

NEW JERSEY
Court of Errors and Appeals.

N. RISLEY & SONS,
Plaintiffs—Defendants in Error,
vs.
OCEAN CITY DEVELOPMENT COMPANY,
Defendant—Plaintiff in Error.

Brief for Defendants in Error.

The declaration contains two counts. The first declaring on a written contract, which is made a part of the declaration, and the second on the common counts with a bill of particulars annexed. It will be noticed that the first count avers a performance of all conditions precedent in compliance with section 118 of the practice act of 1903, page 570, which reads: "Either party to an action may aver performance of conditions precedent generally, and the opposite party shall not deny such performance generally, but shall specify in his pleadings the condition precedent, the performance of which he intends to contest." An inspection of the record will disclose that there were three pleas to the first count. One denying the contract and another generally denying performance and the other averring pay-

ment. In this condition of the pleadings it was only necessary for the plaintiffs to prove the contract and the amount of filling done by them. See *McGlade vs. Home Insurance Company*, 71 Law, page 40.

The plaintiffs proved the contract and amount of filling by Elton Risley, testimony, page 4 to 8, inclusive. At this juncture there was a motion for a non-suit.

I. THE MOTION FOR NON-SUIT WAS PROPERLY DENIED.

Having averred performance of all conditions precedent in keeping with the statute, and there being no plea specifically denying such performance, and plaintiffs having proven the contract and the amount of filling thereunder, there was no fact in dispute, and had defendant introduced no proof the Court would have been required under the cited case to have directed a verdict for the plaintiffs. It was, therefore, a correct ruling on the part of the trial judge in refusing the motion to non-suit.

II. THE THIRD ASSIGNMENT IS UNTENABLE.

It is objected that there was error in requiring the witness Sutton (page 64) on cross-examination to answer this question, "Do you want the jury to understand that you were an expert in bulkhead building at that time?" The witness had been called by the defendant and testified touching the building of bulkheads, and in several instances expressed opinions. On direct examination, at page 59, he is asked, "Will you state from your experience whether it is possible to hold a bulkhead in time of storm unless it is filled in back of it *with a storm?*" Again, "If the sand is filled in back of it is there any trouble to hold the bulkhead?" With these opinions and his whole testimony on direct examination the jury might well have inferred that he was an expert, and the manner of his testimony might well have lead them to infer that he wanted to leave the im-

pression that ne was an expert. In this condition it was entirely proper to ascertain on cross-examination if he was holding himself out as an expert. But, if the question was improper, it cannot be said to have harmed the defendants, and, being harmless, error cannot be assigned. Moreover, no reason is stated for the objection, which fatalizes it under the authorities. See *Mooney vs. Peck*, 49 *Law* 232.

III. IT WAS NOT ERROR TO PERMIT LEWIS M. HAUPT TO TESTIFY AS AN EXPERT.

It will be noticed that the standing of Mr. Haupt was not challenged, nor was his opinion testimony in any way contradicted. One cannot read his examination, beginning at page 75, without being convinced that he is an engineer of high standing, and one wholly competent to speak upon the subject under discussion. It cannot be successfully contended that there was no evidence before the trial judge upon which to base his judgment that Mr. Haupt had qualified as an expert, and, moreover, the admission of his testimony as an expert was only in the sound discretion of the Court, and it would be idle to maintain that that discretion had been abused. See *N. J. Zinc Co. vs. Lehigh Zinc Co.*, 59 *Law* 189.

The fifth assignment of error is based upon an exception to an allowance of the question to the witness Haupt, as follows: "In your opinion, was this bulkhead in question in a better condition to resist the ocean tide, ocean currents, without a filling back of it or with a filling back of it?" Having qualified himself as an expert according to the decision of the trial judge, he was competent to express an opinion which was upon the very subject under inquiry. The objection was put upon the single ground that the witness lacked experience in building bulkheads. If the question had otherwise been improper, it was not for the reason stated. The Trial Court having ruled that he was an expert, and that ruling not being assignable for error, it is

difficult to see how it can be maintained that he could not express an opinion upon the effect of ocean tides and currents upon the bulkhead in question.

The sixth assignment of error deals with a question propounded to the witness Haupt, but it will be noticed that the question called for a yes or no answer, and the witness answered "yes." So far the answer did the defendant no harm, and the exception thereto is, therefore, without force. There was no objection to the witness particularizing, so that the exception can avail nothing to the defendant. There was then a motion to strike out the answer, the refusal of which is the basis for the seventh assignment. The answer was responsive to the question, to which question there was no objection, and it was too late for the defendant to move after having taken the chance of the answer being favorable to it. Besides, we submit the testimony was entirely competent as aiding the jury in the solution of the very question involved by the defence.

The eighth assignment is based upon the Court's permitting the witness Haupt to answer this question: "If you know of a case, Professor, that is in point with this case, where there has been such a result as you started to state, I wish you would give such a case, if you know of it personally?" To this question counsel says: "Objected to for the same reason." This objection cannot avail. This did not bring to the notice of the trial court the point, if any, in the mind of counsel, and the court was not bound to look back to previous objections to determine to which allusion was made.

IV. THERE WAS NO ERROR IN PERMITTING WITNESS SHEROD TO ANSWER THE TWO QUESTIONS WHICH ARE THE BASIS FOR ASSIGNMENTS NUMBER NINE AND TEN.

Witness Sherod was asked and required to answer this question: "Is this company in possession of the land which by this agreement with plaintiffs was to be filled? Has the company sold any of the lots since the plain-

tiffs quit work there?" In view of the claim of the defendant, by the evidence, a question might have arisen as to whether or no it had accepted the work of the plaintiffs, which would have enabled them to recover under the common counts, although not on the written contract. In this aspect it was altogether competent to show that the defendant had taken possession of the filled land and exercised its rights as owner by the sale of lots. While the mere taking of possession and sale of lots would not be conclusive of acceptance, it was evidence competent for the jury. See *Bozarth vs. Dudley*, 44 *Law* 304.

V. NO ERROR IS MANIFEST BY ASSIGNMENTS ELEVEN, TWELVE AND THIRTEEN.

Objection is made to the question asked of witness Hartman, at page 98.

It will be borne in mind that the defendant was contending that it had been damaged by reason of the partial demolition of the bulkhead due to the negligence of the plaintiff, while the plaintiff was contending that their work was properly done, and that the damage, if any, resulted by reason of an unusual storm, which caused the breaking of the bulkhead due possibly to its faulty construction. The question was a vital one of fact, which could only be decided by a jury. The witness Hartman was describing what he did in the construction of the bulkhead, and the jury were entitled to light upon the subject. The witness Johnson was permitted to tell of the character of the storm, which, we submit, was entirely relevant in view of the nature of the controversy. As there was testimony touching the destruction of another bulkhead than the one in question, it was competent to show by the witness Townsend, to whose testimony objection was made, as to the relative severity of several storms upon the several bulkheads. It was not, therefore, error to permit this to be done, but, on the contrary, it was quite evidential in aiding the

jury as to the real cause of the destruction of the bulkhead in question.

VI. ASSIGNMENTS 14, 15, 16, 17, 18, 19 AND 20 HAVE NO LEGAL BASIS.

These assignments are based upon the court's permitting witness Clouting to answer certain questions. The exceptions are to be found on page 131, and it will be seen that no reason is given for the objections. This, under the authorities cited, neutralizes the objections, if they had any force, and we maintain they did not. The same is true of the objection to the question propounded to witness Risley, at page 154; also questions to Mr. Risley, pages 155, 156 and 157. Conceding that these latter questions should have been answered, it will be seen that the objection is put solely upon the ground that they are not a cross-examination, and the court sustained the objection on that ground. It will be seen by the direct examination of the witness that the questions were not proper on cross-examination, and the court's overruling on that ground cannot be assigned for error.

VII. THE TWENTY-FIRST ASSIGNMENT CANNOT BE SUSTAINED.

The assignment is that the court overruled a question put to Freeman Risley, while in fact the court admitted the question on direct examination of counsel for plaintiffs, and the objection was that the question was indefinite. In the first place, as the defendant was claiming damages for delay, it was proper and competent for the plaintiff to show that the delay was not their fault, and that they could have finished the work within the time required by the contract had it not been for the failure of the defendant to build the bulkhead within time. This was the purpose of the question, but, if the question was not competent, the objection was indefinite, and the exception thereon is not available to the defendant.

VIII. DEFENDANT IS NOT PERMITTED TO RAISE THE QUESTION INVOLVED IN ASSIGNMENT NUMBER TWENTY-TWO.

The overruled question was, "Did you ever get a final certificate or acceptance of the work done on that property?" This question was not a cross examination and, moreover, the right to raise the question of the final certificate was precluded both by the failure of the defendant to plead a non-performance of that condition by the plaintiffs and the consent of counsel at page nine to waive that question.

IX. ASSIGNMENT TWENTY-THREE IS UNTENABLE.

This assignment is addressed to the court's permitting witness Norris Ingersoll to answer this question (page 178), "Did the failure to have that bulkhead built in the early summer in any way interfere with the work of your filling?" This was an entirely proper question, the purpose of which was to meet the claim of defendant of delay on the part of the plaintiffs and to assign a cause therefor. But, it will be noticed that the objection was made purely upon the ground that the question was leading. It is too well settled to warrant the citation of authority that the allowance of a question merely because it is leading cannot be assigned for error.

X. IT WAS PROPER TO SHOW BY WITNESS RISLEY WHO BUILT THE BULKHEAD.

It is objected by assignment number 24 that error was committed in allowing witness Elton Risley at page 182 to answer this question: "Who was it that started to build the retaining wall around this property?" In the first place the answer did the defendant no harm, but it was proper for the plaintiff to show that it was built by Sutton, who was a contractor with the defendant, and that they, the plaintiffs, had nothing to do with the weakness of the bulkhead and were not responsible therefor.

XI. THE TWENTY-FIFTH AND TWENTY-SIXTH ASSIGNMENT SHOW, IF ANYTHING, HARMLESS ERROR.

These two assignments deal with questions propounded to witness Risley, pages 182 and 183. The question on page 182 called for a yes or no answer and, as the answer was, "I did," referring to a conversation, that cannot be said to have harmed the defendant. The question on page 183 is, "What was said at that conversation concerning the cutting down of the brush and the building of the retaining wall on and around this property?" By the answer it will be seen that there was a possible explanation for the alleged delay on the part of the plaintiffs in performing the contract and that delay was occasioned by the failure of the defendants to do certain work allotted to them. This made the question competent, relevant and admissible, and, indeed, it may well be doubted if the answer on page 184 could possibly have harmed the defendant.

XII. THERE WAS NO ERROR IN THE CHARGE OF THE COURT OR IN ITS REFUSAL TO CHARGE.

Under this head we deal with assignments 28, 29 and 30. Before a brief discussion of these assignments we again call attention to the issue made by the pleadings. As amended the pleas allege that before the completion of the work by the plaintiffs twenty-one thousand cubic yards of sand pumped in was washed off of the premises into the Atlantic Ocean and not replaced by plaintiffs and that plaintiffs did not fill in or pump in the sand provided for in the contract and because thereof they are not entitled to the one thousand dollars to be paid in accordance with the terms of the contract. The original pleas at page 217 and 218, as we have already indicated, raise no question save the execution of the contract on the part of the defendant. Under the evidence the defence undertook to show that damage had been suffered by reason of the destruction of the bulkhead due to improper filling by the plaintiffs and their

failure to fill before the approach of the storm which did the damage. The plaintiffs claim, and their evidence tends to support their claim, that defendant delayed too long in building the bulkhead; that their filling was properly and efficiently done and that the destruction of the bulkhead and the loss of the sand was due to one or two, or both causes, to wit, a faulty bulkhead or an unusual storm. In this condition of the proof the Court said, "You will have to determine whether the plaintiffs were responsible for the washing away of this bulkhead and the consequent loss of sand and gravel." Certainly that charge is unexceptionable. It can hardly be said as a matter of law under the evidence that the plaintiffs were responsible. It was plainly a jury question. Again he said, "If, on the other hand, the defendants themselves delayed the construction of that bulkhead so that the plaintiffs had not an opportunity to fill in in time to avoid this storm or if the defendant, by its agent Sutton, constructed the bulkhead of such character that it would not withstand the storm, or if without the filling of sand in back of it you believe the bulkhead would have succumbed to the storm, then the plaintiffs are not responsible," &c. Manifestly this was a proper charge. There was nothing in the contract that obliged the plaintiff to be responsible for the negligence of the defendant and to fill and maintain the fill at all hazards. "If they did their work properly, and thereafter the defendant was damaged due to its own negligence, certainly it will have to bear the loss. Counsel for defence excepts to this language of the Court, "It is not claimed in this case that any advantage shall be taken of his failure to issue the certificate, but, his estimate, you will observe, includes only the sand fill which he found there the following spring after the storm had washed away these fourteen thousand cubic yards. I have left you to say whether that is to be deducted or not, and your decision will show whether they are responsible for the washing away of the bulkhead or not." We fail to discover any error in this language.

The defence wanted to pay for what sand was found on the ground after the storm had wrought its havoc, while the plaintiffs said they were entitled to have their pay for the sand which they pumped in and which was there before the storm. The amount was 105,158 yards (less than sued for). (Testimony of engineer, p. 34.)

Now, had not the bulkhead been demolished and the condition remained as it was before the storm, certainly it would not be claimed that the plaintiffs were not entitled to be paid for the sand found on the ground. If, therefore, there was less sand on the ground after the storm not due to the fault of the plaintiffs, but to the fault of the defendant, then the plaintiffs would not be required to suffer the loss, and this is what the language says, but the question is always left to the jury to decide that pertinent question of fact.

The last assignment goes to the Court's refusal to charge certain requests of the defendant. The first being in this language: "Under the terms of the contract sued on the work was at the risk of the plaintiffs until its completion, and they cannot recover for any greater quantity of sand pumped than that shown by the final estimate of the engineers, which was 93,515 cubic yards." It would have been error to have charged this request after what has already been said. There is nothing in the contract, either express or implied, from which the inference can be drawn that required the plaintiffs to suffer against the negligence of the defendant. By that charge the jury would have been obliged to ignore all the evidence touching the real cause of the loss of the sand. Every one agrees that the loss was occasioned by the demolition of the bulkhead, but, now, if its destruction was due to a lack of care and negligence on the part of the defendant, the plaintiff is not responsible, and must be paid as though the sand remained.

The refusal to charge the second request was proper, particularly in view of the fact that there was no legal evidence from which the jury could find damages. No

one pretended to testify to any damages suffered by reason of the failure of the plaintiffs to perform their contract within the time, if they did so fail. And moreover, we maintain that the pleadings would not have justified the jury in finding damages. The notice of recoupment is so vague, indefinite and uncertain as to warrant the Court in ignoring any evidence pretending to show damages.

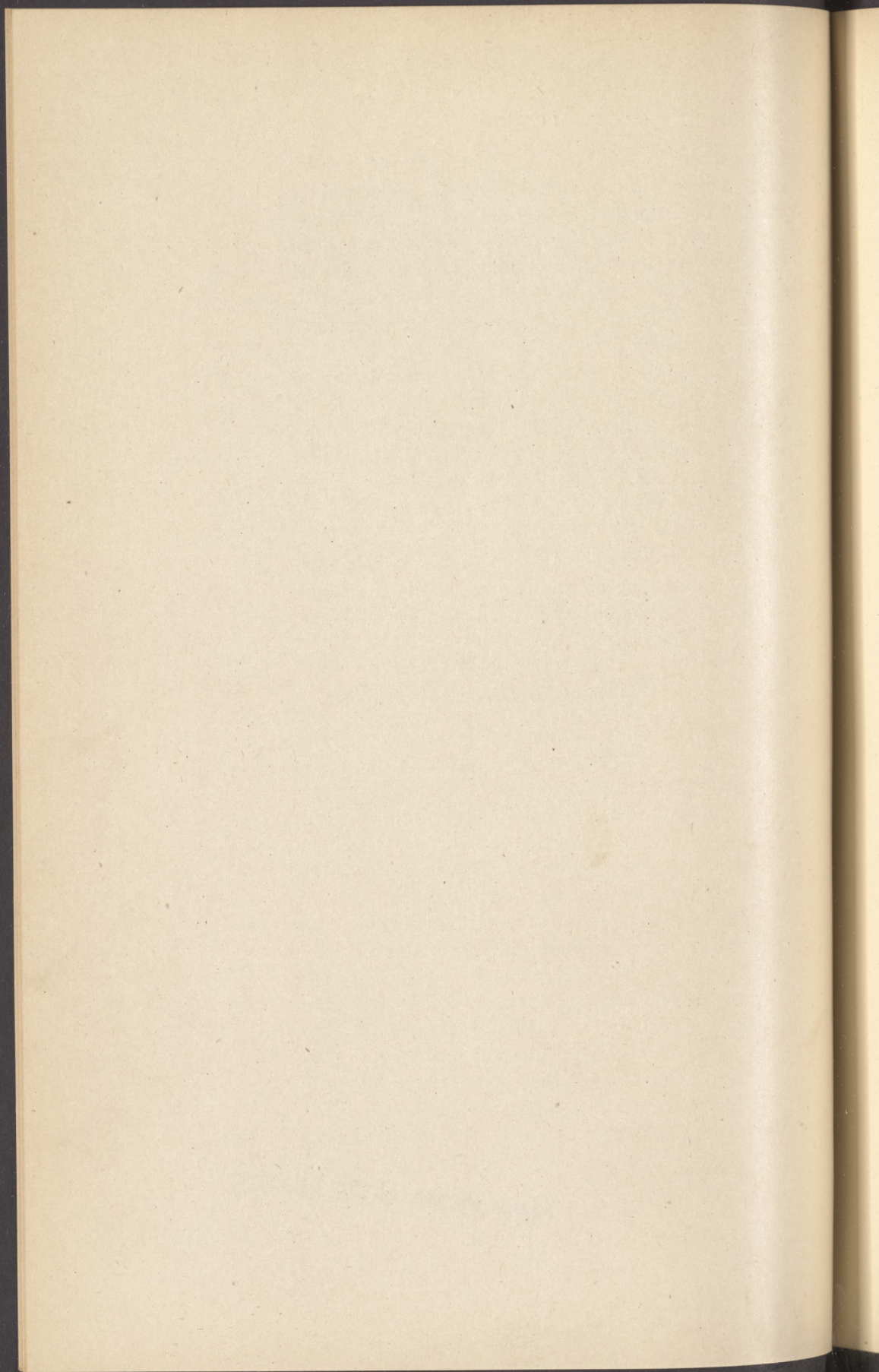
As to the failure to charge the third request it will be noted that the Court charged the same in effect in its charge to the jury, but if it failed, we maintain, for the reasons stated, that it cannot avail the defendant, and for the further reason that there is an absence of any proof on which the jury could have found damages.

We have briefly referred to all of the assignments, and submit that none are sufficient to justify the reversal of the judgment, and we pray an affirmance thereof.

Respectfully submitted,

THOMPSON & COLE,

Attorneys for Defendants in Error.



NEW JERSEY COURT OF ERRORS AND APPEALS.

N. RISLEY AND SON,
Defendants in Error,

VS.

OCEAN CITY DEVELOPMENT
COMPANY,
Plaintiff in Error.

IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR.

The above stated action was instituted by N. Risley and Son against Ocean City Development Company to recover an alleged balance of six thousand, eight hundred and seventy-four dollars and ninety-two cents, claimed to be due under a contract for filling a tract of land in Ocean City, New Jersey. 20

This contract is set out in the record of judgment on page 211 of the printed book; the first section of which provides that "*the contractor shall furnish all necessary labor, material, apparatus, tools and superintendents for the construction of the fill of the property of the Ocean City Development Company in a thorough and workmanlike manner, in accordance with the specifications and plans of Latta and Terry Company describing the same.*" Section three provides that "*the said specifications and plans are hereto attached and shall form a part and parcel of this contract as though set out at length or written herein.*" Paragraph two of section six provides that "*the contractor agrees that all of the construction covered by this contract shall, until final payment and acceptance by the Company, remain at the sole* 30

risk and expense of the contractor." Paragraph three of the same section provides that "as time of completion is an essential part of this contract, the contractor agrees that the filling shall be carried on at the rate of two thousand five hundred cubic yards per month; the entire work being completed by September 20th, 1903."

Section ten provides that "the Company shall pay, and the contractor shall receive as full compensation for the faithful performance of all work done under these specifications and
 10 contract, the sum of thirteen and one-half cents per cubic yard of fill, the amount of fill being one hundred and twenty thousand, nine hundred and six cubic yards, as determined by the survey of Latta and Terry Company, engineers. The Company further agrees to pay one thousand dollars as an allowance for any and all filling made necessary by settlement, which may occur on work covered by this contract."

The first paragraph of the specifications provides that "the work under these specifications shall include the furnishing of all materials and labor for the fill of the property of the
 20 Ocean City Development Company between the curb line and the bulkhead line on Wesley avenue from Forty-ninth to Fiftieth streets, between the center line of Fortieth street and the center line of Forty-seventh street from the bulkhead line of Wesley avenue to the right of way of the West Jersey and Seashore Railroad Company, and between Fiftieth street and Forty-seventh street from the right of way of the West Jersey and Seashore Railroad Company to the right of way of the Ocean City Railroad Company." The first section of the specifications, page 214, provides that "the
 30 work shall be commenced within ten days of the signing of the contract, at such points as the engineer may direct and prosecuted at such rates that the minimum amount of fill in any one month shall be twenty-five thousand cubic yards, and the entire work completed by September 20th, 1903. The work shall be carried on in such manner and at such points as to facilitate and not retard the work of other contractors."

Section fifteen of the specifications provides that "*the work shall be paid for by the cubic yard, and will be measured in place upon completion of the entire work.*" Section six under fill and grading, page 217, provides that "*after the completion of the work and the issuance of the certificate to that effect by the engineers, the contractor shall maintain the fill for the period of three months.*"

Upon the trial, a judgment was rendered by the jury for the entire amount claimed with interest. The exceptions taken at the trial being so numerous, the points will be 10 stated as briefly as possible.

The assignments urged for reversal are:

4. "That the Trial Judge before whom said cause was heard, permitted one, Lewis M. Haupt, to testify as an expert against defendant's objections."

This assignment is based on an exception found on page 78. On page 78, line 15, the witness had testified that he did not consider himself an expert. The question which was permitted to be answered, is found at the bottom of page 76, as follows: "*Does the study that you have made of bulk-* 20
heads and the effect of tides thereon and the experience that you have had, justify your giving an opinion as to the character of bulkhead necessary to withstand a storm on the ocean front?" It was answered over defendant's objection at top of page 79, after the witness had stated as above on page 78, that he did not consider himself an expert. It is submitted that it was error for the Court to have permitted the witness to answer this question when the witness had stated himself that he did not possess expert knowledge and had shown by cross-examination on page 78, that he had 30
had no experience whatever in the building of bulkheads.

The fifth assignment is based on the admission over defendant's objection, of an answer to the following question found on page 80: "*In your opinion, was this bulkhead in question in a better condition to resist the ocean tide, ocean currents, without a filling back of it or with a filling back of it?*" The witness had shown by his own testimony that

he was without any experience in the building of bulkheads, or in the filling of them, and it is submitted that it was error to permit him to express an opinion upon the question. *Cook vs. State*, 4 Zab. 844. The effect intended to be produced upon the jury, apparently, was to show to the jury that this man had made a study of the tides and to thereby influence jurors' minds with his opinion on a subject about which he had had no experience whatever.

The sixth assignment is based on the admission over de-
 10 fendant's objection, of an answer to the following question:
 "Do you know any case where the effect of the water coming over the bulkhead and falling on the earth behind has caused the breaking up of the bulkhead?" (Found on page 81.) It is submitted that the question was entirely irrelevant to the question in issue; at most, it was but *res inter alios actae*.

The eighth assignment is based on the admission of an answer to the question found at the bottom of page 83, as follows: "If you know of a case, Professor, that is in point
 20 with this case, where there has been such a result as you started to state, I wish you would give such a case if you know of it personally." The reason urged against the admission of this answer was that there was nothing to show that the structure about which the witness was speaking, was in any manner, similar to that in issue, or that the conditions were in any degree the same. It is still insisted that it was error to have permitted the witness to answer the question, and it is urged that the answer shows that the ob-
 30 jection was well taken, for the answer shows that the conditions were entirely dissimilar, and there is nothing in the answer contained that is relevant to the case in issue.

The tenth assignment is based on the admission of an answer to the question addressed to Mr. Sherred, found at the top of page 96 as follows:

"Has the Company sold any of the lots since the plaintiff quit work there?" It was objected to as irrelevant, and it is now insisted that whether the Company had or had not

sold any of its lots since the plaintiff quit work, could, in no manner, form a basis or right for plaintiffs' recovery, and yet it was evidently asked for the purpose of inducing the jury to believe that since the defendant Company had sold some of its lots, part and parcel of the lands filled, therefore, the plaintiffs should recover the balance claimed to be due for that filling.

The twelfth assignment is based on the admission of an answer over defendant's objection, to a question found on page 118, as follows: "*In that same storm, were there any houses washed down?* A. Yes, sir. Q. *Anywhere near this?* (Objected to as irrelevant and immaterial, and an exception noted.) A. Yes, sir; there were two houses washed down at Fifty-sixth street and one between Fifty-fifth and Fifty-sixth street." It is urged that these questions and answers were irrelevant and immaterial. There is nothing in the case to show that there is any similarity of conditions existing between the land lying between Forty-seventh and Fiftieth streets, and the land lying between Fifty-fifth and Fifty-sixth streets. There is nothing to show what sort of houses they were, or in what manner they were constructed, nor is there anything to show whether the houses were completed or only in course of construction, and it is insisted that to permit such a question to go before a jury for the purpose of comparison, was injurious error.

The sixteenth assignment is based on the overruling of a question found on page 154. G. A. Risley on page 153, had testified that he was one of the members of the plaintiff firm. On the same page line 15, he testified to having had a conversation with Mr. Sutton about the bulkhead. On page 154, he was asked: "Q. *Mr. Risley, Mr. Sutton testifies that he said that he was to put sand back there and that he did put the sand there. Do you say that he didn't put it there?* (Objected to.) Q. *Do you know whether or not Mr. Sutton did put the sand there?* (Objected to and question overruled.)" It is first submitted that the question was proper cross-examination, and second, that Risley, being a

party plaintiff, was subject to cross-examination on the matters in issue, and such cross-examination was not limited to the questions asked on the direct examination.

The seventeenth assignment is based upon the overruling of defendant's question addressed to Mr. Risley on page 155, as follows: "*The bulkhead didn't go out prior to the storm of September 12th after you commenced to fill in the sand, excepting at the northeast end?*" This question was over-
 10 ruled on the theory that it was not within the line of the cross-examination, and the same argument is urged that defendant was not limited in his cross-examination of a party plaintiff to the questions asked on the direct examination, but only by the question in issue; that after plaintiff had submitted himself as a witness, defendant was entitled to examine him on all matters relevant to the issue without making him defendant's witness; that defendant had the right to purge the party plaintiff's conscience after submitting himself as a witness by putting to him leading questions and cannot be deprived of this privilege, which would follow if
 20 he is obliged to make the party plaintiff defendant's witness as to all matters not examined on by the plaintiff.

The eighteenth assignment is based on the overruling by the Court, of the following question put to Mr. Risley, as not being cross-examination: "*Now, Mr. Risley, after you saw the construction of this bulkhead, you commenced to fill in there, didn't you, against it?*" It is insisted by defendant that this was proper cross-examination for the reasons above stated. It was material to the issue. Defendant had contended that plaintiffs had not fulfilled their contract with-
 30 in the time agreed upon. Plaintiffs insisted that the bulkhead was not sufficiently strong. The fact that plaintiffs saw the bulkhead before they commenced to fill in the sand back of it would have been an important factor in enabling the jury to determine whether the bulkhead was weak in fact, or whether plaintiffs concluded it was weak after defendant had set up the plaintiffs' failure to complete their contract. In other words, the answer to this question would

have assisted the jury in determining whether the claim of plaintiffs that the bulkhead was not sufficiently strong was a bona fide claim or otherwise.

Where a party to a suit denies the principal allegation or charge made against him, in his direct examination, he thereby lays himself liable to a cross-examination upon every circumstance or transaction with which he was connected, which may tend to establish the allegation or charge.

Pullen (Ch.) 5 Atl. 639.

Where a party calls himself as a witness and is examined 10
in chief, the opposite party may go into the whole case on a cross-examination, and need not confine himself to a cross-examination on the matters that were the subject of the direct examination.

Livingston vs. Keech, 34 N. Y. Sup. Ct. (2 Jones & S.) 547.

In Webster vs. Lee, 5 Mass. 334, it was held that if a witness is produced by the party against whom he is interested the other party may cross-examine him on all matters pertinent to the issue on trial. Cited with approval in Den. vs. 20
Camblos, 1 Gr. 135-147.

The nineteenth assignment is based on the overruling of the following question put to Mr. Risley, found on page -56, line 20, as follows: "*After you had the conversation with Mr. Sutton, which you have related, did you or your firm begin the filling in of the sand back of the bulkhead?*" On page 153, Mr. Risley had testified that he was a member of the firm; that he knew Mr. Sutton; that he had a talk with Mr. Sutton about the character of the bulkhead, and that he said to Mr. Sutton, "I was looking at the bulkhead 30
and I asked him and said, 'You certainly don't expect us to pump against this bulkhead, do you?' And he said, 'No, he was going to haul sand in there.'"

It is insisted by defendant that the question asked on page 156, which was overruled as aforesaid, was proper cross-examination, and that the Court erred in overruling it; that it would have been material first, in aiding the jury in pass-

ing upon the truth of the statement made by Risley that he had asked the question of Sutton, which was denied by Sutton, and second, it would have aided the jury in passing upon the bona fides of the plaintiffs' claim that said bulkhead was weak, if after seeing the bulkhead and talking about it with Sutton, the plaintiffs had started to fill back of it.

The twentieth assignment is based on the overruling of the following question addressed to Risley, plaintiff, by the Court, found at the bottom of page 156: "Do you know
 10 *whether or not your dredge was broken down during the progress of the work in question between the first of April and the 20th day of September, 1903?*" It had been testified by the defendant's witnesses that plaintiffs' dredge had been broken down a considerable portion of the time within the dates above mentioned. It was objected to as not being cross-examination and defendant insisted, and still insists that it was a proper question to put to a plaintiff witness upon cross-examination, as it was within the issue being tried.

20 The twenty-third assignment is based on the admission of an answer, over defendant's objection, to a question asked Norris Ingersoll, at the bottom of page 178, as follows: "*Did the weakness of this bulkhead that you saw, interfere with your continuously filling back of it?*" It was objected to as being leading and as calling for a conclusion. It is urged that it was injurious error to permit the answer to the question, as that was the precise question that was being litigated. Defendant contended that plaintiffs had not fulfilled their contract. Plaintiffs contended that they were
 30 prevented from fulfilling because of the weakness of the bulkhead. The question to be submitted to the jury, and which was later submitted to the jury, was whether the weakness of this bulkhead interfered with the filling back of it. The questions propounded to the witness should have brought out the facts, and from these facts the jury should have been permitted to answer the question which this witness was permitted to answer without stating any of the

facts. It is submitted that this was injurious error. In the case of Shoemaker vs. Elmer, 70th N. J. Law, page 710, a physician was asked a question based upon testimony previously given in the cause. It was objected to because it usurped the province of the jury, and the Court of Errors and Appeals so decided, holding that the facts upon which the opinion was desired, should have been stated in the form of a hypothetical question.

The twenty-fourth assignment of error is based on the admission of an answer, over defendant's objection, to the following question, found on page 182, as follows: "*Mr. Risley, who was it that started to build the retaining wall around this property?*" It was objected to as being irrelevant and incompetent, as the contract speaks for itself. It is insisted that the contract was the measure by which this suit must be determined. The contract itself would determine whether Risley was to build it or not, and if under the contract, Risley was to build it, then the question was improper. If, on the other hand, under the contract, Risley was not to build it, then the question was irrelevant, so it is insisted that the question was irrelevant and incompetent in any aspect, and the Judge therefore erred in admitting it. 10 20

The twenty-fifth assignment is based on the admission, over defendant's objection, of an answer to the following question, found on page 182, line 20, as follows: "*Did you ever have any conversation with any of the officers of this Company concerning their having the brush cut down and the retaining bank built?*" This question was answered before the objection could be stated, but after the objection was taken and the question was allowed, it was again answered. Defendant contends that this question was improper for the same reasons as the preceding one. If the contract provided for the removing of this brush and the building of the retaining wall, then the contract should speak for itself. If it did not provide for it, then it was irrelevant in this suit who should remove the brush or build the retaining wall. It is also insisted that there is no ambiguity in the contract, 30

and who should build this retaining wall and remove the brush; was a question of law and not a question of fact to be determined by the Court upon a construction of the contract. The contract provided that the plaintiff should do all necessary work. By permitting the answer, the Court in effect permitted the jury to construe the contract, which it claims was error.

The twenty-sixth assignment is based on the admission of an answer to the question, found at the bottom of page 183, 10 as follows: "*What was said at that conversation concerning the cutting down of the brush and the building of the retaining wall on and around this property?*" It is contended that the legality of this question is precisely the same as the preceding one and the same reasons are urged for reversal, because of the admission of this question, as were urged against the admission of the preceding one.

The twenty-seventh assignment of error is based on the charge of the Court to the jury, in which the Judge said: 20 "*You will have to determine whether the plaintiffs were responsible for the washing away of this bulkhead and the consequent loss of sand and gravel.*"

It is insisted by the plaintiff in error that whether the plaintiffs were responsible in law for the washing away of the bulkhead, was a question of law, to be determined by the Court upon a proper construction of the contract under which plaintiffs undertook to perform the work.

Paragraph 2 of section 6 provided: "The contractor agrees that all the construction covered by this contract shall, until final payment and expenses by the company, remain 30 at the sole risk and expense of the contractor." There was no allegation that the company had accepted the work. The suit was brought because the final payment had not been made, and there was no allegation in the declaration, of fraud upon the part of the company in not accepting the work. The production of the certificate by the architect was waived; but nothing else was waived except the actual pro-

duction of that certificate. It was undisputed in the evidence that plaintiffs had not completed the contract.

Section 1 of the specifications provided that the work should be carried on in such manner and at such times as the engineer should direct. The only excuse for not completing the contract which plaintiffs made, was that the bulkhead was not completed until sometime in August. There was no allegation and no proof that the contractors were requested by the engineers to fill that portion of the land where the bulkhead was not completed, before August. The specifications aforesaid, provided for the filling, under the direction of the engineers, for the express purpose of enabling the various contractors to work in conjunction with one another. It clearly appears by the contract and specifications that the parties did not contemplate having all the other contractors complete their work before the filling was commenced, hence it is submitted that the construction of this contract and of this paragraph 2 of section 6 aforesaid, made a construction of the contract by the Court essential, and it was error to leave it to the jury to construe.

The twenty-eighth assignment is based on the following charge of the Court: "*If, on the other hand, the defendants themselves delayed the construction of that bulkhead so that the plaintiffs had not an opportunity to fill it in time to avoid this storm, or if the defendant, by its agent Sutton, constructed the bulkhead of such character that it would not withstand the storm, or if, without the filling of the sand in back of it, you believe the bulkhead would have succumbed to the storm, then the plaintiffs are not responsible, and cannot be charged with the loss of sand, or the loss of gravel or the price of the bulkhead.*" It was shown by the proof in the case that the bulkhead had been constructed. Plaintiffs must have seen it at and before the time they commenced the filling. If the bulkhead was not as strong as plaintiffs deemed it should be, they should have objected before proceeding with the filling, and have caused such modification of their contract if they deemed it necessary. Their enter-

ing upon the filling after seeing the construction of the bulkhead, amounted, in law, to an acknowledgment that they considered it sufficient, and to a renewal of their written promise to fill in back of it at their risk. The uncontradicted testimony showed that they were requested to fill back of it long before the storm came, and refused and neglected to do so. *The contract required that the filling should be done by the 20th of September, and that time should be the essence of the contract,* hence it is submitted that the Judge
 10 erred in permitting the jury to say that the plaintiff should not be liable if Sutton had not constructed such a bulkhead as the jury thought would be sufficient to withstand the storm. The plaintiffs had contracted with relation to this particular bulkhead, and having so contracted, it was in, competent to permit the jury to vary that contract because the jury might conclude that the bulkhead should have been different from that for which the contract was made. The contract provided that plaintiffs should complete the work at their expense. They never did complete the work,
 20 never did fill in the quantity of sand for which they claimed compensation, and for which the jury allowed them.

The twenty-ninth assignment is based on the charge of the Court as follows: "*It is not claimed in this case that any advantage shall be taken of his failure to issue the certificate; but his estimate, you will observe, includes only the sand fill which he found there the following spring after the storm had washed away these 14,000 cubic yards. I have left you to say whether that is to be deducted or not, and your decision of that will show whether or not they are*
 30 *responsible for the washing away of the bulkhead or not.*"

This assignment is founded on the exception found on page 206, and the exception is founded on the answer to a question propounded by one of the jurors, Shumway, on page 204, in which the juror asked: "Your Honor, are we to consider that contract according to the letter of it, or are we to make allowance for conditions affecting it because of other contracts made conditional to it. What I mean to say

is, taking that contract, if we go by the letter of it as I understand it, these people would be practically responsible under all conditions, that is until the engineer had accepted their work." The Court: "It is not claimed in this case that any advantage shall be taken of his failure to issue the certificate." Mr. Bourgeois: "What he is getting at, the contract provides that his final estimate shall be conclusive. There is no waiver of that at all." The Court: "But his estimate, you will observe, includes only the sand fill which he found there the following spring, after the storm had washed away these 14,000 cubic yards. *I have left you to say whether that is to be deducted or not, and your decision of that will show whether they are responsible for the washing away of the bulkhead or not.*"

It is submitted that the trial Judge erred:

1. In not construing the contract when asked by the juror for a construction upon a particular part of it, and

2. In leaving the construction of that contract, which was plainly done, to the jury.

The defendant insists that under this contract, and under the proof in this case, the plaintiffs were not entitled to recover for pumping more sand than was shown by the measurement upon the ground. The contract specifically provided for this method of measurement, and then made an allowance of \$1000 for such sand as should have settled into the salt holes and other soft places. The jury allowed the plaintiff the one thousand dollars extra for the settling, and then allowed the plaintiffs to recover for every cubic yard of sand which plaintiffs alleged they pumped. The measuring of sand as it is being pumped by a sand dredge, is, at best, uncertain and unreliable, and for the purpose of avoiding this uncertainty in measuring, the contract provided that the sand should be measured in the fill, after completion, and that the settling should be paid for outside of this measurement, hence defendants contend that the Judge erred in permitting this jury to render a verdict for any sum they

saw fit, without regard to the written contract between the parties.

The thirtieth assignment of error is based upon the refusal of the Court to charge three separate requests:

1. *Under the terms of the contract sued on, the work was at the risk of the plaintiffs until its completion, and they cannot recover for any greater quantity of sand pumped than that shown by the final estimate of the engineers, which*
 10 *was 93,515 cubic yards.*

This request is based directly upon the terms of the contract and the final estimate of the engineers, and it is submitted that the refusal of the Court to so charge, was error.

2. *That time of completion is an essential part of this contract. The plaintiffs not having completed the work within the time limited by the contract, they are liable for all damages arising after the time limited in the contract, viz: September 20th, 1903.*

20 The parties to this contract, knowing that ocean storms are almost certain to occur at or about the time of the equinox, limited the time of completion to the twentieth day of September, and provided that time of completion should be essential. It is contended by the defendants that having made time the essence of the contract, and plaintiffs having failed to fulfil the contract within that time, were, in law, responsible for the damages which occurred because of the non-fulfilling of said contract, and that the parties having the occurrence of ocean storms in mind at the time of entering into the contract, it was error for the Court to permit the
 30 jury to excuse or explain away the plaintiffs delay, and that the Court should have charged as requested.

3. The third request, which was refused, was: "*If the jury find that the bulkhead and street work were destroyed by reason of plaintiff's failure to fulfil their contract, then the damages would include the value of said work, and cost of re-building a bulkhead similar to the one destroyed.*"

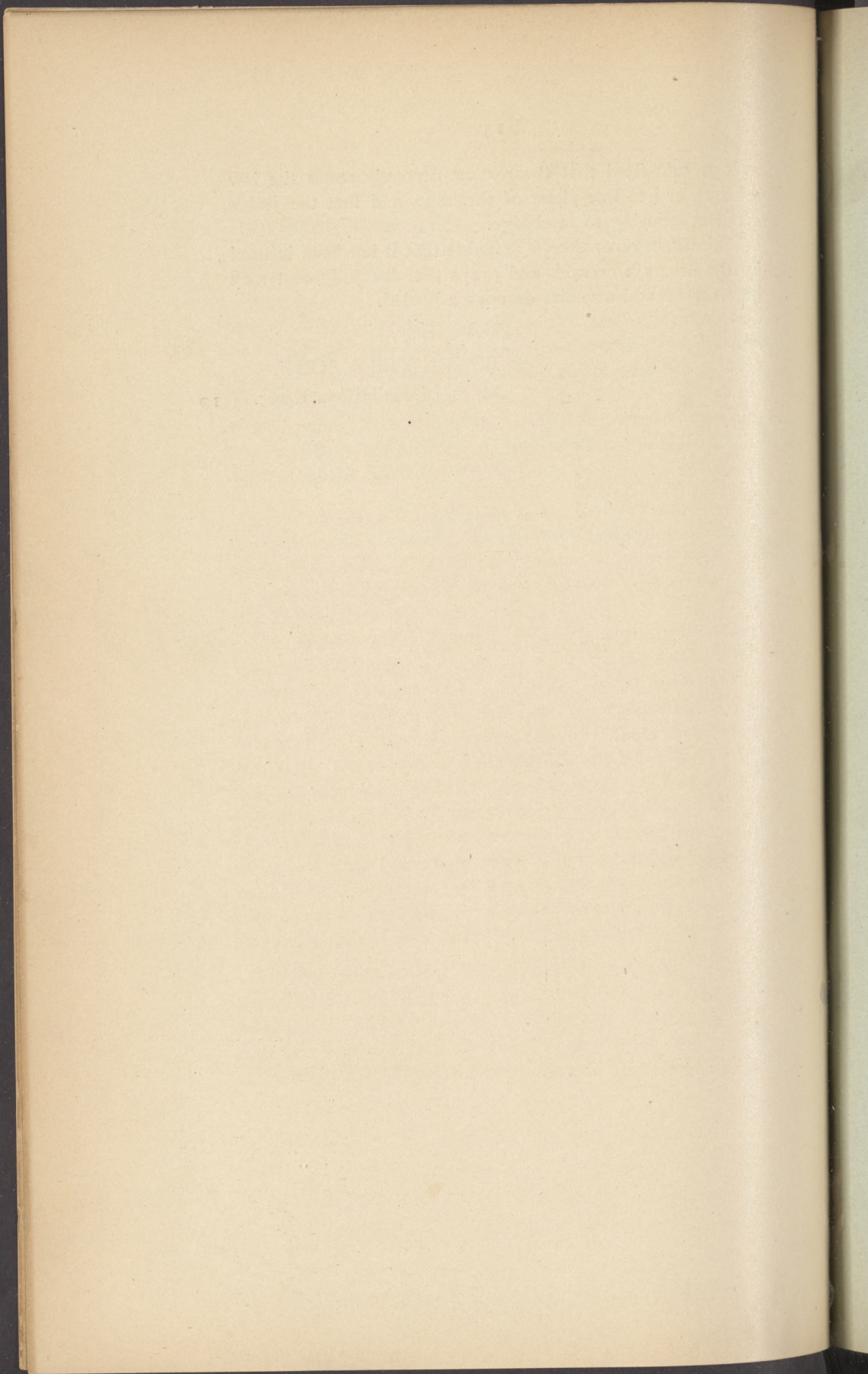
It is submitted that the request correctly states the law with regard to this phase of the issue, and that the Judge erred in refusing to so charge.

Plaintiff in error therefore insists that it has been injured by the errors aforesaid, and prays that the judgment may be reversed and a venire de novo awarded.

Respectfully,

BOURGEOIS & SOOY,

Att'ys. of Plaintiff in Error. 10



NEW JERSEY COURT OF ERRORS AND APPEALS,

N. RISLEY AND SONS,
Plt'ffs, Def'ts in Error,

vs.

OCEAN CITY DEVELOP-
MENT Co.,
Def't, Plt'ff in Error.

}
IN ERROR.

BOURGEOIS & SOOY,
Attorneys of Plaintiff in Error.

THOMPSON & COLE,
Attorneys of Defendants in Error.

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NEW JERSEY, ss.

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature.

GREETING :

For as much as in the record and proceedings, and also 10
in the giving of judgment in a certain plaint, which was in
our said Supreme Court of Judicature before you, between
Nathaniel Risley, Gideon Risley, Elton Risley and Freeman
Risley, trading as Nathaniel Risley and Sons, plaintiff, and
Ocean City Development Company, defendant, in an action
upon contract, manifest error hath intervened, to the great
damage of the said defendant, as it is said, we being willing
that the error, if any there be, should, in due manner, be
corrected, and full and speedy justice done to the parties
aforesaid in this behalf, do command you that if judgment 20
be thereupon given and affirmed, then you distinctly and
openly send, under your seal, the record and proceeding
aforesaid, with all things touching the same, to our judges
of our Court of Errors and Appeals in the Last Resort in all
Causes, at Trenton, on the twentieth day of November, nine-
teen hundred and six, together with this writ ; that the record
and proceedings aforesaid being inspected, we may cause to
be further done thereupon, for correcting that error, what
of right, and according to the law and custom of the State
of New Jersey, ought to be done.

WITNESS our Chancellor and President Judge of our said 30
Court of Errors and Appeals, at Trenton aforesaid, the third
day of November, nineteen hundred and six.

S. D. DICKINSON,
Clerk.

BOURGEOIS & SOOY,
Attorneys.

The answer of William S. Gummere, Chief Justice with-
in named:

The record and proceedings of the plea whereof mention
is within made, with all things touching the same, to the
Court of Errors and Appeals in the Last Resort in all
Causes, within specified, at the day and place within named,
I certify in a certain schedule to this writ annexed, as I am
10 within commanded.

WILLIAM S. GUMMERE,
Chief Justice.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

20

NATHANIEL RISLEY & SONS,
Plt'ff, Def't in Error.

vs.

OCEAN CITY DEVELOP-
MENT Co.,
Def't, Plt'ff in Error.

} WRIT OF
ERROR.

Ret'ble November 20th, 1906.

30

BOURGEOIS & SOOY,
Attys of Def't, Plt'ff in Error.

NEW JERSEY SUPREME COURT.

N. RISLEY AND SONS,

vs.

OCEAN CITY DEVELOPMENT CO.

ON CONTRACT.

10

ATLANTIC CITY, N. J., July 12, 1906.

TESTIMONY

Before HONORABLE A. B. ENDICOTT, Judge, and Jury.

20

Appearances:

For Plaintiffs—MESSRS. THOMPSON & COLE.

For Defendant—MESSRS. BOURGEOIS & SOOY.

Mr. Cole: We offer in evidence the contract under date of April first, 1903, between N. Risley and Sons, complainants, and Ocean City Development Company, defendant, to which contract are specifications, said contract appearing to be executed by the plaintiffs and the defendant.

30

(Paper marked Exhibit P1.)

ELTON RISLEY, SWORN.

Direct examination.

By Mr. Cole :

Q. You are one of the plaintiffs in this case, are you not?

A. Yes, sir.

Q. Who beside yourself compose the firm of N. Risley
and Sons?

10 A. My father, my brother, J. I. Risley, and my other
brother.

Q. And your father's name is Nathaniel?

A. Yes, sir.

Q. You are familiar with the contract in question in this
case?

A. Yes, sir.

Q. You know the property referred to in that contract
to be filled?

A. Yes, sir.

20 Q. Did the firm of N. Risley and Sons proceed to fill the
land under that contract?

A. Yes, sir.

Q. How many cubic yards of earth did your firm pump
on the land of the defendant described in the contract?

A. About 104,000 cubic yards, I believe.

Q. Have you been paid something on account of the con-
tract?

A. Yes, sir.

Q. How much?

30 A. Something over \$8000.

Q. Can you give me the figures accurately?

The Court: Refresh your memory from paper, if you
desire.

Q. I show you what appears to be a copy of a letter writ-
ten by you to the company.

A: The amount was \$8288.74.

Q. Have you for the firm demanded the payment of the balance due?

A. Yes, sir.

Q. Before this suit was brought?

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois: 10

Q. From whom did you demand the payment of the balance you claim to be due?

A. Why, from the Ocean City Development Company.

Q. Who?

A. Why, Mr. Tatem was there and Mr. Henry D. Moore, Mr. William Moore and Mr. Sherrod.

Q. Where was this?

A. In their office in Philadelphia.

Q. When? 20

A. I can't tell you exactly when. Subsequent to the work being done.

Q. What was said to you by them in response to your demand?

A. They said that they had suffered damage because of the bulkhead being washed out, which they claimed was due to our filling not being put in back of it and a heavy storm coming along and washing the bulkhead out.

Q. At the time you made the demand for the balance you claim to be due to you, did you present to them a certificate of the engineer showing the quantity of sand for which you were entitled to be paid? 30

Mr. Cole: That is objected to on the ground that it is not cross-examination, and on the ground that under the pleadings in this case the defence is in no position to raise any question with reference to the conditions precedent.

Mr. Bourgeois: I don't think the contract itself requires that the certificate shall be given.

Mr. Cole: Then I assign that as another reason why the question is not competent.

(Question allowed. Exception noted for plaintiffs.)

A. We didn't produce a certificate that I know of. We produced papers showing the amount pumped.

10 Q. After the making of those papers showing the amount pumped did any portion of the sand by you pumped wash out?

(Objected to as not cross-examination. Objection sustained.)

Q. When did you complete your work according to your understanding of it?

20 (Objected to on the ground that it is not cross-examination and that the question of performance is not in issue by the pleadings.)

Mr. Bourgeois: The examination in chief shows that he made the demand sometime after the work was completed.

Mr. Cole: There is no such question in the case.

Mr. Bourgeois: Before suit was brought.

30 The Court: I think I had better hear counsel as to the issue formed by the pleadings.

Mr. Cole: I will first read the declaration.

(Reads declaration and plea.)

Now the statute says, "Either party to an action may aver performance of conditions precedent generally and the other party shall not deny such averment generally but shall

specify in his pleading the condition preceding the performance of which he intends to contest." My declaration was drawn in the light of this statute. I averred performance of the conditions of the contract and specifications and the reply is that we did not perform. The statute says that that is not sufficient; that they must raise by their plea the issue on the condition that they propose to contend was not in fact performed, and the only issue before the jury, but not put in this contract, was that this was not their contract, and I assume that we also had the burden of showing the
 10 actual amount of filling so that the jury could fix the amount and my proposition is that they cannot now in the face of that plea and in the face of the statute come in and raise all these conditions precedent. They have not made it the issue. A mere denial of performance is not enough.

Mr. Bourgeois: All that that amounts to is that he should have demurred. He says that they can recover when they show the contract. The contract provides that the doing of this work is at their expense and risk all the time. We
 20 have a perfect right to show that after they had pumped some of this sand in and before it was paid for, that it washed out. They can only recover for the sand that is there under the contract that is proven.

Mr. Cole: That is a defence outside of performance. It should have been set up by the plea. There should have been a plea warning us that they would attempt to raise the issue that this sand had washed away. I submit we are not here to meet it. If your object is to set up by this
 30 examination a defence, I submit that it cannot be done by cross-examination.

Mr. Bourgeois: I simply want to find out if they have brought themselves within the provisions of the contract that it is at their expense and risk until it is completed.

The Court: I think that should be reserved for defence and not introduced at this time. I will sustain the objection.

Plaintiffs Rest.

10 Motion for Nonsuit.

Mr. Bourgeois: I move for a nonsuit because they have not shown that this sand was there at the time they demanded payment of the money and under their contract that is a matter that must be there. There is nothing to show that that sand was there at the time of the complaint or the acceptance by the company. It was incumbent on them to show that the sand was there. In other words, they cannot come in here if they pumped 104,000 cubic yards and before they
 20 completed their work 20,000 yards washed out and collect for the 104,000 yards. I say by the terms of the contract they have not proved their case.

(Mr. Cole replies.)

The Court: The motion is refused.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

30

ALLEN B. ENDICOTT, [SEAL];

J.

Adjourned until 1:15 P. M.

Mr. Bourgeois: We have a motion to make. In view of the condition in which your Honor evidently regards these pleadings, Mr. Tatem and I think we would not be safe in going on without an amendment to them such as would entitle us to try the case on its merits, and I have prepared three pleas here denying those particulars. One of them does not go to the merits. The first is that the certificate of the engineer was not produced. If Mr. Cole says that he is not in a position to meet that, we will not insist on that. The other is that the plaintiff ought not to be permitted to recover the amount of the contract because after he pumped the sand in and before its completion 21,000 yards of it washed out. The other is that because of the failure of Risley and Sons to complete this work according to the contract they are not entitled to recover the one thousand dollars provided in the contract for the settling of the sand. 10 20

Mr. Cole: I have consulted with one of my clients and we are content to allow the amendments upon the understanding, of course, that we join issue on the pleas and with the understanding that we are not required—that there is to be no advantage of the failure to produce the certificate of the engineer.

Mr. Bourgeois: Then we will just strike that one out 30

(Pleadings amended as follows: "And for a further plea in this behalf by leave of the Court for that purpose first had and obtained, defendant says that plaintiff ought not to have or maintain their aforesaid action thereof against defendant because, before the completion of said work and before its acceptance by defendant, twenty-one thousand cubic

yards of the sand pumped in and charged for by plaintiff was washed off the premises of plaintiff into the Atlantic Ocean, and not replaced by plaintiff; and of this the said defendant puts itself upon the country.

“And for a further plea in this behalf by leave of the Court for that purpose first had and obtained, defendant says that plaintiff ought not to have or maintain their aforesaid action thereof against defendant because defendant says plaintiff did not fill in or pump in the sand provided for in
10 said contract and because thereof plaintiff is not entitled to the one thousand dollars to be paid to plaintiff according to the terms of said contract for the sinking or settling of said sand; and of this defendant puts itself upon the country.”)

Mr. Cole: With the amended plea in I ask leave to open the case on the part of the plaintiff and submit interrogatories and answers thereto, which answers are not under oath but which oath I waived, and ask them to be marked Exhibit P 2, and I submit the witness Elton Risley for such cross-
20 examination as counsel for the defence may think pertinent under the pleas as amended.

Mr. Bourgeois: We consent.

Defendant's Testimony.

30

WILLIAM G. MOORE, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Moore, I show you Exhibit P 1 and ask you if you have ever seen that before?

A. I have.

Q. And you recognize it as what?

A. I recognize it as the contract for the filling of the Ocean City Development Company's property.

Q. Will you look at that and tell me the date of it?

A. The first of April, 1903.

Q. Now, Mr. Moore, state generally, won't you, without attempting to go over that, what the contract was about?

Mr. Cole: Oh, no.

10

Mr. Bourgeois: Not with the intention of binding the jury to what he says, but simply that they can understand what he says.

Q. What is it about? What is it for?

A. We had three squares of property at Ocean City which we desired to fill with sand for the purpose of laying out building lots and laying out streets, and so forth, and it was necessary, or at least we desired to build out to Wesley avenue, and in order to do that it was necessary to have some protection there to hold the sand and for that purpose it was necessary to have a bulkhead built to hold it. 20

Q. And this contract was for the filling in back of the bulkhead?

A. This contract was for the filling in back of the bulkhead as well as filling in the rest of the property.

Q. Just what property were Risley and Sons to fill in?

A. Well, they were to raise all of the property between 47th street and 50th street.

Q. What do you mean by that? Refer to the contract and state whether or not there was some part of that—some sandhills and so on, to be graded by some other person. 30

Mr. Cole: That contract doesn't say anything about it.

Mr. Bourgeois: It says that they were to fill in particular depressions where the sand wasn't on the ground.

A. You mean in connection with the—the sand hills had to be moved by another party.

Q. That is what I want you to tell me about.

A. They were to be moved by Mr. Joseph Sutton of Ocean City.

By Mr. Cole:

Q. Is there anything in that contract about that?

10 A. It has been so long I will have to look at it. Would that be in the contract or in the specifications?

Mr. Bourgeois: It would be in the specifications in all probability. It says they are to furnish all labor and material for the fill of the property.

Mr. Cole: You cannot read into that that they had any outside contract with somebody else to do something.

20 A. It says that the work shall be carried on in such manner as to facilitate and not to delay the work of other contractors.

By Mr. Bourgeois:

Q. In the first paragraph, "For the fill of the property of the Ocean City Development Company." Now, Mr. Moore, let us go back. Before this contract was entered into, did you have a conversation with N. Risley & Sons regarding the doing of this work?

30 A. Yes, sir.

Q. Now, without stating the terms of the contract, state whether or not anything was then said with relation to the condition of the bulkhead and the manner of the filling?

Mr. Cole: That I object to. It seems to me that the written contract must embody the contract made by the par-

ties and this question seems to me calls for an answer that would in some way modify or change that contract.

A. Oh,—if I may speak on the subject—before the contract was signed it was desired that N. Risley and Sons should understand why we wanted the contract completed by September 20th.

Mr. Cole: I don't think that can be read into the contract at all. He is presumed to know what is in the contract and abide by it, it seems to me. 10

Q. After Risley and Sons entered into the contract and commenced the work were you sometimes on the premises?

A. Yes, sir.

Q. Frequently or otherwise?

A. Occasionally.

Q. Did you have an opportunity of observing and did you observe the progress of the work by them?

A. Yes, sir.

Q. Will you state to the jury the manner in which this work was done by Risley and Sons? 20

A. Well, the only thing I can say is that they didn't live up to the contract in the amount of sand per month that they contracted to put on the property. Their excuse was that their machinery was out of order; something was broken down which kept them from going ahead with their work. The work was done thoroughly unsatisfactorily to us.

Mr. Cole: I ask that that be stricken out.

The Court: Yes. 30

A. It was necessary to save the bulkhead which they were building for us with the understanding that it should be filled behind it as it was built.

Q. Simply state the manner of the progress; how did they get along with it?

A. They went very slowly.

Q. Did you ever have any conversation with them or either of them during the time that they were working there relating to the slow progress that they were making?

A. Yes, sir.

Q. When and what?

A. Well, I can't answer that definitely. It has been so long, but it was while the work was in progress.

Q. What conversation did you have with them?

10 A. Well, if I would meet one of them, "Why isn't this work going ahead?" "Machinery is out of order." "Don't you know that you are under certain contract with us to complete that within a certain time?" I can't remember the exact words, but that was the drift of the conversation. "Well, we are doing the best we can."

Q. How many times do you think during the progress of the work you had a conversation with them regarding the slow progress they were making?

20 A. I wouldn't be able to answer that, Mr. Bourgeois, it has been so long, and I would be apt to exaggerate, because we were so incensed about the thing all the time that any time we saw any of them we tried to push the thing along. Most of our orders were through the engineers. Anything in the way of letters or orders we had for them would be through the engineers, but occasionally, at least on one or two occasions, I saw them on the ground.

Q. Do you remember a storm that occurred about the 12th or 15th of September of that year?

A. Yes.

30 Q. Do you recollect the state in which the land was prior to the storm?

A. Yes.

Q. Do you recollect the state in which it was after the storm?

A. Yes.

Q. Now, what was the effect of the storm upon the bulkhead and the filling?

A. Well, it had taken out a small section of the bulkhead right at the point where the sluiceway was, where the contractors had put a sluiceway there to let their surplus water escape, and after the storm was over a part of the bulkhead was taken out, but to my mind the greatest damage was done in weakening the bulkhead for two or three hundred feet on either side.

Q. Do you recall whether or not after that time you had a conversation with them relative to the progress they were making?

10

A. I cannot.

Q. Now, Mr. Moore, I will ask you again the question whether or not prior to the signing of the contract with Risley and Sons you had any conversation with them relative to the importance of filling in back of the bulkhead as it was constructed?

A. Yes, sir.

Q. And I will now ask you what that conversation was?

A. Well, as near as I can remember it before we were to sign a contract of any kind for filling in behind that bulk- 20
head we impressed them or tried to impress them with the fact—

Mr. Cole: Can't you state what was said.

A. I can't remember the exact words, no. It has been three years now. It was of the importance of having that fill put in behind the bulkhead as promptly as possible so that it would be filled before the storms of the fall would come along and take the bulkhead out as it had been before. 30

Cross-examination.

By Mr. Cole:

Q. You had less one bulkhead before the bulkhead in question?

A. Yes, sir.

Q. That was before they began their work?

A. That was before they began to pump in back of the bulkhead, yes.

Q. Where was that bulkhead, that is, the first bulkhead that you lost located with relation to the second bulkhead that was damaged?

A. That was located on the outside of Wesley avenue.

Q. With relation to the second?

10 A. Same location.

Q. Wesley avenue runs parallel with the ocean?

A. Practically so.

Q. And this filling was three squares running parallel with Wesley avenue? How deep was this filling back of the bulkhead? How many feet back of the bulkhead was he required to fill?

A. All the way back to West avenue, three or four squares back.

20 Q. Where was Wesley avenue as related to the bulkhead which you say was damaged? That is, was it on the inside or outside of Wesley avenue?

A. The bulkhead was on the outside curb line of Wesley avenue.

Q. And where was the bulkhead with relation to ordinary high water?

A. Well, it varied slightly. I should say just about at high water.

Q. How long was that bulkhead?

A. Three squares.

30 Q. How much did it vary from one end to the other, forty to fifty?

A. What do you mean, as far as the high tide line was concerned?

Q. Yes.

A. Well, I should say probably thirty feet.

Q. Not as much as fifty?

A. I wouldn't want to say.

Q. Why? Wasn't it directly parallel with the street?

A. It was.

Q. Doesn't the street run—

A. The bulkhead, I say, was on the outside curb line of Wesley avenue.

Q. Then high water did make in further at one end than the other?

A. A trifle.

Q. When did you begin work on the bulkhead in question?

A. The second bulkhead?

10

Q. Yes.

A. That is the one that was repaired?

Q. Yes.

A. It was sometime in the early summer of 1903.

Q. Can you give us the date? Summer, you know, covers a great deal.

A. Yes, but there have been considerable summers since then and I can't give the exact date.

Q. Was it the month of August?

A. I wouldn't want to say that it was begun then.

20

Q. When was it completed?

A. I can't answer that.

Q. You don't know?

A. In the summer of 1903.

Q. You say you were on the property frequently?

A. Yes, sir.

Q. And you can't tell us any nearer than that when it was begun and completed?

A. It was begun and completed sometime in the summer of 1903. It has been three years since then.

30

Q. I suppose you have tried to furbish yourself up for the purpose of this suit?

A. Not particularly.

Q. How long did it take you to complete the bulkhead after you began the erection of it?

A. Well, the only thing I can say to that is that it was our desire and intention in the building of the bulkhead that the

sand should be filled in back of it and before filling in the sand you couldn't go ahead.

Q. My question is, how long it took you to build that bulkhead there after you began the work?

A. It would have been done a great deal quicker if they had pumped in the sand.

Q. I will admit that, but I want the question answered. How long?

A. I can't tell you.

10 Q. You don't know? When did these contractors begin to pump on this property?

A. I wasn't on the grounds. I can only say we expected them to begin just as soon after the contract as possible, but there was something the matter with their machinery and they didn't go at it.

Q. Don't let us hold a controversy all the time. Answer the questions. I ask you again, do you know when these contractors began to pump in on this land?

A. I don't know the exact date.

20 Q. Did they begin to pump in on the land before you began to build the bulkhead?

A. Which part of the land?

Q. Any part of it?

A. Yes.

Q. How long had they been pumping on any part of this land before you began the erection of the bulkhead?

A. I couldn't tell you.

30 Q. Well, in this conversation that you had with Mr. Riskey before the contract was entered into, as I understand, you impressed upon him the importance of pumping behind the bulkhead first?

A. No; that they should complete the contract before the 20th of September in order to save the bulkhead.

Q. You don't know when the bulkhead was completed? You didn't expect them to pump behind the bulkhead before you built it?

A. No.

Q. In the meanwhile, while you were building this bulkhead, they were pumping on other parts of the land?

A. Yes, that is my understanding.

Q. This storm—was it in September or October?

A. There were two storms, one in September and one in October.

Q. The one that took down the bulkhead?

A. Which?

Q. The second one.

A. The first storm started it and weakened the bulkhead 10 on account of the opening that had been made there by the Risleys, and the second storm finished it up.

Q. Do you know when the Risleys stopped work on this property?

A. That I am not positive about.

Q. Were you in Ocean City during this storm?

A. No.

Q. Don't know anything about the character of it?

A. I was there immediately afterwards, after each storm.

20

Re-direct examination.

By Mr. Bourgeois:

Q. You answered on cross-examination that the first bulkhead that was built by you on the line of the second one washed out? Will you state whether or not sand was pumped in back of the second one?

A. No.

Q. Will you state whether or not that fact was brought to the attention of the Risleys before entering into the con- 30 tract?

A. I think—

Mr. Cole: Do you know?

A. Of my knowledge this whole matter was taken up when the Risleys were in our office; this whole matter of the con-

tract was gone over and the question of the insecurity of any bulkhead there on the front without sand behind it was undoubtedly brought to Mr. Risley's attention at that time, and that it was necessary to have sand put behind it before any storm came, to save our property.

Q. The second storm you say occurred on October tenth or ninth?

A. About that time.

Q. What damage did that do to the bulkhead and the
10 filling?

A. It took the balance of the bulkhead out.

Q. The whole three squares?

A. I think possibly there was a little end left, but I am not sure. There had been practically a square of ground filled in by Joseph Sutton, because Risley could not or would not do it; it had been filled in. I should suppose there was almost a square. I think it is practically about three hundred feet, and that was taken out.

Q. What about the sand that had been pumped in by the
20 Risleys along the bulkhead?

A. That was gone, too.

Q. Gone, too?

A. All of that. There was none of it there.

HARRISON W. LATTA, sworn.

Direct examination.

30 By Mr. Bourgeois:

Q. Mr. Latta, you reside where?

A. Philadelphia.

Q. And what is your business?

A. Engineering and contracting.

Q. In what firm?

A. Latta and Terry Construction Company.

Q. Did you as engineers have charge of the filling in of the land at Ocean City for the Ocean City Development Company, during the year 1903?

A. Yes, sir.

Q. I show you Exhibit P 1 and ask you whether or not that contract and specifications were drawn by you or under your supervision, that is, your firm?

A. Yes, sir, this is the contract and specifications that our firm drew up for that work.

10

Q. Will you state whether or not you were occasionally in Ocean City to superintend the filling under this contract during that summer?

A. I was.

Q. I show you letter dated July 31st, 1903, signed by Harrison W. Latta and ask you whether or not that letter was written or at least signed by you?

A. Yes, sir, this letter was dictated by me and signed by me.

Q. State whether or not prior to the sending of that letter you had been in Ocean City to view the work?

20

A. The letter speaks for itself in that. It says that I was there yesterday, day previous.

Q. Can you state in what condition you found the filling at that time?

A. I can state possibly by reading the letter.

Q. Only from the letter? You can refresh your memory by the letter if you want to.

A. The work had progressed very slowly and there was nothing like the amount done up to that date that had been called for by the contract for monthly—the contract, I believe, requires a certain amount to be done each month, and up to this date nothing like that amount had been done and at this particular time the machinery was broken down and nothing was being done.

30

Q. Now, what land was it that Risley and Sons were to fill?

A. From 47th to 49th street and from Wesley avenue to West avenue, and also a portion in front, a portion between 49th and 50th street which was included in the area of Wesley avenue.

Q. By whom was the other portion of that bulkhead between 49th and 50th streets filled?

A. Mr. Sutton.

(Letter of July 31st offered in evidence and marked Exhibit D 1.)

Q. I show you letter dated August 7th, 1903, signed by Harrison W. Latta, president, and ask you by whom that letter was written?

A. That letter was dictated by myself and signed.

Q. Written by you?

A. Yes.

Q. Can you by refreshing your memory from that letter, state the condition of the work just prior to the writing of it?

20 A. No, I doubt very much whether I was in Ocean City for a week or so prior to writing this letter.

(Letter of August 7th, 1903, marked Exhibit D 3.)

Q. I show you letter dated September 12, 1903, signed by Harrison W. Latta, and ask if that letter were written by you?

A. Yes, sir.

Q. Will you refresh your memory by that letter and state the condition in which the work then was?

30 A. Very little work had been done for some time and the work was very far from completion. The bulkhead had been built and the filling back of it had been started but not in a way that gave any promise of its early completion and not in a way that helped the bulkhead so far as its safety was concerned, and although their promise in reply to an earlier letter of mine was to push the work more rapidly,

there was no evidence of it at all, and the machinery had been broken down and very little work had been done probably for the past month.

(Letter of September 12th, 1903, offered in evidence and marked Exhibit D 3.)

Q. I show you another letter bearing date September 21st, signed by Harrison W. Latta, president, and ask you whether that letter was written by you? 10

A. Yes, sir.

Q. And ask you to refresh your memory from the contents of that letter and state the condition in which the work then was?

A. There had been a storm at that time.

Q. How is that?

A. There had been a storm of more or less severity at that time and the bulkhead had been somewhat damaged, but in the particular location in which they had completed their filling, which was at the 47th street end, the bulkhead had not pushed out any at all except at— 20

Mr. Cole: Will you pardon me. You were not asked anything about that. You were asked to state the condition of the work.

Mr. Bourgeois: That is the condition of their filling.

Mr. Cole: He is commenting now about the effect of this storm on the bulkhead. 30

A. Their sand had been put in there rather indiscriminately and the water from the sand had washed over and undermined the foot of the bulkhead and this letter is telling them to repair that and some other matters and also repeating the fact that had been stated in the earlier letters

that the work had not been progressing satisfactorily, and not with contract speed and does not give any promise of being completed within contract time. Note that the contract time had expired.

Q. State from your observation what was the effect of the storm of September 15th or thereabouts on that portion of the bulkhead not filled in back of with sand and also on that portion filled in with sand.

A. Where they had filled in with sand and where the
10 water had not run over, the bulkhead was intact. Where it had not been filled in with sand it had sprung out.

Q. Did you ever have any personal conversations with them about hurrying this work?

A. I think I met Mr. Risley on the grounds once or twice.

Q. And what conversation then took place?

A. At that time spoke to him about the necessity for pushing the work more rapidly.

Q. Do you know whether the work was ever completed or not?

20 A. I do not. I wasn't familiar with the finishing of the job.

Cross-examination.

By Mr. Cole.

Q. You are the engineers named in the contract to oversee this work?

A. Yes, sir.

30 Q. And you discharged your duty toward your employer?

A. Yes, sir.

Q. How frequently were you personally on this work while Risley and Sons were filling it?

A. From the time of the commencing of the work, which was sometime in April, 1903, until about the writing of this letter, September 21st, 1903, I should judge I was on the work once every month and very frequently twice.

Q. Did you keep any record of your visits?

A. Yes, I did.

Q. Have you got it with you?

A. No, I have not.

Q. What is the date of your last letter?

A. This one is September first.

Q. How long had it been before that date that you had been on the ground?

A. I think probably a couple of weeks; I am not certain.

Q. Had the storm occurred when you wrote that letter? 10

A. Yes, sir, quite a severe storm.

Q. You said something about a storm?

A. Yes, sir.

Q. Had the bulkhead in question been completed when you wrote that letter?

A. Yes, sir.

Q. When was the bulkhead completed?

A. That I couldn't say.

Q. And how do you know that it was completed before you wrote that letter? 20

A. Because I recollecting seeing it at the time.

Q. When?

A. Sometime about the middle of September.

Q. You just said you hadn't been there for two weeks before the date of this letter. Are you right about that?

A. I think I was. This letter was written on the 21st.

Q. Now, are you sure that the bulkhead was completed when you were there prior to September 21st?

A. Yes, sir.

Q. Fully completed? 30

A. Yes, sir.

Q. Had there been any sand at all pumped back of the bulkhead when you were there prior to September 21st?

A. Yes, sir.

Q. How much?

A. I don't recollect.

Q. Why don't you recollect?

A. Because it has been almost three years ago.

Q. You mean you cannot now recall?

A. No, sir.

Q. How soon were you there after September 21st?

A. I can't recall that either.

Q. You mean you can't recall how soon you were there after you wrote this letter of September 21st?

A. No, sir, I can't recall how soon after. I couldn't have been there at all after that letter until the following spring.

10 Q. Well, you have been giving testimony about the effect of a storm on this bulkhead. Were you there at the time of the storm?

A. No, sir.

Q. What do you know about what caused the bulkhead to go down?

A. I don't know anything about the storm of October 15th.

Q. Any storm?

A. I was there shortly after a storm that occurred some time in September.

20 Q. When was that?

A. I can't recall.

Q. How long was it after the storm that you were there?

A. I can't recall.

Q. How do you know that there was a storm that effected this bulkhead?

A. Only by hearsay so far as the storm goes.

Q. If the bulkhead had been washed down and the sand washed out, how do you know that it was the storm that did it?

30 A. I didn't say anything about the bulkhead being washed down and the sand washed out, because I wasn't there.

Q. Didn't you say that the bulkhead washed down and the sand washed out because they didn't have it filled in?

A. I think not.

Q. You don't undertake to say—

A. I don't undertake to say that I saw the result of the storm of October.

Q. You don't undertake to say that this bulkhead was washed down because of the failure of these people to have sand behind it, do you? If you do, what do you base that on?

A. Only by hearsay evidence.

Q. Then all you told Mr. Bourgeois about that business was hearsay, was it?

A. No, sir.

Q. What part was not?

A. The part where I said that I saw the condition of the bulkhead some time during September and that the sand that overflowed on the 47th street end and that at that place where the sand overflowed there had been some damage due to the water running out of the sand. 10

Q. How do you know the damage was due to the water running out of the sand if you didn't see it?

A. Because I could see the tracks of the water running out. In the other place the sand had been piled up and the bulkhead was still intact and no damage had been done to it.

Q. That part of the bulkhead that was intact was much further inland than the part of the bulkhead that was not intact, wasn't it? 20

A. That I couldn't say.

Q. Why not? Don't you know that the high tide varies there and was higher out?

A. I can't recollect.

Q. Do you mean to say that all these times that you were going down there you did not discover these things?

A. It was built on the line of Wesley avenue.

Q. Then you didn't pay any attention to the high water mark? 30

A. No, sir.

Q. Did you ever furnish to the Ocean City Improvement Company an estimate of the amount of filling?

A. Yes, sir, at various times.

Q. Did you furnish an estimate after the plaintiffs had quit work there?

A. No, I did not personally; our firm probably did.

Q. Do you know Mr. William D. Sherrod?

A. Yes, sir.

Q. Who is he with relation to that company?

A. Secretary and treasurer, I think.

Q. Whatever estimate you or your firm furnished were furnished to the company, were they not?

A. Yes, sir.

Q. Furnished to Mr. Sherrod?

10 A. Yes, sir; sometimes we sent copies to Mr. Risley, I think, if he requested them.

Q. Can you inform the jury what was the amount of sand they filled in by your last estimate?

A. No, sir, I didn't make that last estimate.

Q. Didn't your firm?

A. Yes.

Q. Haven't you got a copy of it?

A. The firm has a copy of it, but I cannot testify to that, personally.

20 Q. Have you that with you?

A. Yes, sir.

Q. You are a part of the firm, aren't you?

A. Yes, sir.

Q. Will you produce that a minute?

(Witness complies.)

A. This is something that I am not particularly familiar about personally.

30 Mr. Cole: Does counsel say that the other member of the firm is going on the stand?

Mr. Bourgeois: Yes, sir.

Letter of September 21st, 1903, offered in evidence and marked D 4.)

(Mr. Bourgeois reads letters offered in evidence.)

J. HERMAN TERRY, SWORN.

Direct examination.

By Mr. Bourgeois :

Q. Mr. Terry, you live where?

A. Philadelphia.

Q. And you are a member of the firm of Latta and Terry?

A. I am. 10

Q. I show you contract and specifications of the Ocean City Development Company and ask you whether or not you are familiar with them?

A. Yes.

Q. Are you familiar with the tract of land at Ocean City between 47th and 50th streets?

A. I was engineer on the work, yes.

Q. Under whose immediate supervision was this work prosecuted, that is, as engineer?

A. The work was divided up. Sometimes one member of the firm and sometimes another member. 20

Q. Will you state to the jury just what work was to be done under the contract and specifications generally, and then state to them just how the work was prosecuted?

A. That tract of land called for in the contract was to be filled in by dredging, taking the sand from back in the bay, in the back channel and that was to be pumped in onto this land to be brought up to established grades and that was confined on the front of the bulkhead.

Q. Now, Mr. Terry, let me call your attention to this letter of September 21st, in which reference is made to the sand hills, "I told one of the members of your firm that in case they were not graded down before we got to them we would cross section them," and so on. Will you explain what that had reference to? 30

A. It was simply to make provision so that the contractors for pumping the material in there wouldn't get too much

material in in certain places. These sand dunes were to be cross sectioned so we could get the cubical contents of it.

Q. So they had nothing to do with the leveling up of the sand hill?

A. Absolutely nothing. That was their contract, simply to fill this up to established grades by pumping in sand.

Q. Did they ever fill up the section that is provided in the specifications?

A. Do I understand you to mean the whole area?

10 Q. Yes, that is provided for there.

A. According to the measurements and surveys made, no.

Q. Can you state from the data that you have—you kept field notes of it?

A. Yes.

Q. State just how the filling was done. Where was it filled from? West avenue toward the ocean, or the ocean back?

A. First they filled out along Central avenue, from Central avenue west and then along back—

20 Q. To where?

A. Asbury, and then they were to fill in back of the bulkhead; as the bulkhead was built the provisions of the contract was that they should follow that up and fill in back of the bulkhead as rapidly as that was built and the last section was the section between the two railroads, between West and Haven avenues.

Q. Let's go over those streets. The bulkhead was built on the curb line of Wesley avenue, do I understand? The outer curb line of Wesley avenue?

30 A. Yes. No, it is on the house line.

Q. On the property line?

A. Yes.

Q. And the first avenue inland from Wesley avenue is Central?

A. Yes.

Q. And the next is Asbury?

A. Yes.

Q. And the next is West?

A. Yes.

Q. And the next is Haven?

A. That is right.

Q. The bulkhead was built from which direction, do you know?

A. I wasn't on the work at the time that the bulkhead was being built.

Q. Can you say from any data that you have when the bulkhead was completed? 10

A. I can get from my memorandums about when the bulkhead was finished.

Q. Will you tell us about when it was finished?

A. You are referring now to which bulkhead?

Q. The second bulkhead, that is, the one that washed out; the bulkhead that washed out from 47th street.

A. That was completed sometime in August.

Q. Can you state from your data how much soil or how many cubic yards of sand had been pumped in by Risley & Sons at the various months or whenever you took your data? 20

A. Yes, we took memorandums every month.

Q. Will you state when you took your first estimate and what the quantity was?

A. I will have to get that from the letter book.

The Court: You may refer to that letter book if you desire.

(Witness produces books.)

30

A. That first estimate I got in here is for the month of May. That is 47,545 cubic yards of fill. That is the first estimate.

Q. From the first of April to the first of May?

A. Yes.

Q. How much is that?

A. 47,000 the first estimate which was taken. That is the first estimate which I have in the books.

Q. What is this?

A. 47,545.

Q. How is that estimate made? Explain to the jury.

A. Originally the whole property was surveyed and elevation was taken of the surface of the ground as it was at that time and then it was decided that the surface of the ground should be brought up to a certain level and we calculated the amount of fill which would be required to bring it up to that level and then every month we would go down there and we would measure up the portion of ground which was filled and from that we knew the depth that it had to be filled and how much it had to be brought up and we would calculate the amount of cubic yards. I don't exactly mean that we would take a tape and measure, but it was laid off in blocks.

Q. How many feet square, 100 feet?

A. No, 50 feet square.

20

By a Juror:

Q. When was this estimated?

A. The month of May.

Q. How long had it been under operations then?

A. Two months, I think.

Mr. Cole: The contract is dated April 1st.

30 A. They had been working April and May.

By Mr. Bourgeois:

Q. What is the date you have there on that?

A. June 9th, but it was taken up to the last of May.

Q. Explain a little more fully what you mean by these fifty foot cross squares, how the measurements were made.

A. The whole area, whole tract, was laid out. We would run lines this way and lines across this way and that was laid out and staked out with stakes driven in every fifty feet. Here was a stake and there would be one fifty feet that way, and fifty feet that way, and you would have a square laid out with a stake at each corner.

Q. I ask you to refer to this letter of July 31st and refresh your memory, if you can, as to when that bulkhead was completed.

A. I had not—in reference to that letter of July 31st I 10 wasn't down there on the grounds at that time and the only thing that I could say would be hearsay evidence.

Q. When you went down there in August it was completed then?

A. Yes.

Q. Did you have the building of the bulkhead under your supervision?

A. Just the filling in.

Q. By whom was the bulkhead built?

A. The contractor was Joseph Sutton. 20

Q. Now let's go back to the second estimate that you have, the estimate next after the May estimate.

A. It is dated July 31st. July 31st we have a total amount of work to date 67,186 cubic yards. That includes the previous estimate of 47,545.

Q. Then during the months of June and July they had filled in 19,000 cubic yards, had they?

A. I haven't subtracted it; it is the difference between those two.

Q. Now the next estimate? 30

A. September 1st. Work done during the month of August, 72,233.

Q. That is the total?

A. That is the total, and includes the two previous estimates.

Q. Now the next one.

A. January 29th, 1904. This is an estimate up to January 1st. This letter was written January 29th.

Q. Wasn't there an estimate before that time Mr. Terry?

A. No, sir; the last one we had was this seventy some thousand, and this one is 105,158 yards.

Q. Now, Mr. Terry, was an estimate made by you to ascertain how much of the filling washed out during the storm of October 12th?

A. Yes.

Q. Now what is the quantity that washed out during that storm?

10 A. Well, the exact amount that was washed out during this storm I couldn't say. I made an estimate at the first of the month and then after this the storm occurred between the first of the month and the last of the month and I went down there at the first of the month and took an estimate and could simply measure up the quantity of how much was missing.

Q. How much was missing?

A. That was on the fourth month, seventeenth, 1904, 28,147 yards.

20 Q. That were washed out?

A. That was the amount which was missing between the house line of Wesley avenue and where the tract was brought up to grade.

Q. Is that 28,147 cubic yards included in this 105,158 cubic yards? The total amount as I understand was 105,158 that was pumped in. I think there is 28,147 pumped out. It leaves the balance what actually remained there?

A. That is right.

30 Q. That is 87,011 yards. Will you state whether or not this sand that washed away between the house line and the bulkhead in October of 1903 was ever replaced by Risleys at all?

A. No; there was a separate contract made for that.

Q. Afterwards?

A. Yes.

Q. After the storm of October 12th, Risleys never again attempted to fill that same land, did they?

A. No.

Q. Who did fill it, do you know?

A. The contract was made with Joseph Sutton.

Q. And how did he fill it, by pumping it in or hauling it in?

A. He hauled and cast it in.

Q. Then the contract as completed by Risleys never extended beyond the house line on the east side of Wesley avenue, did it?

A. How is that? 10

Q. The filling as completed by Risleys never extended further east than the house line on the west side of Wesley avenue?

A. Well, I wouldn't say that. It might have extended out in points, or something like that.

Q. But they never filled it out after that, did they?

A. No.

Q. How long after this storm of October 10th, 1903, did Risleys remain on the ground, do you know?

A. No, not exactly. I know the last estimate was taken there in January of 1904. 20

Q. After the storm and until they finally moved their machine away where did they do their pumping, their filling, what part of the property?

A. The bulk of it was done on the back end of the property, that is, back between the railroads. The last estimate I made they were filling between 49th and 50th streets, West and Haven. That is the last time I saw them pumping any.

Cross-examination. 30

By Mr. Cole:

Q. When did you say the last estimate was made before January, 1904?

A. When was the last one before that? I will have to refer to the book for that.

Q. All right. What are the books that you read from?

A. Letter books.

Q. What do they show, copies of letters which you mailed to somebody?

A. Copies of estimates which we mailed to William G. Moore.

Q. Secretary of this company?

A. Yes.

Q. All right, go ahead.

10 A. September 1st is the last estimate which I have here previous to the one of January 29th.

Q. Do you say there was no estimate between September 1st, 1903, and January 1st, 1904?

A. That is the only record which I have.

Q. When did you estimate to discover this loss of sand of some 28,000 cubic yards?

A. We made several, made two surveys down there with reference to that.

Q. Were they made after September 1st?

20 A. One was made—yes, after September 1st.

Q. Well your estimates that were furnished from time to time were estimates of the amount pumped in without reference to what may have settled or gone out?

A. They were approximate estimates.

Q. Did those estimates have any relation to the amount of settlement which took place? Did you consider that?

A. Wasn't considering settlement at all.

Q. As a matter of fact there was some settlement there, wasn't there?

30 A. I suppose there was. I didn't test it.

Q. When did you make your surveys to discover this loss of sand? The dates, please.

A. One was made February 3rd, 1904.

Q. February 3rd?

A. Yes.

Q. Well, when was the other made?

A. The other was April 17th, 1904.

Q. Well, how did it happen that you waited so long to make that?

A. I suppose they only wanted to find out the amount of sand out at that time.

Q. Hadn't this work been completed by Sutton at that time?

A. Which work?

Q. The whole thing?

A. The bulkhead?

Q. No, the whole thing, the filling in. 10

A. What filling was Sutton doing?

Q. I thought he filled in back of this bulkhead?

A. This last bulkhead? I shouldn't think he completed this work until sometime in the summer of 1904.

Q. Then he hadn't done it in April, 1904?

A. No.

Q. As a matter of fact the bulkhead that Sutton filled behind was moved back some forty to fifty feet from the bulkhead that went down in the storm of 1903?

A. That was moved back to the west curb line. 20

Q. And that is the bulkhead he filled behind?

A. Yes.

Q. When did he begin his work?

A. Sometime in the summer of 1904.

Q. Did you have anything to do with preparing the pleas or rather, did you have anything to do with furnishing the information for the pleas concerning the amount of sand that had been washed out?

A. No, they had letters to that effect.

Q. You know that the pleas say it was 21,000 cubic feet, don't you? Which is correct, twenty-one or twenty-eight? 30

A. I don't know what they had. 28,000 is what my figures show.

Q. Now will you tell me, please, when you were on this ground, what dates between the 1st day of August and the 1st day of November, 1903?

A. Between August and November? I don't remember the dates that I was there. I would have to refer for that.

Q. Were you there shortly before the September and October storm, and if so how soon before?

A. No, I wasn't down there about the time of that September and October storm.

Q. Were you there after the storm, and if so, when?

A. This is in 1903 that you are talking about?

Q. Yes, sir.

10 A. I couldn't say just when I was there unless I look it up.

Q. Do you know of your personal knowledge when the construction of the bulkhead in question was begun?

A. I was down there sometime during the time that that was in course of construction and I would say that that was in July when that was in course of construction.

Mr. Bourgeois: Which one do you mean?

Mr. Cole: The second one.

20

A. The one that was washed out?

Q. The one they say was washed out.

A. I was almost positive that that was in course of construction sometime around the 1st of July.

Q. When was it completed?

A. That I can only say from hearsay evidence. I know it was completed sometime the latter part of August.

Q. When did these people begin to work on this ground? When did they begin to fill in the land?

30 A. Originally they started sometime down there in April.

Q. Had they put any sand at all behind the bulkhead in question when the storm in September and October came along.

A. Oh, yes.

Q. Did you furnish to the Ocean City Development Company an estimate of the filling from time to time?

A. Yes.

Q. And you furnished this estimate of January 1st, 1904, did you not?

A. I furnished an estimate according to the dates as I gave you there.

Q. Now, do you know how long it was between the time when it was claimed the second bulkhead washed out and they began the erection of the bulkhead back of which it is claimed Mr. Sutton filled?

A. That was supposed to have washed out sometime in October, 1903, and it was in 1904 that the final bulkhead 10 was started.

Q. What time in 1904?

A. I can't say. Sometime in the middle of the summer.

Q. Now do you know it to be a fact or not that these plaintiffs were delayed in their work of performing this contract because of the failure of the Ocean City Development Company to construct this bulkhead?

A. No.

Q. You mean you don't know it to be a fact, or they were not delayed? 20

A. They were not delayed.

Q. They were working back of the bulkhead all of the time, were they not, before the bulkhead was built?

A. They were not working on that end.

Q. Exactly. This estimate of yours of some 72,000 cubic yards was of filling back of the sand hills, wasn't it?

A. Principally.

Q. Now, Mr. Terry, I understood you to say—I may be mistaken; if I am you correct me—I understood you to say that there was a provision in this contract requiring the plaintiffs to fill first behind the bulkheads. Was I right in that? 30

A. I didn't make that statement, no.

Q. Did you make any statement in your direct examination or did you intend to, to show that there was any provision in this contract concerning the filling behind this bulkhead?

Mr. Bourgeois: I object to that.

(Question repeated.)

Mr. Cole: Strike out "intend to."

(Question repeated by stenographer as follows: "Did you make any statement in your direct examination to show that there was any provision in this contract concerning the filling behind this bulkhead?")

10

A. Yes, they had to fill back of the bulkhead.

Q. Will you read that provision that you have in your mind in the contract?

A. It starts out, "The work under these specifications shall include the furnishing of all material and labor for the fill on the property of the Ocean City Development Company between the curb line and the bulkhead line on Wesley avenue from 49th to 50th street."

Q. Is there any other provision in there about bulkhead?

20

A. "Between the centre line at 49th street and the centre line of 47th street from the bulkhead line on Wesley avenue to the right of way of the West Jersey & Seashore Railroad Company."

Q. Whenever you were down there I suppose you were down there for the purpose of directing the plaintiffs where to fill and how to fill?

A. We were down there as engineers, yes, to give instructions as to where it should be done.

Q. You gave directions, didn't you?

30

A. At various times.

Re-direct examination.

By Mr. Bourgeois:

Q. Did they comply with your directions when given to fill back of the bulkhead?

A. They did not.

Q. What was the nature of the soil from which this sand washed away? That is, the nature of the soil along Wesley avenue from 47th to 50th street. Was it meadow land or beach land?

A. Well, it washed or went out down to the meadow land, I suppose.

Q. But the land immediately along on Wesley avenue was all beach land, was it not?

A. There was all sand there.

10

Q. No settling to that is there?

A. Well no, I don't suppose there is any settlement there.

Q. The settlement occurs back on the marsh?

A. Yes.

Q. Will you explain to the jury just how you arrived at this amount of sand that was washed away, the 28,147 cubic yards? Tell them how you arrived at that.

A. Well, that was on April 17th that we made that measurement down there, and that was all cross sectioned just the same as we went along originally. There was an irregular line went along like that where the ground had been brought up to grade and we measured from the East house line, that is, the line nearest to the ocean; we took from that line and measured distance back to this irregular line, and then we took the depth that had to be filled in to bring that up to that line and cross-sectioned it just as I explained we did originally to find out how much material had to go in there.

20

Q. And that aggregated 28,147 cubic yards?

A. Yes.

Q. Do you know whether or not during the time between October 10th and April 17th that part of the beach had filled up?

30

A. It had.

Q. Do you know how much?

A. No, but there was a barrel scale there and that barrel originally set on the top of the sand, and the last measurement we made it was half way up on the barrel.

Q. Then this 28,000 cubic yards does not in fact show all of the sand that washed out, does it?

A. I don't know.

Q. It does as near as you can get it?

A. Yes.

Q. Mr. Terry, can you state whether or not any portion of the gravelling of the street was washed out? Do you know or don't you know about that?

10 (Objected to. Question withdrawn.)

Re-cross examination.

By Mr. Cole:

Q. In making your estimate of the amount of sand which you say was missing did you take into consideration the grade of the beach as it was before they began to fill in at all, and the grade at the time that you made your measurements? When I say "grade of the beach" I mean the height
20 of the beach.

A. My estimate of that 28,000 yards was taken from the grade or the elevation of the beach at that time, without reference to any other previous grades which that beach might have been.

Q. So that if the grade of the beach at the time you made your estimate was also the grade of the beach at the time they began to fill, you wouldn't say their filling had washed away that number of cubic yards, would you?

A. I wouldn't say their filling had washed away entirely.
30 I would say their filling had washed away.

Q. So you did not in making this estimate take into consideration the height of the beach at the time they began to fill behind the bulkhead, did you?

A. No.

Q. Have you any idea of whether the beach was higher or lower at the time they began to fill than at the time you made this estimate in 1904?

A. I would have to guess at that. When we originally took our estimate and made our cross sections, I have knowledge of that from the survey which we made.

Q. How much sand was required to fill in at that time?

A. That I have an estimate made at this day when we figured out this 28,000 yards.

Q. How many cubic yards was required to fill behind the bulkheads and the sand hills at the time you made your estimate?

A. Originally? 10

Q. Yes.

A. I would like to answer that last question by saying that it went by comparison, because in that last survey the line of finished work would not correspond exactly to the line of sand dunes to which we measured originally, so it went by a comparison.

Q. Did the washing out affect the sand dunes?

A. The washing out cut back in some places into the sand dunes.

Q. Can't you tell us approximately how much was required? 20

A. The amount of fill required from the sand dunes was 21,990 yards. That takes from 47th street to 50th.

WALTER FOSTER, sworn.

Direct examination.

By Mr. Bourgeois: 30

Q. Mr. Foster, you live where?

A. Ocean City.

Q. And where were you employed during the fall of 1903?

A. For Mr. Sutton.

Q. Where were you, if you know, about September 15th, 1903?

A. I was on the work from 47th street to 50th.

Q. Do you remember a storm that occurred about the 15th of September, 1903?

A. I do.

Q. Will you state what effect, if any, it had upon the work of the filling and bulkhead between 47th and 50th street in Ocean City?

A. It took out portions of the bulkhead that had been built there.

10 Q. What portions did it take out?

A. The North end and two or three—I can't just recall how many places, but two or three places.

Q. In the bulkhead?

A. Yes, sir.

Q. Where were those sections located, what part?

A. At the North corner and one section between the corner and the sluiceway and a section at the sluiceway.

Q. Do you know by whom they were replaced?

A. By Mr. Sutton.

20 Q. Did you help replace them?

A. I did not.

Q. Do you know when the bulkhead was completed?

A. I do not, as I didn't have anything to do with the building of the bulkhead.

Q. Were you on the ground so as to observe the progress of the filling?

A. I done that part of the work myself.

Q. I mean the filling that Risley was to do.

A. Yes, sir.

30 Q. When did he begin to fill in back of the bulkhead? I mean immediately back of the bulkhead.

A. That I couldn't say.

Q. Well you can tell me about when, can't you?

A. No, sir, I can't, because my work called me all over the lower part of the island.

Q. Can you state with what degree of progress he filled in back of the bulkhead?

A. Didn't make any progress I should say.

Q. Why?

A. His machine was broken down most of the time.

Q. To your knowledge?

A. Yes, sir; yes, I heard him say it was.

Q. How much of the time between the first of July and the first of October was his machine not working, as nearly as you can tell?

A. That I couldn't say. I didn't make any note of that.

Q. Do you know how nearly he had pumped in the sand 10
back of the bulkhead by the 12th of October, 1903?

A. By the 12th of October?

Q. Yes, or the 10th maybe it was; the 9th or 10th of October?

A. I should say anywhere from one-half to two-thirds of the distance from 47th street to 49th.

Q. Do you know anything about the sluiceway there was in the bulkhead?

A. I do.

Q. What was it built for? 20

A. For carrying off the surplus water, or the water that was pumped in with the sand.

Q. Do you know what was done in regard to the sluice boards there?

A. Yes, sir.

Q. Were they put up there?

A. Yes, sir.

Q. By whom?

A. Mr. Risley.

Q. How many, how high? 30

A. There was supposed to be one there, one above the filling, but I went down one morning and found four a foot wide, which caused a body or pond of water to form in the bulkhead and caused the bulkhead to bulge out and open the seams and the water washed down and undermined a portion of the bulkhead right at the sluiceway, which weakened it and caused it all to spring out.

Q. What, if anything, was done when that happened, by you?

A. I put a force of men on there and endeavored to repair it.

Q. Was Risley's attention called to this body of water?

A. I don't know. I didn't say anything about it to him myself.

Q. Where were you on the 9th or 10th of October?

A. On the 9th I was on the works.

10 Q. Anything unusual happen on that day?

A. Yes, sir.

Q. What?

A. I surmised that there was a storm coming up. I, in company with our stable boss and a colored man, went down and attempted to batten up this sluice to prevent the waves going in and save the bulkhead where it had been weakened.

Q. Did the storm come up?

A. The storm came that night and the following morning.

20 Q. What was the effect of the storm on the bulkhead and the filling?

A. I didn't see it until after it was out. The effect was that it went out.

Q. How much of it went out?

A. All of it except a very little at the south end.

Q. Do you know which part of the bulkhead went out first?

A. Only from hearsay.

30 Q. Well, I don't want that. Was the bulkhead filled in when the storm came, back of it?

A. Well, there was a portion of it filled in, but not complete.

Q. Can you state to the jury whether or not any portion of the land that had been filled in by other people, other than the Risleys, was washed out?

(Objected to as incompetent, irrelevant, immaterial and too remote.)

Mr. Bourgeois: We say that because of his failure to properly fill this, a certain quantity of sand was washed out, and they are liable for that loss.

Mr. Cole: I understood you to ask a question about some other property.

(Question repeated.)

The Court: I will take that testimony. 10

A. If there was any other portion of the bulkhead filled in by others than the Risleys?

Q. No; if there was any of the sand filled in by other people than the Risleys washed out in that storm?

A. Some was and some wasn't.

Q. Who filled in the part that was washed out?

A. I did for Mr. Sutton.

Q. Where was that?

A. Between 49th and 50th. 20

Q. And lying between the bulkhead and the sand hills?

A. Yes.

Q. Did that extend all the way out to the bulkhead?

A. Yes, sir.

Q. Who filled that portion of the land between 49th and 50th street, between the sand hills and the bulkhead?

A. Mr. Sutton.

Q. All of it?

A. All of it. We had a bank built directly from 49th street to the bulkhead, banking off the water and sand, and forcing the water to go out at 49th street, so as not to interfere with our work. 30

Q. What else was done by Mr. Sutton, excepting simply filling in the sand on that tract?

A. He threw sand from the beach over the bulkhead to protect it.

Q. Was there any gravelling done?

A. At this portion, you mean?

Q. Yes.

A. Yes, sir, it was gravelled.

Q. What part?

A. A whole square was done, excepting a very few cases.

Q. What, the street, or what?

A. What was gravelled?

Q. Yes.

A. Well, the street was gravelled and the sidewalk was
10 gravelled.

Q. What became of that gravel?

A. It was washed out in the storm.

Q. When was that gravel and sand washed out, do you
know?

A. On the 10th of October, 1903.

Q. Did you see that when it was being washed out?

A. No, sir.

Q. What time of the day was it washed out?

A. All I know is from what I heard. It happened on
20 the 10th. I know that to be a fact from the fact that I
was there on the 9th and the morning of the 11th.

Q. How did you find the bulkhead and the filling on the
morning of the 11th?

A. I didn't find any bulkhead.

Q. The whole three squares gone?

A. All excepting a very small portion of it at the very
lower end.

Q. And the sand in the part far back?

A. Clear beyond where it was filled in, back to the hills.

30 Cross-examination.

By Mr. Cole:

Q. Do you know anything personally about the tide in
front of this bulkhead?

A. Yes, sir; I had oftentimes noticed it.

Q. I mean at this particular storm on October 10th?

A. No, sir, I wasn't there on October 10th.

Q. Was this storm an ordinary northeaster or an extraordinary storm?

A. A little more than the ordinary.

Q. A very severe storm, wasn't it?

A. Yes, sir.

Q. Who built that bulkhead?

A. Mr. Sutton, or his father-in-law for him.

Q. You spoke of Mr. Sutton replacing some part of the bulkhead that had washed away. Did you mean washed away in the September storm? 10

A. Yes, sir.

Q. At that time you say there was a sluiceway there, in September, 1903?

A. Yes, sir.

Q. What was Mr. Sutton doing on this property?

A. He built the bulkhead and put the sluiceway in.

Q. For this Ocean City Development Company?

A. For Mr. Risley. That is, I understood. It is only hearsay on my part. 20

Q. Do you know that he put the sluiceway in?

A. Yes, sir.

Q. Why? Did you do it?

A. Yes, sir; I done it myself.

Q. Was Mr. Sutton representing this Ocean City Development Company?

A. Yes, sir, I presume he was.

Q. Superintendent, wasn't he?

A. I was under his instructions and I don't know to-day in fact who the Ocean City Development Company is. 30

Q. But you were under him?

A. Yes, sir.

Q. You didn't get any pay from Mr. Risley?

A. No, sir.

Q. Were not working for him?

A. No, sir.

Q. So you knew and Mr. Sutton knew in September, 1903, at the time of this first storm, that that sluiceway was there?

A. Yes, sir.

Q. That is a necessary part of the work of filling in, wasn't it?

A. Yes, sir.

Q. Have to have that in order to fill the land, don't you, to let the water run out?

A. Yes, sir; but it isn't necessary to have it banked up as
10 it was.

Q. I didn't ask you that. When was it that you say you noticed that the bulkhead was weakened by the sluiceway?

A. I can't give the exact date. Just a short time previous to its being washed away.

Q. That is, the October storm?

A. Yes, sir.

Q. Did you represent that fact to Mr. Sutton?

A. Yes, sir, and he said, "I don't understand what that means, as they were to have only one plank above the fill
20 and you say there was four." I says, "yes, sir."

Q. How much sand did you say there was behind the bulkhead before the October storm?

A. Anywhere from one-half to two-thirds. That is, in the fill from 47th to 49th street. I didn't pay so much attention to it particularly, as I wasn't working on that at that particular time, as I was working below. I had a force of men working on the work between 49th and 50th street.

30

ELMER LAWLESS, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Lawless, you live where?

A. In Millville.

Q. Where were you living in October of 1903?

A. Ocean City.

Q. Where in September of 1903?

A. Ocean City.

Q. Are you acquainted with the land of the Ocean City Development Company between 47th and 50th streets in Ocean City?

A. Some, yes, sir.

Q. Were you working down there during the month of 10 September, 1903?

A. Yes, sir.

Q. Do you remember a storm that occurred about the 12th or 15th of September, 1903?

A. Yes, sir.

Q. Do you know whether or not it did any damage to the bulkhead and filling on the property of the Development Company there?

A. Some.

Q. Were you there? 20

A. Yes, sir.

Q. Will you explain to the jury just what you saw?

A. Well, it weakened the bulkhead in two or three places and took some of it out.

Q. Where did it weaken it and where did it take it out?

A. At the north end and one or two places between there and the center.

Q. Do you know how many boards were up at the sluice?

A. I think two or three and probably four.

Q. And what was the result? 30

A. Caused a body of water to raise.

Q. How large a body of water was there there?

A. Well, I couldn't say exactly. Probably three feet deep in some places.

Q. Do you know who repaired the damage to the bulkhead that was occasioned by the storm in September?

A. Mr. Sutton, I suppose.

Q. You don't know?

A. No, sir.

Q. Were you there on the 9th of October following?

A. Yes, sir.

Q. Did you do anything toward protecting the bulkhead at that time?

A. Yes, sir.

Q. What did you do?

A. Nailed up the sluiceway.

10 Q. What time?

A. Sometime in the forenoon.

Q. Did a storm come up that night?

A. Yes, sir.

Q. Where were you when it came up?

A. Home.

Q. Where were you living?

A. Down about 52nd street, I think.

Q. Were you on the ground between 47th and 50th street when the bulkhead washed out that night?

20 A. Yes, sir.

Q. Which part of it went out?

A. Somewheres about the center.

Q. How close is that to the sluiceway?

A. Not far.

Q. It didn't go just at the sluiceway?

A. Not exactly; just close.

Q. After the first part of the bulkhead went out, which way did it go out, toward 47th or 50th street?

A. The north end next.

30 Q. And which was the last part that went out?

A. The south end.

Q. Where the bulkhead went out first was the sand filled in back of it?

A. Yes, sir.

Q. To what height?

A. I couldn't say exactly how near the top it was.

Q. Where it went out next was the filling back of that also?

A. Filled nearly to the top there, yes, sir.

Q. Was the filling up at the north end, where it went out second higher or lower than where it went out first?

A. It was higher.

Q. How about the filling at 50th street?

A. That was filled and graded.

Q. Was that filled higher or not so high as at 47th street?

A. Well it was filled there to the top of the bulkhead, and at the north end not quite up.

Q. You say the south end was the last to go out? 10

A. Yes, sir.

Q. Do you know whether or not the sand went out too?

A. Yes, sir.

Q. How much of it that was filled in there? Did it all go, or pretty nearly all?

A. Nearly all went.

Q. What portion of the sand did not go out?

A. Next to the south end.

Q. Right at 50th street?

A. Yes, sir. 20

Q. How much of the bulkhead went out?

A. Nearly all; very little left.

Cross-examination.

By Mr. Cole:

Q. When you nailed up this sluiceway did you make a good job of that?

A. Yes, sir; I suppose it was a good job. 30

Q. You made it in view of the approaching storm?

A. Yes, sir.

Q. And did your work well, I have no doubt?

A. Yes, sir; tried to.

Q. You were working for whom at that time?

A. Mr. Sutton.

Q. On this particular work?

A. No, sir; I was stable boss.

Q. Now what have you got to say about high water line along that bulkhead? Was the high water line nearer to the south end of the bulkhead, or nearer to the north end?

A. Well now I can't just exactly tell you.

Q. You don't know whether the force of the storm, the tide, was severer at the north end of the bulkhead than it was at the south point, do you?

A. I can't say, because I never paid much attention to the
10 tides.

Q. Were you on the ground observing when the tide was breaking this bulkhead down?

A. Yes, sir.

Q. Watching it?

A. Yes, sir.

Q. Which end of the bulkhead did it occur to you that the storm was severest?

A. It probably went higher, the waves, at the north end.

Q. It is a fact, isn't it that the storm was severer at the
20 north end of the bulkhead than at the south?

A. Yes, I should judge it was, some.

Q. And that is probably the reason that the south end of the bulkhead lasted longer than the north end wasn't it?

A. I couldn't say about that.

Q. You didn't form any judgment about that, did you?

A. No.

Q. Did the water break all over the top of the bulkhead?

A. Some places, yes, sir.

Q. That was at the north end?

A. Yes, sir. In fact, it broke over the top all the way
30 down at times.

Q. Did you help to build this bulkhead?

A. No, sir.

Re-direct examination.

By Mr. Bourgeois :

Q. Mr. Lawless, will you explain to the jury just how this south end went out? I want to know whether the bulkhead went out first and the sand afterwards, or the sand first and the bulkhead afterwards, the south end next to 50th street?

A. As the sand went the bulkhead broke. It would come in and wash the sand and then break the bulkhead as it took the sand. 10

Re-cross examination.

By Mr. Cole :

Q. What washed the sand?

A. The water.

Q. From where? 20

A. After it broke the north end down.

Q. Where did the sand go?

A. Into the ocean, I suppose.

Q. This bulkhead leaked, didn't it?

A. It couldn't help it after it broke down.

Q. Didn't it leak before?

A. I don't know.

Q. Didn't you say it leaked before?

A. When it was first built.

Q. Did the sand go out as a matter of fact at all after the bulkhead broke down? 30

A. No, sir.

Q. In other words the bulkhead broke down first and then the sand went out?

A. Yes.

Re-direct examination.

By Mr. Bourgeois:

Q. Which part of the bulkhead was it that broke down before the sand on the south end went out?

A. The upper end.

Q. Then after the sand went out on the south end, what happened to the bulkhead at that end?

10 A. That went too.

JOSEPH SUTTON, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Sutton, you live in Atlantic City?

A. Yes, sir.

Q. Where were you living during the year 1903?

20 A. Ocean City.

Q. And had lived there for some years previous?

A. About nine years.

Q. During the time that you were living in Ocean City and prior to the first of April, 1903, had you ever built any bulkheads on the ocean front in Ocean City?

A. Yes, sir.

Q. What ones?

A. I built one at 14th street from a point about 850 feet along, 900 feet along with Abel Scull.

30 Q. Where did it commence?

A. From a point north of 13th street to a point 150 south of 15th street. That would be about 800 feet.

Q. Do you know who built the bulkhead for the Ocean City Development Company from 47th to 50th streets?

A. I did.

Q. Will you explain to the jury the construction of that bulkhead?

A. Well the front row of piling was set seven feet from centre to centre, fourteen feet long.

Q. How much in the sand?

A. About nine feet, and the back piling were set ten or twelve feet—it didn't make any difference in the immediate rear of the front piling—and they were fastened together, being bolted on both pilings with 2x10 braces, some 3x4's. On top of the piling rested a four by six sill bolted into the piling. Five feet below that was another four by six with the four inch side exposed.

10

Q. How was that fastened on?

A. They were bolted. Everything was bolted. Lag screws. Then we slid the front plank in, which were fourteen feet long, two inches thick, hemlock planks. They were fastened by bolts to each one of the top beams, and the bottom. That was covered with a cap, either a two by ten or a two by twelve, whichever came handiest, generally the ten's did, and the back seams were stripped with single lath to stop the sand from leaking out, down to the five foot cross beams.

20

By a Juror:

Q. One thickness of plank?

A. Yes, one thickness of plank.

By Mr. Bourgeois:

Q. And the joints were broken by this shingle lath?

A. Yes.

Q. How wide were they, two inches?

A. They ran all sizes.

30

Q. When was the construction of that bulkhead commenced, the second one?

A. They hammered at me to commence it any time from April down, but I didn't commence it until I saw some chance of getting it filled. I commenced it about the latter part of June and finished it about the 6th of August.

Q. There is some testimony here that a previous bulkhead had been built?

A. Yes.

Q. By whom was that built?

A. I did.

Q. How did its construction compare to this one?

A. Practically the same.

Q. What happened to that?

A. It went out.

10 Q. Was sand put back of it?

A. Sand was not.

Q. Now, Mr. Sutton, you have built other bulkheads, you say. Did you build one at the corner of 16th street?

A. Yes, sir.

Q. What was the construction of that?

A. That was an 18 foot bulkhead.

Q. How much was above the surface of the beach?

A. Some feet, twelve feet.

Q. Was that the same construction as this, with the ex-
20 ception that the planks were longer?

A. Yes, sir.

Q. Did you build one on the other side of 16th street?

A. Yes, sir.

Q. What was the construction of that?

A. Just the same. All built under one contract.

Q. Will you state what happened to those bulkheads? Were they filled in?

(Objected to as irrelevant and immaterial.)

30 Mr. Bourgeois: Here are three bulkheads built exactly alike. One was filled in and the other was not and the part that was filled in stood when the storm came up and the other part did not.

(Question allowed.)

(Exception noted for plaintiffs.)

(Question repeated.)

A. The bulkhead north of 16th street, to the centre line of 16th street,—that is 280 feet—belonged to a man by the name of Doe. He got his partly filled and it was a beach machine and not a success, and the other man didn't get his sand. This same storm took the south end out, belonging to Mr. Taylor.

Q. That is where they had no sand back of it? 10

A. The part north, Mr. Doe's, stood and is there yet, and the part south is still out, even though I built it once afterwards and it went out without the sand back of it.

Q. You have had considerable experience in building bulkheads?

A. Yes.

Q. Will you state from your experience whether it is possible to hold a bulkhead in time of storm unless it is filled in back of it, with a storm?

A. Possibly not, not on that specification. 20

Q. If the sand is filled in back of it is there any trouble to hold the bulkhead?

A. Not a great deal. I haven't seen any trouble.

Q. The testimony has been that you filled a portion of this tract. Where did you do the filling, and what filling did you do?

A. You mean back of the bulkhead?

Q. Yes.

A. I filled from 49th to 50th streets.

Q. And how was that filled? 30

A. I dragged the stuff there.

Q. Do you mean to say that you filled the portion between 49th and 50th street that is in the contract of Mr. Risley to fill?

A. Yes.

Q. In what condition did you have that strip at the time the storm occurred on the 9th of October, 1903?

A. I had it all graded and the street built and the curb back of it for three hundred feet. For 200 feet I didn't have it finished, but almost graded.

Q. You mean graded and gravelled?

A. But I had three hundred feet of that square all graded and the street built.

Q. On the 9th of October, 1903, what was the condition of Risley's pumping back of the bulkhead?

A. I should judge from the north end he was what you
10 might call practically up to grade until you come to a point probably three hundred feet on the south block. It might be a little more on the slope, and it would figure probably two-thirds of those two squares from 47th to 49th street, were practically to grade.

Q. The testimony has shown that there was a sluiceway in the bulkhead. Was a part of your contract in the building of that bulkhead to build a sluiceway in it?

A. No, I built the sluiceway. Mr. Risley indicated where he wanted it. I never got paid for it so I don't know why
20 I built it.

Q. The testimony is that when the storm of September 12th came along and weakened the bulkhead you went and repaired it?

A. I did.

Q. At whose request?

A. Mr. Risley's.

Q. Was there ever any question about who you did that for?

A. Oh, no; the company never did anything about it until afterwards. It had to be done right quick.
30

Q. How often before October 12th were you down on the ground?

A. Every day.

Q. How soon after October 9th were you down there?

A. I got there on the 11th.

Q. When you got down there what did you see?

A. Nothing. I think there was about ten feet of the bulkhead. I knew it before I went.

Q. When you were down there just prior to the 9th what did you see with regard to a pond of water back of the bulkhead, if anything?

A. There had to be some water, you know. But there was a time prior to this trouble that the boards had been raised under Mr. Risley's directions. It must have been in order to save sand. The more flush boards in there, the more sediment to unfortunately aid to bulge the bulkhead.

Q. Let's go back to those other bulkheads at 16 street. Was that bulkhead built with a single thickness of planking? 10

A. A single thickness of planking. Instead of being a fourteen foot specification it was an eighteen foot, and was sheathed about ten feet of the front.

Q. What did you have back of it?

A. The same thing as the others.

Q. I mean back of the planking. Did you have simply the shingle lath to make the joints?

A. Yes.

By a Juror: 20

Q. Were these three bulkheads that you speak of all on the same line on the ocean front?

A. I should judge this 16th street one was about the nearest I built. They were all about on the high tide line.

Q. The testimony was that the outer line of this bulkhead referred to was on the line of Wesley avenue?

A. Yes.

Q. Were these two other bulkheads on the same line? 30

A. The first one was built on the southwesterly line of Wesley avenue and that went out. The second one was put back four feet to get rid of the stumps there.

By Mr. Bourgeois:

Q. He wants to know about these on 16th street.

A. They were if anything a little further out.

Q. You built bulkheads at 14th street too, didn't you?

A. Yes.

Q. What was the result with them?

A. They are still there.

Q. Was the sand in back of them?

A. I threw it over the top and wheeled it to the back end to get the job done.

Q. Where was that bulkhead built with relation to the
10 high water mark?

A. That is just about the same thing. Very little difference, if any. I was always afraid of going out around the high water line.

Q. What about a bulkhead at 7th street? Was that filled at the time the storm happened?

A. No, sir; the owners couldn't agree and that went out.

Q. Where was that with relation to the high water line?

A. The northeast line of it was about two-thirds tide up and the other end of it was pretty far. That was out of
20 the high water line. The side stood, but the front went out.

Q. After this bulkhead went out, the second bulkhead, that is, the one that went out on the 9th of October, 1903, do you know whether or not Mr. Risley ever pumped any more sand over those hills?

A. No, he dropped back; back on the back end.

Q. Did he ever fill in back of the bulkhead?

A. No.

Q. Was the new bulkhead completed?

A. Yes, sir.

Q. Where was that located?
30

A. The exact line was the westerly curb line of Wesley avenue. The exact distance back of it was thirty-six feet.

Q. By whom was that filled in back of it?

A. By me.

Q. Why was that set further in?

A. Because they wanted me to fill it and I wanted to find out where the sand came from.

Q. You didn't have a pumping machine?

A. No, sir.

Q. Where were you to get the sand?

A. I simply reached out in front for it and cleaned the beach off.

Q. There wasn't sufficient sand, as I understand, to have filled in back of the bulkhead if it had been put on the same line?

A. During the progress of that work it made up very fast. It accumulated and I got plenty of sand. 10

Q. Was the condition of the beach where the sand washed out between 47th and 50th streets, on the 17th of April, I think, during the month of April, 1904, any lower than it was at the time an estimate was made by Latta and Terry in April of 1903?

A. Was the beach any lower?

Q. Yes.

A. No, it was higher. In April, 1903, it was simply skinned right out. There was nothing left.

Q. And in April, 1904, had it filled in somewhat? 20

A. Oh, yes.

Q. Now, Mr. Sutton, you say you built the third bulkhead, the one that was built on the curb line of the westerly side of Wesley avenue. Will you explain to the jury the construction of that bulkhead?

A. It was not completed. Everything was spiked. Instead of the piling being seven feet from centre to centre, they were closed up to four feet.

Q. What was the length of the piling?

A. Same length, supposed to be. 30

Q. What was the other construction? Was there any difference excepting the fact that the pilings were four feet apart and not bolted, but spiked?

A. Why, I should imagine that anything from a six inch to a twelve inch lag screw every day was far ahead of a spike.

Q. Was that the only difference?

A. Practically. The same general construction.

Cross-examination.

By Mr. Cole:

Q. How many bulkheads have you built on the ocean front in front of the beach on which Ocean City is before you had built the second bulkhead in question?

A. I had built the 14th street bulkhead along with Abel Scull.

10 Q. Is that the only one you had ever built?

A. Yes, sir.

Q. What was your business before you began to build bulkheads?

A. Most everything.

Q. Did you ever have any experience in building bulkheads along the ocean front before that?

A. Not particularly.

Q. Do you want the jury to understand that you were an expert in bulkhead building at that time?

20 Mr. Bourgeois: That is objected to. It is a question of what he is.

(Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

30 A. No, I don't care to be called an expert. I haven't found any bulkhead experts yet in my experience.

Mr. Cole: I ask that so much of the answer as is not responsive be stricken out.

The Court: Yes.

Q. How many bulkheads were there fronting Ocean City in the neighborhood of the bulkhead in question on the 10th day of October, 1903?

A. In the locality of this property?

Q. Yes.

A. There weren't any others.

Q. Didn't you testify about a 16th street?

A. I didn't understand your question. I answered in the neighborhood of this property.

Q. Was the 16th street bulkhead the nearest one? 10

A. Yes.

Q. Now you say you built that?

A. Yes, sir.

Q. After you built the one in question?

A. After I built the first one.

Q. When did the first bulkhead that you built go down?

A. I should judge it went down about the year or close to it, of 1903. The latter part of 1902 or the early part of 1903.

Q. For whom did you build that? 20

A. The Ocean City Development Company.

Q. Did you have written specifications?

A. Yes, sir; I wrote them myself.

Q. Were they your own specifications on the second bulkhead?

A. Yes, sir.

Q. Have you a copy of those specifications?

A. Well, I don't think that I have. I think all of that old stuff I have destroyed.

Q. Did the Ocean City Development Company have a copy of those specifications? 30

A. Yes.

Q. You furnished them with a copy, did you?

A. Yes, sir.

Q. Did you have written specifications for your third bulkhead for that company?

A. I declare I don't know. I imagine I did.

Q. You built the bulkhead at 16th street between the time that you constructed the first bulkhead for this company and the second. Is that true?

A. Well, I think so. It was all done the same summer. It might have been a little earlier or a little later.

Q. You say that you built bulkheads on either side of sixteenth street?

A. Yes, sir.

Q. What was the length of those bulkheads?

10 A. Along the beach front?

Q. Yes.

A. From a point 250 feet north of 16th street to a point—well, it is either 100 or 150 feet south of 16th street. That would make 410.

Q. Were each of those the same length?

A. Yes.

Q. Simply on different sides of the street?

A. That is all.

Q. And they were on the same line?

20 A. On the same line. Built on the westerly curb line of Wesley avenue.

Q. The bulkhead in question was built on the house line of the easterly side of Wesley avenue, wasn't it?

A. Yes, sir.

Q. And the distance between the house line on the easterly side and the curb line on the westerly side is how much?

A. The curb line would be 40 feet.

Q. Then you were mistaken when you testified that these bulkheads were on the same line?

30 A. The same tide line. The relative conditions of the tide line were very similar except on 16th street it was further out than any of them.

Q. How many bulkheads in Ocean City were affected by this storm in 1903?

A. It finished up the 7th street; 14th street stood; 16th street stood except the last 100 feet which had no sand back of it, and this one went.

Q. Was there any bulkhead in Ocean City behind which there was sand which was affected by this storm?

A. No bulkheads. There were some brush heaps.

Q. Was there any sand at all behind the bulkhead in question at the time of this storm?

A. The 47th street bulkhead?

Q. Yes.

A. At the time of this storm?

Q. Yes.

A. Oh, yes. It was graded two-thirds from 47th to 49th street and graded almost all the way from 49th to 50th.

Q. That part of the sand and gravel that was in back of the bulkhead went out with this storm, didn't it?

A. Everything went out.

Q. How near the top of this bulkhead generally was the filling at the time of the October storm?

A. Well, from 47th to 48th street they had it nearly all done. Their pipes were located somewhere between 48th and 49th street. I think they lost four or five thousand yards before.

20

Q. What do you call the south end of the bulkhead?

A. The south end they were pumping was 49th street.

Q. South is as the numbers go up, isn't it?

A. Yes.

Q. You say the highest fill was at the north end of the bulkhead?

A. No, at the south end, because it was complete there.

By Mr. Bourgeois:

Q. They didn't fill that, did they?

30

A. No.

By Mr. Cole:

Q. Were you there on the day that the storm began?

A. I was in Ocean City.

Q. I mean on the grounds?

A. No, sir.

Q. Did you say to Mr. G. A. Risley at a time when there was about three or four hundred feet of this bulkhead built substantially, in reply to a question that he put to you like this, "You don't expect us to pump sand against that bulkhead, do you?" and you replied, "No, I expect to scoop sand up from the hills."

A. Which I did.

10 Q. Do you say, Mr. Sutton, that this bulkhead would not have gone out on this storm if it had been filled back of it?

A. No.

Q. You don't say that, do you?

A. No.

Q. Do you say that that bulkhead was strong enough to have withstood that storm even if it had been filled back of it?

A. That is a matter of conjecture. Others stood and we will suppose this would. I built them with that intention,
20 expectation.

Q. When you were employed to rebuild the bulkhead for the third time were you told where to put it?

A. The last time?

Q. Yes.

A. That was a subject of argument for about four months. Some of the company wanted to build it and some didn't. They located the line. The fact of the matter is I told them I would not go out there and build it, because I had to build it at my own risk. To make that plain I wasn't to
30 be paid until I was finished.

Q. You were superintendent for this company?

A. No, sir.

Q. What were you?

A. I did work for them.

Q. You built the bulkhead, didn't you?

A. Yes, but I was under contract and under the engineer's orders all the time. I don't think I got any the best of it, either.

Re-direct examination.

By Mr. Bourgeois:

Q. Now, Mr. Sutton, won't you explain to the jury why you wouldn't take the chance of building that bulkhead out on the original line?

A. Well, they wouldn't build it unless they could see it finished once. They had just about half enough faith to believe that it would stand with the sand back of it. So I 10 shortened up the specifications and added a little more on the price and took a little chance.

Q. Was that put there as you stated, or because you couldn't get the sand on the other side?

A. Yes, it was put there because I could see sand enough in front to scoop over the bulkhead.

Q. Mr. Sutton, will you state to the jury what is the cost or value of building a bulkhead per foot front similar to the bulkhead which you built on the property line, that is, the east property line of Wesley avenue between 47th and 20 50th street, that is, the second bulkhead.

Mr. Cole: I object to that on the ground that we are not responsible for that bulkhead.

(Question admitted. Exception noted for plaintiff.)

Q. I want to know what was a fair price for the building of a bulkhead similar to the one that washed out.

A. At that time?

Q. Yes. 30

A. Two dollars per foot.

Q. And how long was it?

A. 1680 and the side wings.

Q. Did the side wings go out?

A. Yes, on the bulkhead up into the hills and the same way in the center of 50th street.

Q. What was the cost of the construction of the bulk-head that you did build on the line, anyway?

A. The last one?

(Objected to as incompetent, irrelevant and not a measure of damages in this case. Question allowed. Exception noted for plaintiff.)

A. Two dollars and twenty cents.

10

WILLIAM D. SHERROD, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Sherrod, you live where?

A. Haddonfield, New Jersey.

Q. And you spend your summers?

20 A. Ocean City.

Q. And are a member of the Ocean City Development Company?

A. Yes, sir.

Q. And what office do you hold?

A. I am the treasurer.

Q. Previous to entering into the contract between the Ocean City Development Company and N. Risley & Sons for the filling of the land between 47th and 50th streets, did you have a conversation with them relative to the filling?

30 A. Yes, sir.

Q. Did you have a conversation with them in relation to the manner in which the filling was to be done?

A. Yes, sir.

Q. Will you state what that conversation was?

(Objected to on the ground that the contract speaks for itself.)

Mr. Bourgeois: I want to show that these people had notice of the danger that there was.

The Court: I will take the testimony.

(Exception noted for plaintiffs.)

A. Preliminary to signing the contract there was several points to be decided. Among them an allowance for settlement and such matters, and at that time it seems to me that the words, or very near, as I can recollect, I told Mr. Risley 10 that it seemed to me the very essence of this new contract would be to have our second bulkhead, when complete, protected, as we had lost one and didn't want to lose another. That, as near as I can say, is the conversation.

Q. How is it you fix the time?

A. Because there was a number of points that had to be embodied in the contract and this came up at the meeting

Q. Will you state whether or not Risley & Sons ever filled this sand on this lot from the edge of the hills out to the bulkhead? 20

A. No.

Q. And when it was finally filled it was done by whom?

A. The only portion that was finally filled and completed and gravelled was done by Mr. Sutton.

Q. Were you on the ground during the progress of the work?

A. At times, yes. Not very frequently, as I was very busy during the summer; that is the time that I do most of my business, and I was there occasionally.

Q. Will you state how or in what manner the filling progressed? 30

A. It went very slow and I frequently had talks with the engineers in regard to how slowly the work was going.

Q. Ever had any talks with Risley & Sons?

A. I think I have met them once or twice and talked with them, but I can't remember any times. My impression is that that was general talk at that time.

Q. Now, Mr. Sherrod, can you state to the jury what was the cost of the work that washed away by the storm of October 9th, 1903?

A. I have a memorandum.

(Testimony objected to as incompetent, irrelevant, immaterial and not a measure of damages. Testimony allowed. Exception noted for plaintiff.)

10 A. We paid Mr. Sutton \$600 for gravelling and making the street on Wesley avenue from 50th street to a point 200 feet south of 49th street. 600 feet, in other words.

Q. He didn't finish all of that, did he?

A. No, that is only for the gravel.

Q. Then for the part that washed out, which was some 300 feet, it would be the half of \$600, wouldn't it?

A. He finished 600 feet at a dollar a foot. He made 600 feet of street there at a dollar a foot. All that he filled in is gravel.

20 Q. And that washed out?

A. Yes.

Cross-examination.

By Mr. Cole:

Q. You are the treasurer of the company, Mr. Sherrod?

A. Yes.

30 Q. Did Mr. Risley or any of the Risleys express to you willingness to fill back of the bulkhead that was lastly built by Mr. Sutton?

A. I don't know that they ever expressed any willingness or unwillingness. I don't recollect them saying one way or another, but we simply accepted the fact that it was.

Q. Did he ever refuse to fill back of that?

A. Not that I know of.

Q. Did you ever hear that he had expressed any unwillingness to any officers of the company to fill back of the last bulkhead?

A. We told him what we wanted and he never said what he expected to do.

Q. How long was it after the bulkhead, that is, the last bulkhead, was built that you employed Mr. Sutton to fill in back of it?

A. We never employed Mr. Sutton to do any filling back of the bulkhead before. It simply wasn't done and he went 10 ahead and did it.

Q. Wasn't employed by you to do that?

A. Not to fill back of that bulkhead where the street was washed away. You are talking about the one there at the present, Mr. Cole?

Q. Yes.

A. Oh, I didn't understand. Now if you will tell me again I will answer more intelligently.

(Question repeated.)

A. Mr. Risley had moved away when this last bulkhead was put there. There was never anything said one way or another as far as I know. This was built in 1904. 20

Q. I show you a letter of February 10th, 1904, to Risley by yourself, and ask if that is your signature?

& Sons coming from the Ocean City Development Company

A. Yes, sir.

Q. Was that written as a result of a meeting of the board of directors of the company as stated?

A. Yes, sir. 30

(Letter marked A for identification.)

A. My recollection is that I asked the different members of the board about it and that is the answer.

Defendant Rests.

Mr. Cole: I move to strike out all of the testimony in this cause concerning the alleged expenditure by the company in repairing certain work that was done by Mr. Sutton and also the expense claimed to have been incurred in either building or rebuilding the bulkhead, on the ground that under the pleadings the proof is not relevant, competent or material, and that there is nothing in this case that would justify the jury in finding any evidence that the defendant is entitled to have either of those amounts set off as against
10 the plaintiff's claim.

Mr. Bourgeois: If the court please, the third plea filed by the defendant is as follows: (Reads plea.) Now the law with regard to recoupment is that you can plead payment and set-off, and annexed to this plea there is this notice of recoupment: (Reads notice of recoupment.) The contract and specifications which are a part of the same thing provide that the work shall be done in a certain locality, and the contract provides that it shall be carried on
20 at such points and places as shall best advance the work, and they also provide that it shall be carried on under the specifications of the engineer. Now the evidence shows that they did not carry this on according to the instructions given to them by the engineers and as a result of not having done it we claim that this damage ensued.

The Court: The motion is refused.

(Exception noted for plaintiffs.)

30 Mr. Cole: Will you produce on my call the specifications for the building of this bulkhead that you claim went out?

Mr. Bourgeois: I will if we have them.

Mr. Cole: Note on the record that notice was served on the defendant to produce copy of the plans and specifications for the construction of the bulkhead in question.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

LOUIS M. HAUPT, sworn.

Cross-examination.

Mr. Cole: I want to offer the letter from the Ocean City 10
Development Company to Risley and Sons under date of
February tenth, 1904.

(Letter marked Exhibit P3.)

Mr. Cole: Also a copy of the specifications and contract
between the Ocean City Development Company and Joseph
Sutton under date of August 23rd, 1902, for the building of
the bulkhead in front of the property in question.

(Specifications and contract marked Exhibit P4.)

20

By Mr. Cole:

Q. Where do you live, Mr. Haupt?

A. Near Philadelphia.

Q. How old are you?

A. Sixty-two.

Q. What is your profession?

A. Profession of consulting engineer.

Q. In what character of work?

30

A. In civil engineering, hydraulic engineering and mari-
time engineering and works generally.

Q. How long have you been a consulting engineer?

A. Since resigning from the professorship of the Univer-
sity of Pennsylvania in 1892. I occupied the chair of Civil
Engineering there for twenty years and have also been em-

ployed by the Government as member of the Isthmian Canal and Nicaraguan Canal Commission for five years and have given most of my attention to navigable channels and beach fronts. I have made a special study of the New Jersey coast and have reported on that to the Geological Survey last year.

Q. I wish to ask whether you have had any experience in the building of bulkheads to resist tides on the beach front.

A. I have made a special study of them.

10 Q. Have you made a study of them?

A. Yes, sir.

Q. For how long a time?

A. For the last fifteen years, at least.

Q. Have you made a study of the effect of tides on bulkheads?

A. I have.

Q. Have you been to the premises in question?

A. Yes, sir.

Q. When?

20 A. Yesterday afternoon.

Q. While you were there did you see any part of the bulkhead in question that was washed away by the storm of 1903?

A. I saw a portion of the wrecked bulkhead lying there, several portions.

Q. That you say was yesterday?

A. Yes, sir.

Q. Did you see any of the piling that was used in that bulkhead?

30 A. I did, yes, sir.

Q. What was the length of the piling that you saw?

A. It was twelve feet by measurement.

Q. Have you read the specifications or contract between the Development Company and Sutton, Exhibit P4?

A. I have, yes, sir.

Q. Does the study that you have made of bulkheads and the effect of tides thereon and the experience that you have

had, justify your giving an opinion as to the character of bulkhead necessary to withstand a storm on the ocean front?

Mr. Bourgeois: I object to that. I have no doubt but what in his own estimation it does, but whether or not he is an expert qualified to give testimony is to be determined after I cross-examine him.

By Mr. Bourgeois:

Q. What bulkheads have you ever built on the Ocean City beach? 10

A. As a contractor I have built no bulkheads.

Q. What bulkheads have you ever been consulted on in the construction of them, built on the coast of Ocean City, Ocean City beach?

A. None at Ocean City.

Q. What bulkheads have you ever built at Atlantic City?

A. None at Atlantic City; haven't built any.

Q. What practical experience have you ever had in the building of bulkheads? 20

A. As a contractor for the work? Well, the work at Longport, crossing the channel from Longport to Ocean City.

Q. Is that a bulkhead or jetty?

A. In one sense it is a reaction jetty.

Q. I don't care anything about jetties. Jetties are built for the purpose of resisting the tide in channels, are they not?

A. In part and also for reclaiming lands.

Q. Jetties are built into the ocean or the water? 30

A. Yes, sir.

Q. And bulkheads are built parallel with the water, are they not?

A. Yes.

Mr. Bourgeois: I don't think he is qualified to testify as an expert on the building of bulkheads, and I object to his testifying on that line.

The Court: I will take the testimony.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

10

ALLEN B. ENDICOTT, [SEAL],
J.

By Mr. Cole:

A. I do consider myself as an expert to give an opinion with regard to bulkhead, jetty and wharf construction generally.

The Court: I think he was about to state as to his experience in designing.

20

Q. Mr. Haupt, suppose you tell the jury, please, the experience that you have had in designing bulkheads or other structures to withstand the ocean tides.

Mr. Bourgeois: That is objected to because the testimony is that he has never designed or been consulted with regard to the constructions of bulkheads on the Ocean City front and there is nothing to show that the conditions there are the same as at other places.

30

The Court: The testimony may be taken.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

A. In order to qualify myself for work of this kind I might perhaps say that I have made a careful personal examination——

(Question repeated.)

A. The nearest approach to Ocean City for which I have designed works are those at Longport, which is at the lower end of this island, for Mr. Macauley, the jetty there and reclamation works, as well as the reaction jetty. I was also consulted by the light house engineer for the fourth light house district with respect to the jetty at the northern end of this island, which was the jetty built about 1878 for the purpose of reclaiming the land which was then endangering the light house and also the jetty near the same point for Mr. Walker, where he recovered a lot of land. 10

Mr. Bourgeois: Does that include the result?

Q. You need not tell us, perhaps, the result of what you did, but simply what you did. 20

A. Those are the immediate works in this vicinity. There were also works on Lake Superior when I was employed there by the government and also works on the Gulf coast along Texas, and works abroad in Great Britain and Europe and various works in South America and in Mexico and Central America at the mouth of the San Juan River.

Q. Was this work in which you were engaged and the places which you have mentioned for the purpose of reclaiming lands or resisting the tides of the waters? 30

(Objected to. Question allowed.)

A. The object of the work was various. In some instances to protect land and in others to reclaim it, to protect it from erosion due to force acting upon it. They are winds, waves, currents and tides, which are the four principal forces

acting upon particular beaches to produce the changes which are so noticeable.

Q. Now what is it about the ocean tide that will break down a bulkhead or structure such as was the structure in this case? What caused it to go down? Will you tell that to the jury as plainly as you can in simple language?

A. The four forces that I have mentioned are working upon it all the time with greater or lesser intensities, and the most important factor is the wave action, because the
 10 motion of the waves, especially at high tide, in conjunction with high winds, and spring tides—if any obstacle is opposed to that wave, it will produce a change of direction. It brings an impact with the obstacle which opposes it. The wave must surmount it and it produces a channel along the face of the work. If it is a vertical work still it must surmount the obstacle and falling over behind, so that at times it produces waves of tremendous heights. The downfall of
 20 water on work of this kind, especially on a breakwater or bulkhead such as is described here, means an enormous force applied at its weakest point; in other words there are tons of water falling on the back filling or whatever is there.

Q. In your opinion was this bulkhead in question in a better condition to resist the ocean tide, ocean currents, without a filling back of it or with the filling back of it?

(Objected to because of lack of experience in building bulkheads. Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)
 30

ALLEN B. ENDICOTT, [SEAL],
 J.

A. A bulkhead such as this is really designed to act as a retaining wall to hold the earth which is proposed to be filled in behind it. As such it must be strong enough to resist the pressure of that mass of earth, and it is, therefore,

better adapted to do this work and to stand, so far as the wave and current motion is concerned, without that, because whatever pressure is put upon the back of that wall is so much additional force or strength required of that, and a sheet planking two inches in thickness is in my judgment not at all sufficient to resist such a force as that. The earth weighing twice as much as water, it would be less able to resist than if it were water.

Q. Do you know any case where the effect of the water coming over the bulkhead and falling on the earth behind 10 has caused the breaking up of the bulkhead?

(Objected to as irrelevant, there being nothing here to show that if he does know of such cases there is any similarity between that case and this one.)

Mr. Cole: I am speaking of water falling on what is directly behind the bulkhead. Do you know such a case as that?

(Question allowed.)

20

(Whereupon the defendant, by its counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

A. Yes, sir.

Q. State the cases that you know of, please. Where were these cases? On what body of water?

A. One case was on the New Jersey coast that I was going to state, and another on the Pacific. The ones on the Atlantic Coast are substantially the same. 30

(Objected to as being a conclusion. Testimony admitted.)

A. I will explain the conditions. In the case of the Pacific beach there was considerable erosion from the action of the waves in front of the Granada Hotel and other places and a somewhat similar construction was placed there by driving piles in and placing sheet planking on them. They were placed horizontally instead of vertically. The effect of that fence was to fill the beach up to the top of that fence and almost bury it until a storm came along in March, 1905, and struck that work and scoured out the entire back filling.

10

Mr. Bourgeois: I ask that all that be stricken out because it doesn't show that the conditions were the same at all.

The witness: There was a bulkhead and it was filled with sand.

Mr. Bourgeois: It doesn't show that the bulkhead was the same or the piling was the same; it doesn't show that
20 the wind was the same; it doesn't show that the height of the waves was the same.

The Court: The motion is refused.

(Whereupon the defendant, by its counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

30 By Mr. Bourgeois:

Q. Are the tide heights similar?

A. The tide heights vary on every shore according to the shore line. There are no two places where you will have exactly the same conditions on the same day. All the engineer can do is take the average of the year and ascertain the force and adapt his works to those conditions.

By Mr. Cole:

Q. You were informing us as to what effect the storm had on this back filling?

A. The back filling was completely torn out and the bulkhead was thrown forward by the waves breaking on that back filling, and the whole thing was torn out.

Q. You have read the specifications here?

A. Yes, sir.

Q. In your opinion was this bulkhead more likely to have washed out by this storm without the filling than it was with the filling back of it? 10

A. In my judgment it would have been more likely to go out with the filling back of it, for the reason given that there was an excessive pressure in that direction.

Q. In your judgment was this bulkhead if constructed in accordance with the specifications offered in evidence a sufficient bulkhead to withstand the ocean tides in a storm?

A. It was not, no, sir.

Q. Will you tell the jury in what respect you think it was not. 20

A. The entire construction was too light, as I have just specified in regard to the sheet piling. Only two inches of piling were interposed between the back filling and the ocean action. The main piling was not long enough. The penetration was not deep enough. The back piles were too light and the piling was insufficient. I would like to cite a case of—

Mr. Bourgeois: I object. I don't know but what we might have to take an appeal in this case and we don't want to print all of this stuff. I ask that the witness just answer the questions. 30

Q. If you know of a case, Professor, that is in point with this case, where there has been such a result as you started to state, I wish you would give such a case if you know of it personally.

(Objected to for the same reason. Question admitted.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

A. I was only going to say that I have knowledge of cases
10 where beams twelve by twelve and ten feet span have been
broken like pipe stems by water falling vertically down on
them and structures exactly the same along side of them
have not been injured at all.

Q. Can you give the jury where that was?

A. That was on the Buffalo breakwater on Lake Erie in
the storm of December, 1899. It is merely to show the very
great difference of the action of great storm waves. There
are a number of others that I might cite.

Q. Did you make a sketch of the formation of the bulk-
head which you saw at Ocean City?

20 A. I made a sketch from the wreck of the parts as I
found them and as they were apparently assembled. The
bolts were stuck into the parts so as to show how it was made
and the relative position of the structure itself, and the di-
mensions we measured. I understood there was no scale
or drawing, so I went to get this information.

Q. Is this paper which I hand you the sketch you have
made?

A. Yes, sir.

(Paper offered in evidence and marked Exhibit P 5.)

30 Q. Does your answer to the question that in your judg-
ment this bulkhead was not of a character sufficient to with-
stand the ocean storm contemplate if there had been filling
up to the top of the back of it? In other words if this bulk-
head had been filled behind to its height, would it have been
sufficient in your opinion to have withstood this storm?

A. It would not.

Cross-examination.

By Mr. Bourgeois:

Q. Professor, you say you are a hydraulic engineer?

A. Yes, sir.

Q. And that the damage to this bulkhead is caused by the falling of the water?

A. Not entirely. There are other forces, as I have stated.

Q. Is the damage done by the falling of a stream of water from a height of twenty feet greater in one case than it is in another? 10

A. It depends entirely upon the initial velocity. Ordinarily, if a stream is the same size and falls from the same height, the result is the same.

Q. The initial velocity of water will always be the same of water that is thrown up and drops?

A. Yes, sir.

Q. In other words, the weight of water is determined by the velocity and height of the column? 20

A. Yes, sir.

Q. And the downward weight of water upon the piling during the storm would be precisely the same and no more than a similar weight put there today when there is no storm?

A. You mean at motion or at rest?

Q. In action.

A. Not a column of water twenty feet high, but water falling from that height the result would be the same.

Q. Then the action of the waves and the erosion has nothing to do whatever with the damage done by water falling from a height? 30

A. It has in the height of the water to which it would be raised, but it has nothing to do from a fixed height.

Q. You say that under similar conditions you have known other bulkheads to go out. There was the height of the column in the bulkhead that went out on the Pacific coast. How high were the waves there?

A. I have no measurements. The tides there are about eight feet.

Q. How high were the waves thrown there at Ocean City on the night of October ninth, 1903?

A. I can't speak from personal knowledge.

Q. Is the height determined by the depth of the water or by the force of the wind and the direction of the wind?

A. It is determined not only by the force and direction of the wind, but by the length of exposure and various other
10 conditions, the character of the submerged foreshore and the formation of the coast itself.

Q. Will the height to which a wave will be thrown by striking against a vertical bulkhead be greater or less if the wave strikes the bulkhead at right angles or if it strikes it at a different angle?

A. That will depend upon the wind largely.

Q. Assuming that the wind in one case forces it directly against the bulkhead at right angles and in another case obliquely?

20 A. If it is a slight slope to the rear it would go higher than if it were perfectly vertical.

Q. You don't understand my question. Assume a bulkhead built directly north and south.

A. Yes.

Q. And along the ocean front.

A. Yes.

30 Q. And a storm pending with an easterly wind. Now, assume another bulkhead built directly north and south with a similar storm, only northeast. Will the waves in the north storm go higher or lower than the waves in the easterly storm that strikes it at right angles?

A. It will have a longer recoil but will go to a lesser height.

Q. Consequently do less damage?

A. Yes, so far as the height is concerned.

Q. Have you any knowledge of the direction in which the wind was blowing on the night of October ninth, 1903?

A. I have no personal knowledge.

Q. Then you don't know whether the wind was blowing directly on that bulkhead or blowing obliquely, do you?

A. No, sir.

Q. Now assuming the other statement to be true, that a bulkhead is less likely to be injured when there is nothing back of it than when there is sand back of it, how would you explain the condition that existed there on the ninth of October, 1903, of the bulkhead first going out where there was no sand back of it and of its next going out where there was less sand and then going out last where it is entirely filled? 10

A. As I understand from the testimony that I have heard, the storm was a northeast storm and the north end of it went first because it was subjected directly to the first attack of the wind. The portion of the bulkhead which remained gave protection and fought off that storm to some extent and protected the lower portion more than the upper portion. In addition to that, the high water line was nearer that end; in fact, it was just inside the bulkhead line, and at the upper end the high water line was further out, 20 so that the bulkhead line did not recede from the high water line.

Q. The testimony is that it went first in the middle near the place where the high water line was further distant than at the north end. How do you account for that?

A. I account for that as I have in the case of the Buffalo Breakwater, that there was an accumulation of wave action locally for some cause or other, and you can never tell where it may strike, just as it may meet a ship amidships or on the bow or any other portion. 30

Q. How can you account for the fact that in that same storm the bulkhead built similarly at 16th street, which was still further out beyond the high water line and which was filled in back of, stood, and on the opposite side it washed away where it was not filled?

A. For the same reason, that there was some local action.

Q. Now the bulkhead down at 14th street where it was filled in that remained, and at 7th street, where it was not filled in, which washed out.

A. As I heard the testimony the piles were longer and stronger.

Q. No, they were the same.

A. I understood it was eighteen feet stuff.

Q. No, that was 16th street. They were twelve feet out of the sand and six feet in the sand. Down at 49th street
10 they are eight feet in the sand.

A. There is no other explanation except purely local wave action.

Q. You are acquainted here in Atlantic City somewhat, aren't you?

A. Yes, sir.

Q. You know the bulkhead that is built down at the corner of Jackson avenue?

A. I don't know it by the location.

Q. It was built by Mr. Conrow.

20 A. Yes.

Q. And you know another bulkhead that was built down a little further by Johnsons', don't you?

A. Yes, sir.

Q. During the time that Johnsons were building their bulkhead about a year ago there came a storm and washed out the part that wasn't filled and the part that was filled did not wash out.

A. That may be explained by the condition of the outer bar, just as at Massachusetts and New Hampshire.

30 Q. But I will direct your attention to the fact of this wave action. Now just beyond the bulkhead that I have spoken to you about up here was the one Conrow built that was standing during the storm and didn't go out at all.

A. Was it backed by brush?

Q. No; simply by sand. How do you explain that? Why didn't the action of the wave falling down break the piling off and that go out?

A. I don't know anything at all about the condition there.

Q. Just below Portland avenue in Ventnor there was another bulkhead built. That didn't have any sand back of it and that went out.

A. How high was that about the sea?

Q. About six feet. How would you explain that?

A. I don't want to explain it without seeing the work and understanding the conditions.

Q. All of these explanations that you have given are based on theory, aren't they? They are not based on practical observation of the building of those bulkheads, are they? 10

A. I have not seen the specifications of those bulkheads.

Q. They are based on theory, aren't they?

A. They are based on facts so far as I have been able to ascertain them through visits and descriptions.

Q. You explain all of these things because of bars and something that you don't know anything about? An ordinary man would explain it because they were filled back, wouldn't he? 20

A. He might.

Q. That is the practical explanation, isn't it?

A. According to your view of it I suppose it is.

Q. You know that theory does not always work out in practice, don't you?

A. That depends upon whether the theory is sound or not.

Q. Take the jetty up at Absecon Inlet and also at Longport. Isn't it a fact that every fifty years the bars go Northward and then go down again?

A. The channels move in cycles.

Q. Isn't it true that about 1840 the channel at Great Egg Harbor was where it was five years ago? 30

A. Yes.

Q. And about twelve years ago the Inlet had moved away down at Ocean City?

A. Yes, sir.

Q. And when it was at Ocean City it made up a beach at Longport?

A. Yes.

Q. And as it moved Northward that washed away?

A. Yes.

Q. And you built your jetties there?

A. Yes, sir.

Q. And your jetties have made sand?

A. Yes, sir.

Q. How do you account for the sand making up over here at Brigantine where there was no jetty?

10 A. The sand always builds up that way.

Q. What was there at Longport to arrest that movement in 1888 when it came all the way up there?

A. If the Court desires I will go into the whole theory of that.

Q. No; just answer the question. What was there to stop it then?

Mr. Cole: The trouble of it is that you are testifying all the time. You are telling the jury all that you know. The
20 thing you ought to do is to put a hypothetical question to him.

A. There is a point along the Jersey coast where the currents divide and move North and South. That is Bay Head. There they are moving North into New York Bay. That is the normal direction of that movement because of the contour of the coast line.

Q. Won't Longport make up for half a mile yet before you get to the position that it was in in 1888?

30 A. Not without assistance.

Q. What was the assistance that made the point of Longport make up from 1840 to 1887?

A. Because of that space between the little sand island which existed there between Ocean City.

Q. Was that done by any jetty?

A. No.

Q. Done by nature?

A. Yes.

Q. If you were going to build a bulkhead for yourself, I understand that you wouldn't place anything back of it? You would expect it to stand better without anything?

A. If I were going to build a bulkhead as a retaining wall, I shouldn't put it out on the high water line, or I should build it in a very different shape from that one.

Q. If you were going to build it inside the high water line, then you might fill something back of it?

A. Yes, sir. 10

Q. But if you were going to move it out on the high water line you wouldn't put anything back of it?

A. I said in answer to your question that I should build it of a very different shape.

Q. But there would not be so much danger of its washing down without something back of it, would there?

A. There would be the same danger unless that water were provided for. The waves can be prevented from breaking over the structure.

Q. Then you think that all that they needed there was some provision for taking care of the water that was thrown up and fell back? 20

A. Yes.

Q. Then you think the size of the bulkhead was large enough if they had only provided for a trough to carry the water off?

A. No. You will find such a construction in South America.

Q. Is there any particular line of similarity between this bulkhead that Sutton built over in Ocean City and those that you speak about in South America? 30

A. I don't know of any bulkhead work so light as that at Ocean City.

Q. How do you explain the fact that the bulkheads over there built the same way, where they were filled in, did stand?

A. They haven't had a sufficiently severe storm to try them out.

Q. Well, they had the storm of October 9th, and they have stood every storm since. Wasn't there a severe storm during the spring of 1904, an exceedingly high tide and wind on this part of the coast?

A. I don't remember whether I was in this part of the country at that time.

Q. How thick do you think the planks ought to be for a bulkhead?

A. Well, I have seen four inch planks go out without back
10 filling behind and with back filling the whole thing has gone out.

Q. Taking the testimony in this case that the bulkheads at 16th and 14th street were built of two inch plank and where they were backed they did not go out, it would indicate that two inches was sufficient if they were back filled.

A. It would.

Q. Now about this sketch that you made here, where did you find that?

A. I found this fragment of the jetty lying down near an
20 old wreck on the beach front in Ocean City about, I suppose, 50th street.

Q. What condition was it in?

A. It was in rather a decomposed condition.

Q. Was it in the sand?

A. It was lying flat, not standing up, just behind high water line and near the wreck. The sheet planking was not attached to it.

Q. How do you know where it came from?

A. I went with Mr. Risley and Mr. Risley showed me that
30 that was a part of the structure.

Q. Then you didn't see it come out of there, the same place, yourself?

A. No, sir.

Q. Did it have a single or a double back brace on it?

A. Single.

Q. Did Mr. Risley state to you that the second bulkhead had double braces on it?

A. Yes, sir.

Q. Then from that you inferred that that was not a part of the bulkhead built the second time, didn't you?

A. I did, and the intervals between the piles appeared to be about seven feet.

Q. From the information that you had you were led to believe that if that came from the same location, it was a part of the first, but not the second bulkhead?

A. The one that went out.

Q. Didn't Mr. Risley say to you that the bulkhead that went out had double back bracing? 10

A. I understood him to say the new one, and that in some instances there were double braces to the old one, but not all.

Q. The first bulkhead that was built was built of single back bracing, wasn't it?

A. So far as I know.

Q. I think you said that the lag screws in that were not sufficient?

A. They were very small screws. They were only about three-eighths and from eight to ten inches in length. 20

Q. Well, they seem to have been sufficient to hold that piling and the bracing in position, didn't they?

A. The one that I measured I think only projected two inches below the surface.

Q. Well they seemed to be sufficient to hold these together, didn't they?

A. These particular ones. It is an indication of the vagaries of nature.

Q. Which are the vagaries of nature?

A. Where some held and some did not.

Q. So far as you saw, the lag screws held in every case? 30

A. So far as I saw.

Adjourned to Friday, July 13th, 1906, 9.15 A. M.

Atlantic City, N. J., July 13th, 1906.

Trial of the cause resumed at 9.15 A. M.

WILLIAM D. SHERROD, recalled.

Direct examination.

10

By Mr. Cole:

Q. Did your company have a written contract with Mr. Sutton for the building of the second bulkhead or the bulkhead in question?

A. No, sir, I think not.

Q. Then was the contract for this building purely oral?

A. I think it was, yes, sir.

Q. Are you familiar with its terms?

20 A. It was to be, as I recollect it, similar to the first bulkhead. They were to use as much material and whatever remained of the first bulkhead in the second one and build it as near like the first one as—

Q. He was to use so much material in the old as was available in the building of the new?

A. Yes, sir.

Q. When was he to complete the bulkhead?

A. I can't answer that. I don't remember.

30 Q. Do you mean to say that you don't know when under your contract with Mr. Sutton he was to finish this second bulkhead?

A. No; he was to finish it in time to avoid any storms in the fall.

Q. Don't remember any day was fixed?

A. No, sir.

Q. Do you remember when the contract was made with him to build it?

A. It was made during the spring of the year. He was to start in in the spring, in June, or about that time, and push it along and get it completed as fast as he could.

Q. Haven't you any data in writing at all which would show when the contract was made and when it was to be finished?

A. No, I think not.

Q. Who made the contract with Mr. Sutton on behalf of the company?

A. He made a proposition to the company and it was accepted. 10

Q. Wasn't that in writing?

A. I think not. In fact I know. I haven't any recollection of anything being in writing.

Q. Was no specified time given him in which to complete the work after he began it?

A. I think not. I think the idea was that he was to get it done as quickly as he could so it could be filled in without danger from the fall storms.

Q. Is this company in possession of the land which by this agreement with the plaintiffs was to be filled? 20

(Objected to as irrelevant.)

Mr. Cole: It may have bearing upon the question of acceptance in the event that any question should be raised as to whether there can be a recovery strictly under this contract.

(Question admitted.) 30

(Whereupon the defendant, by its counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

A. We had possession of the land, yes.

Q. Has the company sold any of the lots since the plaintiffs quit work there?

(Objected to as irrelevant. Question admitted.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

10

J.

A. We have, yes, sir.

Q. Have there been buildings built upon it?

A. Yes, sir. Since they left there, you mean?

Q. Yes.

A. Yes.

Q. Did your company build buildings upon that land?

A. No, sir.

Q. Those to whom you sold put up buildings?

A. Yes, sir.

20

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Sherrod, where are those buildings that have been built there since the bulkhead washed down? Where are they located?

A. There is a hotel built at the corner of 48th and Wesley. There is a double cottage built on Central avenue between 49th and 50th.

30 Q. Could that hotel built at the corner of 48th and Wesley have been built without the filling up of the land back of this present bulkhead?

A. No, sir, not safely. Nobody would have thought of doing so.

Q. You were asked yesterday by Mr. Cole whether or not Risleys ever refused to fill in that land back of the bulkhead. Do you remember that?

A. Yes; I think that was a little misunderstood by me. I thought Mr. Cole was speaking of the first time when they were going to build there. I didn't quite understand the question at that time. The understanding was after the bulkhead was washed out that they would not undertake to do any more filling back of the bulkhead.

Q. Was it brought to the company's attention that they wouldn't fill any more sand back of the bulkhead?

A. Yes, sir.

10

Re-direct examination.

By Mr. Cole:

Q. Do you know whether they did in fact fill land, a portion of this land, after January 1st, 1904?

A. I don't remember, Mr. Cole, whether some of the back land was filled after that time or not.

Q. You don't pretend to know that they did pump sand on this ground in question after the estimate of January 1st 20 given by the engineers, do you?

A. I don't remember when they finished up. They were working there after the bulkhead washed out.

Q. You deny, do you, that Mr. Elton Risley on behalf of the plaintiffs did tender the plaintiffs ready to fill back of the bulkhead?

(Objected to as irrelevant. Question admitted.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.) 30

ALLEN B. ENDICOTT, [SEAL],

J.

(Question repeated.)

A. I understood that when the bulkhead was washed out they wouldn't undertake to fill back of any other bulkhead.

Q. Where did you get that understanding?

A. From general impression at that time and Mr. Sutton told me that Mr. Risley had told him that.

Q. What had Mr. Sutton to do with it? Was he representing your company?

A. Yes.

Q. You took his statement for it, did you?

A. Yes, sir.

10

PHILIP HARTMAN, sworn.

Direct examination.

By Mr. Cole:

Q. Where do you live?

A. Ocean City at present.

Q. Did you work on the bulkhead in question that was
20 damaged by the storm of October, 1903?

A. Yes, sir.

Q. What were you, a carpenter?

A. No, not exactly.

Q. What did you do on it?

A. I helped push down the sheathing from the top and helped saw off the tops of it to level it up on top.

Q. In doing that work of levelling up was it your object to have all the piling at the top on a level? Did you undertake to get the piling on the top level?

30

(Objected to as leading and immaterial.)

Mr. Cole: The purpose is to show that in the centre of this bulkhead they couldn't drive this piling down because of obstructions, and they sawed it off at a much greater height than the others.

Mr. Bourgeois: The testimony should be directed to how deep they sunk the piling. That is not the same unless you are going to prove that they were all the same length.

Q. Was there any difference in the distance the piling went in the ground on this bulkhead?

A. Well, I can only answer that by saying that the general length was about the same.

Mr. Bourgeois: I object to that. It is not answerable. 10
He is going to lead up to his direct question. If you want to prove that, it is how far they went into the ground.

Mr. Cole: The witness has said that these piling were of a general length.

Mr. Bourgeois: That doesn't mean the same length.

The Court: I will take the testimony.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.) 20

ALLEN B. ENDICOTT, [SEAL],
J.

Q. Now proceed, Mr. Hartman.

A. The planking on the front were generally the same length, as I said before, and when they would strike what I believe the foreman called the floating meadow below, we couldn't force them down and some of them we were compelled to saw off. I worked on the cross cut saw to help 30
saw them off.

Q. You say you were compelled to saw them off. Where did you saw them off?

A. At the top.

Q. In those cases where you sawed them off at the top how much did you saw off?

A. Some of them nothing and from that I should say some of them as much as five feet.

Q. Do you know that they did experience difficulties in sinking the piling without knowing just what it was that stopped them?

A. Yes, sir, I do know that.

Q. You saw that, did you?

A. I felt it.

Q. In what part of the bulkhead was it that you experienced the most difficulty in driving the pilings, at either
10 end or in the centre or what part of it?

A. Nearer the centre.

Q. Did you use in building that bulkhead any of the timber that had been used in the bulkhead that had gone out before?

A. Yes, sir.

Q. How much of it?

A. Well, that I can't remember.

Q. You did use some?

20 A. Yes.

Cross-examination.

By Mr. Bourgeois:

Q. How long did you work for Mr. Sutton?

A. I worked nine days.

Q. When you first commenced work where were they working on the bulkhead?

30 A. They were working towards the upper end, the North-east end.

Q. That is, 47th street?

A. Towards the 47th street end.

Q. Now how far towards the 47th street end?

A. I should judge one-third of the way from that to the lower end.

Q. In which direction were they working, toward 47th or 49th street?

A. Towards 49th street.

Q. And during the nine days that you were working with them how much of the bulkhead was built?

A. Well, we worked on several different sections; it wasn't built continuously.

Q. Where did you work?

A. I worked on the top principally.

Q. What was your work?

A. I helped push down the sheathing, helped saw off the top to level it off, helped put up stringers. 10

Q. Who sunk the pilings?

A. Who sunk the pilings?

Q. Yes; who put the pilings in?

A. Well, there was very few pilings that I had anything to do with and that was put in while I was there.

Q. When you went there the pilings had been put in down how far? To what street?

A. Why, they were all in but just a very few right towards the Southern end.

Q. Then you don't know anything about the trouble they 20 experienced in sinking the pilings, if they did at all, do you?

A. I spoke of the sheathing.

Q. All that you have spoken of has had relation to the sheathing, hasn't it?

A. Yes.

Q. The two inch planks?

A. Yes, sir.

Q. Are you pretty well acquainted with the beach down there?

A. Yes, sir.

Q. How much sand did you go through with that sheath- 30 ing until you came to the meadow bottom under the sand?

A. That I can't answer.

Q. Do you know that it was only about two feet?

A. No, I don't know how much.

Q. Couldn't you tell in the sinking of the sheathing?

A. The hole was bored in there by the people below.

Q. What do you mean, down underneath?

A. Yes, clean underneath me. We would force the sheathing from the top down into the hole that was already bored.

Q. How would you force the sheathing?

A. With our hands.

Q. And you don't know anything about how close to the top the meadow was, then?

A. No, I don't know about that except by the length of
10 the upper part, that is all.

Q. Didn't you see the sod washing up when they would be forcing the hole down there?

A. No, sir.

Q. Did you look?

A. No, didn't look.

Q. And these sheathing planks that were cut off, you say?

A. Yes, sir.

Q. How many of them were cut off in one place?

A. Well, it would be hard to tell. In fact I couldn't tell
20 how many. There would be spaces possibly ten feet along there where we would have to cut all off, and then they would go along some distance everything nearly even.

Q. How many planks do you think you helped cut off?

A. I couldn't tell. I worked there for a good many hours.

Q. Nine hours, didn't you?

A. I mean at the sawing business.

Q. How many hours?

A. I couldn't tell because I didn't keep any record.

Q. How much space did you cover in the sawing? How
30 many squares did you saw?

A. Well, it wasn't all in any continuous way. You can't tell. You would saw a place along here and maybe you would jump ten feet or twenty feet and saw in another place.

Q. You say you are not exactly a carpenter. Have you served any apprenticeship except with that cross cut saw?

A. No, sir; I don't claim to be a carpenter.

Q. And from this job you were discharged, weren't you?

A. Practically, yes, sir, although not personally.

Q. How much was finished during the nine days that you worked there?

A. Well, the last day that I worked there they enclosed it.

Q. The last day it was inclosed, finished?

A. Well, it wasn't finished. There was other work to do.

Q. But the sheathing were put in?

A. Yes, the last day I worked there.

Q. What day of the month was that?

A. That was the 17th of July. 10

Q. Then the pilings were all in and the sheathing put down and completed the 17th of July?

A. The sheathing were on and the piling were in.

Q. After that they had to strip it in the inside or put the stripping material along the same as the sheathing?

A. No.

Q. After you had sawed the planking off at the top all that was then necessary to be done was to put on that cap, two by eight or two by ten?

A. The cap was put on, a great deal of it, as they worked. 20

Q. When you stopped on the 17th of July the bulkhead was practically completed, wasn't it?

A. Yes, so far as the front was concerned. I just merely know that they worked there after that, but what they did I don't know.

Q. Was there any side bulkhead to be built?

A. Not that I know of.

Q. I understand you, Mr. Hartman, that the bulkhead had been sheathed about one-third of the distance when you went there?

A. Well, you misunderstand me then. 30

Q. All right. What is it?

A. I say that the first section that I worked on was about one-third of the distance from the 47th street end.

Q. What portion of the bulkhead had been built when you first went to work there?

A. There had been a portion at the northeast end and a portion at the Southwest end and several other portions.

Q. In between?

A. In between, but there was breaches in through it. That is, it hadn't been built in between.

Q. Do you mean that the sheathing had been put on at those places or that the piling and sheathing had both been put in in those places and not in others?

A. There was one place where the piling had not been put in.

Q. That is the Southwest end?

10 A. Toward that.

Re-direct examination.

By Mr. Cole:

Q. Were there any tiebacks on this bulkhead when you left? Anything back of it to support it?

A. I believe there were some. I had nothing to do with that and don't know.

20 Q. And you don't know whether it had been stripped back or not, do you, when you left? That is, I mean altogether stripped, completed?

A. I know it had not where I worked.

Q. Do you know whether the plaintiffs here began to pump back of the bulkhead before it was completed?

A. Yes, sir; they were pumping there; the last day that I was working they were pumping there, because I know that I got into the soft sand.

Re-cross examination.

30 By Mr. Bourgeois:

Q. You saw them sinking some of those pilings, didn't you?

A. Yes, sir.

Q. Didn't they sink the back pilings at the same time that they sank the front ones?

A. For the braces?

Q. Yes.

A. Well now that I am not sure, whether they did or did not.

Q. They were both put in by water?

A. Yes.

Q. Don't you remember that they sank them both as they went along?

A. I am not sure either way of that.

10

FRANK HARTMAN, sworn.

Direct examination.

By Mr. Cole:

Q. You live in Ocean City?

A. Yes, sir.

20

Q. And worked on this bulkhead in question?

A. I did.

Q. What did you do?

A. I hired to do the carpenter work.

Q. What did you in fact do?

A. Well, a little of everything. I mostly worked on top of the bulkhead.

Q. What did you do there?

A. I nailed the sheathing and put the cap on and nailed that.

30

Q. Did you see any sawing done at the top?

A. Yes, sir.

Q. Why was that done?

A. Because they couldn't wash the sheathing in.

Q. Why, if you know?

A. Well, as the foreman told me, there was—

(Objected to.)

Q. Did you see they had trouble in sinking them?

A. I did.

Q. What about the length of the sheathing that was used, was it of a general length or different lengths?

A. Different lengths.

Q. Well now how much was this sheathing cut off, if you know?

A. The sheathing that was in that before it was cut varied all the way from—we would push some clear down in, some
10 was cut all the way from one inch to four feet or more.

Q. Why was the sheathing cut when it was cut four or five feet?

A. Simply because we couldn't push it down.

Q. Were you working on this work of pushing them down?

A. Yes, sir; I nailed the top on each piece of sheathing.

Q. In those cases of where you cut it off because you couldn't push it down, did that go as deep in the sand as the others?

20 A. No, sir.

Q. In what part of the bulkhead was it that you had the most difficulty?

A. Right south of the centre as near as I can tell you.

Q. Do you know whether the lag screws that you used in that bulkhead were nailed or screwed in?

A. I never saw one turned in.

Mr. Bourgeois: That doesn't answer the question.

30 A. They were drove. Everyone that I saw put in were drove in.

Q. Do you know whether the plaintiffs were working filling back of the bulkhead before it was completed?

A. They were.

Cross-examination.

By Mr. Bourgeois:

Q. Now, Mr. Hartman, you say those lag screws were driven in. Do you mean they were driven all the way in or simply started?

A. Yes, sir; they were driven all the way in because the foreman told me they had lost the wrench.

Q. Did you see them driven in?

10

A. Yes, sir.

Q. All the way?

A. Yes, sir.

Q. Did you drive in any?

A. Yes, sir.

Q. Did you tell Mr. Sutton they were being driven in?

A. He was there. I didn't tell him.

Q. Did he see you drive them in?

A. I am pretty positive he did. I can't swear to that.

Q. Will you explain to the jury what a lag screw is?

20

A. As I understand a lag screw it is a long screw with a short point.

Q. What sort of a head?

A. Square head.

Q. Were you down at the time of the storm?

A. No, sir.

Q. Did you work on any other bulkheads for Mr. Sutton?

A. No, sir.

Q. This is the only one?

A. Yes, sir.

Q. How many days did you work?

30

A. I can't tell you exactly. I went to work about the 20th of June.

Q. Completed when?

A. Well about the 17th of July.

Q. Did you stop on the same day that your brother did?

A. I did.

Q. Discharged?

A. Well, he did discharge me and he told me to get my time, I started to get my time and he called me back and he said, "Never mind that," but I did get my time and he paid me all right.

Q. At the time you stopped on the 17th of July what was the condition of the bulkhead?

A. How was that?

10 Q. When you stopped on the 17th of July what was the condition of the bulkhead?

A. It was just enclosed; that portion of it was battened and the tiebacks on.

Q. How far down were the braces on?

A. The braces? Well now really I couldn't tell you exactly. I should judge probably one-quarter of the way, not more than that.

Q. How were the pilings and back pilings put in?

A. Washed in.

Q. Both as they went along?

20 A. Well, not always; mostly so.

Q. Mr. Hartman, during the time that you were working there, Risleys were working on the same property?

A. Pumping, yes, sir.

Q. And were they sometimes out along the bulkhead as it was being built?

A. I saw a man—they were pumping into the Northeast end and we were working down the beach further on the Southwest end. I saw a man out toward what we called the dump, but who he was I couldn't tell you.

30 Q. What do you mean by the dump?

A. Where the sand came out of the end of the pipes.

Q. When they put these sheathing boards in they were put in by water power?

A. Yes, sir.

Q. Did you see the sod washing up?

A. Yes, sir.

Q. How deep was the sod, if you know, below the beach?

A. It ran from three to six feet.

Q. Below?

A. Yes, sir.

Q. Now this sheathing that was cut off was sheathing that went down into the sod was it not?

A. Some did and some didn't.

Q. What would there be in the sand to prevent them going down? What would there be in the sand to prevent the sheathing boards from going down?

A. I just don't understand. 10

Q. If it was in the sand.

A. Simply because they were not long enough.

Q. What were not long enough?

A. Some of the old plank simply went into the sand, some of them not more than six inches.

Q. How long were they?

A. Well, ten or twelve feet. We used stuff there ten or twelve feet long.

Q. And it wouldn't go into the sand any more than six inches? 20

A. Simply because they were not long enough to reach into the sand.

Q. How high was that bulkhead above the beach?

A. I should say seven feet.

Q. Wouldn't a ten foot plank reach more than six inches into the sand?

A. I say there was some of them not over that. Some of them went right into the sand six inches.

Q. Do you mean to say that you would use planking only ten feet long? 30

A. I used whatever the foreman told 'me.

Q. Who was the foreman?

A. George Weaver.

Q. Where is he?

A. At Roselle, N. J.

Q. How many planks did you use that went into the sand only six inches?

A. A number.

Q. Where were they used?

A. Wherever we happened to get them.

Q. How much of that bulkhead was there that was as much as seven feet above the beach?

A. Couldn't tell you that.

Q. Was there any of it that was more than five or six feet above the beach?

A. I should say yes.

10 Q. You are willing to swear that there was?

A. Yes.

Q. Which part of it?

A. The centre of it.

Q. Was more than that above the beach?

A. Yes, sir.

Q. How about the Northeast end?

A. The Northeast end was done while I was there and partly filled in, by whom I don't know.

Q. How about the Southwest end?

20 A. It wasn't very high.

Q. Who worked with you?

A. We all worked together.

Q. Did you help nail to the lower stringer?

A. No, sir.

Q. Who nailed to the lower stringer?

A. A boy by the name of Frank, but his last name I couldn't tell you, nailed mostly at the time.

Q. Do you know that they had to dig the sand away so that he could drive his nails into the lower stringer?

30 A. Never saw it.

Re-direct examination.

By Mr. Cole:

Q. How old was this boy?

A. Couldn't tell you.

Q. Have you any idea?

A. I should judge from 16 to 18 years old.

Q. What was his work?

A. He nailed the bottom of the plank mostly, but he would go and carry plank or anything the foreman would tell him to do.

Q. You used sheathing on this bulkhead not over ten feet long?

A. We used sheathing on this bulkhead that reached from the top not to exceed six inches in the beach. 10

Q. Was that some of the sheathing that had been used in the old bulkhead?

A. Yes, sir.

Q. Why was it necessary to cut some of that off?

A. Simply because when the tide broke the old bulkhead out it busted this and the foreman took the top end of it and sharpened it off and put that into the ground and cut the top off where it had busted down. Some of it he didn't cut off at all but just put the square butt into the beach and cut the top off to have it strong. 20

Re-cross examination.

By Mr. Bourgeois:

Q. What would he sharpen the end of the sheathing for?

A. Simply to go down easy and to steer right.

Q. Why would he need to sharpen a plank if it was only to go six inches into the sand?

A. I didn't say he sharpened those plank. He put some in with the square end up. 30

Q. Were those that went in six inches put in with water?

A. Yes. He ran the hose along and never took it entirely from the beach, of course.

PHILIP E. GROVE, sworn.

Direct examination.

By Mr. Cole:

Q. Mr. Grove, have you ever built bulkheads or a bulkhead along the Atlantic Ocean?

A. Yes, sir.

10 Q. Where?

A. Longport.

Q. Ever built more than one?

A. Not along the Ocean. I have built bulkheads inland.

Q. How long ago was it that you built the Longport bulkhead?

A. About six years.

Q. What part of the Longport beach was that?

A. Between 9th and 10th avenues.

Q. How are those avenues with relation to the built up portion of Longport? Are they near the built up portion?

20 A. Yes. At that time there was a couple of houses on 10th avenue.

Q. This bulkhead was right on the ocean front?

A. Yes, sir.

Q. Was it filled behind it?

A. Partly.

Q. What part of it? How long was this bulkhead?

A. Three hundred feet.

Q. Did it stand?

A. No, sir.

30 Q. Will you tell the jury the construction of that?

Mr. Bourgeois: That is objected to. What difference does it make about the construction of that unless he wants to show that it was similarly constructed to this.

Mr. Cole: I have a perfect right for this jury to take it in evidence. This testimony will tend to show that it was

of a much stronger build than the one in question. The whole theory of the defendant's case here is that this bulkhead would have stood if it had been filled behind it.

Mr. Bourgeois: Our inference is based on rather a more substantial line of testimony than this. Our inference is that other bulkheads in the same locality built exactly the same did stand in the sand storm when they were filled.

The Court: I don't think it is competent. If this witness is called as an expert and you want to show his experience I don't know but what he might recite what he has done and so on. 10

Mr. Cole: I think the testimony is competent on either phase. He has already shown that he has built bulkheads on the ocean front.

Mr. Bourgeois: Do you offer him as an expert?

Mr. Cole: I offer him in the light of what he has testified to. 20

Mr. Bourgeois: If he is offered as an expert, I want to cross-examine him.

The Court: I overrule the offer if it is for comparison.

(Exception noted for plaintiffs.)

Q. Mr. Grove, in the bulkhead that you built on the ocean front of Longport, how far apart were the piling? 30

A. Four foot.

(Objected to as irrelevant and immaterial.)

The Court: What is the purpose now, Mr. Cole?

Mr. Cole: The same as before.

The Court: That has already been ruled upon, then.

Mr. Bourgeois: Let us have that answer stricken out.

The Court: Yes.

Mr. Cole: The purpose of this testimony is to show that
 10 this witness built a bulkhead on the ocean front of Long-
 port which was of a much stronger character than the bulk-
 head in question and that notwithstanding he filled back of it
 it was destroyed in a storm of less severity than the storm
 which it was claimed broke down the bulkhead in question.

(Question overruled. Exception noted for plaintiffs.)

Q. Now, Mr. Grove, I ask you whether in your opinion
 a bulkhead built along the ocean front at Ocean City, where
 20 the piling were seven feet apart from centre to centre, was a
 properly constructed bulkhead to withstand a severe North-
 east storm?

Mr. Bourgeois: That is objected to. He has not quali-
 fied as an expert, but if he offers him as an expert I want to
 cross-examine.

The Court: You may cross-examine.

30 Cross-examination.

By Mr. Bourgeois:

Q. Mr. Grove have you ever built a bulkhead at Ocean
 City?

A. No, sir.

Q. Have you ever built more than one bulkhead on the
 ocean front anywhere?

A. No.

Q. Do you know anything about the formation of the beach at Ocean City from 47th to 50th street?

A. I can't say that I do as close as that. I know the general outline of the beach.

Q. Do you remember the storm of October 9th, 1903?

A. Yes, sir:

Q. In which direction was the wind blowing?

A. I don't remember it up around this part. I was in the Chesapeake Bay during that storm. 10

Q. Then you don't know anything about the severity of this storm here?

A. No, sir.

Mr. Bourgeois: I object to his testifying as an expert, because his knowledge is limited to the building of one bulkhead and that not in the locality of the bulkhead in question.

Mr. Cole: Has your Honor got to determine how many bulkheads a man must build before he is an expert? As far 20 as the character of the beach is concerned I believe your Honor will almost take judicial notice of the formation of the beach and in addition to that the witness has said that he knows the general outline of the beach. It cannot be inferred that there is such difference between the beach at Ocean City and Longport that it would make any difference in the building of a bulkhead.

Mr. Bourgeois: A man who has built one bulkhead on the ocean front and four on some bay or another is no more qualified as an expert for bulkheads than a doctor who 30 treated one man for mumps and another for measles would be as an expert for appendicitis.

The Court: He may have studied the formation of bulkheads. I will allow you to interrogate further.

Re-direct examination.

By Mr. Cole:

Q. Have you ever examined the construction of other bulkheads than this?

A. Yes, sir.

Q. Where?

A. All along the beach, all along the Atlantic and Ventnor City beach.

10 Q. Were you interested in the construction of any other bulkheads than this one at Longport?

A. Well, I have talked with the engineers and discussed the question with them, is all.

Q. Was your observation of the construction of bulkheads in other places careful?

A. Yes.

Q. What was your object?

A. If I ever wanted to build another one I wanted to know all I could.

20 Q. Have you ever noticed the effect of the tides upon the other bulkheads?

A. Yes.

Q. And the storms upon them?

A. Yes.

Q. Did you notice that effect on your own bulkhead at Longport?

A. We never had a chance to test that very long. That washed out before we got her finished.

Q. You mean before you got the bulkhead finished?

30 A. No; we had the bulkhead finished.

By Mr. Bourgeois:

Q. Didn't have the filling behind?

A. Not all.

Mr. Cole: I have nothing more to add.

Mr. Bourgeois: I still object that he has not qualified. He has not shown any special knowledge whatever. All the knowledge he has presented here I presume we all have.

The Court: I doubt whether the witness is quite qualified as an expert. I will overrule the question.

(Exception noted for plaintiffs.)

10

HOWARD T. JOHNSON, sworn.

Direct examination.

By Mr. Cole:

Q. Mr. Johnson, where do you live?

A. Ocean City.

Q. Where were you employed during the year 1903?

20

A. 58th street, Ocean City, the Life Saving Station.

Q. How long had you been in the Life Saving Service at that time?

A. Since December first, 1900.

Q. Do you know the bulkhead in question in this case, or did you?

A. Yes, sir.

Q. Did you take any notice of that bulkhead while it was in course of erection?

A. While it was in construction?

Q. Yes.

30

A. Nothing more than I seen the bulkhead there. As far as the completion is concerned I haven't any knowledge.

Q. Did you notice pumping going on inside?

A. Yes, sir.

Q. Was that before the storm of October 9th came along?

A. Yes, sir.

Q. Do you know whether before the storm the bulkhead leaked?

A. Beg pardon.

Q. Do you know whether before the storm of 1903 the bulkhead leaked?

A. Does that mean the water that was there in back of the bulkhead running out?

Q. Yes.

A. Well, I have no knowledge of the bulkhead leaking anywhere excepting at this sluice, where the sluice was put in.

Q. How near were you stationed to this bulkhead?

A. Well, I was stationed at 58th street and the bulkhead is from 47th to 50th.

Q. How long did that storm continue of October 9th?

A. Commenced October 9th and lasted until the 11th.

Q. What character of storm was it?

A. A Northeast storm, very severe.

Q. Were you on watch on the morning of October 10th?

20 A. Yes, sir.

Q. Were you there when the tide had fallen?

A. I was at the bulkhead at one o'clock and was on the bulkhead at the Northeast end until quarter after three and then re-passed it again and reported at the station for duty.

Q. Did you observe at that time whether any part of this bulkhead had given away.

A. Nearly all of it.

Q. At that time had there been filling back of any part of the bulkhead?

A. Yes, sir.

30 Q. And did it give way back of the filling as well as in other places?

A. Yes, sir.

Q. In that same storm were there any houses washed down?

A. Yes, sir.

Q. Anywhere near this?

(Objected to as irrelevant and immaterial.)

Mr. Cole: It is to show the character of the storm.

(Question admitted.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL], 10
J.

A. Yes, sir; there was two houses washed down at 56th street and another one between 55th and 56th.

Q. Anywhere near this bulkhead?

A. A distance of five squares.

Q. Mr. Johnson, can you tell the jury now just where this bulkhead first began to break and how the break worked, in what direction?

Mr. Bourgeois: You haven't shown that he was there at all. He said he was there from nine o'clock to three o'clock. 20

The Witness: From one o'clock to three-fifteen Saturday night, or Sunday morning, rather.

(Question repeated.)

A. I can tell as I saw it. The bulkhead as I saw it began to break at the Northeast end and followed Southwest with the exception of about fifty foot near the Southwest end which had no filling back of it, and that was the only part that stood. 30

Q. Do you mean to say that the only part of the bulkhead that stood was a part that had no filling back of it?

A. I do.

Q. And that was where?

A. Near the Southwest end, about two-thirds way from the Northeast end to the Southwest end.

Q. Now the Northeast end was the most exposed, wasn't it?

A. Yes, sir.

Q. Do you know about the condition of the beach at 16th street where there was a bulkhead, as to whether it was more or less exposed to that storm than the bulkhead in question?

A. Not in regards to the exposure of the bulkhead only
10 that I know that the beach at 16th street runs in a more Northerly direction than at 47th street.

Q. What would be the effect on that in a storm? Would it be more severe or what?

A. The only effect that I could answer would be that the seas would strike it more square instead of striking it on the end.

Q. Which of those bulkheads, Mr. Johnson, in your opinion—that is, the bulkhead in question or the one at 16th street—would the storm strike squarer?

20 A. The one at 16th street.

Q. Was the beach any higher at 16th street than at 50th or lower?

A. Well, I have been on the beach at 16th street—

Q. I mean at this time, if you remember?

A. Not at that time, for I wasn't there.

Q. Do you know anything about the construction of the bulkhead at 16th street?

A. No, sir.

30 Cross-examination.

By Mr. Bourgeois:

Q. What time did you leave the Life Saving Station on the night of October 9th or morning of October 10th?

A. Twelve o'clock.

Q. And your route or your beat was where?

- A. 47th street.
- Q. From 58th to 47th?
- A. 58th to 47th.
- Q. What time did you get to 47th street?
- A. One o'clock.
- Q. How long did you remain there?
- A. Until three-fifteen.
- Q. At 47th street?
- A. Yes.
- Q. And then where did you go? 10
- A. Reported at 58th street.
- Q. What time were you there?
- A. Four o'clock.
- Q. Did you remain at 47th street the entire time?
- A. I remained at the upper portion, the upper portion of the bulkhead.
- Q. Now this bulkhead was three squares long, wasn't it?
- A. Yes, sir.
- Q. What kind of a night was it, dark or light?
- A. When I got out there the moon was rising, not so very 20
dark and not so very light.
- Q. When was it high water?
- A. About eleven P. M.
- Q. What time did the first part of the bulkhead go which you saw?
- A. When I was going up there.
- Q. At 47th street?
- A. Anywheres from 50th to 47th street.
- Q. Did you see the bulkhead when it went out at the center? 30
- A. I seen portions of it.
- Q. From where you were standing at 47th street could you see portions of the center?
- A. As I was passing by.
- Q. But you couldn't see it from 47th street?
- A. The center?
- Q. Yes.

A. Why, I ought to see three squares.

Q. At any time?

A. Yes.

Q. Can you tell when the bulkhead first commenced to go out in the center?

A. Saturday morning.

Q. Was it Friday and Saturday or Saturday and Sunday?

A. Friday, Saturday and Sunday.

10 Q. Saturday was the tenth?

A. Yes.

Q. What time in the morning did the bulkhead first go out?

A. It was high water about ten o'clock Saturday morning.

Q. And nine o'clock Friday night?

A. Yes, sir.

Q. And the first time that you were past there was at one o'clock on Saturday morning?

A. On Saturday morning.

20 Q. That would be—at that time the tide would be almost low, wouldn't it?

A. The tide would be getting down, yes sir.

Q. And do you mean to say to this jury that that bulkhead first started to go out when the tide was practically two-thirds low?

A. No.

Q. When?

A. When the tide was flowing.

Q. That is Friday night?

A. Saturday morning.

30 Q. Didn't any of this bulkhead go out until Saturday? Didn't any of it go out at the beginning of the storm on Friday night?

A. Not to my knowledge.

Q. What time on Saturday morning did the bulkhead begin to go out?

A. Have you got my dates right?

Q. I don't know; I hope so. Friday was the ninth?

A. Yes.

Q. Saturday was the tenth?

A. Yes, sir.

Q. And Sunday was the eleventh?

A. Yes, sir.

Q. Now you say that the bulkhead began to go out on Saturday morning. Now I ask you what time?

A. Probably I misunderstood you and probably it would be better to straighten this thing out. I left the station 10 twelve o'clock Saturday night, so I suppose according to you I would have passed the bulkhead Sunday morning at one A. M.

Q. Well we are all wrong, because I have been examining you with regard to one date and—

A. I am testifying to the date that I was there.

Q. Where were you on Saturday, Mr. Johnson?

A. At the station.

Q. All day long?

A. Yes, sir. 20

Q. And where were you on Friday?

A. At the station.

Q. All day long?

A. Yes.

Q. Did you have any beat on Friday night?

A. Yes.

Q. The same course?

A. About the same.

Q. Where did you go?

A. In a Southerly direction. 30

Q. How far South?

A. Three-quarters of a mile.

Q. Then the first time that you saw this bulkhead was on Sunday morning from about one o'clock in the morning until three-fifteen?

A. That was the first time that I was on the bulkhead.

Q. Do you mean to say that the bulkhead washed out on Sunday morning?

A. The bulkhead started on Saturday morning at high water.

Q. In the middle of the day?

A. Yes; and the last of the bulkhead went out Saturday night or Sunday morning.

Q. When it started on Saturday morning, I suppose on the full tide about ten o'clock?

A. I suppose.

Q. You were not there then?

10 A. Not on the bulkhead.

Q. Where were you then?

A. At the station.

Q. All the time?

A. Yes, sir.

Q. That is eight squares below 50th street?

A. Yes.

Q. And those squares are five hundred feet long, I suppose, exclusive of streets?

A. I suppose so.

20 Q. And the streets are sixty feet?

A. I don't know.

Q. At any rate, it is practically a mile from where your station is to 50th street, isn't it?

A. A short one.

Q. Yes, but it is 4480 feet and there are 5280 feet in a mile. How long have you been in the Life Saving business?

A. December first, 1901, I have been in Ocean City.

Q. And heavy storms in the fall of the year are not infrequent, I presume, are they?

30 A. Not like that.

Q. How much of the bulkhead was there left at the Northeast end?

A. Not any.

Q. How much at the Southwest end?

A. Not any.

Q. Where was there any part of the bulkhead left?

A. About two-thirds from the Northwest end there was about fifty feet.

RALPH TOWNSEND, sworn.

Direct examination.

By Mr. Cole:

Q. Mr. Townsend, you are in the Life Saving Service at Ocean City?

A. Yes, sir.

Q. How long have you been there?

A. Nineteen years. 10

Q. And you were then in the service in October, 1903, during the storm that has been talked about?

A. I was.

Q. Do you know the bulkhead that the witness has been talking about?

A. Been by it lots of times.

Q. Were you by it during the storm of October 9th, 10th and 11th?

A. October 10th I was by it.

Q. What time? 20

A. Four o'clock in the morning until sunrise.

Q. Had you been by the bulkhead any time before that?

A. About two nights out of three every night I went North.

Q. Did you ever observe that bulkhead before it began to break under the storm that it was in any way leaking?

A. I never noticed it leaking any only along near the middle where there was a sluice. Water was running out there.

Q. Didn't notice any leaks anywhere else?

A. None to speak of, no. 30

Q. What do you mean by "none to speak of?"

A. Well, there would be little gullies, probably a couple of inches deep, in the sand where some water came through the cracks of the planking.

Q. Were there cracks in the planking?

A. The edges of them where they were put together, was all.

Q. Did you see any sand leak out of them?

A. No, sir; only just the little gullies; hadn't leaked very much.

Q. Did you see this bulkhead when it began to give way or while it was giving way?

A. I saw it giving way, yes, while I was up there that morning.

Q. Now will you tell the jury, please, your observation? That is, where you saw it first begin to break and the course
10 of the break, just as well as you can remember it now?

A. Where I noticed it first was while I was coming back it was getting towards daylight and I was putting in time on there; it was breaking pretty well up towards the north-east end. It would break and the sea would come in and run back. The sea would come through and open it up and when it would go back it would break them off, two or three bends at a time and it might skip two or three bends and leave them standing and breaking there in another place. It seemed to be taking it out generally, the whole length
20 of it.

Q. Have you noticed the bulkhead in front of this property that was last constructed?

A. Yes.

Q. Is it filled back of it?

A. It is now.

Q. Was it filled back of it last winter?

A. It was until there came a storm and washed some of
it out.

Q. Did that bulkhead break in any way in that storm?

30 A. Bulged it out in three or four places.

Q. Well, the filling was back of it?

A. Yes.

Q. Was that storm of last winter as severe as the storm of 1903?

(Objected to as irrelevant. Objection sustained.)

Mr. Cole: The testimony is that this bulkhead now there, according to the testimony of Mr. Sutton, is of the same character as the bulkhead in question, excepting that it is thirty-six feet back. This bulkhead has a filling back of it. Now according to the testimony of the witness, that bulkhead partially went. Now I want to show that that went in a storm of less severity than the storm in question.

The Court: I didn't think of that phase of it. I think I will allow the testimony.

10

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

A. I don't think the storm was as hard or severe last winter as it was before in 1903.

Q. Mr. Townsend, was or not the storm of October, 1903, 20
a storm of unusual severity?

A. I call it so by the amount of damage it done and the height of the tide and strength of the wind.

Q. And didn't it continue longer than most storms do?

A. Lasted for three days.

Cross-examination.

By Mr. Bourgeois:

Q. Is it unusual for a northeast storm in the fall of the 30
year to last three days?

A. They often do, but not so severe as that.

Q. Generally have storms, severe storms, do we not, in the fall of the year?

A. Quite frequently.

Q. You life saving men seem to expect them, don't you?

A. Yes.

Q. What time was it daylight on the morning of the tenth? Sunrise, I mean?

A. I don't know. Probably half-past six.

Q. And it was high water on the morning of the tenth at eleven o'clock?

A. About.

Q. How long does it take the tide to rise? In other words, how long is it running up and how long down?

10 A. About five hours to run ebb.

Q. Then it was low water at six o'clock on the morning of October 10th, wasn't it?

A. Yes.

Q. How much of the bulkhead had gone out when you first went along there at four o'clock in the morning, if you can tell?

A. Well I suppose there was altogether a hundred and fifty feet of it gone.

Q. Gone out then?

20 A. Yes.

Q. Where was that gone?

A. All along in different places, most of it from the center northeast.

Q. You don't know which went out first?

A. No; didn't see it.

Q. From your knowledge of the tides and so on you would infer that that had gone out on the high tide of the night before, would you not?

A. That night it went out.

30 Q. It wouldn't go out on low water?

A. Low water was breaking all up over the top of it.

Q. It wouldn't be likely to break off on the low water, would it?

A. Low water was four feet higher than any ordinary high water.

Q. When the water went in there would it take the sand out?

A. Everything out, sand, bulkhead and all when it went out.

Q. Do you know whether or not anything other than the storm of last year had weakened the bulkhead that is now in front of the property?

A. No; I don't know that anything had.

Q. Don't know whether it had or had not?

A. No.

Q. Now to what extent was it bulged?

A. This last winter? 10

Q. Yes. How much was it bulged?

A. Probably four feet at the top sagged over and the sand had caved in on the inside where it was filled and where it was bent it would open the cracks for that sand to wash out through it.

Q. It didn't give way except to bulge in any place, did it?

A. It drew the spikes.

Q. I mean the bulkhead itself.

A. The bulkhead itself didn't break off nor give way. 20

Q. And the sand filled back of it practically remained there, did it not?

A. There was several tons of it gone.

Q. Considered as a whole?

A. As a whole it was there, yes.

REUBEN W. CLOUTING, sworn.

Direct examination. 30

By Mr. Cole:

Q. You are also in the Life Saving Service?

A. Yes, sir.

Q. And you knew this bulkhead?

A. Yes, sir.

Q. Were you in the neighborhood of it at any time during the storm of October tenth?

A. Only on Saturday night the tenth, between eight and twelve.

Q. Did you notice that the bulkhead was either weakening or was being broken down?

A. As near as I could tell during that time the whole thing except a section in the middle and the two ends, were
10 gone and piled up promiscuously along the hills.

Q. Did you notice whether the point at the south end of the bulkhead was gone or not?

A. At the point on the south end of the front?

Q. Yes, what they call the southwest end?

A. Yes, sir; I think so, and piled up in along by the houses.

Q. Now, Mr. Clouting, did you take any notice of this bulkhead before the storm began to damage it? I mean as to whether it leaked or not?

20 A. Yes, sir.

Q. When did you notice that?

A. In patrolling.

Q. How long before the storm?

A. Oh, most all the time.

Q. Did it leak?

A. Yes, sir. It would leak above the sluice; where this filling was thrown in it leaked through the cracks many nights so that in the early part of the night I was compelled to climb over to keep from getting my feet wet.

30 Q. How many places do you think it was leaking?

A. That would be hard to determine, but a great many where the shingling lath was on the back. This water would go down below the lower stringer and leak out.

Q. Do you know the bulkhead that is now there before this property?

A. Yes, sir.

Q. Do you know whether that bulkhead has failed any or not, or did fail in the storm last winter?

(Objected to. Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

A. Yes, sir; it was damaged I should think for a distance of fifty feet or more. 10

Q. That had a filling behind it, did it?

A. Yes, sir; filled and loomed to the top.

Q. Was that storm of last winter which damaged the bulkhead which is there now as severe as the storm of 1903?

(Objected to. Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.) 20

ALLEN B. ENDICOTT, [SEAL],
J.

A. No, sir; not by one-half. That is, the height of the tide.

Q. Was it as long a storm in duration?

A. No, sir, not so long. Didn't blow as hard and didn't cause the tide to raise so high.

Cross-examination. 30

By Mr. Bourgeois:

Q. Mr. Clouting, do you remember a night when Risleys left their pipe running during the nighttime without anybody to watch it that the bulkhead gave way practically because of the water back of it?

A. No, sir.

Q. You were not on that night?

A. No, sir; not to my knowledge.

Q. I suppose the only reason you would get your feet wet walking in front of that bulkhead would be because of the leaks in the bulkhead?

A. Yes, sir.

Q. The fact of the water coming out of that four foot sluiceway wouldn't have anything to do with it?

10 A. We would climb over the sluiceway and walk on up.

Q. The water from the sluiceway wouldn't spurt out any?

A. That went out a small place at first where we could step across and afterwards it became necessary to climb over it.

Q. You say that this water came out from underneath the stringer piece. Did you see the bulkhead leak any place in front of which they had filled on the inside?

A. Yes, sir.

Q. Where they had filled as well as where they had not?

20 A. Yes, sir. Soon after they had pumped in.

Q. I mean when they got the sand in back of it would that stop there?

A. No, sir; that would leak until this water had drained out of this fill.

Q. And then what?

A. Partly stop then.

Q. The water that would leak out of there draining from the sand wouldn't cause you to get your feet wet, would it?

30 A. Sure as you live.

Q. It wouldn't be the water that would drain off from the top and come through the lower places?

A. It was draining off from the fill all the time. I suppose it took from two to five days to drain out. It would drain toward the ocean.

Q. Do I understand that the only place where it leaked was where the sand had been placed in back of it?

A. No, sir.

Q. What about the other places?

A. It leaked wherever there was water back of it, regardless of fill.

Q. Did it leak more or less where the fill was put in or where it was not put in?

A. That I wouldn't like to say.

10

CHARLES STETZER, sworn.

Direct examination.

By Mr. Cole:

Q. Where do you live, Mr. Stetzer?

A. Ocean City.

Q. What is your business?

A. Dredging business.

Q. How long have you been in that business? 20

A. Twelve years.

Q. Ever build any bulkheads on the ocean front at Ocean City?

A. Did I?

Q. Yes.

A. No, sir.

Q. Ever oversee the construction?

A. Yes, I have been around where there was quite a good many built. Didn't have anything to do with the building of them myself.

Q. Didn't have anything to do with the building of the 17th street bulkhead? 30

A. No, sir. I was there most of the time.

Q. Do you remember the storm of October, 1903?

A. Yes, sir.

Q. This bulkhead at 17th street, did that go out by that storm?

A. No, sir. Between 16th and 17th.

Q. You noticed how that bulkhead was built, did you?

A. At 16th?

Q. Yes, sir.

A. The one that didn't go out?

Q. One of them did go out?

A. No, sir; not at 16th street that I have any knowledge of.

Q. Who built those?

10 A. Mr. Sutton.

Q. One was on one side of 16th and one on the other, wasn't it?

A. I think so.

Q. Were these bulkheads at 16th street built in the same manner, so far as you observed?

A. No, they was built different.

Q. I am talking about the bulkheads at 16th street. Were they both built alike?

A. I didn't know there was but one built there.

20 Q. The one that you did see built at 16th street, how was that built? How was it put together?

A. That was put down on sheet piling and then they had boards put diagonally on the outside and braces on the inside.

Q. What else?

A. I guess that is about all.

Q. Was there anything in front of the sheet piling?

A. No.

Q. Wasn't it grooved?

30 A. Yes, there was floor boards.

Q. Tongued and grooved boards?

A. Yes, sir.

Q. Were they in front of the piling?

A. The piling was on the inside and then came the plank-
ing and then these floor boards.

Q. Were the diagonal planks on that yet?

A. No; the first planks came down like that (illustrating) and then came these braces and the piling inside.

Q. How was the bulkhead tied back?

A. They had piles put down along there and stringers on here and nailed there.

Q. How long was that bulkhead?

A. Oh, I don't know; don't remember. About half a square, I suppose.

Q. Were you there during the whole time that the work was going on?

10

A. Yes, sir.

Q. Half a square would be how many feet?

A. About two hundred and fifty feet or something like that I think it was. I don't remember that.

Q. Do you know the bulkhead that has been talked about here at 47th and 50th streets?

A. Well, I know more about the first than the second.

Q. Don't know much about the second?

A. No.

Q. Mr. Stetzer, did I ask you whether there was any part of the bulkhead at 16th street that went out, and if I did, what did you say to that?

A. Don't think you asked me.

Q. Did any portion of that bulkhead go out?

A. None in the front; only some close up to the shore.

Q. How much of it went out?

A. The bulkhead didn't go out but the water went in underneath it. We filled it up and went right on with it.

Q. Was that after the storm of October, 1903?

A. I don't remember that. There wasn't no storm that caused that; we caused that.

30

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Stetzer, the bulkhead at 16th street you filled, didn't you?

A. Partly.

Q. Belonged to a man by the name of Doe?

A. Yes.

Q. And that stayed in?

A. Yes.

Q. Don't you remember down below that, Taylor's property, that he had a bulkhead there and don't you remember that that went out?

A. Didn't go out while I was there.

10 Q. But it went out in this storm of October?

A. I think it did.

Q. That wasn't filled, was it?

A. Partly.

Q. But wasn't completed?

A. No.

Q. Was any more of Taylor's bulkhead filled than simply the part that was filled from the sand washing over from Doe's, that you pumped over from Doe's?

A. That is about all.

20

RALPH GOFF, sworn.

Direct examination.

By Mr. Cole:

Q. Do you live at Ocean City?

30 A. Yes, sir.

Q. How long have you lived there?

A. About nine years.

Q. You are a civil engineer and surveyor, I believe, are you?

A. Yes, sir.

Q. Do you know the bulkhead at 16th street in Ocean City?

A. Yes, sir; I made the lines and grades for them.

Q. And do you know the bulkhead in question in this suit?

A. Yes, sir.

Q. Do you know anything of the construction of the 16th street bulkhead?

A. The 16th—I don't know the length of the sheet piling nor of the piling used there. I know that the sheet piling was a two inch plank and faced on the outside with diagonal boards.

10

Q. Do you know how far apart the piling were?

A. I couldn't tell you that.

Q. Now do you know how far back the present bulkhead on the property of this defendant company is from the bulkhead that went out in the storm of October, 1903?

A. The first bulkhead was built on the easterly property line of Wesley avenue. The second was built practically on the same line, a variation of maybe two or three feet or something like that. Mr. Sutton has testified four feet, but it was practically on the same location. The present bulkhead is forty-eight feet westward of the old location on the westerly curb line of Wesley avenue.

20

Q. Do you know with respect to the bulkhead that was first built in front of this company's property how the bulkhead at 16th street stands related? That is, whether it is further eastward or further landward?

A. It is further landward.

Q. How much further?

A. It stands—the 16th street bulkhead stands on the westerly curb line of Wesley avenue. However, the shore line is somewhat different.

30

Q. In what respect is the shore line at 16th street different from the shore line in front of this company's property?

A. The shore line at 16th street runs in a much more easterly direction, an angle of at least twelve degrees easterly from the line of the bulkhead at 47th street.

Q. Would a northeast storm be severer on the bulkhead at 16th street or the one in front of this company's property?

A. No, the waves in a northeast storm would strike the 16th street bulkhead in a long angle, more of a long sloping angle, probably an angle of about thirty or forty-five degrees, and at 16th street more nearly square.

Q. What would be the effect on the bulkhead? Would it strain the bulkhead at 16th street more or less than the one
10 in front of this company's property?

A. Much less.

Q. What do you know, if anything, as to the condition of the beach in front of 16th street just before the storm of 1903? That is, was the beach higher or lower in front of that property than in front of the defendant's property?

A. The 16th street bulkhead was built probably twenty feet shoreward of the high water line, as nearly as I can recollect.

Q. And where was the bulkhead in question built with re-
20 gard to the high water line?

A. At 47th street my survey shows that the bulkhead was about ten or fifteen feet out in the ocean at high water and at 50th street, the south end was about fifty feet shoreward of high water.

Q. Do you happen to know why it was that the bulkhead in front of the company's property was so built?

A. It was done to follow the street lines.

Q. Do you know whether or not the beach made out in front of this 16th street bulkhead?

30 A. It has since.

Q. Since that?

A. Yes.

Q. Do you know whether it did before this storm of 1903?

A. I didn't take particular notice of it.

Q. Mr. Goff, do you happen to know how high above the beach the piling and sheathing were in front of those two bulkheads? That is, the one at 16th street and the one in front of the company's property?

A. At 16th street I think the bulkhead was about seven feet above the beach to the best of my recollection. The grade of the bulkhead from 47th to 50th street was an average of eight feet above the ordinary high tide level.

Q. Now was there anything in front of this 16th street bulkhead? Wasn't there a boardwalk in front of it during 1903?

A. No.

Q. Now is there any difference in the construction of the present bulkhead in front of the company's property than those that were destroyed? 10

A. Yes.

Q. What is the difference?

A. The piling are placed four feet apart.

Q. Any larger in size?

A. I think they are somewhat larger in size. Probably a couple of inches in diameter.

Q. How far apart were the piling in the bulkhead that went down?

A. Seven feet. 20

Q. Is this bulkhead that is now there in any other respect stronger than the bulkhead that went down?

A. Not to my observation. I never made a close examination of it.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Goff, in your opinion if the sand had been filled in behind that second bulkhead it would have stayed there all right, would it not? 30

Mr. Cole: I object. I asked him no questions as an expert.

(Question overruled.)

Q. You say that the pilings in the last bulkhead you think were larger than those in the second bulkhead. You have no definite knowledge of that, have you?

A. I measured some of the piling in the old bulkhead and they were six inches in diameter. The piling I observed in the new bulkhead were eight inches or more.

Q. Isn't it almost always true that the pilings will be some of them smaller than the contract calls for?

A. That depends on the inspector.

10 Q. Did you examine the pilings as a whole to find out how large they were in the second bulkhead?

A. I noticed quite a number that could be observed.

Q. Did you go and measure them, I mean?

A. I measured them, yes.

Q. What was the occasion of your measuring them?

A. I wanted to ascertain the relative condition of the bulkhead and so forth.

Q. I don't mean that. I want to know if you measured the pilings in the second bulkhead that was built. Did you
20 measure those pilings while they were there in the bulkhead?

A. I have measured them since, the parts that have been broken off. In parts that bulkhead was broken off and you can go there today and see the ends of the plank and piling.

Q. Broken off and not pulled up?

A. Yes.

Q. How far down were they broken off?

A. About probably the north end I think all the sheet piling were washed out. The south end many of them were broken off.

30 Q. I mean how close to the sand were they broken off?

A. About on a level with the beach at the time I was there.

Q. You couldn't tell from measuring the piling at the top how much had been broken off, could you?

A. No, of course not.

Q. And it might have been eight inches at the butt and eight inches further down the piling it might have been only six inches?

A. It might. It might be three.

Q. You can't tell that unless you see the piling?

A. Of course not.

Q. You say the top of the bulkhead was eight feet below the high tide line?

A. Above the high tide level. Are you referring to the grade or location?

Q. I am referring now to the grade of the bulkhead as you gave it.

A. Yes.

10

Q. Then if the bulkhead was only six feet above the sand it would mean that the sand was two feet above the high water grade, wouldn't it?

A. Yes.

Q. Now at 16th street, Mr. Goff, don't you remember that when that bulkhead was located there it was located out in the water? When they first commenced to work there don't you remember that they worked in the water?

A. There might have been times when the water would wash up around.

20

Q. Wouldn't every high tide wash up into the bulkhead?

A. Not to my recollection.

Q. Did you make the survey for it?

A. I gave the lines and grades.

Q. Do you remember when the boardwalk was built at 16th street?

A. Yes.

Q. It was built at the high water line, wasn't it?

A. Not at the time this bulkhead was built.

Q. How far outside of high water was the boardwalk built?

30

A. Probably twenty-five feet.

Q. Wasn't it as much as fifty feet?

A. No.

Q. Have you any survey here to show?

A. No.

Q. How high was the grade of the bulkhead at 16th street above the high water line?

A. If I had a grade ordinance I could tell you, but I am afraid I didn't bring any along. It was built to established grade.

Q. But you don't know how high above the high water line?

A. You mean vertically?

Q. Yes.

A. Well, I should imagine that was very close to eight feet.

10 Q. How high was the bulkhead built above the sand?

A. About the same.

Q. Then it would indicate that it had been built about along the high water line, wouldn't it?

A. Very near. In twenty feet you know there is very slight difference in grade on a flat beach.

Q. Don't you remember, Mr. Goff, that the bulkhead at 16th street was in the neighborhood of twelve feet above the sand when they started there?

A. Never.

20 Q. No part of it?

A. No part of it.

Q. Neither the north end or the south end?

A. No, never.

Q. Do you remember whether the beach made up in there during the time the bulkhead was being built, or don't you remember that?

A. Don't remember anything about that.

Q. You say that the bulkhead at 16th street was further landward than the bulkhead at 47th to 50th streets?

30 A. Yes, generally, excepting on the south end of it.

Q. What do you mean by its being further landward? It doesn't lie further seaward, does it?

A. It lies on the curb line of the same street.

Q. Take a meridian north and south. Which is further eastward, the bulkhead at 16th or 50th street?

A. You mean it would be—the longitude would be further east.

Q. The one at 50th street?

A. No. You are talking now about the meridian, the north and south line?

Q. Yes.

A. The bulkhead at 16th street would be probably a mile east.

Q. That is due to what?

A. Due to its location on the earth.

Q. The location of the beach line?

A. No, not in relation to the ocean. You are talking 10
about the meridian. How much further east from a line drawn from 50 to 16th? It would be at least a mile, because a line drawn from 47th street would go over to Beasley's Point.

Q. Wesley avenue doesn't bear the same course all the way down that beach, does it?

A. Oh, no.

Q. After leaving 16th street where does it bend?

A. Between 25th and 26th streets it bends to the left as you are going south. 20

Q. Toward the ocean?

A. Yes. There is an angle there very near seven degrees. There is also another angle between 35th and 36th street where it keeps bending to the left; there is an angle there of something over four degrees.

Q. So that you couldn't tell anything about the location of the bulkhead with relation to the high water line by speaking of it with relation to the curb line, could you?

A. Oh, no, the curb line and the high water line are two different lines. 30

Q. They don't coincide at all?

A. Not at all.

ALBERT ADAMS, sworn.

Direct examination.

By Mr. Cole:

Q. Mr. Adams, you are presently in the Life Saving Service, are you?

A. Yes, sir.

Q. Did you work for Mr. Risley during 1903?

10 A. Yes, sir.

Q. Did you work on this property?

A. Yes, sir.

Q. What did you do?

A. Worked out on the fill, on the dump.

Q. Were you there while they were building the bulkhead or after it was built?

A. I was there after it was built about—well, they hadn't gotten it through when I went to work there.

20 Q. Was there filling immediately back of the bulkhead before that storm of October, 1903, came along?

A. Filling back of the bulkhead?

Q. Yes.

A. Fill in the northeast end.

Q. Did you take any notice of that bulkhead to see if anything happened to it before the storm of October, 1903?

A. By the ocean, by the tide?

Q. By anything. Did anything happen to it?

A. Yes, sir.

Q. What?

30 A. It washed out from under it by the water that was back of it.

Q. Before the storm of 1903?

A. Yes, sir.

Q. What caused that?

A. I don't know. The water we was pumping, our pipe line laid on a southerly direction and water ran in back of it into the corner and out all the time,

Q. Did it leak?

A. It must have leaked or the water couldn't have got out there.

Q. More places than one?

A. It leaked all along on the face of it.

Q. What was the cause of the leak, if you know?

A. Along the face of it?

Q. Yes.

A. It wasn't battened below the bottom stringer, I suppose. 10

Q. Do you know whether any sand went out with it or not?

A. No, sir, I don't.

Q. How frequently did you see that leak?

A. Right along, leaked every time they got water back of it.

Q. How far was the fill from the top of the bulkhead when you saw it giving way?

A. About a foot.

Q. Did any of this bulkhead spring out between the piling 20 before the storm?

A. You mean didn't break out but just bulged out?

Q. Yes.

A. Yes, sir.

Q. What part of the bulkhead, if you can remember, was it that bulged out?

A. Along where the sand was in back of it. It didn't break out but just bulged between pilings.

Q. Have you seen the bulkhead that is fronting this property at this time?

A. That is there now? 30

Q. Yes.

A. Yes, sir.

Q. Have you noticed whether anything has happened to that or whether any sand has washed out?

A. Yes, sir.

Q. When?

A. Last winter.

Q. During the storm?

A. Yes, sir.

Q. What happened to it?

A. The tide came up against it and broke over it and washed the sand out and started the bulkhead out and took considerable sand out of it, pulled the nails out of the plank and broke one stringer in two.

10 Q. While you were there working for Mr. Risley were you in any way delayed in the work or put to a disadvantage by reason of this bulkhead not being finished?

A. Yes, sir.

Mr. Bourgeois: Which, delayed or put to a disadvantage?

Mr. Cole: Both, he says.

Mr. Bourgeois: No, he simply says, "yes." Which was it?

20

A. We were put to a disadvantage.

Q. In what way were you put to a disadvantage by the bulkhead not being completed?

A. Well, when the bulkhead wasn't done we couldn't pump behind it and had to shift back.

Q. When were you ready to pump behind that bulkhead if it had been there, as soon as you began work?

A. Wanted to get it done before the trolleys began to run, on account of getting the pipe across the trolley tracks.

30 Q. Were the plaintiffs here prepared to fill behind the bulkhead before it was put up?

A. Yes, sir.

Q. How soon after you began work there were they prepared to fill behind the bulkhead?

A. Why, I couldn't say just when.

Q. Can't you give some idea about that? How soon were Risley and Sons prepared to put sand behind the bulkhead

after you started work there, if there had been a bulkhead there to put it behind?

A. I don't understand.

Q. When did you begin to work there?

A. I couldn't say that exactly.

Q. Was it in the month of April?

A. It was in cold weather I know, when I went to work for them.

Q. Was there any reason why at that time you couldn't have pumped sand behind the bulkhead if it had been built? 10

A. I don't see any reason why they couldn't.

Q. Tell the jury, Mr. Adams, won't you, fully in what way you were at a disadvantage in doing this work by this bulkhead not being built?

A. Well, only as I said before, we couldn't pump in behind it if it wasn't ready and all done there. They didn't get the bulkhead done so we could work at it, I suppose, and we couldn't fill in behind it if it wasn't there. We was ready to go to work before they put the trolleys on on account of when the trolleys were running we had to dig under the trolley track to put the pipe under and when they wasn't running we could lay it right on the top of it. 20

Q. You had to either cross the trolley tracks then or go under in order to put your pipe for the filling back of the bulkhead? Is that right?

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

30

Q. Mr. Adams, I suppose you communicated everything you saw to the Risleys, did you not?

A. Yes, sir.

Q. Whatever you saw there that you thought wasn't just right you told them?

A. Yes, sir.

Q. Now with regard to this water where you say it leaked out the north end. It is not customary for you to fill in in such a manner as to let the water back up back of you, is it?

A. No, sir.

Q. And you didn't intend to do so in that instance, did you?

A. No.

Q. Can you tell just how it was that it did back back of you there?

10 A. Don't know as I can. All I know is it went back there.

Q. You always endeavor to fill so the water will drain off ahead of you, do you not?

A. Yes, sir.

Q. And in this instance when the water went back, there was no way for it to drain off there at all, was there?

A. There was plenty of room back there to hold this water, but the bulkhead wouldn't hold it.

Q. There was no way for it to run off? You say the bulkhead ought to have held it?

20 A. Yes.

Q. Now, Mr. Adams, how long have you been engaged in pumping sand?

A. That I couldn't say. I don't know when I went to work for Mr. Risley; sometime in the winter. I worked for him a year or so.

Q. You worked for him long enough to know that this sand you pump when mixed with water is practically the same as water?

A. Practically.

30 Q. And unless you drain the water off there is not much difference between holding that sand and that water, is there?

A. As soon as this sand comes out of this pipe the sand is all settled.

Q. But if the water doesn't drain off it doesn't settle?

A. It is water-soaked sand.

Q. Then it is practically the same as water, isn't it?

A. It won't run as free.

Q. Pretty nearly as free, won't it?

A. No, not after it is settled.

Q. When did you begin working for Risleys?

A. I can't say just exactly what month or what day of the month, but in cold weather.

Q. Along in January or February?

A. Couldn't say. I was working for the gas company there and it was cold weather.

Q. Do you know when they entered into the contract for the filling of this land? 10

A. I do not.

Q. Do you know anything about the manner in which it was filled? They had to fill the back part of it first, didn't they?

A. I couldn't say.

Q. Didn't you have to fill the back part first in order to get at your pipes?

A. Not all of it.

Q. How much did you fill? You filled all from West avenue to Asbury and from Asbury across to Central, didn't you, before you went to the bulkhead part? 20

A. I don't remember whether we filled it all or not.

Q. You filled part of it?

A. Yes.

Q. You also had to fill the part between Haven avenue and West?

A. Yes, sir.

Q. And that you didn't fill until the next year when the bulkhead washed out, did you, sometime in January, wasn't it, of the year following? 30

A. January?

Q. Yes.

A. We had it most filled up in January.

Q. Of the year following?

A. Yes.

Q. Now, Mr. Adams, didn't Risleys have plenty of work in filling up the land in the back part there to keep them go-

ing until this bulkhead was finished? They did, didn't they?

A. No; we had to build banks back there.

Q. You could build them just as well then as any other time, couldn't you?

A. While the boat was running?

Q. Was the boat running all the time that summer?

A. That I couldn't say.

Q. But this you can. How much of the time was she broken down?

10 A. I couldn't say.

Q. She was broken down some, wasn't she?

A. I suppose so.

Q. How many times do you suppose she was broken down?

(Objected to.)

Mr. Bourgeois: I certainly have a right to show that the machine was broken down.

20 Mr. Cole: I submit that it is not cross-examination.

(Question admitted. Exception noted for plaintiffs.)

A. That is pretty hard to answer.

Q. There were a good many times, weren't there?

A. Not such a great many times, as I know of.

Q. And for how long a time was she broken down?

A. What time?

Q. During the summer of 1903, after April and before
30 September 20th?

A. After April?

Q. Yes.

A. I don't know nothing about it. I left there about the ninth of March. I went into the Life Saving Station about the ninth of March, 1903. I don't know nothing about it.

Q. I suppose you didn't know that this contract wasn't made until the first of April, 1903, do you?

A. 1903?

Q. Yes.

A. It was a year later than that that I went into the Life Saving Station, 1904.

(Question repeated.)

A. I couldn't say.

Q. About two months altogether, wasn't it?

A. Two months? 10

Q. Yes, taking it in the whole.

A. I don't think it was two months; it might have been.

Q. What was the trouble with the machinery? Can you tell us?

A. No.

Mr. Cole: This is all objected to as not being cross-examination.

Q. Mr. Adams, can you explain why if the Risleys were 20 anxious to have this filling done that they didn't proceed to fill when they were required to do it by the engineers, requested to do it by the engineers?

(Objected to. Question overruled.)

Q. Will you tell me when the trolleys begin to run?

A. No, sir; I can't.

Q. They run along about the last of May, don't they?

A. They run just before they come off the beach. The 30 last of May sometime they start to run. They have a work car there earlier than that, fixing up the road.

Q. When does that begin to run?

A. I don't know. That is liable to run any time.

Q. Did you want to get your work done before the work car commenced to run?

A. Any car, I suppose.

Q. Will you tell me when they commenced to run that work trolley?

A. Can't tell you.

Q. Before they begin running the regular trolleys in May?

A. Sometime the latter part of May.

Q. And Risleys wanted to fill in this bulkhead before the last of May, did they?

A. They wanted to fill it in before these trolleys began to run.

10 Q. They didn't care anything about the fall storms?

(Objected to. Question overruled.)

Q. Did they want to have it in before the trolleys commenced to run?

(Objected to. Question withdrawn.)

Q. Did you put your pipes underneath the trolley tracks?

20 A. I think we did, yes, sir.

Q. Now, Mr. Adams, how much sand washed out of this last bulkhead, if you know?

A. The one that stands there now?

Q. Yes, last one.

A. I could not tell. Quite considerable of it. Some went out the northeast end. In one place I suppose—well, I don't know how much sand they put in there, but four or five loads of gravel in there, and there was two other places. I don't know how much that took. They had to dig out behind that and clean to the bottom of the beach and throw what sand there was laying there out of it and put jacks on the outside and pack it back.

30 Q. That is likely to happen to any bulkhead in case of a storm, I suppose?

(Objected to.)

G. A. RISLEY, sworn.

Direct examination.

By Mr. Cole:

Q. You are one of the members of the firm, aren't you?

A. Yes, sir.

Q. Do you know Mr. Sutton?

A. Yes, sir.

10

Q. Were you on the ground in question about the time he was building the second bulkhead, the one that went down in the storm?

A. Yes, sir.

Q. Did you notice the character of that bulkhead?

A. Yes, sir, I did.

Q. Did you have any talk with Mr. Sutton about it?

A. Yes.

Q. What did you say to him?

A. I was looking at the bulkhead and I asked him and said, "You certainly don't expect us to pump against this bulkhead, do you?" and he said, no, he was going to haul sand in there.

Q. Why did you ask him whether he expected you to pump behind that bulkhead?

A. Because we had had so much trouble before and I thought it wouldn't stand.

Q. Did you say anything to him about the bulkhead not standing?

A. That was the remark I made. I said, "You certainly don't expect us to pump against this bulkhead, do you?"

30

Q. Have you ever seen other bulkheads before this one?

A. Yes, sir.

Q. On the ocean front?

A. Yes, sir.

Q. Where?

A. Well, at various places. I couldn't say exactly where. Never had any experience with a bulkhead on the ocean front to pump against.

Q. How much of the bulkhead was there up at the time that you had this conversation?

A. I don't remember noticing the south end at all at that time, but the northeast end they was working, I should suppose as near as I can remember, at that time they was working pretty close to the northeast corner, down probably five hundred feet. I couldn't say that they were working over two hundred feet down, but I was there afterwards after that time when they were working down further.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Risley, Mr. Sutton testifies also that he said that he was to put sand back there and that he did put the sand there. Do you say that he didn't put it there?

(Objected to as not cross-examination.)

Q. Do you know whether or not Mr. Sutton did put the sand there?

(Objected to.)

Mr. Bourgeois: He testifies that he had the conversation with Mr. Sutton and Mr. Sutton said he was going to put it there. It is to find out whether he told the whole truth.

30 The Court: He testifies to the conversation and not to the fact. The question is overruled.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

Q. Now were you on the ground frequently or not?

A. No, sir.

Q. Just the two times?

A. Well, I was there more than two times, I think, but I didn't have any particular recollection of being there.

Q. At the time you spoke to him about the bulkhead had you commenced to fill in?

A. Oh, yes, but not there.

Q. The bulkhead didn't go out prior to the storm of September 12th after you commenced to fill in the sand, excepting at the northeast end? 10

(Objected to as not cross-examination. Question over ruled.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J. 20

Q. Now, Mr. Risley, after you saw the construction of this bulkhead you commenced to fill in there, didn't you, against it?

(Objected to as not cross-examination.)

Mr. Bourgeois: He is one of the plaintiffs in the suit.

The Court: The argument was advanced the other day that when a party to a suit came on the stand he could be asked anything. 30

Mr. Bourgeois: Yes. I have a perfect right when a plaintiff is on the stand to examine that person to any extent in cross-examination. I cannot be put to the position of making the plaintiff my own witness.

The Court: Can you recall any authority for that proposition?

Mr. Bourgeois: We have always done it. I haven't any here.

(Question overruled.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

Q. Mr. Riskey, you are one of the plaintiffs in this suit?

A. I am said to be, am I not?

(Question repeated.)

A. Yes, sir.

20 Q. After you had the conversation with Mr. Sutton which you have related, did you or your firm begin the filling in of the sand back of the bulkhead?

(Objected to. Question overruled.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

30 Mr. Bourgeois: I want the ground in there.

Mr. Cole: It is not cross-examination.

Q. Do you know whether or not your dredge was broken down during the progress of the work in question between the first of April and the 20th day of September, 1903?

(Objected to as not being cross-examination. Question overruled.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

LEWIS RISLEY, sworn.

10

Direct examination.

By Mr. Cole:

Q. Mr. Risley, did you work on this property in question?

A. Yes, sir.

Q. What did you do?

A. Well, I had charge of the machine on the work and did some of it.

20

Q. You knew something of the bulkhead that was there that they claim went out in the storm?

A. Yes, sir.

Q. Did you ever notice whether that bulkhead before the storm of 1903 was leaking?

A. Yes, sir, it leaked.

Q. Where did it leak?

A. Between the cracks.

Q. I mean what part of the bulkhead, the upper or lower section?

A. As far up as filled. As far as the water and sand was in the bulkhead it would leak.

30

Q. What part, at the ends or center or general?

A. It was general.

Q. Do you know what caused the leak?

A. Well, I never saw one that was made tight yet by just nailing the boards together without corking it or some-

thing like that. It is impossible to make them tight that way.

Q. Did you notice whether that bulkhead gave way before the storm of October, 1903, anywhere?

A. Not to the best of my knowledge.

Q. Did any sand go out in this leak or just the water?

A. Well, naturally water and sand will both go together, but not in large quantities.

Q. What have you to say concerning the plaintiffs here
10 being ready to fill behind that bulkhead before it was constructed?

A. Well they appeared to be terribly anxious to get into the work.

Q. How soon could they have begun to fill behind the bulkhead after you started work?

A. Well, I think that—I don't know their position at all, how soon they was through with other work right in there.

Q. When did you begin work on this particular job?

A. I myself? I began about March, 1903.

Q. On this particular work?
20

A. On this work at 51st street.

Q. How soon after that were you ready to fill behind the bulkhead?

A. I was ready at any time and I guess they were so far as I know. There was no reason why. We had pipe and everything to go right in there and I can't see no reason why we couldn't begin at any hour.

Q. Do you know whether there was any disadvantage to the plaintiffs in performing this contract while they were waiting for this bulkhead?
30

A. How is that?

Q. Do you know whether there was any disadvantage to the plaintiffs while they were waiting for this bulkhead?

(Objected to as irrelevant and immaterial.)

Q. Was the brush cut out?

A. No, sir.

Q. Was the bank built?

A. No, sir.

Q. Now were you interfered with when you did begin to fill behind the bulkhead because of the weakness of the bulkhead?

A. Yes; I was shut down several times by the men that were taking care of the stuff that I was taking out.

Q. Who were these men, the men at the front of the bulkhead?

10

A. Yes, sir; the men that were working on the end that wasn't filled.

Q. I don't know whether you understood my question. Do you know whether any part of this bulkhead gave way while you were filling it?

A. Yes, sir; one night I saw it going out.

Q. Where was that?

A. Somewhere between the sluice and where we were working.

Q. How much of it went out?

20

A. Well, probably between five and eight or ten feet.

Q. Do you mean the piling went out or bulged out?

A. It washed out from underneath from the shortage of the sheet piling or whatever you call them.

Cross-examination.

By Mr. Bourgeois:

Q. What was the date when this washed out, you say five or eight feet? 30

A. Well now that is a very hard question, for I was taking no dates at that time.

Q. Was it about September 15th?

A. Well now it might have been.

Q. And during the storm, wasn't it?

A. No storm at that time.

Q. What about the water that washed out on the north-east end?

A. I didn't see that at all.

Q. Where were you employed, on the work at the bulkhead or on the boat?

A. I was employed on the machine.

Q. Was that machine broken down so that you were not able to pump some of the time between April first and September 20th?

10 A. Yes, sir.

Q. Have you any record of the number of days that it was out of service because you were unable to operate it?

A. Well, not exactly, no.

Q. It was out of repair a considerable portion of the time, wasn't it?

A. To the best of my recollections we wasn't down but twice for repairs.

Q. Why was it then that so many letters were written to you by the engineers urging you to go on?

20

(Objected to. Question overruled.)

Q. Didn't you get any of the letters?

A. No, sir, I didn't.

Q. Are you a member of the firm?

A. No, sir, and am not working for them and haven't been for a year.

Q. And you were not a member at that time?

A. No, sir.

30 Q. What gave you the impression that they appeared to be anxious to get at the work?

A. By their conversation with me.

Q. You know as a matter of fact that before they could pump the sand there behind the bulkhead you know that they had to have a foundation for it, didn't you?

A. I guess we had it all right.

Q. Do you know that they had to have it?

A. We have to have it and we always have it.

Q. Before April first you had been pumping on the square next to 50th street, hadn't you?

A. I don't know nothing at all about the streets down there.

Q. Well, you hadn't been pumping on the tract that is included in this contract before April first, had you?

A. Probably not. I don't know anything about the contract at all.

Q. You did a little bit of filling on the square back of 49th and 50th street before you commenced to fill between 47th and 50th street, and then on the front between 49th and 50th streets, didn't you? 10

A. It might be probable.

Q. When was the last that you pumped on the tract between 47th and 49th street?

A. It might have been something like the 20th of September. I won't say it was so late as that. Before the storm came in October. It might have been something earlier than September 20th, but something similar. 20

Q. The last that you worked there?

A. Yes.

Q. After it went out did you ever attempt to fill it in again on the front, the bulkhead?

A. Not to the best of my knowledge. I didn't.

Q. Did you work there until they stopped working on that strip of land?

A. I left there sometime in the summer, probably in September.

Q. The next year? 30

A. Yes, sir.

Q. After they left this piece of property where did you go?

A. I think between the Reading Railroad.

Q. And after that was filled, you went down to an adjoining property, didn't you?

A. Just across.

Q. Where did you commence that work?

The Court: It seems to me that a great deal of our testimony this morning is very remote from the issue here.

Mr. Bourgeois: We want to know when they moved their machine on this tract of land to the other work they did. I tried to get it yesterday and I couldn't.

10 Q. Do you know when you finished the dredging between the two railroads?

A. Between—well, I should imagine it was something about the last of May or middle of June or something like that. I am not positive about that, but as nigh as I can guess at it.

Mr. Bourgeois: It is admitted that the plaintiffs ceased pumping on the land in question on the tract between the two railroads on April fifth, 1904.

20 Mr. Cole: I don't know whether he understood your question. I won't admit that.

Q. Do you know whether or not you pumped any sand on the tract in question after the last of February of 1904?

A. No, I don't know that we did, for I don't know what you call the tract. If I understood it maybe I would answer it different.

30 Q. I mean whether or not you pumped any sand on the ground between 47th and 50th street lying between the ocean front and the Reading Railroad after the month of February of 1904?

A. Well, I think we did.

Q. Did you pump any sand there after the month of March, 1904?

A. I think so. I think we pumped as I said before up to something about May. I think we did; I am not positive.

FREEMAN RISLEY, sworn.

Direct examination.

By Mr. Cole:

Q. Mr. Risley, you are a member of the firm that is suing here?

A. Yes, sir.

Q. Did you have anything to do with the work of filling the property of this company?

10

A. Yes, sir.

Q. Were you on the ground frequently while the work was going on?

A. Yes, sir.

Q. How much of the time were you there?

A. Pretty much all the time.

Q. When did you actually begin the work of filling on the ground that is named in the contract in question?

A. I don't know exactly when.

Q. About how soon after the contract was made, which is April first, 1903?

20

A. We was working on the streets from 59th to 50th and when the sand run over we had begun on this contract, but I couldn't tell when that was.

Q. Can't you tell us somewhere?

A. There was no bank built there. They said we would have it to fill, so we let it run.

Q. Can't you tell about when you put your pipes on any part of the ground in question to pump sand into it?

A. Sometime in April, I guess. We had done some work at that time.

30

Q. Now how soon after the bulkhead which it is claimed was destroyed in the storm of 1903 was built did you begin to fill back of it?

A. How soon after it was filled?

Q. No; how soon after the bulkhead was put up did you begin to fill back of it?

A. As soon as we got notice from Mr. Sutton.

Q. Now had you been urging the building of this bulkhead before it was built?

A. I had.

Q. With whom had you talked?

A. Mr. Sutton.

Q. About when did you first begin to talk to him about having that bulkhead built?

A. In the spring.

10 Q. What answer did he give you in answer to your request, if any, to have the bulkhead built? What did he say?

A. Well, at different times he spoke about the material not being on the ground for building the bulkhead.

Q. What else, if anything, did he give as a reason?

A. That was the main reason.

Q. When you were urging him to put that bulkhead up were you in a position to begin to fill back of it?

A. I was.

20 Q. Could you have finished the filling back of the bulkhead before the summer was over if it had been built?

(Objected to as indefinite.)

Q. Could you have filled it before the first day of September, 1903, if the bulkhead had been there?

(Objected to for same reason.)

30 (Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

(Question repeated.)

A. We could.

Q. Now were you ever interfered in your work of filling back of the bulkhead because of repairs being made on the bulkhead?

A. We was.

Q. Tell the jury what was the trouble with the bulkhead, if anything, that interfered with your filling.

Recess to 1.30 P. M.

10

Afternoon Session, 1.30 P. M.

(Question repeated.)

A. At what time?

Q. At any time?

A. Why, at one time while we was pumping in there it went out to the northeast of the sluice and another time it went out at the sluice and one time while we was filling in there, the property that we had filled, the water ran back over it and went out. 20

Q. When you say that the bulkhead went out, what do you mean?

A. Why, I simply mean that in one case, that is at the northeast end of the bulkhead it cracked and pressed out, not that there was any part of it went away, but it just leaned over; the fastening broke. 30

Q. Was the filling behind that?

A. Yes, sir; and in another case, in the case of the sluice, I mean, that the water ran underneath the sheet planking and caused a hole so that the water ran out so that we couldn't force the water through the sluice and in the other case it was just simply the water running under the planking, the bulkhead not being tight enough to hold the water.

Q. Now were you delayed in this work by the retaining banks not being built?

A. Not on the bulkhead, but on the property.

Q. I mean on the retaining planks outside of the bulkhead?

A. Yes, sir.

Q. Who was it that began the building of those banks?

A. Sutton.

Q. Did he complete the work?

10 A. No, sir.

Q. Who had to finish them?

A. We had to finish them after he failed. He said he couldn't do it. On account of the sand or the water being in the sand made the bank run down flat and the hole where they shoveled the sand had filled up, not altogether, but partly.

Q. Did I ask you whether this bulkhead had leaked in places?

A. I don't know.

20 Q. Well, did it?

A. The bulkhead leaked the whole of it where there was any water to leak through.

Q. What part leaked?

A. The part that we filled didn't leak so very much, on account of the water and sand coming to it, it doesn't leak through very readily, but any part of the bulkhead that came up above the sand, it would leak through and wash the sand away from the outside, through the seams. The water spurted right out through the cracks.

30 Q. How much filling was there, Mr. Risley, back of this bulkhead, when the storm of October came along, and in what part of the bulkhead was the filling?

A. The filling was in the northeast end corner and there was I should say about two-thirds of the first square up to grade, nearly as far as we would have to pump it and the sand ran clear from there to the sluice.

Q. How near to the top was it along the northeast side?

A. Somewhere near a foot.

Q. Were you about when that bulkhead went out in the October storm?

A. Yes, sir.

Q. Where did it begin to break?

A. Just where the first break was I couldn't tell, but I was there in the neighborhood of nine o'clock on Saturday morning and there was four or five places in the bulkhead at that time and there was one place above the sluice to the northeast and there was one or two places, two, in the property that we had filled, that is, that we had partly filled. 10
One place was up to grade and the other place wasn't quite and then there was a hole down in the southern end, from 48th to 49th street, in front of the house, there was quite a hole just to the southward of the house that was on this property.

Q. Did you notice whether the water came over the top of this bulkhead during the storm?

A. Yes, sir, it came over in great volumes.

Q. How high above the top of this bulkhead did the water shoot? 20

A. Well, the water would shoot twenty feet high, probably higher, but the body of the wave wouldn't go but a little above your head. There was quite a lot of water on the inside ran out, I know, where it had broke through and in washing out that hole in the southward end it worked the bulkhead in some places and washed it right out and in other cases it broke the bulkhead off and the sea came through; of course, where the sand was gullied away it would run down toward the place where it was broke through, carrying 30
the sand out and giving it more of a chance to work the bulkhead, and up to the northeast, where there was no sand practically, back of it, the bulkhead in those places would come out. the piling and sheath planking altogether in some cases, and in some cases the piling would break off.

Q. Was there any sand which went over the top of the bulkhead?

A. Yes, sir.

Q. You saw that, did you?

A. Yes, sir.

Q. Now something was said about the number of boards in the sluiceway. Somebody testified that there was four boards in that sluiceway. Did you notice what the condition was about that?

A. Why to begin with, there was no boards in the sluiceway, but as the sand and mud run down towards the hol-
10 lows, it became necessary to put in something to retain the sand and mud and I put a plank in, one, and that raised the water considerably and I never saw the bulkhead leak worse than it did then.

Q. Did you see any four boards in the sluiceway?

A. I didn't.

Q. Mr. Risley, did you do any pumping on this property after January first, 1905, and if you did, can you state how much probably you pumped in? On any part of it, I mean.

A. Yes, sir, we pumped sand after that time.

20 Q. How late?

A. Why, as late as April 5th, I believe.

Q. Have you any idea of how much you pumped in between January first and when you quit?

A. Well, probably in the neighborhood of thirty thousand yards.

Q. What part of the land was that on?

A. That was on the portions that we had not finished. That is, that we had to bank on the northeast end and on the southern end in one case, between the Reading and
30 Pennsylvania tracks. We built that bank in the spring before the ground was thawed.

Q. Had you put any filling behind the bulkhead that was destroyed before it was completed?

A. I don't know when the bulkhead was completed, but we hadn't pumped any until Mr. Sutton authorized us that the bulkhead was ready.

Q. In other words, you followed what he told you about that bulkhead, did you?

A. Yes, sir.

Q. Do you know anything about the construction of the bulkhead at 16th street about which there has been some testimony?

A. Well, a little.

Q. Have you seen it?

A. Yes, I have saw it after it was built and after the sand was up around it I have seen it. It is built of plank 10 and sheathed on the outside.

Q. Is that different in construction from the one that went down in front of this property?

A. Some little. It is sheathed on the outside.

Q. Does that have a tendency to make it tighter?

A. It adds one inch to the thickness on the front.

Q. Does it tend to make it tighter?

A. Yes, sir. Ploughed and grooved boards would make it nearly perfectly tight.

Cross-examination. 20

By Mr. Bourgeois:

Q. How far down did those ploughed and grooved boards go in the 16th street bulkhead?

A. I didn't dig down to find out.

Q. You don't know whether they went down below the sand at the time the bulkhead was being built or not, do you?

A. I don't; I wasn't there. 30

Q. You were here yesterday?

A. Yes, sir.

O. You heard Mr. Sutton testify?

A. Yes, sir.

Q. You heard him testify that the 16th street bulkhead was sheathed, did you?

A. No, sir, I think not.

Q. Didn't you hear him testify that the 16th street bulkhead was built just the same as the 50th street except that it was sheathed?

A. Yes, sir.

Q. Have you ever known any bulkhead to be built water tight?

(Objected to. Question allowed.)

10 A. I never knew of a bulkhead being perfectly tight, no, sir, but I have known them to be near enough tight—

Q. I didn't ask you that. You can't very well put two boards together, even if you lap them over with a third, and make them tight, can you?

A. Yes, sir.

Q. How do they make vessels' bottoms water tight?

A. Large vessels, they cork them, and small vessels, they put close enough together to make them tight.

20 Q. Can you put two boards together like you do in small vessels so they will be water tight, where the boards are part of the time exposed to the water and part of the time to the dry winds, so they shrink and swell all the time?

(Objected to. Question withdrawn.)

Q. The pumping that you did after the bulkhead went out you estimated at 30,000 yards. Have you any means of knowing what that was?

A. No, sir.

30 Q. After the bulkhead washed out, on the 9th of October 1903, did you ever pump any more sand against or over that portion of the property where the bulkhead was?

A. No, sir, only to wash out our pipe line.

Q. But never with the intention of filling it?

A. No, sir.

Q. Did you ever have any agreement with the Ocean City Development Company that you should not fill that in?

A. No, sir.

Q. You just filled in the back part and then went on and filled other people's work, did you not?

A. Yes, sir.

Q. Did the water during the storm that would push up against this bulkhead and flow down over the bulkhead on to the sand—did the water that thus went in there do any damage to the bulkhead?

A. That is what did do the damage.

Q. Does it follow that if there was water on the inside of the bulkhead it would injure the bulkhead? 10

A. No, sir.

Q. That doesn't follow, is that right?

A. I don't see that that has—

(Question repeated.)

(Objected to as not cross-examination.)

The Court: There is no question pending.

20

Q. Now, Mr. Risley, you testified that you put one plank at the sluiceway that raised a body of water there?

A. Yes, sir.

Q. And you also testified that the bulkhead leaked worse after that was there than before?

A. Yes, sir.

Q. Is it a disadvantage for a bulkhead to leak?

A. Yes, sir, it is a disadvantage.

Q. Then by having this water back up back there it was a disadvantage to the bulkhead, was it? 30

A. It was.

Q. How deep was the water that you had back up back there?

A. Well, the bulkhead—

Q. No, you can answer that. How deep was the water that you had back up against the bulkhead?

A. Right next to the bulkhead?

Q. Anywhere back there.

A. There was a hole on the inside and it was two foot deep probably.

Q. How deep was it next to the bulkhead, if you know it?

A. Six or eight inches.

Q. How long was that body of water back of the bulkhead, for how long a time?

A. Well, the overflow was there all the time.

10 Q. Yes, I know, but this body was kept there by the board that you had up there, as I understand?

A. We wasn't pumping steady on account of some reason or other, on account of the long distance and so on, and the water would continue in one or two hours, you know, probably altogether five or six hours.

Q. Is that all the time that there was any body of water back there, five or six hours?

A. That is all the great body of water, you might call it, was there.

20 Q. Did you take this board out from the sluice after you had stopped pumping?

A. No, it would remain there.

Q. How long was that board in there, do you think, altogether?

A. Every night.

Q. Wasn't it in there for a week or two, two weeks or three weeks?

A. I think not.

Q. How is that?

30 A. I say I think not.

Q. How long was it in there?

A. Put in in the afternoon and stayed over night.

Q. Then after that time did you take it out and have no board there at all?

A. I think I didn't pump there after that.

Q. Now the night of the day that you put the board in there the bulkhead washed out at that point, didn't it?

A. Yes, sir.

Q. Now when was that?

A. Well it was in that summer or fall.

Q. What month was it in?

A. Probably in September.

Q. And about what time in September?

A. The forepart of it.

Q. Can you give us the date?

A. No, sir.

Q. Why didn't you pump there after the forepart of Sep- 10
tember?

A. The reason we stopped pumping into the bulkhead—

Q. No, I want to know why you didn't pump there after
that time. Can't you tell me?

A. I think on account of the mud drum busting in the
boiler.

Q. And you didn't get that repaired any more until after
the storm of October 9th?

A. That is correct as far as I know.

Q. You say that you saw sand go over the top of the 20
bulkhead. Is that correct?

A. Well, I presume that I said that, but the sand left with
the water when the water went over the top.

Q. You saw the water go over the top and the sand was
there, but you couldn't actually see the sand?

A. I couldn't see the sand.

Q. Now you say that when the water came through the
bulkhead it washed the sand out and gave more chance for
the bulkhead to sway back and forth, I understood you to
say. Is that correct? 30

A. Yes, sir.

Q. Then it would follow that without the sand back there
the bulkhead is more likely to go out, isn't it?

A. Not necessarily. For this reason, on account of the
weight of the sand on the bulkhead, the natural weight is
greater with wet sand than it is with water. That would
cause the bulkhead to push out and the sea beating against

it would give this sand just enough movement to cause it to go seaward and to come up on the bulkhead.

Q. Do you take into consideration in that answer that the pressure of sand is downward only and the pressure of water is the same sideways as down?

A. I know that not to be the case.

Q. Is it untrue that the pressure of water is the same laterally as it is downward? Is that untrue?

A. The pressure of water is the same in all directions
10 where it is confined. The pressure is just as heavy on the side, on the bottom, that is, on the bottom of the side, as it is right on the bottom.

Q. And just the same on the sides too as it is on the bottom?

A. Not all the way up.

Q. Is the pressure on the side of a boat's bottom less than the pressure on the bottom of the boat?

A. Certainly.

Q. It is?

20

Mr. Cole: He says so and if you want to contradict him you go on the stand. He is not an expert.

Q. Mr. Risley, is the pressure of sand as great laterally as it is downward?

A. No, sir, especially if it is dry.

Q. Tell me whether or not the filling in of sand back of a bulkhead will help to resist the pressure of the waves coming against the bulkhead?

30

(Objected to as not cross-examination. Question allowed. Exception noted for plaintiffs.)

A. I spoke about—

Q. Can't you answer this question, Mr. Risley?

(Question repeated.)

A. Not on a weak bulkhead.

Q. Will it make a difference to the pressure whether the bulkhead is weak or strong?

A. It makes a difference to it about giving.

Q. Giving what?

A. About the bulkhead giving out. If it gives out it gives a chance to work the sand.

Q. Do you mean to say, Mr. Risley, that if you have what you call a good bulkhead built and packed back of it with sand that the sand back of it does not help to resist the pressure of the waves going against the pilings? 10

A. I am not able to say.

Q. Did you ever get or apply for a final certificate or estimate of the pumping that was done on this ground?

(Objected to as not cross-examination. Question withdrawn.)

Q. You are one of the plaintiffs in this suit?

A. Yes, sir. 20

Q. And you were one in actual charge of the work down there?

A. Yes, sir.

Q. And you had charge of the manner of the conducting of that work, did you not?

A. Yes, sir.

Q. Did you ever get a final certificate or acceptance of of the work done on that property?

(Objected to as not cross-examination. Question overruled.) 30

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

Mr. Cole: And the further objection is made to that question that it is not within the purview of the issue raised by the pleadings.

Q. Was the breakdown to your machinery of which you have spoken, in the early part of September, the first time your machine or engine broke down on that work after April 1st?

A. Not the first time, no, sir.

10 Q. How many times previous to the breakdown in September had the machinery been broken down?

A. Let me understand what is considered a breakdown.

Q. Well, any disarrangement of the machinery such as to disable you from working, prevent you from working.

A. We had one delay somewhere in the neighborhood of a week on account of our pump busting.

Q. When was that?

A. During the summer.

20 Q. Before or after you had commenced to pump on the bulkhead?

A. I think before.

Q. When did you begin to pump back of the bulkhead?

A. I don't know the date.

Q. Can't you tell approximately?

A. The latter part of August.

Q. Mr. Risley, you were familiar with the contents of the contract and specifications, were you not?

A. I know something about it, yes, sir.

Q. Read them?

30 A. Don't remember about that.

Q. Ever see them?

A. I expect I have.

Q. Whose signature is that of "N. Risley & Sons?" Oh, it says by "Elton Risley," doesn't it?

A. It is Elton's signature.

NORRIS INGERSOLL, sworn.

Direct examination.

By Mr. Cole:

Q. Mr. Ingersoll, where do you live?

A. Pleasantville.

Q. Where did you live in October of 1903?

A. I lived down there at Corson's Inlet.

10

Q. You know the land, do you, that the filling was done on by the plaintiffs here?

A. Yes, sir.

Q. And did you see this bulkhead that was destroyed by the storm of October, 1903?

A. Yes, sir.

Q. Did you see the bulkhead in question before the storm came along in October?

A. Yes, sir.

Q. Did you notice whether anything was wrong with that bulkhead before that time?

20

(Objected to as calling for a conclusion of the witness.)

The Court: Ask him what he observed.

Q. What did you observe, if anything, about this bulkhead before the storm of October, 1903?

A. I observed that it was squashing out at the time near the corner.

Q. Was there any sand back of it at that time?

30

A. Yes, sir.

Q. How much of it did you notice had sprung out in length?

A. I couldn't just say about that. I should judge probably thirty to forty feet.

Q. Were you working on this?

A. Yes, sir.

Q. For the Risleys?

A. Yes.

Q. About when was it you noticed this, what time of the year and month?

A. I think it was the very first part of September.

Q. Was there anything else about the bulkhead that you noticed, concerning, for instance, the strength of it or weakness of it?

10 A. I noticed that it didn't seem to be very strong anywhere along it. It was out and in all the way down.

Q. Did the failure to have that bulkhead built in the early summer in any way interfere with the work of your filling?

Mr. Bourgeois: That is objected to as leading, and it seems to me that there ought to be some evidence that the man knew. They have had three of the plaintiffs on the stand and didn't bother asking them about that. They ask the agents.

20

(Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

(Question repeated.)

30 A. I couldn't say. I wasn't there in the early summer.
Q. When did you go to work?

A. I went two or three weeks before this washing out came.

Q. Did the weakness of this bulkhead that you saw interfere with your continuously filling back of it?

(Objected to as leading and calling for a conclusion.
Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill
of exceptions, which is hereby allowed and sealed accord-
ingly.)

ALLEN B. ENDICOTT, [SEAL],

J.

(Question repeated.)

A. Yes, sir.

10

Q. In what way did that interfere, Mr. Ingersoll?

A. Well, they slacked up on it?

Q. To relieve the strain, you mean?

A. Yes, sir.

Q. The pumping was a strain on that bulkhead, wasn't
it?

A. Why I should think so, yes, sir.

Cross-examination.

By Mr. Bourgeois:

20

Q. What was the distance of the throw that you were
pumping? What was the distance between the bulkhead and
the machine?

A. I couldn't answer that; I don't know.

Q. Was it as much as half a mile?

A. Well, close to it, I expect.

Q. If anything it was more than half a mile, wasn't it?

A. I couldn't say how far it was.

Q. When did you say you went to work there?

30

A. I went there two or three weeks before this wash-
out.

Q. That is, before the storm, October storm?

A. No, the September.

Q. And this place that you say it went out near the cor-
ner, that was caused by the backing up of the water, was
it, that had been pumped in there?

A. By the weight of the water and sand pressing against the bulkhead.

Q. Who had pumped that water in, Risleys?

A. Yes, sir.

Q. And the other place you say it was weakened so that you had to wait until it was strengthened, was down near the sluice, wasn't it?

A. It was between the sluice and the corner different places.

10 Q. And it was places where there was water backed up against it by water pumped in there with the sand?

A. Not always. There was places where it was squashed out where there was no water against it.

Q. What did it?

A. The weight of the sand likely.

Q. You mean where it had been filled in?

A. Yes, sir.

Q. Where?

A. At different places between the sluice and the corner.

20 It was out and in and all zigzag.

Q. Were those places noticeable to the eye?

A. Certainly, yes, sir.

Q. Could these life saving men have seen it?

A. Yes, sir.

Q. Could the Adams and the Risleys also have seen it?

A. Yes, sir.

(Objected to.)

30 Mr. Bourgeois: I am trying to find out whether it was observable. They are new defects.

Mr. Cole: They are not new defects to him. He is telling what he saw.

The Court: He is telling what he saw and that is as far as he can say, I think.

Q. Were you there on the 15th of September when the water back of the sluice caused the bulkhead at that point to go out?

A. Yes, sir.

Q. And after that time there was no more pumping done there, was there?

A. No.

Q. You say that the bulkhead was in and out all the way along; is that correct?

A. Yes, down below the sluice. 10

Q. Without regard to whether it was still in back of it or whether it was not?

A. No, sir, not regardless of that. Only where it had been filled. It was all right where it had not been pumped against it.

Q. All straight there, was it?

A. Yes, sir.

Q. How about down at 50th street where they had put the sand back of it? Was it in and out there too?

A. I can't say anything about that. I don't know that 20 I was down that far.

Q. Were you on the ground when they first commenced to pump next to the bulkhead?

A. No, sir.

Mr. Cole: I called in a notice served for a letter under date of September 15th, 1903, from the plaintiffs here to Latta & Terry Company, and I want to introduce a copy.

Mr. Bourgeois: Let's see if it is a copy. (Examines paper.) 30

Mr. Cole: I offer in evidence copy of letter of September 15th, 1903, from the plaintiffs to Latta & Terry.

(Letter marked Exhibit P6.)

ELTON RISLEY, recalled.

Direct examination.

By Mr. Cole:

Q. Mr. Risley, who was it that started to build the retaining wall around this property?

10 (Objected to as irrelevant and incompetent, as the contract speaks for itself. Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

A. You mean the bulkhead or bank?

Q. The bank.

20 A. Mr. Sutton started to.

Q. Did you ever have any conversation with any of the officers of this defendant company concerning their having the brush cut down and the retaining bank built?

A. I did.

Mr. Bourgeois: Objected to as irrelevant, immaterial and incompetent under the contract, which provides that they shall do all necessary work.

30 The Court: You mean that the plaintiffs were to build the bank and the bulkhead?

Mr. Bourgeois: Not the bulkhead, but they were to do all the rest. At least the contract says so.

The Court: Will you refer me to that part of the contract?

Mr. Bourgeois: The first section of the contract.

(Question allowed.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

Mr. Bourgeois: If the Court please, I don't know just 10
the theory on which your honor allows it, but I want to call
the Court's attention to section thirteen of the specifications,
if it is allowed, on the question of ambiguity.

The Court: Proceed.

A. I did.

Q. At what time did you have that conversation as it
stands related to the execution of this contract? Was it
before or after or at the time? 20

A. It was at the time of either making the contract or at
the time of signing it.

Q. And where was that conversation?

A. I think in Philadelphia.

Q. With whom was it?

A. I think with Mr. Tatem and Mr. Moore and Mr. Sher-
rod.

Q. What was said at that conversation concerning the
cutting down of the brush and the building of the retaining
wall on and around this property? 30

(Objected to as incompetent and irrelevant and also tend-
ing to contradict the terms of a written agreement.)

The Court: This was after the contract was made?

Mr. Bourgeois: No, he says either before or at the time.

The Court: I doubt if it is competent then.

The Witness: It might have been afterwards; I can't be positive about that.

Mr. Cole: Our position is that there is nothing in the contract which requires us to either cut down the brush or build the retaining bank, and I propose to show that either before or at the time of or possibly after—I don't know what
 10 the case may be—this contract was made this witness spoke to these officers concerning that work and he was told that Mr. Sutton would attend to it. We propose to follow this testimony up, if admitted, by showing that the failure to cut down the brush and build the retaining bank promptly was responsible for the delay.

(Testimony admitted.)

(Whereupon the defendant, by its counsel, prays a bill of
 20 exceptions, which is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
 J.

(Question repeated.)

A. That Mr. Sutton was to attend to it. If I recollect right Mr. Sutton was there at the time and they turned to him and called his attention to it to do it promptly. I urged them that the work should be done promptly so as not to
 30 delay us.

Q. Subsequently did Mr. Sutton begin the construction of the retaining bank?

A. He did.

Q. But he didn't finish it?

A. He did not.

Q. Did the failure to promptly build the retaining bank interfere with your work?

A. It did.

Q. In what way?

A. Why, we had to shut the machine down and go and build the bank.

Q. You finally had to complete the bank, did you?

A. We did.

Q. Before you could go on with your work of filling?

A. Yes, sir.

Q. Was there any conversation by you with any of the officers of the company at or about the time or shortly after the time of the making of the contract concerning the bulk-
head? 10

(Objected to. Question allowed.)

Q. Was there any conversation?

A. We asked that it be built promptly.

Q. Who did you ask?

A. We had most of the talk with Mr. Sutton about that, but we had some with the officials of the company.

Q. Did you know that Mr. Sutton was to build the bulk-
head? 20

A. We did by their saying so.

Q. After you began to fill did you have any talk with Mr. Sutton about building the bulkhead, about his hurrying it, or anything of that sort?

A. We did.

Q. What was the conversation?

A. We asked that it be done early so that we could fill in there before the trolleys commenced running.

Q. Were you in a position to fill in back of that bulk-
head? 30

A. Just as soon as we completed our other contract.

Q. How soon were you ready to go ahead filling back of this bulkhead?

A. I should say about the first of May.

Q. What excuse, if any, did Mr. Sutton give for not building this bulkhead?

A. My recollection is that the first excuse was that he didn't have the material, was expecting it shortly. Then after he got the material he said he was waiting for the hose, which was down at North Wildwood.

Q. Can you recall when it came there? How long after the material was on the ground?

A. Not very long, but it was quite a while after the bulkhead ought to have been commenced.

Q. Now how soon was it after the bulkhead was either
10 started or finished that you began to pump behind it?

A. I think our filling was commenced before I officially got the notice. It was commenced, if I recollect right, before I got the word to Freeman.

Q. When was that?

A. I think along late in July; I wouldn't be sure. There is a letter somewhere when we was notified.

Q. Now did you fill any on that property after January 1st, 1904?

A. After January 1st? Yes, sir.

Q. How late in 1904 were you filling in there?
20

A. Until sometime in April, I think.

Q. Have you any idea as to how much sand you pumped on that ground after the first of January, 1904?

A. Well, not definitely, but I think a large part of the filling between the two railroads was done at that time.

Q. Can you state certainly, Mr. Risley, the minimum amount of cubic yards that was pumped in after January 1st, 1904?

A. My recollection is that Freeman made an estimate of
30 that and told me there was 16,000 yards.

Q. But you don't know yourself?

A. I do not.

Q. Now do you personally know anything about the construction of the bulkhead at 16th street, about which we have heard testimony?

A. I observed it over a year ago, more or less.

Q. Was that bulkhead different in construction, so far as strength and tightness was concerned, to the one that went down in front of this property?

A. Yes, sir.

Q. In what respect?

A. It had tongued and grooved boards on the outside, which would make it practically water tight, that made it so much stronger, making it a more homogeneous construction.

Q. Did you make any observation of the bulkhead before the property in question before the storm came along and washed it down? 10

A. Well very slightly. I was very busy at that time.

Q. Well, tell us what observation you did make. What did you see, if anything, before the storm came along?

A. Well I couldn't say enough about it to be of any use.

Q. Are you prepared to testify concerning whether there were four boards used in that sluiceway or not?

A. No, sir.

Q. Do you know anything about whether you were delayed any in the prosecution of this work by the failure to build the bulkhead promptly? 20

A. I know that we had to pump further through pipes to do the work; that we were continually expecting that this bulkhead would be shortly done, and delayed moving our pipes, and during the delay pumped further through pipes to get the material where we had to deposit it, waiting for the bulkhead.

Q. Can you recall whether you ever spoke to any of the officers of the company concerning the delay? 30

A. My recollection is that I did at one time on the ground.

Q. To whom?

A. I think Mr. Sherrod.

Q. Can you recall what explanation he gave for the delay?

A. My recollection is that he put it all on Mr. Sutton.

Q. Mr. Risley, did you ever have any talk with Mr. Sutton yourself concerning the strength of this bulkhead?

A. No, sir, not before it went out.

Q. Did you have any afterwards?

A. Well, yes, we talked about it afterwards some.

Q. What, if anything, did he say about the bulkhead?

A. He claimed that it would have stood if it had been properly filled.

Q. He did make that claim, did he?

A. Yes, sir.

Q. This contract provides for the payment of thirteen
10 and one-half cents, I think it is, a cubic yard for filling.
How long have you been engaged in the business of filling
land?

A. About ten years.

Q. By this hydraulic method?

A. Yes, sir.

Q. During that period have you had a number of con-
tracts for filling?

A. We have.

Q. What is a reasonable sum—what would be a reasonable
20 sum to pay per cubic yard for filling such land as the land
in question here?

(Objected to as irrelevant, incompetent and immaterial.
Question overruled. Exception noted for plaintiff.)

Cross-examination.

By Mr. Bourgeois:

30 Q. Mr. Risley, you were frequently on the ground dur-
ing the progress of this work?

A. Not very frequently.

Q. How many times did you see the bulkhead before you
commenced pumping in back of it?

A. I can't say.

Q. You did sometimes didn't you?

A. I think I saw it. Yes, I saw it.

Q. How many times, two or three?

A. Perhaps two or three.

Q. And you saw how the bulkhead was being constructed, did you, at that time?

A. Yes, sir.

Q. Now you have spoken of the 16th street bulkhead not being built the same as this. Do you remember the 14th street bulkhead?

A. No, I don't.

Q. You don't know whether that was sheathed or whether it was not sheathed, do you?

A. No, sir.

(Objected to as not cross-examination.)

Q. And your conversation with regard to the bulkhead, the delays and so on, were principally had with Mr. Sutton?

A. In regards to the bulkhead, yes, sir.

Q. And with regard to the building of that bank, wasn't that bank built by Mr. Sutton for you?

A. It was not. 20

Q. Didn't he build that for you because of some consideration that he was given from you in the giving of the contract?

A. He certainly did not.

Q. Didn't he say to you that he would build that bank for you to help you along what he could?

A. No, sir.

Q. When was the bank built by you?

A. Built by us after he sent some men there and they failed to build it. 30

Q. I mean the time of the year, the time of the month.

A. Couldn't tell you.

Q. You can tell us something about it, can't you?

A. Not that would be of any use to you, no, sir.

Q. Wasn't it before July 1st?

A. No, I don't think so. It might have been possibly.

Q. How did the building of that bank delay you in the pumping of the sand in against the bulkhead in August?

A. Why it delayed the pumping of the sand inside of the bulkhead. It delayed the whole work.

Q. But not the pumping of the sand in the bulkhead?

A. I couldn't say that.

Q. Did you ever get a final certificate or estimate of the sand pumped in by you from Latta & Terry?

10 Mr. Cole: That is objected to on the ground that it is not cross-examination and it is not raised by the pleadings and on the further grounds that it was expressly waived by counsel yesterday when permission was granted to file additional pleas in this case.

Mr. Bourgeois: It was not waived. It goes to the merits of the case how much they pumped in.

20 The Court: He testified the first day as to how much he had pumped, 104,000 cubic yards.

Mr. Bourgeois: He didn't say whose estimate that was. I am asking whether he asked for or received a final certificate or estimate of the quantity of sand pumped in by them.

The Court: The purpose of the question is simply to ascertain the amount pumped in?

Mr. Bourgeois: Entirely.

30 The Court: I will allow the question.

A. We received a statement.

Q. I show you a letter dated May 9th, 1904, signed by Latta & Terry Company, addressed to William G. Moore, secretary, and ask you if that is a copy of the letter re-

ceived by you, or if you received a copy of that letter, one or the other, of that estimate?

A. Well, I would presume it is, but I haven't the amounts in my mind so positively as to state.

Mr. Bourgeois: Mr. Cole, have you the letter of May 9th, a copy of which was sent to you, addressed to William G. Moore, secretary? A copy of it was sent to Risley & Sons.

Mr. Cole: I don't find any letter of that date. I have no such letter.

10

(Letter marked B for identification.)

Q. How many cubic yards per day could your machine pump when you were pumping?

A. That varied.

Q. How many cubic yards per day could you pump when you had to run the pipe equal in length to that between your machine and the bulkhead work in this contract?

20

A. You want the largest amount or the smallest amount?

Q. No, I want to know how many you could pump. You can give the largest and then the smallest and what you could reasonably pump.

A. It depends so much on conditions that any estimate would be based on conditions under which we had to work.

Q. Well now where you had sand similar to that which you pumped in back of the 47th street bulkhead, how many cubic yards could you pump in a day of ten hours?

A. Well, at the time we were pumping out at the bulkhead we was out where the pumping wasn't so good as it was at some of the rest of the work. Perhaps a thousand yards a day would be considered a pretty good day.

30

Q. How many cubic yards do you estimate there were to be pumped in the bulkhead property, that is, between the hills and the bulkhead?

A. I don't know as I ever made any such estimate.

Q. When did you complete your other contract? You say that you started to work on this contract as soon as you completed the other one?

A. It was another contract which Mr. Sutton had with these people and we were sub-contractors.

Q. It was between 49th and 50th street, wasn't it?

A. No, sir. The work overlapped each other. In other words there was no work put up between—no bank put up
10 between the two fills. As we filled one to grade it ran over on the other considerable.

Q. Where was the bank that you say you built that Sutton ought to have built?

A. That was on 47th street.

Q. Between what places?

A. Well, all the way from the trolley that is on Central avenue to Haven avenue.

Q. He didn't build any of that at all, did he?

A. He did not.

20 Q. The only bank that Sutton built was the bank along 50th street, wasn't it?

A. I don't recollect of his building any bank on 50th street.

Q. Where did he build a bank?

A. I don't know as he ever built any bank excepting what he undertook to build on 47th street.

Q. Where did he undertake to build any on 47th street?

A. Between West avenue and Central avenue.

Q. When?

30 A. Well, it was after our—

Q. When?

A. Sometime in the summer.

Q. You don't know when?

A. I do not.

Q. Now did you people ever fill in the sand between the hills and the bulkhead according to the terms of the contract sued on?

A. Why, no, sir.

Q. You never completed it?

A. No, sir.

Q. Did you ever attempt to pump there after the storm of October 9th, 1903?

A. No, sir.

Q. Did you ever have any conversation or any agreement with the Ocean City Development Company about not doing that work?

A. At one time after the storm there was some of the officials of the company down there. 10

Q. Who were they?

A. I couldn't be real positive about that, but I think probably Mr. Sherrod and Mr. Moore. I wouldn't be positive. The question was discussed about the putting up of another bulkhead and the material to fill in back of it. They said they couldn't ask us to stay there and pump that sand in back of the bulkhead, because they couldn't think of putting it up that winter, that the only thing for them to consider for us to do was to construct a sort of pen on the ground between the trolley track and the beach for us to pump into, and I told them at that time that we wasn't anxious about any such job, still we couldn't refuse to do it if they wanted us to do it, but we wasn't anxious about doing it. 20

Q. You say it was Mr. Sherrod and Mr. Moore. Mr. William G. Moore?

A. I think so.

Q. They were the only two that ever came down there, weren't they?

A. I wouldn't say that. They were the only ones I saw there. 30

Q. Did you build a pen along there?

A. No, sir. They never put up any boards and never asked us to pump any sand.

Q. And after you got the sand pumped in on the back of the tract, you did what?

A. We went on and did some work for various people below 51st street and worked there all the summer of 1904 and removed the boat in the spring of 1905.

Q. You stopped working on this tract before they commenced the erection or construction of that last bulkhead, didn't you?

A. I couldn't be sure about that. I don't know when they commenced it. We was right there.

10

Plaintiffs Rest.

DEFENDANT'S TESTIMONY IN REBUTTAL.

20 J. HERMAN TERRY, recalled.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Terry, did you make an estimate of the sand filled in under this contract after the Risleys had ceased pumping there in April of 1904?

A. I think it was about the first of May.

30 Q. I show you a letter bearing date May 9th, addressed to William G. Moore, secretary, and ask you whether or not that letter was written by you or your firm?

A. It was written by me.

Q. And does that contain a correct statement of the final estimate made by you of the sand pumped in?

A. That is right.

Q. Was a copy of that estimate sent to Risley & Sons?

A. I am not sure without I look that up from the letter book. There was some letters sent to Mr. Risley and I think that is the letter.

Q. Won't you look that up, please?

(Witness complies.)

A. On May 16th there was a letter written to N. Risley & Sons, a copy of that estimate.

10

Mr. Bourgeois: Mr. Cole, have you that letter of May 16th? Ours is dated May 9th.

Mr. Cole: I said I had a letter dated May 16th.

(Counsel for plaintiffs produces letter.)

(Letter of May 9th offered in evidence and marked Exhibit D5.)

20

Q. That estimate was made by you from actual measurements on the ground?

A. Yes.

Cross-examination.

By Mr. Cole:

Q. Mr. Terry, does that estimate show the amount of sand actually pumped or the amount of sand which you say was there at or about the time that you made the estimate? 30

A. That was the amount that was in the fill at that time.

Q. That makes no allowance for the settlement, of course?

A. The settlement wasn't taken into account.

Q. Nor does that take into consideration the sand that was pumped in and which was washed out by the storm of October, 1903?

A. This only considers the amount that was in the fill at that time.

Q. That is in May, 1904?

A. That is right.

Re-direct examination.

By Mr. Bourgeois:

10 Q. The question of settlement of the sand was taken into consideration by the contract itself, was it not?

A. That was covered by the contract.

ROBERT BRADSHAW, sworn.

Direct examination.

By Mr. Bourgeois:

20 Q. Mr. Bradshaw, were you the foreman in the construction of the 16th street bulkhead?

A. I was.

Q. Was that built above or below the high water line?

(Objected to as not being in rebuttal.)

Mr. Bourgeois: The testimony was that that was built twenty feet inside the high water line.

30 (Objection withdrawn. Question repeated.)

A. I think it was built below the high water line.

Q. Were you able to work there during the building of that bulkhead, during the whole of the day?

A. No, part of the time we had to stop on account of the high tide.

No cross-examination.

WILLIAM G. MOORE, recalled.

Direct examination.

By Mr. Bourgeois :

Q. Mr. Moore, Mr. Elton Risley testified that he had a conversation with you regarding the continuance of the completion of the filling in of the bulkhead on the ground at Ocean City, N. J. State whether or not you ever had such 10 a conversation and, if so, what it was?

A. I never did.

Q. You are secretary of the company?

A. I am.

Q. State whether or not Risley & Sons were ever relieved by your company from the completion of this work.

Mr. Cole: That is a conclusion.

Q. Whether there was ever any agreement entered into 20 between your company and the Risleys regarding the completion of the work.

A. As far as I know it was not.

Mr. Cole: It is a conclusion and it is not rebuttal.

The Court: Have they said they were relieved?

Mr. Bourgeois: Yes, they say they were relieved by two of the people.

Mr. Cole: They didn't say that. They stated the conversation they had. 30

(Testimony admitted. Exception noted for plaintiffs.)

Q. Now, Mr. Moore, it was testified by Mr. Elton Risley that he met you on the ground and urged that you have the

bulkhead completed immediately. State whether or not you had any such conversation with him or he had such a conversation with you.

A. This is the second bulkhead?

Q. Yes.

A. I had no such conversation with him.

Q. Did he have such conversation with you?

A. Not that I know of.

Q. Was there any objecting done with relation to the
10 bulkhead?

A. By Mr. Risley?

Q. By you folks?

A. There was a great deal of objecting by our company and by myself to have the filling done. I never heard of any urging by the Risleys to have the bulkhead completed.

No cross-examination.

20

WILLIAM D. SHERROD, recalled.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Sherrod, you are treasurer of the company?

A. Yes.

Q. How many directors are there in the company?

30 A. Five, I think.

Q. You heard Mr. Elton Risley's testimony that he had had a conversation with you and Mr. William G. Moore on the ground relative to the filling of a pen there along the hills, did you, after the bulkhead went out?

A. I heard that.

Q. Did you have such a conversation with him?

A. No, sir.

Q. Did he ever have such a conversation with you?

A. No, sir.

Q. Was there ever any agreement entered into between the Risleys and the company relating to the non-completion by Risleys of the filling of the tract next to the bulkhead?

A. No, sir.

Q. When was the new bulkhead put in with relation to the time that the Risleys stopped working on that ground?

A. The new bulkhead was built in June, July and August of the following year after they had ceased work. 10

Q. You heard Mr. Risley's testimony that during the construction of the bulkhead or sometime during the summer you were urged by him to have it completed at once?

A. I heard that, yes.

Q. Did you have such a conversation with him?

A. No, sir.

Q. Were you ever urged by the Risleys, any of them, to have the bulkhead completed?

A. No, sir.

Q. Was there ever any urging done with regard to the bulkhead or the fill? 20

A. Not with me.

By a Juror:

Q. Can we know whether Mr. Sherrod is a real member of the company or a figurehead?

A. I certainly own stock.

By Mr. Bourgeois:

Q. How much? 30

A. Five thousand dollars worth of stock.

Q. You are Mr. Moore's brother-in-law?

A. Yes, sir.

Q. And the son-in-law of William Moore?

A. Henry D.

No cross-examination.

JOSEPH SUTTON, recalled.

Direct examination.

By Mr. Bourgeois :

Q. Mr. Sutton, there has been some testimony given here with relation to the building of a bank and I think it has been testified that you built a certain part of the bank or
10 were to build a certain part of the bank for the Ocean City Development Company. Did you hear the testimony?

A. Yes, sir.

Q. Did you have any agreement to build, or did you build the bank along 47th street for the Ocean City Development Company?

A. No, sir.

Q. For whom did you build it?

A. I don't know as I built any of it. I think I did assist Risleys a few times, in the rush to get some banking up.
20 To go right on the business of banking work I think I didn't do it. I think I assisted them on the 47th street bank.

Q. But you know you had no agreement to do it with the company?

A. None whatever.

Q. You are not a stockholder in the company, are you?

A. Yes, sir.

Q. How many stockholders are there in the company, do you know?

A. About a dozen, might be a few more; I forget.

30 By the Court :

Q. Were you a stockholder in 1903?

A. Since it was organized.

By Mr. Bourgeois :

Q. It has been testified here that you stated to Mr. Sherrod that the Risleys had refused to complete their work.

Did you ever have any conversation with the Risleys relative to the filling in of the sand back of the bulkhead that washed out?

A. Yes; they said they didn't want any more in theirs. We talked about it several times as Mr. Risley testified.

Q. No, I want you to tell me what conversation you had.

A. We had several conversations.

(Objected to as not rebuttal.)

10

Mr. Bourgeois: They have attempted to excuse their not fulfilling the contract by this conversation about the pen.

(Objection withdrawn.)

Q. What was the conversation you had?

A. We had a number of them.

Q. What did they actually say?

A. Our contention between Mr. Risley was that I thought the bulkhead would stand if the sand was back of it and I have always told Risley that he could depend on me that "If you had got your sand back of it you would have got paid for it and been out of it." 20

No cross-examination.

Both Sides Rest.

30

Risley v. Ocean City Dev. Co., July, 1906.

COURT'S CHARGE TO JURY.

GENTLEMEN:

The plaintiffs in this suit seek to recover for the filling
 10 in of 104,916 cubic yards of earth for the defendants at the
 price of thirteen and one-half cents per cubic yard. To this
 they add one thousand dollars which under the contract was
 to be allowed in settlement for the settling of the sand,
 making their total claim \$15,163.66. Of this amount they
 have received \$8288.74, leaving the net balance as claimed
 by the plaintiffs \$6874.92 with interest. You will have the
 transcript which shows this, to take out with you.

The defendants object to paying all of this balance. They
 claim that there should be deducted from the price claimed
 20 for this fill some twenty-eight thousand cubic yards of
 sand—

Mr. Bourgeois: Excuse me, but that is not correct. We
 do not claim twenty-eight thousand. We only claim two-
 thirds of twenty-one thousand. The twenty-eight thousand
 yards was the amount that was never filled in; twenty-eight
 thousand less than one hundred and twenty thousand yards.
 The fill behind the bulkhead was twenty-one thousand and
 that was only one-third done. We claim a reduction of four-
 30 teen thousand yards.

The Court: You object to paying for that which washed
 away with the bulkhead? Then I am mistaken, gentlemen,
 as to the quantity. It is about fourteen thousand that the
 defendants claim they should be allowed credit for because
 they say that washed away with the bulkhead on the occas-
 ion of the storm. In addition to that the defendants claim

that they should be allowed the price or value of the bulkhead which washed out, amounting to \$3360, and in addition to that they claim credit for gravel which washed away to the amount of six hundred dollars. Shall this credit be allowed the defendant? That is the question for you to decide. And in deciding that, you will have to determine whether the plaintiffs were responsible for the washing away of this bulkhead and the consequent loss of sand and gravel. Under the contract the defendants themselves were to put up the bulkhead; that was to be constructed at their expense and the plaintiffs were simply to fill in the sand. If that bulkhead washed away because the plaintiffs failed to back it up with sand properly and in due time, then the plaintiffs would be responsible for that loss and you could properly deduct for the sand which washed away and allow the defendants the price of the bulkhead and the gravel which was lost. But if, on the other hand, the defendants themselves delayed the construction of that bulkhead so that the plaintiffs had not an opportunity to fill it in time to avoid this storm, or if the defendant by its agent, Sutton, constructed the bulkhead of such character that it would not withstand the storm, or if without the filling of sand in back of it you believe the bulkhead would have succumbed to the storm, then the plaintiffs are not responsible and cannot be charged with that loss of sand or the loss of gravel or the price of the bulkhead. So that the case narrows down to the simple issue of whether the plaintiffs are responsible for the washing out of that bulkhead and the consequent loss of sand and gravel. If due to their misconduct, failing to do the work on time and in a proper manner, that is, by promptly supporting the bulkhead, the plaintiffs would be liable and you should make the deductions which have been referred to; if, on the contrary, you believe it was the fault of the defendant because improperly constructed or that it would have occurred without the support of the sand, then this amount should not be deducted.

10

20

30

I have some requests to charge: Number one is refused. Number two is refused except as already charged and number three is already covered by the charge made.

Gentlemen, counsel have prepared a statement of their respective claims. The plaintiffs' claim appears in the transcript which you have, and here is the defendant's.

Juror Shumway: Your Honor, are we to consider that contract according to the letter of it, or are we to make allowance for conditions affecting it because of other contracts made conditional to it? What I mean to say is, taking that contract, if we go by the letter of it as I understand it, these people would be practically responsible under all conditions, that is, until the engineer had accepted their work.

The Court: It is not claimed in this case that any advantage shall be taken of his failure to issue the certificate.

Mr. Bourgeois: What he is getting at, the contract provides that his final estimate shall be conclusive. There is no waiver of that at all.

The Court: But his estimate, you will observe, includes only the sand fill which he found there the following spring after the storm had washed away these fourteen thousand cubic yards. I have left you to say whether that is to be deducted or not, and your decision of that will show whether they are responsible for the washing away of the bulkhead, or not.

30 Mr. Cole: In view of the question by the juror, if I comprehend its meaning, it seems to me that I am justified in asking that your Honor charge the jury that they are not to consider any part of that contract or anything save as they have been charged by your Honor. In other words, the question leads me to think that the juror may have in mind considering something to which your Honor has not called

attention. I say it must be assumed that counsel have asked the court to charge upon those things which he thinks are in issue and your Honor has charged everything that the jury is to consider, so I ask your Honor to say to the jury that they are not to consider any part of this contract other than that to which you have called their attention.

Mr. Bourgeois: We ask in the same line to charge the jury that every provision is in force in that contract except that about the certificate of the engineer.

10

The Court: I will charge the jury that you are to decide the case from the testimony that is before you excepting the court's construction of the law which applies to it.

DEFENDANT'S EXCEPTIONS.

20

Mr. Bourgeois: Defendant excepts to that part of the court's charge in which the court said, "You will have to determine whether the plaintiffs were responsible for the washing away of this bulkhead and the consequent loss of sand and gravel."

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],

J. 30

Defendant excepts to that part of the court's charge in which the court said, "If, on the other hand, the defendants themselves delayed the construction of that bulkhead so that the plaintiffs had not an opportunity to fill it in time to avoid this storm, or if the defendant by its agent, Sutton, con-

structed the bulkhead of such character that it would not withstand the storm, or if without the filling of sand in back of it you believe the bulkhead would have succumbed to the storm, then the plaintiffs are not responsible and cannot be charged with that loss of sand or the loss of gravel or the price of the bulkhead."

(Which exception is hereby allowed and sealed accordingly.)

10

ALLEN B. ENDICOTT, [SEAL],
J.

Defendant excepts to the language of the court in his reply to Mr. Shumway's question as follows: "It is not claimed in this case that any advantage shall be taken of his failure to issue the certificate."

Mr. Bourgeois: "What he is getting at, the contract provides that his final estimate shall be conclusive. There is no waiver of that at all."

20

The Court: "But his estimate, you will observe, includes only the sand fill which he found there the following spring after the storm had washed away these fourteen thousand cubic yards. I have left you to say whether that is to be deducted or not, and your decision of that will show whether they are responsible for the washing away of the bulkhead or not."

(Which exception is hereby allowed and sealed accordingly.)

30

ALLEN B. ENDICOTT, [SEAL],
J.

Defendant excepts to that part of the court's charge in which the court said, "I will charge the jury that you are to decide the case from the testimony that is before you excepting the court's construction of the law which applies to it."

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL],
J.

Defendant excepts to the refusal of the court to charge the requests of the defendant except as charged.

(Which exception is hereby allowed and sealed accordingly.)

ALLEN B. ENDICOTT, [SEAL], 10
J.

DEFENDANT'S REQUESTS.

1. Under the terms of the contract sued on the work was at the risk of the plaintiffs until its completion and they cannot recover for any greater quantity of sand pumped than that shown by the final estimate of the engineers, which was 93,515 cubic yards. 20

ALLEN B. ENDICOTT, [SEAL],
J.

2. As the contract expressly provides "that time of completion is an essential part of this contract" the plaintiffs not having completed the work within the time limited by the contract they are liable for all damages arising after the time limited in the contract, namely September 20, 1903.

ALLEN B. ENDICOTT, [SEAL], J. 30

3. If the jury find that the bulkhead and street work were destroyed by reason of plaintiff's failure to fulfil their contract then the damages would include the value of street work and cost of rebuilding a bulkhead similar to the one destroyed.

ALLEN B. ENDICOTT, [SEAL],
J.

the property of the Ocean City Development Company in a thorough and workmanlike manner, in accordance with the specifications and plans of Latta & Terry Company, describing the same, a copy of which said agreement and said specifications is attached hereto and made a part hereof, and which said agreement is brought here into Court.

Plaintiffs aver that they have in all things performed the said contract according to its terms; and the terms of said specifications, and have filled the property of said Ocean City Development Company referred to in said contract, to the amount of one hundred and four thousand, nine hundred and sixteen cubic yards of fill, for which they are entitled to receive at the rate of thirteen and a half cents per cubic yard of fill, in all, the sum of fourteen thousand, one hundred and sixty-three dollars and sixty-six cents (\$14,163.66) in addition to the sum of one thousand dollars (\$1000) for settlement, as provided in said contract, or in all, the sum of fifteen thousand, one hundred and sixty-three dollars and sixty-six cents (\$15,163.66), which sum defendant has refused, neglected and failed to pay, although demanded so to do, whereby an action hath accrued to the plaintiffs to recover the sum of fifteen thousand, one hundred and sixty-three dollars and sixty-six cents (\$15,163.66) besides interest from the fifth day of April, A. D., nineteen hundred and four, until the date of entry of judgment final, besides costs, wherefore they sue, etc.

And for cause of action plaintiffs further aver that heretofore, to wit, on the first day of May, nineteen hundred and four, to wit, at May's Landing in the county of Atlantic aforesaid, defendant was indebted to the plaintiffs in the sum of fifteen thousand dollars (\$15,000) for the price and value of the goods sold and delivered by the plaintiffs to the defendant at its request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiffs to the defendant at its request; and in the like sum of money for the price and value of work done and materials for the same provided by the plaintiffs for the de-

defendant at its request; and in the like sum of money for money lent by the plaintiffs to the defendant at its request; and in the like sum of money for money received by the defendant for the use of the plaintiffs; and in the like sum of money for money paid by the plaintiffs for the use of the defendant at its request; and in the like sum of money for interest due from the defendant to the plaintiffs for the plaintiffs having forborne moneys due from the defendant to the plaintiffs at the defendant's request for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiffs on their account then and there stated between them; and the defendant, afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, promised to pay the said last mentioned moneys respectively to the plaintiffs on request; yet the defendant disregarded its promises, and has not paid any of the said moneys or any part thereof, to the plaintiffs' damage fifteen thousand dollars, and thereupon they bring their suit.

20 *To the within-named Defendant:*

Notice that the following is a bill of particulars of the work done and materials furnished by the plaintiffs to the defendant at its request, based upon the contract hereto, and made a part hereof:

To labor provided and material used in filling the property of Ocean City Development Company at Ocean City.

1905.

30	May 1st. 104,916 cubic yards of earth pumped in and upon the land of defendant, at 13½c per cubic yard.....	\$14,163 66
	To allowance for settlement.....	1,000 00
		<hr/>
		\$15,163 66
	By cash received.....	8,288 74
		<hr/>
	Balance due	\$ 6,874 92

Judgment will be claimed for the sum of \$6,874.92 with interest from May 1st, 1905, to date of entry of judgment final, besides costs of suit.

THIS CONTRACT AND AGREEMENT made and entered into this first day of April, 1903, by and between the Ocean City Development Company, a corporation of the State of New Jersey, party of the first part, hereafter designated the "Company" and N. Risley & Sons, party of the second part, hereinafter designated the "Contractors."

10

WITNESSETH—That the parties hereto each in consideration of the agreement of the other herein contained, and the payment of one dollar, the receipt of which is hereby acknowledged, do hereby covenant and agree as follows:

1. The contractor shall furnish all necessary labor, material, apparatus, tools and superintendence for the construction of the fill, on the property of the Ocean City Development Company in a thorough and workmanlike manner, in accordance with the specifications and plans of Latta & Terry Company describing the same.

20

2. The contractor shall work under the direction and supervision of the said engineers or their representative, and shall do all work in complete accordance with the true spirit and meaning of the said plans and specifications.

3. The said specifications and plans are hereto attached and shall form a part and parcel of this contract, as though set out at length or written herein.

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4. The contractor shall give the company a complete release of all claims, liens or privileges, chargeable to the said contractor before final payment is made, and shall furnish a statement to the company before such final payment, that all wages and bills for material used in the work have been paid.

5. No payment made or acceptance given under this contract except the final payment or final acceptance, shall be construed as evidence of the performance of this contract, either in whole or in part, against any claim of the company.

6. The company will return to the contractor upon the final acceptance of the above work the bond for the sum of twenty-five hundred dollars, which the contractor hereby agrees to furnish the company to insure the faithful performance by the contractor of all the conditions of this contract.

The contractor agrees that all of the construction covered by this contract shall until final payment and acceptance by the company remain at the sole risk and expense of the contractor.

As time of completion is an essential part of this contract, the contractor agrees that the filling shall be carried on at the rate of at least 25,000 cu. yds. per month, the entire work being completed by September 20th, 1903.

9. It is understood and agreed that the relation of the contractor to this operation or construction, is to be that of an independent contractor, and that as such he is, and will be responsible for all damages or injury to person or property that may arise or be incurred in or during the conduct of the same, by or from negligence of the contractor, or any of the employees engaged therein, and that the company shall be by him held, and kept free and discharged of any and all responsibility, or liability therefor of any sort or kind.

10. The company shall pay and the contractor shall receive as full compensation for the faithful performance of all work done under these specifications and contract, the sum of thirteen and one-half ($13\frac{1}{2}$) cents per cubic yard of fill, the amount of fill being 120,006 cubic yards as determined by the survey of Latta & Terry Company, engineers. The company further agrees to pay \$1000.00 as an

allowance for any and all filling made necessary by settlement, which may occur on work covered by this contract.

At the end of each month the engineer shall make an estimate of the value of the work completed, and the company shall pay to the contractor the amount of this estimate, after deducting 15% retained as a part guarantee of completion, and deducting previous payments, and any other accounts as provided, for in this agreement. Within thirty days after the completion of the work, and the issuance of a certificate to that affect by the engineers, the company shall pay to the contractor one-third of the 15% retained, and at the end of three months after the issuance of the above certificate of completion, the company shall pay to the contractor the balance of the reserved fund, provided the contractor has kept the fill up to the required grade during that time, and made all repairs to any part of the fill that may be damaged. 10

II. The area lying between Fiftieth and Forty-ninth streets and between Wesley avenue and the West Jersey and Seashore R. R. Co., is to be filled before any work coming directly under this contract is done, and no payments will be made under this contract until the fill is completed on the above described area. 20

IN WITNESS WHEREOF the parties hereto have affixed their hands and seals the day and year first above written.

N. RISLEY & SONS,
Per Elton Risley.

OCEAN CITY DEVELOPMENT CO. 30
By Charles De Put:

Witness,

J. A. CHAMPION.

Attest,

Wm. G. MOORE,
Secretary.

SPECIFICATIONS.

The work under these specifications shall include the furnishing of all material and labor for the fill of the property of the Ocean City Development Company between the curb line and the bulkhead line on Wesley avenue, from Forty-ninth to Fiftieth streets; between the center line of Forty-ninth street and the center line of Forty-seventh street, from the bulkhead line on Wesley avenue, to the right of way of the West Jersey & Seashore R. R. Co., and between Fiftieth street, and Forty-seventh street, from the right of way of the West Jersey & Seashore R. R. Co. to the right of way of the Ocean City R. R. Co.

GENERAL.

1. The work shall be commenced within ten days of the signing of the contract at such points as the engineer may direct, and prosecuted at such rates that the minimum amount of fill in any one month shall be 25,000 cu. yds. and the entire work completed by September 20th, 1903. The work shall be carried on in such a manner and at such points as to facilitate, and not retard the work of other contractors.
2. The word company shall refer to the Ocean City Development Company. The word contractor shall refer to the party to whom the work under these specifications is awarded. The word engineers shall refer to Latta & Terry Company, or their authorized representatives.
3. The contractor shall file a bond, satisfactory to the company, conditioned upon the faithful performance of the work under the specifications and contract.
4. Payments will be made monthly based upon the engineers' estimates of the amount of work done, after deducting 15%, which will be retained until the final completion and acceptance of the work, and deducting previous payments.

5. These payments on account will not be considered as an indication of the acceptance of the work, or any part thereof. The contractor shall be responsible for the entire work until its final completion and acceptance.

6. The contractor shall be responsible for any damage that may occur to his employees or plant, or any damage that may be done to any individual or property, caused by his negligence or his method of work.

7. The contractor shall be required to hold the Ocean City Development Company harmless against all claims for the use of any patented articles, process of appliance in connection with the contract herein contemplated. 10

8. These specifications and the accompanying plans, are intended to include under each classification all materials, supplies and labor necessary for completing such construction. The contractor will so understand them, and will not be allowed to take any advantage of any omissions in either. 20

9. If at any time the contractor shall refuse or fail to prosecute the work, or to provide to carry on the same as directed by the engineer, or fail to properly protect any part of the work, permanent or temporary, the engineer shall have the power to purchase, or otherwise provide, materials, tools, machinery, etc., and put the work in proper advancement or condition, and the total cost of doing so shall be deducted from the payments due, or to become due, under this contract. Or if these amounts be insufficient, the difference shall be made up under the condition of the bond. 30

10. The company reserves the right to increase or decrease the amount of work to be done under these specifications, any increase shall be paid for at the contract price, and in case of decrease, the amount actually performed will be paid for at the contract price, and no allowance being made for anticipated profits on the work omitted.

11. The contractor shall not assign or sub-let any portion of the work under this contract, without the written consent of the engineer.

12. No extra work will be allowed under this contract, except upon written order of the engineers, and at the price agreed upon between the contracting parties, prior to the commencement of said work. In case of failure to agree upon a price the company may perform the work themselves, or employ such other contractors as they may deem advisable.

13. Any ambiguity in the plans and specifications shall be referred to the engineers and their decision in these matters and in questions of quantity and quality or material or workmanship shall be final.

14. All stakes necessary for the lines and grades of the work shall be furnished by the engineers. The contractor shall carefully preserve all *stakes* and bench marks.

15. The work shall be paid for by the cubic yard and will be measured in place upon completion of the entire work.

16. Upon completion, the contractor shall remove all rubbish or refuse of any kind, and leave the work in an orderly and workmanlike condition.

FILL AND GRADING.

1. The area to be filled between the curb line and the bulkhead on Wesley avenue from Forty-ninth to Fiftieth streets, between the center line of Forty-ninth street, and the center line of Forty-seventh street, from the bulkhead on Wesley avenue, to the right of way of the West Jersey and Seashore R. R. Co., and between Fiftieth and Forty-seventh streets, from the right of way of the West Jersey and Seashore R. R. Co., to the right of way of the Ocean City R. R. Co.

2. The material for the fill is to be taken from the thoroughfare on the west of the roadbed of the Ocean City R. Co.

3. The fill is to be made by methods selected by the contractor and approved by the engineers.

4. The fill is to be made to grades established by the city ordinances, and before final payment is made, the certificate of the city engineer to the completion of the fill will be furnished the company. 10

5. Payment will be made only on the work within the area staked out by the engineers and there will be no allowance for material deposited above grade.

6. After the completion of the work, and the issuance of the certificate to that effect by the engineers, the contract shall maintain the fill for the period of three months.

And now comes the said Ocean City Development Company by J. Fithian Tatem, its attorney, and defends the 20 wrong and injury mentioned in the first count in said declaration, when, etc., and says that the said supposed writing in the said declaration mentioned, is not its deed, and of this it puts itself upon the country.

And for a further plea in this behalf, by leave of the court for this purpose first had and obtained, the said defendant, by J. Fithian Tatem, its attorney, as to the said first count, says that the plaintiff ought not to have or maintain their aforesaid action thereof against it, because they, the said plaintiffs did not perform their said agreement in writing, 30 and the covenant therein contained, mentioned in said declaration, and of this the said defendant puts itself upon the country.

And for a further plea in this behalf, by leave of the court for this purpose first had and obtained, the said defendant, by J. Fithian Tatem, its attorney, as to said first count, says that the said defendant, at and before the commencement of

this suit, did pay to the said plaintiff the moneys mentioned in said writing mentioned in said declaration according to the form and effect of the said writing, and of said covenant of the said defendant by it in that behalf made as aforesaid, to wit, at Trenton, to wit, at May's Landing, aforesaid, and of this the said defendant puts itself upon the country.

10 And now comes the said Ocean City Development Company, by J. Fithian Tatem, its attorney, and defends the wrong and injury mentioned in the second count in said declaration, when, etc., and says that it did not undertake or promise in manner and form as the said plaintiff hath therein complained against it, and of this it puts itself upon the country.

To Thompson & Cole,
Attorneys of Plaintiff.

20 Take notice that Ocean City Development Company, the above named defendant, on the trial of the above stated cause, will give in evidence and insist that the above named plaintiff, before and at the time of the commencement of this suit was and still is indebted to the said defendant in the sum of thirty-six thousand dollars, being the damages sustained by the defendant by reason of the failure of the said plaintiff to perform its agreement mentioned in the declaration sued upon, according to the terms thereof.

30 Take further notice that the above named company, on the trial of the above stated cause, will give evidence and insist that the above named plaintiffs, before and at the time of the commencement of this suit, were, and still are, indebted to the defendant in the sum of thirty-six thousand dollars, for the price and value of work and labor then and there done by the defendant for the plaintiffs at their request; and in the further sum of thirty-six thousand dollars then and there paid by the defendant for the use of the said plaintiffs at their request; and in the further sum of thirty-six thousand dollars for money then and there loaned by the

defendant to the plaintiffs at their request; and in the further sum of thirty-six thousand dollars then and there received by the plaintiffs for the use of the defendant; and in the further sum of thirty-six thousand dollars for interest for the forbearance by the defendant at the plaintiffs' request, of moneys due and owing from the plaintiffs to the defendant; and in the further sum of thirty-six thousand dollars for money due from the plaintiffs to the defendant on an account stated between them, the same to be paid by the plaintiffs when it should be thereunto afterwards requested; 10
and the same remaining unpaid, an action has accrued to the defendant to demand and have the said money from the plaintiffs; and the said defendant will recoup, set off and allow to the said plaintiffs on the trial, so much of the said several sums of money mentioned as due and owing from the said plaintiffs to the said defendant against any demands of the said plaintiffs to be proved on the said trial, as will be sufficient to satisfy and discharge said demand, and will claim judgment in its favor for the balance thereof, according to the form of the statute in such case made and provided. 20

J. FITHIAN TATEM,
Attorney for Defendant.

Therefore let a jury thereupon come before out Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at May's Landing in and for the County of Atlantic on the second Tuesday of April, in the year of our Lord, one thousand nine hundred and six, by whom, etc., and the same day is 30
given to the parties aforesaid there, etc.

And now at this day, to wit, the thirteenth day of September, A. D., nineteen hundred and six, before our said Supreme Court at Trenton come the said plaintiffs by their attorneys aforesaid, and the justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, at a certain Court held at May's Landing, in and for the County of Atlantic, before his Honor, Allen B. Endicott, one of the Judges of the Circuit Court, to whom the cause had been referred by consent, on the fifth day of July, nineteen hundred and six, according to the form of the statute in such case made and provided, comes as well the said plaintiffs as the said defendant, by their respective attorneys within named, and the jurors of the jury between the parties aforesaid, and the plea aforesaid,
 10 being summoned also come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath, that the writing obligatory, referred to in the declaration of the plaintiffs, is the writing and obligation of the defendant; that it did undertake in manner and form as alleged; that plaintiff did perform said writing on their part and that the defendant has not paid to the plaintiffs the amount agreed to be paid, and they assess the damages of the said plaintiffs by reason of their not performing the said promises and undertakings, over and above
 20 the costs by them about their suit in this behalf expended, the sum of seven thousand, three hundred and seventy-eight dollars and twenty-nine cents.

Therefore it is considered that the said plaintiffs do recover against the said defendant their said damages by the jury in form aforesaid found to seven thousand, three hundred and seventy-eight dollars and twenty-nine cents and also fifty-five dollars and forty-three cents for their costs and charges aforesaid, by the court now here adjudged to the said plaintiffs and with their assent, which said damages,
 30 costs and charges in the whole amount to seven thousand, four hundred and thirty-three dollars and seventy-two cents.

Judgment signed the thirteenth day of September, A. D. nineteen hundred and six.

WM. S. GUMMERE,

C. J.

I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

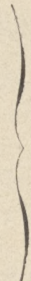
In testimony whereof I have set my hand and [SEAL] the seal of said Court at Trenton, this Second day of October, A. D. nineteen hundred and six.

WM. RIKER, JR., 10
Clerk.

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COURT OF ERRORS AND APPEALS

<hr style="width: 10%; margin: 0 auto;"/> <p style="text-align: center;">N. RISLEY AND SONS, Plt'ffs, Def'ts in Error,</p> <p style="text-align: center;">vs.</p> <p>10 OCEAN CITY DEVELOP- MENT CO., Def't, Plt'ff in Error.</p>		<p style="text-align: center;">IN ERROR.</p> <p style="text-align: center;">ASSIGNMENT OF ERRORS.</p>
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Afterwards, to wit, that is to say on the twentieth day of November, 1906, in the Court of Errors and Appeals, comes the said Ocean City Development Company, by Bourgeois & Sooy, its attorneys, and says that in the record and
 20 proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and also in the giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

That the declaration aforesaid, and the matters therein contained are not sufficient in law for the said N. Risley and Sons to have their said action against the said Ocean City Development Company.

2. That there is also error in this: That the trial judge
 30 erred in refusing to non suit plaintiff at the close of plaintiff's case.

3. That there is also error in this: That the trial judge erred in allowing the following question, addressed to Mr. Sutton, to be answered: "Q. Do you want the jury to understand that you were an expert in bulkhead building at that time?"

4. That there is also error in this: That the trial judge before whom said cause was heard, permitted one Louis M. Haupt to testify as an expert, against defendant's objections.

5. That there is also error in this: That the trial judge permitted an answer to the following question addressed to the said Haupt: "Q. In your opinion was this bulkhead in question in a better condition to resist the ocean tide, ocean currents, without a filling back of it, or with a filling back of it?"

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6. That there is also error in this: That the court permitted witness Haupt to answer over defendant's objection the following question: "Do you know of any case where the effect of the water coming over the bulkhead and falling on the earth behind, has caused the breaking up of the bulkhead?"

7. That there is also error in this: That the court erred in refusing to strike out the answer of the said Haupt to the question: "Do you know of any case where the effect of the water coming over the bulkhead and falling on the earth behind, has caused the breaking up of the bulkhead?"

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8. That there is also error in this: That the court permitted the said Haupt to answer, over defendant's objection, the following question: "Q. If you know of a case Professor, that is in point with this case, where there has been such a result as you started to state, I wish you would give such a case if you know of it personally."

9. That there is also error in this: That the court permitted one Sherrod to answer, over defendant's objection, the following question: "Is this company in possession of the land which, by this agreement with plaintiffs, was to be filled?"

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10. That there is also error in this: That the court permitted the said Sherrod to answer, over defendant's objection, the question: "Has the company sold any of the lots since the plaintiffs quit work there?"

11. That there is also error in this: That the court erred in permitting witness Hartmann to answer, over defendant's objection, the question: "Was there any difference in the distance the piling went in the ground on this bulkhead?"

10 12. That there is also error in this: That the court permitted witness Johnson to answer, over defendant's objection, a question that there were two houses washed down at 56th street and another one between 55th and 56th streets.

13. That there is also error in this: That the court permitted witness Townsend to answer, over defendant's objection, the question: "Was that storm of last winter as severe as the storm of 1903?"

20 14. That there is also error in this: That the court permitted witness Clouting to answer, over defendant's objection, the question: "Do you know whether that bulkhead has failed any or not, or did fail in the storm last winter?"

15. That there is also error in this: That the court permitted witness Clouting to answer, over defendant's objection the question: "Was that storm of last winter, which damaged the bulkhead which is there now, as severe as the storm of 1903?"

16. That there is also error in this: That the court overruled the question put to Mr. Risley: "Do you know whether or not Mr. Sutton did put the sand there?"

30 17. That there is also error in this: That the court overruled the question put to Mr. Risley, plaintiff's witness: "The bulkhead didn't go out prior to the storm of September 12th, after you commenced to fill in the sand, excepting at the northeast end."

18. That there is also error in this: That the court permitted the question put to Mr. Risley: "Now Mr. Risley,

after you saw the construction of this bulkhead, you commenced to fill in there, didn't you, against it?"

19. That there is also error in this: That the court overruled the question put to Mr. Risley: "After you had the conversation with Mr. Sutton which you have related, did you or your firm begin the filling in of the sand back of the bulkhead?"

20. That there is also error in this: That the court overruled the following question put to Mr. Risley: "Do 10 you know whether or not your dredge was broken down during the progress of the work in question, between the first day of April and the 20th day of September, 1903?"

21. That there is also error in this: That the court overruled the following question put to Freeman Risley: "Could you have filled it before the first day of September, 1903, if the bulkhead had been there?"

22. That there is also error in this: That the court overruled the question put to plaintiff as follows: "Did you 20 ever get a final certificate or acceptance of the work done on that property?"

23. That there is also error in this: That the court allowed witness Ingersoll to answer, over defendant's objection, the following question: "Did the weakness of this bulkhead that you saw, interfere with your continuously filling back of it?"

24. That there is also error in this: That the court permitted witness Elton Risley to answer, over defendant's 30 objections, the question: "Who was it that started to build the retaining wall around this property?"

25. That there is also error in this: That the court permitted Elton Risley to answer, over defendant's objection, the question: "Did you ever have any conversation with any of the officers of this defendant company concerning their having the brush cut down and a retaining wall built?"

26. That there is also error in this: That the court allowed witness Risley to answer, over defendant's objection, the question: "What was said at that conversation concerning the cutting down of the brush and the building of a retaining wall on and around this property?"

27. That there is also error in this: That the trial Judge erroneously charged the jury as follows: "You will have to determine whether the plaintiffs were responsible for the washing away of this bulkhead and the consequent loss of
10 sand and gravel."

28. That there is also error in this: That the trial Judge erroneously charged the jury as follows: "If, on the other hand, the defendants themselves delayed the construction of that bulkhead so that the plaintiffs had not an opportunity to fill it in time to avoid this storm, or if the defendant by its agent, Sutton, constructed the bulkhead of such character that it would not withstand the storm, or if without the fill-
20 ing of sand in back of it you believe the bulkhead would have succumbed to the storm, then the plaintiffs are not responsible and cannot be charged with that loss of sand or the loss of gravel or the price of the bulkhead."

29. That there is also error in this: That the trial Judge erroneously charged the jury as follows: "It is not claimed in this case that any advantage shall be taken of his failure to issue the certificate; but his estimate, you will observe, includes only the sand fill which he found there the follow-
30 ing spring after the storm had washed away these fourteen thousand cubic yards. I have left you to say whether that is to be deducted or not, and your decision of that will show whether they are responsible for the washing away of the bulkhead or not."

30. That there is also error in this: That the trial Judge erroneously refused to charge the following requests:

(1) Under the terms of the contract sued on, the work was at the risk of the plaintiffs until its completion, and they

cannot recover for any greater quantity of sand pumped than that shown by the final estimate of the engineers, which was 93,515 cubic yards.

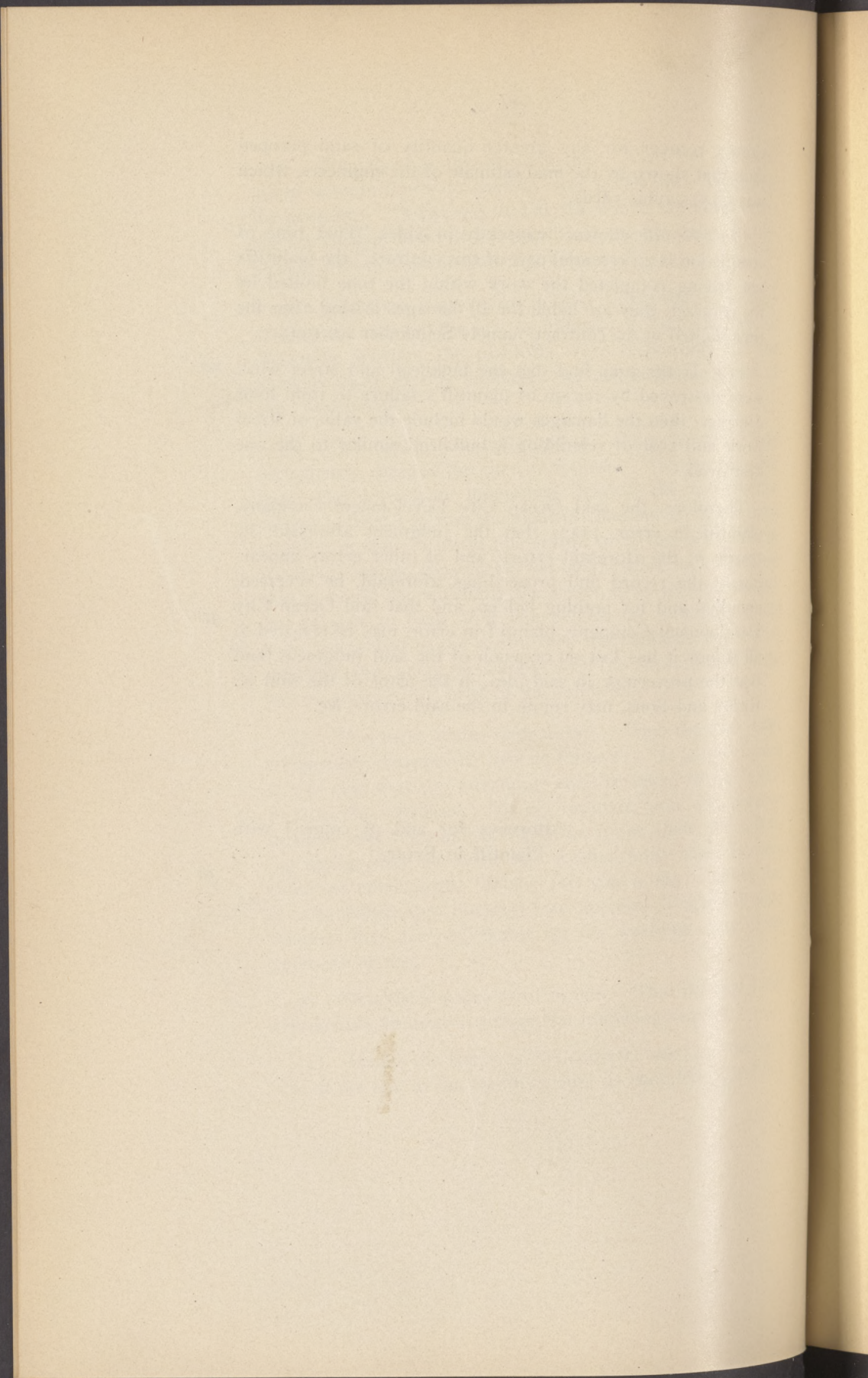
(2) As the contract expressly provides "That time of completion is an essential part of this contract," the plaintiffs not having completed the work within the time limited by the contract, they are liable for all damages arising after the time limited in the contract, namely September 20, 1903.

(3) If the jury find that the bulkhead and street work were destroyed by reason of plaintiff's failure to fulfil their contract; then the damages would include the value of street work and cost of rebuilding a bulkhead similar to the one destroyed. 10

Therefore, the said Ocean City Development Company, plaintiff in error, prays that the judgment aforesaid, by reason of the aforesaid errors, and of other errors appearing in the record and proceedings aforesaid, be reversed, annulled and for nothing holden, and that said Ocean City Development Company, plaintiff in error, may be restored to all things it has lost on occasion of the said judgment, and that the prosecutor in said plea, in the name of the said N. Risley and Sons, may rejoin to the said errors, &c. 20

Attorneys for and of counsel with
Plaintiff in Error.

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STATE OF NEW YORK
IN SENATE

REPORT
OF THE
COMMISSIONERS OF THE
LAND OFFICE
IN RESPONSE TO
RESOLUTION PASSED
MAY 1, 1907

Supplemental Brief for Respondents

The respondents in the above entitled case, by their counsel, have submitted to the Commission a supplemental brief in answer to the report of the Commission, dated May 1, 1907, and in support of their position.

The Commission has considered the supplemental brief and the report of the Commission, dated May 1, 1907, and has concluded that the respondents are entitled to the relief prayed for in their petition.

Very truly yours,
COMMISSIONERS OF THE LAND OFFICE

