cottage or home there?

A. I have two shacks or bungalows.

Q. How long have you had them there?

A. I have had one about four years.

Q. And how long the other?

A. About three.

Q. How long have you been familiar with that beach down there?

A. As a summer visitor I have been familiar with that beach about twenty years.

Q. Do you recall that beach in 1882?

A. No, I don't think I do particularly; that was before the dike was built.

Court: The dike was built then.

Witness: At that time, but just previous to that; I wasn't there when the dike was built.

Court: You were there previous to that?

Witness: Yes, I used to visit there.

Q. What was the character of that beach running from the river north as far or beyond Brielle Road before the dike was built?

A. It wasn't near as high as it is now; it was more of a flat beach; occasionally a sand dune, and then a waterway, as they call it, where the waves with heavy swells would drive over and wash through.

Q. It showed such a condition as that, did it?

A. Yes.

Q. That waves or heavy swells would wash over the beach?

A. Yes, I have been up at my cottage at the river and saw that at times of storms, and saw the water run across.

Court: Where was your cottage at that time?

Witness: Up on the river, about three-quarters of a mile from the inlet.

Q. How many storms have you seen down there the last ten or fifteen years?

A. I have not been there in the winter time to see

any severe storms; generally in the fall of the year, along in September, October and November, we would have a storm, what they would call a regular season storm, and I have seen the tide so that it flooded all the meadows; the whole thing practically was a sea; it left the beach in the same condition; it increased the height of the sand dunes and washed the sand over and made more of an inlet.

Q. Has any water come from the river over the dike since the construction of the dike that you know of?

A. No, sir.

Q. Has any come over to the north of the crib from the river since you know anything about it?

A. Never.

Q. Has the ocean overflowed north of the crib?

A. Washed over, but never ran through there, only on the regular wash from the heavy seas.

Court: How recently has that happened?

Witness: That will happen most every storm we have now.

Court: Notwithstanding the high sand dune?

Witness: It washes over the crib and so that levels it off to the dike on the inside or north side.

Q. There is an eating away north of the dike?

A. On the beach you mean?

Q. On the beach.

A. On the meadow land.

Court: That is on the inside of the dike you have reference to.

Q. I am drawing a distinction between that which we call the crib and that which we call the dike; have you bore that in mind?

A. Yes.

Court: The crib is supposed to be about 192 feet long from the high water mark westerly?

Witness: Yes.

Court: The rest of it is called the dike?

Witness: Yes.

Q. What south of the river, the ebb or the flood flow, is it that has damaged or has eaten that in north of the dike?

A. The flood tide.

Q. What do you mean by that?

A. The tide coming in from the sea.

Q. Does the tide going out damage it?

A. Not materially.

Q. Why?

A. It is simply too sluggish, there is no action or force to it.

Q. How has that beach changed, if any, since 1882?

A. Very materially; it has filled up considerably, —I should judge an average of from six to ten feet, in different locations, higher than it was.

Q. How has Short Creek changed, if any?

A. It hasn't changed very materially; it is just a little filled in at the terminal of the dike, that is, the westerly end of the dike, where it connected with Stump Point; of course it has never been connected there only for about a period, I suppose, of about three months after it was constructed; then there

was a cut in there by the fishermen, as they stated in our hearing, the crabs did it.

Q. Has Short Creek narrowed?

A. Very narrow.

Q. Is it narrower now than it was in 1882?

A. I don't know that it is any narrower, but it has filled in some.

Q. Filled in on which side, the west or east side?

A. On the east side, on account of the current running around and passing around where this cut-in was made in the bank, around the end of the dike, causing the current to run around an S shape there, which naturally leaves the sand in that corner and fills it.

Q. How does that beach on the north side of Manasquan Inlet compare with the beach on the south side of Manasquan Inlet?

A. The beach on the north side, on the Manasquan side, is considerably higher.

Q. On the north side?

A. On the north side.

Q. All the way along it?

A. All the way along.

Q. What is the character of the beach on the south side of Manasquan Inlet?

A. From a point starting at the dike as far as the pavilion it is simply a barren piece of sand, flat sand.

Court: The pavilion is 600 or 700 feet away?

Witness: Yes.

Court: And how high is it, on an average, above high-water mark?

Witness: I should suppose probably four or five feet.

Court: Does this crib now come down beyond high-water mark—below high-water mark?

Witness: Yes, generally covered, all covered, that is, inundated, the bottom of the crib showing.

Court: Does any of it show?

Witness: Yes, it shows.

Court: How much of it?

Witness: Probably 12 or 15 feet.

Court: West of high-water mark?

Witness: East, towards the ocean.

Q. The beach comes out to the fullest extent of the crib, does it not?

A. Yes, except where the wash carries the sand through and empties into the river; for instance, every northeast wind or tide, the waves would run over and carry the sand over into the river; that would naturally leave it level with the crib just at that point, that is, within about 100 feet of the sand dune where that flat is; this flat runs north to the sand dune; the action of the sea breaking, throwing the water across, naturally carries the sand and water over in the river; I have seen it all filled in there, and the ebb tide cut it out; in fact, I have walked across there.

Q. How many years have you been familiar with that place down there?

A. Positively about twenty-five years.

Q. That would carry you back before 1882?
A. Yes.

Court: You are wrong in your arithmetic.

Witness: Yes, seventeen years.

Q. How far can you go back in your knowledge of that beach there?
A. As far as the knowledge of the beach and actual conditions of the beach, I cannot go back beyond, I suppose, forty years.

Court: How old a man are you?

Witness: Sixty-eight.

Q. If that present inlet were to fill up so that the water would not flow out of it, where would the water of Manasquan River, in your opinion, work an outlet to the sea?
A. It wouldn't work any at all; it would simply stay there and filter out through the sand beach and sink back in again from the high water; there would be no action possibly at all there. It would simply lie there in a dormant state, a mere body of water; there woudl be no outlet; in fact, I have opened the inlet myself twice, under those circumstances; we had to find the inlet ourselves.
Q. Have any storms broken an inlet from the ocean into Short Creek?
A. Never.

Mr. Carton: There is no such claim; we claim it hasn't.

Court: Didn't you see this dike or observe its condition in 1913 and 1914?

Witness: Yes.

Court: The condition of repair that it was in?

Witness: Yes.

Court: Did it need repairing in any one of those years?

Witness: It did.

Court: What was the matter with it?

Witness: If I understand it, the government ——

Court: What you saw.

Witness: The government put in an inferior grade of stuff, that wasn't what they call creosoted, and it eat out with the sea, and left it in a sort of a filter condition.

Court: What generally was that condition in 1913 and 1914?

Witness: There was quite considerable of the plank rotted out.

Court: Off both the crib and dike; very little off the crib, principally off the dike?

Witness: Yes, that was north of the double dike; there is a section, west rather of the crib—I don't

know just the length of that; it is probably 100 or 150 feet—that is an extra heavy section of the dike, and beyond that westerly the main damage was done to the dike, but during that period it was all substantially in good condition.

Court: If I understand the result of your observation since 1882, the twenty years you have lived there, two things have happened since the dike and crib were constructed in 1882, namely; that the sand has increased in height ——

Witness: It certainly has.

Court: —and that there have been no inlets cut through?

Witness: No inlets.

Court: Either by the ocean or river, or both, since that date?

Witness: No, sir.

Q. How long had that dike been out of repair previous to 1914?

A. It was gradually getting in a bad condition, but it was not doing any practical damage until about that time, then it began to encroach a little on the north side, the wash, as they call it, scouring out back and forth, and would drag the sand out in the river and left a passage.

Court: How wide was that?

Witness: From 1914 that passage averaged about what it is now—from 40 to 75 feet in width, on an

ordinary tide. Across from the land side to the dike, there is a passage way there large enough to use a boat comfortably with a load in; I always went back and forth to the Short Creek with a boat, and then transferred into another boat to get into the river.

Court: This was inside of the dike?

Witness: Yes, they always used it for a swimming pool.

Court: Do you think that 40 or 75 feet the sand was washed out because of the lack of repair of the dike and crib?

Witness: Yes, the breakage, the principal things of that was from the flood tide.

Court: The breakage allowing the water to get in?

Witness: Yes, digging and undermining.

Q. Did you have a conversation with Mr. Charles S. Hinchman?

A. I did.

Q. In reference to the repairs which he was making there in 1914?

A. I did.

Q. Will you be kind enough to tell us what that conversation was?

Court: When and where did it take place, first?

Witness: Directly opposite my shack, right there at the inlet.

Court: At what time of the year?

Witness: That was about the time that Mr. Howland had his work under way.

Q. Any one present but you and Mr. Hinchman?
A. That is all.
Q. State what was said.
A. Mr. Hinchman told me that he was going to improve the river front; he was going to put a boulevard in there and lay out some building lots, and he gave me a refusal of a lot on the river front; I asked the privilege, and he said yes.

Court: Is there more than one Mr. Hinchman interested?

Mr. Bergen: Mr. Hinchman has since died.

Court: This is the Mr. Charles S. Hinchman?

Witness: Yes. I often had conversations with Mr. Hinchman down there; we frequently got together in a friendly way, and during the conversation he mentioned this thing to me.

Court: Was that all that was said?

Witness: Yes, that is all.

Q. Did you have a conversation with him in 1915 in reference to this repair work?
A. I didn't exactly have a conversation with him; he simply broached the subject to me; we were talking about other matters, and Mr. Hinchman said that he had been to a considerable lot of expense, he had repaired the dike and it was a complete failure,

and that now he had to go under a considerable expense and have it all done over again, and at that time Mr. Oram was there and had commenced on his contract and was then about taking charge of the work, to repair it over again after Mr. Howland did the work the year previous.

Q. How did the height of these sand dunes on the beach north of the inlet compare in the year 1914 with the sand beach south of the inlet?

A. I should judge there was a difference of from eight to twelve feet in the height.

Court: That is, the height is greater on the northerly side?

Witness: Yes.

Q. That was in 1914?

A. Yes.

Q. How is it now?

A. It is increasing all the time.

Q. Had it been increasing for a number of years?

A. Yes.

Court: Is the dike in good repair, or was it last year?

Witness: Fairly good repair, yes, sir.

Q. How much was charged for the leasing of this land by Mr. Hinchman in 1914?

A. Two dollars a foot.

Q. How much is charged now?

A. The price on the beach side, the regular cottage side, as I call it, is the same.

Q. A front foot?

A. Yes, two dollars a front foot, in front of the driveway, between the driveway and ocean.

Court: That is east of First Avenue?

Witness: Yes.

Court: What is the average size of a plot there, the frontage?

Witness: They were laid out 25 feet.

Q. How much was it before 1914?
A. At one period, when the American Timber Company represented, it was $10 a year, and then when the Seacoast Real Estate Company became the possessors, they charged $25 a year, I think, for one or two years, and then afterwards they raised it to two dollars a foot.
Q. Can you recall the year that it was raised to two dollars a foot?
A. I cannot; my lease would show it; I have a lease, a five year lease, that expires in 1920.

Court: Do I understand that all the occupants on the beach are lessees?

Witness: Yes.

Court: When you say Mr. Hinchman offered you an option on one of the river lots in 1914, you mean an option to take a lease?

Witness: Yes, a lease on it, to build a shack.

Q. Did he show you a map when he made you that offer of leasing a lot?

A. No, I didn't see a map, but I presume he must have had one, because he talked very positively about laying this out in lots.

Court: Did he as a matter of fact ever lay it out in lots?

Witness: I cannot say positively about that.

Court: So far as you know?

Witness: As far as I know I cannot testify to it.

Q. There are no stakes on the property?

A. No stakes, not that I know of.

Q. Are there any streets in addition to First Avenue?

A. I understand there is a map in existence that has streets.

Q. Are there any actually used?

A. No, sir, only that one.

Cross-examination.

By Mr. Carton:

Q. Just locate where it was that Mr. Hinchman proposed to lease the lot to you on the river.

A. It was just west of the driveway, between the driveway and the shack known as the Ballantine shack; we were standing there in conversation; it is within about, I should judge, 200 feet of the terminal of the driveway.

Court: Would that run from the driveway to Short Creek or to the river?

Witness: Between the driveway and Short Creek; there is a small cottage in there now.

Q. Is that where your lot would be run?

A. No, my lot would have been somewhere on that line, wherever I had preference; he gave me the preference to locate it.

Q. Where was this lot he proposed to lease to you?

A. He didn't name any particular one; he simply said I could have an option on a lot there within that territory; they were not laid out.

Q. Where did this territory take in?

A. It would take in, I suppose, from the driveway to Short Creek, that would be the river front.

Court: Had the sand been filled in?

Witness: No, nothing at all; this was the time the second contract was taken up with Mr. Oram to do this repairing.

Q. What was the nature of the land between the westerly side of the drive and Short Creek?

A. Practically the same as it is now.

Q. Meadow?

A. Just meadow land, and this wash-out along the dike.

Q. And that land there west of First Avenue and east of Short Creek, is that filling in more every year with sand?

A. No, sir.

Q. It just remains about the same?

A. It doesn't fill in at all; nothing to fill it in.

Court: Did Mr. Hinchman do any filling in after the dike was repaired?

Witness: No, sir, nothing; it was his plan, the way he spoke to me in regard to giving an option on the lot, he had to fill it in or there wouldn't be any place for a shack. I understood Mr. Oram had talked the matter over with him. Outside of that I have no knowledge.

Q. You have been down there; you never observed that they did any filling in or made any improvements?

A. I never seen anything, only this proposition to me.

Court: You live there every summer?

Witness: Yes.

Q. Where is your bungalow?

A. My bungalow is number 174; it is the third from the last to the dike; I am three shacks from the dike.

Q. Are you located near where Mr. Haberle is?

A. I am nearer to the dike than he is.

Q. You lease from the Seacoast Real Estate Company?

A. Yes.

Q. You have referred to the ocean washing in over a strip of beach just north of the cribbing. That takes place constantly in all storms, does it not?

A. Yes, just wash across the point; there is a sort of a point there.

Q. And it washes the sand over in back?

A. No, very little in back; it doesn't reach that

far; it washes the sand over in the river off of the crib, but it doesn't have action enough to carry it over in behind the dike.

Q. It pushes it off in the river?

A. Yes, it drives over in the river.

Q. And the result is that it keeps that sand just north of the cribbing on about a level with the cribbing all the time?

A. Yes.

Q. And is constantly washing back and forth across there?

A. Yes.

Q. And that strip is about 150 feet where that wash takes place?

A. I should think it is about; it is about 150 feet where this hump begins to rise in front of Griffiths place; there is 15 feet above the level of the sand dune; in front of him it is three feet higher than his porch; that has increased in the last two years; the buildings back and wind blowing and driving from the east forms a drift in front.

Q. You say you remember when that dike was out of repair in 1913 or 1914?

A. Yes.

Q. And it was doing some damage before it was repaired?

A. Yes.

Q. And cut in on Mr. Haberle's?

A. Yes, encroached in there.

Q. And that was from the rear?

A. That was from the rear. That was caused by the action of the sea.

Q. Why the action of the sea?

A. Swells running in and breaking through and undermining, gouging in.

Court: Running in the river and going through the broken bulkhead?

Witness: Yes, and digging in.

Q. Then it cut from the back as well as the side?

A. Yes, it could run up and cut down.

Q. Is it your idea that if the bulkhead had been repaired, it wouldn't have had that swish and wouldn't have done the damage?

A. It wouldn't have got in there.

Q. Do I understand that you have any familiarity with the beach or inlet down there before the dike was erected?

A. No, I never paid any particular attention to the beach.

Q. Have you ever known the inlet to be any place other than it is now?

A. Only about in that neighborhood, shifting back and forth there as it did shift.

Q. You do remember that before the dike was erected?

A. One or two seasons; I generally go down in the summer time; I am not there the time of the year when those actions take place, but generally it takes place in the storm seasons, which I don't see.

NATHAN CONOVER, recalled.

Direct examination.

By Mr. Bergen:

Q. Can you tell how much filling it would have taken or it would take to fill up that land to the neces-

sary height for building purposes, up to the line of the dike, which lies between the river and Short Creek?

Mr. Carton: I object.

Court: You mean the depth of filling it would require?

Mr. Bergen: Height and depth, the amount of filling necessary, if he can give it in yards.

Mr. Carton: I object; there is no evidence that we did any such filling.

Court: There is evidence that you contemplated it. You may have changed your mind or didn't do it; he may answer if he can.

A. I have not made an estimate of the quantity it would take to make such a filling. As a statement, every foot of filling would require 1500 yards per acre; we generally think that marsh land should be filled at least four feet to make it habitable and decent to live on. The water behind the dike is from six to twelve feet below the bottom—behind the dike is from six to twelve feet below the top of the dike, and of course that would require very heavy filling and would cost a good deal of money.

Mr. Carton: I move that it be stricken out.

Court: I don't see what the purpose of it is, but still I will let it stand; I don't see that it helps me any.

Mr. Bergen: I have no other witnesses here today.

Court: Do you rest on this branch of the case?

Mr. Bergen: No. I have one other witness, Mr. Vermeule; he is in Cuba and will not return until February 29th. Your Honor may recall that he was not present at our last hearing and is not here today, and the other side has Mr. Rogers, and we close on this branch of the case.

Court: Reserving the right to call Mr. Vermeule you rest.

Mr. Carton: We wish to offer Mr. Hinchman.

Court: Have you anything in rebuttal on the dike?

Mr. Carton: When Mr. Vermeule goes on, we may want to put in rebuttal.

Court: You reserved Mr. Rogers on your direct case?

Mr. Carton: Yes.

Court: Do you want to reserve your right to rebut anything but the testimony of Mr. Vermeule? I do not know why you should not go on with that today.

Mr. Carton: It seems to me we will have rebuttal, and all the rebuttal will come from one witness.

Court: Will it relate to Mr. Vermeule only or to the general testimony?

Mr. Carton: It will relate to the two witnesses who have gone on today as well as Mr. Vermeule.

Court: The two engineers?

Mr. Carton: Yes, it is testimony to rebut the engineers' testimony.

Court: The reservation may remain as to that. Mr. Bergen will be entitled to the same reservation in sur-rebuttal. With that understanding you may proceed with the accounting feature of the case.

C. Russell Hinchman, sworn for complainant.

Direct examination.

By Mr. McMullin:

Q. Are you an officer of the Seacoast Real Estate Company?
A. I am.
Q. What officer are you?
A. Secretary and treasurer.
Q. How long have you held that office?
A. Since June, 1914.
Q. Are you related to Charles S. Hinchman?
A. Son.
Q. What relation are you to Lydia S. Hinchman?
A. Son.
Q. What connection have you with the estate of Charles S. Hinchman?
A. Executor.
Q. When did you father die?
A. June 3, 1916.

Q. I show you a statement of the account between the parties in this suit, with the balance brought down to November 15, 1917, and ask you how that statement was made up? Did you make it up?

A. I did.

Q. From what sources did you derive the information?

A. I made it up from books and records in my possession—books of the Seacoast Real Estate Company, of the estate of Charles S. Hinchman and personal accounts of Lydia S. Hinchman.

Q. What have you to say as to the completeness of the items set out in this statement?

A. I don't know that I understand exactly what you mean by "completeness;" do you mean is it fully itemized?

Q. Are there any other items of credit to which the defendants are entitled, excepting such as are in this statement?

A. Down to that date?

Q. Yes.

A. None that I know of.

Court: What date is it?

Witness: November 15th last, and running from the time of the $22,000 note of Yard's, October 31, 1904.

Q. Have the items of charge been made by the complainants or their predecessors in title?

A. I don't know what you mean by the items of charge.

Court: The things for which you claim credit in the account.

Q. You charge the defendants with certain amounts and credit them with certain amounts; is that right?

A. Yes.

Court: And those items with which you charge them were paid by the complainants or their predecessors in title?

Witness: A part of them were obtained from the sale of collateral, and I don't know by whom they were paid; they were paid by the purchasers of the collateral, those items. For instance, a payment of interest on the note right at the start was paid by Mr. Yard, I think.

Q. How about the charges which are made against these defendants in this account?

Court: Who disbursed the money for those charges; did you or your father or the Seacoast Company?

Witness: That money was disbursed by my father.

Court: Where did you get the information from about the disbursements, from his books and vouchers?

Witness: From his books.

Q. I call your attention to a list of collateral set out in Schedule B in the replication filed in this cause, and ask whether the complainants at this time hold any of that collateral unsold?

A. Yes, they hold unsold 25 shares of stock of the Sea Girt Land and Improvement Company and 200 shares of the stock of the Spring Lake Beach Improvement Company.

Court: And the property in question in this suit?

Witness: Yes. That substituted collateral is not named in this list.

Court: And the land embraced in this deed?

Witness: Yes.

Court: How much do you claim is due the complainants in this suit?

Witness: On the fifteenth of November, 1917, $37,370.99.

Court: And this balance or amount you claim due, of $37,370.99, is any credit to be applied on that account from the 25 shares of stock in the Sea Girt and 200 shares in the Spring Lake Beach Improvement Company?

Witness: Those companies are both in liquidation, and there isn't very much left; I suppose perhaps 200 shares of the Spring Lake Beach stock might realize at the most not over two or three dollars a share, and the 25 shares of the Sea Girt stock I should think might realize from twelve to fifteen.

Court: Is the liquidation voluntary or involuntary in both cases?

Witness: Voluntary. The Spring Lake Company has about twelve or fifteen lots left on hand, and the other company sold all its property to still another company, and took a mortgage for the balance of the purchase money, which is being paid off. When that mortgage is paid off in full, there will be nothing left.

Court: You haven't at the present time given the defendants any credit for the value of that stock?

Witness: Only for such dividends as have been paid.

Court: But not for any value representing either its par or anything else?

Witness: No, I have not, but I have given them credit for several dividends which have been paid.

Court: There is no market for it?

Witness: No, sir.

Court: You haven't attempted to get any offer or price?

Witness: No, I don't know what could be gotten for it.

Q. In this tract of land adjacent to the dike, will you explain the condition as regards rentals from these shacks, as to what the rent is, and what the approximate yearly rental is from these properties?

A. The rent, as Mr. Mount stated, is charged at two dollars a foot front on the beach front, and in such

instances as there has been enough land to build on back of the road, we have charged a dollar a foot, west of the road; there have been two or three places west of the road where people could build, and they paid one dollar a foot, and in front two dollars a foot. As to the yearly rentals, I will have to look it up.

Q. What does your statement show as to the rentals received from this lower beach, the total?

Court: Is there any dispute about those items?

Mr. Bergen: I think not.

Q. What was the condition of that beach in regard to rentals at the time when the American Timber Company conveyed to the Seacoast Real Estate Company?

A. There were not a great many shacks on the beach at that time.

Court: That was when?

Witness: He said conveyed to the Seacoast Real Estate Company; they conveyed to Lydia S. Hinchman and she conveyed to the company; I think that was in 1911 or 1912, as I remember, and at that time the shacks that were on the beach were dotted along; there were wide gaps between.

Q. How many were there?

A. I cannot tell you exactly.

Q. How many are there now?

A. Below the Brielle Road there must be about eighty.

Q. And above the road, on the land involved in this controversy? You said below the Brielle Road.

A. There must be about eighty at the present time, and at that time there might have been fifteen, in 1912.

Q. What about the situation north of the Brielle Road, the 500 feet, the Gazzan Granger tract?

A. That was about in the same relative proportion; it was built up very much.

Q. 15 against 80—about one-sixth?

A. About one-sixth or fifth.

Q. How about the comparative rentals?

A. The only rentals I have known was the one dollar a foot.

Court: Up to what year?

Witness: Up to 1915; in the beginning of 1915 two dollars. There were prior to that time those that paid what you could get from them.

Q. There were a lot of them that exercised squatters sovereignty?

A. We had a litigate with two; there were some there that paid so much and father would go down there and collect from them and turn over what he got; there was never any specific rate; it was along about that time, 1912, he began to make definite leases at a definite rate.

Mr. McMullin: I offer a copy of the account.

Court: Is there any objection to it?

Mr. Bergen: No.

Court: This account appears to have been offered on page 3, and marked Exhibit C3.

(Copy of account marked Exhibit C3a, being a copy of Exhibit C3 with corrections.)

Mr. McMullin: I will turn over the witness for cross-examination.

Court: Reserving the right, if necessary, to offer the books and papers.

Cross-examination.

By Mr. Bergen:

Q. Your father was a man of considerable business size and experience?

A. That is rather indefinite; he was considered to have some business experience.

Q. And he was interested in a great many different concerns?

A. Quite a number.

Q. Did he keep individual books?

A. He did.

Q. And do the accounts of this tract of land appear in his individual books?

A. They appear in his books and in my mother's books, and since 1914 in the books of the Seacoast Real Estate Company, to whom the property was deeded.

Court: By your mother?

Witness: Yes.

Q. You have been over all of those various books of account?

A. I have.

Q. And you have prepared this statement of account?

A. Yes.

Q. Is there anything that you discovered in those books which you think is questionable whether it should be in this account or not?

A. No.

Q. Nothing at all?

A. No.

Q. You are perfectly satisfied that from your investigation of those books, that there is no questionable item in these accounts?

A. No questionable item.

Q. No questionable item at all?

A. No.

Q. There is nothing which you think, as you investigate those books, that you should call our attention to, in order to prepare a proper account in this case?

A. No.

Q. On the next to the last page of Exhibit C3a appear some general items, under the head of Taxes, Expenses, &c., "Taxes paid," do those taxes represent payments made of taxes on these two tracts of land, the Gazzam Granger tract and the tract below Brielle Road?

A. They are in connection with the balance of the entire beach; the assessor has not divided the assessment.

Q. So you have apportioned those as between your other lands and our lands?

A. Yes.

Court: Do you or your parents or the company, the Seacoast Company, own other lands on this beach?

Witness: The Seacost Company owns other lands.

Court: On this beach?

Witness: On this same beach.

Court: Below or above the Brielle Road?

Witness: From the Brielle Road up to this.

Court: The $500 which has been mentioned is from the life station and Woolley's fishery up to the State Camp Ground, and it is assessed as an entirety?

Witness: Yes.

Court: And you made your own apportionment and charged the defendant with what you thought was proper?

Witness: Yes.

Q. Can you explain to us how you arrived at that proportion?

A. It is extremely simple. That portion of the beach which is not involved in this litigation and which represents above Woolley's fishery, which is just east of the life saving station, between that and the beach, is adjacent to the rifile butts on the State Camp Ground, and it has never been possible to get anybody to reside there, because bullets clip off the edges of the metal butts, and even as far down as the fishery, the fisherman are worried, and there is no one on that, and I took the point of view that if it had been possible to get the assessor to assess any of it separately, he would have assessed that as non-productive property, and assessed it at a very low rate; it returns nothing, and I have been simply putting that in at a nominal sum.

Court: What was the sum?

Witness: I don't remember what it was, but I put it in practically at nothing.

Q. What was the total assessment?
A. It varied different years.
Q. Take the first year you have there, what is it?
A. The first year of the apportionment was $800 the total.
Q. The total assessment?
A. The total tax was $800. The assessment I don't remember; I have the bills here; the total tax was $800, and I apportioned it $500 to them on the basis that that non-productive land practically meant nothing, and adding the foot frontage of the balance of the beach, because as long as the State Camp Ground is there you cannot put any tenant on the upper strip.
Q. How much of that tax of $804 did you put against this tract?
A. $500.
Q. And the only tract outside of that would be this tract which is against the military range?
A. Yes.
Q. And your own tract south of the Gazzam tract, south to the Brielle Road?
A. Yes.

Court: I will adjourn the further hearing of this matter until April 5th, 1918, at 10 A. M., and in the meantime counsel may enter into a stipulation about these items in the account about which there is any question, and if any testimony is to be given on the account, I will make a reference to Mr. Bindseil, who can take the testimony before April 5th, so that the case can be finished at the next hearing.

Transcript of testimony taken in the above entitled cause, pursuant to an order of reference made in open court in the above entitled cause, before Nicholas W. Bindseil, one of the Special Masters in Chancery of New Jersey, at the office of Mr. Charles R. Hinchman, Stephen Girard Building, Philadelphia, Pennsylvania, on Thursday, March 21st, 1918, at 10 A. M.

APPEARANCES:

MR. FRANK DURAND and MR. JOHN D. McMULLIN for complainant.

MR. MARTIN V. BERGEN, JR., and MR. DEWITT ROBINSON (of the Pennsylvania Bar) for defendant.

It is stipulated and agreed by and between the counsel for the respective parties, that the testimony of the witnesses may be taken stenographically by the Master and afterwards reduced to typewriting, the signatures of the witnesses to their said testimony being waived.

C. RUSSELL HINCHMAN, recalled for further cross-examination.

Cross-examination.

By Mr. Bergen:

Q. Mr. Hinchman, at the last examination we were discussing the subject of taxes; will you be

kind enough to tell me what properties were included in those tax bills which are apportioned in this account?

A. Suppose I show you the tax bills. (Producing same.) It is my understanding that with the exception of the last year all the property in question and all the property which lies on the beach and the meadows immediately behind the beach from the camp ground down to the Inlet, which is not in question here, all of it, was included, lumped in there; but in the last year, as Mr. Durand explained at the last hearing, the local assessor— you will remember that I told you that we couldn't very well take up the question of tax bills and assessments with the local assessor, because he was one of the heirs of the Rice Estate that started that litigation, which we consider a grab—and in the last bill, the assessor, where formerly I think it was four acres, or somethink like that, had been assessed to the heirs of James Rice, assessed them with thirty some acres, which includes this piece in question in the litigation, and as he did that, of course the last assessment to the Seacoast Real Estate Company would not include that thirty acres.

Q. In other words, Mr. Hinchman, this tax which was levied ran on the beach front from Sea Girt encampment down to Manasquan Inlet?

A. That is right.

Mr. Durand: The assessments are on the beach front only, and the tax bills show it. Mr. Hinchman is mistaken.

Q. Was the Gazzam property assessed in a separate bill and paid as a separate item from the regular beach front property?

A. Not since we have been paying it. Prior to the taking over of that, these bills were paid by Gazzam and were turned over to father. There may have been one or two others in there paid differently. (Referring to tax bills produced.)

Q. When was the Gazzam property taken over?

A. 1910, I think.

Q. When was the other property taken over?

A. 1912.

Q. By the agreement of 1912?

A. Yes.

Q. In whose name was the Gazzam property taken over?

A. The title?

Q. Yes.

A. The deed Mr. Durand has, and I think it was Lydia S. Hinchman, I am not sure.

Mr. Durand: It was taken over in Mrs. Hinchman's name. Those deeds are in evidence.

Q. In whose name was the other property taken over?

A. Lydia S. Hinchman.

Q. Both of them were taken in her name?

A. Yes.

Q. After 1910, therefore, you paid taxes on the Gazzam property, and after 1912, including each of those two years, you paid taxes on the other; is that correct?

A. Yes; there was some property that in the past was paid on by the Sea Girt Land and Improvement Company, that took over part of that property, which isn't included in this property in question here. From the Sea Girt Land and Improvement Company?

Q. I am talking about the property below Brielle Road on the beach front.

A. The receipts are here; they speak for themselves. They are all here. (Producing same.)

Mr. Durand: The land south of the Brielle Road in 1904 was conveyed to the American Timber Company; north of the Brielle Road it was conveyed to the Sea Girt Land and Improvement Company, not including the Gazzam tract. This was at a time when a settlement was made of certain suits pending between the Sea Girt Land and Improvement Company, American Timber Company, and H. H. Yard, and in the adjustment the Sea Girt Land and Improvement Company made a deed to the American Timber Company for the land south of the Brielle Road; the American Timber Company quitclaimed to the Sea Girt Company for the land north of the Brielle Road, but this did not include the property which had theretofore been conveyed by the American Timber Company to Gazzam. There were two tracts north of Brielle Road, one which had been conveyed to John Wooley and the other to the Government for a life saving station, but these were not included in the litigation and are not included in this case.

Mr. Bergen: We agree to that statement of facts by Mr. Durand, subject to correction.

Q. I show you the tax bill of 1910, $102.60. Is the Gazzam tract included in that tax?

A. I should say it is not. I have here a tax bill against the Gazzam property for the same year. (Producing same.)

Q. You have produced a tax bill for 1910 assessed

against J. M. Gazzam for $8.55, paid December 22, 1910; that was paid by your father?

A. Yes.

Q. Does that appear on the acount?

A. Apparently not.

Q. Then that item of $8.55 ought to appear on this account?

A. I should think it ought.

Q. Because that was assessed against the Gazzam tract?

A. Yes.

Q. How about the tax of 1911?

A. It must have been included in the bill of $132.30 for the taxes of 1911 assessed against the Sea Girt Land and Improvement Company.

Q. Have you the tax bill for 1910 of the other property which belonged to the Sea Girt Land and Improvement Company?

A. The Sea Coast Real Estate Company had nothing down there in 1910; it took a deed to this property in 1914.

Q. Who was the owner of the property between the encampment grounds and the Brielle Road in 1910 other than the Gazzam tract?

A. Sea Girt Land and Improvement Company.

Q. Have you the tax bill of the Sea Girt Land and Improvement Company for 1910 for that property?

A. Yes, sir. (Producing same.)

Q. How much does that bill show that the tax assessor assessed that property at?

A. $6,000.

Q. How much does this bill show that the Gazzam tract was assessed at for that year?

A. $500.

Q. Have you the bills for 1911 in reference to this property?

A. Yes.

Q. I show you a bill for 1911, assessing the beach front at $7,000, the tax being $132.30, paid December 21, 1911; does that include the Gazzam tract?

A. It is my understanding that it does.

Q. You never paid taxes in the name of Mrs. Lydia S. Hinchman after 1911?

A. If there is nothing on the tax bills to show, why we didn't.

Q. Returning to 1912, there is a tax bill here assessed against the Sea Girt Land and Improvement Company for beach front $25,000, tax being $514.03, paid July 25, 1914; what property did that include?

A. It says there "Beach front"; I think the most competent witness on this would be the assessor. We get the Manasquan paper and we watch every advertisement of sales.

Q. Did you get any bill for any other land reaching back to the creek, the thoroughfare in back?

A. Only some little odds and ends, some little lots that father purchased. There is one of them. (Producing same.)

Q. This is the only bill you know of for 1912?

A. Yes.

Q. So that would include all of the property?

A. Yes.

Q. Would that include the property from Brielle Road down to the Manasquan Inlet?

A. At that time the property from Brielle Road down to the Manasquan Inlet would be assessed against the American Timber Company, wouldn't it—1912?

Mr. Durand: The transfer to Mrs. Hinchman was made in 1912 in time for the assessment.

Q. Was there any tax paid that year in the name of Lydia S. Hinchman for any of this beach front?

A. Not that I know of.

Q. This is the only bill for that tract?

A. I don't know of any bill in her name in the whole time.

Q. Then the bill includes practically all of the tract from the camp grounds to the inlet?

A. It is my understanding that it does, leaving out the Wooley piece, the fishery, and the life saving station.

Q. Which are not owned by any of the parties in interest?

A. Yes.

Q. How much of that bill did you apportion against the American Timber Company?

A. $316.32, as shown in the account, under date of July 24, 1914; that is when the check was sent, and the bill receipted the following day.

Q. I show you the tax bill of 1913, assessed against the Sea Girt Land and Improvement Company for beach property, valuation $25,000, total tax $505.06, paid July 25, 1914; does that include all this property?

A. That is my understanding.

Q. How much of that is assessed against us?

A. $310.80.

Q. I show you tax bills of 1914 against the Seacoast Real Estate Company, valuation of beach front $40,000 tax paid $804 on December 19, 1914; how much of that is charged against us in this account?

A. $500.

Q. Does that include all of this property?

A. Yes, that does.

Q. I show you tax bill of 1915, the assessment

being $60,000 beach front, against the Seacoast Real Estate Company, the tax being $1385.31, which was paid December 17, 1915; how much of that is assessed against us?

A. $800.

Q. That includes all of this property?

A. Yes, that includes it all.

Q. I show you tax bill of 1916 against the Seacoast Real Estate Company for beach front land $70,000, tax $1813, paid December 16, 1916; how much of that is assessed against us?

A. $1100.

Q. That includes all the beach front property?

A. Yes.

Q. In the account appears a statement 12/15/16 $1000 for taxes, what is that?

A. That $1000 is the apportionment of the 1917 tax, which was paid December, 1917; that date should not be in there; it was paid December 13, 1917; we paid $1797.90.

Q. I show you tax bill of 1917 against the Seacoast Real Estate Company for beach front, meadow, assessments $75,000, tax paid December 14, 1917, $1797.90; does that include all the same property as the other tax bills?

A. It does.

Q. And nothing else?

A. Not that I know of.

Q. Of that you apportioned $1,000 against us?

A. Yes.

Q. In this statement appears items "10/5/12, $102.60"; what is that for?

A. That is bill assessed against the Sea Girt Land and Improvement Company. I find in a ledger of Lydia S. Hinchman, under date of October 5, 1912, the following entry, "Paid cash 'Yard' lower beach taxes 1910 $102.60."

Q. Have you the tax bill of that?

A. Yes, but the receipt is of a different date; $102.60. The bill is assessed to the Sea Girt Land Company, and I imagine that Mrs. Hinchman reimbursed the Sea Girt Land Company for this money for this tax which they had paid for Yard's account.

Q. What other property did the Sea Girt Land Company pay taxes for in 1910?

A. I don't know. They had other property there at the time, but we hadn't acquired title to their other property at that time.

Q. The Sea Girt Land Company owned all the property from the encampment down to Brielle Road except the Gazzam tract and the other tract?

A. If they paid that tax they owned the property at that time; we acquired it from them in 1914. The Seacoast Real Estate Company acquired that property from the Sea Girt Land and Improvement Company in 1914. I don't know anything about what they did with their taxes at that time.

Q. Can you tell me what tax the Sea Girt Land Company or Mr. or Mrs. Hinchman or anybody paid for the property owned by it south of the encampment to Brielle Road for 1910?

A. No, I have no record of that.

Mr. McMullin: In 1910 did Mrs. Hinchman own any property south of the Brielle Road except under the American Timber title?

Witness: She didn't own anything south of the Brielle Road in 1910. In 1912 she made the payments for 1910 and 1911 taxes which the American Timber Company evidently had not paid, but at the time, 1910, she didn't own the property.

Q. Who owned in 1910 the property next to the encampment on down to Brielle Road?

A. Leaving out those pieces that have been already mentioned, the Sea Girt Land and Improvement Company.

Q. Have you got a tax bill paid by the Sea Girt Land and Improvement Company for the taxes for that property in 1910?

A. No, I see I have not.

Q. Do you know what amount they paid that year?

A. I do not.

Q. Do you know whether or not that is included in this bill of 1910 which has been charged against us in this accounting?

A. I find in my letterbook a letter which reads as follows:

Philadelphia, October 4, 1911.

Frank Durand, Esq.,
Asbury Park, N. J.

Dear Sir:—

We are obliged for your favor of yesterday regarding the Manasquan taxes and in response to same we enclose Mrs. Hinchman's check on the Quaker National Bank to your order for $102.60 in payment of the assessment against the American Timber Co. for beach and meadow, Brielle Road to Inlet. Against which bills have proper receipt sent us showing that payment was made by her.

As to the assessment for lots south side Sea Girt Avenue adjoining N. Y. & Long Branch R. R. $8.55, please have that stricken from the rolls as improperly entered, as that covers the graveyard tract and is not taxable under New Jersey statutes.

Yours truly,
C. S. Hinchman."

Q. Then that cannot be for this bill which we have here, because this bill is assessed against the Sea Girt Land Company, and that speaks of a bill assessed against the American Timber Company.

A. It is the same amount, $102.60. If that is a separate bill, then that is the bill they paid, and this other bill was paid in addition. I found that bill among the papers, but I find in the books the entry showing that she paid the $102.60.

Q. Have you got the books of the Sea Girt Land Company here?

A. No.

Q. Where are they?

A. I don't know whether they are in Camden or down in the Quaker City Bank; William S. Clark is the treasurer.

Q. That letter which you have referred to as written to Mr. Durand, refers to a letter written by him dated October 3, 1912, which reads as follows: "Mr. Chas. S. Hinchman,

Dear Sir:—

The Collector of taxes of Manasquan is making up his advertisement of sale for the taxes of 1910, and among the properties advertised is 'American Timber Company, Beach and Meadow, Brielle Road to Inlet, $102.60.' I have asked the collector to hold the advertisement until I could communicate with you in reference to these two taxes." The other I have not read.

A. Yes.

Q. Then that tax bill taxed against the Sea Girt Land Company for 1910 must be for the property which they owned above Brielle Road?

A. Yes.

Q. Assessing that at $6,000 and placing the same tax on it of $102.60, is that correct?

A. Yes, that is just a remarkable concidence, because the other must have penalties included.

Q. I call your attention to the item in the bill "10/10/12, $162.63," what is that?

A. I find an entry in the ledger of Lydia S. Hinchman for that date, "Paid Yard Manasquan Beach balance taxes 1910 and 1911, $163.63." If it is $162.63 in the account, that is a clerical error. I find a letter in reference to that in the letterbook, direct to the Collector. That letter reads:

Philadelphia, Pa., October 10, 1912.

Seymour Drake, Esq.,
Collector,
Manasquan, N. J.

Dear Sir:—

We are today in receipt of your favor dated October 8, covering 1910 and 1911 tax bills. Please hold up the advertisement of the grave yard tract until we have opportunity to hear from Mr. Durand, as we have written him for his opinion in regard to it.

Enclosing herewith please find check on the Quaker City National Bank to your order for $163.63, in payment of the three bills enclosed.

American Timber Company Beach balance 1910,	13.11
American Timber Company Beach 1911	140.27
Lydia S. Hinchman, land on beach near life saving station	10.25
Total	$163.63

Kindly receipt and return bills in the accompanying postpaid and addressed envelope and oblige,

Yours truly,
C. S. Hinchman."

Q. The $10.25 should not be there?

A. Yes.

Q. And the other is, as it states, the balance for 1910 and tax for 1911?

A. Yes.

Mr. Durand: What should the item properly be?

Mr. Bergen: $153.38.

Q. What are the two items of $9.25 and $9.70; can you explain those?

A. An entry in the ledger of Lydia S. Hinchman for December 18, 1912, "To cash Yard Manasquan 1912 tax $9.25"; that is probably the Gazzam tax. "December 17, R. F. Newman, Collector, taxes upper beach $9.70", with a capital "G" written over it, which means Gazzam.

Q. Then those are the taxes for 1912 and 1913 for the Gazzam tract?

A. Yes.

Q. The taxes of 1910 and 1911, therefore, were paid as assessed against the American Timber Company for the tract below Brielle Road, and the taxes of 1910, 1911, 1912 and 1913 were paid as assessed against Gazzam for the Gazzam tract separately from the American Timber Company and distinct, by themselves?

A. Yes.

Q. And the taxes of 1910 and 1911 of the Gazzam tract do not appear to be in your account?

A. That is right.

Q. While the taxes for 1911 and balance of 1910 on the American Timber Company tract appear to be overcharged by an item of $9.25?

A. That is right.

Q. The taxes for 1912 down for the property below Brielle Road and the taxes for 1914 down on

the Gazzam tract were all assessed, together with the other properties owned by the Sea Girt Land Company, in one block assessment; isn't that correct?

A. Yes, owned by the Sea Girt Land Company, and afterward by the Seacoast Real Estate Company.

Q. What properties were owned by the Sea Girt Land Company and subsequently by the Seacoast Real Estate Company which are in these assessments from 1912 down?

A. The land which was retained by them, in the settlement of 1914, at the time that the Sea Girt Land and Improvement Company and the American Timber Company, or H. H. Yard, exchanged deeds.

Q. These other little pieces which you have been talking about, were they included in those assessments?

A. No.

Q. Have you a map which shows exactly the property which is included in these joint assessments?

A. In these little assessments?

Q. No, the big joint assessments?

A. They are shown on the map of Niart Rogers which was offered in evidence and is in the case.

Q. This map of Niart Rogers of 1913 which is in evidence shows a strip of land running from the New Jersey encampment grounds to the life saving station; in your apportionment of taxes, you counted that as of no value, as I understand it?

A. Practically.

Q. Did you put it in as of any value in arriving at this apportionment of taxes?

A. No, sir, as nothing.

Q. Then comes the life saving station between that tract and the tract marked "Ocean Avenue"?

A. The life saving station is back from the sea. The front piece is the Wooley tract.

Q. So that the whole strip from First Avenue to the ocean is not in this apportionment of taxes at all?

A. That is where the life saving station and fishery stand—yes.

Q. The Wooley tract lying in front of the United States life saving station tract?

A. That is right.

Q. Then comes the Gazzam tract next to Ocean Avenue running down 500 feet?

A. Yes.

Q. Below that you owned all the land running from there to Brielle Road?

A. That is right.

Q. And the American Timber Company owns the land from Brielle Road down to Manasquan River Inlet?

A. Yes.

Q. In arriving at your apportionment you took the Gazzam tract south of Brielle Road as belonging to the American Timber Company and charged it up against us?

A. That is the idea.

Q. That is including 1914?

A. Yes.

Q. Before that the Gazzam tract had been taxed separately?

A. Yes.

Q. Does your property, or the property of one or both of these companies—the one succeeding the other in title—run back to the railroad, including part or all of Newberry Pond—the land included in these taxes?

A. No.

Q. Do you pay other taxes for that tract lying to the west?

A. None that I have ever heard of.

Q. Therefore these bills must include that property as well?

A. As I understand it, there is a grave question whether any title to the bed of that pond exists.

Q. But this takes in certainly the southern shore and part of the northern shore?

Mr. Durand: You are asked if that tax bill includes that land back in there?

Witness: Along Newberry Road?

Mr. Durand: Yes.

Witness: I don't think it does.

Q. Does anybody pay taxes for that, do you know?

A. I do not know.

Q. You believe, then, that your tax bill is only for the property lying to the east of Newberry Pond on this map?

A. Yes, east of that red line.

Q. And Watson's Creek?

A. Yes.

Mr. Bergen: Mr. Durand states that his understanding of the taxes is as follows: That Newberry Pond is tide water and claimed by the State; that the taxes of the property lying on the south edge of Newberry Pond are against the property which fronts on the east Main Street Road to Manasquan, so that the property which is included in these assessments in our case is merely the property lying

to the east of Newberry Pond and Jackson's Creek, and connecting Newberry Pond with Watson's Creek.

Q. Have you a statement which shows the rents which you have collected on the properties which you own, or these companies own, lying north of the Brielle Road?

A. Yes.

Q. Can you let us have that for the years running from 1912 down?

Mr. Durand: I object to that on the ground that any rentals received from the lands of the company disconnected from the American Timber Company or the Gazzam tract have no application to this suit and would be irrelevant.

Mr. Bergen: My contention on that point is, that in apportioning this bulk of taxes, the question of rental has a considerable to do with the amount which should have been apportioned against us.

A. I haven't that separated.

Mr. Durand: We will separate it and give you a statement at the next hearing.

Q. Stating very generally—the items are small—what is the item of general expenses, printing, &c., from 1913 to 1915 on the statement, $63?

A. Printing, stationery, printing leases, postage, and I think every item in there, practically, will be covered by what you would call office expense. The biggest item is $23.72. I will look that up.

Mr. Bergen: Never mind that.

Q. And that was apportioned among the various accounts, or is it specifically against our account?

A. I cannot tell that unless I look up each item. I think some are apportioned and some are specifically charged against this account, according to what they are.

Q. Now we come to the item, "commission on collections."

A. That is charged straight on the account of rents, with the exception of two $50 items which were paid by father during his lifetime, as I remember it,—paid Albert Lavance and Harry Clayton. In the early stages they collected some rents for him and he made lump settlements with them at $50 each, as I remember it, for the work they did.

Q. The others were all paid to Mr. Wainwright?

A. Yes, they were all paid to Mr. Wainwright.

Q. Mr. Hinchman, will you be kind enough to tell us when your father, or whoever it was, purchased the Gazzam and Granger notes from them respectively?

A. The Granger note in 1908, the Gazzam note in 1910.

Q. How much did he pay for those notes?

Mr. McMullin: I object.

A. Mr. Granger owed father at that time a considerable sum of money and continued to owe him money until he died; I collected some after he died. Father took the note from him as a credit on account of the debt; he didn't pay him anything, he took it as a credit.

Q. Did he credit him in his account with a certain specific sum of money on the note?

A. He credited a certain specific sum.

Q. Will you be kind enough to let me know what that is?

A. $2500.

Q. Will you be kind enough to tell me how much he paid, or what he gave to Mr. Gazzam for his note?

A. I have a copy of the receipt, which I produce.

Mr. Bergen: (Reading) "Received Philadelphia, June 16, 1910, of C. S. Hinchman Attorney certificate No. 63 for 55 shares of Peale, Peacock & Kerr, Inc., duly assigned to Joseph M. Gazzam, and check for $300 in full consideration for deed dated June 1, 1910, for Beach land at Manasquan, and note of H. H. Yard, dated October 1, 1904, for $3500, endorsed 'without recourse' by J. M. Gazzam, and the letters signed by J. M. Gazzam, A. O. Granger and H. H. Yard, dated October 11, 1904, and October 9, 1901, respectively; and I have also delivered tax receipts from the Borough of Manasquan for the years 1902, 1903, 1904, 1905 and 1909, inc. Receipts for the intervening years which have been paid through Mr. Gazzam will be sent to you for filing with the title papers, and if the taxes are unpaid will be paid out of the $300 received in your check. J. M. Gazzam, per W. S. Wallace."

Q. Mr. Hinchman, there is no doubt that both of those notes are the notes given in October, 1904, is there?

A. I had better look at the notes, hadn't I?

Q. Yes.

A. Would you like to see them? (Producing same.) Granger didn't put "without recourse" on his. The two notes which were purchased are the notes for $3500 each, each dated October 1, 1904,

each at one year after date; one drawn to the order of Joseph M. Gazzam and the other to the order of A. O. Granger, and signed Henry H. Yard. The Granger note is endorsed simply, "A. O. Granger." The other note is endorsed, "Pay to the order of Lydia S. Hinchman, without recourse, Joseph M. Gazzam."

Q. And those notes are the notes which appear in these pleadings in this case, are they not, as the Gazzam and Granger notes?

A. Yes, sir.

Q. Referring to the item of "Commissions on collection of rents" in the account, as I understand your testimony, you paid Mr. Wainwright ten per cent on collections as made; did he deduct that when he returned the collections?

A. No, sir.

Q. You sent him checks for it?

A. He was paid at varying intervals; he would drop me a line and say he wanted some money, and we would check up to send him a check.

Q. Did he collect the rents on the other properties that you owned on that beach?

A. Prior to the property being turned over to the Seacoast Real Estate Company he collected below the Brielle Road; after that he colected on the entire frontage.

Q. And did you pay him ten per cent on all of it?

A. Since the Seacoast Real Estate Company took it we paid him ten per cent straight on all of it.

Q. On the Seacoast Real Estate Company's collections there?

A. On all of the collections, and prior to that time the settlements were made by my father, and I am not clear whether they were on a ten per cent

basis or not. Mr. Wainwright did some legal work in connection with it as well, and at the time that the Seacoast Company took it over, we had an understanding with him that he was to act as vice-president of the company and he would collect the rents, and if it was necessary to proceed against any tenants for collections, he would attend to all that and he should get a straight ten per cent.

Q. Are you able to tell me the rents which you collected in each year on the Gazzam property and on th property below the Brielle Road, the gross sum?

A. The statements show each item collected seperately, but not on the end of each year; they can be divided and furnished you.

Q. Will you do that?

A. Yes. They are not totaled each year. They are totaled down to June 20, 1914, when the Seacoast Real Estate Company took it over, and since that time.

Q. Not divided into yearly periods?

A. No, they run straight down, each separate item by itself with the date.

Q. Do you know whether any rents were collected on the Gazzam-Granger tract prior to 1910?

A. While they had it?

Q. Prior to 1910; your account starts with 7/5/10.

A. That is the first I know of; I don't know whether they collected or not.

Q. Turning to the item of "surveying," what are those surveys for?

A. The entry on August 2, 1913, is "Walter K. Potter, surveying"; December 26, 1914, "Niart Rogers, $76"; January 13, 1916, "Niart Rogers, $58.50." Apportioned one-half $29.25; that was undoubtedly maps in connections with the Rice case.

Mr. McMullin: Can you find the bills?

Witness: Yes.

Q. What were the services which Mr. Walter K. Potter rendered, can you tell me?

A. He made a lay-out for lots down on the lower beach.

Q. Have you got his map?

A. There is a copy among the maps I gave to Mr. Durand.

Mr. Durand: We have the map.

Mr. Bergen: Will you produce it at the next hearing?

Mr. Durand: Yes. Mr. Potter made a lay-out of the lots on the tract south of the Brielle Road—I don't remember the date—and his street struck Brielle Road some distance east of the street in the tract north of the Brielle Road, and when the Borough of Manasquan wanted to put in water and sewer and make a street, they wanted the road laid out straight from one end of the beach to the other, and Mr. Rogers was employed to revise the lay-out on the lower beach and run what is now First Avenue so that it would tie up to First Avenue on the upper part of the beach.

Q. And Mr. Potter then prepared a map showing what work he did?

A. Yes. We can get hold of a copy of that map. I may have one here.

Q. What work did Mr. Niart Rogers do for the $76 which was paid to him on 12/26/14?

New Jersey State Library

A. I judge that that is the work he did for revising the lay-out so as to make the street run straight, as Mr. Durand just stated.

Q. Have you a copy of his bill?

A. Yes,—I don't seem to have it; it is possible he did not send back the receipted bill.

Mr. Durand: We will produce a duplicate of that at the next hearing.

Q. You have no statement of Niart Rogers and receipt showing the payment of 12/26/14 of $76?

A. No, I have the cancelled check.

Q. Do you recall what that was for?

A. It was engineering work.

Q. Did he prepare any maps in connection with that?

A. That I cannot tell you.

Q. The bill of 1/13/16 is a payment to Niart Rogers of $58.50, one-half of which you have apportioned against us?

A. That is correct.

Q. And that bill is the paper which I have in my hand?

A. It is.

Mr. Bergen: I offer that paper in evidence.

(Marked Exhibit D6.)

"January 10th, 1916.

Seacoast Real Estate Co.,
1222 Stephen Girard Bldg., Phila. Pa.
To Niart Rogers, C. E., Dr.

1915		
Aug. 26, 31, Sept. 6, 17, Oct. 1, 5, Nov. 5, Surveys and maps of Beach front lots at Manasquan Beach,	$33.00	
Aug. 30 6 illuminated prints of meadows (Thurlow title) for use of the Supreme Court Judges in review of Rice case	18.00	
Dec. 27, 28, Time and draughting of Stockton, Brand, and other titles on meadows for use in coming suit Rice & als	7.50	
	$58.50	
Jan. 14 Received payment Niart Rogers,		

Thanks."

Q. It states "Surveys and maps of Beach front lots at Manasquan Beach," giving seven dates; have you those various maps?

A. Yes, I have those maps. (Producing two maps fastened together.)

Mr. Bergen: I offer in evidence map in two sections, entitled, "Plan of lots situated on the ocean front at Manasquan, Monmouth County, New Jersey, Property of Seacoast Real Estate Company. Dated September 1915. Drawn by Niart Rogers, C. E."

Mr. Durand: It is in two sections and one section shows the lots and the location of shacks north of Brielle Road, and the other, south of Brielle Road.

(Marked Exhibit D7.)

Q. The bill also calls for work on maps October 1, 5 and November 5. Were there any other maps?

A. Those are the only maps I know of.

Q. Have you got the illuminated prints of meadows?

A. Yes. This is for six copies of the Niart Rogers map of the entire beach front, dated A. D. 1913, the original of which was offered at the last hearing, and which has been marked Exhibit D5.

Q. The third item on this bill is "Dec. 27, 28, Time and draughting of Stockton, Brand and other titles on meadows for use in coming suit Rice & als"?

A. There were a lot of interlocking titles up in the meadows; that must be time spent he spent preparing for his testimony.

Q. There is a bill, under the item "Renewing dikes", of $334.10, 1/13/16; what is that; do you recall?

A. When the Logan Construction Company did that work in 1915—I think it was the people that Oram worked for—it was deemed desirable for the plans to be gone over before they did the work, by an engineer, and the work to be supervised by an engineer, so that there wouldn't be any comeback on its having been done according to the specifications; we didn't know the Logan people. What Howland did there, we knew him, and we wanted an engineer there to supervise it, and Mr. Rogers prepared the specifications for the work and afterwards supervised the work on the ground.

Q. Have you got the plans and specifications which he then prepared?

A. I have; I also think that I have that receipt for that bill of $334.10. (Producing same.)

Mr. Bergen: This bill reads:

"January 10, 1916.

Seacoast Real Estate Company,
To Niart Rogers, C. E., Dr.

1915 Engineering services, plans, supervision of bulkhead at Manasquan River Inlet under contract of Logan Construction Co., as per agreement, total amount of work $6682.08, at 5%, $334.10.

Jan. 14 Received payment,
Niart Rogers."

Q. I want to find out whether he made any maps at that time?

A. He wrote the specifications; I have a copy of it, (producing same); I think I have the original.

Mr. Durand: We offer the contract between the Logan Construction Company and the Seacoast Real Estate Company for repairing the dike, together with the specifications as prepared by Niart Rogers, Engineer, and will produce them later, and if there are any plans, we will produce them also.

(Marked Exhibit C7.)

Q. What was the Rice case; can you tell us?

A. In a general way, yes, sir. The details are on record.

Mr. Bergen: I withdraw the question.

Q. Was any consent gotten from the United States Government for doing the repairs of 1914 and 1915?

A. No, a very decided effort was made to get them to do the work, and they declined to have anything to do with it.

Q. Was any consent gotten from the State of New Jersey to do that work?

A. No.

Q. None was gotten then from the Government of the United States or from the State of New Jersey?

A. No, sir.

Q. Can you tell me the exact amounts you paid Howland and the exact amounts you paid the Logan Construction Company for that work?

A. Yes, sir: August 4, 1914, $1500 paid Jesse A. Howland; August 19, 1914, $2000 paid Jesse A. Howland; Sept. 2, 1914, $200 paid Jesse A. Howland; Sept. 14, 1914, $3500 paid Jesse A. Howland; September 26, 1914, $2970, paid Jesse A. Howland. That is all the Howland bills. The last bill gives the whole account and the payments on account, with the balance.

Mr. Bergen: I offer in evidence the set of bills and receipts, as one exhibit.

(Marked Exhibit D8.)

A. (Continuing) September 7, 1915, paid Logan Construction Company $1000. This was received from Mr. Rogers at the time of the final payment. The checks for the first payments were sent to Mr. Rogers on the evidence shown in that statement, $1000 and $1500, total $2500, payments on account, and when the job was finished up Mr. Rogers certified the account to us, and we sent him a check for the balance due, $4128.08. That was sent on November 18, 1915, and Mr. Rogers forwarded that to the Logan Construction Company, and under date of November 20, 1915, they acknowledged receipt of that check as payment in full.

Mr. Bergen: I offer in evidence that whole set of papers, being letter from Niart Rogers to Logan Construction Company, dated November 18, 1915; letter from Logan Construction Company to Mr. Niart Rogers, dated Nov. 20, 1915; and letter from Mr. Niart Rogers to Mr. C. R. Hinchman, dated November 18th, 1915.
Company to Mr. Niart Rogers, dated Nov. 20, 1915; and letter from Mr. Niart Rogers to Mr. C. R. Hinchman, dated November 18th, 1915.

(Marked Exhibit D9.)

Q. Mr. Hinchman, did your father or the Seacoast Real Estate Company or the Sea Girt Land and Improvement Company, or whichever one it was, make any deductions from these bills in the way of commissions or deductions, or did they pay them the face amounts?

A. What do you mean? Commissions to whom?

Q. To the company; were there any discounts on them?

A. No.

Q. You sent them checks for these full amounts?

A. Yes. Do you want to see the checks?

Mr. Bergen: No, your answer is enough.

Q. All of the bills for legal expenses in defence of title were paid to Mr. Durand or to Judge Collins through Mr. Durand, were they not?

A. Yes, I think one was paid to Judge Collins direct.

Q. Mr. Hinchman, the note, or rather the list of collateral which is marked Schedule B in the replication and which was attached to the note of $22,000

and odd which was given to Mr. Charles S. Hinchman on October 31, 1904, states, "Belmar lots 2952-59, $3000." The item $3,000 being evidently stated in this schedule as "notes to be given by H. H. Yard, and the collateral to be released one year from date upon payment of the following amounts plus 20%." $3,000 being opposite the item of "Belmar lots 2952-59." The account on 12/31/08 has this item: "Credit proceeds 2952-7 Belmar net $895.21." Will you be kind enough to explain to me how you arrived at that figure?

A. Those lots 2952 to 2957 were sold to John W. Borden of Manasquan, New Jersey, for $2500. The taxes were supposed to be all paid up. Mr. Borden discovered taxes in 1899, 1900, 1902 and 1903, which had not been paid by Mr. Yard or the American Timber Company, and he furnished bills for those taxes, which bills were returned to him on December 22, 1908, with authority to deduct the total of the bills, $153.01, and the 1908 tax bill—that is the current year when the sale was made—amounting to $48.48—from the sale price of $2500. The old tax bills and the current tax bill stated totaled up $201.49, and they were deducted from the sale price of $2500, as was also one dollar for recording. That leaves the amount received from John W. Borden for the $2500 sale $2297.51, as shown on the account. From that is deducted the item shown in the short entry on the account of $1402.30, stated as Brown mortgage, and interest from 9/15/04; that amount deducted from the $2297.51 received from Borden leaves $895.21, the item concerning which you asked.

Q. That appears in the account attached to the replication in this case in the entry of 12/31/1908, but does not appear in the statement which was put in evidence, as I understand it.

Mr. Durand: It doesn't appear in Exhibit C3, but appears in Exhibit C3a.

Mr. McMullin: The result appears.

Witness: The item $895.21 appears as the balance; the short entry does not appear. The short entry is the inside column.

Q. Is there any entry in your account which shows the sale or gives us a credit for the sale of lots 2958 and 2959?

A. In this account there is not.

Q. Is there in any account?

A. There is not in any account that I know of. Those lots were disposed of prior to the date of the note with which this collateral agreement was filed.

Q. Can you tell us the date when those lots were disposed of?

A. I can in a moment.

Mr. McMullin: We object to the question on the ground that this suit is based upon a settlement and account stated between the parties resulting in the note sued upon, and that the sale of lots 2958 and 2959 was prior to the making of the note in question.

A. (Continuing) I have a letter to Mr. Gillen acknowledging receipt of the proceeds, and that letter is dated October 10, 1904; the sale was made some little time prior to that.

Q. How much proceeds were received from the sale of those two lots?

A. $1200 less a commission of $30 paid to Charles O. Hudnut, a real estate dealer in Belmar.

Q. You received that on what date?

A. October 10, 1904.

Mr. Bergen: I offer in evidence a certified copy of a deed, Charles S. Hinchman and wife to Rudolph Hurley, dated September 9, 1904, for lots 2958 and 2959, as shown on the map of H. H. Yard's Addition to Ocean Beach, now Belmar. The consideration named in this deed is $1200, $950 of which is to be secured by purchase money mortgage, lien upon the premises herein described. The deed is acknowledged September 19, 1904, and recorded October 10, 1904, in Book 737 of Deeds for Monmouth County, page 235.

(Marked Exhibit D10.)

Witness: There was $100 paid down on those lots on April 30, 1904, so that the actual sale took place —on October 10, 1904, the balance of $1100 was paid, less $30 paid to Hudnut, the agent making the sale, and balance of $1070 received on October 10, 1904.

Q. Then you did not take a purchase money mortgage, but received the cash for the whole consideration of $1200?

A. The ledger shows the cash received for the whole consideration. The letter to Gillen in connection with the settlement shows a purchase money mortgage was taken of $950, and on that account I am of the opinion that the purchase money mortgage was disposed of for cash before the entry was made on the books, for there is no record of the mortgage on the books. (Producing ledger account.)

Q. Therefore you received undoubtedly the cash?

A. Yes; there was a purchase money mortgage given for $950, but I cannot find where it passed through the books, and I think Gillen, who handled

the transaction, found a purchaser for the mortgage at once and sold it.

Mr. Bergen: I offer in evidence a certified copy of the deed from the American Timber Company to Charles S. Hinchman, dated January 27, 1902, for lots 2952 to 2959, both inclusive, as shown upon a map of H. H. Yard's Addition to Ocean Beach, now Belmar. This deed is acknowledged February 6, 1902, and recorded February 8, 1902, in Book 688 of Deeds for Monmouth County, page 28. This deed has an entry in it: "Said premises being subject to a mortgage debt of $1000, said mortgage having been given by Harry F. Tatu and wife October 15, 1900."

(Marked Exhibit D11.)

Q. That is the deed by which title to all the lots 2952 to 2959, both inclusive, were conveyed to your father?

A. I don't know that I am a competent witness as to that. You have a certified copy of the deed.

Mr. Bergen: I offer in evidence a certified copy of a mortgage made by Harry F. Tatu and wife to Peter Brown. This is an old form mortgage, for $1000, in one year from date, with interest at six per cent and is on a large tract of land, including Belmar lots 2952 to 2959. It is acknowledged October 15, 1900, recorded January 28, 1902, in Book 269 of Mortgages, page 66-67 &c.

(Marked Exhibit D12.)

I also offer in evidence an assignment of this mortgage from Peter Brown, et al, to C. Russell Hinch-

man, for the sum of $1115, reciting that there is a sum of $1000 principal and interest from October 15, 1902, due on the mortgage. The assignment is dated September 14, 1904; acknowledged September 14, 1904, and recorded October 10, 1904, in Book of Assignments No. 49, page 32.

(Marked Exhibit D13.)

Q. How much did you pay for that mortgage, Mr. Hinchman?

A. The assignment was taken in my name; I didn't personally buy the mortgage. "September 15, 1904, paid cash assignment Brown mortgage, Belmar, principal and interest from 10/15/02, $1000 principal, and $115 interest."

Q. That is what you paid for it?

A. Yes, sir. I show you the entry.

Q. There appears an entry on your books following the entry which you have just read, that you received a $950 mortgage from Hurley in this transaction?

A. Yes.

Q. As a matter of fact you received the cash, did you not, and not a mortgage?

A. I was of the opinion we received the cash, on account of the other entry; (after examining book) no, according to the cash, there was only received $120, under date of October 10, 1904, which with the mortgage of $950 and the down payment would make up the full purchase price.

Q. Did you ever receive the money for that mortgage?

A. That I would have to run down and find out.

Mr. Bergen: You had better do that.

Witness: It is credited as cash.

Mr. Bergen: Won't you be kind enough to look that up for us before the next meeting?

Q. Mr. Hinchman, did you receive the principal plus interest of that purchase money mortgage after the date of the note?

A. Yes, it must have been.

Mr. Bergen: I offer in evidence certified copy of a release by C. Russell Hinchman to Charles S. Hinchman, from the Tatu mortgage, for the sum of $1, releasing lots 2958 and 2959, the release being dated September 17, 1904, acknowledged September 20, 1904, and recorded October 10, in Book of Releases No. 15, page 133.

(Marked Exhibit D14.)

Q. Was any other consideration paid for that release, other than the one dollar?

A. That mortgage was held by me for the benefit of Charles S. Hinchman. I said that I didn't purchase that individually. He purchased it and the assignment was placed in my name.

Q. Was any consideration paid or credit on your books or your father's books, or any other books, for the release of these two lots from that mortgage?

A. No, except in the sale of the lots; they were sold clear of the mortgage.

Mr. Bergen: I offer in evidence a certified copy of the map of H. H. Yard's Addition to Ocean Beach, which is spoken of in the Tatu to Brown Mort-

gage, on file as of February 25, 1884, made by A. F. Irons, Surveyor and Civil Engineer, in November, 1883.

(Marked Exhibit D15.)

Mr. Bergen: I will suspend the further cross-examination of Mr. Hinchman and call another witness.

William S. Wallace, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. Will you tell us your profession?
A. A member of the Philadelphia Bar.
Q. Did you represent Mr. Joseph M. Gazzam?
A. Yes.
Q. Did you represent him in 1901?
A. Yes.
Q. Do you represent him today?
A. No.
Q. Did you represent him in 1910?
A. I think I did, yes; I forget when we separated, but I think it was later than that date, I am very sure of that.
Q. Do you recall the transaction or any of the facts of the transaction by which Mr. Joseph M. Gazzam and Mr. A. O. Granger loaned money in 1901 or 1902 to Mr. Henry H. Yard?
A. Yes, I refreshed my memory on that.
Q. Can you tell me what that was?

A. Well, I recall it now, having refreshed my memory; it has been some time ago; Mr. Yard had some interest in what was known as the Liberty Iron Company, and he thought it was going to turn out very beneficial to him and he needed some money. Mr. Granger and Mr. Gazzam agreed to loan him money, which they did loan him, an aggregate of $4800; they went halves on the thing, each of them loaned $2400 in actual cash, and he gave his notes on the basis of 125 per cent, which would be, I take it, about $6000 in notes. Yard also transferred to them at that time;— or rather to Mr. Gazzam; not to both of them, but to Mr. Gazzam, title to certain lands at Manasquan, New Jersey; they were to hold those lands practically as collateral. Title was put in Gazzam's name absolutely. Subsequently those notes were not paid, but renewed, and interest was added, and they ultimately resulted in renewal notes of about $3500 each. Of course, I had to do with Mr. Granger, but I didn't represent him in this matter particularly. I think Mr. Hinchman acquired Mr. Granger's interest in those notes, and he later acquired Mr. Gazzam's interest, in this claim against Yard, which was transferred to him by a transfer of the notes without recourse, and the paper which in effect transferred whatever title he had in the land—I took the position, having looked into it, that Mr. Gazzam was practically a mortgagee, and while he had held title, he could not transfer the lands direct to Mr. Hinchman, which Mr. Hinchman wanted done at the time, and the result was that Mr. Hinchman made a deal with Mr. Gazzam by which he turned over certain stock of the corporation of which I am a director and also an officer, and cancelled them—Peale, Peacock & Kerr, Inc.—a coal mining corporation; he

had 55 shares in that, as I recall it; he transferred that stock to Mr. Gazzam, with some comparatively small amount of cash to balance the transaction, and Mr. Gazzam transferred to him what notes he held of Yard's, endorsed without recourse, and practically put Mr. Hinchman in the position Mr. Gazzam was in as regards the lands; that is, in effect, a mortgagee.

Q. Witness being shown a lettercopy book with a stamp on the back of it "Gazzam No. 1," and marked in ink "Gazzam" on the back, is asked, what is that book?

A. That is Mr. Gazzam's letter copybook. I might say that at this time I was associated with Mr. Gazzam in the same offices, and I was really his direct representative. He did very little without consulting me.

Q. On page 391 appears a letter which reads as follows:

"February 12, 1910.

Mr. J. Gazzam Mackenzie,
Toledo, Ohio."

Who was he?

A. Mr. J. Gazzam Mackenzie was Mr. Gazzam's nephew; he was in charge of some interests Mr. Gazzam had in the Ames-Bonner Company, Toledo, Ohio, and about this time, I think Mr. Gazzam and myself were coming to the point of a separation and he was turning things over—he was working more through his nephew than he was through me; that is, this matter concerned something that I had to do with, and the nephew wrote me about, and that letter you refer to there is posting him.

Mr. Durand: Do you offer it?

Mr. Bergen: Yes.

Mr. Durand: Who signs the letter?

Mr. Bergen: Mr. Wallace.

Mr. Durand: What bearing has that in this case?

Mr. Bergen: It is a direct admission against interest.

Mr. Durand: Whose letter is it?

Mr. Bergen: Mr. Wallace's.

Mr. Durand: That wouldn't bind us or wouldn't bind Mr. Gazzam.

Mr. Bergen: Certainly it would.

Mr. Durand: I object to the introduction of a letter from Mr. Wallace to Mr. Mackenzie on the ground that it is irrelevant; it shows a letter to a party who is not interested in this litigation, a stranger to the suit.

Witness: I was going to say there is no doubt that Mr. Mackenzie effected this deal with Mr. Hinchman; I didn't do it; I attended to the legality of the thing so far as drawing the papers and giving my opinion as expressed in that letter. Mr. Mackenzie was Mr. Gazzam's agent; there is no question about that.

Q. And he had referred to you to ascertain the facts of the transaction?

A. Yes, and I wrote that voluminous letter, four or five pages long, to give the whole detail, and I spent a day digging it out.

Mr. Bergen: I will read the letter:

"My dear Mr. Mackenzie:

On my return to the office, I find yours of the 11th in reference to Mr. Hinchman wanting to make a deal to purchase Mr. Gazzam's claim against Yard—giving him Peale, Peacock & Kerr stock therefor—or if this cannot be done, suggesting that 'the collateral' which is in Mr. Gazzam's hands should be sold and the proceeds divided.

The Yard matter grew out of various loans made by Mr. Gazzam and Mr. Granger to Yard back in 1901, each advancing half and half. The original agreement was that Mr. Gazzam and Mr. Granger were to make a join loan of $4800, for which Yard was to give notes for 125% of the amount advanced. He was to use the money to make the same deal with what was known as the Liberty Iron Works. If the deal was successful, in addition to paying the notes and interest, he was to make certain further payments based upon the selling price of the property in cash or kind. At the time, he agreed to convey to Messrs. Gazzam and Granger some land at Manasquan, N. J., they to reconvey this land to Yard when his notes were paid. If the notes were not paid the land was to belong to Messrs. Gazzam and Granger—Yard was to be relieved from any liability on his notes.

Up to October 4th, 1904, Messrs. Gazzam and Granger had made advances which were represented by notes of $3,000, that is, a total of $6,000 between them, which you see evidently covered the $4800 that was to be advanced, represented by notes

at 125% of the advances as agreed upon. In other words, they held notes for $6,000 and interest as against advances for $4800. The Liberty Iron Works deal never materialized. The Manasquan property, however, was deeded to Mr. Gazzam personally in 1901, altho he held it as trustee and security under the arangement above mentioned.

In 1904 Yard being pressed for payment and not being able to settle, agreed to give Messrs. Gazzam and Granger each his note for $3521.26. However, the $21.26 was paid in cash to each and he gave his note to each, dated October 1st, 1904, for $3500, payable in one year with interest. Also, in November 1904 a further deed was made to Mr. Gazzam for the Manasquan property to meet some point that had arisen since 1901, concerning the title, and to better Mr. Gazzam's title. Subsequent to 1904, Mr. Granger sold, transferred or otherwise disposed of his interest to Mr. Hinchman, so that Mr. Hinchman stands in Mr. Ganger's shoes, and has paid as Mr. Granger did before him, one-half of the small amount of taxes on the Manasquan property.

Yard has never paid, and I understand is not in a position to pay. While it was expected that he would make large moneys out of California Timber deals, this agreeable condition evidently never resulted, in fact, I understand from a recent talk with Mr. Hinchman, that his last advices were that Yard was in very bad shape physically, with some incurable disease, and he did not think or expect that he would ever be able to pay. I am told that he was rather involved in some of the timber transactions, which have been for the last couple of years the subject of much newspaper and magazine discussion.

Mr. Gazzam still holds his note for $3500, dated

October 1st, 1904, with interest from date, covering as I understand it advances made between October 9th, 1901, and December 11, 1901, aggregating $2400—(viz.: Oct. 9, 1901, $300; Oct. 21, 1901, $500; Oct. 25, 1901, $800; Dec. 11, 1901, $800). These original advances with interest to February 1, 1910, would amount, as I figure it, to $3593.60. I find a memorandum of the original advances with interest to September 21, 1908, when they amounted to $3389.60, adding one year and five months interest to February 21, 1910—$204, would make a total amount of principal and interest of these original advances to that day of, say, $3593.60, above mentioned, or you will see in excess really of the principal of the $3500 note, which at the time it was given, covered bonus.

About a year or so ago I endeavored to close a deal with Mr. Hinchman for his purchase of Mr. Gazzam's interest in this Yard matter on the basis of an exchange of stock for Peale, Peacock & Kerr, but they could not get together as to values, particularly as to the Peale, Peacock & Kerr. Hinchman some time ago suggested selling, as he calls it 'the collateral.' Now, you see the only collateral is the deed to certain land—it is not stock or bonds that could be put up at auction and could be sold. While the title is in Mr. Gazzam absolutely, he practically holds it as trustee; in other words he is in the position of a man holding a mortgage. This would be his status in an equity proceeding. While Yard's original proposition was, that if he did not pay his debts they should consider the land their own, I do not think this would be safe to rely upon as giving a good title. Nor do I think they could put up this property for sale and buy it in like they would personal property that was pledged as collateral.

As I advised Mr. Gazzam before, and my advice is after a consultation with a New Jersey lawyer, the only way they can clean this out would be practically by a foreclosure in equity and thereby getting a title through such proceedings and cleaning out any equity of redemption that might exist in Yard. This is more important now, as in the case of Mr. Yard's death, any other way of doing it might be questioned by his legal representatives or his heirs, or should they turn up and offer to pay the debt, and Mr. Gazzam had sold the property, he might be placed in an awkward position. Consequently, you will see my reason for stating that if this property is sold, and as it really amounts to a mortgage in equity, it can only safely be cleared up through a proceeding such as is intimated. This is the reason for endeavoring to get Mr. Hinchman to take the transfer of Mr. Gazzam's note and claim and also transfer him the property to hold the same as Mr. Gazzam held it with the idea that he could then clean it up himself if he so desired.

I make this detailed explanation in view of his suggestion that the collateral be sold and the proceeds be divided up. Of course the matter could be accomplished through a quitclaim deed from Yard with a release of all claims against the property, etc., but I assume it would require that his notes be surrendered. However, I do not take it, that if the reports are true, that he is personally worth anything. This might be a more direct, quicker and cheaper way of adjusting the matter if it could be done. The best way would be to sell Hinchman what Mr. Gazzam has and let him take it as Mr. Gazzam now holds it, if a figure satisfactory could be arrived at. As you see, the matter today stands Mr. Gazzam close on to $3600 actual cash and interest.

Now, as to the Peale, Peacock & Kerr stock. The company pays 4% dividends, has for some time past. Between ourselves, it has a good sized surplus, but this is in the property. From one point of view—book values—the stock is worth more than par. However, it is a close company and there is little or no market for the same. The last sales I know of were some years ago, when at public auction they sold for par and a fraction over. On the dividend basis it would be worth, say, something over $30 a share, counting 6% dividends equal to par. My recollection is, that in the dicker with Hinchman a year ago, we offered to take his stock around 30 odd, it may be a little over, but he would not assent. Of course the company is making more than the dividends paid, but it has its fat and its lean years,—what the prospective value is, I cannot say. I know, a couple of years ago, Mr. Gazzam wanted to make a loan at the Quaker City Bank, offering to place his stock as collateral, and in discussing the same with Mr. Clark,—after investigating it—they did not see their way clear to loan on it, say, over a valuation of $30 a share. Of course, as you know, Mr. Gazzam is a director of Peale, Peacock & Kerr, and is familiar with its affairs. There has been no change since (that I know of) he was last present at a meeting. However, I am inclined to think, in view of the unsatisfactory condition of the Yard claim, if Mr. Gazzam could get rid of that by turning it over to Hinchman and let him work it out, by simply assigning his interest in the note and property, without recourse, he could possibly afford to offer a little more for the stock of Peale, Peacock & Kerr than he would take if he was buying it otherwise—whether he would want to go as far as par, I do not know, but he might

feel like offering something between $40 and $50—par is $50. He would then be getting a return, where on the Yard matter he was getting nothing.

It seems that Hinchman has other property at Manasquan that adjoins this property, altho he tries to conceal his desire. The point really comes down to a question of price of the stock.

Hinchman has several times claimed to me, in conversation, that some company in which he is interested at Manasquan was the real owner of this property, and that in some way Yard got it transferred to himself or his representative. However, I do not know whether there is anything in his point or not. The property is assessed for taxes at about $500—the name of the tax collector is E. M. Goddard, his address Manasquan, N. J. The name of the lawyer to whom you evidently refer is Frank Durand of Asbury Park, N. J. He knows considerable about this title, as he has had a great deal to do with Yard. He, however, was, whether he is still, I do not know, the attorney for Hinchman in his proceedings against Yard.

I think this covers the story from beginning to end. To repeat, my judgment would be that if a satisfactory deal could be made to turn over Mr. Gazzam's interest, lock, stock and barrel, just as it is without any come-backs at him for Peale, Peacock & Kerr stock, even at a valuation of the latter higher than its dividend indicates, that it would be a good deal. Hinchman has 55 shares of Peale, Peacock & Kerr stock, which at $40 per share would amount to $2200—at $45, $2475, and at par $2750, so valuing Mr. Gazzam's claim, according to his original advances at face and interest, it would require a cash payment on the part of Hinchman to equalize this. This was one of the questions we stuck on in our former relations.

I imagine Hinchman is the real market for this property—in other words, that he would pay more for it than anyone else, and I think he wants it, if he can get it at what he deems a proper figure, for some purpose I have been unable to fathom.

Yours truly,
Wm. S. Wallace."

Q. Mr. Wallace, does the statement of the fact in reference to that settlement of 1904 and the original giving of the notes—are they facts to your knowledge?

A. Absolutely, yes, sir.

Mr. Bergen: I also offer in evidence letter contained in this letterbook, on page 406, dated March 23, 1910, addressed to Mr. Charles S. Hinchman, which reads as follows:

"March 23, 1910.

Mr. Charles S. Hinchman,
Provident Building,
Philadelphia, Pa.

My dear sir:—

Referring to the arrangement entered into between yourself and Mr. Mackenzie, representing Mr. Gazzam, whereby as I understand from Mr. Mackenzie and also from yourself over the telephone yesterday, you agree to purchase Mr. Gazzam's claim against Yard, as the same stands, and pay therefor 55 shares of Peale, Peacock & Kerr stock and $300 in cash.

The matter has been referred to me to draft the necessary transfers from Mr. Gazzam to yourself. As you already are aware, Mr. Gazzam's claim is based upon Yard's note for $3500 dated October 1st, 1904,

payable in one year after date, with interest, at 708 Bailey Building, 1218 Chestnut Street, which note is wholly unpaid, both as to principal and interest. As the assignee of Mr. A. O. Granger, I understand you also hold a similar note of like date, tenor and amount. As you are also aware, Mr. Gazzam holds title to a piece of land at Manasquan, N. J. While the title to this piece of land is in him absolutely, nevertheless he holds it merely as security for the repayment of notes given by Yard to Mr. Gazzam's order, and also the note to the order of Mr. A. O. Granger which you hold as his assignee.

I think that the proper and direct way of transferring Mr. Gazzam's interest in this claim is to have him assign the note in question to you, without recourse and also to assign and transfer his right, title and interest in the land above mentioned which he holds for the payment of the notes above mentioned, so that any title vested in Mr. Gazzam in this land would pass to and be held by you under the same conditions, namely, as security for the payment of the notes, both of which you would then own.

Referring to your request that Mr. Gazzam make an out and out deed for this land. As I stated over the telephone, I do not think he has the right to do so, and I certainly could not advise him to do so. While Mr. Gazzam has apparently the absolute title, still in effect and in equity I am fully satisfied that his interest would be construed as that of a mortgage, solely, and that while the notes are overdue and unpaid, nevertheless if he sold the land, as if it was his own, and Yard or his heirs turned up later, they could, possibly upon a tender of the money owing, demand return of the property, or recover large damages—in any event, cause serious

trouble. While this may be remote, nevertheless it has to be considered. This is not only my own opinion, but is that of a member of probably the most prominent law firm in Jersey City, who takes the position that there should be practically a foreclosure to clear out Yard's interest. You as the holder of the note given by Mr. Granger and the purchaser of Mr. Gazzam's note, and holding the land as security through transfer as mentioned above from Mr. Gazzam, can take such steps, as would absolutely clear up the title and divest any equity of Yard's or his heirs.

In answer to the inquiry of yesterday I would state that when these loans were made by Mr. Gazzam and Mr. Granger to Yard in 1901, it provided as follows:

'Upon the payment of my notes with interest at the expiration of one year from their respective dates, you to reconvey or procure the reconveyance to me of the tract above described (the Manasquan tract) otherwise the property is to become yours absolutely with the understanding that I am not to be relieved of my liability on the above mentioned notes.'

In October, 1904, the notes not having been paid and interest having accumulated the notes were renewed to run for a further period of one year—the renewal notes being those above mentioned. In this arrangement it was agreed by Messrs. Gazzam and Granger as follows:

'Upon payment of your notes given, the Manasquan property would be deeded back to you or your order.'

From the foregoing you will observe that while in 1901 Yard agreed if he did not pay his notes the property should become the absolute property of

Messrs. Gazzam and Granger, still later when they entered into the renewal arrangement, Gazzam and Granger agreed that they would reconvey the property upon the payment of the notes, notwithstanding the reference to the property vesting absolutely as above mentioned. In view of the latter expression, from Mr. Gazzam's standpoint, the only thing he can do is to treat it as he agreed to do, as a mortgage. In answer to your other inquiries I beg to say that Mr. Gazzam holds two deeds for the Manasquan tract—one dated October 18, 1901, by the American Timber Company to himself, containing the description and reservations of which I enclose copy; the rest of the deed is simply the printed form of a New Jersey general warranty deed by a corporation. The other deed is a deed of confirmation, dated November 1st, 1904, from the Sea Girt Land Improvement Company to Mr. Gazzam covering the same description above referred to enclosed herewith, except there are no reservations mentioned as in the other deed and there is no map attached, nor is there any warranty—both deeds are absolute conveyances to Mr. Gazzam in fee. The latter deed is signed by yourself as President, attested by Mr. Clark, the secretary of the Sea Girt Company. The first deed is recorded in the Clerk's office of Monmouth County in Book 678 of Deeds, page 306, and the deed of confirmation is recorded in same place, Book 745 of deeds, page 451. The latter deed was evidently prepared by Mr. Durand of Asbury Park as the backing has his name and address printed thereon. I think we sent you sometime ago copies of the descriptions in the above deeds.

I go into more or less detail in this matter in order that you may fully understand and appreciate

Mr. Gazzam's situation and his inability to legally make a direct deed to you for this property. Furthermore, I understand from Mr. Mackenzie and also from yourself that you bought Mr. Gazzam's interest as it was, and was to take it as such. I imagine that as a holder of the entire claim you would be in a position to expeditiously eliminate any question as to Yard's equity in the title. I understand also that you request the other information in order that you may submit this matter to your counsel in connection with, I assume, the proper way of making transfer of Mr. Gazzam's interest. Meantime, what I propose would be to send to Mr. Gazzam the note for assignment as above mentioned and also a paper covering the transfer of his interest in the land, treating it of course as it is at present, a transfer of security and not of the absolute title, and thus the matter should be in a position to be closed within the very near future.

Yours truly,
Wm. S. Wallace."

Q. The copy of the signature to this letter to Mr. Hinchman is your signature, is it?

A. Yes.

Q. Was that letter sent to Mr. Hinchman by you?

A. Yes.

Q. And the signature of the former letter, dated February 12, 1910, is that your signature?

A. Yes.

Q. And that letter was sent by you to Mr. Mackenzie?

A. Yes.

Mr. Bergen: I gave notice yesterday for the production of that letter, and now call on the other side to produce it.

Mr. Hinchman: I don't seem to have it.

Q. Where is Mr. Mackenzie now?

A. So far as I know, he is in Toledo, Ohio, care of the Ames-Bonner Company, of which he is vice-president and manager. He has charge of the affairs of that concern.

Q. And Mr. Gazzam himself, where is he?

A. Within a month I had a letter from him from Clearwater, Florida, where he goes in the winter time, and has for several years past. He is there now unless he has returned since I heard from him.

Q. Witness is shown book purporting to be check stubs on the bank account in the Quaker City National Bank of Philadelphia, from January 1, 1900, to April 3, 1902; the stub of whose check book is that?

A. That was the stub of Mr. Gazzam's Quaker City National Bank check book.

Q. I call your attention to a stub of a check dated October 9, 1901, and ask you to read the entry of that check.

A. (Reading "No. 2332; dated October 9, 1901. H. H. Yard a/c. Purchase and loan on New Jersey property, 1/2 for A. O. G."—which meant A. O. Granger—"$600."

Q. I call your attention to entry of check No. 2338; will you be kind enough to read that?

A. (Reading) "No. 2338. Dated October 21, 1901. H. H. Yard a/c. N. J. property 1/2 a/c A. O. G. $1000."

Q. I call your attention to stub of check No. 2341; kindly read that.

A. "No. 2341. Dated October 25, 1901. H. H. Yard a/c N. Jersey property etc. $800."

Q. Has that stub anything on it as to 1/2 for A. O. G.?

A. No.

Q. I call your attention to stub of check No. 2372, and ask you to read it.

A. "No. 2372. Dated December 11, 1901. H. H. Yard a/c N. J. property &c. 1/2 A. O. G. $1600."

Q. I call your attention to letter dated January 19, 1907, and ask you who signed that letter, if you know?

A. That entire letter and signature is in the handwriting of Mr. A. O. Granger, which I am very familiar with, because I represented him for a number of years.

Mr. Bergen: I offer that letter in evidence, which reads as follows:

"Toledo, Ohio, Jan. 19/07.

Hon. Jos. M. Gazzam,
Toledo.

My dear Senator:—

I enclose letter from Mr. Hinchman, 15th inst., the middle portion of which refers to H. H. Yard. What do you think of his proposition? Do you believe Yard will ever pay us? Can we do anything to force him to pay? Is it advisable to sell the Beach property and sue him for balance? Can a judgment so obtained in one state be collected in another? I need the money and would like to realize.

Very truly yours, &c.
A. O. Granger."

I also offer in evidence the check book stubs from which I read into the record during the testimony of Mr. Wallace.

(Marked Exhibit "A", 3/21/18.)

Mr. Durand: No cross-examination.

(Adjourned to Tuesday, March 26th, 1918, at 10 A. M., at the office of Mr. C. Russell Hinchman, Stephen Girard Building, Philadelphia, Pa.)

CONTINUATION

Continuation of testimony in the foregoing cause, taken before Nicholas W. Bindseil, one of the Special Masters in Chancery of New Jersey, at the office of Mr. C. Russell Hinchman, Stephen Girard Building, Pennsylvania, on Tuesday, March 26th, 1918, at 10 A. M., in the presence of counsel as before stated.

C. Russell Hinchman, recalled for further cross-examination.

By Mr. Bergen:

Q. At the last hearing you stated that you would present for us today a statement of the rentals as actually received for the properties other than below Brielle Road and the Gazzam tract; in other words, the rents received from 1910 for the properties above the Brielle Road.

A. I didn't understand it that way. I have here a statement of the rents on the properties in question, which I produce.

Q. At our hearing last time you stated you would produce that; if you do not now, will you be kind enough to produce it at the next hearing?

A. Yes. I can give you the total rentals received from June 20, 1914, which is the date the Seacoast Real Estate Company started collections, to December 31, 1917, as follows:

1914 (from June 20)	$2009.00
1915	7161.20
1916	8757.24
1917	9793.80

These are the rentals for the entire beach, including the property in question—including all the property which is covered by the taxes in evidence.

Q. Will you not be kind enough to have present for us at the next hearing a statement which analyzes these various rents against the various tracts?

A. A comparative statement?

Q. Yes, a comparative statement from 1910 down?

A. Yes.

Q. You were to produce today the map which was made by Walter K. Potter; have you that with you?

A. Yes. (Producing same.)

Mr. Bergen: I offer in evidence map marked "Plan of a portion of Manasquan Beach,Monmouth County, N. J. Survey of Map. Walter K. Potter, Civil Engineer, Manasquan, New Jersey."

(Marked Exhibit D16.)

Q. This map is a lay-out of the property north of the Brielle Road as well as south of the Brielle Road?

A. Yes.

Q. Did Mr. Potter lay this out north of the Brielle Road as well as south of the Brielle Road?

A. I don't know what Mr. Potter did there.

Q. Why did you charge the defendant in this case with the whole amount of his bill of $76?

A. It was $50, not $76.

Q. I also call your attention to the fact that this map shows a lay-out in building lots, &c., of the property lying immediately against the rifle range; do you get any rents for any of that property?

A. No.

Q. And never have?

A. Never have.

Q. You were to produce for us today the Rogers bill for the item of $76; have you that with you?

A. Yes, sir. (Producing same.)

Mr. Bergen: This bill reads as follows:

"December 17—1914.

Mr. C. S. Hinchman,
1222 Stephen Girard Bldg., Phila. Pa.

To Niart Rogers, C. E., Dr.

Sept. 9—Time Durand's office	$1.00
Oct. 17-20 Surveys Manasquan meadows s&h 1-½ days	15.00
" 21-22 Maps, searches, time &c., Freehold Rice case	20.00
" 23-26-27 Time & services at Freehold, Rice case,	30.00
Nov. 12—Prints of map Manasquan Beach front lots tentative	3.50
Dec. 16—Prints of map Sea Girt to Pt. Pleasant, illuminated	6.50
	$76.00

Received payment
Niart Rogers."

I offer that in evidence.

(Marked Exhibit D17.)

Q. Did you charge us with the full amount of $76?

A. I charged the full amount of $76.

Q. You were to produce for us today the contract of the Logan Construction Company; have you got that with you?

A. I have not. I have the bond which was filed with the contract for the completion of the contract, and I find a letter acknowledging receipt of the bond and contract, as I remember, and stating in the letter that I am going to send the contract to Mr. C. S. Hinchman, at Sea Girt, which I undoubtedly did, or handed it to him, I don't know which, and it was probably turned over to Mr. Rogers, who was the supervising engineer on the job, and used in his work of supervising, and he may have it, and it would be with the bond if it were here.

Q. Referring again, Mr. Hinchman, to this Exhibit D17, bill of Niart Rogers, for $76, were not all of those services rendered in reference to the case which was called the Rice case?

A. I imagine they were, yes, sir.

Q. At the last hearing it developed that in the sale of the lots number 2958 and 2959, instead of cash you took a purchase money mortgage for $950?

A. Yes.

Q. Will you be kind enough to let us know when that mortgage was paid off?

A. $200 was paid on account on September 29, 1905; the balance of $750, on September 18, 1906. You received credit for cash on the date of sale, because I hadn't noticed this entry.

Q. This note in this suit is dated in 1904, is it not?

A. Yes, sir.

Q. Can you tell me whether your father ever took any proceedings to collect that note in the courts of New Jersey?

A. I think so. Mr. Durand can give you full information as to that. As I recall it, there was a proceeding taken at the time when I was living down in Maryland and was out of the state, but Mr. Durand will know all about that.

Q. Then you don't know of your own knowledge what suits were brought?

A. No.

Q. Do you know whether your father ever proceeded to sell this property under the agreement of 1912?

A. As provided for in the agreement?

Q. Yes.

A. Yes, he did.

Q. When was that?

A. That was May 27, 1914.

Q. What did he do at that time?

A. The agreement provides that if the matter is not settled up by a certain date, the property could be put up at Barnes & Lofland's and sold at public auction, as is customary with personal collateral, and he consequently arranged with Barnes & Lofland to advertise the property, and had it advertised and sold, as is usual with collaterals.

Q. Are there any charges for the expense of that proceeding in this bill?

A. I think not.

Q. At the time he made that sale had he not received more than the amount of money which was required to be paid to him under the agreement?

A. No.

Q. That agreement called for the payment before May of that year, 1914, of $1000 on account of principal, and $2,000 interest. Had that been paid by that time?

A. No, I don't remember the $2,000 interest; if it is in there, it called for it.

Q. A payment of $3,000?

A. Whatever the agreement called for; he received nothing.

Q. He had received through the collection of those rents more than $3,000, had he not, and through the collection of this collateral?

A. I suppose he had.

(Original agreement marked Exhibit C4 produced by Mr. Durand.)

Q. When did he make that purchase at Barnes & Lofland's?

A. Mother bought it at Barnes & Lofland's on May 27, 1914.

Q. And your mother is Lydia S. Hinchman?

A. Yes.

Q. And how much did she pay at that sale for it?

A. $5,000.

Q. What did you do with the $5,000?

A. There were no other bidders.

Q. So your mother paid $5000 for it?

A. Yes.

Re-direct examination.

By Mr. McMullin:

Q. Do your father's books show any transactions with Mr. H. H. Yard prior to the date of the note sued upon?

Mr. Bergen: I object to that testimony, because the note is what is in suit in this case.

A. Yes.

Q. What is the general nature of these transactions, in a very general way?

A. In a very general way, Yard had procured money from father in various ways and for various purposes for a number of years.

Q. Had your father any collateral for these various advances that he made?

A. No, there were various collaterals.

Q. For what was this note which is sued upon given?

A. As I understand it, it was a settlement on a statement of account between them up to a certain date.

Q. Do you know what date that was?

A. October 31, 1904.

Q. Was that the date of the note?

A. That is my recollection. I haven't got the note here.

Q. Where was Mr. Yard at the time this settlement was made and note given?

A. I am not sure. The records and correspondence show that Mr. Yard was here a few days, but I am not sure that he was personally present on that day.

Q. Who was S. L. Gillen?

A. S. L. Gillen was a man that was in Mr. Yard's employ for many years; I think he came to him first as an office boy, as I remember it, and eventually became his private secretary and officer in his various corporations.

Q. Did your father have any negotiations or correspondence with S. L. Gillen relating to the sales of lots 2958 and 2959, Belmar?

A. He did.

Q. Have you copies of the correspondence?

A. I have copies of the letters which went to Mr. Gillen and I have a letter of September 5, 1904, from Mr. Gillen, but I don't find some of the letters from Mr. Gillen which are referred to in the replies.

Q. Will you produce all such of the correspondence as you have from your letterbook? Will you turn in the letter book to a letter addressed to S. L. Gillen, Esquire, dated September 19, 1904, signed C. S. Hinchman; have you that letter?

A. Yes.

Q. Have you a copy of the letter in the same book, between the same parties, dated September 26, 1904?

A. Yes, sir.

Q. Have you a similar letter, under date of October 10, 1904?

A. Yes.

Mr. McMullin: I offer in evidence the copies of those three letters, reading as follows:

"Philada., Pa. September 19, 1904.

S. L. Gillen, Esq.,
Belmar, N. J.
Dear Sir:-

Since writing you about the Brown mortgage assigned to my son, I have been going over the description and exceptions in it noted in the mortgage, and unless there are other releases of record than those mentioned in the mortgage, there would seem to be quite a number of lots unreleased in the ten acres or most southerly part of Yard's Add'n to Belmar; the lots mentioned as excepted in that ten acres being Lots 2760, 2761, 2764 and 2765; Lots 3057, 3058 and 3059 opposite the two just sold and Lots 2854, 2855 and 2856 on 16th Avenue north side.

Is this correct or not? If further releases have been granted by Peter and Anthony Brown, or the title was defective to the parts not excepted in the mortgage description which is stated to be '10 acres more or less' please advise what the releases were, and if you have any searches covering this ten acre tract which will make its title clear to me, I would be obliged if you would send them to me to look over, and I will return them as soon as through with them. If there are other parts of the ten acres on which this mortgage is a proper lien, I should be glad to reduce the release figure on all the lots it covers to such figures as you would deem just, so as to enable you to handle the remaining lots and make them pay out, the figures Mr. Yard established on them, or more if possible.

Yours truly
C. S. Hinchman."

(Marked Exhibit C8.)

"Philadelphia, Pa. Sept. 26, 1904.

S. L. Gillin, Esq.,
Belmar, N. J.
Dear Sir:-

I called at both your office and house at Belmar on Saturday to thank you for your letter of September 22nd and for the map sent me showing property released from the Peter and Anthony Brown mortgage. That map I have filed with the mortgage papers which makes it perfectly clear.

I would like to have your idea of the proper amount for which the triangular piece back of the F Street lots and strip might be sold. Can you tell me who now owns Lots 1, 4 and 6 in Block 2? If I could secure the whole of that block including the

Monaghan house at a reasonable price I think I have a customer in sight.

I have paid the back taxes all up to current year 1904 on the two lots sold to Rudolph Hurley, and will send the receipts to Mr. Frank Durand today, so that he may draw proper deed from the Borough for same. That deed I presume should be to Mr. Hurley, as the deed from myself and Mrs. Hinchman has already been sent to you. Mrs. Hinchman told me that you had called to see her at Sea Girt, and presumed that it might be to take her acknowledgment on that deed. I therefore enclose request to cover same from her.

Yours truly,
C. S. Hinchman."

(Marked Exhibit C9.)

"Philadelphia, Pa. October 10, 1904.

S. L. Gillin, Esq.,
Belmar, N. J.

Dear Sir:-

We are in receipt of your favor of the 8th inst. covering check for $120. being balance of $150 cash payment by Rudolph Hurley on account of Lots 2958-9 Belmar, N. J. at $1200 less commission of $30 paid out of same to Chas. O. Hudnut per receipt enclosed with the check.

The Hurley bond covering the $950 mortgage debt was also duly received with your favor, and we await the other papers as soon as received from the Recorder, being the assignment of the Brown mortgage, the release of these two lots, and Hurley's mortgage covering the $950 balance of purchase money. (with thanks)

Yours truly,
C. S. Hinchman.

I have the telegram from——"

(Marked Exhibit C10.)

Mr. Bergen: I object to the offer of these letters, because it seems to me they are not properly proven. The mere offer of a copy of a letter in a man's letterbook, addressed to a person who is not a party in interest here, although there is some evidence to show that he may be an agent of that man, does not certainly prove that that letter was mailed or sent or received.

Q. What is that letterbook in which these letters appear?

A. This is a letterbook of C. S. Hinchman covering correspondence from March 29, 1904, to October 25, 1904.

Q. I hand you an original letter dated September 5, 1904, signed S. L. Gillin, and ask you what that is?

A. This is a letter received by C. S. Hinchman from S. L. Gillin.

Q. Do you know Mr. Gillin's handwriting?

A. I do.

Q. Is that his signature?

A. The entire letter is in his handwriting, the signature and all.

Mr. McMullin: I offer that letter in evidence, reading as follows:

"Sept. 5, 1904.

Dear Sir:

On looking over the record of deeds &c. effecting the Brown mortgage which you purpose buying I

find that it covers the narrow strip E, part of D and the triangular piece C in addition to lots 2952 to 2959 inclusive. In any event it would seem to be policy for you to have the mortgage assigned to some person other than yourself for the time being.

Yours truly,

S. L. Gillin.

I enclose map showing situation."

(Marked Exhibit C11.)

Q. Have you the map referred to in Exhibit C11?
A. I have. (Producing same.)

Mr. McMullin: I offer the map in evidence, entitled "Map of Belmar, Monmouth County, N. J., 1894."

(Marked Exhibit C12.)

Q. Exhibit C9 speaks of a map said to be sent to Mr. Hinchman by Mr. Gillin with a letter of September 22; have you been able to find the letter of September 22?
A. I have not.
Q. Have you found the map?
A. I found the map. It was filed with the papers. (Producing same.)
Q. Is this it?
A. Yes, sir.

Mr. McMullin: I offer that map in evidence, entitled "Map of Belmar. Monmouth County, N. J. 1890."

(Marked Exhibit C13.)

Q. Mr. Bergen asked you about the consideration for lots 2958 and 2959, and has called your attention to a mortgage of $950, which was taken in part payment of consideration for the lots. When was credit given for this consideration on your books?

A. Credit was given in the real estate account in which the lots stood as a debit at the time of the settlement for the full amount of the balance due in the settlement.

Q. How much?

A. $1070.

Q. What date was that?

A. That was October 10, 1904; there had already been a $100 down payment.

Q. Was not given credit for the $1200?

A. Undoubtedly in the settlement of account between them.

Q. Do your books show whether or not he was given credit?

A. You cannot get that off the books; there were perhaps a dozen different accounts between father and Yard, and they got together and made a settlement, and the note was made as the result.

Re-cross examination.

By Mr. Bergen:

Q. What was that settlement which they made at that time?

A. I don't know.

Q. When was it made?

A. Just prior to the giving of the note.

Q. Where was it made?

A. In father's office, I think.

Q. Were you here?

A. I was not present at the settlement. I was not in Philadelphia at the time.

Q. You were not present at the settlement?

A. No.

Q. Did you hear Mr. Yard discuss this settlement?

A. No.

Q. Did you hear it discussed by anybody in his presence?

A. No.

Q. Then you know nothing about the arrangement through him?

A. Not through him.

Q. Then you know nothing about what was settled at that time, do you?

A. Only through what correspondence I have seen.

Q. Only through subsequent matters which you heard from your father?

A. From father and I saw a lot of correspondence in connection with it, that is all.

Q. Do you know whether the subject of the lots 2958 and 2959 was mentioned at that time between those two gentlemen?

A. I do not.

Q. Do you know whether they actually agreed that the money which was received and to be received from that lot was to be credited to Mr. Yard when it was received?

A. No, sir.

Q. Don't you know that that was the agreement between the parties?

A. That what was the agreement?

Q. That the money which was to be received or had been received from the sale of those lots, the money to be received in the future, should be credited to Mr. Yard on account of that note?

A. You ask me if I knew anything about the agreement; I said I did not then; I don't now.

Q. Have you read the note?

A. I read the note.

Q. Doesn't it expressly state so?

A. It does not.

Q. How do you explain the appearance in it of the fact that collateral had been given of those two lots, otherwise?

A. I don't know how to explain it, excepting that it was a mistake.

Q. That these gentlemen didn't know what they were doing at the time?

A. They undoubtedly knew what they were doing.

Q. And you know more about it at this time when you fixed up this account?

A. No. It is incredible to me that a man of Mr. Gillin's intelligence would include in the list of collaterals on October 31, two lots which he had attended to the settlement and collection of the money for some time prior to that time.

Q. Had the money been collected?

A. The settlement had been made.

Q. Had the money been collected?

A. They had collected the money and a purchase money mortgage.

Q. And is it not a fact that the statement of the collateral which was to be taken with the note is dated back behind the date of the note and includes the specific date of this settlement?

A. No, I think not. (After examining papers.) It is dated nine days after the date of the settlement.

Q. You have still this Brown mortgage, have you not?

A. Yes.

Q. It has never been cancelled of record?

A. No.

Q. Do you know the properties which the record show have been released from it?

A. I do not.

Q. Can you show me the entries in your father's ledgers which show the amount he charged against Mr. Yard for the release of these lots?

A. I think so; for the release of what lots?

Q. 2952 to 2959 inclusive.

A. There is no charge made in the case of those two lots 2958 and 2959.

Q. Was there any charge made against the release of the lots 2952 to 2957, both inclusive?

A. There was.

Q. Will you be kind enough to turn to the memorandum which shows how much was charged to Mr. Yard or the American Timber Company on the release of property 2952 to 2957, inclusive, from the Brown mortgage?

A. I turn to page 396, mortgage loan account, and read the entry as follows: "September 15, 1904. $1000 to cash assgnt. Brown mtg. Belmar lots & int. Fr 10/15/02 folio 5, $1115." Under date of December 31, 1912, appears the following: credit entry, page 524: "$1000 By real estate Belmar, etc. as of 12/31/08, date of sale of property, $1115, cost and interest from 9/15/04. Brown Mtg. on lots 2952-7 Belmar, $1402.30." That was credited in 1912, but it says as of 12/31/08, which is the date the interest is calculated to, and the sale is shown on the account filed in this case as 12/31/08.

The reason it appears in the mortgage loan account in 1912 is that a number of items were charged off the account at the end of that year.

Q. Then the only entries which show this, is the

entry which shows the purchase by your father at $1,000 and interest?

A. Yes.

Q. That is no memorandum whatsoever or mention of Mr. Yard or of his lots?

A. No.

Q. Or the American Timber Company?

A. No.

Q. It shows that your father purchased this mortgage, and the entry shows that he even charged up the interest which would accumulate for the expiration of the year which he carried over to another date?

A. No, the item of interest there is interest which the former owners of the fee of the property had failed to pay to Peter and Anthony Brown, the mortgagees, and when Peter and Anthony Brown sold their thousand dollar mortgage they wouldn't sell it without getting that $15 past due interest.

Q. I refer to the item of $13.01?

A. That doesn't enter into it.

Q. What is that?

A. A great many old investors had a theory that their money was worth six per cent to them, and they used to charge up—every debit item on their ledger was charged with six per cent interest. Here are two columns; it wasn't a cash matter at all; they charge every debit item on their ledger with six per cent for the year, and they credited every credit item with six per cent. Then down here at the bottom they strike a balance and carry it to an account known as interest. The theory was that if their profits for the year didn't exceed the net balance carried down from all the accounts into that interest account which they charged up—it wasn't cash they got, it was simply bookkeeping figures—that they

were not getting any money. It was a perfectly silly thing to do, and it took much time and trouble over nothing, and when I got hold of the books I stopped it.

Q. Therefore the entry does show that your father considered that as an investment, that purchase himself of that mortgage, and in his personal theoretical books charged himself with interest on that?

A. It was purchased as a mortgage, and it was thrown into the mortgage loan account; anything in these books is done that way. He didn't buy it as an investment; he bought it because the mortgagees wanted their money. If he hadn't any other interest in the property he wouldn't have gone out and bought that mortgage.

Q. You say your father charged nothing for the release of lots 2958 and 2959 from that mortgage?

A. Apparently not.

Q. When was the sale made of lots 2952 to 2957?

A. 12/31/08, that is the date of the settlement; the sale may have been made a month before.

Q. Is there any entry at that time in your books which shows a charge for the release of this mortgage from those lots?

A. No.

Q. Can you turn to the book entries which show that transaction?

A. On folio 524 of the ledger; I have already given this entry.

Q. But that is the entry which you are about to call our attention to, which was made on December 31, 1912?

A. And reads as of 12/31/08. You will observe that there are other items all credited up at the same time, aggregating in excess of $50,000, which were the debts prior to that time, and they were wound

up at the end of that year on December 31st. At that time he was charging off in addition to that apparently about $80,000 of bad loans, making a clean-up of the account at that date.

Q. Can you call my attention to the entry which shows the transaction when these lots 2952 to 2957 were sold?

A. Yes; that will not be in the mortgage loan account; that will be in the real estate account. On folio 553, December 31, 1908, "By cash, proceeds lots 2952-7 Belmar (Referring to cash book page 138) $2297.51."

Q. Did your father keep any account in his books which charged and credited Yard or the American Timber Company account; did he segregate these accounts in any place?

A. No, not altogther. The Yard accounts were some of them under bills receivable and some of them under different heads.

Q. Therefore the way you prepared this account was by simply going through the various items of your father's ledger?

A. Yes.

Q. And picking out those items where he had charged or credited Yard or the American Timber Company with the payment or receipt?

A. All the enties that I found that I knew had to do with the Yard account or with the collaterals covered in that loan.

Q. Then the entry which appears in your father's ledger of 12/31/08, proceeds of 2952-7, Belmar, does not read as you have stated in the account, but credits Mr. Yard with your father's having received the full sum of $2297.51; is that not correct?

A. Yes.

Q. And it was not until 1912 that your father en-

tered this other entry charging off this Brown mortgage as against these lots?

A. That is correct.

Q. Although he had previously credited Mr. Yard with the receipt of the full sum of money of $2297.-51?

A. You will observe that the interest is only charged up on that Brown mortgage to the date of this sale, 12/31/08, and that that item and a lot of other items, as I have already testified, were charged off in that item at the end of 1912.

Q. But the fact remains that when your father kept his books, as the transaction occurred he credited Mr. Yard with the full sum of $2297.51, the proceeds of 2952-7, Belmar?

A. No, he did not; he credited an account in the ledger which is headed, "Real Estate, Belmar, Como, Spring Lake, &c." These lots were originally charged up to that account, apparently, and the sale was credited in that account. The mortgage was originally charged up to the mortgage loan account and when it was discharged it had to be credited.

Q. Is there any entry in your mortgage account which shows that it was charged against Mr. Yard?

A. No, it was charged against these lots.

Q. It shows that your father purchased the mortgage, not charging it against anything?

A. The entry says "Assignment Brown Mortgage Belmar lots and interest."

Q. And to show that your father considered that as a purchase of a mortgage and an investment of money, he shows in there his personal calculation of $13.01 as the interest that that amount of capital of his should make through the balance of the year?

A. How could he regard it as anything else than the purchase of a mortgage and an investment of money?

Q. His own personal money?

A. Certainly, he invested money in that to protect the equity.

Q. Why do you say he invested it to protect the equity?

A. Because I knew the old gentleman very well, because he wouldn't have bought that mortgage for investment if he had not been interested in the equity in some way.

Q. In this account, page 553, are all these items under this heading the Yard properties?

A. No.

Q. There are other properties?

A. There is the Blakeley account of the Allen tract, 1908 taxes Spring Lake real estate; Sea Girt, Albright Estate interest.

Q. That contains other items?

A. Yes, sir, more other items than it does these.

Q. You testified that these two maps, Exhibit C12 and C13, were those which were sent by Mr. Gillin to your father in these letters which you read; how do you know that those maps were so sent?

A. The map, C12, was folded up in the letter which refers to it, and filed in that way; the other map, C13, contains an endorsement in my handwriting, "To be filed with Belmar mtg. assigned to C. R. H." It contains on the margin a statement in red ink, in Mr. Gillin's handwriting, which reads as follows: "Shows premises released from Brown mortgage," and was filed with the papers in the Brown mortgage, and I assume that that is the map referred to in the letter which is in evidence.

Q. You know nothing about whether these letters which you have offered in evidence today, Exhibits C8, C9, and C10, actually were sent to Mr. Gillin by your father, other than finding these copies of letters so addressed in his copy book?

A. That is all.

Q. You made up this account from your father's books and your mother's books?

A. Yes, and the Seacoast Real Estate Company.

Q. In 1910 there appears a statement in the declaration filed in the attachment suit, being suit brought on the Yard note of $22,000, which states that the amount then due is $9301.59 with interest; that statement is "judgment will be claimed for 9301.59 with interest and costs," the words "9301.59" being written over the lined out figures "$22,452.13," and the words following, "with interest thereon from October 31, 1905," being lined out. Have you a memorandum which shows where those figures came from?

A. No, they must have been made up just as I made this up at this time; they must have been made up at that time, I suppose; I was not in Philadelphia at that time; from 1908 to late in 1911 I was living in Maryland.

Re-direct.

By Mr. McMullin:

Mr. McMullin: Referring to Exhibits C8, 9 and 10, have you the originals of those letters? We call on you to produce the originals of those letters.

Mr. Bergen: We have never seen those letters; we have a great batch of stuff.

Q. Will you turn to your letterbook, to those letters?

A. (Witness does so.)

Q. Is Exhibit C8 signed?

A. Yes, by C. S. Hinchman.
Q. Do you know his handwriting?
A. Yes.
Q. Is that Mr. C. S. Hinchman's handwriting?
A. That was his signature.
Q. Turn to Exhibit C9, September 26; is that also signed by Mr. Hinchman in his own handwriting?
A. That is.
Q. Exhibit C10, letter of October 10, is that also so signed?
A. It is.
Q. What was the custom of your father in reference to the mailing of letters copied in his letter-book?

Mr. Bergen: I object.

Mr. Durand: Do you object to these letters?

Mr. Bergen: I have put in the objection which I have made.

A. The custom is to mail the letters.

Mr. McMullin: Complainant offers in evidence two bonds and mortgage securing same, from Harry F. Tatu and wife to Peter Brown and Anthony Brown, mortgage being dated January 28, 1902, recorded at Freehold in Book 269 of Mortgages, page 66, and assignment of mortgage from Peter Brown and Anthony Brown to C. Russell Hinchman, dated September 14, 1904, recorded in City Clerk's office, in Book 49 of Assignments, page 32.

(Marked Exhibits C14, C15 and C16 and C17.)

Q. Have you copies of the releases which were made from that mortgage and which appear of record, other than the two releases made by yourself to your father, those being for the lots 2952 to 2957?

A. I have not.

FRANK DURAND, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. You are a practising attorney at Asbury Park and have been for many years in the courts of New Jersey?

A. Yes.

Q. And for how many years have you represented Mr. Charles S. Hinchman?

A. Probably since 1901 or 1902.

Q. In the statement of account which has been filed in this case, appear certain items; the first is November 2, 1914, this appearing under the head "Legal expenses in defence of title, $250"; can you tell me what that item is?

A. Not from this account. We can specify these later on.

Q. There were two main litigations you had down there, the Rice case and the Lockwood case?

A. There were two cases; one was the Lockwood case, which was the first case, and later the Rice case.

Q. What was the Lockwood case?

A. The Lockwood case was an action of ejectment brought against a man named Lockwood, who had

built a shack south of the Brielle Road and immediately in front of about where Deep Creek turned into Short Creek, and his shack had been located there for quite a number of years; he had paid no rent; the title had been conveyed by the American Timber Company to Mrs. Hinchman, and he had refused to pay any rent and refused the recognize the ownership of either the American Timber Company or Mrs. Hinchman, and representing Mrs. Hinchman who held at that time the title, we brought an action of ejectment against Lockwood. That case was brought before Judge Dungan, Circuit Court Judge, and I think took nearly a week. In that case really the question of the title of that lower beach was involved. It was claimed that up to about the Brielle Road all the lower beach was in Ocean County and not in Monmouth County, and was a part of the Cook tract, which is the tract immediately south of the Manasquan River, on the Point Pleasant and Ocean County side; that when the Government put in the dike and fixed a permanent inlet, they had cut off from the Cook tract this strip, which they insisted before the putting in of the dike at times was fast to the Point Pleasant side, and it involved the question of title to that entire lower beach.

Q. The question really being whether the inlet had cut through in a new place?

A. Whether the inlet or the outlet of the river was where it was as fixed by the dike, or whether it went out about at the mouth where Deep Creek turned into Short Creek.

Q. And the point that won that case was, or one of the very important things was, your proof that there had been an original break-out from the Short or Deep Creek through?

A. Our proof was that while the inlet shifted before the dike was put in up and down the beach, yet that the real outlet of the river was about where it is now as fixed by the dike, and that this land was no part of the Cook tract on the south side of the river, but was over in Monmouth County.

Q. And that there had been an original break through, not by simply the changing of the position of the Manasquan inlet, but when the inlet got as far up as it was testified to in that case, it had been an original break from Short or Deep Creek through into the ocean; is that not correct?

A. The testimony was that before the dike was put in by the Government, the inlet would go up the beach, and the beach on the Monmouth County side would wash out, and on the Ocean County side there would be a bar formed which would keep creeping on up the beach until finally sometimes it would lap over on to the Monmouth County beach and close up the river.

Q. Does not Judge Dungan's opinion in that case state that the testimony convinced him that the inlet had not washed up until it had formed—by a steady washing northern process—until it had gone through at the juncture of Short and Deep Creek to the ocean?

A. The testimony was in the case that there was a time when there was a break and the river went out the junction of Deep and Short Creek.

Q. But that that was from a break?

A. But that was due to the action of the winds and tides, and was not the normal outlet of the river.

Q. And was not made by a steady northern trend of the whole inlet?

A. The testimony was that the northern trend of the inlet was the usual trend, but that along in the

sixties there was what the witnesses called a "freak inlet." In other words, because of the usual washing away, there was in addition to that a break, and the ocean broke through at Deep Creek and then broke out again farther up; that is, it went in from the ocean into Deep Creek, and then came out again up by the life saving station.

Q. What was the Rice case?

A. The Rice case arose out of a pretended claim of title of the Rice family to the land lying west of the beach front and between the beach front and Watson's Creek and East Main Street, on the north, and Deep Creek on the south.

Q. Who were the parties to that suit?

A. In that suit the plaintiffs were the members of the Rice family, and the Seacoast Real Estate Company was the defendant.

Q. Was Lydia S. Hinchman a defendant in that case?

A. No, not in that case.

Q. When was that case brought?

A. That was brought, I think, in the summer of 1914; I am not sure; it was brought in October of that year.

Q. Was that case brought after the conveyance by Lydia S. Hinchman to the Seacoast Real Estate Company?

A. That is my recollection of it.

Q. Have you any memorandum which shows when that case was brought?

A. I haven't it with me.

Q. Did the description of the land in that case include the lands lying to the south of Brielle Road?

A. Yes.

Q. In metes and bounds?

A. Yes. That is not in metes and bounds, but it

was claimed in the suit; the testimony of witnesses claimed that their deed covered from East Main Street to Deep Creek; that was an action for trespass.

Q. Did the declaration in that trespass suit describe by metes and bounds the land?

A. It didn't describe in metes and bounds; it described in boundaries.

Q. Did it describe the land in boundaries which lay between Brielle Road and Deep Creek?

A. It included the land between Brielle Road and Deep Creek.

Q. It included that in the statement itself?

A. Oh, yes; in that suit they claimed under a deed which had been a very indefinite description, and then they went on to state that it included certain premises, and that made the southerly boundary, Deep Creek. In addition to that, they made a lease to some—I have forgotten his name—for some of the property south of Brielle Road, between Brielle Road and Deep Creek, and collected the rent.

Q. In those charges which appear for defence of title, can you pick out those charges which relate to the Rice case?

A. Our charge in the Lockwood case was $500, being the item in the account, of November 13, 1914. The charge in the Rice case was $500. That included some work in the Supreme Court in addition, although we were five days trying the case, as I recollect it. At the time of the Rice case Judge Collins was doing some work for Mr. Hinchman in another case, and Mr. Hinchman had him associated for the purpose of arguing this case in the Supreme Court. In the Lockwood case we had judgment and Lockwood took an appeal, and we finally succeeded in having the appeal dismissed

without argument, for failure to prosecute. In addition to the trial of these cases, there was a lot of work, and the larger part of the work was in the preparation of the cases, in looking for witnesses.

Mr. Bergen: We are not questioning the amount of the fees.

A. (Continuing) The questions were about the ownership of the land, and it was necessary to drum up some old witnesses, and I did a lot of work in both cases, and we succeeded in getting a host of very good witnesses in both cases.

Q. From the time of this note of October, 1904, you represented Mr. Hinchman?

A. Yes.

Q. Did you bring any actions to collect that note?

A. I issued an attachment on the $22,000 note for Mr. Hinchman.

Q. When was that?

A. I don't remember the time, but I think it was some little time after.

Q. How many attachments did you issue, do you know?

A. I issued one attachment for Mr. Hinchman on this $22,000 note; I issued sometime after,—I think in 1908, I am not sure about the year,—an attachment for Mrs. Hinchman on the two notes that she took over from Gazzam and Granger.

Q. Did you issue any other than those two attachments?

A. No.

Q. Whom did you make parties in those attachments, or what lands did you seek to get?

A. In those attachments, the attachment of Mr. Hinchman was against Mr. H. H. Yard, and in that

attachment I had attached a lot of property that stood in the name of different parties.

Q. Those different parties were the various members of the family of Mrs. Yard, were they not?

A. Some were companies and some were members of the family.

Q. Of Mrs. Yard?

A. Yes.

Q. Her mother and her sisters?

A. Her mother and sister and brother-in-law, and then there were some other parties—I am a little hazy about it now, because I had at different times quite a number of proceedings against Mr. Yard.

Q. You made parties anybody who had land which came from Yard or the American Timber Company and was friendly to Mr. Yard?

A. No, I attached lands in the name of the American Timber Company; I think some was in the name of Gillin, and some in the name of Mrs. Ammon, who was Mr. Yard's mother-in-law, and some in the name of Mrs. Yard, and I think some in the name of Mrs. Tatu.

Q. Then you filed bills to set aside those conveyances?

A. Then I filed bills to enforce the attachments as against those properties, and I also filed a bill in the Court of Chancery to foreclose the Gazzam deed.

Q. In the case brought in the Monmouth County Common Pleas Court against H. H. Yard et als, you filed a declaration on April 16, 1910, the suit being brought on the note of $22,000, which is in our present case, made by Yard on October 31, 1904, and the statement on that declaration is as follows—it appears as a statement following the bill of particulars setting out the $22,000 note—"To the within named

defendant: In case the within summons and declaration are served upon you personally, then take notice that if you intend to make a defence to this action you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your plea or demurrer within thirty days from the date of such service, and in default of the filing of such affidavit, plea or demurrer, judgment will be entered by default against you. In case the within summons and declaration are served upon you by the leaving of a copy at your dwelling house or place of abode, then take notice that unless you appear and file a plea or demurrer within thirty days after the date of service hereof upon you, judgment will be entered against you." "Judgment will be claimed for $9301.59 with interest and costs. Durand & Carton, Attorneys." The figures $9301.59 appear in the original to have been written in over the lined out figures "$22,452.13" and the lined out words which followed, "with interest thereon from October 31, 1905"; that was done in your own handwriting, was it not?

A. I think so.

Q. Can you tell me where you got the figure $9301.59 which there appears?

A. I cannot tell now. I presume I received the information from Mr. Hinchman. That statement is contained in the notice attached to the declaration, and the suit was by attachment, and an appearance was entered by Mr. Yard, and at that time the old practice was in force and I filed the declaration on a common count—an old style of declaration—and there was a schedule attached showing the copy of the note, and what you call attention to is the notice that was attached to the declaration. My recollec-

tion is that the change that was made was made by me with a pen, and it stated that there was a certain amount due with interest and costs.

Q. That suit is still pending?

A. I think all those suits were settled.

Q. Just between us, very recently?

A. The settlement, as I understand, was arranged with Mr. Wainwright, representing Mr. Yard, when I gave him, I think, a discontinuance of that suit and the other attachment and dismissals of the bills in equity.

Q. No judgment was gotten in that case?

A. Oh, no. In an attachment I would not file a declaration without having received notice of an appearance, and he may not have filed his appearance in court, but he served me with notice of appearance, and I was thereupon compelled to file a declaration, because under our practice the case would proceed in the usual way of an action at law. In connection with the matters involved in this suit, there was first an attachment brought in the Monmouth County Pleas Court for Charles S. Hinchman against Henry H. Yard, on the $22,000 note; after that attachment was brought, a bill was filed in the Court of Chancery, in which Charles S. Hinchman was complainant, and Henry H. Yard and others were defendants, to charge that as a lien on the properties described in that bill. There was an attachment issued for Lydia S. Hinchman against Henry H. Yard out of the Monmouth County Circuit on the Gazzam and Granger notes, and that attachment was executed on certain properties and a bill filed in the Court of Chancery to enforce that attachment as against the properties. There was also a bill filed in the Court of Chancery in the name of Lydia S. Hinchman against the American Timber

Company and Henry H. Yard for the foreclosure of what is known as the Gazzam deed.

Q. When was that brought?

A. That bill was filed in November, 1911. In that case answers were filed by both the American Timber Company and Mr. Yard and the case was referred to Vice Chancellor Lewis for hearing. It was in that condition at the time the matters were adjusted between Mr. Yard and Mr. Hinchman, by which these cases were discontinued and dismissed, and the deeds from the American Timber Company and Yard and wife for the Gazzam tract and the tract south of Brielle Road were taken in 1912.

Q. And that is the agreement which figures in this case?

A. Yes. At the time we were negotiating for these deeds, my understanding was that the conveyances were absolute conveyances, passing the title absolutely to the Gazzam tract and in the lower beach tract in Mrs. Hinchman. The matter was pending for some time, but when the matter came up for closing, Mr. Hinchman entered into an arrangement which is represented by the agreement which has been offered in evidence in this case.

Cross-examination.

By Mr. McMullin:

Q. Did Mr. Wainwright represent the defendants?

A. In all these cases Mr. Wainwright represented the defendants, and my recollection is I delivered to Mr. Wainwright, or to Mr. Hinchman, to be delivered, discontinuances of the attachments and dismissals of the bills in equity.

Transcript of continuation of testimony in the above entitled cause before Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Friday, April 5th, 1918, at 10 A. M., in the presence of Mr. Frank Durand, Mr. James D. Carton and Mr. John D. McMullin for complainant, and Mr. Martin V. Bergen, Jr., and Mr. DeWitt Robinson (of the Pennsylvania Bar) for defendant.

Mr. McMullin: There are two corrections in the account: the item of charge under "surveying," 8/2/13 $50, should be reduced to $25; and the item of $250, under "legal expenses," November 2/1914, should be reduced to $125. Both these bills had to do with the bringing down of water and sewer and other municipal improvements on the beach—the road. The surveying charge was Surveyor Potter's bill for surveying the land, and covered other items than those in question here, and those bills should be divided half and half.

Harvey E. Blakey, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. Where do you reside?
A. Sea Girt, New Jersey.
Q. What is your business?
A. I am superintendent of various lines of work, such as water, sewer, grading and such things.
Q. Do you conduct a real estate business?

A. Well, I have sold real estate; I haven't any office for such work, no, sir.

Q. In 1914 did Mrs. Yard ask you to sell some real estate which stood in her name?

A. I am not certain about the date any further than I have a letter to that effect, but my impression is that she said I might sell some property.

Q. Did you have any conversation or correspondence with Mr. Charles S. Hinchman in reference to liens of attachment which appeared on the record against that land?

A. Yes, sir.

Q. What brought about those conversations and letters?

A. My reasons?

Q. Yes.

A. My reasons were, to know whether I could go ahead and make sale clearly and satisfactorily, and asked his advice.

Q. What do you mean make the sale clearly and satisfactorily; whether you could sell clear of the lien of attachment?

A. Whether I could make the sale clearly for Mrs. Yard, without any further trouble; I didn't want to go ahead and make the sale, if I thought there were any reasons why I should not.

Q. What did Mr. Hinchman inform you in reference to that inquiry of him?

Mr. McMullin: I object. In what way, by letter or conversation?

Q. Was it by letter?

A. By letter.

Court: Have you the letter?

New Jersey State Library

Q. I show you a letter dated October 4, 1914, addressed to "My dear Mr. Blakey" and signed "C. S. H."; is that from Mr. Charles S. Hinchman?

A. Yes, sir.

Q. And that is his handwriting?

A. Yes, sir.

Q. Did that letter come to you in reply to this inquiry you made from him?

A. Yes.

Mr. Bergen: I offer that letter in evidence.

(Marked Exhibit D18.)

Mr. Carton: May we inquire the purpose of this offer?

Mr. Bergen: Mr. Hinchman made a deliberate effort to take our land from us by an attempt to repair the property out of our hands; that not only did he do that, but with that owned by Mr. Yard and members of Mr. Yard's family—that is, Mrs. Yard and Mrs. Little, who was Mrs. Yard's sister, and Mrs. Yard's mother, and another sister owned various other properties down there; that Mr. Hinchman issued sets of attachments on these notes—two of them—attaching all of thse properties, and claiming that they were Mr. Yard's properties or the American Timber Company's properties; that that so tied our hands that we had no lands and no ability to raise loans to pay the interest on this mortgage, or to protect ourselves under the agreement of 1912 which is in evidence.

Court: You set up all this situation in your answer?

Mr. Bergen: No, sir; that these are the facts we are proving.

Court: How can I let you prove anything without the issue which you framed in your pleading? Do you allege any fraud on his part as a bar to the foreclosure?

Mr. Bergen: We don't allege fraud here; we are proving here the circumstances, which show—

Court: Suppose you do; suppose you show that Mr. Hinchman endeavored in various ways to get possession of the property unfairly, and admitting it is all true, how will that be a bar to his foreclosure?

Mr. Bergen: We admit the fact of his making the repairs on the dike.

Court: As a necessity?

Mr. Bergen: Yes, and we say in addition to that, not only it was not a necessity, but it was a deliberate attempt to repair us out of our property, so we could not possibly redeem it.

Court: And this is one of the incidents of the scheme?

Mr. Bergen: Yes.

Court: If I find it has no relevancy I will strike it out. The complainant's objection will be noted on the record.

Mr. Carton: We object to it; it has no relevancy to the issue as framed.

(Letter dated October 4, 1914, marked Exhibit D 18.)

"3635 Chestnut St.,
Philadelphia, Oct. 4th, 1914, 10.30 A. M.

My Dear Mr. Blakey:—

I have just heard from you by phone from Sp'g Lake that Mr. Yard passed away on the 2nd inst. in S. F. & am sorry that he couldn't have realized his dream of making "a million out of his mining & Timber Deals & Dredging Company" (with the money he showed me drafts for when about to go to California) & coming back then to settle with all that he obtained money from or owed anything to on acct. of his operations along the Coast. I have been a heavy loser thro' placing too much confidence in him & realize that I can hope for nothing except such salvage as I may be able to work out from such pieces of Coast Coproperties like that at Como (opp. the Station) which has so far proved only a bill of expense for repairs & taxes & such lots as our attachment may hold like the 100 ft. front at S. E. cor. of Blk 5 at Sea Girt which you advise me Mrs. Yard has authorized you to sell for $2500 clear, the offer submitted in yr letter sent before I left Sea Girt for the City. He promised to send me a Deed for a section of fine timber land (such as he gave me photos of) as soon as his titles were perfected. All this of course now goes at nought for I had only his verbal promise which died with him—peace to his ashes & memory. I hope S. L. G. will be able to get a comfortable sum saved for his widow & son—out of the various properties he did get title to in California & the 1800 acs of fine timber land

in West Va. I deeded to the American Timber Co., wch he owned when I concluded to concentrate my interests at Sea Girt as far as possible & to work out problems connected with the Lower Beach which I have worked over for years past & wch his withholding of information on (which he had in his head like that abt the several contending interests on N. S. of Lake Como) only made my work more difficult & slow to ascertain the real facts & avoid tangles. Mr. McDermott advised you correctly in the letter you showed me as to condition of the liens on those 2 lots as 1 lot 100 x 150 N of Mr. Shotwell—100 x 150 ft. in Blk 5 Sea Girt and I hope you sent her his F. McDermott's letter to be returned to you with full N. J. Warrantee Deed to you to be held by you in escrow until you could get the settlement put thro' as your letter indicated. You know I told you that if the deed came on all right, I w'ld advance you the money needed to make settlement and divide any profit made on resale within a year & might arrange to settle it all either thro' Mr. Durand or Mr. McDermott & I think yr letter suggested that she should get S. L. G. to prepare the deed, but as one of her late letters to me indicates that "all Mr. Yard's help" as she designates S. L. G. & others had "robbed him," it occurs to me that it may be that she will hold off from telling Mr. S. L. Gillen abt it & that you had better see Mr. Durand as my counsel & let him prepare the deed to be sent to Mrs. Yard for her to execute back before a proper officer or Commr. of Deeds for N. J., resident in S. F. & I will then send the amt necessary to you to clean up the Taxes & then the bal to be divided half to Mrs. Yard & 1/2 to Mrs. H. & self on a/c of our Judgts & attachments. I have no objection to deed being made direct to myself & save bringing yr name into

the title & extra recording—except for the possible effect on Mrs. Yard's mind wch is likely to be antagonistic just now because she don't know all the facts.

Yrs. truly, C. S. H."

Q. I also show you letter dated October 10, 1914, addressed to yourself and signed C. S. Hinchman; is that letter from Mr. Charles S. Hinchman?

A. Yes.

Q. Which you received?

A. Yes.

Mr. Bergen: I offer that letter in evidence.

Mr. Carton: Same objection.

Court: Same ruling.

(Marked Exhibit D19.)

"Philadelphia, Oct. 10th, 1914.

Harvey Blakey, Esq.,
Sea Girt, N. J.

Dear Sir:

Pls send me the Deed for examination as soon as you receive it from Mrs. Y. for the 2 lots in Blk 5 (at the S. E. cor of Block) 100 x 150 ft. so that I can pass upon the sufficiency thereof—also with it copy of yr letter making the offer for me & her reply to you authorizing its acceptance. If you have not already seen Mr. Durand abt it you need not as I can attend to the matter with the County Clerk when I come down to attend the Rice Suit set for trial during the week following 19th inst. Freehold. Should she get the money she wants from sale of the fishery or some other lots at Spg. Lake she may go back on

this sale & if you do not get deed from her by Monday you may get either Mr. F. D. or H. W. to fill out a full N. Jersey Warrantee Deed to be sent to her to execute & return to you or Mr. W. to deliver & remit her net share of proceeds when settlement is made. I think the T/D attached to yr letter or copy thereof will show the contract as made.

Yrs. truly C. S. Hinchman.

If a new Deed has to be sent out I think it will be better to make a straight sale to the Sea Coast Real Estate Co. of wch F. D. is Prest. & H. H. W. V Pt rather than to use either of our names or make extra recording charges. Pls acke safe rect. Rather than to leave any ground for a misunderstanding in any ones mind it will I think be best to make it a straight sale to the Sea Coast R Est Co & have them pay you a comn for the purchase. Pls keep me advised daily until this is closed up.

Yrs truly,
C. S. H."

Q. What is the contract spoken of in this letter?
A. You mean as to the tract?
Q. Yes.
A. It is a lot located at Sea Girt on the ocean front.
Q. What was the intent of these two letters?

Mr. Carton: Objected to.

Court: They were replies to inquiries as to whether you should go ahead and sell the property?

Witness: Yes.

Court: Clear of these claims of his?

Witness: I did it because I didn't know whether I could clearly make the sale without finding out.

Court: You wanted to find out his position in the matter?

Witness: Yes.

Q. And did he ever recede from that position—change that position?

A. No, sir.

Q. Were you successful in putting through the sale?

A. No, it has never gone through yet, but it could be put through, but it hasn't ever gone through.

Cross-examination.

By Mr. Carton:

Q. Where are these lots located which are referred to in these letters?

A. They are located on Baltimore Boulevard and ocean front at Sea Girt.

Court: No part of the premises in question.

Q. Not on the Manasquan Beach?

A. No, Sea Girt.

NATHAN J. CONOVER, recalled for further

Direct examination.

By Mr. Bergen:

Q. Is the water at present back of that dike?
A. Back of the dike, yes, sir.

Court: When did you see it?

Witness: In November, the last time I was there, down to a point within, I think—whatever my testimony was—from the crib.

Q. You have described it before?
A. Yes, and the map showed it.
Q. Your testimony relates to November and not April, 1918?
A. Yes.

Cross-examination.

By Mr. Carton:

Q. You are referring to the water back in the basin?
A. Yes.

Mr. Bergen: In our account there appeared a mortgage made by Henry F. Tatu to Peter Brown. I want to prove that that mortgage is still on record and still in existence and is in the possession of Mr. Hinchman. That is all in the case. I want to prove the releases which the records show are against that mortgage.

Court: Isn't that all formal proof?

Mr. Bergen: I have a search of the title.

Court: I think they will admit it.

Mr. Durand: We will admit it.

Court: The search is offered by consent in lieu of calling the County Clerk to prove the facts.

(Transcript of records referred to offered in evidence and marked Exhibit D20.)

DeWitt Robinson, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. What is your business?
A. Attorney at law.
Q. Of what State?
A. Pennsylvania.
Q. Do you practice in the Supreme Court and in the various courts of Philadelphia County and of the State of Pennsylvania?
A. Yes, sir.
Q. And fully admitted to do so?
A. Yes.
Q. How long have you been practicing there?
A. Twenty years.
Q. Have you with you the present statute—

Mr. McMullin: If it has reference to the usury law, we will admit it.

Court: It is admitted in place of further examination of Mr. Robinson, that the usury law set up in the answer of the defendant correctly states the law of Pennsylvania at the time this contract was made and at the time the Yard notes were given.

Mr. Bergen: I also wish to offer in evidence the negotiable instruments act, P. L. 1901, page 208, sections 52 and 58.

Mr. Durand: That is also set out in the order permitting the defendant to amend the answer, and we consent that it correctly sets forth the law of Pennsylvania on the subject.

Mr. Bergen: That is all we have with reference to the account.

Court: You haven't rested your case on the question of necessity?

Mr. Bergen: No, I think it is proper that Mr. Rogers should be called. The complainants reserved the right to call him.

Niart Rogers, sworn for complainant.

Direct examination.

By Mr. Carton:

Q. What is your business or profession?
A. Surveyor and civil engineer.
Q. How long have you been actively engaged in that capacity?

A. About twenty-eight years.

Q. Where have you been practicing your profession?

A. Principally in Asbury Park, Monmouth County.

Q. Are you familiar with the Manasquan Beach?

A. To some extent.

Q. How long have you been familiar with that location?

A. About three or four years past.

Q. Have you had occasion to make any examination of the property there at the Manasquan Inlet and do any work there?

A. I made surveys there of the lands along the ocean front and was in charge of the rebuilding of the government dike.

Q. When did you make that examination of the government dike?

A. In the summer of 1915.

Q. At whose request?

A. At the request of Mr. Hinchman, the elder, C. S. I think it was.

Q. What were you called upon to do?

A. I was called upon to prepare specifications for the repair of the government dike.

Q. Did you do so?

A. I did.

Q. In the summer of 1915?

A. I think it was in June or July of that year.

Q. Did you understand that any work had been done on that dike the year prior, 1914?

A. I understood that there had been work done by Mr. Howland.

Q. You had nothing to do with that?

A. Nothing whatever.

Q. You were not employed until the 1915 season?

A. No, sir.

Q. What did you find the condition of the dike to be when you examined it in 1915?

A. At about the central portion of the dike there was a large rupture where it had been completely torn out, probably 150 feet in length; the piling, the sheathing had been taken out by the action of the tides.

Q. (By the Court) You are speaking of the dike as distinguished from what we have been calling the crib? You made a distinction between the dike and the crib?

A. The dike is that portion extending as I should gather from the cribwork which is nearest the ocean to a point over on the Island of Sedges.

By the Court:

Q. When you spoke of cribwork you made a distinction between the dike and cribwork?

A. Yes. There was some work done on the crib, but I speak now particularly as to the dike.

By the Court:

Q. Go on and describe that break as you started.

A. It was about 150 feet in length; the piling and sheathing had been torn out; some were still floating there and suspended in part, but it was so badly broken that the tide of the river surged through the dike.

Q. What were you called upon to do with regard to correcting that situation or doing anything with it?

A. I was instructed to have repairs made to that dike.

By the Court:

Q. For what purpose?
A. Restoring it to a good condition.

By the Court:

Q. What was the purpose of restoring it to a good condition?
A. For the protection of the land on the northerly side of the dike.

By the Court:

Q. When the water went through this break that you speak of, did it do any damage to the land?
A. Yes, it was washing away on the northerly side of the dike.
Q. Where was this break in the dike with reference to the bed of the stream of the Manasquan River on the ebb current?
A. The tide coming down the river strikes pretty hard against the dike, and it runs along there after it reaches Short Creek—which has probably been delineated to the Court—and follows the dike almost to the cribwork, with a heavy pressure.
Q. The ebb current flows out?
A. Yes.
Q. And what effect was this tide having where this opening was?
A. It was going through there and cut away the sand on the other side.
Q. What did you advise should be done?

By the Court:

Q. Did you notice whether the cutting had been appreciable at all, whether it was to any extent?

A. Yes, it had a commotion, something like a whirling motion, it had a tendency to whirl about and cut the sand out in that way.

Q. Was there a large body of water formed back of it, or a considerable portion?

A. There was a large body of water back of it.

Q. As a result of this break?

A. Largely due to that break. There was another point in which water could enter from Deep Creek, but near the other end of the dike there had been a spur built there by Mr. Howland, but the water was coming in between that and the land.

By the Court:

Q. Is that near Stump Point?

A. Yes, on the easterly side of the creek.

By the Court:

Q. The dike didn't end on the point?

A. The main dike extended in a westerly direction along the river to a point near the main land of the Island of Sedges, but it was not connected at that time, but a spur had been built on the easterly side of the creek at right angles to the dike, and it was between that spur and the mound that the water was flowing from the Deep Creek on to the northerly side of the dike; so the break up in the dike at that time allowed the water to go through the dike from both sides.

Q. What did you advise should be done?

A. I advised that the gap should be closed with the usual form of construction, piling and springers and double sheathing.

Q. Was that construction similar to the former construction that had been used there?

A. Yes, very similar to the original construction —not quite as massive with the timber, but ample.

By the Court:

Q. Was it similar to the Howland construction, such as you could see of what remained of it?

A. It was on that order, but even better.

Q. Did prepare a plan and specification showing the work to be done?

A. I prepared specifications only; there was no general plan.

By the Court:

Q. No drawings?

A. No.

Q. Were bids advertised for?

A. I received three bids; they were not advertised through the papers, but sent to the various contractors.

Q. What had charge of it?

A. I did.

By the Court:

Q. Did you receive the bids from contractors?

A. Yes.

Q. From whom did you receive bids?

A. From Jesse Howland and one from a man named Atkinson and the Logan Construction Company.

Q. Was the contract finally awarded to the Logan Construction Company?

A. Yes.

Q. Were they the lowest bidders?

A. They were on all but one item, and that was on the proposition entitled number one, in which Mr. Howland gave exactly the same figure; on all the other items he was lower than the other two bidders.

Q. And the Logan Construction Company being as low on that, you gave them the whole contract?

A. Yes.

Q. Do you remember the amount of the contract?

A. It was taken at unit prices, but I cannot just remember the amount.

Q. Have you the figures with you?

A. Yes. I am reading now from a report made on November 16th, 1915, to Mr. C. R. Hinchman.

By the Court:

Q. Made by you?

A. Made by myself.

By the Court:

Q. On this job?

A. On this job.

Q. I want the correct cost?

A. I will take it from that; this is a carbon copy of the letter sent to them.

Court: Give the total cost.

Witness: The total cost of the work was $6682.

Mr. Bergen: I think we should see that paper, to see what it is.

Court: You may. The witness stated that he was unable without referring to this to state what the cost was.

Q. Was there an additional contract or a contract made for some work to be done to the cribwork?

A. There was a supplemental contract amounting to $490 on the cribwork which is on the easterly end of the dike.

Q. And the Logan people did that work also?

A. Yes.

Q. Did you meet Mr. Oram?

A. Yes, Mr. Oram was the superintendent in charge of that construction.

Court: For the Logan Construction Company?

Witness: For the Logan Construction Company.

Q. Who outlined to Mr. Oram the manner of doing the work down there?

A. As to any particular part?

Q. The whole work.

A. I had entire supervision, but in relation to the work on the crib, he was on the ground at that time working on the other end of the dike, and we found it necessary to make these repairs, so I talked with him about it, and we formulated a plan between us as to the reinforcement of it.

Q. Of the cribwork?

A. Yes, of the cribwork.

Q. But not of the other work?

A. Not of the other.

Q. Was the other work done under your plan and under your supervision?

A. Yes.

Q. Entirely so?

A. Yes.

Q. Prior to making your plans after you had inspected the job, did you receive any instruction from Oram as to the way of doing this work?

A. I never received any instruction from Mr. Oram.

Court: Or suggest modifications?

Q. Or any suggested modifications as to how this work ought to be done?
A. Only in the case of the cribwork at the very easterly end.

By the Court:

Q. That $490 supplemental contract?
A. Yes.

By the Court:

Q. Mr. Carton's question goes to the bigger contract, the $6,000 one.

A. No, none whatever.

By the Court:

Q. Did he suggest anything whereby you could reduce the cost of doing that work in both labor and material?
A. No.

By the Court:

Q. Or suggest a different plan of doing it?
A. No.

By the Court:

Q. Or of tying it?
A. No.
Q. Did he suggest to you, or to anyone, as far as you know, the building of any other dam or the

building of this dam in any other way so that the cost might be reduced?

A. No, sir.

Q. Did he recommend to you the building of a spur dam from the end of the crib to the sand dune?

A. No.

Q. Any suggestion of that kind made at all?

A. I don't remember of any.

Q. While the work was being done by him did he make any suggestion to you at all whereby the work might be done in a different way at a reduced cost?

A. No, I think not.

By the Court:

Q. Or be done in a better way at the same cost?

A. I don't know of any such instance.

By the Court:

Q. Did you see what was called the spur dam that the government installed originally, or spur dam at the time these repairs were being made?

A. No.

By the Court:

Q. Or the remains of them?

A. No, sir.

Q. Did you observe any footing, or what would amount to a spur dam on the wooden part of the dike along the dike on either side of it?

A. No, sir.

Q. Were you familiar with the dike in 1914 when Mr. Howland did the work?

A. Only to a limited extent.

Q. You had not been able to make any examination of it?

A. No, sir, I had not.

Q. Do you know whether during the winter of 1914-15 after the Howland work was done, whether there were any unusually severe storms on the Atlantic Coast?

A. I cannot recall any definite storms.

Q. You recall the storms that did the damage at Seabright?

A. Yes.

Q. Do you remember that they occurred during the winter of 1914-15?

A. I think it was.

Q. Were the parties who bid in competition to the Logan Construction Company people who did this sort of work?

A. They had been doing work of various kinds, building of bridges and sewer work. I had had dealings with them on other contracts.

Examination.

By the Court:

Q. Do you know what caused this break in the dam, this break of 150 feet or so that you spoke of?

A. Not any positive knowledge; I think I know.

Q. You say that on the ebb tide the water comes down the river there with a great deal of force and strikes against the dike; does it strike at this point where the break occurred?

A. Yes, and it strikes almost a direct blow at that point, but from what I could see there on the portion of the dike remaining, where the break had occurred, my judgment was that the piling were not of sufficient length to hold in the lower strata.

Q. The old piling?

A. Yes. They were tipped out; the pressure against them had tipped them out and gradually surged them off the fastenings above; some of them were still hanging in that shape.

Q. Do you know about how many feet of the dike itself you had to repair or contemplated having repaired under your specifications?

A. The principal break was about 150 feet in length, but there were repairs made on other portions of the dike, extra lapping and reinforcement.

Q. Wasn't $6000 a rather heavy price to pay for that?

A. No, I think it was a very reasonable price.

Q. What is the average cost per foot for a construction similar to the one you speak of?

A. We had several different propositions there, but some of the bids were very much higher and they ran about the average; this was all creosoted material, which added very largely to the cost.

Q. Within your range of experience you say you put down a row of piling and two rows of planks?

A. Yes.

Q. And anything else?

A. There were two rows of piling, one on each side, and waling top and bottom, and in some instances single sheathing and others double, and they were bolted, fastened and spiked together.

Q. What should that cost creosoted a running foot?

A. The only parallel which I know is a construction in Asbury Park on the beach front similar to that, jetty type, which has cost as much as $10 and $12 a foot.

Q. You had 150 feet?

A. No, this extended over the entire dike.

Q. What did it comprise? I got the impression Mr. Hinchman paid something like $6000 for 150 feet?

A. No.

Q. What else was there?

A. There was 800 lineal feet, that was reinforced, and there was extra sheathing applied at different sections of it, in addition to that; then there was another small sput from the spur which had been previously built at Deep Creek leading out into the sedge.

Q. How long was that?

A. That was 35 feet; I think the price of that was about $6 or $7 a foot—I don't recall exactly what the figures were.

Q. So you had practically about 1000 feet to rebuild or repair, or both?

A. Yes, there was over 1000 feet.

Q. In addition to the work you did on the crib for $490?

A. Something in that neighborhood.

Further direct examination.

By Mr. Carton:

Q. When you refer to the 150 feet you refer to the Howland work which had all gone before?

A. Yes. That was the most expensive portion of the work; I cannot remember the figures offhand.

Q. Have you the figures here?

A. Yes, they are in my statement there.

Court: If you are going to offer the report, you need not duplicate it.

Q. Have you a report showing the cost?

A. This summarizes it. (Producing paper).

Mr. Carton: I offer the summary of it.

Mr. Bergen: No objection.

Court: Then just offer it.

Mr. Carton: I offer the summary of Mr. Rogers under date of November 16, 1915.

(Marked Exhibit C14a.)

"The Logan Construction Company have finished the work at Manasquan Inlet. The quantities of completed work are as follows:—

151 lin ft of new double bulkhead	@ $18.	$2718.00	
807.5 ft of waling & piling	@ $ 2.85	2301.38	
143 ft of do. with sheeting	@ $ 6.70	958.10	
29 ft of return bulkhead	@ $ 7.40	214.60	$6192.08
Repairs to easterly end of dyke, by agrmt			490.00
Total cost of work			$6682.08
Credits.			
Partial payment,		$1000.00	
Partial payment,		1500.00	2500.00
Balance due on work			$4182.08

Q. While this work was being done by Mr. Oram did you observe whether there was any scouring or churning at the point where the river went through this break?

A. The material had been scoured out next to the dike for some little distance the whole length of that break and some little distance beyond it, toward the east.

By the Court:

Q. What did the distance average?

A. 100 feet east of that point.

By the Court:

Q. 100 feet deep?

A. Oh, no, down to a depth very nearly the depth of the channel on the outside, which was about eight or ten feet at ordinary high water.

By the Court:

Q. So for a distance of 100 feet in length and eight feet in depth on an average the sand had been scoured out?

A. Yes.

By the Court:

Q. Behind the bulkhead?

A. On the other side, opposite the channel.

Q. And also scoured out behind, on the north side of the dike?

A. Yes.

Q. What length of piling did your plan cover?

Court: Have you a copy of your specifications?

Witness: I have the specifications here that were signed by the Logan Construction Company.

Q. And according to which the repairs and improvements were made?

A. Yes; I also have the bids of the other parties, Atkinson and Howland, on the same specifications.

Court: Why don't you offer those? They tell the whole story. He says that is the way it was planned and completed.

Mr. Carton: I offer them in evidence.

Court: I will let them be marked and reserve Mr. Bergen's objection, and if I find they are improper, they will be struck out.

(Specifications marked Exhibit C15a.)

Witness: The sheathing was 24 feet in length; the sheathing is the planking. The piling was 30 to 32 feet long driven; that means after the top is cut off.

By the Court:

Q. What was the depth of water there; have you any information about that, at the time you began the work at this break, at mean tide and ordinary tide?

A. From 8 to 10 feet.

By the Court:

Q. Why did you need the piling that depth?
A. To get a firmer hold in the bottom.

By the Court:

Q. How far were they driven?
A. They stand about six feet above low water mark. I suppose they were driven ten feet probably into the bottom.
Q. And did you deem it necessary to have that length because of the experience you had observed on the effect of the sea on the Howland piling?
A. That was the principal reason, to prevent any further tearing out of the bulkhead at that point.

By the Court:

Q. Did you notice the length of the Howland piling?
A. Some of them were not more than sixteen feet in length.
Q. Have you made any observations, Mr. Rogers, of the action of the inlets along the Atlantic Coast?
A. I have made some observations.
Q. Have you any knowledge of the Manasquan Inlet prior to the erection of the government dike?
A. Not so much except that I have gathered from the information compiled by the government maps, showing the various locations of the inlet from time to time.
Q. Where have you lived all your life?
A. I have lived near Asbury Park.
Q. And familiar with the Shark River Inlet?
A. Yes.

Q. What has been the course of the inlets that have not been protected; what course have they taken?

Court: Is there any dispute about that?

Mr. Bergen: I have none.

Court: My own observation for nearly forty years along the coast leads me to agree to all that the gentlemen said that it—above Barnegat on the north Jersey coast.

Mr. Carton: I don't think we will pursue that any further, then, in view of Mr. Bergen's admission.

Cross-examination.

By Mr. Bergen:

Q. Where is your place of business?
A. My office is at Asbury Park.
Q. What is your business?
A. I am a surveyor and engineer.
Q. Have you done much engineering work?
A. Quite considerable work.
Q. What works have you done?
A. More particularly in a municipal line.
Q. What do you mean by that, street work?
A. Streets, roads, water sewers; I have had charge of bulkhead construction in Asbury Park, jetty, some on the ocean front, and supervision over the repair of jetties there.
Q. Have you had any work in connection with tidal waters?
A. Nothing extensive.

Q. What work have you ever had in reference to tidal waters?

A. As I have stated.

Q. And of work in flowing streams?

A. This was the first of that kind.

Q. This was the first work of that kind you ever did?

A. Yes.

Q. What were you to do down there; what did Mr. Hinchman ask you to do?

A. To make general repairs to that dike, and put it in first-class condition.

Q. That is what he asked you to do?

A. Yes.

Q. And that is what you did?

A. I think we did.

Q. To the best of your judgment?

A. I think we did; I think the work shows that of itself today.

Q. Did Mr. Hinchman ever state to you that he desired to improve that land by the filling of it in out to this dike?

A. I think there was some idea looking to the improvement of the land on the northerly side of the dike.

Q. The filling of it in, wasn't that true?

A. I think so, ultimately; I don't know at what time.

Q. Have you any of the plans which you drew at that time?

A. I made some maps for Mr. Hinchman.

Q. Have you got those maps here?

A. I have not.

Mr. Bergen: Mr. Durand, have you those maps here?

(Mr. Durand produces map Exhibit D5.)

Court: Is that one of your maps that you refer to?

Witness: I made that map.

Q. Have you others there that you made in connection with the contemplated improvement, filling in of the land back of the dike?

A. I made a number of maps for them.

Court: For what purpose?

Witness: There is one map which showed the land used along the ocean into lots and streets laid out upon it, and the proposed streets.

Map marked "Plan of ocean front land situated at Manasquan Beach, Monmouth County, N. J., Property of the Seacoast Real Estate Company," is another map made by me in 1914.

(Blue map produced and marked for identification Exhibit D19.)

Q. Any other maps?

A. There were some maps showing the ocean front lots particularly on the Beach front. I have also a certain map, section number one, plan of lots situated on the ocean front at Manasquan, Monmouth County, New Jersey, property of the Seacoast Real Estate Company, drawn by Niart Rogers, September, 1915, in two sheets, and the second sheet is section two, and that was also made by me.

(Map of two sheets marked Exhibit D20 for identification.)

Court: Are there any other maps which you made for this territory, for the purpose of showing this improvement and filling in, other than those which have been called to your attention now?

Witness: There is one other map drawn on a larger scale, but which shows the entire meadow section west of the beach. That was used in the Rice matter.

Court: Have you got all of the specifications in?

Witness: There were but three bids received on those specifications.

Court: Have you got all of the specifications in—not bids—under which this work was done?

Witness: With the exception of the supplementary work on the crib.

Court: Everything else is in evidence?

Witness: Yes.

Court: The $490 is the supplementary contract?

Witness: Yes.

Court: And all these specifications under this contract which was made with the Logan Construction Company are in?

Witness: Yes.

Court: Have you the supplementary specification relating to that contract?

Witness: No, that was simply a supplementary agreement.

Q. Was the work done under those specifications according to these specifications?

A. As near as possible.

Q. Did you watch it?

A. Yes.

Q. Were you there continually?

A. I was there frequently.

By the Court:

Q. How frequently?

A. Sometimes every day in the week, sometimes three or four times in the week.

By the Court:

Q. How many weeks did it take to complete the work?

A. The work was completed in November and it began in August.

Q. Was the piling put down the full length as specified and required?

A. With very few exceptions; there were some had to be cut off; we struck a hard strata and it was impossible to drive the piling in further, but the cut-off was never more than four or five in any instance, and they were few.

By the Court:

Q. There was no piling that were driven less than 25 feet?

A. That was on the easterly end of the dike where

there was a lot of rip-rap, and the piling became so firmly wedged it was impossible to drive them without splitting, and it was necessary to cut the tops off.

Q. Did you receive any bids as to the filling up of this land between the dike and the land?

A. No.

Q. Did you have any discussions in reference to it, filling up back of the dike?

A. Not with anyone except Mr. Hinchman.

Q. How about Mr. Oram?

A. No.

Q. What were your conversations with Mr. Hinchman?

A. I cannot recall just now what that was.

Q. How were you to get this land filled up?

A. We were to dredge it from the sand bars in the river.

Q. From the sand bars on the river side?

A. On the other side.

Q. Not on the Short creek side?

A. As a general scheme Deep creek would have been deepened, but I don't know to what extent they intended at that time to go, but I think the idea was to take the sand from the bars in the river on the southerly side of the dike.

Q. And pump it out with one of those suction pumps and throw it right on this land?

A. Yes.

Q. Did you get any contract out for that work?

A. No, sir.

Q. You never got into that any further?

A. No.

Q. Mr. Rogers, how would this dike have held that embankment; would it have held it in its present form?

A. If that work had been carried out, it was proposed to put in tie backs.

Q. Have you contracts made for the tie backs?

A. No.

Q. Did you have specifications for them?

A. No.

Q. Did you have regular plans for them?

A. No.

Q. Had you suggested that to Mr. Hinchman?

A. No, because that thing seemed very indefinite as to when the actual filling would be.

Q. How do you mean, that if this work—when it was carried out, the general plan was to have these tie backs; have you had any discussion with Mr. Hinchman?

A. The scheme was tentative then.

Q. Between whom?

A. In their discussions with me; there seemed to be no certainty when the filling might proceed; it wasn't completed immediately, that I know.

Q. That is, that was to be done in the future?

A. Sometime in the future.

Q. But you drew plans showing the extension of lots?

A. That map shows perhaps what was intended to be done with the land adjoining.

Q. This was part of a scheme to develop this whole thing and fill these lots up?

A. It may have been at some future time, but not immediately.

Q. It was part of it?

A. I don't know whether they intended to carry it out or not; it was a scheme.

Examination.

By the Court:

Q. In the preparation of these specifications what controlling idea did you have in mind, or what purpose did you intend to accomplish?

A. The principal idea was to so strengthen the dike that it would prevent any further inroad of the river on that side.

Q. And why was the inroad from the river desired to be prevented?

A. To prevent the erosion of the land.

Q. Being washed away, you mean?

A. Yes.

Q. Was the purpose in the preparation of that specification to protect the land that was there or to provide a barrier that would hold land that might be put in back of it, or both?

A. Both. It seems at that time, the cutting out on the north side of the dike had extended to a point very near the cribwork spoken of down by the sand dunes, and that was due largely to leakage between the piling, which were only single sheathing; there were large gaps there, through which the water could gap out and cause the sand to seip through, and prevented washing away the sand in that manner, so it was exposed on both sides down to a point probably 100 feet west of the dike—cribwork.

Q. If the only purpose of repairing the dike was to prevent the land lying north of it, would your specifications then have been different or modified and would the cost of the work have been materially reduced?

A. I don't see where it could have been much reduced, to have made a permanent improvement.

Q. A permanent improvement for the purpose of protecting the land lying north of it, the land that was there then, not that was to be added or created afterward?

A. The land that was remaining in order to protect that, which was one of the things.

Q. Could that work have been done in a modified way and at a less cost than called for by your specifications and under the Oram contract?

A. I don't think so.

Q. You think $6000 was the least possible money that could afford the protection to the land already there in the repair and reconstruction of the dike?

A. Yes.

By Mr. Bergen:

Q. Was your advice asked on that point?

A. As near as I can recall it, my instructions were to prepare such plans and specifications for the repair of that dike.

Q. Was your advice asked on that question?

A. As to an alternative ——

Q. Was your advice asked on how was the best way to preserve the land which was there at that time, or were you asked to repair that dike?

A. I was asked to repair the dike.

Q. And that was what you were employed to do?

A. Yes.

Q. As to the best way to do it?

A. Yes.

Q. And that was all you were asked to do?

A. Yes, at that time.

Q. I am trying to get an answer from you in this way, whether you had two purposes in mind or

whether you were employed as engineer to prepare specifications with two objects in view, the repair or restoration of the dike, namely, to repair it so as to prevent the inroad of the water, and then to so build it that—whether then or subsequently—a development scheme was carried out by which sand was pumped in behind it—whether you expected to make the dike strong enough to act as a retaining wall to hold that sand that might be pumped in?

A. For both purposes.

Q. Suppose you hadn't both purposes in mind, or had only built the dike, or repaired and restored it for the purpose of preserving the sand that was there at the time you saw it and prepared your specifications, how much less could the work have been done for, if at all?

A. I don't see that it could have been done for any less.

Further cross-examination.

By Mr. Bergen:

Q. Did you have any of those purposes in mind at all? Were not your instructions to prepare plans to repair that dike?

A. I did just what—

Q. Mr. Hinchman told you to do?

A. Not exactly; the idea was to prevent the inroad of the water from both sides, and that I did, first, by repairing the break in the main dike, and then by building an additional spur on the easterly side of Deep Creek; that kept the water from coming in from both directions and prevented the washing away of the sand on the northerly side of the dike. That is what would have occurred, evidently, from what had happened.

Q. How would that prevent the washing away?

A. Because it kept the water from coming in there.

Q. In where?

A. In north of the dike; it deflected it along the channel toward the ocean.

Q. What was the character of the land to the western part of this point of land?

A. West of the dike?

Q. What kind of land was it which was the western part, that is, at the juncture of this creek?

A. It is marsh land.

By the Court:

Q. Over toward Stump Point, going from the crib westerly to Stump Point, what was the character of the land there?

A. Between the dike and Stump Point there was a channel.

Q. Now, next to that channel eastward?

A. Eastward—the dike west of a point, which we will say was the westerly line of where Deep Creek entered the main channel, had become disintegrated, destroyed; the water surged through at many places.

Q. What was the character of the land there?

A. The high land was a sort of a marsh covered with grass.

Q. It was sedge?

A. Sedge and sand.

Q. Would that sedge wash away?

A. Yes.

Q. Would it?

A. Yes.

Q. Had Stump Point been washed away?

A. Stump Point had been worn away, washed away or cut away.

Q. How much in twenty-five years?

A. There was a gap there I think forty or fifty feet.

Q. That it had been washed away in twenty-five years?

A. Yes, it separated from the main dike.

Q. And that was where you mean it had been cut away in twenty-five years?

A. There was quite a gap there.

Q. Is it not a fact that this sedge land wears away very slowly?

A. It wears away pretty rapidly where the water comes heavily against it, as it does there.

Q. Don't you surveyors always in your surveys of these marshes consider that these creeks are permanent places because they are sedge?

A. Where it is confined to a narrow stream, like Deep or Short Creek, it surely does, because it follows its natural course. If a heavy dike built as that was cannot withstand the force of water, no sedge would.

Q. Where was your heavy dike?

A. Along there, built by the government.

Q. How far out from this sedge land?

A. It was separated from this sedge probably 150 feet in some places.

Q. It was out in the center of the river?

A. No, not at the present; not to my knowledge of it.

Court: Your map doesn't show it in the center of the river; it is on the side.

Mr. Carton: Yes.

Witness: There was some water north of the dike, but the average depth is only about three feet on the north side of the dike.

Q. Then you say that there was great danger that this sedge land would be carried away at this point?

A. No doubt of it in my mind; if there wasn't any protection there for it, the sedge would be cut away with the action of the tide.

Q. How much in twenty years?

A. I cannot say how much.

Q. Ten feet?

A. It might be torn away as much as 10 feet in one year; it might go twenty years and not be torn away any more.

Q. What were the odds that it wouldn't be torn away any more?

A. That depends on the formation, whether it is solid sedge or sand.

Q. You know the land?

A. Yes, some is sedge and some sand.

Q. How much has been torn away at Stump Point?

A. I don't know, because I haven't observed it for twenty years.

Q. How far back does this sedge land go, how far from the eastward toward the point of the creek?

A. As to what location do you mean?

Q. Taking your entrance of Deep Creek into Manasquan Inlet, how far does it go to the east—the sedge land?

A. There is some sedge land extending more than half way from the creek to First Avenue that is constructed there and shown on the map.

Q. Then what is the character of the land there?

A. Principally sand.

By the Court:

Q. Sand and bushes?

A. Sand with scattering grass.

Q. What would be the effect if you had constructed a short dike running into that sedge land from the creek; would that have protected that point?

A. It would, but it wouldn't have protected the land between that point and the ocean.

Q. Why not?

A. Not at that point it wouldn't; there already was a spur there at Deep Creek, but it wasn't sufficient to stop the water from Deep Creek flowing in on the north side of the dike.

Q. Have you considered that your dike was necessary running all the way up 1000 feet and then going over at a right angle to this land; would not an oblique dike have done the same thing?

A. Where?

Q. From the meadow into the land?

A. No, I think not.

Q. Why not?

A. The formation there is sand and silt; there isn't any solid sedge there.

Q. Run it into the solid sedge; then wouldn't it have protection?

A. That wouldn't be much of a barrier to the tides coming down Manasquan River.

Q. What kind of a tide does come down Manasquan River?

A. Very heavy; quite a current.

Q. How fast does it come?

A. It moves very rapidly.

Q. How fast?

A. I don't know the exact velocity, but it is very swift.

Q. You are a scientific man; can you tell us what you mean by that?

A. I mean more than ordinarily fast; I mean swiftly.

Q. What is the usual run of tide there?

A. I don't know; you want miles per hour?

Q. Yes.

A. Or feet per minute, because that I cannot tell you, because I never took any velocity measurement, but I know it is a very swift moving tide.

Q. Have you ever measured the tide?

A. I said not.

Q. Have you ever measured any tide?

A. No.

Q. Do you know whether that is as swift as any of those other streams, even Wrecked Pond?

A. Yes.

Q. Does it come faster?

A. It has a broader inlet.

Mr. Carton: Complainants rest.

Court: You may offer any omitted exhibits or papers which have been overlooked or which have been marked for identification.

Cornelius C. Vermeule, sworn for defendant.

Direct examination.

By Mr. Bergen:

Q. What is your business?

A. Civil engineer.

Q. Will you be kind enough to qualify yourself as such?

A. I was graduated at Rutgers College in 1878, and two years later received a degree of civil engineer—

Court: Do you question Mr. Vermeule's qualification? I am satisfied.

Mr. Carton: We do not question it.

Court: I am satisfied that he is qualified.

Q. Are you familiar with the Manasquan Inlet?
A. I am. I have known it since about 1880.
Q. Have you watched it closely?
A. I have. Several surveys have been made by me or under my direction during that period, and I have observed it closely. I have made a special study of it in connection with the behavior of inlets and also in connection with a proposed inlet waterway which I located originally for the State about 1907 or 1908.
Q. Are you familiar with the tidal waters and the rivers and the tide rivers along the Jersey Coast and these inlets along the Jersey Coast?
A. I am; I have been familiar with everything between Sandy Hook and Cape May for many years.
Q. Do you know of these government dikes at Manasquan Inlet and their effects?
A. I do. I saw them at about the time they were constructed, and from time to time since I have observed their effect.
Q. What was the purpose of their construction?
A. To maintain an adequate inlet in a fixed position, to permit some navigation in the Manasquan River. Naturally the inlet became very shoal; it shifted more or less from place to place, and it was impossible to navigate it much of the time; the purpose was to improve the navigation.

By the Court:

Q. Was the shifting north?

A. There was shifting north at times and again south; a shifting south at times was very persistent; I saw it at one time when it was very nearly down to the pavilion that Mr. Blodgett built at the south side; it would then swing north to about its present position and would occasionally cut along up outside of the beach and along the beach to the northeast, as most of the inlets do; but those northeasterly openings are usually transient. The most stable condition of any inlet, including Manasquan, is toward the southeast. When the channel is going out toward the southeast, it is most nearly in a stable condition, that being due to the combined effect of the winds and the movement of the sand. The northeasterly outlet is very quickly closed up by a storm wind from the northeast or from the east. The channel toward the southeast is not closed up usually by a storm.

Q. You say that when it began cutting up to the north, it would cut along the beach; do you mean that the beach itself would be comparatively little narrowed?

A. The beach would be narrowed a little and a bar would immediately begin to build up on the ocean side of the channel. That bar would in a short time accumulate; especially if there came a storm from the northeast that bar would be thrown into the channel, and the channel would be forced south again, but always when the inlet comes out along the beach to the northeast there is a bar outside of it.

Q. Then all of this testimony we have had means that the channel in its reaching to the north would cut very little off of the beach itself, but would really build to the outside?

Mr. Carton: I object to the form of the question.

Court: I don't know how familiar the witness is with the testimony.

Q. Is that a fact?
A. That has been what has usually occurred at the Manasquan Inlet.

By the Court:

Q. When you say comparatively little cutting away what do you mean; how much do you call comparatively little?
A. It might cut back at times to about where the present row of houses is along the beach; that would be the high water mark, formerly, but that would only extend up over the present dike ordinarily some six or seven hundred feet as a usual thing.
Q. Along the ocean front?
A. Along the ocean front, yes, sir.
Q. Can you tell us the cost or estimated cost of these government jetties?
A. They were recited to cost $72,000 originally, I believe.

Court: Is there any difference between this witness's evidence and Mr. Payne and the government reports and Mr. Conover?

Mr. Bergen: No.

Witness: It is in the engineer's reports.

Q. In your judgment could any damage occur from the shifting of this inlet, to the land line, irrespec-

tive of navigation, which would warrant the keeping in repair or the construction of such a dike as the government dike or keeping it in repair?

A. No, I think it would be unwarrantable as a measure of protection to the land, entirely so.

By the Court:

Q. See if I understand you; if the dike on the northerly side of the Manasquan River were entirely removed, there would be no danger of the sand or the beach or the land which is formed there now or is existant there, being washed away or injured?

A. No, I don't go as far as that. I mean to say that dikes of that construction, and built at that expense, would not be warrantable as a measure of protection for the land, because the cost would be too great.

By the Court:

Q. They are warranted only in your judgment for the purpose of maintaining the channel?

A. That is all.

Q. Will you be kind enough to describe to me the beach running north from the inlet as it exists now and as it existed when you first knew it?

Court: When did you last see it?

Witness: I last saw it in the fall, I think last November.

Court: And you first knew it about 1880?

Witness: Yes.

A. From 1880 to 1890 the beach was much lower than it is at present; there has been a progressive building up of the beach, and in fact during the earlier years it was so low that occasionally the sea would break over it. At the present time it is a high and firm beach, with dunes all the way along.

By the Court:

Q. What increase has been made to the height, if anything?

A. There has been a general increase of, I should say, eight or ten feet in height.

Q. How about the meadow back of the beach?

A. The meadow back of the beach has grown; there was formerly more water along Short Creek. In fact, there was quite a considerable body of water just a little way back of the beach inside, but that has filled up from the sweeping of the sand there back from the beach and from the growing of the sedge and muscles and other meadow growths.

Q. So that that has also filled up, is that correct?

A. Very materially.

Q. In your judgment does this north jetty benefit this property; and if so, how?

A. The north jetty is of some benefit, particularly in protecting the south end of the beach from erosion and from holding the inlet there in a more stable condition. I should say that that is the important benefit to the property from a money standpoint, and that the additional benefit further back toward the west has been very slight in point of actual value —money value. The government dike from the crib-work back to Short Creek, and then the wing dike back to the meadow, if it were in good condition, would unquestionably protect the meadow along

that distance, but the protection there wouldn't be worth anything like the money that would be necessary to build or to even maintain that dike after it is built. The erosion is not serious; and if I may proceed, I will say that in my opinion, after hearing the testimony and looking over the testimony, the benefit that would be material to the land could have been preserved by slight repairs to the cribwork and the building of a comparatively short wing dike, back from the government dike to the sedge meadow, just west of the road leading down the beach, a matter of about 150 feet. There is a very slight chance at present that the sea might cut through back of the cribwork along the end of the beach; it is not imminent at all, but it wouldn't be worth while to take the risk that it might cut through there, because if it did cut through, it would cause damage very quickly. That could have been prevented—adequately prevented by this short wing dike which I spoke of. The dike and the repairs together should not have cost more than $2,000. And when it comes to the protection of the meadow from that point, the meadow is not of great value. There might be a little slow cutting away of the meadow, but in my opinion it would be much slower than it has been since the dike first broke down, because the first wash, after there was an opening through the government dike, would be caused by eddies, the water going through one opening, eddying around and either going around through the same opening or eating around and cutting back through another opening. There would be a rapid cutting away for the first 50 or 75 feet, perhaps, behind the dike, and then it would be comparatively slow, because the water would have room to do this eddying without additional cutting.

If later, experience should show that it was worth while to fill in for protection to the meadow—that part of the meadow, it would be accomplished adequately by the repair of the short wing dike near Short Creek and the building of about two additional short wing dikes running out from the meadow edge toward the stream.

By the Court:

Q. At an expense of what?

A. At an expense of not over two thousand additional to the other two thousand dollars. I question whether that would ever be necessary, but experience all along the shore has shown that the most economical way of protection is by means of these wing dikes running perpendicular to the shore, which are properly groins, but we are calling jetties usually in New Jersey. The repair of the government dike was not warranted by any benefit that would come to this property. If we assume that it was warrantable to make the repairs to the dike, then it was done in a wrong way.

By the Court:

Q. Why do you say it wasn't warranted, in view of what you say that there is a possibility of some of the land being washed away or erosion affecting it?

A. Because the same result could have been secured at very much less expense.

By the Court:

Q. If it wasn't warranted at all, why do it at any expense?

A. It was not warranted at the expense which has actually taken place.

By the Court:

Q. Suppose you were a mortgagee holding a mortgage on that strip of sand or meadow, would you have gone to the expense of having the dike repaired to preserve your security if it had been in the condition as described here to us, with this break of 150 feet and other breaks in it?

A. I would not; I would not have touched the government dike beyond making some repairs at the cribwork and building the wing dike back as I have explained.

Q. At the expense you have indicated?

A. Yes, at $2,000; I should then have awaited development, and taken a chance on losing some of the meadow back there, which is not very valuable, and if I found that the loss actually warranted the expense later, I should have built these wing dikes.

By the Court:

Q. Suppose you were not an engineer, but just an ordinary laborer, unfamiliar with the technical features of this thing, would you do anything more than consult an engineer and be guided by his advice as to the necessary work to be done?

A. I should certainly consult an engineer and be guided entirely by what he recommended it was best to do, if I had confidence in the engineer.

By the Court:

Q. And assuming him to be capable?

A. Yes.

Q. Do you believe that the danger of a cutting through north of the crib was imminent—sufficiently imminent to warrant any repairs being made at this time, in 1913 and 1914?

A. No, I think it was hardly—I don't think it was justifiable at that time.

By the Court:

Q. How familiar were you with the conditions down there in 1913, 1914 and 1915?

A. I made an examination there in 1912; I was not there in 1914 and 1915; I base my conclusion upon what has happened evidently between the time I was there in 1912 and the present time, or in November.

By the Court:

Q. From the evidence as you saw there?

A. Yes.

Q. In your judgment was there any danger of cutting through north of the crib which would warrant any repairs or any work being done at that time?

A. No, I think not.

By the Court:

Q. You mean in 1914 or 1915?

A. I think not.

Q. Will these repairs as made give permanent or any standing improvement or protection to the land?

A. No, I think they are of very little value; the same money could have been expended to very much

better advantage, or a less amount of money; I consider it was a mistake to have joined this new work to the old government work at all. This government dike is over thirty-five years old at the present time, and it is approaching the limit of its usefulness; it is bound to go down, and is going down, and the result of building this new work and bolting to it this heavy old work, is going to drag the new work down, which has already begun; the old work is dragging the new work toward the river channel. If it was necessary at all to have built the bulkhead from the road at the beach west, then the bulkhead should have been built entirely independent of the government dike, and could have been built at less expense than to repair the government dike.

Q. What was the condition in November of this new work?

A. The dike or jetty at that time was leaving over quite seriously toward the channel, toward the river to the south, and the general condition of the work indicated to me that it would not have a long life; it would soon cease to be of any use whatever.

Q. What do you mean by long life?

A. That it would soon go to pieces; it would soon begin to go over, and things would be just where they were before the repairs were made, practically.

Q. Do you mean in a year or two; can you state a length of time?

A. I think from appearances it will only be a matter of three or four years.

Q. Has the whole north dike any effect on preventing the cutting through of the sea at points further north than in the immediate contiguity of the crib?

A. None whatever, and I think I had better explain how that cutting takes place. The cutting

through of the beach is a matter from which there is no danger now. If a low point should develop in the beach and there comes a storm tide with a continuous east or northeast wind, the storm tide piles up sometimes three or four feet above ordinary high water, and at such times the waves run up on the beach and cut over a low point at the same time this storm condition often continues forty-eight hours or more, seventy-two hours sometimes, and the meadow in Manasquan River fills up to this abnormally high level. Then after the waves have cut partially across the beach and the wind veers around to the west and the sea goes down suddenly outside and often drops more than a foot an hour, the water rushes from the meadow over the beach and completes the cutting through, and will often open an inlet right straight through the beach. The cutting is done more effectively by the water running out from the meadow toward the sea than by the waves washing in from the sea. That being the case, the only effect of this north jetty would be to confine the water in the meadow, because naturally it would find its way out south and out through the inlet faster under natural conditions than it would with this jetty there. The jetty retards the flow of the water out of the meadow and maintains it at a high level as compared with the ocean, so it would actually increase the effect of the breach through the beach rather than decrease it. It has practically no effect on the situation whatever.

By the Court:

Q. How do you account for the fact then that seventy years history or more of this inlet and of its shifting back and forth shows that there has been

no shifting to the north since the construction of the dike, as I recall the testimony, while it was a common thing before that?

A. That has been the history all along the beach.

By the Court:

Q. If the dike is ineffective or is no protective barrier, then why doesn't the inlet continue to shift and open north of the dike, as it did before the construction of the dike?

A. I am not speaking now of the shifting of the inlet north; I am speaking of the effect of the rupture through the beach, which has been spoken of in the testimony, forming a new inlet at some distance north; that has no relation whatever to this improvement at the inlet at the present time.

By the Court:

Q. What I have in mind in my question is this: apparently before the government built this dike,—which of course was not built for the protection of the soil or land, but built to keep a channel open in that river,—the waters of the river wandered wherever they pleased, and as a result of the tide, wind and storm, there was a shifting north and south, principally toward the north, and the inlet shifted a considerable distance—a mile or more at some points; since the dike has been constructed there has been no such shifting; on the contrary the river has been confined, the sand has made up and increased in height seven or eight feet, the meadows have been more or less relieved of back water; this location that has been referred to has been materially reduced in size. Hasn't that all been due to the dike?

A. No, that is due to the wind drifting the sand up on the beach, which it will do most of the time, move the sand up the beach. The only question is, after it gets up there, whether it will hold. And sometimes the question whether it will hold is determined by a very trifling matter—the matter of the growth of a little sedge or a little brush on the beach. The chief influences now in building up the beach are the houses and other buildings that have been built there; they are holding the sand, and I don't consider the building up of the beach is in any way whatever due to this work at the inlet, and therefore that the influence of that inlet on that beach never extended, in my judgment, more than seven or eight hundred feet north of the present line of the beach; if it at any time extended so far north, it had very little effect on the beach, because the action of the inlet becomes very rapidly diminished as it extends itself north; the flow becomes weaker and weaker, and the scour on the beach becomes weaker and weaker, until finally the inlet isn't even able to get over the bar; it closes up.

Q. What is the speed of the tide in the Manasquan River?

A. The tide sometimes runs quite swiftly there. The normal tide is much less in the river than in the ocean. The rise and fall in the ocean is about five feet average, but it is only a matter of two or three feet, usually, in the river; still there is quite a current coming and going through the inlet.

Q. Especially coming out?

A. Yes.

Cross-examination.

By Mr. Carton:

Q. You say you have been acquainted with the Manasquan Inlet for some thirty-five years?

A. Yes, about that.

Q. Has your acquaintance with that location been since the erection of the dike by the government, or had you some knowledge of it before that time?

A. It began in 1880, just before the erection of the dike, and it has been continued since.

Q. This shifting of the inlet that you refer to is from your recollection from that time on, of course?

A. From recollection and from surveys. I had repeated surveys of the inlet, which I have referred to from time to time and been familiar with, and helped make, in fact.

Q. You have never seen any shifting of the inlet north in your time, because the government dike has been there, I suppose?

A. No, not to the same extent it shifted before the dike was there.

By the Court:

Q. Did it ever shift since 1882, since the construction of the dike?

A. Yes, there has been great shifting; it has swung away south.

By the Court:

Q. No, I mean to the north?

A. It has not gone far north; it has run around the end of the dike and run up the beach a little

ways; it has done that within ten years; it has run around the end of the dike and up the beach so a bar would form outside, as I described before.

Q. How do you account for that running around the end of the dike and cutting a small inlet there since the erection of the dike; what action produces that?

A. That is due mainly to the pressure of the southeast wind, which is the prevailing wind during the summer, and that southeast wind moves the sand up the beach toward the inlet, and that sometimes comes along fast enough, and the inlet does not clear itself and it presses the bar out beyond the mouth of the inlet and throws the inlet toward the north or northeast. That condition occurs after a long period of good weather, and then when there comes a storm, it comes back again the other way.

Q. Isn't that because of the natural tendency of the inlet to shift north?

A. It shifts north during fair weather, and south during stormy weather.

Q. And it shifts north during southeast storms?

A. Yes, although those are rare; we don't have so many of those; their action is limited.

Q. What has been your observation of the popular or the most usual shifting of the inlet from the Barnegat Bay north—the inlets on the north Jersey coast, what has been your observation as to their shifting, whether mostly to the north or mostly to the south?

A. Just what I have told you; in fair weather they go north and in stormy weather they usually go back south.

Q. Hasn't the shifting been most pronounced to the north?

A. No, the pressure is toward the north during fair weather.

Q. The damage that is done by the shifting of the inlets, hasn't your experience been that it has been to the north?

A. It has been both ways; I just explained that Mr. Blodgett almost lost his pavilion, to my certain knowledge, by a shift to the south. The same thing occurs at Shark River. The property on the south side of the inlet, they have never been able to use for years, because the inlet would every little while break through down there, and go straight through the property. There is a zone where those inlets move, and you cannot say the damage is any more one way than the other. The damage is the same throughout the whole width of that zone.

Q. Out at Shark River hasn't the damage been done principally on the north there?

A. No, I don't think it has been any more on the north than south; the damage to Mr. Zinzinia's property on the south has been just as pronounced as the other property on the north.

Q. The extensive cutting or the area it cuts there has been much greater on the north than south, on Shark River?

A. It depends on where you fix as north.

Q. Take the Shark River Inlet, you know, don't you, that within the past ten years the most of the shifting has been to the north up to the Avon boardwalk?

A. It has been both ways; I think you may have in mind the present location of the inlet in fixing your term north and south; the present location of the inlet is an artificial one.

Q. When it ceases going north, it goes back to its original place at the south, doesn't it?

A. No, it goes north until the flow becomes weak and the inlet closes up entirely, and then it very often breaks over or sometimes has to be opened to the south; then it begins to do a lot of damage to the south, and sometimes with a storm, it will go right back to the south.

Q. You are doing considerable work at the Shark River Inlet now to prevent the inroads north?

A. We have just about completed it.

Q. Under the State?

A. Yes.

Q. And at very great expense?

A. Not much, $100,000; that isn't much in controlling an inlet.

Q. And what is the purpose of that improvement there?

A. To keep the inlet in a fixed position and keep a constant tidal flow into Shark River, so as to maintain sanitary conditions and preserve the marine life in the bay, and if possible, make a harbor for light draught vessels.

Q. Has it anything to do with preserving the land to the north, the Avon side?

A. That wasn't mentioned; if it had been, the State wouldn't have appropriated any money.

Q. But Avon has contributed considerable money for that purpose?

A. No, I don't think it is for that purpose; I don't understand it so.

Q. It has made a considerable contribution to the proposition?

A. Yes.

Q. You say that entire expense of $100,000 was for the purpose of preserving the sanitary condition and making a possible inlet for light craft?

A. You can find the original recommendation;

there isn't a mention of the protection of the land; the purpose of it was defined to be to create a harbor for light draught vessels, and to preserve the flow of salt water into Shark River Bay.

By the Court:

Q. That isn't finished yet, is it?

A. It is practically finished.

Q. There has been an inlet there right along before you did any work at Shark River?

A. Where was it?

Q. There was an inlet to the ocean, wasn't there?

A. Sometimes.

Q. That would let salt water in Shark River, wouldn't it, no matter where it was?

A. When it was there, it would; sometimes it wasn't there.

Q. Where would it be when it wasn't there; what would happen to it?

A. I don't know what became of it when it wasn't there; I have never been able to find out.

Q. Did it close up?

A. It closed up.

Q. And what was the effect then?

A. Then there was no flow into the bay; there couldn't any boats, fishing boats and pleasure craft, get in and out.

Q. Do you understand that Shark River is used for pleasure craft in and out to the ocean?

A. Yes.

Q. Is Manasquan River used for that purpose?

A. Yes, somewhat.

Q. Put to very much greater use—the Manasquan than Shark River—for that purpose?

A. I don't think so.

Q. About the same?

A. About the same.

Q. Do you think that the preservation of the Manasquan dike would be desirable for the purposes that you referred to?

A. It would be of some advantage; I personally never recommended the opening of Shark River Inlet; I simply stated what the advantages would be and how much it would cost. The Legislature had determined the question of whether it would be opened or not.

Q. But you are the engineer in charge of the work?

A. Surely, but not to the extent of determining whether it should be done or not.

Q. You don't think that is an unnecessary expenditure of money, do you, $100,000, at Shark River?

A. I think it is going to be well worth while.

Court: What difference does it make to us in this law suit?

Q. But you do think that the $6000 expenditure at Manasquan River in this case was a woeful waste?

A. I don't think that anything was done that was beneficial to this land. If you built that dike to preserve the channel out there, it might possibly have been of some use, I don't know.

Q. You know that the Shark River Inlet was considerably north at the time the dike was built, don't you?

A. The dike was built mostly on dry land at the time it was built.

Q. At the Manasquan Beach how far back did the inlet extend westward from the ocean?

A. I don't understand your question.

Q. I think I understood you to say on your direct examination, that the inlet was out near the ocean as it went up the beach and it didn't extend very far westward from the ocean line; did I understand you right in that?

Court: That is what he said, and a bar formed in front of it.

A. It didn't go very far westward.

Q. How far westward did you say it went?

A. I explained about where the present houses are along the beach.

Q. Did it include the land where the houses are located now, the inlet which covered that strip?

A. No, I should say about to them, but hardly to them, high water mark.

By the Court:

Q. When you are talking about the inlet in that position, you are talking about it out in the ocean?

A. Yes.

By the Court:

Q. You are talking beyond the mouth of the river, as a matter of fact?

A. The mouth moves north along the beach.

By the Court:

Q. You are now beyond the crib and beyond the dike and you are moving north parallel to the shore line more or less?

A. Yes.

By the Court:

Q. And then the bar forms outside of that?
A. That is true.

By the Court:

Q. And after it goes up six or seven or more hundred feet, as you said, then it has a tendency to take a turn to the west for a slight distance? After it has gone north, then you say the bar formed outside of it?
A. Yes, somewhere in the course of six or seven hundred feet; it would usually work its way back to about the line of the present houses.

By the Court:

Q. Where it is way back to the west?
A. Yes.

By Mr. Bergen:

Q. You don't mean it would do this with the dike present?
A. No, I am speaking of the old condition.

By Mr. Bergen:

Q. Before the dike?
A. Yes, and after the inlet got six or seven hundred feet north, sooner or later the bar would close right across it.
Q. And it is your idea that that inlet in area did not extend westward probably beyond the present line of the houses?
A. No, not ordinarily.

Q. And it is because that is your opinion, that you think it would be unwise to protect the dike, because it wouldn't get back further than that, even though the inlet cut through there?

A. No, I had no such idea at all.

Court: This is purely speculation on the witness's part, because as I understand him, he doesn't know that that was so prior to 1880; that is right?

Witness: I have had access to all the old surveys.

Court: Aside from the records?

Witness: Yes.

Court: But you had no personal experience or observation prior to 1880 of the situation?

Witness: No.

Q. You examined all those old surveys?

A. We have them back to 1839.

Q. And the fact is that the inlet as it shifted north covered the entire point of beach where the houses are erected; they show that, don't they?

A. Some of the earlier maps, that may have been so; it hasn't been so at any time since 1880.

Q. I show you the map taken from the government report of the improvement for the Manasquan River, made in 1878, Exhibit C6; you probably seen a copy of this?

A. Yes.

Q. Will you indicate on this map where the row of houses are erected now, if you can?

A. There isn't anything here that I can fix it by.

Q. Will you tell us where the cribbing is, how far westward the crib extends on this map?

Mr. Bergen: This map is a map of 1878, before the crib was made, with this ink line on it, which General Payne put in, and we say that that line was not exactly in the proper place. The survey of 1882 is here, which dovetails in with this.

Court: There is no objection to it; I will admit the question.

A. I cannot by anything that is shown here. This shows the projected jetty, but these jetties were never completed in accordance with this plan, and a large amount was never done at all that is shown here, and there is nothing here to fix it by.

Q. I ask you if you observe on this map where it is marked "Inlet 1868," its location; what does that indicate to you as an engineer?

A. It indicates that at some time there was a breach through the beach, and the inlet opened there.

Q. Will you indicate on the map the course that inlet took from what you observe on the map?

A. That does indicate it; it is indicated on the map correctly, I presume.

Q. It indicates a southwesterly course from the ocean, doesn't it?

A. Yes.

Q. And a connection through Short Creek to the Manasquan River in that way?

A. It doesn't indicate that to me, because this isn't large enough to correspond with this,—that is, the opening shown here by the inlet, is much wider than the width of Short Creek, and it doesn't seem

that—the Short Creek as shown here would be at all adequate to form an outlet for that inlet to the ocean, speaking of the relative size of the two.

Q. Wouldn't the conclusion be that this was all formed—a creek the entire space through here—from the inlet, as shown on the map, to the Manasquan River?

A. No. (Pointing across the plot marked green as well as "water," as indicating a meadow or marsh.) There is nothing to indicate to me any more than that there was a breach through into a pond of water which then existed just inside of the beach.

Q. Do you take that to be the regular inlet to the Manasquan River at that time, or the only inlet there was at that time?

A. There is nothing here to show that that is the only inlet; there could have been another inlet.

Q. You don't contend that there was an inlet at the point of the dike, south of the dike, at that time the inlet was shown there, do you?

A. I don't contend anything about it; there is nothing shown.

Q. You don't believe that to be the situation, do you?

A. I do. I should say from what is shown there—judging from what is shown—that there must have been another inlet, that that is simply a breach through the beach.

Q. That that was not the inlet in 1868?

A. That there was an inlet there, but that there must have been another.

Q. There must have been another at the point south of the present dike?

A. Yes, I cannot figure any way that the Manasquan River could have gotten through here and gotten out of that inlet, from what appears on that map.

Q. From your experience, that wouldn't be the natural course of the inlet of the Manasquan River, in shifting north before the dike was erected?

A. I don't say it did.

Q. Why do you say you cannot figure an inlet going out of that point at that time?

A. Because we have maps made at that time that don't show that the Manasquan River went out by that way.

Q. The map wouldn't necessarily show where the inlet went out unless it changed half a dozen times a year, would it?

A. A map may show more and may show less; it doesn't indicate anything to my mind.

Q. Did you observe the construction of the dike as it was being built by the government?

A. Not closely; I remember having seen it under construction, but I didn't observe it closely.

Q. The cribwork, where was that constructed; how far into the ocean did that extend, or in the water did it extend, if it did go in the water, that is, beyond the line of the beach?

A. I don't recollect; I remember that there was a good deal more dry ground there at the time they began to do the work than there was shortly afterwards, on the line of that north dike, but I don't remember just how far that cribwork extended into the ocean.

Q. Isn't it a fact that cribwork was entirely out in the water?

A. I don't remember about that.

Q. Beyond the line of the beach?

A. No, I don't think it was; I think it was built right on the beach at that time.

Q. You haven't any distinct recollection of that?

A. I am giving you my best recollection of it.

Q. Isn't it a fact that that beach at that point around that cribwork has built up since its erection?

A. It has increased in height, unquestionably.

Q. And the area about there has increased very much, has it not?

A. Yes, the area at the end of the beach has increased.

Q. That would be one of the functions of such a cribwork?

A. Certainly.

Q. You say that the work done on the dike was of comparatively little value for the preservation of the beach; have you in mind the value of the land down there when you make that statement?

A. I have in mind, yes, the value of the land inside of the beach, the meadow land.

Q. You think that land is not of sufficient value to warrant much an expense?

A. That is true.

Q. If the land had been more valuable, do you think it would have warranted the expense?

A. I don't think it would have warranted it at that time; it wasn't necessary as a matter of precaution; if any such expense was warranted, it is on the ground that you are going to develop and fill up and make new land there; it might be that that would be sufficiently valuable. That I haven't passed on; but simply as a matter of protecting the land or shore and the meadow land, the improvement cost more than it was worth.

RECESS.

Q. At the hour of adjournment, we were discussing the question of whether the value of the land at the ocean front had anything to do with the ne-

cessity of the repairs. If the land on the ocean front north of the dike had been valuable land, would you then have considered repairs to the dike necessary?

A. No, not throughout the dike; I should have, as I already said, recommended the repair of the cribwork at the end of the beach, which is important to the protection of the property, but not the remainder of the dike.

Q. No matter what the value of the land or the uses to which it might be put, you would still consider that any repairs to the dike itself would not be warranted, is that so?

A. That is true.

Q. I think I did understand you to say on your direct examination that the repairing of the dike would be some benefit to the beach front; what did you mean by that?

A. I meant that if the dike running back from the cribwork and up to Short Creek and back to the upland, was made perfectly tight and kept in good repair, it would afford some little protection; it would afford protection to the meadow inside of it, that was all.

Q. You didn't have in mind that it would afford any protection to the beach front where the cottages are erected at all?

A. No, I don't think it would be of any importance for that.

By the Court:

Q. Not to the beach front alone, but to back of the beach, where the sand is raised some eight or ten feet, on the back part of where the houses are erected?

A. You mean back across the road?

By the Court:

Q. Just on the edge of the meadow or marsh?

A. No, I explained that it might develop in the future that there would be a little erosion of the meadow that would be worth while to prevent, but as matters stand up to the present time, I don't consider that it would be of any value.

Q. When do you think there would be any necessity, or any danger, rather, if the entire dike was allowed to be taken out, that is, the dike as distinguished from the cribwork?

A. From the end of the road which I have spoken of west; I should just as lief see it go out, as far as the land is concerned.

Court: The road is the road we have been calling First Avenue?

Q. Just back of the shacks?

A. Yes.

Q. If you were the owner of the property on the elevation, the shacks, as far as you are concerned, you would just as lief have the entire dike west of the cribwork wiped out?

A. Yes.

Q. As far as protection is concerned?

A. Yes.

Q. Isn't it a fact that after heavy storms, there is a swift ebb current out of Manasquan River that takes its course against the dike and so on to the land back of the shacks?

A. There is quite a current through there; of course, the dike itself had been the cause of a channel forming along the dike. The best channel formerly was always to the south side of the river

and went around an entirely different course than it does at present; that channel down along the dike is comparatively a recent affair, but the dike has been the cause of that channel to a large extent.

Q. Then there is that channel there now, no matter what the cause; there is such a channel?

A. Yes, sir.

By the Court:

Q. Do you know what the depth of the water is in ordinary mean tide, in there?

A. It varies somewhat; the depth through the inlet is ordinarily about five to six feet.

Q. And along the dike or crib?

A. At places back it is a little more, but somewhere between five or six feet and ten or eleven feet.

Q. Is this channel just opposite the dike the channel you refer to?

A. It is quite near the dike.

Q. And the fact that there is a channel there, would that not direct the currents to it and to the north as they went out to the river?

A. There would always be a current through there.

Q. And would that not attract the existence of this channel; wouldn't it attract the ebb currents towards this channel, and therefore toward the back of the beach?

A. No, as the channel is at present, the current would not reach the meadow to any serious extent, if the dike was entirely away from there. The dike itself when in bad repair, develops the currents and causes eddies, and rather increases the erosion of the meadow, unless kept in repair.

Q. Wouldn't the natural course of the current be to the north of the present dike, if there were no dike there?

A. No, the natural channel, if there had never been any dike there, would have been around to the south, where it was practically all of the time, even up to 1912. As late as 1911 or 1912 the channel didn't follow the north dike, but went way around to the south and came around just to the west of Blodgett's pavilion, and then turned out and went out through the beach.

Q. That filled toward the south side and shifted the currents toward the north, about the time you mentioned?

A. There has been some change there; there is more channel to the north now.

Q. The fact is that the channel has filled up on the south and shifted the channel to the north, shifted its tendency to the north?

A. It has filled up some; there was some sand accumulation; of course, there is still a channel there.

Q. This repair that you would make to the dike there, you would repair the cribwork and construct a wing to what point?

A. A point just west of the road I have spoken of, First Avenue.

Q. And what would be its termination; what would it terminate in?

A. In the meadow, in the bank, the natural bank.

Q. In the sand dune there at the southerly end of the cottages?

A. No, not in the sand dune; it would come out just to the west of First Avenue and would terminate practically in the sedge meadow.

By the Court:

Q. There wouldn't be any bank there in the sedge meadow?

A. There is quite a steep bank there all the way along the edge of the water.

By the Court:

Q. I mean a bank formed by the edge of the marsh?

A. Yes.

Q. There is no sedge meadow bank there, Mr. Vermeule, is there?

A. There is sand and sedge, perhaps not a meadow exactly.

By the Court:

Q. How high above the water of the creek is it?

A. It must be four or five feet above ordinary high tide.

Q. You would not recommend this sput to the sand dune at all, but west of it, into the sedge meadow?

A. Just west of First Avenue.

By the Court:

Q. As I understand you, you say the sedges are four or five feet above the ordinary high tide?

A. At that point. I can show it on the map. The grass is growing up through the sand at that point; it is not ordinary meadow. The meadow ordinarily is just a little trifle above high tide. The public street marked on map, Exhibit D3, and that shows the government dike and cribwork, marked "U. S. Government Dike Built in 1882." At present there has been a little eddying and a little cutting back of the dike about at the end of First Avenue, and from about the easterly edge of that cutting I would run a dike at an angle of about 45 degrees and bulkhead right back to a point just west of First Avenue.

By the Court:

Q. And that bank of sedges, or whatever the soil may be in there, you think is four or five feet above the ordinary tide level?

A. I think it is nearly level.

By the Court:

Q. At the point terminating where your dike would end?

A. Yes; that happened to be filled up with sand there a little higher than ordinary meadow.

By the Court:

Q. The rest of the territory shown on your meadow, where your dike would cross west of First Avenue, is that sedge land or meadow land over to the creek?

A. It is land that has a good deal of sand; it is filled in with sand, but the sedge has grown up through the sand.

By the Court:

Q. It is practically meadow, marshy?

A. Firm along the water front of the Manasquan River.

By the Court:

Q. Won't you make a cross mark in pencil where you say you would terminate the end of your dike?

A. Yes, sir, (witness does so) at point marked "X" west of the main street, or First Avenue.

Q. At this point which you have marked "X", which you say would be the termination of the spur, that isn't sedge meadow there at all, but is sand?

A. It is not sedge meadow.

Q. And it is not sedge?

A. There is sedge growing up through it; the sedge grass grows considerably above meadow level.

Q. And there is similar grass out where the cottages are built?

A. Yes.

Q. Do you call that sedge meadow?

A. Not at all; I don't call this sedge meadow.

Q. The foundation there is simply sand, with the grass growing through it?

A. This (indicating) is largely sand, although it is a mixture.

By the Court:

Q. The crown of this property facing the ocean is about where the public street is marked on this map, D3, and then is there a slope both east and west from some point there?

A. The crown of the beach is to the east of the public street some little distance.

By the Court:

Q. And there is a slope east and west from this crown on the beach?

A. There is.

By the Court:

Q. And gradually that sand sloping to the west dies out and you then come to the sedge or marsh land without the sand on it?

A. Yes, this sand has worked there and mixed in the meadow.

Q. You say there has been a little cutting at the point you indicated, where you marked a cross; what has caused that?

A. That was an eddy evidently back of the government dike.

Q. Would not that eddy increase and become more troublesome if the dike was allowed to get out of repair?

A. I think the dike is largely the cause of it. The wing dike which I have spoken of would be a thorough protection against that.

Q. This wing dike that you propose to construct, when completed how high above the ground would it extend?

A. About six feet above high water.

Q. Would it be your idea that because of such construction, it would bury itself—this wing dike—in sand?

A. I don't understand.

Q. After this dike, or jetty, whatever you may call it, was erected, would the action of the elements there cover it with sand?

A. Not necessarily; there would be a little tendency for the sand to fill up behind it. The beach would move over more or less. I would build that bulkhead to prevent any continuation of that cutting, and prevent any possible tendency to cut along behind the government crib.

Q. The tides do wash over this very point that you refer to now, the tides from the ocean, that is, north of the cribwork?

A. No; there is some washing over near the outer end of the crib, of course.

Q. Isn't it a fact that this raised land where the

cottages are erected, extends about the same height down to a point within a couple of hundred feet of the dike, and then from that point on to the dike is level, because of sand being washed over from the sea?

A. It doesn't from where the houses are down to the dike.

Q. For how long a distance from the dike north does the sea wash over there now?

A. It doesn't wash over back of the crib at any place; it washes over the outer end of the crib diagonally.

Q. And would wash over this spur dam?

A. No, I don't think it would reach that at all. The direction of a storm there from the east and the northeast would be such that it couldn't reach this point at all,—the point where I would put the wing dike. There is a high beach here which it doesn't come over at all, the high beach just to the east of the point which I have marked "X", and from that point down to toward the end of the crib-work, some part of that is occasionally washed over by the waves, but not to do any damage particularly.

Q. When were you on the ground last?

A. November.

Q. Will you indicate on the map D3 how far southward the elevation extends, the raised land where the cottages are built?

A. This map has on it a profile at the point marked EE, which gives the exact height of the beach at that point; that extends some distance further south.

By the Court:

Q. That same elevator?

A. At practically the same elevation. Then from

that point there is a gradual descent to the level of the dike.

Q. I ask you if you didn't observe when you were there, that for a distance of at least 100 feet from the dike north, it is absolutely level, bearing indication of the tides washing over there?

A. There is some indication further out toward the cribwork, to the east, of the sea having washed over. I saw no indication of the sea having washed over back here (indicating), where I mentioned the eddy as being.

By the Court:

Q. Or at the line of the street prolonged?

A. Or at the line of the street.

By the Court:

Q. Was that sand, as you remember the condition in 1880, as high at the point of the dike and crib as it is today?

A. It was not. The beach has continued to build up for some time after 1890; it is a progressive increase, from 1880 to 1890 to some time afterward.

Q. Has that been built up with sedge meadow or sand?

A. Beach sand, dunes.

Q. There is no change in the formation of sedge meadow; that is a natural condition which has to be there, hadn't it?

A. That is usually very permanent.

By the Court:

Q. From the construction of this dike under the Rogers plan—you have seen it last November—was

it built strong enough to afford not only protection for the land then in place, but for any fill that might be made behind it?

A. It had the appearance of having had sufficient material put in it for that purpose, but as I already stated, it was going over.

By the Court:

Q. The construction was faulty?

A. Apparently the old work which had been bolted up to it was dragging it over to the side, toward the Manasquan River.

By the Court:

Q. Then it wasn't practical to accomplish either purpose?

A. No, it was not sufficient for either purpose.

Q. The dike as you observed it would not be such a dike as you would advise, but if it was to be used to fill in back of it, would it?

A. No, I should not have advised it for any purpose.

Q. Because you don't believe that it is of any use to the situation at all?

A. Not only that, but if I wanted to build a bulkhead and fill in behind it, I would not have attached it to the government dike.

Q. Neither are you sure that the wing which you referred to there would be sufficient to protect the beach, are you?

A. Yes, I have much more confidence in wings.

Q. You are not sure that that would be successful?

A. Yes, I am.

Q. If that is so, why did you say if that did not

do the work, that you would then extend it a similar distance, at a similar cost?

A. I said that my first measure would be to build that wing dike back to a point west of First Avenue. There being no immediate need apparent of doing anything, I should then wait, and that if it developed that there was too much cutting of the meadow at any future time, I should prevent that by building these groins, or jetties, out perpendicular to the shore line.

Q. So that you can anticipate that there might be such a necessity, I suppose?

A. The best rational way to do would be to wait and see what develops.

Q. Have you ever had any experience doing any such work as the work you now suggest?

A. I have had a great deal of experience in the study of these inlets and in the general subject of hydraulics of streams and in harbor work; I am now doing a great deal of that kind of work in Cuba.

Q. I haven't any doubt about that, but can you tell us where you ever attempted to protect such a situation, such as this one is, by a similar construction?

A. No, not identical with this; we haven't had conditions exactly identical.

Q. The whole thing, then, is experimental entirely, isn't it?

A. No, I should not say experimental; it is a matter of judgment based on experience, and experience not only of myself, but of many other people; I have profited by their experience as well.

Q. This is what you would advise because of your experience?

A. Because of my experience and study of what has been done.

Q. And your experience has not acquainted you with the fact that it was the custom of these inlets to shift north from time to time, and year to year, for fifty years or seventy years prior to the construction of the dike there?

A. I have evidence that it was at times shifting north and at times shifting south, as I have explained.

Q. But you don't believe that that inlet shifted as far north or as extensively in its area as is claimed for it, do you?

A. I don't know what is claimed.

Court: What is the extreme distance?

Mr. Carton: Some said a mile and a half.

Q. You don't even believe that that indication on the government map of where the inlet was in 1868 is just correct?

A. I believe that that map shows just what it shows, and I have explained what it shows.

Q. You questioned whether there was such an inlet there at that time?

A. No, I didn't; I said evidently there had been a breach through the beach at that point, that is, assuming that the map is correct.

Q. But it is your belief that when that inlet was there, there was also an inlet at the mouth of the river; you believe that, too?

A. I believe that.

Q. Supposing that the testimony was that the boats came in there at that 1868 inlet before the government dike was built, would that change your view of the matter any?

A. No, I should expect a boat could go in there.

Q. And if the evidence was that when this inlet

was there and at other points north of the dike, the inlet was closed below and they had to dig it out to get the inlet back, would that change your view of the matter any?

A. No, I should expect that might happen at times.

Q. Do I understand you to say you were down there before the dike was repaired, in about 1912?

A. Yes, I was there in 1903 and 1904, and again in 1911 and 1912.

Q. What was the condition of the dike at that time?

A. The dike in 1911 and 1912 was not in first-class repair; I didn't notice its condition of repair particularly; I was more concerned at that time with the condition of the inlet.

Q. It was beginning to get out of repair, as you remember it?

A. That is my recollection of it.

Q. If you were to repair the dike, how would you repair it, assuming that it would be necessary to repair it?

Mr. Bergen: I object.

Court: He has already indicated that.

Mr. Carton: I asked that question because he has said that it was improper to add new work to the old.

Court: He said he wouldn't repair it at all, in fact, for the preservation of the property.

Witness: That is true.

Q. Wouldn't the addition, the putting there of the

new work, strengthen the whole construction, the old dike?

A. It might help hold it up a little bit—I think it did to some extent—but the old dike didn't help the new; the new had a tendency to hold up the old, but the tendency of the old is to tear the new down. The new had work to do without holding up the old dike. The work that was put on the old dike would have built a new bulkhead, and could have been built at less expense, back nearer to the shore line.

By the Court:

Q. Would that be apparent to the ordinary layman who is not an engineer?

A. It depends on the layman.

By the Court:

Q. Mr. Hinchman isn't here for me to observe him, but I am taking him as a levelheaded, practical man; would the conditions and the futility of this thing be apparent to him?

A. I think they would. I think that any good business man must be impressed with the fact that a structure thirty-five years old is not a good thing to tie up new work to.

By the Court:

Q. Mr. Hinchman was a man who was a careful business man, and yet he spent something like six or seven thousand dollars of his money, expecting eventually to get it back out of this property, which he may or may not get, but he spent it, and I wonder why, if the conditions were so apparent to the ordi-

nary reasonable man that that thing was futile, he should take the chance of spending that money in the hope that he might some day get the whole or part of it paid back. I am trying to put myself in his position; what would I, or any other ordinary man who is not an engineer, have done under the circumstances to preserve my security?

A. It is a little difficult for me to say what a layman's point of view would be, but from my experience with many laymen, I think they would have seen the situation, that it was not a good thing to do, to tie the new work up to the old.

By the Court:

Q. Or that it wasn't necessary at all?

A. It was not necessary.

Q. Assuming that he had been advised that it was necessary to do something to that dike, do you say it would have been better to have erected a new dike entirely, rather than add the new work to the old work?

A. Yes, if I had been convinced that a bulkhead was necessary there—

Q. We are assuming that for this purpose.

A. I would have advised building it entirely independent of the government dike. There is another reason for that, which I cannot lose sight of, and that is that this dike is not on anybody's property, it is out in the channel, it is government property, subject to removal by the government at their will, and that it is on land to which you have no title; because in my experience that land belongs to the State; I would have had to be influenced by that.

By the Court:

Q. Assuming that it was necessary to do this work, and a new dike should be erected instead of tying up to the old, what in your judgment would be the difference in the cost of repairing the old and erecting an entirely new dike?

A. An entirely new bulkhead for that distance, from where I would say I would end my dike—

Q. We will say from the cribwork west.

A. It is simply a matter of adding my wing to it; from the wing dike west is about 650 feet to Short Creek. That bulkhead should have been built at any time prior to 1914 for not exceeding $6,000; we had bulkheads built for less than that.

By The Court:

Q. What was your average a foot with such construction?

A. They ran from eight to ten dollars at that time; not now.

Q. In 1915 it hadn't changed so very much?

A. It began to go up in 1914; but I should say that in any ordinary time that bulkhead should not exceed ten dollars a running foot, and might have been built for eight, with such construction as I would build.

By The Court:

Q. What do you say about the construction such as Mr. Rogers testified to?

A. I have not given that close attention.

Q. Would that construction vary very much from yours, except one was tied up and the other was not?

A. Not very much. There is enough work down

there to build an independent bulkhead and a very good one, stronger than is necessary.

Q. On the matter of cost, are you basing your judgment on the experience you had in the Shark River job?

A. Yes, timber bulkhead built there for Mr. Zinzinia concerning which I advised him.

Q. Those built for Mr. Zinzinia were built on the south side?

A. Yes.

Q. Does the question of the depth of the water have anything to do with the cost of the construction?

A. The length of the sheathing has a good deal to do with it, and the piling also.

Q. Let us assume further that a dike was necessary for the purpose of preservation of the beach, would it be desirable or necessary to keep the dike in repair, in your judgment?

A. The new dike that I proposed?

Q. Yes.

A. Yes, that would need repair from time to time.

Q. It would be disastrous to allow even a plank to get off?

A. I should not say as much as that.

Q. If one plank was removed, or there would be a cutting in, cutting the sand out at that point?

A. A little, but it wouldn't hurt much for some time.

Q. Wouldn't it take the second plank off very shortly?

A. That would depend on conditions; sometimes yes, and sometimes no.

Q. When the tides came down there it would raise up in front of it and cut sand down behind; that would be the action?

A. There couldn't enough water get through with one plank off to have a very disastrous result.

Q. Wasn't that the experience you had at Avon; wasn't that the reason that the Avon dike had to be built on the north side, because the old dike got out of repair?

A. The old dike was a wreck; of course, the old dike was of no account at all; it wasn't considered.

Q. But that is what let the inlet run into the Avon boardwalk, because it did get out of repair?

A. It couldn't have gone up there if that dike had stayed in repair.

Q. If they had kept the dike in repair, the inlet couldn't have gone up there?

A. That is true.

Q. You know it is true that they fished out of the inlet from the Avon boardwalk?

A. Yes, that wasn't the first time it was in the habit of going up there.

Q. It was in the habit of going up there when the dike got out of repair?

A. Yes.

Q. You are spending $100,000 there now—the State is—to stop that inlet from going up that far?

A. No part of that money was spent on the south side.

Q. You say that the elevated beach where the shacks are is due to the wind driving the sand up there; that same sand will be taken out by the inlet if it cut through at that point?

A. Wherever the inlet cut through, it would take sand out, of course.

Q. And the inlet has been all through that point, has it not, before the erection of the dike?

A. Not through all the points that I mentioned and had in mind.

Q. It has been through all the points from the dike north of Brielle Road?

A. I have no experience of its ever having gone up there, and I have my doubts about Manasquan Inlet ever having been at the Brielle Road.

Q. You don't know?

A. It is entirely against my belief and experience.

Re-direct examination.

By Mr. Bergen:

Q. In 1914, was there any necessity, in your judgment, for doing any work at this place to preserve this land?

A. No, I think there was not at that time.

By the Court:

Q. Your answer is predicated on your visit in 1912 and ignores all conditions actually as they were in 1914, because you were not there?

A. It is predicated simply on what I observed in 1911 and 1912, and in 1917.

By the Court:

Q. And what conditions existed between those two dates you don't know?

A. Only from the evidence on the ground.

Q. What is the character of sedge land in those meadows, as to durability?

A. As a rule a sedge meadow is very persistent and resists an erosion to a remarkable extent. It stays in a fixed position. The shore line doesn't change much, except that they do build out. In the

building of a sedge meadow, I have observed very frequently what happens. A bar builds up to normal high water mark, then the sedge begins to grow, and the meadow then grows faster until it gets a little above high water mark, up to the level of ordinary extreme spring tides, and grass grows and a heavy turf forms, which in many cases is heavy enough to support a locomotive and train of cars; the growth of turf and roots and the muscles help very much; the muscles will usually cover a good part of the edge of a meadow of that kind along the water; all of these contribute to make it permanent, and a tendency to accretion, rather than erosion.

Q. Are the two banks on the edge of Deep Creek at its outlet to Manasquan River of this character of sedge?

A. Yes.

Q. Do you know of any other places than this Manasquan Inlet where dunes have built up without help from any artificial cause?

A. Yes, there are many such points all the way from Sandy Hook to Cape May; the beach opposite Toms River was originally—there was originally the old Cranberry Inlet; there was another inlet in that vicinity—

Court: That isn't disputed?

Mr. Carton: No.

A. —that has built up through natural causes until now it is a good high beach. The same thing occurred south of Bond's, down near Little Egg Harbor Inlet; I personally observed that beach grow out more than a mile southward in about five years, and into water that had been previously sixty feet

deep in places. That beach is now well built up in dunes,—a good high beach. The same thing occurred all the way from Galilee north to the Highlands; there were inlets there from time to time in that whole stretch. Seabright and Sandy Hook was at times an island; it was at times connected directly to the main land, Navesink Hills, and that was a low beach for a long time, and subject to breaches through; then it built up and was stable for a long time. Recently there has been a tendency again to erosion there, a cutting back of the ocean, but that is another cycle; a long cycle of years it was stable, entirely.

Q. You believe that this beach built up without any help from the crib?

A. I believe it built up entirely for the reasons I have stated: the wind carrying the sand up, and either sedge grass growing or later the construction of these buildings and houses has had a tendency to hold the sand and build up the beach. It is entirely from natural causes, except as to the building of the houses and other buildings; that has contributed.

Re-cross examination.

By Mr. Carton:

Q. You do not contend, or do you, that the building up of the dunes where these cottages are erected is the result of the construction of the Manasquan dike at all?

A. I cannot see that that dike has had any effect—any influence on the building up of these dunes. It has been a protection to the south end of the beach, but not otherwise.

Q. Not on the north side?

A. No, sir.

Q. It has not had any protection of the beach on the north?

A. It has protected the south end of the beach.

Mr. Bergen: We rest.

NIART ROGERS, recalled in rebuttal for complainant.

Direct examination.

By Mr. Carton:

Q. When have you last visited the Manasquan Beach?

A. Last Tuesday morning, April 2nd.

Q. What was the condition of the dike at that time?

A. Just the same as it was when completed in 1915.

Q. Mr. Vermeule has referred to a visit there in November, I think, 1917, and stated that at that time the dike tipped toward the river, toward the south; has that been your observation of it, or is that true at this time?

A. At the time it was constructed there was some irregular shape, not perpendicular, due to the construction beneath, but so far as I was able to observe the other day, it is no different from the time that we completed it.

Q. It is in the same position as it was when it was constructed?

A. Yes; it was necessary to avoid sunken timbers, especially in the section where it had gone out, the 150 feet we spoke of, to drive the piling off to one side, in order to get them down, and we had to

put in three or four sheathing often times when we only intended to put two, to cover up the crevices. It seemed to be unavoidable from those causes, and that accounts to some extent for the irregularity.

Q. Has there been any tipping over, or is it in the same position now as it was when you erected it?

A. I cannot see any difference.

Q. What have you to say with regard to the sedge meadow, whether or not it is sedge meadow on the north side of the dike, at the west side of First Avenue, about 150 feet at the point where Mr. Vermeule has marked "X" on Exhibit D3?

A. That is a point very near the road—no, I didn't observe any sedge there; that is practically drifted sand in there, with a little grass growing over it.

By the Court:

Q. How high is it above the water?

A. I should say above ordinary high water mark from two to three feet, but the sedge is nearer Deep Creek.

By the Court:

Q. How far from the point marked "X" to the west does the sedge begin?

A. The sedge is particularly noticeable about half way between that and Short Creek.

By the Court:

Q. About how many feet would that be, 100 feet?

A. I should say between three and four hundred feet.

By the Court:

Q. The sedge begins to appear and then continues over to the creek from that point?

A. Yes, but even at that point it is covered with sand.

By the Court:

Q. How high is the sedge at the point where the creek—

A. At Short Creek and the main channel above the water—at high water, it is very little above the usual stage, from a foot to a foot and a half, possibly.

Q. Is the sedge or grass growing at the point marked "X" on the map different in character from that growing on the elevation on which the shacks are erected, on the beach proper?

A. The same kind of grass.

Q. Is that sedge meadow or sedge grass at that point where that grass is?

A. No.

Q. Mr. Rogers, what is the condition of the beach north of the dike and opposite the cribbing as to elevation immediately north of it?

A. Opposite the cribwork it is practically level with the top of the bulkhead, and westerly it slopes down to a point about one hundred feet east of where the street intersects the dike; about 75 yards west of the end of the cribwork, it is about two and one-half feet below the dike, and then slopes down more abruptly to about the low water mark.

By the Court:

Q. In preparing your specifications, did you con-

sider the feasibility of putting in a spur dam instead of repairing the entire dike?

A. No, sir.

By the Court:

Q. Or jetties?

A. No, sir, no other plan was brought out at that time.

By the Court:

Q. Why didn't you consider any other plan? Was this considered by you the only feasible and practical one?

A. I thought that to be the most feasible plan at the time.

By the Court:

Q. Was it the least expensive?

A. I think so.

By the Court:

Q. Or didn't you take the question of expense into consideration?

A. We took into consideration that a dike had been constructed there at a previous time, at some considerable expense, and was in fair repair, with the exception of the main break, and to repair that would have been a simpler problem than to do new construction.

By the Court:

Q. Less expensive?

A. I cannot say as to that, because it would depend

altogether on the other plans which might have been formulated; I didn't go into it.

Q. With your knowledge of the condition of the beach there, both before and after the construction of the government dike, if you were called upon by Mr. Hinchman or anyone else to make repairs to that situation for the preservation of the beach, would you pursue the course you did, or would you adopt the course suggested by Mr. Vermeule?

A. No, I think I should have done what we did in that case.

Cross-examination.

By Mr. Bergen:

Q. Do you mean to say there is no sedge grass growing through the sand at the point marked "X" on the map D3?

A. If there is, it would be very close to the water's edge, because the sedge that should be there is covered entirely by sand.

Q. Was the question ever presented to you directly to draw a plan or make a design or a plan to protect that beach, exclusive of a land scheme?

A. There was no other plan considered than the one we built.

Court: That doesn't answer the question quite.

Q. (Last question repeated).

A. No, it was not.

By the Court:

Q. Was there a land scheme or a filling in scheme presented to you in connection with the protection

of the beach at the time you presented your specification?

A. Only in a tentative way, as to what might take place in the future.

By the Court:

Q. How far did that influence you in the preparation of your specifications, that tentative suggestion?

A. Not to the extent that we would go on and make a complete construction for that purpose.

By the Court:

Q. Did you make that construction stronger or more substantial or heavier as a result of that tentative suggestion?

A. I think I stated in my former testimony that if the filling proposition had been carried out, we would have put in other piling back, with ties to it, to stiffen the bulkhead.

By the Court:

Q. Why cannot you answer either directly or affirmatively? Did you in preparing your specifications provide for the fill in addition to providing for the retention of the land already there, or did you simply provide for the retention of the land already in place?

A. This construction could easily follow from the construction which we followed out.

By the Court:

Q. I don't understand your answer.

A. The dike was constructed with piling on each

side of it, and it is easily possible, if the filling-in scheme was adopted, to attach other piling to those piling on that side, the north side, with anchor piling some distance north.

By the Court:

Q. I am trying to find out whether so much money was spent in repairing and rebuilding with the expectation that a fill would be made behind it, or only was so much spent in making the necessary repairs and rebuilding to preserve what was already there?

A. So far as I understand, at that time there was a possibility of making a fill.

By the Court:

Q. And how much additional expense was involved in the possibility?

A. Not any to my knowledge.

Q. Out of the total contract of between six and seven thousand dollars, how much less could that work have been done for, if that possibility hadn't been mentioned?

A. None; it would have increased the cost of the work if we intended to do the work at once.

By the Court:

Q. But no matter when you intended to do it, did it add anything to the cost of the work?

A. I think not.

Q. If there had been no mention of any fill at all, would you have used the construction you did for the preservation of the beach?

A. Yes.

By the Court:

Q. Just as expensive?

A. I don't see how the cost have been any less.

Q. Was it ever in your mind or in any conversation between you and Mr. Hinchman, the protection of this beach, the land now north of the dike on the ocean front—the land north of the dike, any of it?

A. Only as I have stated, that there was a possibility that that would be filled in at some future time.

Q. Was there ever any mention between you and Mr. Hinchman that you were doing this work because you wanted to protect the beach itself?

A. I cannot recall the conversation used at this time.

Q. You are not sure of that?

A. I am not sure enough to qualify positively.

By the Court:

Q. What were you doing the work for?

A. To protect the inlet of the river as against that land primarily.

By the Court:

Q. Why doesn't that answer Mr. Bergen's question; weren't you trying to protect the land north of the dike?

A. Yes, but I think Mr. Bergen is trying to lead me on to say that they contemplated greater expense.

Court: Just answer the question.

Witness: I didn't understand it that way.

Q. Was there ever any conversation between you and Mr. Hinchman when you were doing this work or considering doing this work on this dike, that it was done for the purpose of the protection of the river bank or beach or land itself?

A. It was for the protection of the river bank along the dike.

Q. Was it ever mentioned between you?

A. It must have been mentioned; we discussed the matter as to why it should be done.

Q. Won't you tell me positively whether it was done or wasn't it?

A. I cannot qualify as to that; I cannot remember a conversation that long ago.

Q. But you know positively that the thing discussed between you two was that you would eventually fill this up and have a land speculation scheme there, you know that?

A. That was a possibility.

Q. That was talked over between you?

A. That was only a tentative—

Q. (Last question repeated).

A. It was mentioned; it was considered but it wasn't gone into in detail.

By the Court:

Q. When Mr. Hinchman came to you what did he come to you for and ask you to do?

A. The dike was disrupted there and in very bad shape.

By the Court:

Q. What did he say?

A. He realized that there had to be something done

and done immediately to protect it against any further inroads of the water.

By the Court:

Q. Protect what?
A. The land on the north side.

By the Court:

Q. Can you tell us substantially what he said?
A. No, I cannot repeat the conversation.

By the Court:

Q. When he said something had to be done, what did he say?
A. He asked me to prepare specifications as to having the dike repaired.
Q. Mr. Rogers, who was the engineer that did work on this land before you, the surveyor? What was his name?
A. Potter made surveys.
Q. Mr. Potter had drawn up a map?
A. He had made some.
Q. You have seen that map?
A. Yes.
Q. That map had a full lay-out of lots on this land?
A. I think it did.
Q. A full set of lots?
A. I think it did.

By the Court:

Q. Extending westerly to the creek?
A. Yes.

By the Court:

Q. That was in 1913, wasn't it?

A. I think prior to that time; I began my surveys in 1913.

Q. Then you prepared some set of maps or a map covering exactly the same thing for the same purpose?

A. Showing the proposed streets, but not lots. I think my map shows roads only, with the exception of the ocean front lots.

Q. Is this map marked originally with D19?

A. Yes.

Q. How many maps did you prepare which laid out River Avenue along this bulkhead?

A. I think that is the only one; I am not positive; but that scheme didn't originate with me; that is something that had gone before.

Q. That was a long while before; then you prepared that map, and you prepared this map in two sections, D20, did you not?

A. That was for the purpose of showing the land under lease—the later map.

Q. You did prepare the map?

A. I prepared the map.

Q. And that also laid out River Avenue?

A. Yes, as proposed.

Q. Did you prepare any other maps which laid out this tract of land?

A. I don't recall any other.

Q. Is it not the fact that the only fundamental thought in Mr. Hinchman's mind was a land scheme, to fill that land in; is that not true?

Mr. Carton: Objected to.

Court: If he knows.

A. I don't know what his thought was, but he was considering the cost of filling in land north of the dike.

Re-direct examination.

By Mr. Carton:

Q. If you were erecting this dike for the purpose of the fill, would you have constructed such a dike as was erected there or repaired?

A. We had to do some additional work on it, put anchors on it a tie-backs; other piling would have been driven farther back and tied to it.

JOHN C. PAYNE, recalled in rebuttal for complainant.

Direct examination.

By Mr. Carton:

Q. Have you been here in the court room all day?

A. Yes, sir.

Q. While Mr. Vermeule was testifying?

A. Yes, sir.

Q. Did you also hear the testimony of Mr. Conover and Mr. Oram, who testified on a former day?

A. I think I heard the greater part of it.

Q. These gentlemen have referred to the erection of a wing or spur dam running from the west end of the so-called cribbing on the Manasquan dike for a distance of probably 150 feet to the west line of

First Avenue, and have stated, as I recall, that that would be the proper construction for the preservation of the beach front at Manasquan for the premises in question. I ask you if, in your experience and in your judgment, you agree with those views?

A. I am obliged to say that my judgment, formed from my experience, and the action under similar conditions, is that it would only be an incident if that form of construction carried out the purpose which I would have in mind, and that was the integrity of the beach front. I have in mind clearly a case where water was allowed to get back of a bulkhead, and a current similar to the currents formed in that river, where the reservoir back carried the footing of the bulkhead out entirely; and my judgment, formed from my experience, is, that the only safe practice in those cases, is to keep the water out.

By the Court:

Q. And is the only practical way to keep the water out to reconstruct and repair this dike?

A. Yes, sir.

By the Court:

Q. Over to Stump Point?

A. Yes, sir. And if I might add in furtherance of that, that establishes a line for the river; that establishes the north line of the river, and in no other way could you be sure of keeping out a condition that would get away from you—as this case I have in mind, the bulkhead was carried entirely out.

By the Court:

Q. Have you familiarized yourself at all with the

New Jersey State Library

specifications, or did you hear Mr. Rogers describe the form of construction of this work?

A. Generally.

By the Court:

Q. Do you think it was unduly expensive?

A. No, sir, I think it was not.

By the Court:

Q. Or was it all required for the conditions existing?

A. I think it was all required, and might easily have been more expensive, owing to the conditions which I know to exist there.

Q. You examined the work of the bulkhead before you testified?

A. Yes.

Q. Assuming that you had been employed by Mr. Hinchman in 1914 or 1915 to make repairs, or to do work there which was deemed necessary for the preservation of the beach front, would you have advised Mr. Hinchman to repair the dike as it was done, or to allow it to go as it was and erect these spur dams?

A. I am clearly and strongly of the opinion that I would have carried out the same plan as was carried out. I would follow the government dike; whether I would attach it to the government dike or not, I wouldn't say positively, because I haven't made such examination as to lead me to give an answer as to that, but the general plan I would follow; I think it is the correct plan, and only one, to preserve the beach front.

Q. In that you would extend it westward to preserve the north line of the river?

A. Yes, I certainly would.

Q. I think I understood you to say when you testified before, that you were acquainted with the Manasquan Beach even prior to the erection of the government dike; am I correct in that view?

A. I visited Manasquan previously to the erection of the dike, but I can scarcely say that I knew the beach intimately enough to testify at this late day.

Q. And whether or not the inlet did travel northward from its present location or not, you only know from your experience and your investigation, I assume?

A. I only know from the examination of maps and from my experience of the action of inlets along the coast.

Q. You testified that there was a tendency of these inlets to shift north?

A. Entirely so, the fact that they seem to shift to the south, in my judgment, is merely that they return to their original position, which makes a sort of a basin or bay at the outlet; on the south side of the inlets there is a cove, but it is not my experience, nor it is not borne out by the examination of maps, that the inlets shift farther to the south than the axis of the river itself.

Q. Assuming that this dike was allowed to remain out of repair or to be entirely removed altogether, what effect, in your judgment, would the currents of the Manasquan River have on the spur dam referred to by Mr. Conover and Mr. Vermeule and Mr. Oram?

A. My experience leads me to conclude that they would, when the conditions favored, find themselves standing up in clear water, and the beach making its way off to the north in its usual, natural custom.

Q. And eventually finding a way out to the ocean?

A. Oh, yes; it would work its way to the north, as they always have done, north of Barnegat Inlet,

until the strength of the current was decreased and then closed up.

Q. Can you tell us whether you know anything about the condition of the soil north of the jetty, and about the point of First Avenue, as to whether it is sedge meadow or sand?

A. I was there in the fall of last year, and while it is considerably lower than the elevation of the ridge on which the buildings are erected, it is sand, clear sand with some beach grass growing in places, coarse beach grass.

Q. There is beach grass growing up on the elevation where the cottages are erected?

A. A great deal of it.

Cross-examination.

By Mr. Bergen:

Q. General Payne, my understanding of your testimony is, that unless this dike cut off this Short Creek by going over to the bank on the other side of it, it would have no value to protect this land?

A. Not at all; I have in mind that Short Creek empties into the Manasquan River, but the dike goes so far back that it establishes a line for the river and carries the danger far enough away to remove it. It establishes a line for the south side of the river.

Q. Then do you mean that it has value, although it does not cut off Short Creek?

A. It has every value; it has the practical value of having preserved, in my judgment, the beach front at that point.

Q. Is there any danger that Manasquan Inlet will take a current—will send its main current and break open up above?

A. No, because the dike is carried far enough to the west to carry it past the point of impact of the current coming down.

Q. Then I understand you to vary from your testimony which you gave the first day; is that correct?

Court: In what way?

A. I don't know what your understanding is.

Court: In what respect is the difference?

Q. On the first day's testimony, did you not testify as your conclusion, that the dike had no value for this purpose unless it went into Stump Point?

A. No, sir; my testimony then was as it is now; the value is in establishing the regimen of the north side of the river, and in going back as far as it has gone back, it has practically done that; it has demonstrated that it has done that. If the current of the Manasquan River had found its way through Deep Creek opening, then it would have had to be carried further west.

Mr. Carton: We rest.

Court: There is another thought in my mind: if the dike were taken away entirely and the crib, whether it would result in the closing of the inlet, and creating a body of stagnant water back there, which would affect any land scheme?

Mr. Bergen: I would like to cover that.

NATHAN J. CONOVER, recalled for further

Direct-examination.

By Mr. Bergen:

Q. I call your attention to map D3 and the mark "X" just west of the street marked "Public street," which mark was made by Mr. Vermeule in his testimony; is there sedge grass covered by sand at that point?

A. There is often grass all along First Avenue, at different points along First Avenue, coming up through sand which came from sedge underneath.

Q. There is, therefore, as he testified, sedge land underneath?

A. Yes.

By the Court:

Q. Do you make any difference between the sedge and beach grass?

A. No, they are not alike.

By the Court:

Q. Do you treat them the same in your testimony?

A. The beach grass is a separate grass growing in separate clusters, and sedge grass is a fine grass growing very thick.

Cross-examination.

By Mr. Carton:

Q. Is the grass growing there that you have described different from the grass which is growing up where the cottages are erected?

A. Yes, in places; there are places where there is sand with beach grass growing on it, and there are places where this sedge grass comes up through the sand, and further out it is sedge.

Q. Are you referring now to the location of First Avenue?

A. West of First Avenue.

Q. To what depth or height of beach sand will sedge grass grow, as you have observed?

A. Sometimes sand will drift over the sedges, and the sedge grass will continue to grow up; I should say not more than two feet, but in the meantime debris and other stuff will work in with the sand which will give it something of the character of the sedge.

By the Court:

Q. Which is the coarser blade, the sedge or beach grass?

A. The beach grass.

Cornelius C. Vermeule, recalled for

Further direct-examination.

By Mr. Bergen:

Q. If there were no dike at all at Manasquan Inlet would there be any danger whatsoever of that inlet actually closing?

A. Not for any length of time; it might for a very short time close up.

By the Court:

Q. For a season?

A. No, ordinarily there is so much fresh water coming in to Manasquan River that it must find an outlet; it is different from Shark River.

Q. The amount of water coming into Shark River is small, and if that river closes there is no accumulation of water behind it to open it. In the case of the Manasquan River, if the inlet is closed and there is no way for the water to get out, the water fills up until it breaks out; I have never known that inlet to be closed up any length of time.

By the Court:

Q. The body of water is so much larger than Shark River?

A. Yes.

Cross-examination.

By Mr. Carton:

Q. Have you ever known or heard of the Manasquan Inlet being closed up for as long as two or three months and in one instance a whole summer?

A. No, I have not.

Court: Totally closed?

Mr. Carton: Yes.

Witness: It has been closed for a short time, but I have no knowledge of its having been closed for the whole summer.

Q. What do you mean by it would break out quicker than the Shark River Inlet would?

A. Because the river is larger, and the body of water up there is so much greater at Manasquan; there is a large amount of water coming in all the time in the Manasquan River, fresh water supply, and if you closed up the inlet, it has got to fill up until it eventually breaks through.

Q. And it has to find its weakest point to get out?

A. Yes.

Q. Assuming that one of the freaks of the storm that closed it up, was to build up a big sand bank at the mouth of the river, and there was this great body of water in the river that had to find a way out, might it not find its way out north of the present dike?

A. If it built up higher than the present beach, which I think is very improbable, then it might.

Q. That is a possibility, is it not?

A. No, I don't think it is.

Q. Haven't you known the inlet at Shark River to be built up with sand eight or ten feet high at times?

A. No, I have not.

Q. The normal inlet?

A. I have seen it often; I have never seen a time that that beach was more than a foot above ordinary high water; it looks high at low water, but it is not very high as a matter of fact.

Q. Isn't it possible that if the Manasquan River was closed, the natural inlet entirely closed, and was kept closed for some days, that the storm might pile up the sand at the normal outlet of the river?

A. I should consider it very improbable that there would not be some point at that inlet that it was low enough to break through. I have no experience in all the time that I have known that inlet, of any long period that that remained closed.

Q. And you think the natural point for it to break through would be the normal inlet and not a point to the north of it? Is that a fact, if it were closed up for any considerable length of time, that the most likely place where it would break out would be the normal inlet, instead of some other point either north or south?

A. It would break out somewhere between Blodgett's pavilion and the present jetty.

Q. Notwithstanding the fact that the tendency of these inlets is to shift to the north?

A. You must remember that it has taken a great many years for that beach to grow to its present height north; how can you conceive that down at the inlet where it is now it can grow in two or three months to be higher where those beach lots are; it doesn't seem to me that is reasonable.

Q. I ask you how it is that the Avon Beach which had grown there for a number of years—that the inlet cut through there at Shark River to the north for 100 feet?

A. I don't see what that has to do with it.

Q. That was the natural effect on Shark River, where the tide isn't near as great?

A. What was?

Q. That it cut through this great bank of sand to the north of the inlet, that had been built up there for years; it did it at Shark River?

A. When? I don't know when it did.

Q. Isn't that what you are spending $100,000 there for?

A. You have an idea it makes a stone bridge there; it doesn't do that.

Q. I haven't anything of the kind.

A. That seems to be your idea. I cannot understand what you say on any other basis.

Court: Repeat the question.

Q. You say the beach at Shark River was built up north of the normal outlet, was it not, but the inlet shifted north on the Avon side?

A. Yes.

Q. And had built up there to a considerable height and of some permanency?

A. Yes, quite a height.

Q. And the fact is that when the old dike at Shark River broke, the inlet cut that all out and shifted it all north to the point of the Avon boardwalk?

A. It did it by moving north progressively, cutting that end of the beach and moving north progressively, but it didn't do it in the way you said.

By the Court:

Q. How long did that progression take?

A. The whole movement until it got up to the bulkhead at Avon was about a year.

Q. Hasn't it been your experience that when the normal inlet fills up then it remains filled and holds the water back until the inlet shifts so far north that it expends itself or dies out?

A. Yes, it possibly does that; then the rational thing has been to spend a little bit of money and cut a new channel through; that would be possible down here, and much cheaper than to rebuild that bulkhead.

Q. And that is what they did at all these inlets on numerous occasions?

A. Yes, and it is the cheapest thing to do.

Q. And that is because the force of the water in the river didn't break out at the normal place?

A. That is true at Shark River; I don't think it

has been often done here at Manasquan, but if it was done, it was done to hurry up the process and make an opening; usually the fishermen want to get their boats out.

Mr. Durand: We offer in evidence the answers in the case in the Court of Chancery of Lydia S. Hinchman, in the case of the American Timber Company, bill filed October 26, 1911, answers filed by the two defendants, the American Timber Company and Henry H. Yard.

Court: They can be received in evidence, and copies will be used instead of the originals.

(Marked Exhibit C17.)

Mr. Durand: We also offer in evidence two notes for $3500, each made by Henry H. Yard, which read as follows:

"$3500.00 Philadelphia, October 1st, 1904

One year after date I promise to pay to the order of Joseph M. Gazzam .....

Thirty-five hundred ..... Dollars with interest

At Room 707 Bailey Building, 1218 Chestnut St., Philada., Pa.

Without defalcation, for value received.

Henry H. Yard."

(Endorsement)

"Pay to the order of Lydia S. Hinchman without recourse.

Joseph M. Gazzam."

"3500.00 Philadelphia, October 1st, 1904

One year after date I promise to pay to the order of A. O. Granger .....

Thirty-five hundred #/100 ..... Dollars with int. at Room 707 Bailey Building, 1218 Chestnut St., Philada., Pa.
Without defalcation, for value received.
Henry H. Yard."
(Endorsement)
"A. O. Granger."

We also offer in evidence note of Henry H. Yard for $22,452.13, which reads as follows:
"$22,452.13 Phila., Octr. 31st, 1904
One year after date I promise to pay to the Order of C. S. Hinchman .....
Twenty-two thousand four hundred & fifty-two 13-100 Dollars.
for Value received, without Defalcation, with interest Along with the foregoing obligation I have delivered Deeds for Certain lots at Belmar & Como and West Virginia as per list attached, showing redemption amounts and 200 shs. Spg. Lake Beach Impt. Co. & 25 shs. Sea Girt Land Impt. Co. as collateral security for the prompt payment, at maturity, of this and of any other liability or liabilities of the undersigned, due or to become due, or of any that may be hereafter contracted with the holder of this Promissory Note; which collaterals, either whole or any part thereof, I hereby authorize and empower the holder of this Promissory Note (provided the same or any other liability of the undersigned, as before described, be not paid at maturity) to sell at public or private sale at any time or times thereafter, without further reference or notice to me, and with the right on the part of the holder of this obligation to become the purchaser, at such sale or sales, of the whole or any part of said collaterals (freed and discharged of any equity of redemption), and to

transfer, assign and deliver up the same; and, after deducting all legal and other costs, attorney fees and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said holder shall deem proper, returning the overplus, if any, to me; and should any deficiency occur, I further promise and agree to pay the same to the holder hereof, on demand.

Payable at 902 Provident Bldg., Phila., Pa.

No. Due Octr. 31, 1905 Henry H. Yard."

(Endorsement)

"$1,347.13 Int. at 6% Novr. 1, 1905 to Oct. 31/05 & extended for 1 yr.

CSH

Credits for sales of any coll to be made hereon as soon as Taxes are paid up on all the collateral property by H. H. Yard, & receipts furnished furnished to sd. C. S. H. to show payments.

C. S. Hinchman.

H. H. Yard."

We also offer in evidence a statement of the collateral accompanying the note for $22,452.13, which reads as follows:

"PROPOSITION FOR RELEASES ON SETTLEMENT BETWEEN H. H. YARD AND C. S. HINCHMAN, OCTOBER 19, 1904.

Notes to be given by H. H. Yard and Collateral to be released within one year from date upon the payment of the following amounts:

Belmar Lots 2143-2146	$1,200.
Como Lot 2, Block 2	1,000.
25 shares of stock of Sea Girt Land Impt. Co. at $30 p sh.	750.
200 Shares Stock of Spring Lake Beach Impt. Co. at $10 p s	2,000.

Lands in Hardy County, West Va.	4,500.
Lands at Como near Railroad Station	1,500.
Belmar Lots 2952-2959	3,000.
Como tract, Gillin	3,000.
Como tract, Muhr, North of Lake and Lot 9 Block 3	4,000.
	$20,950.

Agreed upon)
C. S. Hinchman)
H. H. Yard)

October 19, 1904
Phila., Pa.

Notes will be according to % checked by H. H. Y. & rechecked by S. L. G. for H. H. Y. & W. C. A. for C. S. H. (amtg. to $22,452.13 as of Octr. 31, 1904)"

We also offer in evidence the record in the attachment suit in the Monmouth County Circuit Court of Lydia S. Hinchman against Henry H. Yard, and particularly the plea filed by the defendant Yard, which is a plea of general issue.

We have some papers in the two cases in the Court of Chancery, which are here from the Clerk's office. I have copies of them which be furnished in place of the originals.

Court: Any formal matters, such as exhibits which have been marked for identification, but which have not been formally offered, will be considered in the case.

Mr. Durand: It will be admitted, Mr. Bergen, that the "S. L. G." referred to in the collateral memorandum is the Samuel L. Gillin?

Mr. Bergen: Yes.

OPINION.

IN CHANCERY OF NEW JERSEY.

Between
SEACOAST REAL ESTATE COMPANY,
Complainant,
and
AMERICAN TIMBER COMPANY, ET ALS,
Defendants.

Submitted June 5, 1918.
Decided July 10, 1918.

Messrs. Durand, Ivins & Carton, and Mr. John D. McMullin (of the Philadelphia Bar) for complainant.

Mr. Martin V. Bergen, Jr., and Mr. DeWitt Robinson (of the Philadelphia Bar) for defendants.

FOSTER, V. C.

Complainant's bill is filed to foreclose, as a mortgage, a conveyance made by the defendant, American Timber Company, to Lydia S. Hinchman, under date of May 31, 1912. On June 22, 1914, Lydia S. Hinchman and Charles S. Hinchman, her husband, assigned this conveyance, or mortgage, and the indebtedness secured thereby, to complainant. These deeds were given to secure the payment of the indebtedness owing by one Henry H. Yard to both Mr. and Mrs. Hinchman.

The premises in question consist of two tracts of land at Manasquan Beach in Monmouth County with an ocean frontage of about 3000 feet, and the lands extend southerly along the beach from a point about five hundred feet north of the Brielle Road to the Manasquan River.

At the time the deed from the American Timber Company to Mrs. Hinchman was made and delivered, Henry H. Yard and wife gave to Mrs. Hinchman a quit claim deed dated June 1, 1912, for their interest in the premises.

The defendants are the American Timber Company of which Henry H. Yard, now deceased, was president, and his widow and minor son. The complainant, of which Mr. Hinchman, now deceased, was president, is practically another name for Charles S. Hinchman and the members of his family, and the defendant corporation is only another name for Mr. Yard and members of his family.

The indebtedness which these deeds were intended to secure, complainant claims now amounts to $37818.90, and arises out of the following transactions:

In 1901 Mr. Yard borrowed from Joseph M. Gazzam and A. O. Granger certain sums of money and gave to each of them his notes for $3000. On October 1, 1904, the indebtedness being unpaid, Yard gave to Gazzam and Granger his notes for $3500, each payable in one year with interest. After maturity these two notes were purchased by Mrs. Hinchman and later were assigned by her to complainant. The security which Gazzam and Granger held for their notes was the first tract of land in question, which the American Timber Company had conveyed to Gazzam and Granger and which they in turn conveyed to Mrs. Hinchman when they sold her the

notes, and which she transferred, with other security, to complainant when she assigned the notes.

The indebtedness of Mr. Yard to Mr. Hinchman is entirely distinct from the indebtedness due on the notes bought by his wife, and is based upon a note dated October 31, 1904, payable to Hinchman's order for $22,452.12. This note was given as a result of a settlement between Yard and Hinchman at this date; and attached to this note is a statement, dated October 19, 1904, showing the collateral held by Hinchman for its payment.

Since the delivery of the deeds in 1912 Mr. and Mrs. Hinchman and complainant have been in actual possession of the premises and have rented portions thereof, and Mr. Hinchman has had the entire control and management of the property and has collected a gross annual income therefrom of about $5000, and complainant now values the property as being worth about $75,000.

The parties recognize that the Hinchmans and the complainant have since 1912 been occupying the position of mortgages in possession, but defendants dispute the amount claimed to be due complainant, on the following grounds:—

1. That complainant has not given proper credit for the amount realized from the sale of some of the collateral shown on the above-mentioned statement.

2. That the amount claimed to be due on the notes to Gazzam and Granger is usurious.

3. That the amount charged for repairs to the mortgaged premises is improper and illegal.

Considering these objections in the order stated, it appears that the first objection is based upon the following circumstances:

In the statement of collateral prepared by Mr. Yard and Mr. Hinchman under date of October 19, 1904, appears, among other property, the following:

Belmar Lots, 2952-59	$3000.00

In the account attached to the replication, complainant makes this statement:

12/31/08 Proceeds 2952/7 Belmar	$2297.51
Less Brown mtg. & Int. for 9/15/04	1402.30
	$895.21

The Brown mortgage referred to was a mortgage given by Harry Tatu and wife to Peter and Anthony Brown on October 15, 1900, covering about ten acres of land at Belmar, and not part of the lands involved in this action. Subsequently Tatu and wife conveyed this property to the American Timber Company subject to this mortgage, and on January 27, 1902, the American Timber Company, as part of the collateral for Yard's indebtedness, conveyed to Charles S. Hinchman out of this tract eight lots, Nos. 2952-2959, both inclusive, subject to the Brown mortgage.

On September 14, 1904, the Browns assigned this mortgage to C. Russell Hinchman, the son of Charles S. Hinchman, for the consideration of $1115.00. On September 9, 1904, Charles S. Hinchman sold lots Nos. 2958 and 2959 for $1200, and on December 5, 1908, he sold the remaining lots, Nos. 2952-57, for $2500. Releases of the Brown mortgage were given by C. Russell Hinchman for all these lots for the nominal consideration of one dollar in each case.

The total amount received from the sale of the eight lots by Mr. Hinchman was $3700, from which he paid taxes, commission and a recording fee amounting to $232.49, leaving a net balance in Hinchman's hands of $3467.51, and of this sum complainant gives defendants a credit of only $895.21.

Complainant seeks to justify its position by claiming that Lots Nos. 2958 and 2959 had evidently been included in the statement of collateral through mistake; that the sale had been made and credit therefor given to Mr. Yard's account six months before the settlement was reached between Yard and Hinchman. Complainant contends there is no proof to show that the proceeds of this sale were not properly credited as it claims, but the answer is that there is no proof to show that it was, and the burden is upon complainant to show how it credited or disposed of the proceeds of the sale of any of the collateral held by Mr. Hinchman or itself as security for Yard's debt. The deed for these two lots was executed and acknowledged by Mr. Hinchman on September 19th, 1904, just one month before the date of the collateral statement; and I am unable to find anything in the record to support the claim that the proceeds of the sale had been previously credited on Yard's indebtedness, or that the collateral statement erroneously included these two lots; and my conclusion is that defendants should be credited with $1170, the net amount realized by Mr. Hinchman from the sale of these lots, with interest.

Complainant further insists it is entitled to charge against the proceeds of the sale of the remaining six lots, Nos. 2952-2957, the amount due on the Brown mortgage.

It appears that C. Russell Hinchman actually bought and held the Brown mortgage for his father. It further appears that for reasons satisfactory to Mr. Hinchman, the son released the lien of this mortgage from the collateral lots as they were sold for a merely nominal consideration of one dollar. Complainant claims Mr. Hinchman was obliged to pur-

chase the Brown mortgage to protect his collateral, and prevent its foreclosure, and it is clear that he did not buy it for the Yard account, but apparently held it as an investment and did not charge it against nor connect it with the Yard account until 1912—eight years after he bought it and four years after the last of the eight lots were sold. At the time of the sale of the lots, Hinchman credited the entire proceeds thereof in his books and did not charge the principal and interest of the mortgage to defendants until December, 1912. It would seem that Mr. Hinchman in releasing the lots for a nominal consideration thought he had ample security in the balance of the Tatu property, for the amount due on the Brown mortgage; and in this he was probably correct. Whether he was or not, defendants are entitled to have either the entire net proceeds of the sale of these eight lots credited on the amount now claimed to be due, or they are entitled to have the Brown mortgage surrendered to them for cancellation. If complainant desires to hold the Brown mortgage as an investment, which it is entitled to do, because the transaction is entirely independent of the matters involved in this controversy, then defendants are entitled to be credited, on the amount now claimed to be due, with the net proceeds of the sale of the Belmar lots amounting to $3467.51, instead of the credit of $895.21.

The defendants' next objection, that the Gazzam and Granger notes are usurious, is based on the claim that between October 9, 1901, and December 11, 1901, Mr. Yard had borrowed sums of money from both Gazzam and Granger; that the amounts he actually borrowed from each of them was $2400, and that as evidence of his indebtedness he gave each of them four notes for sums aggregating $3000.

Apparently Yard did not pay either the principal or interest of the notes when due and on October 1, 1904, he gave Gazzam and Granger the notes in question for $3500 each, payable in one year; the balance of the interest due on the old notes of $21.26 was paid by Yard to Gazzam and Granger.

It appears from the testimony of Wm. S. Wallace, a member of the Philadelphia Bar, and who for years acted as the attorney of Mr. Gazzam, that he is personally familiar with these transactions, and he states that Gazzam and Granger agreed to loan Yard $4800; that each of them loaned him $2400, and that Yard gave each of them his notes for $3000, the difference between the amounts of the loans and the amount of the notes representing the bonus Yard had agreed to pay them for the accommodation. That in 1904 when Yard was pressed for payment he agreed to give Gazzam and Granger each his note for $3521.26, representing the principal of, and the interest due on, the old notes. Later he gave his note dated October 1, 1904, to each of them for $3500, and paid $21.26 to each of them in cash. Wallace is corroborated by a copy of his letter to Gazzam's nephew in which he explains the transactions between Yard and Gazzam and Granger in connection with negotiations, then pending, for the sale of these notes to Mrs. Hinchman. He is further corroborated by the entries on the stubs in Mr. Gazzam's check book, and the proof is convincing that the amount actually owing by Yard to both Gazzam and Granger, including interest, on October 1, 1904, the date of the notes in suit, and which were purchased in the name of Mrs. Hinchman after maturity, was $5,592.28, and not $7,000, as complainant claims.

The pleadings and proofs show that notes were

made and were payable in Pennsylvania, under the Pennsylvania Act on Usury and Negotiable Instruments (P. L. 1901, p. 208, sec. 52 & 58). Only the amount actually loaned on them, with legal interest, can be recovered, and the law of Pennsylvania governs such a situation. Trust Co. v. Electric Co., 57 Eq. 42.

Complainant contends, however, that if the notes are usurious, this defence has been waived, and that defendants are estopped from setting up such defence in this action. This contention is based on the fact that in other proceedings instituted by Mrs. Hinchman in 1911 (and not yet tried), to collect the amount due on these notes, Yard and the American Timber Co. appeared and filed pleadings therein, but they did not, in any of these actions, set up the defence of usury against the amount claimed to be due; and in consequence, by their failure so to do, it is claimed that the defendants herein are estopped from doing so. And it is further claimed that it is doubtful if the American Timber Co., as a surety, can, under P. L. 1902, p. 459 (C. S. 5706), which forbids a corporation to set up usury as a defence to an obligation, set up the defence of usury now. All the defendants have pleaded usury in this case, —the American Timber Company pleading it especially as surety—which it may do, 39 Cyc. 1074 —and if necessary, the pleadings filed in the other actions could, on proper application, be amended to permit the defendants therein to set up such defence. Hill v. Colie, 25 Eq., 469; Corning v. Ludlum, 28 Eq., 398. The right of the Timber Co. to raise the defence is not affected by the act of 1902, as this statute has been held to be limited in its application not to the ordinary debts of a corporation, but to obligations of a corporation which have been bought

in the open market and have gone before the public for investment. Lembeck v. Storage Co., 70 Eq. 757, p. 761; Mazarin v. Building Co., 80 L. 35. As the proofs show that neither Mrs. Hinchman nor complainant paid the face value of the notes, and as they also show that the transactions with respect to them, between Yard and Gazzam and Granger, were usurious, all that complainant can be permitted to recover thereon is the amount actually loaned on the notes, with lawful interest.

The last objection to complainant's claim questions the necessity for and the legality of the charges made by complainant for repairs to the mortgaged premises.

Defendants claim the repairs were unnecessary; were extravagantly made and were actually improvements, and not repairs; and that they were made for the present and future permanent improvement and development of the property, with the intent on the part of Mr. Hinchman to improve defendants out of their property by making the amount they would be required to pay, in order to redeem, so large that defendants would be unable to pay it.

About one-half of complainant's total claim, or $18,986.16, represents the cost of the repairs which complainant claims it was necessary to have made, in order to protect and preserve the mortgaged premises, and that these repairs were absolutely necessary because of the following circumstances:

About 1882 the federal government completed the construction of a stone crib at the southeasterly end of the mortgaged premises; this crib extended from the line of the beach into the ocean for a distance of about 100 feet and extended inland for about 200 feet; in connection therewith the government also constructed a dike extending inland from the wester-

ly end of the crib for a distance of about 1800 feet to Stump Point, the highest and nearest point of firm land on what is called the Island of Sedges. The government's purpose in building the crib and dike was to establish a permanent channel for the Manasquan River. Prior to the construction of the crib and dike the river had no fixed outlet to the ocean; the action of the elements caused the outlet to shift from time to time towards the north; the sand would be washed and blown away; at times the erosion on the beach would be very pronounced; sometimes the greater part of the beach was washed away by the shifting of the inlet as much as half a mile north of its present location. Before the government improvement was made there was no building of any kind on the beach.

As a result of the construction of the crib and dike, the inlet was retained in its present location; the beach became wider and ten or more feet higher; the creeks or bodies of water back of the beach became smaller and the marsh land firmer; all erosion ceased; a street was built nearly the entire length of the beach; water mains were laid therein by the municipality; about 200 bungalows have now been built on the beach producing an annual rental of about $5000. And complainant claims that under Mr. Hinchman's management the rental value of the lands has increased from $10 per lot in 1911 to $50 a lot now; and that the value of the property has increased from $25,000 in 1912 to $75,000 now.

Under the deed from defendant, Timber Co., to Mrs. Hinchman, she entered into possession of the property in 1912, and from that time to the present the property has been under the sole charge of Mr. Hinchman and complainant. For some time prior to 1912 the dike, which was then about thirty years

old, has been getting out of repair; about half of the plank sheathing had broken or rotted away, and some of the piling were gone and some of the stringers were rotten. Some of the stone rip-rap that lay in front of the piling had been allowed to drop down by the water scouring the sand from under it. The government had not, and apparently would not, make any repairs; the crib at the mouth of the inlet adjoining the beach was, and is, in fairly good condition. As a result of the changed condition of the dike the waters of the river got behind it and formed large sized pools or lagoons at times—some of them more than seventy-five feet in width, and washed or scoured some sand away from part of the beach adjoining the crib. Mr. Hinchman did nothing to remedy this condition until the summer of 1914, and then he called on one Howland, a practical bulkhead builder, and after they had inspected the situation and talked the matter over, and without consulting defendants, he gave Howland an order to repair the dike at a cost of about $11,970, without any plans, specifications or written contract. Mr. Hinchman told Howland's son, who actually did the work, that the purpose in repairing the dike was to fill in behind the dike with sand level with the plank on the dike. In 1913 Hinchman told the witness Haberle that he intended to fill in on the northwest side of the dike and put a boulevard there parallel with the dike, and while Howland was at work on the dike, Mr. Hinchman told the witness, Mount, that he was going to improve the river front and put a boulevard in there and lay out some lots and gave Mount an option to purchase one of the lots. Within a few months after Howland had finished his work, the severe storms of the winter practically demolished all of it and left the dike in almost the same condition it was in during the early part of 1914.

In 1915 Hinchman had the dike repaired again and employed Mr. Rogers, an engineer, to advise about the work. Rogers examined the dike in the fall of 1915 and found that in the central portion of it, for a distance of probably 150 feet in length, the piling and sheathing had been taken out by the action of the tides, and a contract was given on his specifications to the Logan Construction Company for $6682, to rebuild, repair and reinforce about 1000 feet of the dike; and an additional contract was also made for $490 for repairs to the crib. In connection with their talk about repairing the dike, Hinchman gave Rogers the idea that he contemplated filling in the swamp or meadow land out to the dike, and Rogers, at Hinchman's request, prepared maps in January, 1915, showing the meadow lands north of the dike and west of the beach strip laid out in streets and lots, and from what Hinchman told him, Rogers understood that there was a general scheme to deepen the creek and fill in north of the dike by pumping sand from the bars in the river on the northerly tide of the dike.

The repairs made to the dike in 1915 are still very largely intact although some part of the piling has been drawn out of place and is leaning out towards the river, and the scouring of sand and the formation of the pools back of the dike have almost entirely ceased.

Practically all the parties agree that the crib and dike have kept the inlet in a permanent location; most of them agree that it is probably necessary that the crib and the dike, or some substitute for the dike, should be maintained in order to prevent the tide of the river from reaching the beach and from washing away the sand that has formed back of the crib or dike, but they greatly differ as to the methods to

be adopted and the expenditures that would be required for such purposes.

Complainant and its witnesses, with the exception of Mr. Oram, who was the engineer of, and superintended the repairs made by, the Logan Construction Company in 1915, all claim that the repairs were necessary and that their cost was reasonable. Mr. Oram states that the work necessary to preserve the property could have been done for about $3,000 by building a spur dam, but he did not inform Mr. Hinchman or Mr. Rogers of this, because there was more profit in it for his company to do the work as Hinchman and Rogers outlined it, and because the spur dam would not answer the purpose Mr. Hinchman told him he had in mind in doing the work, which was to pump in sand behind the present bulkhead and fill it up; and the work his company did was not to preserve the property, but to fill in with sand and carry out a further development scheme. The engineers of defendants claim that scarcely any repairs were required to be made to the dike for the purpose of protecting the property; they agree with Oram that if protection and not development had been the object in doing the work, then the total cost of the same would not exceed two or three thousand dollars.

It further appears that whatever scheme of improvement or development was contemplated, nothing further had been done to carry it out.

It is admitted that at the time these expenditures were made in 1914 and 1915, Mr. Hinchman knew that he was simply a mortgagee in possession, and that he did not make the repairs, or improvements, under the mistaken belief that he was the absolute owner in fee.

The law applicable to the present situation is well

settled and the principle adopted by our courts is, that a mortgagee in possession has the authority and is under the duty to keep the premises in necessary repair, and is entitled to be repaid any disbursements made for the protection or preservation of the property. In Clark & Smith v. Smith, et al, 1 Eq. 121, at p. 139, Chancellor Vroom remarked that "the language of the books is 'necessary repairs', and this language has been construed strictly." In Vanderhaize v. Hugues, 13 Eq. 410, Chancellor Green held that credit should be given the grantee for both necessary repairs and lasting improvements, but this extension of the principle was made, as Mr. Justice Dixon points out in delivering the opinion of the Court of Errors and Appeals in Freiknecht v. Meyer, 39 Eq. 551, at p. 562, on the inference that all parties considered the grantee to be the absolute owner, and that as such he had made the lasting improvement. And in this latter case, where complainant sought the redemption of the mortgaged premises, it was held, that when the grantee under the mistaken belief that he was the absolute owner of the property, made permanent improvements thereto, complainant in order to redeem must pay the mortgagee the value of the improvements, applying the maxim that one who seeks equity must do equity. All the authorities that have come to my notice in cases where the mortgagee is the complainant, limit his right to reimbursement to the money expended for necessary repairs made for the protection or preservation of the property. Where allowance has been granted to a mortgagee as complainant for permanent improvements, it has been based on the fact that such improvements had been made under a mistaken belief of absolute ownership on the part of the mortgagee; or it has been allowed in cases

where the mortgagor as complainant sought to redeem and attempted to appropriate the benefit of the mortgagee's expenditures without compensation.

The principle that must control the present situation is stated in the opinion of the Court of Errors and Appeals in Laible v. Ferry, 32 Eq. 791, at p. 801, where it is held that,

> "It is perfectly well settled that where one knowingly makes permanent improvements upon the lands of another, without the consent or fault of the latter, he cannot, as a complainant in equity, obtain reimbursement for such expenses, even to the value of the benefit conferred upon the land owner."

The facts in this case bring it within the range of this principle. Complainant when he made his expenditures in 1914 knew that he was not the owner of the premises, but only the mortgagee in possession. Assuming some repairs to the dike were necessary, the danger at the time, of injury to the property and mortgage security was neither imminent nor impending. The expenditures were made without notice to the owners and without their knowledge, and these expenditures were made not merely for repairs but as a part of a scheme to improve and develop the property.

At the time the expenditures were made in 1914, there was not much more than $15,000 due on the mortgage, which was past due and which could have been foreclosed with little delay at any time. The Hinchmans had possession of the property from 1912 but made no repairs thereon until 1914. If the dike was out of repair in 1912, as they claim, then they neglected it for nearly two years. At the time these expenditures were made the property is esti-

mated to have been worth at least $50,000—over three times the amount due on the mortgage; the net annual income from the property was then about $4,000, and Mrs. Hinchman and complainant were in position to apply it at any time to the reduction of the amount due on the mortgage, and such reduction would have resulted in paying off the greater part of the mortgage debt by the time the expenditures now claimed were made.

The expenditure of over $11,000 in 1914 was wasted because the work it paid for was either badly designed or improperly executed, or both, as most of it did not last a year; and neither the property nor any of the defendants were in any way benefited thereby. The expenditure of nearly $7,000 on the dike in 1915 may be said to have been of some value to protecting a part of the property and the work done then or the greater part of it is still in a fair condition and is a benefit to the property.

This work of 1915 was done under expert advice and was fairly thought to be necessary, and I believe these or some other repairs were necessary, at that time. It is true that the proofs show that some other method of repair could have been adopted, the probable cost of which would not have exceeded $2000 or $3000. This proof, however, is largely a matter of speculation and estimate on the part of defendants' engineers. The other methods of repair suggested by them might or might not have proven as effective as the one Mr. Hinchman's engineer advised him to adopt, and these other methods of repair might have been built for the estimated amounts, and they might have cost much more. The whole subject is largely based on speculation and estimate of the most general character and is too uncertain to justify me in holding that the cost of the necessary repairs made in 1915 was excessive.

On all the facts I find that Mr. Hinchman was not justified in making the expenditures for repairs and improvements to the dike which he did in 1914; that he was justified in making the expenditures he did in 1915 in making repairs that were necessary to both the dike and the crib, and while these expenditures for 1915 are considerably in excess of defendants' estimate of the cost of such repairs, still I am satisfied they were honestly made in the belief that they were necessary to protect the property and were made under expert advice and for the repair work only which Mr. Hinchman's engineer had designed as necessary for the proper repair of the crib and dike in order to protect the property.

A decree will be advised in accordance with the views herein expressed.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between SEACOAST *REAL* ESTATE COMPANY, *Complainant,* and AMERICAN TIMBER COMPANY, ET ALS, *Defendants.*	On Bill, &c. Final Decree.

This cause coming on to be heard on bill and answer and counter-claim, and general and special replication thereto, in the presence of John D. McMullin and Durand, Ivins & Carton, of counsel with the complainant, and Martin V. Bergen, and with him DeWitt C. Robinson, of the Philadelphia Bar, of counsel with the defendants, and the pleadings having been read and the depositions of witnesses and proofs having been heard, and the arguments of counsel having also been heard, and the Court having duly considered the said pleadings, proofs and arguments.

And it appearing that the deed from the American Timber Company to Lydia S. Hinchman, bearing date on the 31st day of May, 1912, and recorded in the Clerk's office of Monmouth County in Book 934 of Deeds, page 342 &c., is a defeasible deed and was given to secure the payment of the amount due the

said Lydia S. Hinchman on two certain promissory notes made by one Henry H. Yard to Joseph M. Gazzam and A. O. Granger, dated October 1, 1904, each for $3500, payable one year after the date thereof, and assigned by said Gazzam and Granger unto the said Lydia S. Hinchman, also secured by deeds from the said American Timber Company unto said Joseph M. Gazzam dated October 18, 1901, recorded in said Clerk's office in Book 678 of Deeds, page 306 &c., and from said Gazzam to said Lydia S. Hinchman dated June 1, 1910, recorded in said Clerk's office in Book 914 of Deeds, page 128 &c., and the payment of the amount due the said Charles S. Hinchman of a certain promissory note made by said Henry H. Yard to said Charles S. Hinchman dated October 31, 1904 for $22452.13, payable one year after the date thereof, and which deed and indebtedness secured thereby were assigned to the complainant by deed from the said Lydia S. Hinchman and Charles S. Hinchman her husband, to the complainant, bearing date June 22, 1914, and recorded in said Clerk's office in Book 978 of Deeds, pages 458 &c.

And it further appearing that the indebtedness of the said Henry H. Yard to the said Charles S. Hinchman was further secured by a conveyance to him of certain lands at Belmar, Monmouth County, New Jersey, and the transfer of twenty-five shares of the capital stock of the Sea Girt Land Improvement Company, and two hundred shares of the capital stock of the Spring Lake Beach Improvement Company.

And it further appearing that the said Gazzam and Granger loaned and advanced to said Henry H. Yard on the said two notes of $3500 each, only the sum of $4800.

And the Court being of the opinion that lots 2958 and 2959 at Belmar were part of the lands held by said Charles S. Hinchman as security for the payment of his said indebtedness secured by complainant's deed and the proceeds received by him from the sale of said lots, are a credit on said indebtedness, and the mortgage given by Harry Tatu to Peter and Anthony Brown, dated October 15, 1900, should be surrendered for cancellation to the defendant, American Timber Company.

And the Court being also of the opinion that the complainant is entitled to recover on said Gazzam and Granger notes only the sum of $4800 the amount actually loaned and advanced by said Gazzam and Granger to said Yard, together with lawful interest thereon.

And the Court being also of the opinion that the said Charles S. Hinchman was not justified in making the expenditures for repairs and improvements to the dyke and crib in 1914, and the complainant is not entitled to recover for the same; and the Court being of the opinion that said Hinchman was justified in making the expenditures made in the year 1915 for the repairs that were necessary to both the dyke and the crib, and that the complainant is entitled to recover for the said expenditures made in the year 1915, together with lawful interest thereon.

And it further appearing that said Hinchman and the complainant have since the execution and delivery of deed been in the possession of said premises and received the rents and income therefrom and the complainant has accounted for the same to December 6, 1918, showing a balance due complainant as of that date of $12594.27.

And it further appearing that in the management

of said premises the complainant has procured certain maps and surveys in relation to said premises the cost of which has been charged against defendants in said accounting.

And it further appearing that the complainant is entitled to the relief sought and prayed for in its bill of complaint and that there is due to the complainant on its said deed or indenture of mortgage the said sum of $12594.27 with interest thereon from December 6, 1918.

And that the complainant is entitled to have the said shares of stock in the Spring Lake Beach Improvement Company and Sea Girt Land Improvement Company, and the said mortgaged premises sold to pay and satisfy the said sum due the complainant, together with interest thereon and the costs of this suit, and that the said mortgaged premises comprising two separate parcels should be sold separately, and no cause being shown or appearing to the contrary.

It is thereupon on this sixteenth day of January, 1919, by EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor does by virtue of the power and authority of this Court, hereby order, adjudge and decree, that the said deed from the American Timber Company to Lydia S. Hinchman bearing date May 31, 1912, and recorded in Monmouth County Clerk's Office in Book 934 of Deeds, page 342 &c., was given to secure the indebtedness of Henry H. Yard to the said Lydia S. Hinchman on two certain promissory notes made by the said Henry H. Yard to Joseph M. Gazzam and A. O. Granger dated October 1, 1904, for $3500 each, also secured by deeds from said American Timber Company to said Gazzam dated October 1, 1901, and recorded in said

Clerk's office in Book 678 of Deeds, page 306 &c. and from said Gazzam to said Lydia S. Hinchman dated June 1, 1910, recorded in said Clerk's office in Book 914 of Deeds, page 128 &c., and to the said Charles S. Hinchman on a promissory note made by the said Yard to the said Hinchman dated October 31, 1904, for $22452.13, and that the defendants are entitled on said indebtedness to credit for the proceeds received by the said Charles S. Hinchman from the sale of lots 2958 and 2959 at Belmar, and that there was loaned and advanced by the said Gazzam and Granger to the said Yard on said notes of $3500 each only the sum of $4800 and that the complainant is only entitled to recover the said sum of $4800 together with lawful interest thereon, and that the complainant is not entitled to recover for the expenditures for repairs and improvements made to the dyke and crib in the year 1914, but is entitled to recover for the expenditures made by the complainant for the repairs and improvements made to said dyke and crib in the year 1915, and that there is due to the said complainant on its said deed or indenture of mortgage the sum of $12594.27 together with interest thereon from the 6th day of December, 1918, and that the said twenty-five shares of the capital stock of the Sea Girt Land Improvement Company and the two hundred shares of the capital stock of the Spring Lake Beach Improvement Company, and the said mortgaged premises be sold to raise and satisfy the said sum of money due to the said complainant, together with lawful interest thereon as aforesaid with the complainant's cost to be taxed, and that first the said shares of stock be sold and secondly the said mortgaged premises be sold in two separate parcels, and that a writ of fieri facias do issue for that purpose out of this court, directed to Nichol-

as W. Bindseil, one of the Special Masters of this Court, commanding him to make sale, according to law, of the said shares of stock and mortgaged premises, said mortgaged premises to be sold in two separate parcels, and that out of the money arising from such sale he pay to the said complainant, or to its solicitors, it said debt, interest and costs, and in case more money should be raised by the said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court to abide the further order of the Court, unless otherwise previously disposed of by order of the Court, and that the said Sheriff make return without delay of his proceedings by virtue of the said writ.

And it is further ordered, adjudged and decreed that American Timber Company, body corporate, CATHERINE E. YARD and CARL AMMON YARD, the defendants, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this decree.

And it is further ordered, adjudged and decreed that the complainant surrender for cancellation to the defendants, the mortgage given by Harry Tatu to Peter and Anthony Brown, dated October 15, 1900.

And it is further ordered, adjudged and decreed that special allowances as counsel fee of $1000 are hereby made to Durand, Ivins & Carton, of counsel with the complainant, and $1000 to Martin V. Bergen, of counsel with the defendants, and that the sum of $285.88 be allowed complainant for notes of testimony and fees and expenses, and that the sum of $268.02 be allowed defendants for notes of testimony, and that said sums be included in the taxed costs in this cause.

And it is further ordered, adjudged and decreed

that should the said defendants or any of them at any time before the sale of said stock and premises redeem said stock and premises by paying to the complainant or its solicitors the said sum of $12594.-27 together with lawful interest thereon as aforesaid and its taxed costs and counsel fees and the costs on said writ, then and in that event the said complainant shall execute and deliver to said defendant AMERICAN TIMBER COMPANY, a proper deed of conveyance for said lands and deliver possession of said lands to said defendant and transfer to said defendant said shares of stock and deliver to it all maps and surveys of said lands the costs and expenses of which has been included in said accounting and charged therein against defendants.

E. R. WALKER,

C.

Respectfully Advised.
JOHN E. FOSTER, V. C.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between SEACOAST REAL ESTATE COMPANY, *Complainant*, and AMERICAN TIMBER COMPANY, ET ALS, *Defendants.*	On Bill, &c. Notice of Appeal.

The complainant hereby appeals from so much of the final decree made in this court, in the above stated cause, as decrees that the complainant is only entitled to recover the sum of $4800 together with lawful interest thereon on the two promissory notes made by Henry H. Yard to Joseph M. Gazzam and A. O. Granger, dated October 1, 1904, for $3500 each, and that decrees that the complainant is not entitled to recover for the expenditures for repairs and improvements made to the dyke and crib in the year 1914, and decrees that there is only due the complainant on its deed or indenture of mortgage the sum of $12594.27 together with interest thereon from the 6th day of December, 1918, to the Court of Errors and Appeals in the last resort in all causes.

DURAND, IVINS, CARTON,
Solicitors of Complainant.
FRANK DURAND,
Of counsel.

Dated January 21, 1919.

I conceive there is good cause for appeal in the above-stated cause.

FRANK DURAND,
Of counsel with complainant.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
SEACOAST REAL ESTATE COMPANY,
Complainant-Appellant,
and
AMERICAN TIMBER COMPANY, ET ALS,
Defendants-Respondents.

Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Seacoast Real Estate Company, body corporate, the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 16th day of January, 1919, wherein the said Seacoast Real Estate Company was complainant, and the said American Timber Company, body corporate, Catherine E. Yard and Carl Ammon Yard were defendants, in this respect, to wit: that the said decree adjudges that the complainant is only entitled to recover the sum of $4000.00 together with lawful interest thereon on the two promissory notes made by

Henry H. Yard to Joseph M. Gazzam and A. O. Granger, dated October 1, 1904, for $3500 each, and is not entitled to recover for repairs and improvements made to the dyke and crib in the year 1914, and that there is only due the complainant on its deed or indenture of mortgage the sum of $12,594.27, together with interest thereon from the 6th day of December, 1918.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree should have adjudged and decreed that complainant was entitled to recover the sum of $7000.00, together with lawful interest thereon on the said two promissory notes made by Henry H. Yard to Joseph M. Gazzam and A. O. Granger, dated October 1, 1904, for $3500.00 each, and was entitled to recover for the expenditures for repairs and improvements made to the dyke and crib in the year 1914 and should have adjudged and decreed that there is due the complainant on its deed or indenture of mortgage, in addition to the said sum of $12,594.27, the difference between said $4800 and $7000, and the interest thereon, and the expenditures for repairs and improvements made to the dyke and crib in the year 1914, together with interest thereon.

Your petitioner therefore prays that the said decree of the Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

DURAND, IVINS & CARTON,
Solicitors for & of counsel with
Appellant.

ANSWER.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between SEACOAST REAL ESTATE COMPANY, *Complainant-Appellant*, and AMERICAN TIMBER COMPANY, ET ALS., *Defendants-Respondents.*	On Petition of Appeal.

Answer of American Timber Company, Catherine A. Yard and Carl Ammon Yard, by his guardian ad litem, Catharine A. Yard, the defendants and the respondents to the petition of appeal of the above-named appellant:

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was on the 16th day of January, 1919, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said decree, so far as appealed from by the appellant, is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

MARTIN V. BERGEN,
Solicitor for and of counsel with Respondents.

New Jersey Court of Errors and Appeals.

BETWEEN

SEACOAST REAL ESTATE COMPANY,
Complainant-Appellee,

AND

AMERICAN TIMBER COMPANY, CATHARINE A. YARD, CATHARINE A. YARD, Administratrix c. t. a. of the Estate of Henry H. Yard, Deceased, and CATHARINE A. YARD, Guardian of Carl Ammon Yard,
Defendants-Appellants,

AND

LYDIA S. HINCHMAN and CHARLES RUSSELL HINCHMAN, Executors of the Estate of Charles S. Hinchman, Deceased, and LYDIA S. HINCHMAN,
Defendants-Appellees.

STATE OF CASE.

MARTIN V. BERGEN,
DEWITT C. ROBINSON,
(OF THE PENNSYLVANIA BAR),
Counsel for Appellants.
DURAND, IVINS & CARTON,
JOHN D. McMULLIN,
EDMUND WILSON,
Counsel for Appellees.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In Chancery of New Jersey.

Between

SEACOAST REAL ESTATE COMPANY,
Complainant,

and

AMERICAN TIMBER COMPANY, *et als.*
Defendants.

On Bill, &c.

NOTICE OF APPEAL.

The defendants hereby appeal from so much of the final decree made in this court, in the above stated cause, as decrees that the complainant is entitled to recover for the expenditures made by the complainant for the repairs and improvements made to the dike and crib in the year 1915, and decrees that there is due to the complainant on its deed or indenture of mortgage the sum of $12,594.27, together with interest thereon from the sixth day of December, 1918; and decrees that the said mortgaged premises be sold to raise and satisfy the said sum of money due

New Jersey State Library

to the said complainant together with lawful interest thereon as aforesaid with the complainant's costs to be taxed, and which decrees that special allowances as counsel fees of $1,000. are hereby made to Durand, Ivins & Carton of counsel with the complainant, and decrees that the sum of $285.88 be allowed complainant for notes of testimony and fees and expenses and that said sums be included in the taxed costs in this cause; and decrees that should the said defendants or any of them at any time before the sale of said stock and premises redeem said stock and premises by paying to the complainant or its solicitors the said sum of $12,594.27 together with lawful interest thereon as aforesaid and its taxed costs and counsel fees and the costs on said writ, then and in that event the said complainant shall execute and deliver to said defendant American Timber Company, a proper deed of conveyance, and in that the said decree does not order that the defendants' costs, including counsel fee and expenses for notes of testimony should be borne by complainant.

Dated May 29th, 1919.

MARTIN V. BERGEN,
Of Counsel with Defendants.

I conceive that there is good cause for appeal in the above stated cause.

MARTIN V. BERGEN,
Of Counsel with Defendants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

SEACOAST REAL ESTATE COMPANY,
Complainant-Appellee,

and

AMERICAN TIMBER COMPANY, CATHARINE A. YARD, CATHARINE A. YARD, ADMINISTRATRIX C. T. A. OF THE ESTATE OF HENRY H. YARD, DECEASED, AND CATHARINE A. YARD, GUARDIAN OF CARL AMMON YARD,
Defendants-Appellants,

and

LYDIA S. HINCHMAN AND CHARLES RUSSELL HINCHMAN, EXECUTORS OF THE ESTATE OF CHARLES S. HINCHMAN, DECEASED, AND LYDIA S. HINCHMAN,
Defendants-Appellees.

PETITION OF APPEAL.

To the Honorable Court of Errors of Appeals in the Last Resort in all Causes.

The petition of American Timber Company, Catharine A. Yard, Catharine A. Yard, Administratrix c.

t. a. of the Estate of Henry H. Yard, Deceased, and Catharine A. Yard, Guardian of Carl Ammon Yard, the Appellants in the above stated cause, respectfully show:

That your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the sixteenth day of January, 1919, wherein the said Seacoast Real Estate Company was complainant, and the American Timber Company, Catharine A. Yard, Catharine A. Yard, Administratrix c. t. a. of the Estate of Henry H. Yard, Deceased, Catharine A. Yard, Guardian of Carl Ammon Yard, Lydia S. Hinchman and Charles Russell Hinchman, Executors of the Estate of Charles S. Hinchman and Lydia S. Hinchman were defendants, in this respect, to wit: that the said decree adjudges that the complainant is entitled to recover for the expenditures made by the complainant for the repairs and improvements made to the dike and crib in the year 1915, and decrees that there is due to the complainant on its deed or indenture of mortgage the sum of $12,594.27, together with interest thereon from the sixth day of December, 1918; and decrees that the said mortgaged premises be sold to raise and satisfy the said sum of money due to the said complainant together with lawful interest thereon as aforesaid with the complainant's costs to be taxed, and which decrees that special allowances as counsel fees of $1,000. are hereby made to Durand, Ivins & Carton of counsel with the complainant, and

decrees that the sum of $285.88 be allowed complainant for notes of testimony and fees and expenses and that said sums be included in the taxed costs in this cause; and which decrees that should the said defendants or any of them at any time before the sale of said stock and premises redeem said stock and premises by paying to the complainant or its solicitors the said sum of $12,594.27, together with lawful interest thereon as aforesaid and its taxed costs and counsel fees and the costs on said writ, then and in that event the said complainant shall execute and deliver to said defendant, American Timber Company, a proper deed of conveyance; and which decrees that the defendants' costs, including counsel fee and expenses for notes of testimony should be borne by defendants.

And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree should have adjudged and decreed that the complainant was not entitled to recover for the expenditures made by complainant for the repairs and improvements made to the dike and crib in the year 1915, and should have deducted from the amount of $12,594.27 the amount of the expenditures for repairs and improvements to the said dike and crib in 1915, being the sum of $7,016.18, with interest from December 6th, 1918, the whole amounting to $8,335.98, and should have adjudged and decreed that the complainant was not entitled to have its taxed costs paid out of the property and by defendants, but should have ad-

judged and decreed that defendants' taxed costs, including counsel fee and costs of testimony, should be paid by complainant.

Your petitioners therefore pray that the said decree of the Chancellor may be, in the particulars aforesaid, reserved, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

MARTIN V. BERGEN,

10 *Solicitor for and of Counsel with Appellants.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

SEACOAST REAL ESTATE COMPANY,
Complainant-Appellee,

and

AMERICAN TIMBER COMPANY, CATHARINE A. YARD, CATHARINE A. YARD, ADMINISTRATRIX C. T. A. OF THE ESTATE OF HENRY H. YARD, DECEASED, AND CATHARINE A. YARD, GUARDIAN OF CARL AMMON YARD,
Defendants-Appellants,

and

LYDIA S. HINCHMAN AND CHARLES RUSSELL HINCHMAN, EXECUTORS OF THE ESTATE OF CHARLES S. HINCHMAN, DECEASED, AND LYDIA S. HINCHMAN,
Defendants-Appellees.

ANSWER TO PETITION OF APPEAL.

The answer of the above-named appellees or respondents to the petition of appeal of the above-named appellants.

These respondents, not acknowledging all or any of

the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the sixteenth day of January, 1919, made and entered in the Court of Chancery, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said
10 decree, in the respects appealed by the said appellants, is agreeable to equity, and they pray that the same may be, in the respects set forth in the said petition of appeal of the appellants, affirmed, with costs to be adjudged to these respondents.

DURAND, IVINS & CARTON,
Solicitors for and of Counsel with Respondents.

5 JUN.T. 1920 7 3 JUN.T. 1920

Filed after the Oral Argument by leave of Court.

New Jersey Court of Errors and Appeals.

BETWEEN

SEACOAST REAL ESTATE COMPANY,
Body Corporate,
Complainant-Appellant,

AND

AMERICAN TIMBER COMPANY,
Body Corporate, et al.,
Defendants-Appellees.

SUPPLEMENTAL BRIEF FOR COMPLAINANT-APPELLANT.

DURAND, IVINS & CARTON,
JOHN D. McMULLIN,
EDMUND WILSON,
Counsel for Appellant.

MARTIN V. BERGEN, JR.,
DE WITT C. ROBINSON,
(of the Pennsylvania Bar),
Counsel for Appellees.

RED BANK, N. J.
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1920

New Jersey Court of Errors and Appeals.

Between SEACOAST REAL ESTATE COMPANY, Body Corporate, *Complainant-Appellant,* And AMERICAN TIMBER COMPANY, Body Corporate, et al., *Defendants-Appellees.*	On Bill, Etc.

SUPPLEMENTAL BRIEF FOR COMPLAINANT-APPELLANT.

On the argument two matters were raised by members of the court which were not discussed in appellant's brief, and only one of which is referred to even incidentally in brief for appellees. Accordingly it seems proper to file with the court this supplemental memorandum.

I.

May a Mortgagee in Possession Recover Compensation for Repairs Which Were Needed When He Went Into Possession and by the Doing of Which the Premises Were Put in a Better Condition Than When He Went Upon Them?

The Government work was in dilapidation when the Hinchmans took possession. This is clearly

established by the testimony of Pearce, p. 52 and pages following; Clark, page 170 and pages following; Bailey, p. 174 and pages following; Allen, p. 179 and pages following; Brown, p. 194 and pages following; Longstreet, p. 199 and pages following; Moss, p. 211 and pages following; Haberle, p. 223 and pages following. No one of these witnesses describes minutely the condition in May, 1912, when the Hinchmans entered upon the land; nor does any one of them describe with particularity the condition as it was in 1914, when the first repairs were made. They do, however, make it clear that for several years prior to the repairs the condition had grown progressively worse. The openings in the dike increased in number and size, and the inroads of the ocean and river had already begun to destroy the property and in 1914 threatened the inundation of the southerly end of the tract and the ocean front. This, under the clear weight of evidence, was the emergency with which the mortgagee was presented in 1914. It seems a fair inference from the evidence that the danger was more imminent in 1914 (when the repairs were begun) than in 1912, when possession was taken. See especially in this connection description of condition at time repairs were begun, as given by Pearce, pps. 72 and 73. The witness Bailey was asked:

Q. "Do you remember the dike becoming in disrepair prior to 1914?

A. Yes, I have noticed that steadily.

Q. What has been the effect of the increasing condition of the disrepair of washing off the planking?

A. That is it was fast with heavy planks and would wash off, and it would cause the current to cut in back of the dike." See p. 192, at line 20.

This and similar statements made by other witnesses indicate that, going back for a number of

years, the condition was growing steadily worse up to 1914.

To the same general effect was the testimony of Allen, beginning at p. 184 and pages following.

To the same general effect also is the statement of Haberle, who lived on the land in question. He was there in 1914, and during the ten years immediately preceding. The condition became so acute in 1914 that he was obliged to move his house. The menace that made this work necessary was one which became acute in the year 1914. See p. 224 and pages following.

We think the conclusion is inevitable that the dangers from erosion increased as the dike disintegrated, and that as a result there were added elements of peril in 1914 which were not present in 1912.

But even though it should appear that there was no substantial change in the condition in 1914 as compared with that which was present in 1912, yet, if it also appear that the repairs were reasonably necessary to preserve the land from loss and injury, the complainant would be entitled to compensation in the emergency here presented.

This view depends upon the meaning to be ascribed to the words "necessary repairs." The cases in this state which have dealt with this matter are not numerous. They clearly repudiate the English doctrine as to the right of the mortgagee to be compensated for improvements and confine his compensation to necessary repairs.

Clark & Smith v. Smith, 1 N. J. Eq. 121, at p. 136.

Vanderhaise v. Hughes, 13 N. J. Eq. 410.

Freichnecht v. Meyer, 39 N. J. Eq. 551.

Under the rule adopted by the Court of Chancery in this state, no allowance is to be made for lasting improvements unless made by a mortgagee

in possession under the honest belief that he was in fact the owner of the property. Such cases as have arisen do not define with particularity necessary repairs. The broad general rule has merely been applied to particular facts. Surrounding circumstances and details have controlled the conclusion reached in concrete instances.

Shaeffer v. Chambers, 2 Halsted, 548, which followed the Clark case in point of time, lays down this rule:

> "A mortgagee, by taking possession, assumes the duty of treating the property as a *provident owner would treat it; and of using the same diligence to make it productive that a provident owner would use.*"

The rule thus stated is in harmony with what the text books say in this regard.

The word "provident" is thus defined by Webster: "providing for future wants; prudent in preparing for future exigencies; cautious."

It would follow that the provident mortgagee must not only meet present necessities, but must also provide for future emergency.

The cases seem to recognize that the mortgagee is to be compensated whenever his conduct is consistent with what a provident owner would do. He is, however, denied the right to make the estate better at the expense of the mortgagor unless the mortgagor consent. The mortgagor alone may determine whether he will make his estate more valuable by the outlay of more money. Yet, upon the other hand, work done which conserves the convenience and fitness of the property and which protects it from waste and destruction, the mortgagee may be compensated for.

In *Reed v. Reed, 10 Pick. (Mass.) 398,* compensation was allowed where the mortgagee repaired a holding wall and built a new one, notwithstanding that the cost of the work exceeded the amount allowed for rents and profits. This decision was

in part based upon a Massachusetts statute. That statute, however, so far as it relates to the matter before us, was identical with the common law of New Jersey.

In *Saunders v. Frost, 5 Pick. (Mass.) 259*, the complainant sought to charge as repairs the expense incurred in building an aqueduct. Recovery was not allowed, since it appeared that the complainant failed to show that *without the aqueduct the mortgaged premises would not have been supplied with water.* It is an inevitable inference from a reading of the case that if this circumstance had been shown, recovery would have been allowed. This case is cited with approval in *Clark v. Smith* (supra).

In *Adkin v. Lewis, 5 Oregon, 292*, new fences enclosing and protecting an exposed portion of cultivated fields were regarded as necessary repairs, and compensation was awarded. It is to be noted that the rule in respect to repairs and improvements is the same in Oregon as in New Jersey. The fence was regarded as a necessary repair because it preserved the property by excluding marauders, trespassing cattle and the like. The dike built by complainant was by analogy equally necessary for the purpose of protecting the land in question by excluding the eroding waves of the ocean and the river.

A clear and comprehensive discussion of the rights and duties of a mortgagee in possession is to be found in an opinion by Chief Justice Shaw of Massachusetts. See *Woodward v. Phillips, 14 Gray (Mass.) 132.* The opinion reads in part as follows:

> "The law upon this subject (repairs by a mortgagee in possession) seems to be well settled; but in the great variety of cases which occur, it is difficult to prescribe a rule, broad enough, and at the same time precise enough, to apply to all cases. The relations of the

parties are to be regarded. The mortgagee, although he has entered for condition broken as a step towards making his remedy effectual, until foreclosure is not the owner of the property. He holds it as a pledge only. The object is to secure the payment of his debt; in other respects he is in the relation of trustee for the owner. He has no authority to make the estate better at the expense of the mortgagor. The mortgagor, as owner, has the right to exercise his own judgment on the question, whether he will make his estate more valuable by an outlay of more money.

"Still the mortgagee, whilst in possession, is bound to use reasonable means to preserve the estate from loss and injury. *Even the rule, said to have been adopted by the master, that he must preserve it in as good condition as that in which he received it, is not strictly precise, though nearly so.* But supposing, at the moment of entry, doors are off, fences are down, and repairs are at the time necessary, the mortgagee may make reasonable repairs. But even the term 'reasonable' is not exactly precise. *A high degree of convenience and fitness, without which the estate would not answer its design, may make an expenditure reasonably necessary, though it was wanting at the time of entry.* Under the general rule, the reasonable fitness must be determined by the circumstances of each case, giving the terms 'necessary' and 'convenient,' as in the case of highways, a construction more or less strict, according to the subject to which they apply."

It will be observed that the court held that the full measure of duty was not merely to "*preserve it* (*property*) *in as good a condition as that in which he* (*the mortgagee*) *received it.*" The mortgagee is justified in conserving "a high degree of convenience and fitness, without which the estate would not answer its design." To that end he may make reasonable expenditures in producing a condition which "was wanting at the time of entry."

The rule thus stated, applied to the facts before

us, would justify the expenditures made by the mortgagee, even though the condition had not changed between 1912 and 1914. Without these repairs, according to the undisputed evidence, the value of the property would have been destroyed. Its enjoyment also would have been rendered impossible, and "the estate would not answer its design."

It was in recognition of this familiar principle that it was held in Illinois that the building of a stable was a necessary repair. See *Magnusson v. Charleson, 9 Ill. App. 194.*

A useful note upon the duty and rights of a mortgagee in possession will be found in 49 L. R. A. (N. S.), beginning at p. 122.

II.

Does the Circumstance That the Work for the Most Part Was Done by the Mortgagee on a Government Structure Prevent the Complainant-Appellant from Being Entitled to the Allowance Which He Now Claims?

The first two courses of the description found in the mortgage are as follows:

> "(1) southerly along the high-water mark of the Atlantic Ocean, to where the Manasquan River empties into the ocean, known as Manasquan Inlet; thence (2) north and northwesterly, along the Manasquan River, and the various courses thereof, to where the said river or branch thereof, crosses said Brielle Road, to the center of said road."

It is evident that the mortgaged lands extended to the Manasquan River. If the course of the river were changed by erosion or accretion, the title owner would still have access to the Manasquan River under the settled law of this state. It appears that in 1882 the Federal Government constructed crib work extending from high water mark

out into the ocean some 75 feet, and then extended back from ordinary high water mark over the upland a distance of about 200 feet. From the westerly end of this crib work a dike was built, extending generally in a westerly direction a distance of 1,800 feet. The location of this construction is shown upon an exhibit which accompanies the briefs. It is a photographic reproduction of a Government map and is the smallest of the maps now before the court. It will be identified by this title, "Chart of Manasquan Inlet showing the condition of the Improvement June 30th, 1882." It is apparent from an examination of this map that at least half of the construction (crib and dike) was upon upland. This land was then in the possession of either the mortgagor or of some one of the mortgagor's predecessors in title. Open water shown upon this map and located about the middle of the dike, according to the testimony, subsequently became upland. It does not appear by what license the Federal Government located the structure in part upon the upland as it was in 1882. It is certain that the mortgagor and his predecessors in title had the legal right to pass upon and over the dike and crib work (no matter where located) to reach waters of the Manasquan River. This right could not be denied; certainly by no fact or circumstance which appears in the state of the case. Prior to 1914 the Government structure yielded to the violence of the waves and had begun a process of disintegration. The Government had both neglected and refused to make the necessary repairs. See evidence of Pearce, beginning at p. 60. Engineers came upon the ground at the request of certain citizens. The condition was observed. The repair, however, was not undertaken, apparently because no Government appropriation had been made. See also evidence of Russell Hinchman, p. 407 at bottom. Referring to

conditions which obtained in 1914 and 1915, the witness was asked:

"Q. Was any consent gotten from the United States Government for doing the repairs of 1914 and 1915?

A. No, a very decided effort was made to get them to do the work, and they declined to have anything to do with it."

In this emergency necessary repairs were made by Hinchman. Waste had already begun. Recurring storms threatened the integrity of the tract. What ought a prudent owner to have done in such an emergency? Unless relief was sought, the property would be submerged, its enjoyment rendered impossible, and the "convenience and fitness without which the estate would not answer its design" would be destroyed. It is not pretended that generally a mortgagee may spend money under the pretext of repairs on the lands of another without having first acquired the right to do so from the owner of the land where the work is done, because under such circumstances the expenditure might be lost to the mortgagor. The present case does not, however, present such an emergency. The structure for the most part is shown not only by the maps, but by the proofs, to be located upon lands to which the mortgagor held title, and then in the possession of the Hinchmans as trustees.

It may easily happen that repairs become necessary off the mortgaged premises in order to protect land in possession of the mortgagee. To recover, the mortgagee is merely required to show that the repairs were necessary for the protection and preservation of the property. It has never been held, so far as we can ascertain, that the mortgagee is compelled to show a benefit to the mortgagor other than such as may arise from reasonable protection. It is only where the alleged repair is in the nature of an improvement (which is not this case) where it is essential for the mortgagee

to prove that the mortgagor received substantial benefit by enhanced value. Suppose a mortgagee in possession, having acquired a sufficient license from an adjacent owner, should build a drain upon the land of such adjacent owner, the purpose and effect of which was to preserve the foundations of a dwelling house on the mortgaged premises from destruction by reason of surface water and the like. Such work, we think, would be clearly necessary within the rule, and the mortgagee would be entitled to recover the amount so spent, although the drain was not located upon the mortgaged premises. The property in the illustration has been protected and preserved by necessary repairs, and this meets all the requirements of the legal test.

It may be said that the analogy fails because no license or authority was obtained by the Hinchmans from the Federal Government to do work upon its structure. The answer is that the structure in major part was upon lands of the mortgagor and that if any work were done upon such portion as was located off the mortgaged premises and below high water mark, the Government had in effect abandoned the structure, and by fair implication the right to do the work by the mortgagee, if not granted, was certainly neither challenged nor denied, and never will be.

It is inconceivable that the work thus done would have been destroyed or could have been legally destroyed by the Federal Government, or that anything could or would be done by the Government to impair its efficiency. The act of the mortgagee, under the circumstances presented, was in harmony with the conduct of a prudent owner.

Assuming that the property in question needed preservation and could be effectively preserved by restoring the Government dike and repairing the crib work, what other or better method could have been employed? It would have been a reckless and lavish expenditure to have built a new structure

north of the Government work. This would have been improvident in the extreme. We think the conclusion is inevitable that what the mortgagee did in meeting the *vis major* of circumstances was prudent, resulted in a preservation of the property, made its beneficial enjoyment possible, and fell by fair reasoning within the limits of reasonable repairs.

III.

The Mortgagee by Written Agreement Was Empowered to Make Sale of the Property; This Enlarged the Equities of the Complainant.

There is another circumstance not commented upon in the argument or briefs which we think is of useful import. It appears that at the time the deed was given by the American Timber Company and the Yards, a written agreement was entered into between the Yards and the Hinchmans. See Schedule C attached to replication, p. 21 of printed book. This agreement contains the following paragraph:

> "It is agreed that the minimum price at which the Manasquan Beach properties may be sold shall be Fifteen Thousand ($15,000) Dollars, less a commission of ten (10) per cent.
>
> If the Manasquan Beach properties have not been disposed of within two years from May 1st, 1912, the same shall be sold at public auction at the Philadelphia Bourse by Barnes and Lofland to the highest bidder. Provided, that upon payment on May 1st, 1914, of accrued interest at six (6) per cent, upon the debt of said H. H. Yard from May 1st, 1912, and $1,000 on account of principal (without release of collateral) the sale at auction shall be postponed to May 1st, 1915."

There would seem to be a marked difference between the rights and duties of a mortgagee in possession, controlled by an agreement which authorized and contemplated a sale, and those of a mort-

gagee in possession under naked mortgage powers. A sale of the property was in the minds of both of the contracting parties. A minimum price of $15,000 was fixed. If not sold at that price within two years from May 1st, 1912, the property was to be sold at public auction. Such a sale was consummated, in accordance with the agreement, on the 27th of May, 1914, before any repairs were made. See p. 437. For reasons which the record does not explain, the mortgagee did not insist upon any rights which might have thus been acquired. It seems to us that these circumstances clearly modify the equities between the parties. A sale was contemplated and authorized to be made by the Hinchmans at any time within two years from the first of May, 1912, and a minimum price of $15,000 was fixed in the agreement. The provident acts of the mortgagee not only preserved the property, but resulted in enhancing its value for sale purposes. The purchase price of $15,000 fixed in 1912, at the time of the trial had been enhanced to at least $50,000. It would seem that recognition of this work and the money so expended should have been made in the present accounting.

This principle seems to have been recognized by the Illinois courts. In *Halbert v. Turner, 233 Ill. 531 (84 N. E. 704)* it was held that an allowance for improvements will be made or denied according to circumstances, and where the property was to be sold, it was deemed equitable that the mortgagee be allowed for the amount his improvements enhanced the value of the property. We have not had an opportunity of examining the text of this case, but references to it seem to justify the above summary.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

Between

SEACOAST REAL ESTATE COMPANY,
Complainant-Appellant-Appellees,

and

AMERICAN TIMBER COMPANY, ET ALS.,
Defendants-Appellees-Appellants.

On Bill, &c

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BRIEF FOR DEFENDANTS-APPELLEES-APPELLANTS.

HISTORY OF THE CASE.

This is before this court on cross appeals from a decree entered on a bill brought to foreclose deeds in the nature of a mortgage made by the American Timber Company on its property at Manasquan, New Jersey, under the following facts:

The American Timber Company owned several tracts of land. By several deeds it conveyed these tracts as security for personal debts owed by its President, Henry H. Yard. In these proceedings it has not raised the question of *ultra vires*. These debts arose from two distinct transactions.

First.—On October 31st, 1904, there was a settlement between Henry H. Yard and Charles S. Hinchman, by which Yard gave Hinchman a note for $22,452.13. Attached to this note was a statement showing collateral held by Hinchman to secure payment of the note. Hinchman entered into possession of the various properties mentioned as collateral and received any incomes coming from same and from the sales of same. A considerable amount of this collateral was property owned by the American Timber Company. This note with the collateral was eventually assigned to the complainant.

Second.—In 1901, Henry H. Yard borrowed from Joseph M. Gazzam and A. O. Granger, from each, sums totaling $2400 and gave to each various usurious notes for same totaling the sum of $3000. On October

1st, 1904, an arrangement was made between the three parties by which interest was calculated on the usurious notes, making a total of $3521.26 due to each. Yard paid to each in cash $21.26, total $42.52, and gave to each a single note dated October 1st, 1904, payable one year from date, with interest, in the sum of $3500. Subsequently, after the date of maturity, these notes were purchased by Lydia S. Hinchman and eventually turned over to the complainant. As collateral security for these Gazzam and Granger notes the American Timber Company conveyed to Mr. Gazzam by deed a tract of land on the Manasquan beach known throughout these proceedings as the Gazzam tract located north of Brielle Road and south of the Life Saving Station, and when his note was purchased by Mrs. Hinchman, with full notice to her that he held this tract as mortgagee, he turned it over to her still as collateral for the two notes, she having previously purchased the other note.

Subsequently by a paper, not dated, but made in 1912, certain of the property given as collateral with the $22,000 note, called "lands in Hardy County, West Virginia," was turned back to the American Timber Company, and in its place a warranty deed was given to Lydia S. Hinchman by the American Timber Company for another tract on Manasquan beach, lying from Brielle Road to the Manasquan Inlet and also for the property known as the Gazzam tract, as collateral security "to secure claims due individually by Henry H. Yard, to C. S. Hinchman and Lydia S. Hinch-

man," the amounts of such claims not being mentioned and apparently not being then determined between the parties as far as we know.

This proceeding is a bill in equity to foreclose these deeds against the Gazzam tract and against the Manasquan beach property. In June, 1914, Mrs. Hinchman assigned all of her interests in these claims and in these lands to the complainant, the Seacoast Real Estate Company.

Complainant therefore, had to render an account of its and Mr. Hinchman's handling of all these collateral securities, and an account was attached to the replication to the counter-claim.

The Vice Chancellor found a certain sum due on the mortgage.

Both the complainant and the American Timber Company appeal from the decision of the Vice Chancellor. These cross-appeals raise but three questions, the others raised before and decided by the Vice Chancellor not being questioned.

First.—The question of usury in the Gazzam-Granger notes. This question, however, is waived in complainant's brief.

Second.—The question of charge against the mortgagor of certain expenditures made by the mortgagee in 1914 and 1915, on a certain dike.

Third.—Costs allowed by the Vice Chancellor to the complainant (not the amount of fees but how should they be borne).

I.

CHARGES IN REFERENCE TO THE DIKE.

In June, 1914, both the Gazzam tract and the tract below Brielle Road to Manasquan Inlet were conveyed by Lydia S. Hinchman to the Seacoast Real Estate Company, the complainant in this bill. Of this company Mr. Charles S. Hinchman was the President, and complainant frankly admits in his brief that this company was merely another name for Mr. Hinchman. At this time the mortgage debt amounted to roughly about $15,000. Charles S. Hinchman was a man of large business circumstances, and had been notified by the letter written by Mr. Wallace to him of his legal status under these deeds (see record, pp. 426-27).

In 1882 the Federal Government had constructed a crib at the southeastern point of the tract with a dike running over to Stump Point. Its purpose of construction was to form a permanent channel for Manasquan River. In 1914 Mr. Hinchman repaired this dike as far as Short Creek and built a cross dike, connecting the dike into the tract at the eastern side of Short Creek. In 1914 the Company expended on this work $11,970. A great part of the work broke away during the following winter, and in 1915 an additional sum of $7,016.18 was expended by this company. Complainant claimed that these sums thus expended should be allowed in its account and paid for by defendant mortgagor, the American Timber Company.

The Vice Chancellor refused to allow the expenditure made in 1914 but allowed that made in 1915 and both sides appeal.

Law.

The law is well settled in New Jersey. A mortgagee in possession has no right to recover for improvement, although it may be beneficial and permanent in character. He can recover for repairs, but they must be necessary repairs, and this language is "strictly construed," and allowance for them is only on the ground of "absolute necessity for the protection of the estate."

Clark *vs.* Smith, 1 N. J. Eq. 121, p. 136, etc.;
Laible *vs.* Ferry, 32 N. J. Eq. 791, p. 801;
Horn *vs.* Bank, 9 L. R. A. 676;
27 Cyc. 1265.

"Where a deed, although absolute in form, was intended by both parties to be merely a security for the debt, the grantee, going into possession, is in the position of a mortgagee in possession, and is not ordinarily entitled to be reimbursed for improvements made by him on the land."

27 Cyc. 1268.

"If a person has actually the rights of a mortgagee in possession of real property, but makes improvements under the honest although mistaken belief that he has acquired the absolute title, he will be entitled to compensation for the cost of such improvements."

27 Cyc. 1267;
Friechnecht *vs.* Meyer, 39 N. J. Eq. 551;
Vanderhaise *vs.* Hugues, 13 N. J. Eq. 410 (as explained in 39 N. J. Eq. p. 562).

But not where only negligence makes him believe that his title is absolute.

Foley *vs.* Kirk, 33 N. J. Eq. 170;
Haggerty *vs.* McCanna, 25 N. J. Eq. 48.

We contend that these cases mean that a mortgagee in possession can expend money for repairs which are absolutely necessary for the protection of the property, but that he cannot expend money for improvements no matter how beneficial they may be; that in making his repairs he must confine himself to such, and that if he exceeds necessary repairs and goes into improvements, then they are classed under the term of improvements and he cannot recover them.

In Clark *vs.* Smith, 1 N. J. Eq. 121, p. 140, Chancellor Vroom says:

"If the mill could have been used with the machinery as it was when Haigh voluntarily took possession of it; if the repairs made were for the purpose of increasing its speed, or enabling it to do a greater amount of work than it had formerly done, when its machinery was in order, so as to enhance the benefit of the possession, then no allowance is to be made for the repairs."

In Mickles *vs.* Dillaye, 17 N. Y. 80 (Kirchway's Select Cases on Mortgages, p. 526), an old building on

the premises was dilapidated. It could have been repaired for $250, but was rebuilt and enlarged for $5,000. The court held that this was an improvement, not a repair, and ordinarily would not be allowed to the mortgagee in possession.

See also

McCumber *vs.* Gilman, 15 Ill. 381 (Kirchway, 536).

The facts are as follows:

The Manasquan beach tract lies at the northwesterly angle of the outlet of the Manasquan River into the Atlantic Ocean. It is a beach property from 200 to 400 yards wide bounded on the southeast by the Atlantic Ocean; on the southwest by the Manasquan River; on the northwest by a small creek called Short Creek, which runs northeasterly parallel to the ocean and separates the tract from Sedge Island, and on the northeast by Brielle Road, which runs across the beach at a point about 2500 feet northeast of Manasquan River.

In 1882 the United States Government in an attempt to improve the Manasquan Inlet constructed a crib and dike running northwest from the Ocean, touching the high land of this beach on the northeasterly side of the river but passing off into the tide water of the river and extending over to Sedge Island, which lies on the westerly side of Short Creek, where the dike was originally grounded in a place called Stump Point (see maps attached hereto).

The crib was about 200 feet long; the dike was about 1300 feet long. The effect of this construction was immediate. Prior to this time the inlet, following the usual custom of all the inlets north of Barnegat Inlet on the Jersey Coast, would shift on the ocean side toward the north. The side of the property where Short Creek joins Manasquan River was always permanent in its station. It is sedge land, the sedge running about half way from Short Creek to the ocean (see Exhibit C5 attached). Sedge Island is also sedge, and both are practically permanent and have been so for many years; but on the Ocean side the river bank is sand. Here the winds would gradually build up the southern bank of the outlet, creating steadily a point of sand like Sandy Hook, running along the Ocean front and forcing the river into a northeasterly direction at a right angle, the river gradually cutting in on the beach and extending further and further to the northeast along the beach front until the whole mouth would become so shallow and so wide as eventually to fill up the bed of the river (see Exhibit C5 attached). When this occurred the river would break through in its straight channel directly to the Ocean across the hook it had formed at this point and the process would be repeated again with the same result and the same repetition.

The condition in 1878 is shown by Exhibit C 5 attached as follows: The outlet is turned around and runs along the beach northeasterly with the sandy hook forming from the south shore, until it gradually, after

cutting into sandy beach, loses itself in the ocean to the northeast. The Government there contructed its dike. The crib work which was a permanent stone construction of great strength and durability starting at the Atlantic Ocean across the sandy hook crossing the river outlet on this turn and being ended at the then high sand beach; then a dike construction starting from the crib running out in the tide way, away from but practically parallel to the sedge land of the River bank and back to the sedge land of the island across Short Creek where it was anchored in a place called Stump Point.

At this time in 1882 the beach was a narrow beach and Short Creek was a comparatively wide creek, narrow where the sedge land of the beach was separated from Stump Point but assuming considerable width to the northeast of this place. The beach was low and there is evidence to show that at one time, years before, the water had broken out across the beach into the ocean a little bit southwest of Brielle Road. The effect of the dike and crib was to keep the channel of the river at a permanent place where it has since remained and to eliminate the gradual circling of it to the north. The beach all the way from Brielle Road to the dike began at once to grow in height, strength and width and Short Creek began to narrow until now it is but the smallest kind of a creek. The beach began to increase in height until now it is 12 or 15 feet above high water (see map of cross sections hereto atached). Its greatest height being within 100 feet of the crib, and the

beach became a permanent, strong, durable beach, so much so that the Borough of Manasquan has constructed a new road and laid a sewerage and water system the length of the beach.

Shortly after the hitching by the Government of the dike to Stump Point the local fishermen tore it away from the point, but the effect of this construction was that the sand gradually accumulated between the dike and the beach and into the tide way which there existed when it was constructed.

This beach proper from Brielle Road to Manasquan River, a length of about 2500 feet, had first entered into this transaction by the agreements and deeds of 1912, when the property was conveyed by the American Timber Company to Lydia S. Hinchman, which property with the Gazzam tract, was conveyed by her in June, 1914, to complainant. It was received by Mrs. Hinchman with full knowledge that she was a mortgagee of both tracts and not an owner of them.

In 1912 there was practically no development on the beach and practically no houses except some squatters.

For a number of years prior to 1914 the dike had been gradually disintegrating, but the crib was in good condition. As the sheathing of the dike broke and the dike disintegrated the water gradually worked its way in back of the dike down until it was practically at the northwest point of the crib, being very little in width from the dike at that point, but curving at a slow curve and being 60 to 70 feet in width at a point about 150 or 200 feet northwest of the crib. The sand, however,

had been and continued to be level with the crib practically its whole length.

In 1913 Mr. Hinchman had a map prepared by a surveyor, Walter K. Potter, laying out a building operation on the Manasquan Beach as if the land were filled to the dike (Exhibit D 16, pages 434, 402, 403), and had the surveyor Niart Rogers prepare a set of maps showing this building lay-out in December, 1914 (Exhibit D 19), in September, 1915 (Exhibit D 20) and in January, 1916 (Exhibit D 4, record pp. 299, 496, 402, 405, 435 and 436).

In July, 1914, Mr. Hinchman employed a practical constructor named Howland, to repair the Government dike as far westerly as the bank of Short Creek when he was directed to construct a cross dike connecting the work he was doing with the southeast bank of this creek. This work consisted of putting piling on 5 feet centres between the northeasterly row of the old Government piling; then putting wales on the shore side and putting sheathing on the shore side of these wales, the whole being tied up to the Government dike (p. 122). The piling were 23 feet in length (p. 98) and the sheathing 16 feet. It was specific work ordered by Mr. Hinchman without plans or specifications or advice from a competent engineer, and known by the constructors to be too light to accomplish any result (pp. 96-97, p. 124 and p. 487). A great part of it washed away during the following winter. At the time of doing this work Mr. Hinchman informed the younger Howland that his purpose was to fill in the

land out to the dike (p. 94) and similarly informed the elder Howland (pp. 134-135). During the following winter a great part of this work went out and in July or August, 1915, Mr. Hinchman took up with the Surveyor Niart Rogers, who had been drawing for him the plans for the lay-out of lots on this tract, the preparation of specifications for the repairs of the Government dike (pp. 478 and 502), made necessary by the work done by Mr. Howland in 1914 having been carried away during the previous winter. The testimony of Rogers shows that the general purpose of Mr. Hinchman was the improving of this tract by the filling in of the land between the dike and the beach property (p. 495 and following). This work was done by the Logan Construction Company. The sheathing was again constructed on the land side of this construction. At the time of trial part of this construction was leaning out.

Mr. Hinchman made statements showing that the purpose of the repairing of the dike was for land development scheme by filling the back of the dike, to the younger Howland (p. 94); to the elder Howland (pp. 134, 135); to Mount (pp. 360-361); to Haberly (pp. 233-234); to Oram (p. 255), who was asked to make estimates for filling and to Rogers (pp. 495, 499, 501, 563, 564, 566, 567).

Complainant asks that these two expenditures, $11,970. and $7,016.18 be added to the mortgage debt. The American Timber Company, who is the mortgagor surety, contends that neither of these expenditures are proper to be charged against this land; that

they were expenditures made for the mortgagee in possession, not for the necessary protection of the beach from immediate and great damage, but for the improvement of the mortgagee's possession of the land. That as a matter of fact they were not improvements, but were pure waste of money without any permanent benefit to the land. That they were made by the mortgagee in possession with the purpose of improving the mortgagor out of its land by the expenditure of such large sums of money that it could not protect its equity,—certainly this would be its result if allowed; that when they were made the mortgage itself was reduced to about $15,000. and the annual rents on the property were bringing in about $5,000., so that the mortgage was absolutely safe. That there was no danger of damage to the land, and it denies the whole argument of necessity and of protection which the mortgagee seeks to establish.

ARGUMENT.

To justify these expenditures the complainant must establish:—

First.—That these expenditures were made as a repair for the protection of the property and not as an improvement for the benefit of the possession.

Second.—That such repairs were absolutely necessary for protection to the land and therefore the danger must have been an imminent danger.

Third.—That the danger was one of such a serious character in value to the land as to make the amount of the expenditures judicious.

Fourth.—That the mortgagee used due care in making them.

A.

Reasons for expenditures and were they justifiable?

The cases of Clark *vs.* Smith; Mickles *vs.* Dillaye and McCumber *vs.* Gilman, cited above, show that the allowance for repairs is held strictly against the mortgagee.

It is self-evident that a property before it is improved usually needs repairing, but the expenditure to be allowed to the mortgagee must be kept strictly to repairs and not amount to an improvement which will enhance the benefit of the possession by the mortgagee. In the Mickles *vs.* Dillaye case an old frame building had become delapidated and could have been repaired for $250, and the mortgagee built a new building costing $5000, it was held to be an improvement and not a repair.

In the case at bar there is evidence showing a possibility in the minds of some or another witness, imminent, fanciful or otherwise of four reasons for making these expenditures:—

First.—To prevent a cut out by the river to the west of the crib on the ocean side of the beach, which would

permit the current to resume its old methods of swinging to the north along the sand beach.

Second.—To prevent damage by erosion to the river bank where the current hits the bank between the crib and Short Creek.

Third.—To prevent the current of the river from swinging through Short Creek with the possibility of a cut out across the beach at the old inlet place of 1868.

Fourth.—As an improvement to the property, using the construction as a bulk head and filling in with sand the river front out to its line in a land development scheme with boulevards, streets, building lots, etc.

The first enumerated danger is that the river might cut through northwest of the crib between the sedge land and the crib which would allow the inlet to swing to the north in the old way. The questions as to the justifiableness of these expenditures from the standpoint of protection against this danger we will argue at length.

It, however, is impossible to justify these expenditures as a repair against the second enumerated danger, that of erosion of the northern bank of the river where the current hits between the crib and Short Creek. This danger, eliminating the danger of a cut-out, we contend to be absolutely not of such a character as to warrant any expenditure whatsoever. Not only was it not imminent in the sense of danger, but it was not substantial as an injury.

This danger is the sole ground of justification given by Niart Rogers in his testimony. Nowhere does he mention or suggest the danger of a cut-out west of the crib. If this as a cause is eliminated his testimony utterly fails complainant.

This danger was not imminent. The land here was sedge land. The danger would come not from the ocean but from the ebb-tide of the river. It may be true that the current as testified to by Howland and by Rogers was thrown over on the ebb-tide from the southern shore at an acute angle, beating into this spot, which is the spot where the repair as constructed by Howland went out, but the testimony of all the witnesses show that in 1914, prior to the repairs by Howland, there was practically no sheathing on the dike west of the crib. That this condition of the dike had been for a number of years. That this current shot over there to be sure but it had done no injury to the bank for a number of years except to wash it out to the extent of 70 feet in the 2500 foot length of the beach, and some of this cut might have been there before the Government dike began to disintegrate as it had been before 1882.

The whole question of imminence of this danger is summed up in the testimony of Rogers (p. 506):—

"Q. Then you say that there was great danger that this sedge land would be carried away at this point?

"A. No doubt of it in my mind; if there wasn't any protection there for it, the sedge would be cut away with the action of the tide.

"Q. How much in twenty years?
"A. I cannot say how much.
"Q. Ten feet?
"A. It might be torn away as much as 10 feet in one year; it might go twenty years and not be torn away any more.
"Q. What were the odds that it wouldn't be torn away any more?
"A. That depends on the formation, whether it is solid sedge or sand.
"Q. You know the land?
"A. Yes, some is sedge and some sand.
"Q. How much has been torn away at Stump Point?
"A. I don't know, because I haven't observed it for twenty years.
"Q. How far back does this sedge land go, how far from the eastward toward the point of the creek?
"A. As to what location do you mean?
"Q. Taking your entrance of Deep Creek into Manasquan Inlent, how far does it go to the east—the sedge land?
"A. There is some sedge land extending more than half way from the creek to First Avenue that is constructed there and shown on the map."

But this danger, even if it existed, would not justify this expenditure. Complainant is seeking to justify an expenditure of $11,970 in 1914 and of $7016.18 in 1915. This danger threatened the back part of an undeveloped (unless we concede this expenditure as an improvement for the benefit of the mortgagee's possession) beach front tract. It had practically no value without future development. To this Veremule (p. 516) and Conover (p. 343) testify.

We insist that this danger as a justification is so negligible as not only not to warrant any repair but not even as worthy of being considered in determining the character of any repairs if made for any other purpose.

The third danger enumerated above is the sole danger to which Mr. Payne testifies as a possibility (if we can understand his testimony). His whole testimony is built around this, that the danger to this beach might come from a cut-out far north of the dike and below Brielle Road, where an outlet had been in about 1868. That the way to safeguard against this was by having the dike grounded on Stump Point, as the Government had originally done in 1882, so as to prevent the water from flowing through Short Creek. He testifies (p. 147) as follows:

"A. I firmly believe that the maintenance in its integrity of the dike put down by the Government extending back to the fixed island at Stump Point, is absolutely necessary for the permanency of the situation north of the dike."

And also on p. 160:

"Q. Would the preservation of this Government dike, not in its entirety running into Stump Point, but only part of that distance, have insured the protection, in your judgment, of this land north of it?

"A. No, sir.

"Q. Then in your judgment the work done by Mr. Howland was not sufficient to protect this land?

"A. In that I understand the work done by Mr.

Howland was a repairing of the Government dike which ran to Stump Point, which was effective.

"Q. Did he run his repairs to Stump Point?

"A. I don't know; I am only speaking of the integrity of the government dike to Stump Point as having been effective in preserving the status of the land north of it.

"Q. Suppose that Government dike was not preserved to Stump Point, but was preserved on the eastern shore of Short Creek, what would be the effect?

"A. I should apprehend that in time the waters of the Manasquan River would find their way back of the dike and would render the part built ineffective and woud finally follow its natural progress to the north, as has been stated.

"Q. Therefore, such a construction as that would not, in your judgment, protect this land—not going to Stump Point?

"A. No, sir.

"Q. Where do you fear, in your opinion, the water affecting this land?

"COURT:—In the absence of the bulkhead or with the present bulkhead?

"MR. BERGEN:—In the absence of the bulkhead, with the old bulkhead as it was in 1914.

"WITNESS:—What is that?

"Q. Where woud you fear the water attacking this land?

"A. I would fear both from the ocean front and from the attacking of the river flowage in the rear of the dike.

"Q. Where would that flowage in the rear of the dike go, in your judgment and fear?

"A. Where would it be effective?

"Q. Where would it affect this land?

"A. It would overflow the land and would gradually eat out the support of the bulkhead and tend to restore its natural condition and render the bulkhead or jetty ineffective and of no account.

"Q. Had it done that since 1882, when it was erected?

"A. Not while it was in its integrity.

"Q. Had it done so while in its integrity?

"A. To the extent that its being out of repair allowed the water to eat in; it had impaired the uses or the purpose of the bulkhead by taking away the sand back of it."

And on pp. 162-163 and 164:

"Q. You say that the work done by Mr. Howland would not be of value for this purpose unless it reached over to Stump Point, as I understand it?

"A. No, sir; I didn't intend to say that. I don't think I specified Mr. Howland's work. I don't want to be captious, but my idea is that the general plan devised by the Government extending a continuous effective bulkhead back to Stump Point in line with the main line of the fixed river, was absolutely necessary to preserve the status of the land north of the bulkhead or jetty.

"Q. Suppose, instead of running it across the creek to Stump Point, it ran at right angles into the meadow land of the beach property at Short Creek, what effect woud that have?

"A. I should think it woud invite the waters of the river to flow through there and erode or cut away the beach, and attack the beach in the rear.

"Q. In other words, in your judgment, if the Government dike had been repaired by Mr. Howland or

anybody, not reaching across Short Creek or to Stump Point, but cutting across on the eastern side or back of Short Creek into the meadow land of Short Creek, that would not be effective in protecting this land, but would naturally invite trouble?

"A. I think so, yes, sir.

"COURT:—In the situation supposed by Mr. Bergen's question, there would be nothing to prevent the main neck of the river going through Short Creek, would there?

"WITNESS:—No, sir.

"COURT:—To strike the beach north of the jetty or bulkhead?

"WITNESS:—Yes, sir; the river and outlet might then find its way through Short Creek instead of going on to the natural outlet.

"COURT:—And would then come in contact with the beach?

"WITNESS:—Yes, sir, and might flow out where it went out in 1868, as shown on the map.

"Q. Is that the reason you considered it would merely be apt to invite trouble, General Payne?

"A. I don't quite understand your question 'merely.' In answering your question, I think that would invite the flow of the river through that natural channel, the first channel that it would meet, and the action of the southern spot, the natural action of the beach front being to make up, there would be the attack, and the water woud get out the first place it came to, and that would seem to be about the first place it would come to to get out."

The answer to this contention is this, that for 25 years the Government dike had been separated from Stump Point (see testimony, pp. 187-88-89 and 210), and yet had not cut through at that place and that the

constructions made by the mortgagee did not go to Stump Point and left the mouth of Short Creek open. Certainly this danger, if as a fact it were a possibility with this stronger beach and narrower creek, was not of such an imminent character as to warrant any expenditure by a mortgagee in possession and none was made.

B.

We therefore proceed to an argument on the justification of this expenditure as a repair to prevent the breaking through of the river northwest of the crib.

We insist that it is a fact that these expenditures were made by Mr. Hinchman not as a repair for the protection of the property from any danger, but as an improvement for the purpose of filling in the land as a land development scheme. The idea of protection as a justification came with the case.

(*a*) The testimony of Niart Rogers is convincing on this. He admitted that it had long been the intention of Mr. Hinchman to develop and fill in this land; that he had mentioned it to him and that he could not even recall that the subject of protection to the land by preventing an erosion (he never suggests cut-out) had ever been mentioned to him by Mr. Hinchman in connection with the transaction (see pp. 495, 499, 501, 563, 564, 566, 567 and following). He never mentions the danger of a cut-out west of the crib.

(*b*) Mr. Hinchman made statements to Rogers (pp. 495, 499, 501, 563, 564, 566, 567), to Oram (p.

255); to both the Howlands (pp. 94 and 134, 135); to Mount (pp. 360 and 61) and to Haberle (pp. 233-234) showing that this was his purpose.

(*c*) Mr. Hinchman had a series of maps prepared by Potter in 1913 and by Rogers in 1914, 1915 and 1916 for the sole purpose of showing this land scheme development with the land filled in to the dike and with streets and lots laid out, etc. (exhibits D 4, D 5, D 7, D 16, D 19 (should be D. 20), and D 20 (should be D 21)).

(*d*) The construction of the sheathing on the shore side rather than on the water side of both the Howland and the Logan Construction Company improvements shows that this was the intention. It is self-evident that if the purpose of repair of the dike had been to keep the water out, then the repairs would have been made and the sheathing would have been built on the river side of the dike; if the purpose was to hold in a filling then the construction would be on the inside. This is conceded by Addison Howland (p. 95).

(*e*) Rogers (pp. 499-500) testifies that it was contemplated that the land should be filled and that their scheme included that when they made this fill they would strengthen the construction with piles and tie-ins to give it strength to withstand the weight of the fill.

(*f*) The mere nature of the work done shows that this was the intention. It is common sense that if the purpose was to prevent a cut-out of the river just north of the crib the shortest conceivable dike reaching from

the crib to a strong part of the land would be more effective and cheaper than a long dike which ran out into the channel and then cut over at a right angle to a point in the land. That is, simply one and one make two. If preservation from a cut-out was in his mind then a short dike would have been constructed as Mr. Vermeule, Mr. Conover and Mr. Oram all testified to and as Howland pracically admits.

2. The *locus in quo* was as follows: from the westerly edge of the crib to the easterly side of Short Creek was about 1100 feet. The sedge land which existed at the westerly point extended easterly to a comparatively short distance of the crib (see map hereto attached Exhibit C 5). The sand bank, between the sedge land and to the northeast of the crib, was the highest bank on the beach. The bank along the river cut which existed north of the dike was very steep. It is self-evident that if there was any protection from any such cut-out immediately west of the crib to be gained by the dike as repaired and constructed by complainant which ran for this 1100 feet from the crib and then was built at a right angle to the farthest point of the sedge, there would be better protection by a shorter dike running from the crib into the high land or into the sedge land. Such a construction would not have the disadvantage of the 1100 feet of stretch which this did in the current and water way of the river. This is self-evident. The objection that the water might cut around the head of a shorter oblique dike is true of the longer

dike as repaired, and as actually occurred after the Howland construction. In such a case, when it happens, simply extend the dike out a little further into the beach or into the sedge land, or erect cross dikes as suggested by Mr. Veremule, but it cannot be questioned that such a short oblique dike would answer the purpose of the longer dike in protecting from this cut-out west of the crib, if the construction as done by Mr. Hinchman would do so, and would have the tremendous advantage of not requiring repairs and possibly of being swept out as exists with the long 1100 foot structure. All this is as self-evident as that one and one make two. If the long dike was protection from this danger a short oblique dike would have been equally good protection without any of the disadvantages of the long dike. Why then did Mr. Hinchman choose to work on the theory of the long dike instead of the short dike? The answer is that he was not attempting to repair the property, or if he had that in mind, and the evidence nowhere shows that he ever did have it in mind, that this real idea was an improvement, and that he expended $18,000. on an improvement which Mr. Veremule and Mr. Conover testified is not a permanent or lasting benefit to the property, where the short dike would have been of such lasting benefit to it. Instead of constructing a short dike which would have cost $2,000. he made an improvement costing $18,000. In other words, instead of repairing the house at a cost of $250. he built a new one

at a cost of $5000. which is the Mickles *vs.* Dillaye case and his repair had become an improvement.

The virtue of this short dike for this purpose is admitted by Mr. Howland. It is true that in his testimony (pp. 136, 137), he prefers the long dike to the short dike because the long dike would prevent the current from eating away the bank of the river, but the answer to this is that this land which thus would be exposed to the river has such slight value as to be negligible and not warrant and expenditure to protect it. Such an expenditure would not be judicious as defined by the cases, and again presents no such imminent danger as to warrant the mortgagee in expending any money to protect against. Besides, the majority of it would be sedge land which would not be eaten away by the action of the river. This is argued before.

3. It is equally self-evident that the present arrangement is not of any permanent value to this land even for this purpose. Messrs. Veremule, Conover and Oram positively deny that the present structure has any permanent, beneficial value to the beach for the protection from any danger or for any other purpose. Their theory is that a short dike would not have been exposed to the violence of the current of Manasquan River to which the present structure is exposed. That the present structure is not of strong enough construction as now constructed to hold, and will eventually go, and at the time of hearing part of it actually was leaning.

4. In addition to this argument is the fact that this structure was simply a repairing of the Government dike. It is on the property of the State of New Jersey and is not constructed on the property of defendant (Payne p. 159). It is a public nuisance and can be torn down at any time by the Government or by the State of New Jersey, and therefore irrespective of its flimsy character is not of permanent value while the short dike as suggested by these engineers would not have this disadvantage, but would have been permanently the property and on the property of the mortgagor.

5. We deny that the danger of this cut-out was so imminent as to warrant any repair by complainant.

The locus in 1914, was as follows: The crib 200 feet in length, obliquely to the ocean, was in good condition, but the efficiency of the dike had gone with its sheathing. The beach had built up level with the crib, and at the western end of the crib sloped up to the highest point of the whole beach. A little to the west of this came the permanent sedge land which continued over to Short Creek. The sedge land and the crib were permanent. As the sheathing of the old dike gave way the river had eroded the bank and the water came in north of the dike. Near the western end of the crib it was very narrow and very shallow, gradually widening in a broad curve until at about 150 or 200 feet west of the crib it was about 60 or 70 feet in width. This is where the current hit the bank. The bank of the cut sloped steeply.

(*a*) Mr. Conover denies any danger of a cut-out (p. 312), but Mr. Vermeule (p. 514); Mr. Oram (p. 257); Mr. Howland (p. 117) and the various local witnesses consider it a danger. Not a single one of these witnesses testify as to any imminence of such a cut-out. If Mr. Payne's testimony can be considered as suggesting it, its very lack of positiveness shows that in his judgment the danger was not immediate. Mr. Rogers never mentions it as a danger, which shows conclusively that in his mind it was not an imminent danger since he never thought of it.

(*b*) The work done by Mr. Howland in 1914, in a large part actually went out during the following winter and yet the beach did not cut through, and in addition to this the cross dike, which was constructed from the dike over to the land at its western point was not constructed deep enough into the land to prevent water from passing between it and the land and yet the point did not cut out.

(*c*) The action of the Borough of Manasquan authorities in 1914, in laying out and constructing a gravel road, laying a sewer system and water mains down the length of this beach actually to the existing cut shows conclusively that in the opinion of these men and their engineer there was no danger at that time of a cut through which would have injured the road and the property.

Certainly such an inconclusively proven danger will not justify an expenditure of $18,000 made for another purpose.

6. We deny that the possible danger of cut-out justified this enormous expenditure.

(*a*) In considering this as a danger warranting this expenditure we must consider this land as in its unimproved condition of 1912, the date of the mortgage. We cannot consider it as in its improved condition of 1914. To do so would be directly contrary to the doctrine of Clark *vs.* Smith. If cottages had been built in 1912, then the mortgagee might have been justified in protecting the land so as not to have imperiled them, if the expenses justified, but there were no improvements in 1912, that this cut out even if it occurred would have injured, and if cottages existed their value would not have justified such a large expenditure as this.

(*b*) The surrounding circumstances must be taken into consideration in considering the justifiableness of this outlay.

The amount due on this mortgage in June, 1914, was about $15,000. The mortgagee had prior to 1914, received $4131.05 in rents, and he had the properties so rented that in the year 1914 itself he received about $4000 in rents. By giving us credit on the mortgage therefore, he could safely count that within a period of a few years at most his whole mortgage would be paid off from the rents. If the cut-out occurred the crib and sedge land would remain and could always be connected up and the river put back in its channel. His security would even then be ample.

(*c*) The State of New Jersey had long been working on a water way scheme for the whole coast of

New Jersey, and in 1908 and 1909, Mr. Vermeule testifies that he had been working for the State in devising plans for the improvement of this inlet. That it was apparent in 1914, that the State would soon spend money and do work here is shown by the fact that the legislature of 1911, appropriated $150,000 to construct a waterway from Barnegat Bay to Manasquan Inlet (P. L. 1911, p. 446), under reports of the State Geologist (see also P. L. 1914, p. 472). In 1915, a sum was appropriated to connect Barnegat Bay and Manasquan Inlet (P. L. 1916, p. 90). In 1916, Mr. Conover testifies, that he knew that this work was actually under way. In 1918, an additional appropriation of $84,000 for this work was made by the legislature. In addition to this the United States Government would almost certainly step in and do work at this inlet as it had done in 1882, when such an agitation was being raised by the legislature itself.

7. These expenditures cannot be justified on the ground that Mr. Hinchman was advised to make them by competent engineers.

The question of whether the advice of engineers would justify Mr. Hinchman in making these expenditures would depend on many things. It would certainly,

(*a*) require him to seek direct advice on whether this feared danger was imminent;

(*b*) on the best method of protection against that specific danger, eliminating any improvement;

(*c*) of preservation in the condition existing when

the mortgage was created, and the question of justifiableness of the expenditure as against the feared injury.

The idea of an improvement must be entirely eliminated.

In the case at bar Mr. Howland shows throughout his testimony that his instructions were to repair the dike. He repeats it time after time. He admits that the real purpose was a land development scheme. He does state (p. 134) that his advice was asked as to how to protect the land and his testimony might be read to mean from the injury from a cut-out, but nowhere does he say that this danger of a cut-out ever was actually discussed between Mr. Hinchman and himself; that he ever advised that it was an imminent danger or advised that the repair of the dike was the best prevention from it, and his testimony (pp. 108-109, 136-137) shows that if the question of protection ever came up between them it was for protection from further erosion of the river bank which, of course, would add just so much to the amount of filing which eventually the carrying out of the land scheme would require.

We insist that Mr. Howland was not a competent engineer and that he never gave an opinion as to the sufficiency of the work ordered. That no plans or specifications were prepared, and that he knew it was too light—that his son, Addison Howland, directly admits (p. 96).

As to the 1915 construction. Mr. Rogers nowhere qualifies as an expert.

But his testimony shows that the question of danger from a cut-out and how to protect against it was never asked of him. He never even mentions the subject in his testimony. He admits that the subject of land development was raised between him and Mr. Hinchman and that the subject of protection from erosion of the river bank was in his mind, but he could not recall that even this danger ever was discussed between them (pp. 495, 499, 501, 563, 564, 566, 567).

8. The mortgagee in possession was practically in the position of a trustee with very limited powers, and if his intention was to do this work for the preservation of the property from an immediate imminent danger then he had certain obligations on himself to perform.

(*a*) He should first have employed an engineer competent and experienced in this class of work, stated to him what he feared, and asked and followed his advice. This he never did as argued before.

Mr. Howland testified that his advice was never asked. That he was ordered to repair the then present Government dike and build the cross dike. This was done in such an unscientific way, but following the direct instructions from Mr. Hinchman, who had no scientific knowledge on the subject, that his work was practically useless and in a great part went out the next winter.

In cross examination we thoroughly went into this matter with Mr. Rogers, and although repeatedly

asked the question, Mr. Rogers finally ended up in admitting that he never recalled that his advice was asked on the best way to protect the property (pp. 561, 566, 567). That he knows that it was in the mind of Mr. Hinchman that the dike should be repaired for a land scheme which was talked about between them (pp. 495, 499, 501, 564, 565, 567).

We respectfully submit that Mr. Rogers was merely employed for the purpose of repairing the dike, just as Howland had been employed, without any advice being sought from him as to how to preserve the land from any cut-out. He admits that the thought of connecting the crib with the land, which was apparently the best way to do, according to Oram, to Vermeule and Conover, was never even mentioned by any one. We could not get him to admit that he was employed solely for the purpose of repairing the dike, but we submit that he practically admits it and that that was the real reason for this employment. This is very different than the employment of an engineer whose advice is sought and followed for the purpose of preventing an imminent danger.

We contend therefore, that Mr. Hinchman failed utterly in the performance of his duty, which was the employment of a proper engineer, and we contend that Mr. Rogers, even if the proposition had been submitted to him, would not have filled this category. He never had done work of this kind. He was a surveyor, not an engineer. If he had been asked to preserve and had recommended this—without considering a cross dike—he is convicted of being incompetent.

(*b*) It was a further duty of the mortgagee in possession to see that his expenditures were commensurate with the end sought, and they were not so great in proportion to the benefit to be derived as to amount to a waste.

For the original work contracted for by the trustee with Howland $11,970 was expended. To repair this a contract was given to the Logan Construction Company for $7,016.18, a total of $18,986.18. These constructions were repairs to an old dike built by the United States Government for an entirely different purpose—to turn a river and make a permanent channel in it. To construct and maintain such a structure required expenditures far beyond the benefit to the land of preventing a cut-out north of the crib.

We contend that no such construction as this was warranted by the trustee. That any man posing as an engineer who suggested it as a protection to the land would at once show that he was not competent. That there is no defense to a trustee who, without the advice of an engineer to construct this dike with its cross dike, says it is for the sole purpose of preserving this land, Mr. Vermeule testified that not only the expense of construction, but even the expense of maintaining it was so great as to not warrant it for the protection of this land, and the results have shown that Mr. Vermeule is correct. Howland's repair went out and Oram's construction is on its way to destruction, and will go in three or four years. So that no permanent or lasting benefit has been done to the land.

(*c*) It was a further duty of a trustee to use a high degree of care that his expenditures should not be wasted and gross. He had no right to make experiments with our money or on our credit, nor expend $18,986.18 for that which could have been better done for $2000.

The character and specific detail of the work by Howland were specifically ordered by Mr. Hinchman. There were no plans, specifications or contract as to cost.

It is admitted by all the witnesses, including Mr. Howland, that the piling and sheathing were too short for the purpose;

that if the purpose was for protection then the sheathing should have been on the outside and not the inside;

that he should have sunk his sheathing into the rip-rap;

that his method of sinking his piling and sheathing was not a good one.

The fact that his work went out the following winter shows conclusively that it was not done with proper care and was experimental and insufficient in nature.

The work done by the Logan Construction Company shows also that it was of the same inefficient character.

That Rogers was not an engineer employed to protect this property is conclusively shown from the results obtained or it must be conceded that he was not competent.

The work of Oram is also now leaning out as Mr.

Vermeule and Mr. Conover both stated and will only last three or four years as Mr. Vermeule testified.

No engineer would attempt to put this kind of work in a river and hitch it to this old dike which had been built for thirty-five years, and which any one would know would carry it away.

Mr. Oram's sheathing was also on the inside, which is not durable or efficient if considered as a protection to the land.

The result is that $18,986.18 is charged against us for work which could have been better done for $2000. The present construction will not last more than three or four years, and will require continual expenditure for maintenance. This is an absolute waste.

(*d*) The dike which was built or repaired by Mr. Hinchman is attached to a Government dike, which was built for the purpose of making a channel in the Manasquan River and maintaining an inlet. It reaches far out into the tide water of the Manasquan River and was built in the tide way. It is therefore largely on land of the State of New Jersey in navigable water and subject to any changes which either the State of New Jersey or the United States Government would choose to make in the position and improvement of this inlet. In other words, here is a dike which the complainant claims he constructed as mortgagee in possession to protect this beach from an imminent danger, and yet it can be removed any day by the State of New Jersey or by the United States Government. Certainly no trustee can expend our money on another

person's land without having any power of keeping it in place and claim that he has made a permanent and lasting repair to our property. This in itself is such negligence as would persuade the court not to force us to pay for these repairs, even if considered as such.

Summary of Facts.

This is a case where a mortgagee in possession admittedly tried a land development scheme.

The mortgagee in possession was the Seacoast Real Estate Company. Its President was Mr. Charles S. Hinchman, a man of vast experience in business, and its Vice President was Mr. H. H. Wainright, a member of the New Jersey Bar. Mr. Durand, another member of the Bar, had always been general counsel and general adviser to its President, Mr. Hinchman, and to his various corporations. Mr. Durand is now President of this corporation. He was therefore, deep in its counsels. Mr. Hinchman was directly notified by a letter from Mr. Wallace when he bought the Gazzam-Ganger notes, that the deed accompanying these notes merely gave him the right of a mortgagee. The mortgagee in possession, therefore, knew all the facts in the matter. It must have done so.

It is impossible for use to view their action in expending this money at this point and in tying up the property of the American Timber Company by their attachments other than that they deliberately attempted to increase the burden by a land development scheme so that the American Timber Company could not re-

deem. In other words, to improve us out of our property. This Company and Mr. Hinchman, its President, had long contemplated the development of this point as a land improvement scheme. They employed in 1913 a surveyor, Potter, to make a plan of lots and lay out a street along the river front of the land to be filled in, and they employed Rogers to also do this work in 1914, 1915 and 1916.

With this scheme in mind and these plans of lots prepared by surveyors they started in the work of filling in the land, (1st) by repairing the old Government dike which had been built 32 years before and ran along the front of the property, (2nd) although they had at that time in their employ Mr. Rogers, who had just prepared maps for them, their President went to a constructor and told him that they wanted the dike repaired, and stated to him that he was improving the land and that he wanted a cross dike built over to the point of the marsh from the old dike, doing all this without engineers, without plans and specifications and without a written contract. It cost $11,970, and was constructed entirely too light for any purpose, and the contractor himself admits that he knew it was too light when the work was done, but that he was employed to do that specific work in that specific way.

In the following winter a great part of this work went out, and the President, Mr. Hinchman, then admitted that his experiment had failed and now turns to his surveyor, Mr. Rogers, who had been drawing these plans of lots for him, and Mr. Hinchman tells him that

he wants this dike repaired and this specific work done and gets him to draw up plans and specifications and put it out to bid, which he does, and an additional amount of $7,016.18 was paid for this work. This work was not done on the land itself, but on the land of another owner without any power to preserve and maintain it.

Subsequently the mortgagee in possession filed a bill to foreclose and this corporation sets up that this work was done not as a land improvement scheme, but for the purpose of protection for the beach. The testimony fails to show that such a matter was ever in the contemplation of any of the people, but that it was always in furtherance of a scheme of land development and improvement, that there was no imminent danger of any damage to the beach; the only damage possible to be considered would be a cut through of the inlet immediately north of the crib and between it and the beach; and this was not imminent and could have been protected, if imminent, by the expenditure of $2,000; that the work which the mortgagee in possession did would not prevent this injury; that it was not of any actual value to the land; and that the construction is already falling down; that the expense of maintenance alone would be more than its value to the land; that it was in the tide way of an navigable stream.

The complainant asks that he should be paid the full amount expended.

We also contend that even if this construction could be considered as a protection, yet it was concededly also

built as an improvement. The protection feature could have been built for $2000. The improvement feature plus incompetence and lack of any care caused it to cost $18,986.18. This conclusively, under Mickles *vs.* Dillaye, 17 N. Y. 80, shows it should not be allowed; that it was an improvement not a repair.

We respectfully contend that there was no danger to the land imminent enough to warrant any expenditure; that these expenditures are of no value to the land for protection; that they did not enhance its value for any purpose, and none should be charged against the mortgagor. They improve us out of our land.

DEWITT C. ROBINSON,
MARTIN V. BERGEN,
Solicitors for Defendants and Complainants in Counter-Claim.

New Jersey Court of Errors and Appeals.

Between

SEACOAST REAL ESTATE COMPANY, BODY CORPORATE,
Complainant-Appellant,

and

AMERICAN TIMBER COMPANY, BODY CORPORATE, et al.,
Defendants-Appellees.

} On Bill, etc.

REPLY SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLEES.

Answering the supplemental brief of appellant:

(1) In answer to its first argument therein set out, we contend that this was not a reasonable expenditure to protect the property from any imminent danger; that the only danger really suggested was from erosion to the back valueless land, which was very slight in its progression,—70 feet in 14 years, and had probably expended itself. That neither cut out nor erosion

would injure the property so that "the estate would not answer its design;" that the expenditures were not reasonable and all the other arguments on the main brief.

(2) In answering the second argument, we directly deny that these expenditures were made on a structure in major part on lands of the mortgagor.

We present the following propositions:

(*a*) In New Jersey the title of an owner of lands adjoining a navigable stream goes to the then high water mark, title to the part beyond the then high water mark being in the state.

(*b*) Such a land owner is entitled to all accretions and the state to all eroded land as determined by the shifting high water mark.

Ocean City *v.* Shriver, 64 N. J. L. 550;
Dewey *v.* Stevens, 83 N. J. Eq., 314 and 656.

(*c*) The land owner is entitled to accretions although induced by artificial structures (if not made by himself for the purpose).

1 Farnum on Waters and Water Rights, Sect. 39, p. 323;
Roberts *v.* Brooks, 78 Fed. 411; 24 C. C. A. 158; 45 U. S. App. 395;
St. Louis *v.* Rutz, 138 U. S. 226;
29 Cyc. 351;
Gould on Waters, 3rd Edit. Sect. 155, p. 311.

But such title is subject to the tide again cutting away the land whether by the artificial structure becoming out of repair or other causes intervening, and the high tide moving into the land.

If the artificial structure causes the land to emerge so quickly as not to amount to an accretion, title would remain in the State.

Coulson & Forbes on Waters, 2nd Edit. (1902) p. 30;
Gould on Waters, 3rd Edit. Sect. 15, p. 311.

(*d*) In Dietrich *v.* Northwestern Union Railway Co., 42 Wis. 248, the Supreme Court of that State, in laying down a set of conclusions as to rights of adjoining owners, says, page 262:

> "*Fourth.*—As a right of necessity, when water navigable or not navigable, is by natural causes wearing away and intruding upon its banks, the riparian owner, whether or not he own the soil *usque ad medium filum aquae,* may, as against the public, at his peril of obstructing the public use when the water is navigable, and at his peril of the necessity, intrude, as far as may be necessary, into the water, for the construction of works necessary to the protection of his land against the action of the water."

and in explaining this conclusion says, on page 265:

> "The rule permitting a riparian owner, as against the public, to intrude as far as may be absolutely necessary, in the construction of works necessary to protect his land against the action of

the water, without impairing any public use, appears to us to go little, if any, beyond the rule at the common law: The King *v.* The Commissioners, etc., 8 Barn. & Cress., 355; Trafford *v.* The King, 8 Bing. 204. So far as it may appear to enlarge the common-law right, we believe it to be necessary to the rights of property on some of the waters of this State, especially on Lake Michigan; and we hold it to be one of many rights founded on the necessities of self-preservation. See Miller *v.* Milwaukee, 14 Wis. 642. It may aid in preserving much valuable property; and, guarded as we have guarded it, can work no injury to the public. Whether and how far one riparian owner may exercise this right to the injury of another, or, exercising it, be liable for such injury, are questions on which we indicate no opinion."

The case of The King *v.* The Commissioners, etc., 8 Barn. & Cress. 355, thus relied on is thus commented on in Coulson & Forbes on Waters, 2nd Edit. (1902), page 39:

"It does not appear that the Court in the last-cited case meant to lay down the principle that a riparian owner has a right as against the Crown to erect defences against the sea on the shore below low water mark when the shore is the property of the Crown, and so to justify a purpresture; this right would seem confined to the soil above high water mark, which is *prima facie* his own. The question did not arise in the case, as the works were executed by the Commissioners of Sewers, and the action was by an adjoining land owner for damage done to his land by the works."

With Dietrich *v.* Northwestern U. Ry. before him, in Gould on Waters, 3rd Edit., Sect. 160, page 319, the author says:

> "If a sea-wall or embankment is erected in tide-waters beyond the limits of the owner's land, it is doubtless illegal at common law as being a purpresture, since it does not appear that littoral proprietors are authorized, as against the Crown or without its sanction, to erect even defenses against the sea below high-water mark. In this country, it is doubtless a principle of general application, as has been expressly held in Wisconsin, that, as a right of necessity, when water, navigable or not navigable, is by natural causes wearing away and intruding upon the banks, the riparian owner, whether he owns the soil *ad filum aquae* or not, may, as against the public, intrude into the shoal unnavigable water near the banks so far as may be necessary for the purpose of constructing works essential to the protection of his land against the action of the water. Such structures are public nuisances if they interfere with the navigation."

(*e*) That under the special usage of New Jersey and the Wharf Act of 1851 (Comp. Stat. 5856) a shore owner could reclaim between high and low water marks. Thus establishing a new actual high water mark to which title as between state and owner ran.

Gough *v.* Bell, 22 N. J. L. 441;
Stevens *v.* Railroad, 34 N. J. L. 531;
Heiney *v.* Nolan, 75 N. J. L. 397.

The second syllabus of Gough *v.* Bell, 22 N. J. L. 441, says:

> "But in New Jersey the owner of lands along the shore of tide waters may extend his improvements by wharfs or filling up near the shore in front of his lands to low water mark unless prevented by the state provided he do it so as not to interfere injudiciously with navigation, and when he has so improved or reclaimed the shore his title will extend to actual high water mark."

Provided it was done before the repeal of this act by the Act of 1891, Comp. Stat. 4385.

Heiney *v.* Nolan, 75 N. J. L. 397;
Atty. Gen. *v.* Railroad, 68 N. J. Eq. 198;
Stockton *v.* American Lucol Co., 36 At. Rep. 572.

(*f*) Such title depends on the maintenance of the reclamation.

The rights of a land owner who allows his land to become gradually eaten away or suddenly submerged are the same whether his title is gotten by reclamation, deed or accretion, except that in case of sudden submergence he has a reasonable time to recover.

In Ocean City *v.* Shriver, 64 N. J. L. 550, loss of title by gradual erosion is discussed.

In Farnum on Waters and Water Rights, Sect. 74, page 331, the author says:

> "If a portion of the land of the riparian owner is suddenly engulfed, and the former boundary

can be determined or the land reclaimed within a reasonable time, he does not lose his title to it."

In Bacon *v.* Mulford, 41 N. J. L. 59, at page 64, the Supreme Court says:

"There was no power in the provincial legislature, therefore, to grant any right in this soil. If the power existed, the repeal of the act of 1842 annulled the right, as it amounted to a mere license, revocable at any time. Had a structure which originally extended beyond high water mark been maintained, it would have carried the title of the riparian owner with it, if the structure did not interfere with the navigation of the creek: Gough *v.* Bell, 2 Zab. 441; Stevens *v.* Paterson and Newark R. R. Co., 5 Vroom, 532.

"But the original structure, being a mere raft of logs lying on the ground, over which the tidal waters rose and fell, did not carry the high water mark, so far as appears in the testimony, beyond the present line. If it did so, its dilapidation and disappearance left the place as it was originally, with the title in the state, below high water mark. And this was its status in 1848."

(*g*) The whole theory of right of ownership in accretions, is that of equalization. The owner may lose land by having it eaten way, and hence may gain land by having the tide gradually go out. The title of both the adjoining owner and the state goes to the varying high water mark, and both accretion and erosion are to be judged by the same rules.

Where, therefore, there is a gradual imperceptible change, the title is ever following the position of the high tide, and it would be just as impossible for the adjoining owner to claim land covered by the tide as for the state to claim land uncovered by the tide.

And similarly, it seems to us that where accretion has been induced or augmented by a structure erected by another and this as an accretion goes to the adjoining owner (it does not go to him if not an accretion), if that structure were removed or destroyed so that the tide again worked in back, the line of the state would contemporaneously follow.

This would not be a sudden submergence where the owner would have a reasonable time to recover.

In the case at bar the Federal Government in 1882 built its dike, constructed in part at least in the tide way below high water mark (Record, pages 236, 239, and the Government maps of 1878 and 1882).

The record does not show any reclamation by the owner before 1891. It does show that the land for 200 feet west of the crib, on which the dike was constructed, was then high land; that the land became high land along the crib and also westerly beyond the 200 foot stretch of high land on which the dike had been erected over the place where the current had cut in (see Government map of 1882); but Haberle's testimony (pages 225, 229) shows that the high water mark must for many years have been east of the cross dike built in 1914 and north of the westerly end of the Government dike, and that as the dike gradually be-

came out of repair the high water mark slowly eroded back from the dike 60 or 70 feet from 1904 at the place of the current and westerly to Short Creek (Record, pages 225-229). The record also shows that at the 200 foot stretch it eroded back a very short distance.

If the land had been reclaimed before 1891 it had been lost by failure to maintain the reclamation and by erosion. If it had been gained by accretion it had been lost by being eaten away.

It make no difference whether the high water mark was before 1912. We are considering rights as existing then and in 1914.

In 1912 and 1914 all the western part of the dike from about 200 feet west of the crib was 60 or 70 feet beyond high water mark, and all the cross dike was beyond high water mark, and therefore on property of the State of New Jersey, and therefore, this construction cannot be maintained by us.

In reality even if the land now fills up it puts us in the position of an owner who by an artificial structure has caused accretion or sudden exposure, and may be unable therefore to claim the same.

We do not attempt to argue that a mortgagee in possession under no conditions should expend money for necessary protection by work on another's soil. It might be that the construction of a spur dike would be justifiable even though built on state property as ocean front property which could be protected from erosion of the ocean current by the construction of a spur dike out beyond high water mark. But we do

contend that this construction and expenditure is not excusable or justifiable under any such hypothesis.

(3) The third argument is that the expenditure was made with the purpose of enhancing the value of the property for sale purposes, the parties contemplating a sale of the property.

The case of Halbert *v.* Turner, 233 Ill. 531, does not seem to assist appellant. In that case an ignorant colored man owned two lots worth $100 to $300. He borrowed $31 and conveyed by deed the property to the loaner. The parties seem to have considered the transaction as a sale with a power to redeem in the borrower. After his death the loaner entered into possession and moved a dwelling house on the lots at an expense of $550. There were claimants against his estate and the Orphans' Court ordered sale of the property. Since a sale was to be had of the property and therefore the result of allowing the enhanced value of the property from the improvements would not result in preventing the mortgagee from redeeming his property, and as the court states that improvements are sometimes allowed (the Court must have meant because both parties believed the mortgagee was the owner), the enhanced value $200 was allowed to the mortgagee.

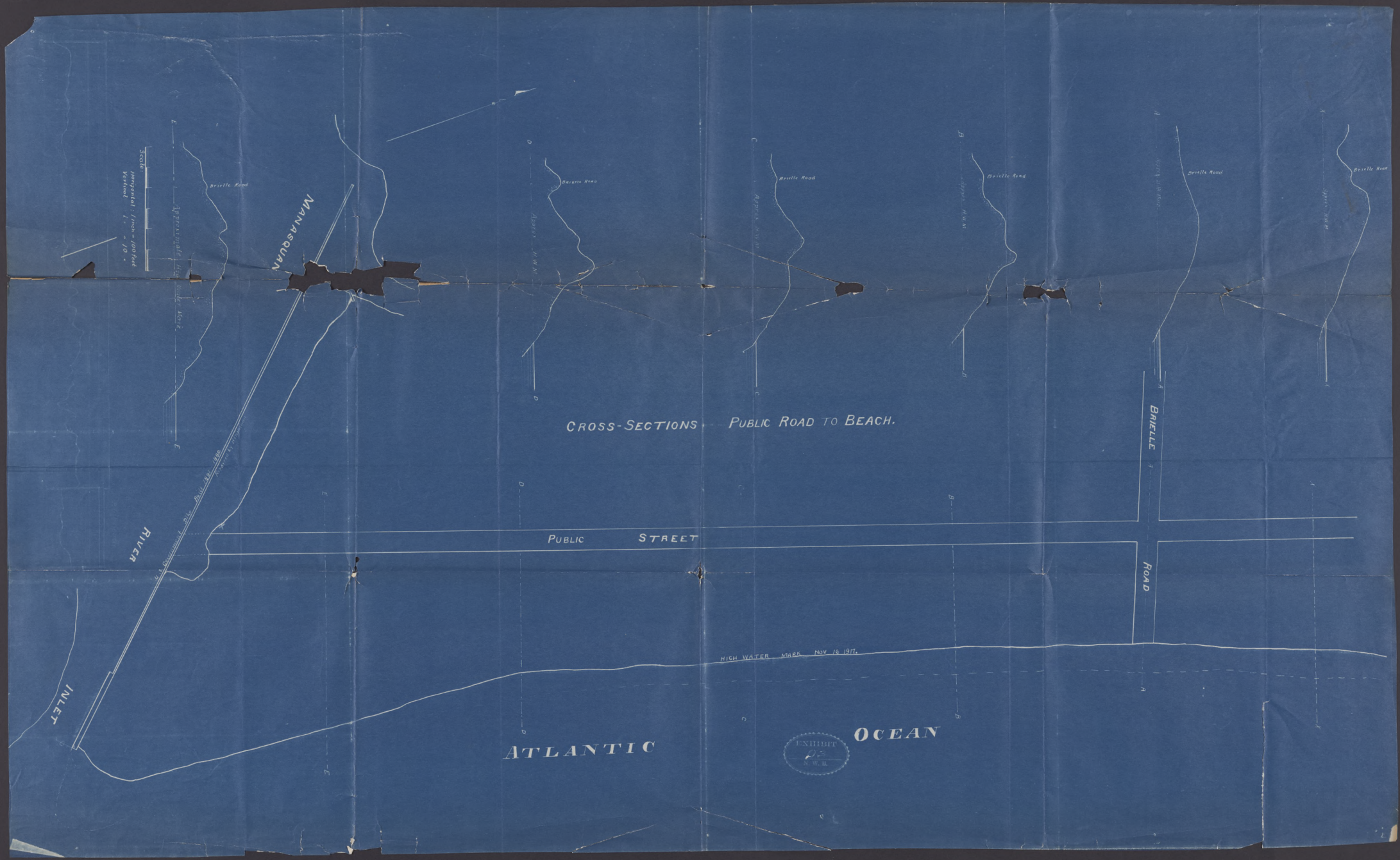
In the case at bar the expenditure was not made to improve the property for sale, but *after* the sale. Under this case not the expenditure but the enhanced value (which is *nil*) only could be allowed. It is idle to argue that this expenditure increased the value of

the property from $15,000 to $50,000. Whatever increase in value came to the property in 1914 was from the construction by the municipality of the street and sewer, etc. systems. It is equally idle to say that the American Timber Company wants a sale of this property, or ever wanted it.

It is impossible to get any sympathy for Hinchman and his corporation in this matter. The record shows that by a series of attachments he had tied the American Timber Company, the Yards and their family connections all up from any ability to protect this property. By this sale, which he must have known was of no effect, he tied them up again from being able to borrow on this tract. In 1914 he secured $4000 of rent from this tract and the mortgage becomes reduced to $15,000, yet he deliberately spends $11,900 on the property and the following year about $7000 more. He could only have done this with the design to improve them out of this property and make it impossible for them to redeem.

The record shows that this title to this property has been subjected to two distinct attacks. This shows the danger of inability on the part of the American Timber Company to borrow money on this tract and its vulnerability to being improved out of its property.

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CROSS-SECTIONS PUBLIC ROAD TO BEACH.
Brielle Road
MANASQUAN
RIVER
INLET
PUBLIC STREET
BRIELLE ROAD
HIGH WATER MARK NOV 18 1917.
ATLANTIC OCEAN
EXHIBIT
N.W.H.

