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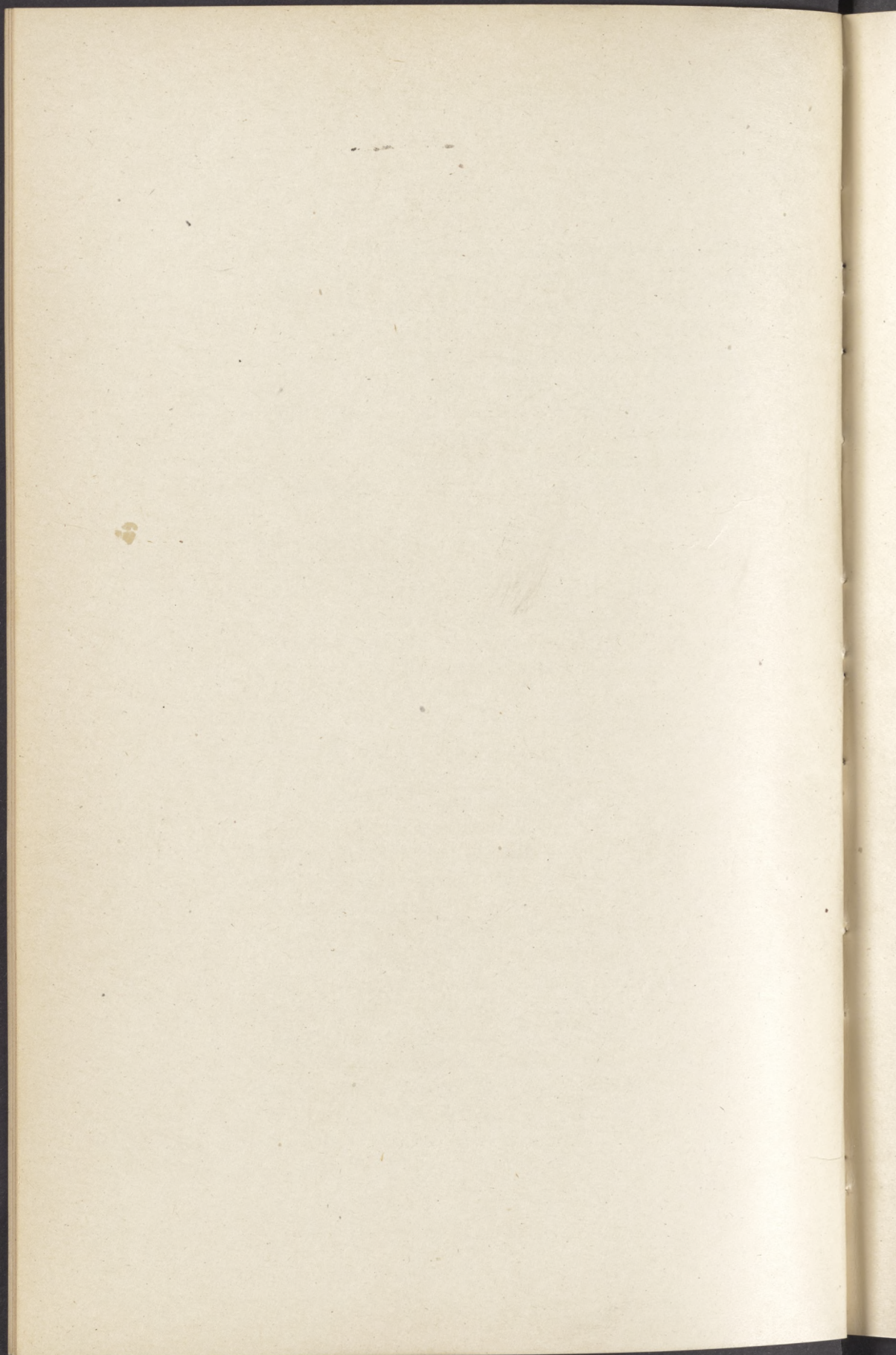
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# New Jersey Court of Errors and Appeals

## Notice of Appeal

(Filed Nov. 18, 1917.)

IN CHANCERY OF NEW JERSEY

|  |                                |               |    |
|--|--------------------------------|---------------|----|
| Between,<br>ARCHIBALD S. LAMBERT,<br><br>and<br>IDA M. VARE, | Complainant,<br><br>Defendant. | } On Bill &c. | 20 |
|--|--------------------------------|---------------|----|

The defendant hereby appeals from the whole and every part of the final decree dated the fifth day of September, 1917, made in this Court in the above stated cause, to the Court of Errors and Appeals, in the last resort in all causes. 30

Dated, November 14, 1917.

LEWIS STARR,  
Solicitor of defendant,  
IDA M. VARE.

I conceive there is good cause of appeal in the above stated cause.

LEWIS STARR, 40  
Of Counsel.

**Petition of Appeal***(Filed Nov. 29, 1917.)***NEW JERSEY COURT OF ERRORS AND  
APPEALS**

10

|   |   |
|---|---|
| Between,<br>ARCHIBALD S. LAMBERT,<br>Complainant-Respondent,<br>and<br>IDA M. VARE,<br>Defendant-Appellant. | } |
|---|---|

*To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:*

20

The petition of Ida M. Vare, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 5th day of September, 1917, in a cause wherein the said Archibald S. Lambert was complainant, and the said Ida M. Vare was defendant, in these respects,

30

to wit:

00

1. That the said Court did order, adjudge and decree that, as to that portion of the lands and premises described therein, to which the said Ida M. Vare made claim in the answer as amended, the said Ida M. Vare had no estate, interest or incumbrance upon the same, or any part thereof.

40

2. That, with respect to said lands and premises, so far as relates to any claim thereon by

## Petition of Appeal

or on behalf of the said defendant, Ida M. Vare, in the answer as amended, the title of the said complainant, Archibald S. Lambert, in and to the same, and every part thereof, was thereby determined, fixed and settled, and declared to be good.

10

3. That the said defendant, Ida M. Vare, pay the complainant his costs to be taxed, together with a counsel fee of \$100.

And you petitioner humbly appeals from the whole and every part of said decree, as above set forth, upon the ground that the same is erroneous, for that:

1. The said Court should have adjudged and decreed that the complainant, Archibald S. Lambert, had no estate or interest in or incumbrance upon that portion of the lands and premises described in said decree to which the said Ida M. Vare made claim in the answer as amended.

20

2. The said Court should have determined that the said defendant, Ida M. Vare, had a good title to that portion of the lands and premises as described in said decree, to which the said defendant, Ida M. Vare, made claim in the answer as amended.

30

3. The said Court should have determined, fixed and settled the claim of the defendant, Ida M. Vare, to be good and valid to that portion of the lands and premises described in said decree to which the said Ida M. Vare made claim of title in the answer as amended.

40

## Petition of Appeal

4. The said Court should have decreed that the defendant, Ida M. Vare, was the owner to that portion of the lands and premises described in said decree which she claimed to own under the claim of title as set forth in her amended answer.

10 5. The Court erred in admitting in evidence an agreement dated September , 1908, between Jesse R. Turner and wife and L. Irving Reichner, marked Exhibit C-11, because the said agreement was immaterial and irrelevant.

20 6. The Court erred in permitting the complainant to introduce evidence to show that the property described in the agreement, C-11, was sold subject to a mortgage, the question admitted being, "Was the property sold subject to that mortgage," on the ground that the said testimony was immaterial and irrelevant.

7. The Court erred in permitting the complainant to introduce in evidence a mortgage dated March 30, 1903, made by Turner and wife to Hannah E. Kelly, Marked Exhibit C-17, on the ground that the said mortgage was immaterial and irrelevant.

30 8. The Court erred in permitting the complainant to show conversations between the witness Daniel L. Collins and L. Irving Reichner, the questions put to the said witness being:

A. "What did he say about it?"

B. "What did he say to you?"

C. "What did he tell you then?"

40 D. "What did he say to you the second time he came?"

## Bill of Complaint

E. "Well, did Mr. Reichner give any reason for coming back the second time for a deed?" on the ground that the testimony is immaterial and irrelevant.

Your petitioner, therefore, prays that the said decree of the said Chancellor may, in the particulars aforesaid, be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable Court shall seem meet. 10

LEWIS STARR,  
Solicitor for and of Counsel with Appellant.

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**Bill of Complaint**

20

(Filed Oct. 30, 1916.)

## IN CHANCERY OF NEW JERSEY

*To His Honor Edwin R. Walker, Chancellor Of  
The State Of New Jersey:*

The complainant, Archibald S. Lambert of Atlantic City, New Jersey, respectfully shows:

1. That by deed dated March 10th 1916, Jesse 30  
R. Turner of Atlantic City, New Jersey, for a valuable consideration conveyed to complainant all that certain lot or piece of land and premises situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey, described as follows:

BEGINNING in the Easterly line of Berkley 40  
Square, at the distance of three hundred and

## Bill of Complaint

fourteen feet Southwardly from the Southeasterly corner of Atlantic Avenue and Berkley Square, and extending thence Southwardly, along the Easterly line of Berkley Square and the extended line thereof to the Riparian Commissioners' exterior line in the Atlantic Ocean; thence Eastwardly, along the same, one hundred and sixty-five feet, more or less, to a point where the same would be intersected by the projection of the westerly line of Kingston (formerly Milledgeville) Avenue, extended; thence Northwardly, by said extended line and the Westerly line of Kingston Avenue, to a point therein three hundred and fourteen feet Southwardly from the Southwesterly corner of said Kingston and Atlantic Avenues; thence Westwardly, parallel with said Atlantic Avenue, one hundred and sixty-five feet to the place of beginning, which deed is recorded in the Clerk's Office of Atlantic County at Mays Landing, New Jersey, in Book 550 of Deeds page 465 &c.

2. That said deed is in orator's possession ready to be produced.

3. That your orator has ever since the making and recording of said deed been in the peaceable possession of the land therein and above described; and at the time of purchasing said land and taking said deed he believed and yet believes he bought and acquired a good title to said land in fee simple, and has always claimed and does now claim to own the same accordingly.

4. That for more than five years next preceding the filing of this bill said land has been assessed

## Bill of Complaint

for taxes against Jesse R. Turner, orator's predecessor in title, and orator, and said taxes have been paid by them.

5. That your orator's title to said land is denied and disputed by Ida M. Vare, the defendant in this suit, and the said defendant claims some interest therein; and no suit or action of any kind whatever is pending to enforce or test the validity of such title claim; and your orator charges that such claims so made by defendant is utterly without foundation, unjust and vexatious. 10

6. That by reason of such claims your orator's property in said land is greatly affected, and the same cannot be sold as they otherwise could, said claim being a cloud on orator's title. 20

7. Complainant is without adequate remedy in the courts of law and therefore prays—

1. That said Ida M. Vare, defendant in this suit may answer this bill of complaint without oath, and each statement therein made.

2. That said Ide M. Vare set forth specifically what title or claim to said land or interest therein she makes or claims and by what instrument such title or claim is derived and how created, and that by the determination and final decree of this court her rights in and to the land described and every part thereof, may be fixed and settled, and that your orator be decreed to have a perfect title thereto and that the defendant has no estate, interest in or encumbrance on said lands or any part thereof and that her claim to the same is unjust, vexatious and void. 30 40

## Answer

3. That an injunction issue against said Ida M. Vare enjoining her from selling or in any wise encumbering said land.

01 10 4. That a writ of subpoena may issue commanding said Ida M. Vare to answer this bill of complaint and to abide by such decree as this court may make in the premises.

C. L. COLE,

Solicitor and of Counsel with Complainant.

---

**Answer**

(Filed Nov. 21, 1916.)

20  
03  
IN CHANCERY OF NEW JERSEY

Between,

ARCHIBALD S. LAMBERT,

Complainant,

and

IDA M. VARE,

Defendant.

} On Bill, &c.

30  
05  
Ida M. Vare, the defendant in the above cause, of Philadelphia, in the State of Pennsylvania, by this answer:

1. Avers that she has no knowledge or information sufficient to form a belief as to the facts contained in paragraphs one and two of the bill of complaint.

40  
2. Denies the facts set forth in paragraph three.

## Answer

3. Avers that she has no knowledge or information sufficient to form a belief as to the facts set forth in paragraph four.

4. Admits that she disputes any claim of title of the plaintiff to the lands and premises described in the bill of complaint. 10

5. Avers that defendant claims to own or have an interest in the Westerley half of said premises.

6. Admits that no suit or action of any kind whatever is pending to enforce or test the validity of the title to said premises, claimed by the respective parties.

7. Denies that the claim of defendant is utterly without foundation, unjust and vexatious. 20

8. Avers that she has a title to and claim on that portion of the lands and premises referred to in the complainant's bill, described as follows:

BEGINNING at a point in the Easterly line of Berkeley Square distant 314 feet Southerly from the Southeast corner of Berkeley Square and Atlantic Avenue; thence Southerly along the Easterly line of Berkeley Square, if extended, to the interior or inland line of the Atlantic City Public Park; thence Easterly along said interior or inland line of said Public Park 82 1/2 feet; thence Northerly, parallel with Berkeley Square, if extended, and 82 1/2 feet Easterly at right angles therefrom, to a point 314 feet South of Atlantic Avenue; thence Westerly, parallel with Atlantic Avenue, 82 1/2 feet to the place of beginning. 30

9. Avers that the interest of the defendant is that of owner in fee simple as to a portion of 40

## Answer

said premises lastly above described, and that the defendant's title thereto is derived by virtue of a conveyance, one made by James H. Aiken, dated October 9, 1911, recorded in the Clerk's office aforesaid October 10, 1911, in Book 471 of Deeds, page 35.

10

10. Avers that the defendant also acquired and now possesses a leasehold estate in a part of said lands and premises by virtue of a lease made to defendant by the Board of Commerce and Navigation of the State of New Jersey, dated the 14th day of September, 1915, recorded in the Clerk's office aforesaid on November 1, 1915, in Book 546 of Deeds, page 243, &c.

20.

CHARLES C. BABCOCK.  
LEWIS STARR.  
Solicitors for and of Counsel  
with Defendant.



**Testimony**

## IN CHANCERY OF NEW JERSEY

|    |  |   |                                |
|----|--|---|--------------------------------|
| 10 | Between,<br>ARCHIBALD S. LAMBERT,<br>Complainant,<br>and<br>IDA M. VARE,<br>Defendant. | } | On Bill, &c.<br>Final Hearing. |
|----|--|---|--------------------------------|

Before his HONOR, E. B. LEAMING, Vice Chancellor, at the Chancery Chambers, Atlantic City, N. J., on Monday, April 2d, 1917.

## 20 Appearances:

Hon Clarence L. Cole, for complainant.

Hon. Lewis Starr, and Charles C. Babcock, Esq., for defendant.

Mr. Starr: I want to make an application, if your Honor please, to amend the 9th paragraph in the answer that was filed in this case. I discover that one of the conveyances which is set forth as a source of title in the defendant

30 does not cover the *locus in quo* at all. The conveyance dated September 28th, 1911, made by James H. Aiken and others, recorded October 10th, 1911, in book 471, page 32, does not cover the premises in controversy in this suit. I want to amend by eliminating all reference to that conveyance made September 28th, 1911, by Aiken and others, recorded &c., and rely upon the other

40 conveyance set forth in that paragraph.

## Testimony

The Vice Chancellor: Have you any objection, Judge Cole?

Mr. Cole: No objection to the elimination.

The Vice Chancellor: Then you would make it read "by virtue of"—

Mr. Starr: One conveyance.

The Vice Chancellor: And then you would cross out "one dated September 28th, 1911," &c., down to "and the other." 10

Mr. Starr: Yes; that does not cover our property at all.

The Vice Chancellor: And then following that will be "made by James H. Aiken, dated October 9th, 1911," &c.

Mr. Starr: Yes.

The Vice Chancellor: Draw the order of amendment and file it. 20

Mr. Starr: Yes, I will draw the order of amendment and file it.

At this point a recess was taken until 1:45 p. m.

Hearing of the cause resumed after recess, in the presence of the respective counsel heretofore noted.

Mr. Cole: I offer an original deed dated March 10th, 1916, from Jesse R. Turner,—

The Vice Chancellor: Is peaceable possession denied? 30

Mr. Starr: There is no serious contention with reference to the matter but it seems to me that the complainant is obliged to prove it in order to show jurisdiction.

The Vice Chancellor: Not if it is admitted.

Mr. Starr: It is not admitted in the answer.

Mr. Cole: Well, is it admitted on the record? 40

## Testimony

Mr. Starr: I would prefer to have you make the formal proofs. I am not going to dispute it but I would prefer you to make formal proofs.

Mr. Cole: I offer an original deed from Jesse R. Turner, and Mary E., his wife, to Archibald S. Lambert, dated March 10th, 1916, and recorded March 11th, of the same year, in book 550 of deeds, page 465.

The Vice Chancellor: And conveys what?

Mr. Cole: The premises described in the bill.

(Said paper marked Exhibit C-1.)

Mr. Cole: Now, I offer deed from the State of New Jersey to Jesse R. Turner, dated May 11th, 1914, executed by the Governor and Riparian Commissioners.

Mr. Starr: You speak of it as a deed. It is not a deed, it is a lease, not a grant.

The Vice Chancellor: Riparian grant?

Mr. Starr: No, it is a riparian lease.

Mr. Cole: Well, it is a lease, in point of fact.

Mr. Starr: It is a riparian lease, not a grant.

Mr. Cole: Now, that leases the right of the State to the land on the westerly side of Millidgeville Avenue, "beginning 314 feet southerly" &c., —well, it describes the land in question and other land.

(Said paper marked Exhibit C-2.)

Mr. Cole: Now, I want to offer certified copy of a deed dated the 19th day of November, 1908, from Jesse R. Turner and wife to L. Irving Reichner, which was recorded on the 21st of said November, in book 392 of deeds, page 371. Now, that conveys, beginning in the westerly lines of Milledgeville Avenue 275 feet south of Atlantic, it runs 39 feet and then runs to Berkeley Square.

## Testimony

It says, "being a part of the same premises conveyed by Hannah A. Kelley, widow," &c. "The above premises being under and subject to the conditions and restrictions as set out in said deed from Hannah E. Kelley to Jesse R. Turner and Harry R. Young, aforementioned. Provided, however, and it is hereby expressly agreed and understood that this conveyance is for a definite tract of land and that the said party of the second part, his heirs or assigns, derive no title to lands oceanward of the tract hereby conveyed by reason of the said Atlantic Ocean at any time in the future encroaching upon said land hereby conveyed, and upon said ocean receding from lands hereby conveyed the title to said lands oceanward of said lands hereby conveyed remains in said Jesse R. Turner, his heirs and assigns. It is also understood and agreed that in no case shall the said party of the second part, his heirs or assigns, have the right to apply for a Riparian Grant in front of the lands hereby conveyed, such a right being expressly reserved to the said Jesse R. Turner, his heirs and assigns. It is hereby agreed that the present high water line is oceanward of the lands hereby conveyed, which lands do not border on the Atlantic Ocean, but that lands now owned by Jesse R. Turner in front of lands hereby conveyed, do border on Atlantic Ocean, and that he, the said Jesse R. Turner, his heirs and assigns, have the exclusive right of applying for said Riparian Grant under all circumstances."

Mr. Starr: Now, I object, if your Honor please, to the introduction of that deed, upon the ground that it does not cover the lands here in con-

Archibald S. Lambert—Direct

troversy, the *locus in quo*, and the deed is inadmissible, irrelevant, improper and incompetent.

The Vice Chancellor: Let the deed be filed. It may become relevant; I cannot tell. This is, however, offered simply for the purpose of establishing possession. It will have to be re-offered in the matter of title. This, I understand, is intended as a bar.

(Said paper marked Exhibit C-3.)

ARCHIBALD S. LAMBERT, the complainant, being duly sworn according to law, on his oath says—

By Mr. Cole: Q. You are the one bringing this suit, are you not? A. Yes.

Q. Are you familiar with the land on the easterly side of Berkeley Square, in Atlantic City, beginning 314 feet south of Atlantic and running to the boardwalk? A. I am.

Q. Are you in possession of that property? A. I am; yes, sir.

Q. How long have you been in possession? A. Over three years.

Q. I notice your deed is dated 1916. Did you have an agreement to buy before you got a deed? A. I had a lease on there.

Q. A lease from whom? A. Jesse Turner.

Q. And you went into possession under that lease? A. Yes, with an option to buy.

Q. What, if anything, have you done on the property in the way of improving it since you have been in possession? A. I had it filled up to grade close up to the board walk and the city wouldn't let me make a return on the street, on

Archibald S. Lambert—Direct

Berkley Square, and the storm came along and washed all my material away, everything I had there

Q. Well, have you concreted it in any way? A. Yes; I have got a concrete bulkhead in there now, I mean the foundation of a concrete bulkhead, twelve feet in the sand. 10

Q. Where is that located? A. That is about one foot inside of the park act.

Q. By that do you mean inside of the present boardwalk? A. Yes, sir. The city park act calls for four feet inside of the boardwalk, I think, I don't know.

Q. Does this bulkhead which you speak of run the full width or depth of the property? A. 165 feet. 20

Q. And did the bulkhead run on Berkley Square any distance? A. Well, yes.

Q. What distance on Berkley Square? A. About one hundred and fifteen feet, ten or fifteen feet.

Q. At what cost have you made these improvements?

Mr. Starr: Objected to as immaterial, if your Honor please.

The Vice Chancellor: I think it may be.

Q. What did these improvements cost you? A. I have spent so far about \$15,000. 30

Q. That is in the actual improvement on the ground? A. Yes.

Q. Now, have you a building on the ground? A. Just a storage place there for my material, that is all.

Q. What is the size of it? A. 20 by 40.

Q. How long has it been there? A. Two years and over. 40

## Archibald S. Lambert—Cross

Q. Has any one else been in possession of the property during the four years but yourself? A. Nobody but myself.

Q. And what was the purpose of this bulkhead?  
A. Concrete bulkhead?

10 Q. Yes. I say, what was the purpose—why did you put it there? A. Why, I put it there with the intention of filling this street in and getting access to my property so I could improve it.

Q. Did you design to fill it up to the level of the street, do you mean? A. Yes, sir.

Q. That was your object, was it? A. That was my object.

Q. To whom has this property been assessed during the last four or five years?

20 Mr. Starr: I object.

The Vice Chancellor: I think that is immaterial unless it is set up in the bill.

Mr. Cole: Well, it isn't in the bill I won't press it, Judge.

## CROSS-EXAMINATION by Mr. Starr:

Q. Mr. Lambert, when did you say you first undertook the improvement of this property? A. About three years ago, I guess, as near as I can  
30 come to it.

Q. And at that time you had an option of purchase from Mr. Turner, did you not? A. Yes, for which I paid a thousand dollars.

Mr. Starr: I move that be stricken out as not responsive.

The Vice Chancellor: Yes, that is not responsive.

40 Q. I show you what purports to be a photograph of the property: Do you recognize that?

## Archibald S. Lambert—Cross

A. That is the block of land running from this avenue to Berkley Square (indicating).

Q. The run there or boardwalk is Millidgeville Avenue, isn't it, in the centre (indicating)? A. That is Kingston Avenue.

Q. It was formerly Millidgeville, was it? A. It 10  
used to be and was changed.

Q. Changed to Kingston? A. Yes.

Q. And the next street below is Berkley Square?  
A. Yes.

Q. And the house in white, in the center of the picture—is that the one occupied by Mrs. Vare?

A. I presume so.

Q. And does this picture show the building that you have there? A. It does.

Q. And also the sign? A. Yes. 20

Q. Property on Millidgeville Avenue? A. Yes.

Q. I show you another picture: Do you recognize that? A. Yes, I do; that is the approach to Berkley Square.

Q. The elevated boardwalk is the approach to Berkley Square? A. Yes.

Q. And the building is shown there (indicating)? A. Yes.

Q. And the white house on the left is the Vare property? A. I think so, I am sure. 30

By Mr. Cole: Q. This sign on one photograph: Did you put that up? A. I had that put there.

Q. How long has that been there? A. Oh, over two years and a half, I guess.

Q. What are these lying on the ground here (indicating)? A. Concrete piling.

Q. Is that the same kind that is used in this block? A. Yes. 40

Archibald S. Lambert—Cross

Q. This photograph shows the bulkhead, doesn't it? A. No, that is sand beach.

Mr. Cole: All right. We will offer those photographs.

(Said photographs marked Exhibits C-3 and C-4, respectively.)

10 Mr. Starr: I have some more photographs, Judge Cole.

By Mr. Starr: Q. Mr. Lambert, when you began to improve this property you built a bulkhead consisting of piling and sheathing in the center of Berkley Square, did you not? A. Yes.

Q. And subsequently that was destroyed by a storm? A. No.

Q. Well, it was partially destroyed, then? A. 20 Yes.

Q. As shown in this picture? A. Yes.

Q. This picture I now show you shows the piling running— A. To Berkley Square.

Q. Longitudinally? A. Yes.

Q. In the middle of Berkley Square? A. Yes.

Q. And it shows the bulkhead running at right angles to Berkley Square? A. I didn't complete that bulkhead on the property line, inside of the approach, I made a temporary return in there to 30 protect my material, I didn't touch this (indicating), see; I didn't fill that; I didn't put in any sheath block.

Q. The white house is the Vare property? A. Yes.

Q. And that is a picture after the storm occurred? A. No; that is before the storm.

Q. Before the storm? A. I think so, because 40 all of this washed down (indicating), the piling all broke off the front of it.

Archibald S. Lambert—Cross

Q. Well, didn't you fill it in? A. No, I didn't fill that in.

(Said photograph marked Exhibit C-6.)

Q. Now, I show you another photograph, which is marked "December 11th, 1914, at 3:30 p. m. H. B. Smith, Photographer." Do you recognize that? 10

A. That was after the storm.

Q. That was after the storm, was it not? A. Yes.

Q. And the bulkhead was washed away? A. Yes.

(Said photograph marked Exhibit C-7.)

By the Vice Chancellor: Q. Is this bulkhead of yours parallel with the boardwalk? A. Parallel with the boardwalk, yes.

Q. And also runs landward in the direction of Berkley Square? A. No, Dr. Thompson won't let me make a return, he forbid me putting in sheathing block in the middle of the street, and I just made a temporary return there, you know, to protect my piling, and the storm came along and washed it all away. 20

By Mr. Starr: Q. Now, I show you another picture, dated "December 11th, 1914, 3:30 p. m. H. B. Smith, Photographer." Do you recognize that? A. Yes.

Q. That is after the storm, was it not? A. That was after. 30

Q. And it shows the washing away of the piling, doesn't it? A. Sure.

Q. And that looks in a northeasterly direction, does it not, from about a point at the boardwalk and Berkley Square? A. This is Kingston Avenue (indicating). 40

Estell D. Rightmire—Direct

Q. Yes, along there. You are looking towards Kingston Avenue, aren't you, in this picture? A. Towards Kingston Avenue.

(Said photograph marked Exhibit C-8.)

10 Q. Now, I show you another photograph which is marked "December 11th, 1914, 3:30 p. m. B. Smith." Do you recognize that? That is looking directly up the beach from a point below Berkley Square, is it not? A. That is looking towards Berkley Square, down.

Q. You mean up, don't you? A. Up.

Q. You see the concrete steps? A. Yes.

Q. They are at the foot of Berkley Square, are they not? A. Yes.

(Said photograph marked Exhibit C-9.)

20

Mr. Cole: The answer admits the defendant's claim and also says there is no suit pending, so that is our case.

Mr. Starr: We will proceed, then, with our proofs?

The Vice Chancellor: Yes.

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### Case for defendant

30

Mr. Starr: It is conceded, if your Honor please, that the source of title in both parties is Hannah Kelley, that both claim through Hannah Kelley.

40

ESTELL D. RIGHTMIRE, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

## Estell D. Rightmire—Direct

By Mr. Starr: Q. Mr. Rightmire, what is your occupation? A. Civil engineer and surveyor.

Q. Are you located in Atlantic City? A. Yes, sir.

Q. I show you a map which is marked "Map showing property south of Atlantic Avenue between Berkley Square and Kingston Avenue, Atlantic City" and I ask you whether or not you made this plan? A. I did. 10

Q. And did you make the measurements which are shown on the plan? A. I did.

Q. It shows Atlantic Avenue, does it not? A. Yes, sir.

Q. Berkley Square and Kingston Avenue? A. Yes, sir.

Q. And is this map made to a proper scale? A. It is. 20

Q. From measurements made by you? A. It is.

Q. Have you delineated in red the property which is claimed by the defendant, Mrs. Vare, in this case? A. I have, yes.

Q. Beginning where? A. 236 feet south of the south side of Atlantic Avenue.

Q. And extending how far southward? A. Southward to the interior line of the park.

Q. And then how deep is the lot, running it from Berkley Square? A. 82½ feet. 30

Q. And does the rear of the lot, parallel with Berkley Square, extend to the interior line of the park? A. Yes, sir.

The Vice Chancellor: That is the land described in the bill?

Mr. Starr: That is all the land claimed by Mrs. Vare. 40

The Vice Chancellor: In your answer?

Mr. Starr: No.

Estell D. Rightmire—Direct

The Vice Chancellor: That is the land that the bill is filed to quiet the title to?

Mr. Starr: No; the bill is filed to quiet the title from here to there (indicating). This is all of the Vare property included under all of the deeds.

10 Q. Now, have you delineated on this map, surrounded by yellow, the location of the Vare house?

A. Yes, sir.

Q. Is that shown here, No. 137? A. That is, yes, sir.

Q. I notice on this map, "High Water line December 30th, 1901, 251 feet to the south of Atlantic Avenue." Have you any personal knowledge of the location of high water line at that time? A. No, sir, I haven't.

20 Q. That was put on the map arbitrarily by you? A. From information given me.

Q. Yes, but you have no personal knowledge of it? A. None whatever.

Q. I notice a parallel line, "Hannah E. Kelley, bulkhead, 275 feet south of Atlantic Avenue." Now, is there a bulkhead at that point at the present time? A. There is a bulkhead running through the properties.

30 Q. Now, where does that begin and where does it end at the present time, or when you made this map? Do you remember when you did make the map,—the measurements? A. I made the measurements sometime in the latter part of January, I think.

Q. Of this year? A. Yes.

40 Q. (Repeated) Now, where does that begin and where does it end at the present time, or when you made this map? A. Well, I did not follow it

## Estell D. Rightmire—Direct

all the way through from Berkley Square. I followed it from a line 82½ feet east of Berkley Square to the easterly line of Kingston Avenue.

Q. Well, now, is that bulkhead there at the present time? A. Yes.

Q. Between those points? A. Yes.

Q. And what is the character of the bulkhead? 10

A. It is a wooden bulkhead.

Q. Yes? A. Wooden sheathing, wooden sheath piling, and pine piling.

Q. And did you measure the distance from Atlantic Avenue to that bulkhead along Kingston Avenue? A. Yes, sir.

Q. And what is the distance? A. 275 feet.

Q. And do you know whether or not it runs parallel with Atlantic Avenue towards the west, towards Berkley Square? A. Practically so. 20

Q. Does that bulkhead extend any further west at the present time than the easterly line of the Vare property? A. I couldn't see that it did. There is a yard there at the present time.

Q. Now, I call your attention to the words "Bulkhead," which I will mark A. B. and C., and ask you whether or not there is a bulkhead there? A. It is.

Q. And of what material is that? A. It is a wooden bulkhead. 30

Q. About how high? A. It is about the property elevation or street grade.

Q. Now, is that bulkhead along the easterly line of the Vare property for some distance? A. It is up to the line of the old Hannah Kelley bulkhead.

Q. Now, that extends from A. to what point? A. To B. A. to B.

Q. A. and B. on the map? A. Yes. 40

## Estell D. Rightmire—Direct

Q. And from B. and C. on the map where does the bulkhead extend? A. It extends down to the boardwalk approach, the westerly side of the boardwalk approach.

Q. And is that in front of the Vare property?  
10 A. Yes, or on the southerly side of the Vare property, Vare house.

Q. And can you say whether or not that bulkhead is substantially at right angles to Berkley Square? A. Practically so, yes.

The Vice Chancellor: The B. and C. part of it is.

Q. The B. and C. part? A. Yes.

Q. Now, there is a concrete bulkhead marked on this map. Did you measure the distance from Atlantic Avenue to that concrete bulkhead? A. I  
20 located that from the Vare bulkhead.

Q. Well, how far is it from Atlantic Avenue?  
A. 310 feet.

Q. And that extends from a point marked D. toward the west? A. Westwardly, yes.

Q. And does it extend across the end of Berkley Square? A. It does.

Q. And further west in front of the other properties in that locality? A. It extends down as far  
30 as Jackson Avenue.

Q. I notice some parallel lines with a circular line in front at the foot of Berkley Square. What does that indicate? A. That is concrete steps?

Q. Ornamental steps, approach to the beach?  
A. Ornamental steps, yes.

Mr. Starr: This question is not strictly  
40 in our case but I thought I would use Mr. Rightmire rather than recall him.

## Estell D. Rightmire—Direct

Q. Did you make any observations with reference to the location of high water line about the first of September, 1909? A. Yes, sir.

Q. What observation did you make then? A. I made observations in 1909, from the middle of August up to September first.

Q. And where did you find the ordinary line of high water to be at that time extending from Kingston Avenue westwardly in front of the Vare property, or from the Vare property, what is now the Vare property, up to Berkley Square? A. I can give you the date. August 14th, 1909, high water is 276 feet south of Atlantic. August 16th, 1909, 275 feet south of Atlantic. This was mean high water. 10

By the Vice Chancellor: Q. I have that right, have I? August 14th, 1909, 276 feet south of Atlantic Avenue reached high water mark on that day? A. Yes, sir. 20

Q. Now, the next date you gave was what? A. August 16th, 275 feet south of Atlantic.

Q. Right. A. On the 17th, 275 feet south of Atlantic. On the 18th, 305. On the 19th, 305. August 27th, 310. August 28th, 310. August 29th, 310. August 30th, 310, in the morning, and in the afternoon it was 290. And the 31st it was 290 south of Atlantic. On September 1st, 290 south of Atlantic. 30

Q. Was that 290 a. m. or p. m.? A. I haven't recorded it here. On the 31st it was in the a. m.

Q. Now, September 1st how much? A. 290. That is all the observations I made.

Q. Let me see the point you measured down from? A. From the south side of Atlantic Avenue.

Q. At Kingston? A. At Kingston Avenue, yes. 40

By Mr. Starr: Q. Now, what did you observe with relation to the general location of the line

## Estell D. Rightmire—Cross

from Kingston to Berkley Square? A. Why, the line was practically the same, of course irregular—the line was practically the same all along the beach at that particular point.

10 Q. And did that regularity continue as far as Berkley Square towards the west? A. Yes, it even extended further.

Q. The line of the high water there is practically straight? A. Practically straight at that time.

Q. Now, subsequently Mr. Lambert filled in in front of these properties, did he not? A. Yes.

Q. Bulkheaded and filled in? A. Yes, it has been filled in by some one.

## CROSS-EXAMINATION by Mr. Cole:

20 Q. What was the occasion of your making these observations in August? A. Why, Mr. Reichner at that time asked me to make observations, I suppose to get a—I don't know what for, any way I made a map.

Q. You mean Mr. L. Irvin Reichner? A. Yes, sir.

Q. At that time did he own the property that Vare now lives in? A. I don't know whether he did or not.

30 Mr. Starr: I object to that.

The Vice Chancellor: It may be competent to show interest.

A. (Continuing) He lived somewhere on Berkley Square.

Mr. Starr: Whether the man owned it or not will depend upon the deed in evidence.

40 The Vice Chancellor: He is trying to find out from cross-examination what interest he is representing.

## Estell D. Rightmire—Cross

Mr. Cole: Not only that, a man may own property without a deed. I have known that thing to happen.

The Vice Chancellor: I think it is competent to show whose interest he represented.

Q. (Repeated) At that time did he own the property that Vare now lives in? A. I don't think he lived in the Vare house at that time. 10

Q. You were making these observations for Mr. Reichner, weren't you? A. Yes, sir.

Q. Mr. Reichner? A. Yes, sir.

Q. And did he tell you why he wanted you to make these observations?

Mr. Starr: Objected to, if your Honor please. Mr. Reichner isn't a party to this suit. 20

A. No.

Mr. Starr: We are not chargeable with anything he says.

The Vice Chancellor: He has already answered that he did not.

Q. Did you know for what purpose you were making these observations? A. I did not, no.

Q. Did you suspect?

Mr. Starr: I object to that.

The Vice Chancellor: I think it is competent. 30

A. I thought perhaps he wanted to have a map made showing the location of high water.

Q. Did you understand at the time there was some question about title that was going to be involved? A. No.

Mr. Starr: Objected to, on the ground we are not bound by anything Mr. Reichner may have done. 40

## Estell D. Rightmire—Cross

The Vice Chancellor: I think it affects the work of the witness—what he thought he was doing it for. I think it is competent.

Q. Did you have anything in your mind at the time you made these observations as to the reason  
10 for having them made? A. No, sir; I never inquired, I didn't know just what he wanted it for.

Q. How long was it, if at all, before you were making these observations for Mr. Reichner that you made observations as to the location of high water line in front of this property? A. I never made any observations prior to that time.

Q. At that time were you the city engineer? A. 1909, yes.

Q. Do you know what became of your map? A.  
20 That is, of the location?

Q. I understand you made a map for Mr. Reichner? A. I gave it to Mr. Reichner.

Q. You gave it to him, did you? A. Yes, sir.

By the Vice Chancellor: Q. That showed high water mark where you found it,—at 310, whatever it was? A. 290 south of Atlantic.

Q. That is, you located it as a straight line at 290? A. Yes, sir; these irregular lines shown on this particular map.

30 Q. Well, you called it 290? A. Yes, sir.

By Mr. Cole: Q. Do you know Messrs. Ashmead & Hackney? A. Yes, sir.

Q. Civil engineers? A. Yes, sir.

Q. Did you ever see their map showing high water line during the same period? A. No, sir.

Q. Never saw it? A. No, sir.

Q. Did you know that they were making observations at the time you were? A. No, sir.  
40

Q. Never heard of it before? A. No, sir, never did.

## Estell D. Rightmire—Cross

Q. Didn't know that they were making observations and made a map of the high water line July 28th, 1909? A. No, sir.

Q. Now, how far from Atlantic Avenue is the bulkhead at right angles to Berkley Square? A. 314 feet.

Q. It is 314 feet south of Atlantic? A. 314 feet south of Atlantic.

10

The Vice Chancellor: Where would your 290 be on this map?

Mr. Starr: It is marked there (indicating).

Q. This bulkhead which runs parallel with Berkley Square beginning 314 feet southwardly, does it actually tie up to the Hannah E. Kelley bulkhead? A. So far as I know it does.

20

Q. Well, but did you observe whether it did in fact? A. No, I did not.

By the Vice Chancellor: Q. How did you go to work to locate high water mark? How do you do that? A. Why, we begin and measure from the property lines on the south side of Atlantic Avenue to where the high water has come during that day.

Q. What arrangement do you make with reference to the tide? Do you measure at the time the water is at its highest or do you locate high water by finding the marks on the sand where the tide has been? A. We find where the tide has been.

30

Q. How can you tell which day the marks which you measure to were made, whether on the day that you are measuring or on some prior day? A. Well, I made the observations soon after the tide receded.

40

## Estell D. Rightmire—Cross

Q. Each day you went there after the tide had receded? A. Yes, sir.

Q. And sufficiently near the time of the beginning of the recession to know which mark it was the tide of that day had made? A. Yes, sir.

10 Q. Because there may be, may there not, a series of marks? If each succeeding day high water mark is a little lower it leaves on the beach a series of high water marks, doesn't it? A. You will see that; yes, sir.

Q. And you were able to tell which of these was made on the day of the measurement, were you? A. Yes, sir.

20 Q. Now, which high water would you select? The high water of the morning and high water of the evening aren't always the same, are they? A. Not always; no, sir.

Q. One or the other is higher according to the time of the month? A. Yes, sir; also the moon.

Q. Now, how was it during this period that you were making these measurements? A. Why, I do not recall just what tide I took. Of course, I took the observation when it was most convenient for me to get down there to look it over.

30 Q. Very often the evening tide is very much higher than the morning tide, at other seasons of the year, the morning tide, as I understand it, will be very much higher than the evening tide. A. Yes, that is true.

Q. Now, do you know, as a matter of fact, which was the high high tide of these days? A. I don't; no, sir.

Q. Or the low high tide? A. No, sir; I don't.

40 Q. Well, now, with reference to the beach at this point where you located high water mark:

## Estell D. Rightmire—Cross

Was it very flat or is it a steep beach? A. It is very flat, sloping beach.

Q. And along that beach, running parallel with the ocean, how much would the marks of the high tide vary in distance from Atlantic Avenue? It would be a very irregular line, wouldn't it,—at some points running up into a little peninsula and at other points comparatively straight and at other points in a peninsula pointing in the other direction, according to the levels of the beach? A. Not on that beach, Judge, the beach was very flat. 10

Q. Can you give me a notion about how much variation there was on that beach at that time? A. I should judge it was three or four feet irregularity.

Q. That is, the highest mark, high water, on the level, wouldn't be more than three or four feet from the lowest high water mark? A. As near as I can recall at this time I would say so, because it was a very flat beach between Columbia Avenue and Jackson Avenue. 20

Q. Well, this irregularity of high water mark is due in part to— A. The elevation of the beach.

Q. The want of levelness of the beach, isn't it? A. Yes, sir.

Q. And it is also due in part to the circumstance of some swells washing up further on the beach at one point than swells do at others, is it not? A. Yes, sir. 30

Q. In other words, a big breaker will reach up further than a small one? A. Yes.

Q. And if several big breakers come in succession they will make a boy who is on the beach run to preserve dry feet where the small breakers won't? A. Yes, sir. 40

## Estell D. Rightmire—Cross

Q. Now, what I want to find out is how you tell where high water mark is? Is it where one of those washes comes in with unusual force and runs up on the beach or is it where others have not run up so high? A. Well, I always make the general—that is, make the measurement to the general line of the high water.

Q. That is, you average the points? A. Average the general line of high water; yes, sir.

Q. Well, did you make these on these given dates, at a given point, without reference to other points up and down the beach? A. At that time that is the only place I made the measurements.

Q. That was all at a given point? A. Yes, sir.

Q. On the strand? A. Yes, sir.

Q. Now, as a matter of fact, won't the water, the waves from the surf, wash up on the beach if the beach is very level very much further than the level of the ocean? A. It will if it is a big surf or a wind behind it.

Q. Now, did you allow anything for that? A. No. I don't recall whether the wind was south or whether it was west at that time.

By Mr. Cole: Q. Or east or northeast? A. Or east; no, sir.

Q. You paid no attention to the water? A. No.

Q. You can't remember at this time whether the surf was excessively high or not? A. It was very quiet during the time, that is, comparatively quiet.

Q. Have you any notion how far on a level beach such as that at this point the high water mark that is made by the water will be above the level of the ocean? A. That is, without any wind behind it?

## Estell D. Rightmire—Cross

Q. Take an average day. A. An average day, the average mean tide rises about—rises four feet.

Q. Rises what? A. Four feet above low water, on a level, that is the difference in the level of the tides between low water and mean high water, 10 four feet.

Q. I don't mean that. I mean, given a level beach about as there is at this point, and an ordinary sea, not a storm but just the ordinary breakers, I understand you to agree with me that the waves will by their force carry the water up on the sand to a level higher than the ocean. A. Yes, sir, it will.

Q. Now, how much higher? That is what I want to know. A. Well, I don't know just how much 20 higher it would go, it may go three or four feet, it all depends, of course, upon the height of the tide and the wind.

Q. Well, I am taking average conditions. A. Average conditions—why I should judge on a flat beach it would run up—well, I wouldn't like to say just how much because it would only be a guess.

By Mr. Cole: Q. Give us your judgment? A. Why, I should judge run up perhaps a hundred 30 feet.

By the Vice Chancellor: Q. A hundred feet in distance? A. Yes.

Q. How many in elevation, in height? A. The elevation, I don't know just how—I never observed that.

Q. What did you say was the average difference between high and low water mark? A. Mean 40 low water and mean high is four feet on the beach.

## Estell D. Rightmire—Cross

Q. On the ocean front? A. Yes. Storm tides have come as high as eight and four-tenths.

Q. And what distance did you say you thought the marks of the ordinary tide at this point would reach toward Atlantic Avenue more in some places than in others? Did you say two yards? I have forgotten what you said. A. I think I said two or three feet.

Q. Two or three feet? A. Yes. Of course, you know, in some places it may be more, but the average wouldn't—I don't think it would average on that beach at that time, before there were any obstructions there, more than perhaps two or three or four feet.

Q. Now, supposing you took two points on your Atlantic City beach at high water mark, distant the width of a block—that is how far here, about? A. Three hundred fifty feet.

Q. Three hundred fifty feet apart. Wouldn't high water mark be likely to be considerably nearer Atlantic Avenue at one point than it would the other? A. In some instances, yes.

Q. How much would that vary? A. Why, I have seen it vary here on the beach a hundred feet.

Q. At points 300 feet apart? A. Yes, sir.

By Mr. Starr: Q. At those points that you say you have seen the variation of that distance was the beach level or were there little slues? A. Well, it is where sand has been washed up. Take the upper end of the island at the present time, I think you will find places there at this time that comes in further at one place than it does at another in the same block.

Q. Do bulkheads, perhaps, have something to do with it? A. That has a great deal to do with it.

## Estell D. Rightmire—Cross

Q. These measurements that you made between Berkley Square and Kingston Avenue, did you attempt to measure the spots where the water reached those days? A. No, I just went down to high water at Kingston Avenue.

Q. Well, did you make these measurements to the extent to which the water came up toward Atlantic Avenue? A. I did, yes. 10

By the Vice Chancellor: Q. Let me ask you this, Mr. Rightmire, and I am not asking it for the purpose of curiosity but I think it may be material. I don't know whether you could give me any notion but if you can I will ask you to do so. I want to know how much further, in your judgment, on a beach of the flatness of the beach at this point where you took these measurements, the mark actually made by the high water on a given day would be up the beach, with a heavy surf and a strong wind blowing on the shore, than it would be with a light surf, on the same day, with a strong wind blowing off shore? In other words, how much further would the tide run up on the beach, the water run up on the beach? A. With a high tide and wind behind it I think it would have gone very much further at that time. 20

Q. I want to get an idea how much difference there would be with a heavy sea and wind blowing on the beach and a light sea and a strong wind holding the waves back? A. Why, it would be a number of feet but just how many I couldn't say. 30

Q. Couldn't form any notion? A. At times with the west wind our sea is very low, it doesn't run very far.

Q. Could you give me any idea how much difference there would be between one of those west 40

## Estell D. Rightmire—Cross

wind light sea tides and when you were having a strong wind and a heavy sea from the ocean? A. No, I could not. I think if we had had a strong sea with a strong wind behind it it would have gone over those bulkheads at that time, the Hannah  
 10 Kelley bulkhead, 275 feet south of Atlantic, without question.

Q. And with a west wind and high tide it would have been how much further out? A. I don't know whether at that time it would have been much further out, because I think the wind at that time was very quiet. It was in the latter part of August; I don't think there was any storms at that time, I am not sure, though, it is a good while ago, it is eight years or almost.

20 By Mr. Cole: Q. Does the book from which you read show any figuring? A. No.

Q. To get the average, or did you merely put the high water line in it? A. Just the high water as I observed it at that time.

Q. Did you do any figuring at all? A. No, I didn't.

Q. Did you have an idea when you were making these observations that Mr. Reichner's desire was to have the high water line as close to Atlantic Avenue as possible? A. I didn't have the  
 30 least idea what he was after.

Q. What did he say to you when he employed you?

Mr. Starr: I object.

The Vice Chancellor: I think it is competent.

A. Why, he asked me if I would make observations of the water line from Atlantic Avenue  
 40 during the month of August and I told him I would, but he didn't say for what purpose.

## Estell D. Rightmire—Cross

Q. That was all he said to you? A. Yes.

By the Vice Chancellor: Q. You didn't know whether it was to his interest or to the interest of the person who employed you to have it near or far? A. No, sir, I didn't know a thing about it.

By Mr. Starr: Q. Mr. Rightmire, with reference to the irregular lines of the water, did you take those into consideration in making the measurements in any way, by averaging or otherwise? A. No, I didn't take them into consideration. I just measured down to the high water line at that particular point.

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Mr. Starr: I offer in evidence map entitled, "Map showing property south of Atlantic Avenue between Berkley Square and Kingston Avenue, Atlantic City, N. J Scale, one inch thirty feet. E. D. Rightmire, Civil Engineer, Atlantic City, N. J."

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(Said map marked Exhibit D-1.)

By the Vice Chancellor: Q. We can probably tell by getting an almanac of those days, but perhaps you know what condition the moon was in at the time or about the time you were making these measurements? A. I do not.

Q. You don't know whether it was new moon or full moon or what? A. I don't at that time, but perhaps—Captain Jeffries is here, he is the fellow that makes the tides here in Atlantic City, he might be able to tell you.

30

Q. This is back a number of years and we can easily find it in an almanac, but do you know how much difference there is in a tide on the Atlantic City beach at the full of the moon when the moon and the earth are in apogee or when they are in

40

## Estell D. Rightmire—Cross

perigee, the scientific term is, I think? A. Anywheres from one to two or two and a half feet, probably; it all depends which way the wind is.

Q. In the elevation? A. Yes.

Q. Now, how much on the beach in distance? A.

10 Well, of course it would be that same elevation but how far it would run up—

Q. On an average beach, ordinary average shelving beach? A. It would run up a great deal further, just how far I couldn't say.

Q. But you don't remember what the moon was? A. No, sir, I do not.

Mr. Starr: I offer in evidence a certified copy of a deed dated December 31st, 1901, made by Hannah E. Kelley to John M. Hilton, beginning at the southwest corner of Atlantic and Millidgeville Avenue, and thence (1) southerly, in the westerly line of Millidgeville Avenue, 275 feet—

20

The Vice Chancellor: That would be, according to this map, at the Kelley bulkhead.

30

Mr. Starr: Thence (2) parallel with Atlantic Avenue 165 feet to the east line of a 50 feet wide street called Berkley Square; thence (3) northwardly, in the east line of Berkley Square, parallel with Millidgeville Avenue, 275 feet to the southerly line of Atlantic Avenue; thence (4) eastwardly, in the southerly line of Atlantic Avenue, 165 feet to the place of beginning. It is recorded January 6th, 1902, in book 268 of deeds, page 52.

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(Said paper marked Exhibit D-2.)

## John F. Ryon—Direct

JOHN F. RYON, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr : Q. Mr. Ryon, where do you live?  
A. Pleasantville.

Q. What was your business in the latter part of 1901? A. Real estate, in Atlantic City. 10

Q. Were you in partnership with anybody? A. Yes, sir.

Q. Who? A. Mr. D. L. Collins.

Q. Did the firm of Ryon & Collins have anything to do with the purchase of the tract of land from Mrs. Kelley between Berkley Square and Millidgeville Avenue, south of Atlantic Avenue?  
A. Yes. 20

Q. In whose name was title taken? A. John M. Hilton.

Q. I show you Exhibit D-2 and ask you whether or not that is a certified copy of the deed under which title was taken in the name of Mr. Hilton for Ryon & Collins? A. Yes.

Q. Do you remember how long before the execution of this deed, the 31st of December, 1901, the contract had been made with Mrs. Kelley for the purchase of that property? A. No, I do not remember the exact date. 30

Q. Well, approximately? A. Well, probably three months on a guess.

Q. Were you subpoenaed to produce a contract for the construction of a bulkhead between John M. Hilton and Wilbert S. Higbee, the bulkhead to be located between Millidgeville Avenue and Berkley Square? A. Yes, sir. 40

Q. Did you find such a contract? A. No, sir.

## John F. Ryon—Direct

Q. Have you made a search for it? A. Yes, sir.

Q. Do you know whether such a contract was made? A. Well, I would say yes.

Q. What say? A. Yes, there was a contract  
10 made.

Q. The contract was made between whom? A. I don't know, I don't know whether it was between Mrs. Kelley or someone else, I am not prepared to say.

Q. Well, have you made an examination among your papers to ascertain whether you have that contract? A. I haven't the contract; no, sir.

Q. Do you know what became of it? A. No, sir.

20 Q. When did you last see it? A. I don't remember.

Q. Do you know when the contract was made? A. No.

Q. Was it made before or after the property was conveyed, the 31st of December, 1901? A. It was made before the settlement was made, to be sure.

Q. The contract was made before the settlement was made? A. Yes.

30 Q. And the deed is dated the 31st of December, 1901, and it is acknowledged on the 2d of January, 1901. Do you know when the settlement occurred? A. Well, it was previous to—

Q. I mean January 2d, 1902, not 1901. Do you know when the settlement was made, by referring to those two deeds? A. Well, the settlement was made previous to January 6th, 1902, because the  
40 title policy was issued at that time.

John F. Ryon—Cross

Q. I see. Do you know how the contract for the bulkhead happened to be made? How did it come to be made? A. No, I don't remember the details in connection with it. It was on account of the storm, the old one was washed away and we was expecting to build there and we had to make a protection and we had a new contract made for the bulkhead. 10

Q. Did Mr. Higbee subsequently build a bulkhead? A. I think Mr. Higbee built the bulkhead, yes, sir. I don't know whether he made the contract or not but he was a party to it.

Q. Do you know when the bulkhead was actually built? A. No.

Q. Were you down on the ground while the bulkhead was being built? A. Yes, I was there while the bulkhead was being built. 20

Q. And Mr. Higbee was the contractor, was he? A. Yes, sir.

Q. Do you know whether or not Mr. Higbee had other men employed there? A. Yes, he did.

Q. Do you know who they were? A. Well, no, I just don't know who the workmen were excepting one, I know one who worked on it at that time.

Q. Who? A. Mr. Parsons, George L. Parsons.

Q. Did Ansley Bowen work on it? A. I think so, I am not sure of it. 30

CROSS-EXAMINATION by Mr. Cole:

Q. Mr. Ryon, are you sure that you saw a written contract for the building of that bulkhead? A. Well, I couldn't say that I saw a written contract, no, but I feel that there was one, that is the only thing. 40

Q. What I want to know is whether you ever saw a written contract for the construction of that bulkhead? A. I couldn't say.

## Ansley B. Bowen—Direct

ANSLEY B. BOWEN, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says:

10 By Mr. Starr: Q. Mr. Bowen, where do you live? A. At 106 South Cambridge Avenue, Ventnor City.

Q. And what is your occupation? A. Contractor and builder.

Q. In the latter part of 1901 what was your occupation? A. Why, I was foreman for W. S. Higbee.

20 Q. Did you have anything to do with the building of a bulkhead between Millidgeville Avenue and Berkley Square? A. Well, I had charge of the men that built the bulkhead, yes.

Q. Were you actually present when the bulkhead was built? A. Well, I was there when it started, I don't think I stayed there until it was finished.

Q. How far south of Atlantic Avenue was that bulkhead located? A. I couldn't say exactly; of course, I know we was given a line to build it.

Q. Who gave you the line? A. I think Mr. Higbee gave it to me.

30 Q. Have you been there recently to look at that property? A. Well, I haven't been there in two months.

Q. Not for two months? A. Yes.

Q. Is a portion of that bulkhead still visible? A. Yes.

Q. And is that the same bulkhead that you worked on? A. I think so; yes, sir.

40 Q. And where is that bulkhead visible at the present time? A. Just outside of Reichner's property.

Ansley B. Bowen—Direct

By the Vice Chancellor: Q. What year did you build it? A. Nineteen two.

By Mr. Starr: Q. Now, where is Reichner's property? A. On the west side of Kingston Avenue, or Millidgeville it was called then, about two hundred—I should judge two hundred and twenty-five feet south of Atlantic Avenue, something like that. 10

Q. Now, look at this map, Mr. Bowen. This is Kingston Avenue, this is Berkley Square and this is Atlantic Avenue (indicating.) Can you point on that map where the bulkhead which you say you built is now visible? A. Why, this must be it, right there (indicating.)

Q. Running from A. to E.? A. About to here (indicating) is where it is visible.

Q. Runs from the west side of Kingston Avenue to the Vare property, does it not? A. To the Vare property, yes. 20

Q. Now, what part of 1902 was that actually built? A. That was started in March, I think, of 1902.

Q. Who worked on the bulkhead? Do you remember the names of the persons? A. Why, I remember two of them—three of them, three men I remember that worked on it. 30

Q. Who were they? A. Why, George Parsons was one, Joe Eastlack and my brother.

Q. Did Stephen Williams also work on it? A. Yes, he drove the piling.

Q. Well, now, while that bulkhead was being built did you have any trouble with water coming in there? A. Yes, at the spring tides we did, yes. 40

## Ansley B. Bowen—Direct

By Mr. Cole: Q. How is that? A. At spring tides we did, that is, we couldn't work right on top of the tides when there was spring tides.

Q. At spring tides? A. Yes.

By Mr. Starr: Q. How far inside of the bulkhead did the tide come? A. I should judge twelve  
10 feet, twelve or fifteen feet, it would run up on the beach twelve or fifteen feet.

Q. Could you work there at the top of the tide? A. Not when the tide was running the fullest, no.

By the Vice Chancellor: Q. You said the tide would at times run twelve or fifteen feet above the line of your work? A. It would run up on the beach that far, you know, inside of the line of  
20 bulkhead.

Q. That is what I mean: It would run shoreward twelve or fifteen feet of where you were locating the bulkhead? A. Yes.

Q. And did I understand you to say that you could not work there at the top of the tide any day while you were working? A. No, I think there was some days we could, because the tide came fuller some days than others.

By Mr. Starr: Q. Well, after the bulkhead was  
30 built can you say whether or not the ordinary high tide washed the bulkhead, touched it, reached it? A. Every tide, you mean?

Q. Ordinary high tide. A. Well, I wouldn't say it would, no, not every one. There was times, according to the size of the moon, that the tide would be fuller than it would at other times, but I wouldn't say every high tide came to that bulkhead, no, I wouldn't say that.  
40

## Ansley B. Bowen—Direct

Q. Well, would the average tide come there? A. Well, I wouldn't say it would.

By the Vice Chancellor: Q. You wouldn't, you say? A. I wouldn't, no.

By Mr. Starr: Q. That bulkhead was built from where to where? A. That bulkhead was built from Bartram Avenue to Berkley Square.

10

Q. How long did it take you to build the bulkhead? A. Before it was completed?

Q. Yes. A. Why, I don't just remember but I know quite a long time, because they had the engine just outside of the bulkhead that was pumping water and it came a storm before they got the bulkhead down and it washed this engine down. I think it was probably three months, two or three months before it was completed.

20

Q. Do you remember whether the men worked in boots at the ordinary high tide? A. Well, I wouldn't say the ordinary high tide but they had boots on all the time, that is, the people putting piling in.

Q. After the bulkhead was finished what was done with reference to the inside of the bulkhead toward Atlantic Avenue? A. It was filled in.

Q. Who did that? A. John Leeds, I think, did that.

30

Q. John Leeds? A. Yes.

Q. And when was that done? A. That was done the following spring or summer.

Q. Do you know whether or not any piling or brush was put on the outside of that bulkhead to protect it? A. I think there was about ten or twelve feet out.

Q. Outside? A. Yes, they drove a few piling there.

40

Ansley B. Bowen—Direct

Q. And when was that done? A. Well, that was done, I should say, the summer after the bulkhead was completed.

Q. That was the summer of 1902? A. I think it was.

10 Q. When did you first become acquainted with that beach along there? A. Well, we started a house there just before that bulkhead was built.

Q. started a house in 1901, did you not? A. Yes, in the fall of 1901.

Q. Fall of 1901? A. Yes.

Q. Now, were the conditions in 1901, so far as the location of high tide was concerned, about the same as they were when you started the bulkhead at that point? A. I should say so; yes, sir.

20 Q. Just about the same? A. About the same.

By the Vice Chancellor: Q. What house did you build? A. A house on Kingston Avenue, the first one that was built there on the upper side, I think it is 109, I should say, South Kingston.

By Mr. Starr: Q. That was built for whom? A. That was built for Hilton, John Hilton.

Q. Do you remember whether there was a date on that house when it was built? A. There was.

30 Q. What was the date of it? A. I think that was "1902." I wouldn't be positive about that.

Q. You are not sure about that? A. I am not, though I think it was 1902.

Q. You began the house in 1901, you say, in the fall? A. Yes.

Q. And how far away from the place where the bulkhead was built was this house located? A. About eighty feet, that is, the south side of the house.

40

## Ansley B. Bowen—Director

Q. Yes. And what have you to say as to the conditions of the shore along there, between Berkley Square and Kingston Avenue? Is there any difference in the line of the high water? A. Not much.

Q. Is it about the same? A. Not much where the high water came along up there. Of course, it may be a little higher beach in some places but I didn't notice that. 10

Q. Now, you built the Vare house, did you not, too? A. Yes.

Q. You were the contractor for that? A. Yes.

Q. Do you remember when the Vare house was built? A. The Vare house was built in 1909; I think it was finished in 1910; the contract was signed in 1909, I think, finished in 1910. 20

Q. In doing that did you build a bulkhead around it—in building that house? A. Yes.

Q. Did you locate the bulkhead which you built then on the map? A. Here, (indicating) I think.

Q. That is from A. to B. and to C.? A. I think I took in here over to this point (indicating.)

Q. From A. to B. and C. and across Berkley Square? A. Yes.

Q. Now, what became of the Hannah Kelley bulkhead when you built the Vare house,—at least that portion of it which was on the Vare property? A. We cut it out of the way, that is, so we could put the piling and the foundation in for the Vare house. 30

Q. Where did that old bulkhead run so far as the Vare property was concerned? A. It run right through the Vare property.

Q. Right through the Vare house? A. Yes. 40

## Ansley B. Bowen—Cross

Q. And you took that bulkhead away when you built the house? A. Part of it; this part of it is covered up there (indicating.)

10 Q. Do you remember when you were building the Vare house whether you found any brush or piling under that house? A. Well, we would strike something where we would sink the piling down, we didn't see what it was; that is, it would take quite a while for to put some of the pile down, there was some friction.

Q. You spoke a moment ago about brush and piling that was placed outside of the Kelley bulkhead. Where did that brush and piling extend,—from where to where? A. That was about twelve feet outside of the old bulkhead and extended  
20 from street to street. I would not be so positive it ran all the way to Bartram Avenue.

Q. From Kingston Avenue to Berkley Square? A. Yes.

Q. Now, after the bulkhead was finished how far up on the bulkhead did the water come at high tide? A. After it was finished?

Q. Yes. A. You mean when the—

Q. The old bulkhead, the Kelley bulkhead. A. I couldn't say; I know the spring tides washed up  
30 against it.

Q. Came up to it? A. Yes.

## CROSS-EXAMINATION by Mr. Cole:

Q. Mr. Bowen, you speak of men working in boots. They work in boots to drive piling irrespective of tide, don't they? A. Yes.

40 Q. Now, just what was your relation to the Hannah Kelley bulkhead? What were you there for? A. Why, I had charge of the men that built

## Ansley B. Bowen—Cross

the bulkhead, that is, the carpenters that cut the string pieces and the sheath piling.

Q. Were you there on and off from the time the work was begun until it was completed? A. I wouldn't say completed, I was on and off until the piling was most all in, and they had that storm tide and I think I was moved somewhere else when they had that storm tide. 10

Q. How long had you been at this work when this storm tide you speak of came along? A. I think that the sheath piling and the piling were about half in.

Q. And speaking of the storm tide, you mean a high northeasterly wind? A. Easterly wind, yes.

Q. An unusual storm, wasn't it? A. Yes.

Q. And, as I understand your testimony, an ordinary high tide did not come up to that line of that bulkhead, it was the spring unusual tide, wasn't it, that did that? A. Well, certain run of tides, when there was a full moon most all the tides would run up to the bulkhead, I should say ten or fifteen feet inside of the bulkhead, run up on the beach, so that a man couldn't work there with shoes on, our carpenters all—that you know, of course—they didn't wear boots and right on the high water they wouldn't work. 20

Q. What do you mean when you speak of spring tides? A. Well, when the moon is full the tide runs fuller than what they did— 30

Q. In other words, when the conditions were unusual the tides would approach that bulkhead—is that right? A. Yes.

Q. But with normal conditions the tide wouldn't touch it? A. I wouldn't say that, I don't just remember; I wouldn't say it wouldn't or it would. 40

## Ansley B. Bowen—Cross

Q. Can you tell us when that work was completed? A. The bulkhead?

Q. Yes. A. The exact date?

Q. Yes. A. I could not.

10 Q. Now, after you left there in 1902, having finished the Hannah Kelley bulkhead, did you pay any attention to the condition of the tide until you went back in 1909 to build the Vare house? A. Oh, yes, I built two houses between that time.

Q. Is it a fact or not that the ocean has been receding, going out, there ever since 1902? A. It has. I built two houses outside this bulkhead since that, before I built the Vare house.

Q. The ocean has been gradually receding ever since 1902, hasn't it? A. Yes, sir.

20 Q. How much further oceanward did you find the ordinary high tide in 1909 from what it was in 1902? Give us your best estimate. A. Well, I should say it was about 100 feet, 120, somewhere around there.

Q. It is more than that now, isn't it? A. Yes.

Q. And that has been gradual and continual, hasn't it, since 1902? A. Yes.

30 By Mr. Starr: Q. Mr. Bowen, isn't it a fact that while you were building the bulkhead around the Vare property the ordinary tide came up to that bulkhead? A. I don't think so.

Q. Well, were you troubled with water? A. No, I don't think so.

40 By the Vice Chancellor: Q. How did you put the piling down in building this Kelley bulkhead? A. Water pressure, they pumped in the ocean,—that is, they started that way, they couldn't complete it that way because it washed their engine away.

## Ansley B. Bowen—Cross

Q. The big storm, you mean? A. Yes, the big storm.

By Mr. Starr: Q. How deep were the pilings put down in this bulkhead? A. How deep down in the ground?

Q. Yes. A. I should say sixteen feet.

10

Q. And how high would the top of the pilings be above the surface of the sand? A. Oh, three foot six or four feet.

Q. And the sheathing was put how far in the sand? A. Well, I think we used 14 foot sheathing, four feet above the sand, about.

By the Vice Chancellor: Q. How is that? A. 14 feet long sheath piling, and they were four feet above the sand, and they would be ten foot in the sand.

20

By Mr. Starr: Q. The piling was four feet above the surface of the sand? A. Yes, about that.

By the Vice Chancellor: Q. And you went down how far into the sand with the sheathing? A. About ten feet, I think they used fourteen foot block.

Q. How would you be able to maintain a trench if the tide was coming up to your work? A. He was just asking me about the Vare.

Q. I thought he was asking about the Kelley.

30

Mr. Starr: I meant the Kelley.

A. The Kelley?

Q. The Kelley bulkhead. A. I think that sheath piling was shorter, I wouldn't say they were fourteen feet.

Q. How far did you go down in the sand there with your sheathing? A. Sheath piling?

40

## Ansley B. Bowen—Cross

Q. Yes. A. Well, I should say eight feet, but they did that with water pressure.

Q. Were they driven? A. No, water pressure, city pressure they used there until it washed their pump away.

10 By Mr. Starr: Q. You don't have to have any trench for that? A. No.

Q. And how high was the sheath piling above the surface of the sand on the Kelley bulkhead? A. I should say about three foot six.

By the Vice Chancellor: Q. Did you have to do any trench work at all? A. Not to amount to anything at all, they would probably dig a little trench to let the water run away where it wasted from their hose but they didn't dig no trench to get any piling down.

20 By Mr. Starr: Q. I show you a picture marked No. 5: Do you recognize that? A. Yes.

Q. What house is that marked A.? A. That is the first house I built.

Q. Where is that located with reference to the Vare property? A. Inside of the Vare property.

Q. Next to the Vare property? A. Yes.

Q. And the house marked B: What house is that? A. That is the house that Reichner did own at that time but Miss Reed owns it now.

30 Q. Is the Hannah Kelley bulkhead shown on that picture? A. That is the Hannah Kelley bulkhead, right there (indicating).

Q. Do you remember when you built the house marked A.? A. I think that was built about 1907, I wouldn't be positive about that, I think that was built in 1907.

40 Q. That picture was taken just about the time it was finished, wasn't it—because the dirt is thrown out of the cellar? A. Yes.

## Ansley B. Bowen—Cross

Q. It shows the dirt thrown out of the cellar, does it not? A. Yes.

Mr. Starr: I offer that picture in evidence.

Mr. Cole: What is the object of putting this picture in?

Mr. Starr: I want to identify it.

(Said picture marked Exhibit D-3 for identification.)

Q. I show you another picture marked No. 4: What does that indicate? A. That is the same. Whose property, do you mean?

Q. Yes. A. That is the same property.

Q. That is the same as the one marked A. in the other? A. Yes.

Q. Looking in a different direction? A. Yes.

Q. Does that show the Hannah Kelley bulkhead? A. Yes, sir.

Q. Does that run along the front? A. Yes, sir.

Q. And what is that on the outside? A. The piling I spoke about.

Q. And brush, too, on the outside? A. Yes.

Q. And both of these pictures show the physical conditions at that place at that time? A. I think they do as near as I can remember.

Mr. Starr: I ask that they both be marked.

Mr. Cole: What is the object?

Mr. Starr: To show the location of the bulkhead.

Mr. Cole: We already have that, it is 275 feet south of Atlantic Avenue.

Mr. Starr: It shows the physical conditions inside and outside of the Kelley bulkhead.

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## Ansley B. Bowen—Cross

Mr. Cole: Well, do you want to establish any fact as to any particular time by these photographs?

Mr. Starr: Yes.

Mr. Cole: Then I object to them going in.

10 Mr. Starr: Well, I will have this marked for identification.

(Said picture last shown to witness marked Exhibit D-4 for identification.)

By the Vice Chancellor: Q. Mr. Bowen, are you sure it was in 1902 you built the Kelley bulkhead? A. Yes.

20 Q. It couldn't have been 1903? A. No, it was 1902. I tell you why I am so sure of that: I saw the bill to-day where the lumber was shipped there, but I couldn't remember so well—I wouldn't say that if I hadn't saw the bill.

Q. Are you sure you got the right bill? A. I didn't have it, Mr. Higbee had the bill, he looked it up, because he wanted to refresh his memory.

By Mr. Cole: Q. Who looked it up? A. Mr. Higbee.

30 By Mr. Starr: Q. Do you know whether or not the bulkhead was being built at the same time you were building that Hilton house on Millidgeville avenue? A. It was started about the same time that was finished.

Q. I show you another photograph and ask whether you recognize that? A. Yes.

Q. What is that? A. That is Miss Reed's house.

Q. Is that the same house that is marked B. in D-3 for identification? A. Yes, it is the one marked B. here.

40 Q. Is the Hannah E. Kelley bulkhead shown in that? A. Yes.

## Ansley B. Bowen—Cross

Q. And what about the piling and brush on the outside,—is that shown? A. That is the piling and brush (indicating).

(Said picture marked Exhibit D-5 for identification.)

Q. Do you remember when you built that house for Mr. Reichner? A. The house marked B.? 10

Q. Yes. A. I didn't build it.

Q. You had nothing to do with it? A. No; I had nothing to do with that.

Q. Do you know when it was built? A. Not exactly, no.

By Mr. Cole: Q. Mr. Bowen, do you know how many bulkheads have been built between Atlantic Avenue and the ocean at right angles to Berkley Square? A. Two that I remember of. 20

Q. That is the Hannah Kelley and the Vare? A. Yes.

Q. You know of no other bulkheads? A. No. I don't think there has been any more built there until the one that Lambert started since that.

Q. You were a witness in the certiorari proceedings of Mr. Lambert against Atlantic City? A. I think I was, yes.

Q. Testified before the commissioner? A. One of the commissioners, yes. 30

Q. Now, I haven't your testimony before me but did you testify in that case that the ordinary high water did not strike the Hannah Kelley bulkhead? A. The ordinary high water?

Q. Yes. A. I don't think I did in that way, I don't think I did, but I don't remember about that, whether the ordinary high water did or not, I know the spring tide did. 40

Wilbert S. Higbee—Direct

Q. You don't recall having testified in that case that the high tide did not strike the Hannah Kelley bulkhead? A. What do you mean,—at the time—in 1902?

10 Q. Yes. A. No, I did not, I don't think I would have testified that way, because I was not sure of it.

Mr. Starr: I have his testimony here if you want to see it.

The Vice Chancellor: Well, it isn't there, Judge Cole. He wouldn't have passed you the book if it was.

Mr. Starr: He wasn't asked about that at all; he was called to testify with reference to the Vare bulkhead.

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WILBERT S. HIGBEE, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Mr. Higbee, where do you live? A. Atlantic City, 112 South California Avenue.

30 Q. And what is your occupation? A. Building.  
Q. What was your business in 1901? A. Building.

Q. Did you have anything to do with building the bulkhead that has been spoken of here as the Kelley bulkhead, between Millidgeville Avenue the Berkley Square? A. I suppose I did. It was known to me as the Hilton bulkhead.

40 Q. And with whom did you make the bargain to build it? A. The Ryon & Collins office.

Wilbert S. Higbee—Direct

Q. Was there a written contract with relation to it? A. I don't remember that there was.

Q. And do you remember when you made the contract to build it? A. I don't remember the date, no, sir.

Q. About when? A. About the first of March, 1902. 10

Q. And your dealings were with whom? A. Ryan & Collins.

Q. Which one of the firm did you see? A. I don't know. It was always the same thing, seeing either in dealing with them.

Q. Where was that bulkhead located? A. It run between Bartram Avenue—from Bartram Avenue to Berkley Square.

Q. And where is Bartram Avenue with relation to Kingston Avenue? A. That is the second avenue this way of Kingston Avenue. 20

Q. And what sort of a bulkhead did you build? A. It was a two inch planking with fourteen inch stripping over the joints and four by six top stringer nailed to it and a three by four at the bottom.

Q. Have you observed whether or not any part of that bulkhead is still in existence? A. I have, yes. 30

Q. And where is it that you can observe or can see it? A. I observed it just this side of the Vare cottage on through to the—I think to the street this side, first street this side.

Q. Running from the Vare cottage to Kingston Avenue? A. I believe so, I am not sure that it does all the way, but it does up near the Vare cottage and part of the way through the lot.

Q. Is that the same bulkhead you built? A. I take it to be the same. 40

Wilbert S. Higbee—Direct

Q. How do you know it was 1902 that you built the bulkhead? A. I find a bill for the material.

Q. You are satisfied that is the date? A. I am, yes, sir.

By the Vice Chancellor: Q. What makes you think so? How can you tell? A. Well, sir, I find  
10 a bill giving the items, the number of feet of lumber used in that bulkhead, March 8th, 1902.

Q. I am anxious you should not make any mistake, if possible. How do you know it was that bulkhead and not some other? A. I don't know of any other that I built at that time or near that time requiring that kind of material.

Q. Well, you built a bulkhead along there somewhere in 1903, didn't you? A. I might have, I  
20 don't just recall.

By Mr. Starr: Q. Do you remember what the contract price was for that bulkhead? A. I don't  
no, sir.

Q. I show you a bill, your bill to J. M. Hilton; it is dated June 10th, 1902. A. Yes, sir.

Q. Is the amount of the contract for the jetty that bulkhead? A. Yes, sir.

Q. Is that the item? A. I believe it to be.

Q. Read it, won't you? A. To contract on jet-  
30 ty, \$480.

Q. Is that the Kelley bulkhead? A. That must be, that was the only one that I built at that time.

Q. This is your bill to Hilton, is it not? A. It is; yes, sir.

The Vice Chancellor: That is dated what?

Mr. Starr: June 10th, 1902.

Q. And will you say whether or not that bill  
40 includes the contract price for the house on King-

Wilbert S. Higbee—Direct

ston Avenue that you were building at the same time for Mr. Hilton? A. It does, yes, sir.

Q. And where was that house located? A. On the upper side of Millidgeville Avenue, the east side of Millidgeville Avenue.

Q. Do you remember when you began the construction of that house? A. In the latter part of 1901. 10

Q. Was there anything on that house to indicate when it was built,—the date? A. There was a tablet, yes, sir.

Q. What was the date on that tablet? A. Well, I can't say, I don't know. If I were going to say I should say 1902.

Mr. Cole: Well, if you don't know I wouldn't say.

A. (Continuing) All right. I can't say. 20

Q. Did you ever build any other bulkhead for Hilton? A. No, sir.

Q. Or for Ryon & Collins? A. Not to my knowledge, no, sir.

Q. Now, what did you observe with reference to the tidal conditions at that point while that bulkhead was being built and before? A. Well, before I couldn't say, and I can only say as I recall the tides from the building of the bulkhead. 30

Q. Well, now, what did you observe with reference to that? A. Why, I recall that during the progress of the bulkhead we were building the cottage and there were at high tides times that the man couldn't work on the bulkhead and went back to the building to work.

Q. Why couldn't they work on the bulkhead? A. On account of the highness of the tide. 40

Wilbert S. Higbee—Direct

Q. And when was that bulkhead finished? Do you remember? A. I couldn't give the date of finishing; no, sir, I don't know.

Q. Will you state whether or not the high tide came inside of the bulkhead toward Atlantic Avenue? A. It did.

10 Q. How far? A. I should say as much as twenty feet.

By the Vice Chancellor: Q. That was the Hilton building? A. The Hilton bulkhead.

Q. No, but the building? A. The Hilton building; yes, sir.

Q. The building that they would work on when the tide interfered with work on the bulkhead was the Hilton building? A. Yes.

20 Q. Which bears the tablet? A. Which did, yes, sir; it is not on there now.

By Mr. Starr: Q. And is that the building that you were building at the same time— A. Yes, sir.

Q. —as the bulkhead was being constructed? A. Yes.

Q. Before you examined this bill for lumber what was your recollection as to the time when the bulkhead was built? A. My recollection was that it was built during the time of the cottage but that it was requested that it should be completed so as to make settlement with the settlement of the cottage.

30 Q. As to the time, you can't remember whether it was 1901 or 1902? A. The completion to my mind was 1902.

Q. Have you any knowledge of the tidal conditions in that neighborhood prior to 1902, when 40 this bulkhead was built? A. I couldn't recall it.

Wilbert S. Higbee—Direct

Q. While you were building the house on Millidgeville Avenue did you observe how far the tide came up at the foot of that avenue? A. Not particularly, no, sir.

Q. After the bulkhead was finished did you observe how high the tide came up on a level with the outside of the bulkhead? A. During the summer following the bulkhead being finished I noticed that the sand gathered next to the bulkhead. 10

By the Vice Chancellor: Q. You noticed what? A. The gathering of the sand against the bulkhead.

By Mr. Starr: Q. You mean the resistance of the bulkhead caused the gathering of the sand? A. Yes, sir.

Q. Who filled in the sand back of the bulkhead, do you remember? A. I believe John Leeds. 20

Q. Before the sand gathered how far did the water come up on the outside of the bulkhead? A. I couldn't say positively.

Q. Was there any difference in the location of high tide along that beach at that point,—about the same or not, at Kingston Avenue and Berkley Square? A. My recollection is that it came up just a little further at Berkley Square than it did at Kingston Avenue. 30

Q. What do you mean by "a little further"? A little further towards Atlantic Avenue? A. I mean that the beach seemed to run on a diagonal line, running out a little further at Kingston Avenue. 30

Q. Well, do you mean by that that the high tide was nearer Atlantic Avenue at Berkley Square than it was at Kingston Avenue? A. Yes, sir; that is my recollection. 40

Wilbert S. Higbee—Cross

Q. And was that about the time the bulkhead was being built? A. Yes, sir.

Q. Do you remember the names of some of the men who worked on the bulkhead for you? A. I remember Richard Bowen, I don't think I recall any others positively.

10 Q. Well, did Ansley Bowen work on it? Did he have charge of it? A. He was working at that time—I think as soon as that started that he went to another job.

CROSS-EXAMINATION by Mr. Cole:

Q. Mr. Higbee, which was begun first,—the Hannah Kelley bulkhead or the cottage of Hilton? A. The cottage.

20 Q. Which was first completed? A. I couldn't say. I believe the bulkhead.

Q. How long had you been at work on the cottage before the bulkhead work was begun? A. I think two months or two and a half.

Q. Now, do you recall the storm that came along and did some washing out? A. Yes, sir.

Q. Did that occur more than once during the time that you were working there? A. How is that?

(Question repeated).

30 A. I don't remember more than once. We might have had continuous high tide, but there was a time when the engine outside of the bulkhead washed down.

Q. Were you there daily during the progress of the work? A. Yes, sir.

40 Q. From beginning until the close of it? A. I believe so.

## Wilbert S. Higbee—Cross

By the Vice Chancellor: Q. Was the engine that you used on this bulkhead work for pumping your water located outside of the location of the bulkhead? A. Yes, sir:

Q. How far towards the ocean? A. I should say twenty-five or thirty feet. 10

Q. How was that located? How was it secured? A. I think there were posts or piling with cross strips nailed and planking laid over that and the engine sat on it, I believe, I am not sure as to that.

Q. Can you tell at this time with accuracy how far, if at all, it was above the level of the sand where it was located? A. I should say three feet.

Q. And 25 yards out? A. 25 feet.

Q. 25 feet out? A. Yes, sir. 20

Q. What sort of an engine was this? Did it include a boiler and fire box? A. An upright boiler, as I would call it, with a fire box underneath.

Q. Well, the fire box, then, would be at the bottom of the— A. Yes, sir.

Q. —of the iron structure? A. Yes, sir.

Q. And that would be setting on wood work about three feet above the level of the sand? A. Yes, sir.

Q. So that any sea that should come under your work if it was three feet above the sand would put out your fire, wouldn't it? A. If it was a rough sea it naturally would. 30

Q. I mean if it was three feet above the sand? A. A smooth sea wouldn't, no, a storm would.

Q. I thought your fire box was only three feet above the level of the sand? A. That is what I said; yes, sir.

Q. Well, the water would come into your fire box if it was that high? A. Well, I don't think so, necessarily. 40

## Wilbert S. Higbee—Cross

Q. Well, how high was the fire box above the level of the sand? A. Well, say three feet.

Q. Why wouldn't water come in it if the water was three feet above the level of the sand? A. Well, of course, I wasn't talking about the water being three feet above the level of the sand, but at this particular time the engine was washed down it was washed off of its foundation, it all went down in the sand.

Q. Well, what I was really thinking of was this,—and you can perhaps straighten me out on the thing: That if an ordinary high tide was interrupting your workmen on this bulkhead so that they would have to knock off and go and work on the Hilton cottage,— A. Yes, sir.

20 Q. Wouldn't the seas, if they were seas of any size at all, be pretty near up to the fire box of your engine 25 feet out beyond the bulkhead? A. That might be; yes, sir.

By Mr. Cole: Q. Mr. Higbee, it might be but was it? A. I never knew of it washing the fire out, never heard of it.

Q. This occasion when you speak of it being washed down was a storm, wasn't it? A. It was a storm tide; yes, sir.

30 Q. Well, wasn't it an unusual storm? It wasn't ordinary tide, was it? A. Well, an ordinary tide, no, it was an easterly storm tide, but I don't know that it was unusual.

Q. How many times did you say the water struck the Hannah Kelley bulkhead during the time that you were building that cottage? A. I can't say.

40 Q. Well, every tide didn't strike it, did it? A. I don't think it did.

## Wilbert S. Higbee—Cross

Q. Wasn't it only the unusual tide, the extraordinary tide, that struck it? A. Well, possibly it was, I don't know.

Q. Well, how many times will you say, during the period of three or four months that you were building that bulkhead, did your men have to quit because of the tide and go to the cottage? A. I 10  
couldn't say. I think some other person could say better than I, because I wasn't right there at the time.

Q. You can give us some estimate, can't you? A. No, sir.

Q. But the men did work there at times when the tide was high, didn't they? A. Yes, sir.

Q. Now, how much sand had collected in front of this Hannah Kelley bulkhead in the summer of 1902? A. Well, I should believe twelve to eighteen 20  
inches.

Q. You mean in height? A. Yes, sir, in height.

Q. And how far outside of the bulkhead was ordinary high tide in the summer of 1902? A. I couldn't say.

Q. Can you estimate? A. No, sir.

Q. Was it 50 feet? A. I don't know.

Q. It was some distance out, wasn't it? A. I really don't know. 30

Q. You mean you haven't any information on the subject? A. I haven't, no, sir. The only time I would see it—I had the cottage, that other work down there I was doing—would be occasionally when I would go down there, I would walk down and see the bulkhead, that is the most I know of it.

By Mr. Starr: Q. Mr. Higbee, what was the object in having the engine out beyond the bulk- 40

Richard T. Bowen—Direct

head? A. I really don't know. Of course, that wasn't any arrangement of mine, I simply made the contract with another party.

Q. Who drove the piling? A. This man here by the name of Williams, I think it was Turner & Williams who drove them for me.

10 Q. The fire box opening was above the platform on which it was located? A. Above the platform; yes, sir.

By the Vice Chancellor: Q. On that platform, of course, you would have your coal or fuel that you were using, whatever fuel you were using? A. I suppose so; yes, sir.

Q. You would have to protect it from the water, wouldn't you? A. Well, now, I don't know whether they kept it there or whether they took it out from the land, I don't know, I can't say. That is only as I recollect it now, it might have been five feet, I don't know.

20 By Mr. Cole: Q. This testimony you have been giving us is based on your own observation, isn't it? A. Yes, I believe so, as I know.

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30 RICHARD T. BOWEN, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. What is your business, Mr. Bowen? A. Building.

Q. And were you employed by Higbee in 1901 and 1902? A. I was.

Q. As what? A. As a journeyman.

40 Q. Carpenter? A. Yes, sir.

Richard T. Bowen—Direct

Q. Did you have anything to do with the building of the Hannah Kelley bulkhead? A. Yes, sir.

Q. What part did you play in it? A. Well, I did some of the actual work, and I was inspector as the piling, &c., was being put up.

10

Q. Who drove the piling? A. Turner & Williams.

Q. Do you know how far that bulkhead was located south from Atlantic Avenue? A. Well, I don't know the actual number of feet, it is about 300 feet, 275 or 300 feet.

Q. Have you seen any portion of that bulkhead recently? A. Yes, sir.

Q. Is there any portion of it visible at the present time? A. There is a portion from Millidgeville to—from Millidgeville Avenue over to the Vare land.

20

Q. Is that the same bulkhead that was built? A. Yes, sir.

Q. Now, what is your recollection as to the time when that was built, Mr. Bowen? A. That was built in March, 1902, started.

Q. And how long did it take to build it? A. Well, from the time it was begun until completed I suppose was a couple of months, but there wasn't that much actual working time on it.

30

Q. Why didn't you work continuously on it? A. Well, come storm tide and took the engine away, and the fact was we had to quit.

Q. What was the kind of bulkhead? How long were the pilings? A. Well, I should judge they were sixteen or eighteen feet, the piling sunk about ten foot in the ground.

40

Richard T. Bowen—Direct

Q. And that would leave how much above the surface? A. If they were sixteen that would be six foot, of course.

Q. And sheath piling? A. Well, the sheath piling—I couldn't say as to the length of those.

10 Q. Now, how far below Kingston Avenue did the bulkhead extend? A. All the way to Berkley Square.

Q. Now, what did you observe with reference to the line of ordinary high water mark while you were building or working on the bulkhead? A. Well, after the storm tide was there most every ordinary high water came to the bulkhead.

By the Vice Chancellor: Q. After what? A. After this storm occurred.

20 By Mr. Starr: Q. Now, before that time? A. I couldn't say because we wasn't bothered.

Q. Do you remember when the storm occurred? A. No, I don't, only it is sometime during the construction of the bulkhead.

By the Vice Chancellor: Q. Did you say that ordinary tides did come up to the bulkhead. A. The lower part of it, yes, sir.

By Mr. Starr: Q. You mean which end? A. The Berkley Square end; the other half was done before the storm.

30 Q. Did you work on the house that Mr. Higbee was building on Millidgeville Avenue before the bulkhead was built? A. Yes, sir.

Q. And when was that house begun,—do you know? A. It was begun in the fall of 1901.

By the Vice Chancellor: Q. You said you didn't know when the storm occurred? A. I said sometime during the construction of the bulkhead. The  
40 bulkhead was started in March.

Richard T. Bowen—Direct

Q. But you don't know how long after that the storm came? A. No; I should judge a couple of weeks, probably.

By Mr. Starr: Q. How much of the bulkhead had been finished before the storm came? A. About half of it.

Q. What did you observe with reference to the condition of the tides before you started to work on the bulkhead, if anything? A. I didn't observe the tides at all, because I had no occasion to.

Q. You don't know where the water came? A. No.

Q. Now, with reference to the line of high tide between Kingston Avenue and Berkley Square, which was nearer Atlantic Avenue, the point at Kingston Avenue or Berkley Square? A. Berkley Square.

Q. How much difference was there? A. Well, I couldn't say the exact difference, but there was a knoll opposite Kingston Avenue, a sort of a knoll of sand there.

By the Vice Chancellor: Q. Which end did you begin work on? A. The Bartram Avenue end.

By Mr. Starr: Q. Bartram Avenue is located east of Kingston Avenue, is it not? A. Yes, sir.

Q. Now, while you were working there how far did the line of high tide come in inside of the bulkhead? A. Well, at the wind-up it came in fifteen or twenty feet, probably more, I couldn't say about that.

Q. While you were working there how far did it come in before the storm? A. Before the storm I couldn't say as it came in at all, because we wasn't bothered.

10

20

30

40

Richard T. Bowen—Direct

Q. You weren't obliged to stop work at all? A. No; because it was in the other end, we were working on the up town end.

Q. I am speaking about at Berkley Square: How far did it come in there? You weren't  
10 bothered up at the other end, the Bartram Avenue end. How far did it come in at Berkley Square?

A. Well, I couldn't say as it came in at all until the sand was cut out of there. I am building a bulkhead at the present time. The sand cut down the other night twenty inches in one night.

Q. Who else worked on the bulkhead with you?

A. Well, a man by the name of Eastlack, and I think Parsons worked on it.

Q. Parsons? A. Yes.

20 Q. And who did the driving of the piles? A. Turner & Williams.

Q. After the bulkhead was finished how far did the water come up on the outside of the bulkhead, between Kingston Avenue and Berkley Square?

A. Well, at the lower end of it it came up against the bulkhead probably twelve inches, that is, the water stood there at high tide, about twelve inches.

30 Q. You mean at the Berkley Square end the water came up against the bulkhead and stood there twelve inches? A. Yes, sir.

Q. Do you remember a date on the house on Millidgeville Avenue that was being built by Mr. Higbee at the same time? A. Yes, sir.

Q. What was the date of that—do you remember? A. 1902.

40 Q. When the bulkhead was built was there anything put outside to protect it—the Kelley bulkhead? A. Not during the construction of it.

Richard T. Bowen—Cross

Q. Well, later? A. I couldn't say about later; I had nothing to do with it.

Q. Were you there? A. I think there were, there was a couple of rows of piling put there afterwards.

Q. How far on the outside were they put? A. 10  
Twelve or fifteen feet.

Q. Any brush? A. I think there was some brush there.

Q. Do you know who put that there? A. No, I don't.

CROSS-EXAMINATION by Mr. Cole:

Q. You said, in answer to Judge Starr's question, that before this storm came which washed the engine away that you were not 20  
bothered. Do you mean you were not bothered with the tide? A. Was not bothered at the upper end, no, where we were working, because we started at the upper end.

Q. You weren't bothered in the construction of this bulkhead by reason of the high tide before this storm came, is that correct? A. Yes, sir.

Q. You hadn't paid any attention to the location of the high tide with relation to this bulkhead until after the storm, had you? A. I don't 30  
think so.

Q. Was that a severe storm? A. Well, you would call it an ordinarily severe storm, yes.

Q. How much sand did it take away from the beach along there? A. Possibly two feet at the lower end of it.

Q. It took more than that, didn't it? A. It was 40  
only one end of it that it took the sand out there.

## Richard T. Bowen—Cross

Q. Which end was that? A. The lower end.

Q. The Berkley Square? A. Yes, sir.

Q. Don't you think it took more than two feet?

A. Well, I couldn't say about that.

By the Vice Chancellor: Q. Did the storm wash  
10 away any part of the bulkhead you had finished?

A. No, sir.

By Mr. Cole: Q. It took away at least two feet  
of sand, did it? A. I would say about two feet.

Q. When did you leave the property—what time  
in the year? A. I left there about the first week  
in April.

Q. The work hadn't been finished then, had it?  
A. Yes, sir.

Q. I mean the cottage? A. Yes, sir.

20 Q. Was that finished too? A. Yes, sir.

Q. Everything was finished? A. Yes, sir.

Q. Did you pay any attention to the tides after  
that? A. No, sir.

Q. Have you any idea how much further inland,  
towards Atlantic Avenue, the water came during  
that storm tide than it had been coming before?  
A. Well, that all differs even in a storm tide.

Q. Well, my question relates to how much far-  
ther at Berkley Square, for example, the water  
30 came towards Atlantic Avenue during that storm  
tide than it had before that? A. I don't know, be-  
cause the storm tide happened in the night, I  
wasn't there.

Q. You haven't any idea how much further it  
came? A. No.

Q. Had the tide begun to recede, go out the ordi-  
nary high tide, before you left in April? A. The  
40 tide go out?

Mahlon W. Newton—Direct

Q. The ordinary tide, begun to go out. A. You mean the beach make up again?

Q. Yes. A. Yes, it starts to make up.

Q. It had before you left, had it? A. Yes.

Q. How much beach had made up, do you think?

A. Well, I couldn't say about that because I wasn't interested. 10

Q. Have you any idea? Two feet? A. No, that I couldn't say,—if it all came back.

Q. Has it been making up all along the whole property from Berkley Square towards Bartram Avenue? A. Yes, make up one night and go out the next, all depends, on account of the tides and seas. As I said before, at the present time, a bulk-head I am building now, one time go down there it is made up, another time it is cut out. 20

MAHLON W. NEWTON, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says:

By Mr. Starr: Q. Mr. Newton, where do you live? A. Green's Hotel, Philadelphia.

Q. Have you been interested in the development of real estate in the lower end of Atlantic City? A. Yes, sir. 30

Q. And have you had knowledge of the tidal conditions south of Atlantic Avenue, between Kingston Avenue and Berkley Square? A. Yes, sir; I have.

Q. Since when? A. Since 1902.

Q. Did you have any knowledge prior to that? When did you first own any property in that neighborhood? A. How is that? 40

## Mahlon W. Newton—Direct

Q. When did you first become the owner of any property in that neighborhood? A. In 1902, March.

Q. Did you live there before that time? A. Yes, sir, I did.

10 Q. And built some properties down there? A. Yes, sir.

Q. When did you build the first property? A. In 1900.

Q. And where was that located? A. Located at Millidgeville and Atlantic Avenue and Aberdeen Place.

Q. Do you know where the Vare property is? A. Yes, sir.

20 Q. Do you know the location of the land between Kingston Avenue and Berkley Square along the ocean? A. Yes, sir.

Q. Do you remember when the Hannah Kelley bulkhead was built? A. Yes, sir.

Q. Did you have knowledge of the conditions prior to that time? A. Yes.

Q. Physical conditions of the shore line prior to that time? A. Yes, sir.

30 Q. So far as your observations are concerned where was ordinary high water line between Millidgeville Avenue and Berkley Square before the building of the Hannah Kelley bulkhead? A. Well, I don't just remember that, but I know that the water used to splash up against the Hannah Kelley bulkhead, I know that, after it was built. I don't have a recollection just where the high water mark was before the bulkhead was built. We used to go down bathing there from our cot-  
40 tage.

Mahlon W. Newton—Direct

Q. Well, what do you mean by the water splashing up against the bulkhead? A. After the bulkhead was built in front of Hannah Kelley's property.

Q. And how deep would the water be in front of the bulkhead? A. Well, it wouldn't be very deep. 10  
sometimes it would splash up against, sometimes it would not. Ordinary tide it would strike the bulkhead.

Q. And what part of 1902 did you observe that—do you remember? A. Why, we used to go down there generally about the first of June, we used to bathe there; that is where I got my information, from being down to the beach at that time.

Q. And at what point of the beach would you bathe? A. About along there at Kingston Avenue, 20  
what is now Kingston—Millidgeville Avenue.

Q. What about Berkley Square? A. Well, right along there we used to bathe, too.

Q. Was there any difference in the line of the high water at Berkley Square? A. I don't think it was very much difference, I think it is pretty near the same, I never observed any difference.

Q. Then, as I understand, Mr. Newton, you did not take any particular notice of where high water line was prior to the time the Kelley bulkhead was 30  
built? A. No, sir; I couldn't give the number of feet it was from Atlantic Avenue.

Q. I didn't mean that. Was it inside of where the bulkhead was subsequently located or on the outside? A. I think it was about where the bulkhead was located. Sometimes at high tides it would come inside of where the bulkhead was located, other tides it would come up about to 40  
where the bulkhead was located.

Mahlon W. Newton—Direct

Q. And when the bulkhead was finished about how high was it above the sand, the level of the beach? A. Why, I think it was about six feet from the sand to the top of the bulkhead. I imagine that; I am not right sure of that.

10 Q. And was the beach there level or shelving? A. Why, it was a nice level beach.

Q. And what was there on the inside towards Atlantic Avenue of the line where the Hannah Kelly bulkhead was subsequently located? A. Well, there was sand dunes there. It was leveled off later on, turned into building lots.

Q. Inside of where the bulkhead was subsequently laid was that beach or sand dunes? A. Well, that was beach there.

20 Q. From its appearance could you say whether the water had flowed over it? A. Well, it had at high tides, storm tides it would flow all over there.

Q. How about the ordinary high tide, exclusive of storm tides? A. As my recollection goes the high tide would be about where the bulkhead was located, that is as near as I can remember. Sometimes the tide would come inside of it; very often come inside. I have seen it come pretty near up to Atlantic Avenue while I lived there, Atlantic

30 Avenue.

Q. Now, after the Kelley bulkhead was built what did you observe with relation to the tides? A. Well, as the years went along of course the sand filled in there, and it made out considerably since that time.

Q. You had a concrete bulkhead built, did you not? A. Yes, sir.

40 Q. And how far is that located from Atlantic Avenue? A. It is about 275 feet, I think, from

## Mahlon W. Newton—Direct

Atlantic Avenue, from the south side of Atlantic Avenue, I think that is it I guess it is a little more than that, a little more than that probably; I guess that was the wood bulkhead, we had a wood bulkhead first.

Q. Well, now, in 1907—in 1908 I understand you built a house on Tallahassee Avenue, did you not? 10

A. Yes, sir. It was built before that.

Q. Tallahassee Avenue is located where with reference to Berkley Square? A. Why, it is a short block.

Q. Next street towards the west, is it not? A. Yes, sir.

Q. When did you build that house? A. Built that in 1903, '02 and '03.

Q. And did you also build a house at the corner of Berkley Square and the beach, now owned by Mr. Taubel? A. Yes, sir. 20

Q. Well, in 1907 and 1908,—take 1907 first, where was the ordinary high water line with reference to the concrete bulkhead that you subsequently put there,—inside or outside of that? A. Why, the high water mark was inside of where the bulkhead now stands in 1907 and 1908.

By the Vice Chancellor: Q. You have reference to your concrete bulkhead? A. Yes, sir. 30

By Mr. Starr: Q. And in 1909 where was it located with reference to the concrete bulkhead? A. Well, each year it made out a little, every year got further out.

Q. In the month of November, 1908, was ordinary high water line inside or outside of the concrete bulkhead,—in the fall of 1908? A. Why, in 1908 it was about where the bulkhead is now, as near as I can remember. 40

Mahlon W. Newton—Cross

CROSS-EXAMINATION by Mr. Cole:

Q. Mr. Newton, do you know whether they filled in the land back of the Hannah Kelley bulkhead after it was constructed? A. Yes, sir; they did fill it in some.

10 Q. Where did they get the sand from? A. I think they got it off of the beach in front of it.

Q. Right in front of the bulkhead? A. Yes, sir.

Q. How much sand in depth did they take off of that beach there to fill in back of the bulkhead?

A. Well, the way we used to fill in—

Q. No, the way they filled in. A. Well, the way they filled in and the way we filled in, they used to throw the sand over at low tide, over the bulkhead, and when the tide would come in it would  
20 wash the sand all back up, and fill the hole up.

Q. Now, in your judgment, how many feet of sand did they take away from the front of that beach in front of the bulkhead? A. I couldn't tell you that, Mr. Cole.

Q. You have no idea? A. No, sir.

Q. But they did begin to dig away to fill in back promptly after the building of the bulkhead, didn't they? A. Yes, sir.

By the Vice Chancellor: Q. That practice you  
30 refer to isn't allowed any more, is it? A. Yes, sir; it is allowed yet.

Q. Do they still do it? A. Yes, sir.

By Mr. Cole: Q. And how long were they engaged in that work, Mr. Newton? A. Well, I don't just know, Mr. Cole, but I should imagine they were a couple of months filling it.

Q. Do you now claim to have a very clear recollection of the location of ordinary high water  
40

## Mahlon W. Newton—Cross

line from 1901 to the present time in front of Mr. Vare's property at Berkley Square? A. Well, I have a pretty fair recollection of it; yes, sir.

Q. How much further toward the ocean is ordinary high water mark now than it was in 1902? A. I think it is at least 125 feet. 10

Q. Has it been receding gradually and continuously since 1902? A. Yes, sir.

Q. How much further inland did the tide come in that storm of 1902 than the ordinary tide? A. Well, I don't know how far, Mr. Cole, but I have seen the tide come pretty near to Atlantic Avenue.

Q. I have seen hardly a dry spot in Atlantic City myself, but do you remember the storm of 1902, in March, early in 1902? A. Yes, I remember the storm. 20

Q. You remember that storm? A. Yes, sir.

Q. Very well; now, how much further toward Atlantic Avenue did the water come in that storm than it came in the ordinary tide? A. Well, I couldn't answer that question, I don't know.

Q. Well, did it come 25 feet? A. Yes, it came more than that.

Q. A hundred feet? A. It came pretty nearly up to Atlantic Avenue, I know that.

Q. It was an extraordinary tide? A. Not a very 30  
extraordinary tide; it was a storm tide it was a good, big storm tide, I remember.

Q. Now, Mr. Newton, will you say that every ordinary high tide in 1902 struck the Hannah Kelley bulkhead? A. No, sir, I won't say; I say most of the tides that came in did strike it.

Q. But there were ordinary high tides that did not strike the bulkhead in 1902? A. They were 40  
ordinary tides that did not strike it.

Mahlon W. Newton—Cross

Q. I mean when the tide was high, the ordinary high tide did not reach the Hannah Kelley bulkhead? A. Yes, most every tide after the bulkhead was built.

Q. Were there any ordinary high tides in 1902 that did not reach the Hannah Kelley bulkhead?

A. I don't know that.

Q. You won't say that there were not, will you?

A. No, sir.

Q. Do you think it might have been—

The Vice Chancellor: Isn't the difficulty with the word "ordinary"? I do not know whether you and the witness have the same meaning.

Mr. Cole: Probably not. It may be that he has one in mind and I another. That is what I am trying to find out.

The Vice Chancellor: Well, that is what I am afraid of.

A. What I meant to convey to the Court is this: That the ordinary high tide would come up to the Hannah Kelley bulkhead after the bulkhead was built, each year after that the tide did not strike it, it went out, it kept receding out.

By Mr. Cole: Q. Well, where were you living in March, 1902? A. I was living at my cottage down in Atlantic City, on Atlantic and—

Q. Sure about that? A. Yes.

Q. And did you live there throughout that spring? A. Yes, sir.

Q. Every month? A. Well, we went down there in April, during the Easter season, and stayed down from that time on.

By the Vice Chancellor: Q. Mr. Newton, I am not at all sure that I know what an ordinary high

Mahlon W. Newton—Cross

tide is, and I don't know whether counsel does. What do you mean by an ordinary high tide? I know there are unusually high high tides that are not necessarily storm tides, and there are unusually low high tides that are below the usual tide. Now, what do you mean by an ordinary high tide? 10  
—because they vary from day to day. A. Yes, they vary a little, but we take where the washings are, and every tide that washes up on the beach—each tide brings in either sea grass or something and it will wash it up, and by watching that day in and day out you can tell pretty well how far the tide comes up; it varies every day and every tide, pretty nearly, but when we see the ordinary tide, the average tide, they will not vary 20  
such a great deal unless there is a high one.

Q. It would perhaps be halfway between the unusually high tide and the unusually low high tide?  
A. Yes, sir.

Q. I suppose. A. Yes, that would be what we term an ordinary tide.

By Mr. Cole: Q. Now, Mr. Newton, having that definite issue in your mind of ordinary high tide, I ask you whether you will now say that every such tide during the spring of 1902 reached 30  
the Hannah Kelley bulkhead? A. No, sir, I couldn't testify to that, Judge; I am sure it didn't, not every tide.

By the Vice Chancellor: Q: Every ordinary tide, he said? A. Yes, every ordinary tide.

Mr. Cole: He just said that every ordinary high tide did not reach it.

The Vice Chancellor: Your question was 40  
with reference to the ordinary tide and his answer was in reference to all tides.

## Mahlon W. Newton—Cross

(Last question and answer on page 117 read by stenographer).

A. (Continuing) I wouldn't want to say—to testify that every tide struck Hannah Kelly's bulkhead, because it might not, but the ordinary tide would strike it.

10 By Mr. Starr: Q. Mr. Newton, is it a fact that the beach has been making up there since these bulkheads have been built? A. Yes, sir.

Q. And when, with respect to the Hannah Kelley bulkhead, did the sand commence to accumulate?

A. Well, it has been accumulating down there ever since I was acquainted with the beach, Judge.

Q. And isn't it the fact that the presence of the bulkhead and brush and pilings on the outside  
20 would have a tendency to accumulate the sand? A. Yes, sir.

Q. That is the object of putting the bulkhead there, isn't it, and the brush and piling, to protect the beach? A. Yes, but there has been a great accumulation of sand down there in these last five or six years, and there has been no brush put in down there in our district but it has accumulated sand very rapidly there.

Q. And has that accumulation been after the  
30 construction of the various bulkheads? A. Yes, sir.

By Mr. Cole: Q. What is your understanding, Mr. Newton, of the object of a bulkhead as distinguished from a jetty? A. Well, my understanding is that a bulkhead keeps the ocean from washing in over your property; if you want to build a house, a lawn or anything, you put a bulkhead out  
40 to protect your lawn or your house.

## Stephen Williams—Direct

Q. In other words, Judge Starr is mistaken when he thinks the object of a bulkhead is to make land; it is really to protect it, isn't it? A. To protect it.

Q. And the object of a jetty is to make land?  
A. Yes, sir. 10

Q. That is your understanding, isn't it? A. Yes, sir.

By Mr. Starr: Q. Is it or not a fact that a bulkhead will make land—the construction of a bulkhead? A. Well, I don't think that, no, sir. A jetty is what is supposed to make land.

STEPHEN WILLIAMS, a witness produced 20  
in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Mr. Williams, where do you live? A. 715 Arctic Avenue, Atlantic City.

Q. What is your occupation? A. Pile driver.

Q. What was your occupation in 1901 and 1902? Same business.

Q. Did you have anything to do with the construction of what has been spoken of as the Hannah Kelley bulkhead? A. Yes, sir. 30

Q. What did you have to do with it? A. I sub-contracted—Turner & Williams—we went under the name of Turner & Williams—sub-contracted to put the piling—the sheath piling in for Mr. Higbee.

Q. Mr. W. S. Higbee? A. W. S. Higbee; yes, sir.

Q. Mr. Turner is dead, isn't he? A. Yes, sir. 40

## Stephen Williams—Direct

Q. Do you remember when you started work there? A. Yes, sir.

Q. When was it? A. Oh, I say—I don't remember the date but I know it was either in the latter part of 1901 or the beginning of 1902, in the winter.

10 Q. And where did you build the bulkhead? A. From Bartram Avenue to Berkley Square.

Q. Is it built across Kingston Avenue down to Berkley Square? A. Yes, sir.

Q. And do you remember the size of the piling you sunk? A. Yes, sir.

Q. How deep were they? A. 16 foot piling?

Q. And how much out of the sand? A. Where we started was about—I would say about four feet  
20 or four and a half, but at the time we got down to the other end it was about six feet out.

Q. Did you know anything about this beach prior to the time you went there? A. No, sir, I didn't know anything about it.

Q. Now, were you troubled with water, the tides, while you were working on it? A. Yes, sir.

Q. What did you observe with reference to the water, the ordinary high tide? Did it come up to the bulkhead or beyond the bulkhead? A. Well,  
30 we started this bulkhead at Bartram Avenue and the tide did not bother us when we first started, but it did before we got through, we had to knock off on the high water.

Q. And where was that? A. Down Berkley Square.

Q. Did you observe whether or not the water came inside of the bulkhead? A. Yes, sir.

Q. How far? A. Why, I suppose it would run in between 12 and 18 feet inside of the bulkhead.

40 Q. Where? A. Berkley Square.

## Stephen Williams—Direct

Q. What about Kingston Avenue? A. It didn't come up there.

Q. Did you have a storm there? A. Yes, sir.

Q. Do you remember when that was? A. Well, I can't just remember when it was but I know we had just started good and maybe about half done when this storm came in and washed down our boiler, and it was lost for about a week before we found it, washed down under the boardwalk and we lost it, so we looked around for it and was getting ready to buy another one when I happened to come along, walking along on top of the boardwalk, looking along, and found it. 10

Q. Where were you working when the boiler was lost? A. I think that was along about Kingston Avenue.

Q. Were you there after the bulkhead was finished, after the sheath piling was put in? A. Well, I can't say that I had anything particularly to look out around there after I finished there, I don't know as I was around there any time soon, I used to see Mr. Leeds filling it in, but I don't know that I ever took enough notice to notice the tides. 20

Q. Was the boiler located in or outside of the bulkhead? A. Well, it was outside of the bulkhead. 30

Q. How far out? A. Well, I will tell you how it was we put it on the outside. There was a slue that we wanted our suction pipe to reach, and if we put a certain number of sections of pipe to connect up our pump it would throw us on the line of the bulkhead, so we left out a section and it throwed us on the outside, so I suppose that section was about twenty feet. 40

## Stephen Williams—Cross

Q. Twenty feet out? A. Yes, sir.

Q. And how high was it above the sand? A. About four feet.

Q. And the fire box was how far above the sand? A. I suppose the fire box was a foot more.

10 Q. So the water would have to come up between four and five feet before it would strike the fire? A. Before it would strike the fire, yes, sir.

## CROSS-EXAMINATION by Mr. Cole:

Q. What made this slue you speak of? A. Oh, there is generally—sometimes, you know, there is slues along the—

Q. Don't you know that slue was made by hauling sand out of it? A. This was outside of the board walk, this slue I am speaking of.

Q. Outside of the board walk? A. Outside of the board walk, yes, sir.

Q. Was your boiler outside of the board walk? A. Oh, no, sir; we used the pump and boiler to put in this bulkhead, and we wanted to put the foot-bell of our pump out into this slue where we wouldn't be bothered with water or sand.

Q. How far was this slue away from your boiler? A. About two hundred feet.

30 By the Vice Chancellor: Q. Had to be out beyond low water? A. Yes, sir.

By Mr. Cole: Q. Well, up to the time of this storm you had no trouble with your boiler, had you? A. No, sir.

Q. How long had you had it there? A. Well, I can't just remember how long; we was quite a little while building that bulkhead.

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## Stephen Williams—Cross

Q. About how long? A. I suppose there a month.

Q. And in the meanwhile you had been working on the bulkhead? A. Yes, sir.

Q. And had no trouble? A. No, sir.

Q. Hadn't been bothered with the tide? A. No, 10  
sir.

Q. Had you paid any attention to the tides before that? A. Well, not so particularly, we used to—

Q. Did you pay any particular attention to the tides before that? A. Well, I can't say that we did.

Q. How far was the ordinary high tide away from your bulkhead before the storm tide came along? A. Well, I would suppose—I know that 20  
we used to—it used to run up under our boiler but I don't think it ever came up as far as the bulk head.

Q. Before you had that storm tide it washed under your boiler but it didn't come to the bulkhead, did it? A. Never came to the bulkhead, no; that is, on this upper end.

Q. How long did this storm last? A. I think it lasted about a couple of days, maybe more.

Q. Severe storm, wasn't it? A. Yes, sir.

Q. When did you leave there? A. I couldn't 30  
tell you that, either.

Q. How long were you working there? A. Oh, it was quite a while building that bulkhead, I guess two months.

Q. Had the tides begun to make out before you left? A. Well, yes, sir; of course, that storm—

Q. Now, answer my question. Had the tides begun to make out before you left? A. Yes, sir, I 40  
think it had.

## Stephen Williams—Cross

Q. How many feet, probably? A. Feet high or feet back?

Q. Back from the bulkhead. A. Well, I couldn't tell you that.

Q. Well, 10 feet, 15, 25? Give us your best judgment. A. I suppose probably it made up 10 feet back, maybe more, the trouble is—

Q. There is no question, Mr. Williams. Did you see them fill up back of this bulkhead with the sand from the front? A. How is that?

Q. Did you see them fill up the back of the bulkhead with sand from the front of it? A. How is that?

Q. Did you see them do that? A. Yes, sir.

By Mr. Starr: Q. You spoke about the water making out in that last question Mr. Cole put to you. Which end of the operation was that,—the Bartram Avenue end or the Berkley Square end? A. Where it didn't come to the bulkhead?

Q. Yes. A. At the Bartram Avenue end.

By Mr. Cole: Q. Did it make out any at Berkley Square? A. Yes, sir, I think it did. I tell you what I wanted to get at was on account of this wash out we had there. Any time you have a storm and a bulkhead is left open there is bound to be a wash-out on the end. It was quite a little while before we could get in there and connect this up; of course, it made an awful cut out there all the time; that is the reason why I say it was probably 6 or 7 feet out, but after we got it connected up of course it began to make up right away.

Q. Began to make up right away? A. Yes, sir.

Frank N. Martin—Direct

Adjourned until Tuesday, April 3d, 1917.

Further adjourned until Monday, May 7th, 1917, at Atlantic City, N. J.

Resumed, before his Honor, E. B. LEAM- 10  
ING, Vice Chancellor, at the Chancery  
Chambers, Atlantic City, New Jersey, on  
Monday, May 7th, 1917.

Appearances:

Hon. Clarence L. Cole, for complainant.

Hon. Lewis Starr, and Charles C. Babcock,  
Esq., for defendant.

FRANK N. MARTIN, a witness produced in 20  
behalf of the defendant, being duly sworn accord-  
ing to law, on his oath says—

Mr. Cole: If your Honor please, I have  
here a copy of the agreement made by Han-  
nah E. Kelley and others with Hilton, to-  
gether with a copy of the map recorded  
with the agreement, which I would like  
your Honor to examine now. We may be  
able to shorten this case.

The Vice Chancellor: Do you consent 30  
that this agreement go in now, Judge  
Starr?

Mr. Starr: I will consent to it going in  
if he wants to put it in as part of his case,  
not as part of my case.

Mr. Cole: I will put it in now. I offer 40  
certified copy of articles of agreement  
dated August 3d, 1901, made by Hannah E.

## Argument

Kelley and others to John M. Hilton, acknowledged the 2d day of August, 1901.

The Vice Chancellor: It is dated the 3d?

10 Mr. Cole: Yes, that is what it says, but it also appears to be acknowledged the day before. Now, it is followed by a supplemental agreement dated November 22d, 1901, which is acknowledged on the 2d day of December, 1901. Now, they are all recorded on December 5th, 1901, in deed book 266, page 230. The map is annexed and made a part of the agreement. Now, the map shows block 26 and block 24, referred to in the contract and also referred to in the deed which has already been offered in evidence on behalf of the defendant.

20 (Said agreements, with map annexed, marked Exhibit C-10.)

30 Mr. Cole: Now, I will read what it says: This contract, after describing the land beginning at a point, etc., goes on and names the lots in the blocks, and then says "and duly laid out in blocks and lots by the said Hannah E. Kelley, a map or plan of which is filed in the Clerk's office of the County of Atlantic at May's Landing, New Jersey, and a copy of which is attached hereto and made a part hereof." Then there are numerous restrictions to go in the deed and be impressed on the land. It is a contract which shows a scheme. Now, after having all that it says: "That all lands which shall hereafter be made by accretions from the Atlantic Ocean or which shall accrue to her to the northward of the present board

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## Argument

walk"—that is, accrue to Mrs. Kelley, party of the first part,—“by reason of the same being moved oceanward or by reason of the lines of the present Ocean Front Park being moved oceanward, shall be subdivided into lots of the same size as those shown on the map aforesaid; that the streets shown upon the map aforesaid shall be continued to the high water line of the Atlantic Ocean; and that all of the following covenants, conditions and restrictions shall be binding and enforceable upon such additional lots which shall accrue to her by reason thereof.” And the deed has the same language. Now, my point is Hilton cannot come in here now and claim the benefit of accretions, nor can these people claim it, under the contract and under the deed.

The Vice Chancellor: Well, I may be favorably inclined to that view unless something occurs to change the situation.

Mr. Starr: Well, if your Honor please, if this conveyance was made to high water line then the grantee under the conveyance would be the riparian owner regardless of the covenant.

The Vice Chancellor: Yes, if it was a deed of a mere rectangular piece of land, by monuments, if you choose, making no reference to the ocean but which in fact did extend into the ocean, such a deed, I would say, would include the riparian rights, but what of a deed made in that form, with a map annexed to it on which was delineated

## Argument

10 the ocean further southerly, and in which there were covenants—I said deed, I should have said agreement, because the agreement was the instrument pursuant to which the deed was made—covenants which provide that the accretions shall belong to the grantor?

20 Mr. Starr: No, it doesn't say so. There is the distinction, if your Honor please. The covenant, I think, is not to be interpreted as claimed by Judge Cole. My contention is that we are not bound by the delineation on that map. If it can be shown that this conveyance ran into the water the covenant does not fit the situation at all. The covenants were evidently intended to apply to a large tract of land between Tallahassee Avenue and Columbia Avenue, not to this particular piece or this particular property that was sold. Now, the provision is "that all lands which shall hereafter be made by accretions from the Atlantic Ocean, or which shall accrue to her to the northward of the present boardwalk by reason of the same being moved oceanward or by reason of the lines of the present Ocean Front Park being moved oceanward, shall be sub-divided into lots of the same size as those shown on the map aforesaid,"

30 The Vice Chancellor: Well, that is all right so far. There is no trouble about that.

40 Mr. Starr: So there is nothing there to indicate that Mrs. Kelley when she made

## Argument

that deed attempted to reserve to herself any of the accretions. And "that the streets shown upon the map aforesaid shall be continued to the high water line of the Atlantic Ocean; and that all of the following covenants, conditions and restrictions shall be binding and enforceable upon such additional lots which shall accrue to her by reason thereof." Now, this covenant would have been placed in a deed for one lot on Atlantic Avenue, so that it is perfectly apparent that the covenant was intended to apply to all of the land, and there is nothing by which your Honor can find that Mrs. Kelley intended to reserve to herself the accretions if, as a matter of fact, she conveyed the land into the water. It seems to me that is a perfect answer.

The Vice Chancellor: What does it mean when it says the lots shall accrue to her?

Mr. Starr: Until the land was sold to high water line, and that is a reasonable interpretation to be put upon this covenant.

The Vice Chancellor: What have you got to say concerning the fact that a map is annexed to the agreement which shows intervening lots between the lots conveyed and the ocean?

Mr. Starr: Well, the intervening lots, if your Honor please, are not numbered. Your Honor will see that the lots from Atlantic Avenue to a point 275 feet are numbered. Now, it seems to me that is evidential of the fact that it was not assumed that these lots were to be conveyed except as

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## Argument

10 they might be conveyed as a matter of law. There is nothing in this deed I can see which can be taken by your Honor to militate against the proposition that if the conveyance as made carried the title to high water line that then the grantee in that conveyance became the riparian owner regardless of the map and regardless of the covenant in the deed.

20 The Vice Chancellor: I do not think that a circumstance that a rectangular piece of land extending down oceanward does not as a matter of fact call for the ocean is conclusive in itself if in fact it does reach to the ocean, but it seems to me where such a conveyance is made and no call for the water appears on the face of the agreement or deed, and there is annexed to the agreement a map which does in fact show water further southward, that that, taken in connection with the fact that you find no call for the water is almost conclusive. That is only a first impression. I shall not undertake to pass upon that now. There may be evidence that throws light on it,

30 but it is a very powerful circumstance. The Ocean City Association always conveyed to a definite point a few feet short of the water with a view of saving to itself the accretion; the Association was very careful about that, never having conveyed to the ocean on a portion of their tract. Here are lots that are numbered from 1 to 21, and the map on which they are numbered shows land between them and the ocean.

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Mr. Starr: That is a fact.

Argument

Mr. Cole: That is not all, may it please your Honor. It has got to come out in the case sooner or later, it cannot be hidden. Mrs. Kelley shortly afterwards proceeded to sell this property, took mortgages back running into thousands of dollars, Reichner took title from Turner and agreed that the high water line was beyond where he was taking; Mr. Vare took title from Reichner to this very land and subsequently this controversy arose, and while it may be that they went to Hilton to get a deed of confirmation upon the idea that he was entitled to the benefit of the accretion and the fact shows it, yet everybody in this case was going upon the hypothesis that Mrs. Kelley had land beyond the 275 feet, evidence that is going to be indubitable. Now, it seems to me it is rather preposterous to say that there is not an implied agreement there upon the part of these people, her grantees, that the accretions were for Mrs. Kelley's benefit. What else could it mean?

The Vice Chancellor: I see the force of your contention, Judge Cole, but I cannot deny the claim which defendant makes, nor the right to show in support of that claim the distance to high water mark, unless you will concede as a fact that 275 feet from Atlantic Avenue reached the water.

Mr. Cole: Oh, well, I could not do that. I think the fact is the other way, and we will show it before we get through, only I thought we might save time.

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Frank N. Martin—Direct

The Vice Chancellor: Well, in the absence of such a stipulation I cannot deny to the defendant the right to show that it went to the water.

10 Mr. Cole: We contend it did not go to the water and we will show it before we get through.

By Mr. Starr: Q. Mr. Martin, where do you live? A. I live in Atlantic City.

Q. What is your business? A. I am in the real estate business.

20 Q. Did you have any knowledge of the tidal conditions along the beach front from Kingston Avenue to Berkley Square prior to the time the Kelley bulkhead was built? A. Well, I can't say just when the Kelley bulkhead was built, but from '84 up to about '02 or '03 I used to use the beach nearly every day, driving from Ventnor up to Atlantic City and back.

Q. How did you come to use the beach? A. Simply because at that time, along about the '90's, there was no other way to get up except on the beach or what we called the road back of the sand-hills.

30 Q. Now, do you remember the fact that the Kelley bulkhead was built? A. I was filling land back of Millidgeville Avenue the time they were building the bulkhead there. I was in the dredging business then and we owned property—the Ventnor Dredging Company owned property from Trenton Avenue, I think, down to Millidgeville, and we were filling that property up just about that time, but I didn't go out on the beach  
40 to see what they were doing there.

Frank N. Martin—Direct

Q. Yes. Well, now, how often would you travel along the beach during the latter part of 1901?

A. Well, sometimes two or three times a week then, because we had moved up to Atlantic City then, I had been living at Ventnor, and while we had one scow at Ventnor we had another one up in Atlantic. 10

Q. Do you know where Mrs. Vare's property is at the present time? A. I have seen it, but I—

Q. At the foot of Berkley Square? A. At the foot of Berkley Square, it is called now, I believe.

Q. Well, now, what did you observe with reference to the ordinary high tide or high water prior to the time the bulkhead was built? A. Well, when I was driving up and down the beach at that time the high water would be anywheres from 150 to 200 feet south of Atlantic Avenue. 20

Q. Would that be inside or outside of where the bulkhead was built? A. Well, I don't know, now,—I don't know exactly how many feet the bulkhead was built, but I can tell you the tide came from 150 to 200 feet to Atlantic Avenue.

By the Vice Chancellor: Q. That was about what year? A. That was along in the '90's, 1900. Along in the '90's they built a bulkhead at Jackson Avenue and filled it in there and that made a change in some portions of the beach. 30

Q. You said 150 to 200 feet? A. From 150 to 200 feet.

Q. In about 1900 or 1901? A. That is about the usual—there is not much change in the ordinary run of tides there, or hadn't been up to that time.

By Mr. Starr: Q. Now, after the Kelley bulkhead was built—the testimony is that was built in 1902—would you say whether or not the ordinary high water washed the bulkhead? A. Well, if it wasn't bulkheaded on a straight line there— 40

Frank N. Martin—Direct

it must certainly have washed the bulkhead, because if there was any low place there it would run away past it, on either side of it.

Q. Now, after 1901 have you any knowledge of the tidal conditions at that point? A. Oh, I used  
10 to drive down the beach occasionally and back I had sold some—we had a piece of beach front at Austin Avenue that we sold.

Q. And where is that located? A. Austin Avenue is about five blocks below Berkley Square.

Q. Could you drive along the beach at high tide? A. No, sir, could not.

Q. Was there any space on the beach at all outside of the bulkhead that you could drive on at high tide? A. At low water you could.

20 Q. I mean at high tide? A. Now, I can't say positively about that, because, you see, that street was built then and I commenced to use the street to drive on.

Q. I am speaking about the time immediately after the bulkhead was built. Do you recall whether or not the water came up to the bulkhead? A. I can't say, because I didn't go down and examine that, but I know the general conditions before that beach was bulkheaded, that the tide was within 150 to 200 feet of the railroad track.

30 Q. And that is on Atlantic Avenue? A. That is on Atlantic Avenue. In fact, I have seen it over the railroad track.

Q. I suppose that would be an extraordinary tide? A. That would be a storm tide.

Q. The line of high water which you have been speaking of—was that extraordinary or the ordinary usual tide? A. That was what I would call the ordinary high water, the wind to the south-  
40 ward.

## Frank N. Martin—Cross

Q. No unusual conditions to make a higher tide? A. No. Sometimes it would run a little further than others.

## CROSS-EXAMINATION by Mr. Cole:

Q. Did you make any measurements? A. Did I ever make any measurements? 10

Q. Yes. A. Not at that particular point.

Q. Your figures are simply an estimate? A. They are an estimate. I will tell you how I estimate it. I hauled hay up the beach and we used to go off around Austin Avenue at Aunt Pattie's and the pull there was very high, was about 100 foot, that was at Austin Avenue, what I call dry, until at Sacramento Avenue the pull of the beach was probably 75 foot. 20

Q. Have you any present recollection that you were in front of Berkley Square at the beach in August, 1901? A. I couldn't say I was there in August, 1901.

Q. Have you any present recollection that you were there in December, 1901? A. I only know, Judge, from going up and down the beach, that is the only way. Sometimes I would drive up the beach from Ventnor to Boston Avenue, coming off at Boston Avenue. 30

Q. Have you any present recollection of the bulkhead that has been referred to as the Kelley bulkhead? A. I remember there was a bulkhead being put there sometime around 1901 or 1902.

Q. Do you remember having seen it after it was constructed? A. I wouldn't swear that I had gone down there and seen it.

Q. Have you any present recollection of having seen the ordinary tide wash against that bulk- 40

## John S. Leeds—Direct

head? A. Not against that particular bulkhead, because I wouldn't be down on the beach there.

Q. That is the question. I want to know whether you have any present recollection about that particular bulkhead? A. No; I haven't got  
10 any recollection of that particular bulkhead.

By Mr. Starr: Q. In 1901 where were you living? A. I was living on Hartford Avenue then.

Q. And you were engaged in business at Ventnor then? A. I was engaged in the dredging business.

Q. And how often would you go up and down the beach in the summer of 1901? A. If the tide suited inside I would drive down the beach nearly every day, if it didn't I would drive down the  
20 street. We had a couple of scows at Ventnor and one working up at Albany Avenue.

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JOHN S. LEEDS, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Mr. Leeds, what is your occupation now? A. At this time I was in the general contracting business and street building.  
30

Q. I mean at the present time what is your occupation? A. I am in the employ of the city, in the board of assessors.

Q. In 1901 what was your occupation? A. I was in the general contracting business and street building.

Q. Did you know Hannah Kelley? A. Very well.  
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## John S. Leeds—Direct

Q. In 1901 did you do any work for her? A. Either in the spring of 1901 or 1902—I couldn't say positively which but I think in 1901—I made a contract with Hannah Kelley to improve the land from the center line of Columbia Avenue to the center line of Bartram Avenue, from Atlantic Avenue as far down as it was proper to grade. 10

Q. This was in what year? A. 1901, I think; I won't say positive. It was either 1901 or 1902.

Q. And what did you do as an incident to that contract? A. There were some small hillocks on this property, and as the beach formation always is hollow in spots and hills where the sand blows up, I leveled these off and built the streets that intervened between those points.

Q. Now, did you have occasion to observe the condition of the land immediately on the west of that? 20

By the Vice Chancellor: Q. Did you say you also built streets between those blocks on her property? A. Yes, sir.

Q. That is, you laid out the streets? A. I laid out the streets and improved the land from the center line of Columbia Avenue to Newton and Petroff's land, where they commence.

By Mr. Starr: Q. Do you remember what street that was where their property began? 30

The Vice Chancellor: He said from Columbia Avenue to Bartram. That would pass over Berkley Square.

Mr. Starr: No, Bartram is east.

The Vice Chancellor: Here is Bartram on the map. I am taking it from this map.

Mr. Starr: Well, it is the other direction, if your Honor please. 40

John S. Leeds—Direct

(Question repeated.)

A. I can't recall the name of the street just at the present moment but Petroff and Newton's land joined Hannah Kelley's land, they each had two blocks.

10 Q. Well, now, do you know where Berkley Square is now? A. Yes, sir.

Q. Do you know where Kingston Avenue is? A. Yes, sir.

Q. Is that part of the land that you improved? A. Yes; Kingston Avenue was then Millidgeville avenue, it has been changed, the name of it.

Q. And what about Berkley Square? Did you improve land there? A. Hannah Kelley named Berkley Square.

20 Q. Do you remember when that was done? A. All about the same time.

By the Vice Chancellor: Q. I misunderstood. Your contract with Hannah Kelley included the leveling of the land from Columbia Avenue down to Berkley Square? A. Yes, sir; that portion which Ryan & Collins purchased from her afterwards.

30 Q. You said that your contract was from Columbia Avenue to Bartram, which I understood at first would pass over Berkley Square. A. Well, I had two or three separate contracts then, but in the aggregate they covered it.

By Mr. Starr: Q. Now, do you remember the fact of the bulkhead being put there by Mr. Higbee from Bartram Avenue toward the west, to Berkley Square? A. Yes, sir.

40 Q. Before that bulkhead was put there did you have occasion to observe the tidal conditions along the ocean front at that place—from Bartram Avenue to Berkley Square? A. I did.

John S. Leeds—Direct

Q. Where, with respect to the bulkhead or the line of the bulkhead before it was built, did ordinary high water come? A. Well, I wouldn't presume to establish high water mark, but ordinarily, day in and day out, before the beach had been disturbed, the high water line came somewhere within the line of that bulkhead, possibly fifteen or twenty feet. 10

Q. In which direction? A. Inside of the bulkhead.

Q. Toward Atlantic Avenue? A. Yes. The reason that I know that is because I put down a brush jetty, like a worm fence, in order to catch sand so that Hannah Kelley's property would be filled further towards the boardwalk.

Q. Now, where was that brush located with respect to the present location of the Hannah Kelley bulkhead? A. That brush was located horizontally along the beach front somewhere within twenty feet of that present bulkhead. 20

Q. Inside or outside? A. Inside.

Q. Toward Atlantic Avenue? A. Yes.

Q. Well, now, when you put that brush there did the ordinary high water come up to the line of the brush? A. Well, that would be hard to say because about that time we began to take sand off of the beach to fill this land with. Petroff and Newton were filling their blocks at the same time, and possibly half of the sand to fill this land came from off of the beach front. 30

By the Vice Chancellor: Q. Where was this brush put by you? Down by Berkley Avenue or further up toward Columbia Avenue? A. Well, it was put about midway, I would say—she had two blocks there and I presume, as near as I can 40

John S. Leeds—Direct

tell, that it was about in the center of those two blocks.

By Mr. Starr: Q. And how long was the brush? How long did it extend along the beach? A. Oh, 150 to 200 feet.

10 By the Vice Chancellor: Q. The bulkhead did not extend easterly that far, did it? A. There was no bulkhead there, Judge, when I put this brush down.

Q. But when it was put there did it extend east as far as your brush? A. I couldn't say about that, because the brush had all washed away before the bulkhead was built or been covered up, what hadn't covered was washed away.

20 By Mr. Starr: Q. What do you mean by washed away? A. I mean that the storm tides had come in and lifted the brush, carried it away.

Q. Now, when you put the brush there—do you remember when that was? How long before the bulkhead was built there? A. It was during this contract, I took the contract about—early in the spring and finished in the fall.

Q. You think that was in 1901? A. That is my recollection.

30 Q. Did you actually work yourself on that contract? A. I was there all the time that the work was being done.

Q. Did you know of a sale of that block or two blocks to Hilton by Mrs. Kelley? A. I knew that it was sold through Ryon & Collins at that time, yes.

40 Q. Well, now, who filled in the land back of the bulkhead after the Kelley bulkhead was built? A. Now, what do you refer to,—the piece that Ryon & Collins controlled?

John S. Leeds—Direct

Q. Yes. A. Why, Mr. Collins had men to throw the sand over there from in front of the bulkhead, up over the bulkhead, and then he employed me with horses and scoops to scoop it back and level it down after it was thrown up.

Q. Now, what was the condition of the land immediately inside of the bulkhead before it was filled up? I mean inside toward Atlantic Avenue. A. I didn't get that question. 10

Q. Well, was it ordinary beach land? A. It was all ordinary beach land.

Q. No sand dunes immediately inside of the bulkhead, adjoining the bulkhead? A. No, the sand dunes were along the railroad in all cases, Judge.

Q. And who paid you for leveling off the sand? A. Hannah Kelley. 20

Q. And Mr. Collins, you say, directed you to do it? A. Mr. Collins paid me for that portion which he threw over the bulkhead, I think. Now, you understand, my dealings with Mr. Collins was a separate affair from Hannah Kelley. My contract with Hannah Kelley was to make as much land as was practicable, and after that contract was made she then sold to Ryon & Collins, or John M. Hilton, I think.

Q. Now, how far from Atlantic Avenue did you level off the land under your contract with Mrs. Kelley? A. Well, that question leads into another. As I said before, I had two or three contracts that tied in together. 30

Q. I am speaking now of the block between Kingston and Berkley Square. How far south of Atlantic did you level off? A. I couldn't answer that; I couldn't answer that. 40

John S. Leeds—Direct

Q. What is your best recollection? A. Why, I presume 225 feet. I think there was about 50 feet there that had to be topped up, the sand Mr. Collins had thrown over on two of the streets, from Berkley Square to Kingston Avenue, I built those  
10 all the way down to the bulkhead.

Q. After the bulkhead was built did you observe whether or not the waters of the ocean washed the bulkhead? A. Well, just as it is today and always has been. The tides come and the tides go. One day the water is out near the boardwalk and the next day it is somewhere else. I have seen—in fact, there was an incident occurred while I was working on that land that the life saving crew had to go out and rescue the men  
20 working on the boardwalk with a life-boat, and I have seen times when I could walk outside of the boardwalk.

The Vice Chancellor: I have lived on the seashore most of my life and I have always had the opinion that the line of high water, ordinary high water mark, was a myth and that it was a mistake, on the ordinary Atlantic coast, at least, to recognize it as a fixed boundary. I have camped on these  
30 wild beaches, when they were in their wild condition, for weeks and even months at a time, gone in swimming in the surf every day, and I am pretty nearly able to say that no two days would you find the maximum point at which the water would wash up the beach to correspond, and why the Courts have ever adopted or undertaken to fix up on a definite line as the line of ordinary  
40 high water mark I do not know. It seems

John S. Leeds—Direct

to me it is almost an impracticable thing. Those conditions that I suggest would obtain from day to day, and if you move on for a few weeks you get different lunar conditions and the tides are affected materially, so that one month will not be the same as another month. When the moon gets at certain points the tides will be almost storm tides without any storm, then again they go to the other extreme, tides so low that a high tide is what at other times is a low tide. You take the men who follow oystering and clamming in the bays: An ordinary question is, to one who has been out on the bay at work from one who has not been out, "Did you have a good low water today?" Some low waters are scarcely less than other high waters. A clammer will one day get in a full day's work because there is what they call an extremely low low water, and another day, to use their language, "There was no low tide at all today." And the same variation exists with reference to high tides. It is a difficult problem to tell where high water mark is or ought to be on a given date or a given year. It is not twice in the same place except by accident. A bayman very often does not get one-half the hours to work one day that he does another on account of the tide being extremely high, or high high, or extremely low, low low. I have grown up on the seashore, born on a clam-shell, as sometimes we call it, and I cannot forget those things that I have seen

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## John S. Leeds—Cross

and known of. I have suffered myself from the irregularity of tides when I have had my day's sport planned. I only make those suggestions as rambling thoughts of my own experiences that I find it difficult to forget.

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Mr. Cole: At all events it is a very feeble thing to base a title to land on.

By Mr. Starr: Q. Mr. Leeds, do you know why that bulkhead was built there— A. Yes.

Q. —on a line 275 feet from Atlantic Avenue?

A. Because Hannah Kelley had sold Ryon & Collins 275 feet.

Mr. Cole: Now, this must be hearsay.

The Vice Chancellor: I doubt the competency of that.

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Mr. Starr: I think myself it is incompetent.

Q. Do you know whether or not there was any brush put on the outside of the bulkhead after it was erected to protect it? A. I never knew of any brush being put outside.

Q. What say? A. I never knew of any brush being put outside of the bulkhead. It might have been put there by Ryon & Collins but I never knew it. There wasn't any brush put out there while I was there.

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## CROSS-EXAMINATION by Mr. Cole:

Q. Did you finish your work under your contracts with Mrs. Kelley before or after the completion of the bulkhead? A. You have reference to the Ryon & Collins bulkhead?

Q. Yes, the one that has been called here the Kelley bulkhead. A. Well, I continued on there

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## John S. Leeds—Cross

where they left off with a bulkhead and came up to the center line of Columbia Avenue.

Q. Working for whom? A. Hannah Kelley.

Q. On the bulkhead? A. I started in from where Higbee left off on the Ryon & Collins bulkhead and came up to the center line of Columbia Avenue with the bulkhead on the same line, for Hannah Kelley. That is why I know it was 275 feet from Atlantic Avenue. 10

Q. Did you have any work for Mrs. Kelley other than the construction of the bulkhead? A. Yes.

Q. Was that before or after you got the contract for the bulkhead? A. Both.

Q. Did you do any work for Mrs. Kelley outside of the bulkhead after the bulkhead was completed? A. Repeat that question. 20

(Question repeated.)

A. I hauled sand from outside of the bulkhead after it was completed.

Q. For whom did you haul it? A. Hannah Kelley.

Q. For what purpose? A. To fill in the land back of her bulkhead.

Q. And was it her land at that time?

Mr. Starr: I object to that.

Q. By "back of the bulkhead" do you mean the Ryon & Collins or her bulkhead? A. Well, it was all being filled at the same time. 30

Q. And where did you get your sand from? A. I got all of the sand that was necessary to fill up the lands owned by Hannah Kelley originally from outside of the bulkhead to fill inside.

Q. And was it in front of her property? Or, 40 put it differently; Was it between Berkley Square

## John S. Leeds—Cross

and Kingston Avenue? A. Well, I got the sand from wherever the tides had deposited it the night before sometimes.

Q. Did you get any instructions from her as to where you were to go and get this sand?

10 Mr. Starr: I object to that. It is immaterial.

The Vice Chancellor: I do not think that is competent, Judge. I will not exclude it if you think it might be competent but I hardly think it is.

Mr. Cole: Well, they have proved the fact that sand was used from the outside of the bulkhead to put inside, I thought we might have a right to know—

20 The Vice Chancellor: I doubt whether her acts in relation to the property would be competent to bind the other side.

Q. Mr. Leeds, have you any clear recollection at this moment as to where what you call ordinary high water was in August, 1901, in front of Berkeley Square? A. As I said in the first place, I couldn't establish any particular mark. The tide was somewhere in the location of that bulkhead in that year that you speak of, in August, 1901.

30 Q. And were there times during 1901 when ordinary tide was oceanward of the bulkhead? A. I have seen the tide hit that bulkhead there and fly thirty feet in the air, the water; I have seen other times when the water at high water was twenty or thirty feet the other side of the bulkhead.

Q. During 1901? A. During 1901.

40 By Mr. Starr: Q. Now, Mr. Leeds, you said you worked on another bulkhead for Hannah Kel-

John S. Leeds—Cross

ley. Where was that located? A. That was a continuation of this bulkhead that you speak of.

Q. Toward the east? A. Toward the east.

Q. Same character of bulkhead? A. About the same character, only it was not as expensive. It was built out of second-handed lumber, more of a temporary affair. 10

Q. Well, now, was there any difference along there, from Bartram Avenue toward the west down to Berkley Square, so far as the line of ordinary high water was concerned? A. There was a cove in the beach, always was a cove in the beach, the further down you went, commencing from Columbia Avenue and going down toward Jackson, it made a horse-shoe bend in there, the cove.

Q. Now, where was that horse-shoe bend with reference to Berkley Square? A. Well, Berkley Square would not have been in the narrowest point from Atlantic Avenue, it would have been about mean—between, with regards to this particular property. 20

Q. Now, in answer to Judge Cole you said something about taking the sand from outside of the bulkhead where it had been deposited the night before. What do you mean by that? A. I mean that we would work today and we would dig deep holes, say two to three feet deep, and to-night's tide would come in and push the loose sand up against the bulkhead again, and then in the morning the men would throw it up over the bulkhead. 30

Q. That was after the bulkhead was built? A. Yes, sir.

By Mr. Cole: Q. Mr. Leeds, do you remember when the Newton bulkhead was built? A. Yes, sir.

John S. Leeds—Cross

Q. Was that before or after the Hannah Kelley? A. Well, there wasn't very long between any of those bulkheads, either the one that I built or the first one, the one that Higbee built on the Hannah Kelley property.

10 Q. Do you recall where the tide came with respect to the Newton bulkhead? A. Very well, yes, sir.

Q. Well, how did it come? A. At the lower end of the Newton bulkhead, at Jackson Avenue, there was a hole washed out where the sea had splashed up and been blown over, washed out there twenty or thirty feet square and as deep as this ceiling.

Q. Was the Newton bulkhead on a line with the Hannah Kelley bulkhead? A. They were all on  
20 a line.

Q. All on a line? Are you quite sure about that? A. They were about on a line.

Q. What do you mean by "about"? Within a foot or two? A. I never saw any surveyor with instruments down there. They were put down by carpenters.

By the Vice Chancellor: Q. If this map is right the Newton bulkhead is some thirty-five or forty feet outside of the line of the Kelley bulkhead,  
30 isn't it?

Mr. Starr: That is a different bulkhead.

A. There have been several bulkheads built since the time that we speak of, Judge.

Q. Then you do not have reference to where the present concrete bulkhead is? A. No, not the concrete bulkhead, no, sir.

Q. There was one ahead of that, was there? A.  
40 Just a sheath piling and cedar posts.

John W. Cooney—Direct

By Mr. Starr: Q. And that was built from where to where, Mr. Leeds? A. That was built from where Ryon & Collins left off to the center line of Jackson Avenue.

Q. Towards the west? A. Yes.

By the Vice Chancellor: Q. That was inside of where the present concrete bulkhead of Newton is? A. Yes. 10

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JOHN W. COONEY, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says:

By Mr. Starr: Q. Mr. Cooney, where do you live? A. Atlantic City. 20

Q. What is your present business? A. Contracting and pile-driving, bulkhead building, pier building.

Q. What was your business in 1901 or 1902? A. Pile driving, bulkheading.

Q. Did you have anything to do with the placing of some piling or brush piling at the lower end of the beach, around Berkley Square and Kingston Avenue? A. I built two bulkheads there, Mahlon Newton, Petroff & Emley, and the Kelley bulkhead was built ahead of us, and I put in some piling, brush and sand bags for Mrs. Kelley in front of her bulkhead. 30

Q. Now, when did you build the Newton bulkhead? Do you remember? A. Nineteen hundred and two.

Q. And had the Hilton or Kelley bulkhead been constructed at that time? A. Yes, it was 40 previous to the Newton bulkhead.

John W. Cooney—Direct

Q. And the Newton bulkhead began where? A. Pardon me. It was previous to the second bulkhead I built for Newton. I was back doing work when Turner's boiler washed down.

10 Q. Where was the first bulkhead you built there? A. For Mahlon Newton.

Q. Where was it located? A. That was located from Berkley Square down to Jackson Avenue.

Q. Do you remember when you built that? A. About 1902.

By the Vice Chancellor: Q. About when? A. 1902, sir, I judge around 1902. I couldn't say exactly the time.

20 By Mr. Starr: Q. Where was that located with reference to the line of the Kelly bulkhead? Was it inside or outside? A. Well, it was on about the same line, there was very little difference; I think Kelley's extended a little further, not much.

Q. Now, did you observe the tidal conditions while you were doing that work? A. Yes.

Q. Where was the ordinary line of—rather the line of ordinary high tide at Berkley Square? A. There were certain days that we could not work, we had to knock off—with the water, some days we might get in a full day but very rarely.

30 Q. Well, where was the line of ordinary high water? A. I have seen the high water come within 190 feet of the railroad track while we was working there.

Q. Was that inside or outside of the line where the bulkhead was built? A. Oh, inside of the bulkhead.

40 By the Vice Chancellor: Q. That was which bulkhead? A. Newton. I had nothing to do with

John W. Cooney—Direct

the Kelley bulkhead, only just putting in brush and sand bags.

By Mr. Starr: Q. Now, did you place anything or build anything in front of the Kelley bulkhead?

A. Mrs. Kelley give me a contract to put in piling, brush and sand bags. I done the same for Mahlon Newton and Petroff and Emley. 10

Q. Where was that placed? A. About eighteen to twenty feet on the outside of her bulkhead, towards the ocean.

Q. And was that at Berkley Square? A. From Berkley Square.

Q. Which direction? A. She was above Berkley Square. Newton started at her property and went on down.

Q. Do you remember when the Kelley bulkhead was built or started? A. Well, my recollection brings the Kelley bulkhead in 1902; I don't know, I may be wrong, but I almost could swear it was built in 1902. 20

Q. And when did you put the brush piling in front of it? A. In 1902, while I was doing Mahlon Newton's job. I done three jobs for Mr. Mahlon Newton.

Q. Why did you put the brush piling there? A. To stop the sea from hitting it and to make sand. 30

Q. Hitting what? A. Hitting the bulkhead on storm tide.

Q. Now, before the Kelley bulkhead did you have any knowledge of the situation? Before the Kelley bulkhead was built did you know that beach in a general way? A. Yes, I worked in and around down in there.

Q. Where, with respect to the line where the Kelley bulkhead was subsequently placed, was the 40

John W. Cooney—Cross

ordinary line of high water before the bulkhead was built? A. Well, I have known it—oh, around 190 to 200 feet from the railroad track at that point, all the way down around there for blocks, three blocks.

10 Q. Now, after the Kelley bulkhead was built did ordinary high water wash it? A. Yes, some days it would, and I have seen westerly winds—it would never touch it.

Q. Well, with the tide uninfluenced by conditions of wind or storm? A. Oh, ordinary tides it would wash up around there I guess for eighteen to twenty feet above it.

Q. What do you mean “by above it”? A. Wash beyond it, towards the railroad tracks.

20 Q. Towards Atlantic Avenue? A. Yes. I have seen storm tides go right up to Atlantic Avenue.

CROSS-EXAMINATION by Mr. Cole:

Q. But when the wind was from the west it wouldn't touch the bulkhead? A. Wouldn't touch it at all, sir, work there all day without touching it.

Q. And how far would it be away from the bulkhead then? A. I have seen it 20 feet away from  
30 the bulkhead.

Q. Under normal condition? A. Under normal conditions it would hit the bulkhead all the time, pretty much.

By the Vice Chancellor: Q. When was that?  
A. Sir?

Q. When? A. While we were working there, ordinary tides it would hit the bulkhead.

Q. When? About what time? When the bulk-  
40 head was being built? A. When I was building

John W. Cooney—Cross

Mahlon Newton's bulkhead. I had nothing to do with the Kelley bulkhead at all, your Honor.

By Mr. Cole: Q. Well, have you been talking about the Newton bulkhead—about the tide washing it, or the Kelley bulkhead? A. Well, it was about on the same line, Judge.

Q. Isn't it a fact that the tide made in nearer to Atlantic Avenue as you went down the beach? A. Bulkheads will make beach and prevent the tide from coming to it.

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By the Vice Chancellor: Q: Were you putting this brush outside of high water mark? A. Inside of high water mark, your Honor. We always build bulkheads—the bulkheads we built is generally between high and low water mark.

Q. I thought you were putting your brush outside of the high water mark. A. Outside, towards the ocean to protect it.

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Q. But inside of the high water mark, did you say? A. Yes, sir, inside of the high water mark.

Q. And you were putting your brush some ten or fifteen or twenty feet outside of the bulkhead? A. Outside the bulkhead.

Q. And that was in what year? A. 1902.

Q. And that was in front of the Kelley bulkhead? A. Yes, sir, all the way down.

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Q. Then I don't understand what you mean by saying ordinary high tide came inside of the bulkhead? A. Above the bulkhead, ordinary tide would come up there about eighteen or twenty feet, but with the westerly wind wouldn't touch the bulkhead.

Q. I may have misunderstood you. I understood you to say that the time you were putting

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## John W. Cooney—Cross

the brush there, in 1902, the Kelley bulkhead was already built? A. Yes, sir.

Q. But it hadn't been built long? A. No.

Q. But you were putting your brush inside or oceanward of what you considered ordinary high water mark? A. Here is the Kelley bulkhead (indicating), your Honor, and I was outside towards the ocean about eighteen to twenty feet away from her bulkhead, towards the ocean.

Q. Yes. A. To protect the bulkhead.

Q. Now, then, were you putting your brush inside or outside of what would be the ordinary high water mark of the ocean—what you would call the ordinary high water mark? A. I would be on the inside of high water mark.

20 Q. With your brush? A. With the brush, and we filled bags with sand, and we would put piling in in place of putting stone, generally we put stone, rock, we put sand bags.

Q. Well, I don't understand how it is when you say that, that you still say that the line of ordinary high water mark was inside of the line of the bulkhead? A. Here is the line of the bulkhead (indicating); the high water mark would run 20 feet above this line of bulkhead; some days 30 we had to knock off, we couldn't work, the water would drive us out of there that was eighteen or twenty feet away from the line of her bulkhead, towards the ocean, that is what I would call inside of the high water mark, if the high water runs to there—would, in fact, that is what I would call inside.

Q. What I am trying to find out is where the average—if you could find the average—high 40 water mark was, uninfluenced by winds, either

## John W. Cooney—Cross

southerly or northerly winds, or westerly or easterly winds, and then what I want to know is, would your brush be inside of the ordinary high water line or would it be outside? A. On the high water it would always be in the water, the water would run away above, your Honor.

Q. Above your brush? A. Oh, away above our brush. 10

Q. Well, then, I havn't understood your answers before.

Mr. Starr: It is a question of what he means by inside.

A. I mean inside of the high water mark. The water comes here (indicating). I would call this inside of the high water, towards the ocean.

Q. Well, then, you would put brush where the water or ordinary tide would wash it? A. Oh, yes, sir; yes, sir, all the time. 20

Q. How can you hold it down? A. We would fill bags with sand and put it on top of the brush and mattress it with wire. I done the same for Mr. Newton, Mrs. Kelley and Petroff & Emley.

Q. And it would wash over it? A. Every day. Some westerly winds, when we were there, the tide wouldn't touch us at all, and there has been days we have been working on the brush we would knock off because of the high tides. 30

By Mr. Starr: Q. Now, Mr. Cooney, in 1901, in the latter part of 1901, say from August, to the first of January, 1902, what was the condition of high water at that point Berkley Square, if you know? A. It seemed to be a kind of a slue in there, it would come up pretty near—well, about 190 feet of the railroad. John Young's pier we t up while I was building Mahlon Newton's bulk- 40

## John W. Cooney—Cross

head and it tore down piling 50 foot long, 10 by 10. they were washed off of there and came over clear on top of my bulkhead within twenty feet of the railroad track.

By Mr. Cole: Q. You are talking about a storm  
10 now, aren't you? A. That was a storm tide.

By Mr. Starr: Q. Did you have knowledge of the condition about which you have testified in the year 1901? A. Yes. I built more bulkheads down that way than any other man in the county.

Q. Did you bid on the building of the Kelley bulkhead? A. Yes.

Q. That was afterwards built by Mr. Higbee?  
A. Yes. Turner beat me.

Q. You bid on that? A. I bid on that job.

20 By Mr. Cole: Q. This work that you were doing for Mrs. Kelley, outside of what you call the Kelley bulkhead, was done after the bulkhead was built and after it was sold to Collins, wasn't it? A. No. Mrs. Kelley paid me and gave me the contract. I built it for Mrs. Kelley.

Q. But, I say, this work that you did for Mrs. Kelley outside of the bulkhead, where you put this matted work that you speak of— A. Yes.

30 Q. That was done for her after the bulkhead had been built and after she had sold the land to Collins, wasn't it? A. I don't know about selling the land but it was after the bulkhead was built.

Q. And in 1902? A. 1902.

Q. How late in 1902? A. I guess it was in the fall of 1902, sir.

Q. Did you see Collins around there at the time?  
A. No.

40 Q. Did you see Hilton around there at the time?  
A. Once in a while I would see Mr. Hilton.

Wilbert S. Higbee—Direct

Q. Did you ever see Collins around there while your work was going on? A. I may have.

Q. How large was your contract? What did it amount to in dollars and cents—your contract with Mrs. Kelley? A. I think I got—my job for Mrs. Kelley run to about one hundred and seventy-five to two hundred and twenty-five dollars. 10

Q. And this work that you were doing for her outside of the bulkhead was right in front of Berkley Square, wasn't it? A. Above Berkley Square, adjoining Petroff & Emley, and I went all the way down.

Q. I don't care about that, I am talking about Mrs. Kelley, in front of Mrs. Kelley's property. A. Yes, sir.

Q. Between Berkley Square and Kingston Avenue? A. Yes, sir. 20

By the Vice Chancellor: Q. And extending all the way down? A. Yes, sir.

Q. For Mrs. Kelley? A. For Mrs. Kelley, and then joining it with Mr. Newton and Petroff & Emley, all the way down.

By Mr. Cole: Q. But Mrs. Kelley's you only put, you say, as far as Berkley Square? A. For her front.

Q. And you put this brush work down for her? 30  
A. Yes, sir.

Q. After the bulkhead was built? A. Yes, sir.

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WILBERT S. HIGBEE, re-called:

By Mr. Starr: Q. Mr. Higbee, when you testified at the first hearing with reference to the fact 40

## Forrest B. English—Direct

that you were interfered with by the water in the building of the bulkhead, and also that the ordinary high tide extended inside of the bulkhead, did you refer to a time before or after the storm occurred? A. Principally after, after the storm.

10 Q. Well, did you observe whether or not the water came up to the bulkhead before the storm? A. I couldn't say positively, but I think it used to come up, and possibly not to interfere with us until after the storm.

Q. But it came up to the line of the bulkhead?

A. It did, as I remember it, yes, sir.

Q. And did it extend toward Atlantic Avenue beyond the line of the bulkhead before the storm?

20 A. Well, I think it did, as I remember it, we were very cautious to leave our lumber at nights out above or beyond the bulkhead so as not to have the tide interfere with it, I think we used that precaution.

Q. Toward Atlantic Avenue? A. Toward Atlantic Avenue, yes, sir.

No Cross-examination.

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30 FORREST B. ENGLISH, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Statr: Q. Mr. English, what is your business? A. Insurance.

Q. And where do you live? A. Philadelphia.

40 Q. Do you own property in Chelsea, in the neighborhood of Berkley Square? A. Yes, sir.

## Forrest B. English—Direct

Q. Where is your property located? A. 114 South Plaza Place.

Q. And where is Plaza Place with reference to Berkley Square? A. About what I would call two blocks south.

Q. You mean two blocks west, don't you? A. Oh, yes. 10

Q. Towards Longport? A. Yes, toward Longport.

Q. And about how many feet? A. From Berkley Square to Plaza Place?

Q. Yes? A. I guess it is 250 feet, isn't it?

Q. When did you build there? A. I started to build in 1904.

Q. In 1904? A. Yes, sir.

Q. And did you have any knowledge of the tidal conditions at that point prior to 1904? A. Prior to 1904, no, sir. 20

Q. When did you first become acquainted with the condition of the tides along the ocean at Berkley Square? A. In 1904 and 1905, of course I noticed it more in 1905.

Q. 1905? A. Yes.

Q. And has your knowledge of those conditions extended from that time until the present? A. How is that? 30

Q. Has your knowledge of the tidal conditions extended from that time until the present? A. Yes, sir.

Q. And what portion of the years during that time have you lived in Atlantic City at your property? A. From June until October.

Q. Were you down there in the winter time at all? A. No, sir. 40

## Forrest B. English—Direct

Q. Did you have occasion to observe the line of ordinary high tide in the year 1908? A. 1908?

Q. Yes. A. Except that I know that the water used to touch the old bulkhead that Mr. Newton built there, the wooden bulkhead.

10 Q. Now, do you know where the Vare property is? A. Yes, sir.

Q. Do you remember the location of what has been spoken of as the Kelley bulkhead? A. Yes, sir; I think I have knowledge of that. It was a continuation of the old bulkhead that Mr. Newton put there.

Q. Towards the east? A. Yes, sir.

Q. Now, prior to the time the Vare house was built did you observe that bulkhead? A. Yes, sir.

20 Q. And is that the same bulkhead that extends from Berkley Square to Kingston Avenue? A. At the present time?

Q. Yes. A. No; I think there has been a bulkhead built out—

Q. I mean on the inside of that. A. Oh, inside? Yes, sir.

Q. You remember that? A. Yes, sir.

Q. In front of Mr. Reichner's property? A. Yes, sir.

30 Q. Now, in 1908, which was before the erection of Mr. Vare's house, where did high water extend, ordinary high water extend, with relation to that old bulkhead? A. It came up and touched it usually every day.

Q. Did that occur all the time in 1908? A. No; practically since I have been there, that is, up to the time the old bulkhead was built, since the old bulkhead was there.

## Forrest B. English—Direct

Q. What opportunity had you to observe the tidal conditions? A. I was down there every day of the time I was here and it was always wet. My children were down on that beach, and I visited there, I was there, naturally, every day, of course, being so close.

10

Q. Now, was there any change in the condition in 1909 when you were down there? A. Not that I know of.

Q. In 1909, did the water extend up to the old bulkhead, the Hannah Kelley bulkhead? A. There is one thing that I remember, and that was that between Montgomery Avenue and Jackson Avenue there was a lot open there and water had broken down the old bulkhead that was along there, so much so that it used to come right up, I suppose, twenty-five and thirty feet of the other side of the Newton wooden bulkhead time and time again.

20

Q. In the year 1910, what were the tidal conditions along there from Berkley Square to Kingston Avenue? A. Practically the same.

Q. Now, after the Vare house was built was there a bulkhead built around that? A. After it was built?

Q. Well, before or afterwards. A. Well, now, I saw them building some kind of a bulkhead. Naturally, they had to build a bulkhead around the Vare property.

30

Q. Vare did have to build a bulkhead? A. Well, there was a portion of the ground there—it was a lawn, as I remember it, of Mr. Reichner's, and then there was a bulkhead built further out there, it extended out, as I recall it.

40

## Forrest B. English—Direct

Q. Now, after that bulkhead was built, did you observe whether or not the line of ordinary high water touched that bulkhead? A. Yes, sir.

Q. That is, the bulkhead that was built around the Vare house? A. Yes, sir.

10 Q. And how long did that condition continue? A. Well, that bulkhead was on a line, I think, with the new bulkhead that Mr. Newton built, and I have naturally seen the water come up and touch the new bulkhead.

Q. You are speaking of the concrete bulkhead? A. Yes, sir.

Q. How long did that condition continue—that is, the water wash the Newton bulkhead and also the Vare bulkhead?

20 Mr. Cole: He has not said it did wash the Vare bulkhead.

Q. Well, did the line of the ordinary high water wash the Vare bulkhead? A. Yes, sir.

Q. After it was built? A. Yes, sir.

Q. How long did that condition continue? A. Up until the time this—as I recall it, up until the time this obstruction was put there.

Q. You mean the bulkhead by Mr. Lambert? A. Yes, sir.

30 Q. Before the erection of the Vare house at the foot of Berkley Square what was the character of the land immediately inside of the Kelley bulkhead at the foot of Berkley Square and also Kingston Avenue? A. Well, there were houses built there.

Q. Immediately inside? A. Yes, sir.

Q. Was there a lawn there or was it beach front?

40 A. There was a lawn there in front of Mr. Reichner's house on Berkley Square.

## Forrest B. English—Cross

Q. Was there also at Kingston Avenue? A. Yes, sir.

Q. And did that lawn extend to the line of the old Kelley bulkhead? A. Yes, sir.

Q. I show you a photograph, which was marked Exhibit D-4 for identification, and I ask you whether or not you recognize that photograph? Yes; I think this is Mr. Reichner's house, as I recall it (indicating). 10

Q. It has been testified by Mr. Ansley Bowen that that is the house immediately in the rear of Mr. Vare's property? A. Yes, sir.

Q. Is that your recollection? A. Yes, sir.

Q. And does that photograph show the conditions that existed with reference to the bulkhead on the beach front in 1908 and 1909? A. Yes, sir, because this is prior to the lawn being laid out there. 20

Q. I show you another photograph, which is marked Exhibit D-3 for identification, and ask you whether or not you recognize that photograph? A. Yes, sir, that is the same house.

Q. "A" is the same house? A. I think it is; yes, sir.

Q. Does that show the conditions of the bulkhead at that point? A. Yes, sir. 30

Q. In 1908 and 1909? A. Yes, sir.

Q. You recognize it, do you? A. Yes, sir.

## CROSS-EXAMINATION by Mr. Cole:

Q. Is it your idea that what has been referred to as the Vare bulkhead is on a line with the Newton bulkhead? A. The present bulkhead?

Q. Yes? A. I think it is at the present time. 40

## Forrest B. English—Cross

Q. Don't you know that the Newton bulkhead is 35 feet oceanward of the Vare bulkhead? A. At the present time?

Q. Yes. I mean the Kelley bulkhead. A. Yes, sir; 25 feet.

10 The Vice Chancellor: Of the Kelley bulkhead?

Q. Yes. A. But you are speaking of the later Vare bulkhead, I understood.

Q. That is what I want to find out. Do you know what has been referred to as the Kelley bulkhead? A. Yes, sir.

Q. Where is that constructed with relation to Atlantic Avenue? A. Where is it in relation to the construction of Atlantic Avenue?

20 Q. Where is the Kelley bulkhead which you have in mind constructed in relation to Atlantic Avenue? How far from it? A. As I understood it, 275 feet.

Q. Where did you get that understanding? A. I have heard it repeated time and time again.

Q. Is that the only way you know? A. Yes, that is the only way I know.

Q. How far oceanward of that bulkhead is the Vare bulkhead? A. Oh, I don't know whether I  
30 could answer that or not.

Q. Now, you say in 1908 you saw every ordinary high tide strike the Vare bulkhead, do you? A. I don't say I saw every one. I say that pretty nearly every day I was down there, and that the old bulkhead was washed from time to time.

Q. What do you mean by "the old bulkhead"? A. The wooden bulkhead is what I refer to as the old.

## Forrest B. English—Cross

Q. Well, the Kelley or the Vare? A. I suppose it would be the Kelley bulkhead.

Q. Well, I want to know whether you are saying now that the Kelley or the Vare bulkhead was swept by every ordinary tide in 1908? A. Well, it would be, I imagine, the Kelley bulkhead, because the one that I principally refer to naturally would be Mr. Newton's bulkhead, and I understand they were both on a line. 10

Q. Where did you get that understanding? A. Where did I get it? I have seen it from time to time.

Q. Do you now think that the Kelley bulkhead and the Newton bulkhead are on a line? A. The old one, yes, sir.

Q. When was the Vare bulkhead built? A. That I couldn't say. 20

Q. Can you tell us the year? A. I suppose that must have been 1911 or 1912.

Q. When did you ever see ordinary high water strike the Vare bulkhead? A. Most every year that—that would be prior to anything being put there on the beach, that obstruction there.

Q. Were you paying special attention to that or simply casual? A. Oh, it came up right in front of my own house, and if it came there it came to Mr. Vare's bulkhead. 30

Q. How long have you known Mr. Vare? A. How long?

Q. Yes, sir? A. Thirty years.

Q. Very friendly, aren't you? A. Yes, sir.

Q. You came here at his request today? A. Came at his request?

Q. Came here at his request today? A. He asked me to appear here, yes, sir. 40

## Forrest B. English—Direct

Q. You are neighbors of his, of course? A. Yes, friends and neighbors, yes, sir.

10 The Vice Chancellor: I notice here, gentlemen, that this agreement for the sale of this land in question, with other land, contains a stipulation whereby Mrs. Kelley agrees to fill in the land which she is conveying "to the established city grade, grade the same and cause it to be covered with manure, hay or some other such material as will effectually prevent the filling from being blown away, all of which shall be done before the said 25th day of September, 1901." Do counsel know whether that was the work that was done by this witness that testified a few moments ago that he leveled off the hills and did other leveling there and filling? That seems to be a filling that was done prior to the bulkhead or agreed to be done prior to the bulkhead. It could not be done outside of high water mark without a bulkhead. The agreement does not seem to contemplate any bulkhead but it does contemplate having it filled. Doesn't it occur to you that if it was being filled and not bulkheaded that it was necessarily above high water mark?

20

30

Mr. Cole: There is no doubt, I think, that that is the same work. He said that he had begun this work before the bulkhead was constructed. That is his testimony.

40 The Vice Chancellor: I understood him to say that he believed it was 1901, and that he had nothing to do with the bulkhead, but

John S. Leeds—Direct

I don't know whether he was the man who was filling it to city grade or not.

Mr. Cole: He said so.

The Vice Chancellor: Is he still here?

Mr. Starr: Yes. Mr. Leeds.

10

JOHN S. LEEDS, re-called:

By the Vice Chancellor: Q. Won't you tell me, please more about this filing that you did for Mrs. Kelley, or this leveling? I understood you to say that you leveled off hills and one thing or another. Did you fill to city grade? A. The city grade as established at that time, yes.

20

Q. That is what you did, did you—fill up to city grade? A. Yes, sir.

Q. Did you put on any top dressing? A. I covered the land with stable manure, litter in the streets, with eight inches of gravel.

Q. Let me read this to you and ask you whether this is the kind of work that you did. I am reading from the contract with Mrs. Kelley made in August, 1901, when she agreed to sell the land to Hilton. She agrees in that contract "to fill all of the above described land"—now that includes this land in front of which the Kelley bulkhead was afterwards built, "to fill all of the above described land to the established city grade, grade the same and cause it to be covered with manure, hay or some other such material as will effectually prevent the filling from being blown away, all of which shall be done before the said 25th day of

30

40

John S. Leeds—Direct

September, 1901." Now, is that the kind of work you did? A. Yes, sir.

Q. And did you or did you not have a bulkhead in front to protect your filling? A. Well, I did and I did not. When I started to do this fill there  
10 was no bulkhead there. I scooped the sand off of the beach and pulled it with a drag scoop, I laid it up against the fill, and then Ryon & Collins purchased this land in the meantime and this bulkhead was built, and what we hadn't scooped in was thrown over the bulkhead and trimmed back.

Q. Well, what I want to find out is this. I would like to make it plain to you if I can. Had you finished this filling for Mrs. Kelley and covered it with your manure top dressing before Ryon & Col-  
20 lins built this Kelley bulkhead? A. No, I had not.

Q. You had not finished? A. No.

Q. Well, can you tell me now whether the land which you were filling and which you agreed to fill was above high water mark or below? In other words, without a bulkhead you couldn't fill land below high water mark, could you? A. No, sir.

Q. Now, what were the conditions at the point where the Kelley bulkhead was built at the time you started in on your work? A. My testimony as  
30 I gave before shows that in my judgment the ordinary high water was somewhere around fifteen or twenty feet inside of the Kelley bulkhead line.

Q. Well, then, how could you agree to fill it or undertake to fill it without a bulkhead? A. I didn't agree to fill 275 feet originally for Hannah Kelley. I said that we had two or three different contracts that tied in together.

Q. Well, in this contract she agrees to fill 275  
40 feet and I supposed that was the work that you

John S. Leeds—Direct

were doing? A. But I had made my agreement with Hannah Kelley before she had sold to Ryon & Collins. After she had sold to Ryon & Collins she came to me and said "I must have 275 feet of fast land. That is what I have sold to Ryon & Collins."

10

Q. And then it was that you filled in more—filled out to the bulkhead? A. From that came the bulkhead, and after the bulkhead was up it had to be filled back. There must have been some kind of an agreement between Hannah Kelley and Mr. Collins about this extra filling, because Mr. Collins paid me for trimming the sand back and Hannah Kelley paid me for the rest of it.

Q. Mr. Collins paid you for filling up to the bulkhead, did he? A. No, Mr. Collins paid me for trimming back the sand which he threw over the top of the bulkhead assuming that to be the top of the bulkhead (indicating): They would pile sand up as high as they could throw it, and then I would come along with a drag scoop and pull it back twenty-five or thirty feet.

20

Q. Who paid you for throwing the sand over the bulkhead? A. Mr. Collins himself had men do that in that particular point.

Q. Well, then, for what work you did, leveling back of the bulkhead and adjacent to it, you were paid by Collins? A. Yes, sir, at that particular point.

30

By Mr. Starr: Q. Mr. Leeds, could you have filled in the whole 275 feet, in accordance with your arrangement with Mrs. Kelley, without a bulkhead being put up at that line, 275 feet? A. I didn't arrange with Mrs. Kelley to fill 275 feet, but I couldn't have filled 275 feet.

40

Henry F. Michell—Direct

Q. Why not? A. Because the storm tides would have come and taken it away.

By the Vice Chancellor: Q. What about the ordinary high tides? Could you have done so without any storm tides? A. I was attempting  
10 to get out to that point. I built that brush jetty to try to catch the sand and hold it, but the tides were coming in, and Mr. Collins must have realized the point that he needed a bulkhead, because if those came after they purchased the land—

Q. But what Judge Starr asked you was whether you could have filled in at city grade,— A. I could not.

Q. Out to 275 feet? A. I could not.

20 Q. I mean if there had been no storm tides? A. Why, it would not have been practical to have tried it. I don't think I could have done it.

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HENRY F. MICHELL, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

30 By Mr. Starr: Q. Mr. Michell, where do you live? A. Philadelphia in winter time and Atlantic City in summer.

Q. Are you in business in Philadelphia? A. Yes, sir.

Q. And do you own property in Atlantic City? A. Yes, sir.

Q. On what street? A. Kingston Avenue, formerly Millidgeville Avenue.

40 Q. And what is the number of your property? A. 131 south.

## Henry F. Michell—Direct

Q. Are you on the east or west side of the street? A. Well, I would call it east side.

Q. On the upper side? A. Yes, sir.

Q. This way (indicating)? Towards Atlantic City? A. Yes, sir.

Q. And how many houses from the beach is your house? A. Well, the third house. 10

Q. And when did you buy that property? A. 1909.

Q. Did you live there in the year 1909? A. No, didn't go there until 1910.

Q. For how long back have you had any recollection of the tidal conditions along the beach from Kingston Avenue to Berkeley Square? A. Well, in 1909, really, after I bought it. We bought it in the day-time and the beach was pretty clear; it appealed to us. In the evening we walked down, my wife and family, and found out that the water ran up to the bulkhead, you call it, and I said to my wife, I says "Gracious, what have we bought?" We bought this for the children to play on. So the next day we went down again, the water was away but came up again in the evening. 20

Q. Well, now, what month was that in 1909? Do you remember? A. That would be September.

Q. September, 1909? A. Yes. 30

Q. Now, is that the only time that you observed the tidal conditions in 1909? A. Well, that is the first time, but after that—

Q. In the same year? A. Well, no, we moved up then.

Q. Now, in 1910 what time did you go down there to live in the summer? A. About the 15th of June.

Q. And stayed there how long? A. About the first of October. 40

Henry F. Michell—Direct

Q. Now, did you have occasion to observe the line of ordinary high tide during that summer between Kingston Avenue and Berkley Square, particularly in front of where Mr. Vare's property is now? A. Oh, yes, that is right in front of us, 10 we could see it. The water often came up there while we were sitting on the porch, we could see it. At that time Mr. Vare didn't have a house, it was a vacant lot.

Q. Now, I show you a photograph marked Exhibit D-3 for identification: Is your house shown on that photograph? A. Yes, sir.

Q. Which is it? A. This house here (indicating), at that time the second house.

Q. The one that I mark "M"? A. That is it.

20 Q. Now, sitting on your porch could you see the where I could see it, Judge, we could see it come extent to which high tide came up? A. Here is up right here, washing up against this (Indicating), right in front of us.

Q. You remember the location of that bulkhead before Mr. Vare's property was built, do you, that was built in front of the Reichner property? A. Yes, partly, naturally looked at it quite often.

30 Q. With reference to that bulkhead how far did the ordinary high water during that summer come? A. Well, if the bulkhead wasn't there it would come back further:

40 Q. Was the land filled in back of the bulkhead, between the bulkhead and Mr. Reichner's property? A. There was what you call—like a lot of other properties—a lot of gullies there where the water would come over and it would be unsafe for the children to get in back of the bulkhead.

Henry F. Michell—Direct

Q. Now, you remember the construction of the Vare bulkhead, do you? A. Yes; I casually watched it as it was going up.

Q. Now, after that bulkhead was built how far did ordinary high water extend? A. Well, naturally it would wash up against Mr. Vare's more than it would down our way, because Mr. Vare reaches out further than we do. 10

Q. Now, did the ordinary high water in 1911 extend to Mr. Vare's bulkhead? A. Oh, yes, yes, frequently.

Q. How long did that condition continue? A. Well, off and on all the time, Judge.

Q. Was there any change in the conditions of the beach there that would make a difference in the tide? A. Well, we had quite high water there last year, it frequently washed up to our bulkhead there in front of the house. 20

Q. Until Mr. Lambert put his bulkhead there what did you observe with reference to the extent to which high water came up to the Vare bulkhead? A. You mean about the depth of it?

Q. No, the extent, not necessarily the depth? A. Well, it would wash up to it, don't you know.

Q. To the Vare bulkhead? A. Yes.

Q. At Kingston avenue? A. Yes. Well, Kingston? 30

Q. I don't mean Kingston avenue, I mean Berkeley Square. A. Berkeley Square. We can see that bulkhead right from our porch, and from our porch we can see the other bulkhead. We were disappointed when we bought there on account of the water coming up.

Q. In the summer of 1914 wher did the ordinary high tides extend at the foot of Berkeley 40

## Henry F. Michell—Cross

Square? A. I am afraid I can't answer that, because I would probably not notice it, so I wouldn't want to say one thing or another, because I don't know. I got used to it, don't you see.

Q. Well, was there any material change in the line of the tide from when you first observed it?  
10 A. Well, after—

Q. After Mr. Vare's bulkhead was built until the Lambert obstruction was put there was there any material change in the line of the high water?

A. Well, the Lambert bulkhead stopped the water from coming up.

Q. Until that was built where did the water go?

A. Why, it came up pretty well.

Q. Where? A. Came up to our bulkhead.

Q. What about the Vare bulkhead? A. It  
20 would naturally come up there, past there, only deeper, because we are about 35 feet back of Mr. Vare's.

Q. What do you mean by "we"? A. Well, we Millidgeville people.

Q. You mean on Kingston avenue? A. Yes, Kingston avenue.

Q. Is that old bulkhead still there in front of Mr. Reichner's property? A. Yes.

30 CROSS-EXAMINATION by Mr. Cole:

Q. Every high tide came up against the Vare bulkhead, didn't it? A. Well, I would say nearly. I didn't look at it close enough, don't you see, it wasn't a matter of great importance, and being a summer resident I didn't specially make a note of it.

Q. Were there some high tides that did not come up against that bulkhead? A. I couldn't answer that.  
40

## Joseph D. Swoyer—Direct

Q. What do you understand ordinary high water to mean? A. Well, I suppose when the water came up to where—right off the bottom of our avenue there, you see, it would come right up to the bulkhead and wash against the step where we went down on the beach.

Q. Do you remember when the Vare bulkhead was built? A. Yes, sir. 10

Q. Who built it? A. I wouldn't know that.

Q. Did Mr. Vare have it built? A. I wouldn't know that, sir. You see, not being interested at all, I didn't take any notice of it.

JOSEPH D. SWOYER, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says— 20

By Mr. Starr: Q. Mr. Swoyer, where do you live? A. I live at Upper Darby Township, just outside of Philadelphia, suburbs.

Q. Did you ever live on Berkeley Square? A. Since 1907.

Q. Until when? A. Until May, 1915.

Q. And did you live there all the year round? A. Beginning 1909. I bought in 1907. We tried it living here just in the summer, we liked it so much we moved everything down and lived there from that time up until the time we left here in May, 1915. 30

Q. And how far from the beach was your house? A. Fourth house originally. Our street wasn't paved or the curb laid or anything when we first took the place, even Atlantic avenue wasn't paved. 40

Joseph D. Swoyer—Direct

Q. And yours is the fourth house now? A. No; it is fifth since Vare has built. You are speaking of my old house? I had two. I built a new one next to the corner afterward.

10 Q. Now, while you were here from 1907, you say,—1907? A. 1907 I bought and I moved right down.

Q. Did you have occasion to observe the location of high water line? A. Absolutely, because I was scared to death after I bought my house, because the water came very often close to my own place.

20 Q. Now, in the year 1908, in the fall of 1908, where did the high water line come,—the ordinary high water line come with respect to the bulkhead that was there at that time? A. Toward Atlantic avenue decidedly.

Q. Did it wash the bulkhead? A. Came through the bulkhead up the street, what is now Berkeley Square.

Q. Now, in 1909, in the fall,— A. How late in the fall?

Q. In September. A. I was there.

Q. Were you there in September, 1909? A. I was there until October.

30 Q. Where was the line of ordinary high water so far as that bulkhead was concerned at that time? A. The same thing, there was no change at all.

40 Q. Was there any change until the Vare bulkhead was built? A. Absolutely the same. The only change was made at all that I noticed up until the time I left, which was May, 1915, was when I think the gentleman named Lambert built a bulkhead down there, it didn't hit it as hard, but I can say and do swear that all the while that I

Joseph D. Swoyer—Cross

lived there the tide came up beyond the Kelley bulkhead, always hit it, and subsequently came up the street, Berkeley Square, up in the street, because we were very much alarmed after we bought the place for fear we would have some trouble.

Q. Do you remember when the bulkhead was built around the Vare house? A. I don't remember exactly. I remember when it was done but I couldn't tell you just exactly when it was. 10

Q. After that was built what did you observe with reference to the water striking it? A. Always came up there.

Q. At the foot of Berkeley Square? A. Understand, I was a business man, came to town pretty near every day, but I would say consistently that high water mark touched his place every time, every high water mark; and in a storm—I saw a storm that came up over the top of that new bulkhead, away up Berkeley Square, up the street. 20

CROSS-EXAMINATION by Mr. Cole:

Q. Were you living there on the 28th of July, 1909? A. Yes, sir.

Q. Did you see either Mr. Ashmead or Mr. Hackney, surveyors, surveying the high water line? A. No, sir. 30

Q. At that bulkhead? A. No, sir.

Q. Do you know it to be a fact that on the 28th day of July, 1909, high water line, ordinary high water line, was at least thirty feet oceanward of the Vare bulkhead? A. What time of day?

Q. Any time of the day, high water line I am talking about. A. No, I don't.

Q. High water? A. No, I don't. 40

## Andrew Marcus—Direct

Q. Then your testimony is that at that time every high tide— A. That I saw.

Q. Pardon me, Mr. Swoyer. A. Pardon me.

Q. Then your testimony is that at that time every high tide, ordinary or otherwise, struck the  
10 Vare bulkhead, is it? A. No; I say the tides that I saw. I go to business every day.

Q. Well, do you now say that every ordinary high tide washed the Vare bulkhead in 1909? A. I would say it reached the bulkhead, yes, sir.

Q. And in 1908? A. Yes, sir.

Q. Every year you were there? A. Up until the time I left, 1915.

Q. You, of course, were very friendly with Mr. Vare? A. I never met Mr. Vare in my life except  
20 since he had the place in Atlantic City, I know him scarcely at all.

Q. How long have you known him? A. Since he built his place there. I never saw the man before.

Q. How long was that? A. When he built his place? I haven't an idea just exactly what year it was.

Q. Don't remember? A. I don't. I should  
30 judge about 1912, 1911 or 1912, something like that; I don't know; I couldn't tell you. I have only known him as a neighbor, I have never been in his house, he has never been in mine.

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ANDREW MARCUS, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

## Andrew Marcus—Direct

By Mr. Starr: Q. Andrew, where do you live?  
A. I live in Linwood now, or Egg Harbor Township, rather.

Q. And what is your business? A. I am a farmer now. I used to be in the contracting business, general contracting here in Atlantic City. 10

Q. In 1901 what was your business? A. General contracting.

Q. Did you have anything to do with filling in any land down in Chelsea in the neighborhood of Kingston avenue and Berkeley Square and along there? A. I did.

Q. For whom did you work? A. I worked mostly for Newton, different parties, a little for different parties but mostly for M. W. Newton.

Q. And where was the seat of your operations for Mr. Newton down there? A. How is that? 20

Q. Where did you work for Mr. Newton? A. Down there at Tallahassee avenue and Berkeley Square, just below Berkeley Square.

Q. What year did you work there? A. I worked there several years. 1901, 1902 and 1903, I think.

Q. Now, in 1901 did you have occasion to examine or to observe where the line of high water was in that neighborhood, at Berkley Square? 30  
A. Yes.

Q. What kind of work did you do? A. What kind of work did I do?

Q. Yes, what kind of work did you do? A. Filled in.

Q. Do you remember the fact that a bulkhead was built at Berkeley Square? A. Yes.

Q. By Mr. Higbee? A. Yes.

Q. Well, now, before that bulkhead was put there where did you observe that the ordinary 40

## Andrew Marcus—Cross

high water came toward Atlantic avenue? A. Well, before the bulkhead was put there I don't have much recollection, but I do know when the bulkhead was put there the ordinary high water was from ten to twenty feet towards Atlantic avenue.

10 Q. Inside of the line toward Atlantic avenue? A. Yes, towards Atlantic avenue, from ten to twenty feet, when the bulkhead was put there.

Q. Now, after the bulkhead was put there did the ordinary high tides wash the bulkhead? A. Yes.

Q. Came up to it? A. Yes.

Q. Did you have anything to do with the filling in of the land at Berkeley Square immediately adjoining where Vare's property is now? A. I did.

Q. And is that the place you observed? A. Yes, sir.

Q. You observed the line of the high water there? A. Yes, sir.

Q. How early in 1901 did you have any knowledge of the conditions there? A. Well, I couldn't hardly say about that, how early. I think the bulkhead was built in the latter part of 1901, according to my recollection.

30 Q. How long before the bulkhead was built did you know of the conditions there? A. Oh, I was there all summer.

Q. The summer of 1901? A. Yes.

CROSS-EXAMINATION by Mr. Cole:

Q. For whom did you work? A. I worked for M. W. Newton.

40 Q. Did you work for Mrs. Kelley? A. No.

Q. Or Hilton? A. Eh?

## Andrew Marcus—Cross

Q. Did you work for Hilton? A. No.

Q. Or Collins? A. No.

Q. You hadn't anything to do with the Kelley bulkhead, the Kelly property? A. No, nothing to do with the Kelley property.

Q. Well, what have you to say—did every ordinary high tide wash the Kelley bulkhead? A. Yes. 10

Q. In 1901? A. Practically,—well, yes, every ordinary high tide did, an extra low tide might have not, but an ordinary tide washed the bulkhead.

Q. Well, there were many times when the ordinary high tide did not wash that bulkhead, weren't there? A. There was no time when the ordinary high tide did not wash the bulkhead. 20

Q. What were you doing, paying attention to the Kelley bulkhead? A. Well, nothing particular only I was working adjoining it and we had to move up—when the tide went out we went out further to get our sand and as the tide came up we had to come nearer to shore.

Q. What time in 1901 did you work for Newton? A. Practically all of 1901.

Q. What time in 1902 did you work for him? A. Well, practically all of 1902. 30

Q. Filling in this land of his all the time? A. Filling in lots on both sides of Atlantic avenue. We filled in a block on the north side of Atlantic avenue for Petroff and Newton.

Q. When did he build his bulkhead? A. Well, I couldn't say. I think about that time.

Q. Which was built first,—his bulkhead or Kelley's? A. I think his was. 40

## Adonija P. Leeds—Direct

Q. Was his on a line with Kelley's? A. Well, that I couldn't say, I couldn't say whether it was or was not.

Q. Wasn't it further out? A. How?

10 Q. Wasn't it further out toward the ocean? A. I really couldn't say about that, whether it was further out or not.

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ADONIJA P. LEEDS, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Mr. Leeds, where do you live?

20 A. Pleasantville.

Q. What was your business in 1901? A. Tin roofing and plumbing, tin business and plumbing.

Q. Now, did you have knowledge of the construction of a bulkhead at Berkeley Square? A. Not the least.

Q. By Hannah Kelley? A. Not the least.

Q. Or the construction of a bulkhead by anybody between Kingston avenue and Berkeley Square?

A. Not the least. I saw bulkheads there but whose they were I didn't know.

30 Q. Well, you knew a bulkhead was built there?

A. I knew there was bulkheads on the beach.

Q. Were you there while they were being built?

A. No, sir.

Q. Were you there after they were built? A. No, sir. Well, I have been by there, without a doubt, but not to notice anything.

40 Q. What say? A. Not to notice anything, nothing more than being on the boardwalk, that is about all.

## Ansley B. Bowen—Direct

Q. Well, don't you remember being down there, either while that bulkhead was being built or shortly afterwards? A. No, sir. All the connections I had with that—I done some work for Mr. Higbee, rather I had a man that done the work on the house that he built there.

Q. Well, you were there at that house, weren't you? A. I was never at the house myself, no, sir.

10

No cross-examination.

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 ANSLEY B. BOWEN, recalled:

By Mr. Starr: Q Mr. Bowen, I show you photograph which is marked D-4 for identification. You have already identified the photograph and the house which was marked "A"? A. Yes, sir.

20

Q. Did you build that house for Mr. Reichner? A. Yes, sir.

Q. Now, when was it built? A. Built in the fall of 1908.

Q. And when did you begin the house? A. The permit was taken out August 4th.

Q. And you finished it when? A. About December.

30

Q. Now, does that photograph show the condition of the house about when it was completed? A. It does.

Q. I notice the dirt and rubbish around. Had it been cleared up yet? A. No; that came from inside the garage.

Q. And does that photograph show the conditions as they existed with reference to that house and the bulkhead in the fall of 1908? A. Yes.

40

William S. Vare—Direct

Q. About when the house was completed? A. About when the house was completed.

No cross-examination.

10 Mr. Starr: If your Honor please, I offer these two photographs in evidence.

Said two photographs, heretofore marked Exhibits D-3 and D-4 for identification, marked Exhibits D-3 and D-4, respectively.

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20 WILLIAM S. VARE, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Mr. Vare, are you the husband of Ida Vare, the defendant in this case? A. Yes, sir.

Q. When did you first have any knowledge of the tidal conditions along the beach from Kingston Avenue to Berkeley Square? A. About July 1st, 1910.

30 Q. And where were you living at that time? Can you show on that picture (Exhibit D-3)? A. I lived here, your Honor (indicating).

Q. I will mark it with a letter "V". You lived in that house? A. Yes, sir.

Q. All summer? A. That at that time was the second house from the beach on the northeast side of Millidgeville avenue. I lived there July, August and the early part of September.

40 Q. At that time did you observe the location of what has been spoken of here as the Hannah Kelley bulkhead? A. Yes, sir.

## William S. Vare—Direct

Q. And how close was the house which you occupied at that time to that bulkhead? A. It was directly opposite on the ocean side of my house.

Q. You were on the upper side of Kingston avenue? A. I was on the northeast side of Kingston avenue.

Q. And could you see the Kelley bulkhead which extended then from the Kingston avenue to Berkeley Square from your front porch? A. My children played there mostly every day during that time. 10

Q. Well, did you see it? A. Yes, sir.

Q. Now, during the summer of 1910 what did you observe with reference to the location of ordinary high water line between those two streets, extending down as far as Berkeley Square? A. It came to that bulkhead. 20

Q. Was there any house then erected upon the lot immediately adjoining that bulkhead on the north? A. There was a lawn that extended from the northwest side of Millidgeville or Kingston Avenue to the northeasterly side of Berkeley Square. In other words, I sat on my porch and looked across two lawns, as it were, being the side-yards of these houses here, these two houses marked "A" and "B" on this photograph (Exhibit D-3). 30

Q. Now, when was the bulkhead built around the property that you subsequently acquired? A. So far as I know at the same time the house was built, or probably a very short space prior thereto.

Q. And when was the house that you subsequently bought for Mrs. Vare built? A. I purchased—I secured an option in the latter part of April, 1911. The house was then in course of erection and completion. 40

William S. Vare—Direct

Q. And did you occupy the house that summer?

A. It was to have been finished in June but I didn't get in until later, in the middle of the summer.

Q. And then you bought it the same fall? A.  
10 Oh, no, I moved in in the summer.

Q. What month did you move in in 1911? A. I lived in 1911, in the early part of the year, at another house on Berkeley Square, waiting to get possession of the new house, and I think it was the latter part of July that I got possession, in 1911.

Q. You rented for the summer then, and you bought in the fall? A. No; I rented—I paid \$3,000, which was considered part of the purchase  
20 price or rent. In other words, if I had not purchased the \$3,000 would have been for rent, but having purchased it went as part payment.

Q. And have you lived there every summer since? A. Yes, sir.

Q. And have you lived there at any other parts of the year except the summer? A. Oh, go down at week-ends during different parts of the year; generally go down Easter time, for instance, and sometimes spend a couple of weeks, and some-  
30 times during the winter we go down week-ends, but we are there constantly June, July, August and September.

Q. After your cottage was built and the bulk-head was built around it, what did you observe with relation to the location of high water line at the foot of Berkeley Square? A. The high water line daily covered all the beach and came up  
40 against the bulkhead.

William S. Vare—Direct

Q. Which bulkhead do you mean? A. I have reference to the bulkhead on the side of my house, and then in the back end it went around and—the Hannah Kelley bulkhead in the rear of my house was possibly 35 feet, or thereabouts, north of Vare bulkhead, the Vare bulkhead was only built halfway between Berkley Square and Millidgeville Avenue, there was an offset which ran into the Hannah Kelley bulkhead. 10

Q. How long did this condition of the high water washing your bulkhead continue? A. That continued until there was additional bulkheads built by—my information principally is through the public press—however, built by Mr. Lambert.

Q. And when did he begin work there? Do you remember? A. I don't just recall the date. I think he built one first and the tides very shortly washed it down, and I think there was an attempt to build a second one. 20

Q. You don't know what year it was? A. I don't just recall. I haven't the exact date. There has been considerable—if you will pardon me—there has been discussion about the Newton bulkhead.

Q. I was going to ask you about that. A. I saw the old Newton bulkhead. 30

Q. The old wooden bulkhead. A. Yes.

Q. Now, where was that located? A. Why, that was on a line with the Hannah Kelley bulkhead which originally run through the middle of my cellar and on a reasonably straight line with the Newton bulkhead.

Q. Now, did you notice whether there were any pilings or brush in front of the Hannah Kelley bulkhead at Kingston Avenue? Did you observe 40

## William S. Vare—Cross

any of those? A. When I went there in 1910 that had been transformed into a lawn—the preceding year, but the old Newton bulkhead was approximately somewhere between 25 and 30 feet northward from the present concrete bulkhead.

- 10 Q. When was the present concrete bulkhead built? Do you remember? A. Either the latter part of 1911 or 1912. I would not be quite sure on that. I had only lived in my house a short time.

## CROSS-EXAMINATION by Mr. Cole:

Q. The deed in this case was made to the wife, wasn't it? A. Yes.

Q. In fact it is your property? A. It is Mrs. Vare's property.

- 20 Q. You spoke of having secured an option: Did you mean yourself? A. I bought it and made Mrs. Vare a present of it.

Q. Did you secure the option?

Mr. Starr: I object, if your Honor please. It seems to me it is immaterial whether the title was taken in Mr. Vare's name or Mrs. Vare's name.

- 30 The Vice Chancellor: I do not think it is material to the issue at all, but he referred to it as his and I suppose he has a right to investigate it.

Q. Did you secure an option for this property?

A. For Mrs. Vare.

Q. Well, was it in your name or in her name?

A. I don't just recall.

Q. Have you it here? A. No, sir.

Q. With whom was it made?

- 40 Mr. Starr: I object to that, if your Honor please.

William S. Vare—Cross

The Vice Chancellor: It may be competent.

Mr. Starr: Upon the ground it is immaterial and irrelevant.

The Vice Chancellor: I cannot be sure it is.

Q. With whom was the option made or by whom was it given? A. My recollection is with Mr. Aiken and Mr. Reichner. There was two pieces of property involved. 10

Q. Isn't it a fact that the transfer was made through Mr. Aiken to you or Mrs. Vare, he acting simply as a conduit pipe?

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: I overrule the objection. 20

A. I wouldn't know the definition of your proposition.

Q. Well, did Mr. Aiken have any interest in this property? Wasn't he merely acting as an agent for you or Mrs. Vare? A. I don't know Mr. Aiken.

Q. Don't know him? A. No, sir, wouldn't know him today if I fell over him.

Q. Do you know from whom you bought this property? A. From Mr. Aiken and Mr. Reichner. 30

Q. From both of them, do you mean? A. I should say so, yes, sir, because there was two separate pieces of property.

Q. Well, you transacted all the business for the purchase of this property, didn't you? A. Oh, no, my attorney did.

Q. Who? A. Joseph K. Fletcher. 40

## William S. Vare—Cross

Q. Well, then, you left the matter to your attorney, did you not? A. Very largely, Mrs. Vare—for Mrs. Vare.

Q. What became of the option you got from Mr. Reichner? A. In what respect?

10 Q. I say, what became of it? A. In what respect? I don't understand.

Q. You said you had an option for the property. I have asked you what became of it? Where did it go? A. Mrs. Vare exercised it.

Q. But the paper itself: What became of that? A. Offhanded I couldn't say.

Q. You know the property in dispute here, don't you? A. Yes, sir.

20 Q. What property is it? A. 137 South Berkeley Square.

Q. Is that the property on which your building is or the property oceanward of it? A. Do you have reference to Mrs. Vare's property?

Q. I am asking about the property in dispute in this suit. Do you know what property is in dispute here? A. Yes, sir.

Q. What property is it? A. Why, I understand it to be the piece of land—part of it and adjacent to Mrs. Vare's property.

30 Q. Oceanward of the bulkhead? A. Yes and no. I do not understand, for instance, the piece four feet or thereabouts, possibly five feet, of the beach oceanward from the bulkhead is in dispute. I understand the rest of the piece is in dispute.

Q. Who told you what land it was that is in dispute?

Mr. Starr: I object, if your Honor please. It is immaterial and irrelevant.

40 The Vice Chancellor: I will overrule the objection. I cannot say that it is irrelevant

## William S. Vare—Cross

with certainty, although I confess I do not know its force.

Q. Who told you what land it is that is in controversy in this suit? A. I was advised by my attorney that—

Q. Who? A. Joseph K. Fletcher, that the property that Hilton sold to Aiken—Aiken giving Mrs. Vare a quit-claim deed covered with it everything that Mr. Aiken owned there. 10

Q. My question is who told you what land it is that is in dispute in this suit? A. Why, it seems it came by natural conditions.

Q. Well, you claim to own the land in dispute? A. I certainly do, and I got it for Mrs. Vare.

Q. If you will answer my questions we will get along. By virtue of what deed or condition or transaction do you claim to own this property? 20

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: I think it is competent. I do not see any reason why he should not disclose what claim he has against the property.

A. Through the quit-claim of Mr. Aiken to Mrs. Vare and the subsequent riparian right granted.

Q. Do you claim to own this property by virtue of a deed from Hilton to Aiken and from Aiken to Mrs. Vare? 30

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: I will overrule the objection.

A. As well as being the hard and fast land.

Q. Then you claim under both?

Mr. Starr: Objected to as immaterial and irrelevant. 40

## William S. Vare—Cross

The Vice Chancellor: Overruled.

Q. Do you? A. First the quit-claim deed from Mr. Aiken to Mrs. Vare, it being the hard and fast land.

10 Q. Who requested Mr. Aiken to get a quit-claim deed from Hilton? A. I really don't know.

Q. Didn't you authorize anybody to get it? A. Why, it is the most natural thing that my attorneys—Mrs. Vare's attorneys would get all that was purchased.

Q. Did you authorize anybody to secure a quit-claim deed from Hilton? A. Acting for Mrs. Vare I authorized the securing of all the papers that went with the transaction.

20 Q. In other words, you authorized your attorney to do whatever he could to make certain your title to this land in question, didn't you? A. I authorized the attorney to secure everything.

Q. Now, Congressman, won't you answer the question. It is a simple question. A. Yes, sir. Repeat the question.

Q. (Repeated) In other words, you authorized your attorney to do whatever he could to make certain your title to this land in question, didn't you? A. Yes, sir.

30 Q. Did you instruct your attorney to get a lease from the State, from the Riparian Commissioners?

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: Overruled.

A. Yes, sir.

Q. When did you give him that instruction? A. I have no record of the date.

40 Q. To whom did you give it? A. Offhanded I don't just recall details.

## William S. Vare—Cross

Q. When you made application for the riparian lease had you then secured the quit-claim deed?

A. I don't recall the date.

Q. You can't recall whether you had or not. A. I don't recall the date.

Q. Did you know when you got the quit-claim deed from Aiken or Reichner that Reichner had agreed with Turner that high water line was outside of 314 feet south of Atlantic Avenue? 10

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: Overruled.

A. I don't recall getting a quit-claim deed from Mr. Reichner. I got a quit-claim deed from Mr. Aiken.

Q. When you got the quit-claim deed from Mr. Aiken did you know that Mr. Reichner had agreed with Mr. Turner that high water line was oceanward of 314 feet south of Atlantic Avenue? 20

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: Overruled.

A. My recollection was that Mrs. Reichner owned the property.

Q. At the time you got the quit-claim deed from Mr. Aiken did you know that Mrs. Reichner had agreed with Mr. Turner that high water line was oceanward of 314 feet south of Atlantic Avenue? 30

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: Overruled.

A. I don't recall that.

Q. Do you know now that there was an agreement between Mr. or Mrs. Reichner and Mr. Turner that on the 19th day of November, 1908, 40

## William S. Vare—Cross

high water line in front of this property was oceanward of 314 feet south of Atlantic Avenue?

Mr. Starr: Objected to as immaterial and irrelevant.

The Vice Chancellor: Overruled.

10 A. I don't recall that.

Q. You never heard that? A. I say I don't recall it at this time.

Q. Do you mean to say, Mr. Vare, that you never heard of an agreement or a deed in which was inserted a provision—between Turner and Reichner—that high water line was more than 314 feet south of Atlantic Avenue?

Mr. Starr: Objected to as immaterial and irrelevant.

20 A. I may or may not, I don't recall.

Q. Will you say you did not? A. I say I don't recall.

Q. Will you say you don't know it? A. I say I don't recall.

Q. Were you never told that by your lawyer?  
A. I put the entire—

Q. Were you ever told by your lawyer what I have been asking you? A. I put the entire papers in charge of Mr. Joseph K. Fletcher and, acting  
30 for Mrs. Vare, made the purchase upon his advice; the details I don't recall.

Q. Were you ever told by your lawyer that Mr. Reichner and Mr. Turner had agreed that high water line was more than 314 feet south of Atlantic Avenue? A. I don't recall.

Mr. Starr: Objected to as immaterial and irrelevant.

40 The Vice Chancellor: Objection overruled.

## William S. Vare—Cross

Q. Did your lawyer ever make a search against this property for you? A. That I wouldn't recall.

Q. Did he ever report to you that he had made a search? A. Mr. Fletcher took the papers and, based upon his recommendations, I made the purchase, the details I don't recall.

10

Q. Did he ever report to you that he had made a search against this property? A. I repeat again, the details I don't recall.

Q. Did you ever see a search against the property? A. No, sir.

Q. Did you ever have the title insured? A. I presume the title is insured.

Q. Have you got the insurance policy here? A. No, sir.

Mr. Cole: Judge Starr, have you got the insurance policy here? 20

Mr. Starr: I don't think I have.

Mr. Cole: See, won't you, and produce it if you have?

Mr. Starr: Sure.

Q. Well, your title is insured, isn't it? A. I guess so.

Q. But you don't know? A. Well, to be frank, I couldn't say positive whether it is or not. This is only an incident of a very busy life, sir.

30

Q. Well, do you recall anything about this transaction at all?

Mr. Starr: I don't seem to have it, Judge.

Q. (Repeated) Well, do you recall anything about this transaction at all—about the purchase of this property? A. Well, I recall drawing some checks and making Mrs. Vare a present of the house.

40

## William S. Vare—Cross

Q. Do you know that you got the riparian lease for this property? A. I so understood it, yes.

Q. From whom? A. Judge Starr.

Q. When were you told that? A. I don't just recall.

10 Q. What else were you told about this property? A. You will have to be more specific.

Q. Did you ever see a deed for it to Mrs. Vare?

A. I may have seen the heading of a deed; I don't just recall any of the details.

20 Mr. Starr: I offer in evidence a deed from John M. Hilton and wife to Howard H. Yocum, dated January 25th, 1908, acknowledged on the 25th of January, 1908, and recorded February 3d, 1908, in book 373 of deeds, page 423. That conveys a tract of land beginning—

The Vice Chancellor: The same description as in the Hilton deed?

Mr. Starr: No, only one lot, beginning in the easterly line of Berkeley Square 236 feet south from Atlantic Avenue, running eastwardly 82½ feet and southerly 39 feet.

30 Said paper marked Exhibit D-5.

Mr. Starr: Now, deed dated February 3d, 1908, made by Howard H. Yocum to Cephise A. Reichner, acknowledged February 6th, 1908, and recorded February 24th, 1908, in book 377 of deeds, page 239; conveys the same as in the last deed, the same description.

40 The Vice Chancellor: Is it referred to by any other designation or boundary?

## Exhibits Offered in Evidence

Mr. Starr: No, the same premises conveyed in Hilton to Yocum.

Said paper marked Exhibit D-6.

Mr. Starr: Then a deed from Cephise A. Reichner and husband to James H. Aiken, dated September 1st, 1908, acknowledged September 1st, 1908, recorded the same day in the Clerk's Office of Atlantic County, in book 390 of deeds, page 144. 10

Mr. Cole: What is the consideration?

Mr. Starr: One dollar.

The Vice Chancellor: What does it convey?

Mr. Starr: Conveys the premises as described in the last preceding deed without reference to any map. 20

Said paper marked Exhibit D-7.

Mr. Starr: Then a quit-claim deed from John M. Hilton and wife to James H. Aiken, dated August 31st, 1909, acknowledged the same day and recorded September 3d, 1909, in book 411 of deeds, page 106.

The Vice Chancellor: Conveys what?

Mr. Starr: There is a difference in the description. It is the same beginning point, 82½ feet parallel with Atlantic Avenue and of that width or breadth throughout southerly between parallel lines to ordinary high water mark of the Atlantic Ocean. 30

Said paper marked exhibit D-8.

Mr. Starr: Now, another quit-claim deed dated September 1st, 1909, made by Howard H. Yocum to James H. Aiken, acknowledged September 1st, 1909, recorded September 3d, 1909, in book 411 of deeds, page 40

## Exhibits Offered in Evidence

103, and that quit-claims the property beginning 236 feet from Atlantic Avenue, eastwardly 82½ feet and extending to the Atlantic Ocean.

Said paper marked exhibit D-9.

10

Mr. Starr: Now, the next is a quit-claim deed from Cephise A. Reichner and husband to James H. Aiken, dated August 31st, 1909, acknowledged August 31st, 1909, and recorded September 3d, 1909, in book 411 of deeds, page 105; same beginning, 236, and extending to the Atlantic Ocean.

Said paper marked Exhibit D-10.

20

Mr. Starr: Then the next is a quit-claim deed made by James H. Aiken to Ida Vare, dated October 9th, 1911, acknowledged the same day, recorded October 10th, 1911, in book 471 of deeds, page 35; that conveys the same tract beginning 236 feet south of Atlantic and running to the ordinary high water mark of the Atlantic Ocean, and recites the quit-claim deed from Hilton to Aiken.

Said paper marked exhibit D-11.

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Mr. Starr: Now, I offer in evidence lease made by the State of New Jersey to Ida M. Vare; it is dated the 14th day of September, 1915, and it is acknowledged so far as the grantors are concerned on the 23d day of October, 1915, and so far as Mrs. Vare is concerned on the 27th of October, 1915, and recorded on the first of November, 1915, in the Clerk's Office at May's Landing, in book 546 of deeds, page 243. It leases

40

land beginning 236 feet south of Atlantic

## Exhibits Offered in Evidence

and extending all the way out to the inland line of the Public Park, just a trifle inside of the boardwalk.

Said paper marked exhibit D-12.

Mr. Cole: That is expressly subject to the Turner lease.

Mr. Starr: Well, here is the language: 10  
 "This lease is made expressly subject to the rights, title and interest, if any, acquired by Jesse R. Turner under a lease of the land under water hereinbefore described, with other lands, made by the State of New Jersey to said Jesse R. Turner bearing date the eleventh day of May, 1914, and recorded, etc. With the right and privilege, under the covenants and conditions of this 20  
 lease, to appropriate the lands under water above described to her and their exclusive private uses."

At this point a recess was taken until Tuesday, May 8th, 1917.

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Resumed, before his Honor, E. B. LEAM- 30  
 ING, Vice Chancellor, at the Chancery Chambers, Atlantic City, New Jersey, on Tuesday, May 8th, 1917.

## Appearances:

Hon. Clarence M. Cole, for complainant.

Hon. Lewis Starr, and Charles C. Babcock, Esq., for defendant. 40

Frederick C. Rollman—Direct

ARCHIBALD S. LAMBERT, recalled.

By Mr. Starr: Q. Mr. Lambert, when did you begin to build any bulkheads or drive any piling on this property in front of the Vare premises?

A. Sometime in the latter part of 1914 or 1915.

10 By the Vice Chancellor: Q. When did you say?

A. 1914 or 1915, I just don't remember which.

By Mr. Starr: Q. The latter part of 1914? A. Yes, I think so.

Q. Can't you tell us more definite than that? A. Well, the man who did the work at my request could tell you more, Mr. Gandy there (indicating), he will tell you when he comes on the stand, I didn't keep any account of it.

20 Q. Well, it was after you made the contract to purchase the property from Mr. Turner, was it not? A. After?

Q. Yes. A. I didn't do any work until I got a contract.

Q. Now, that contract was dated in July, was it not, 1914? Do you remember? A. As near as I can remember, sometime in July.

Q. And it was in the fall of that year that you began your operations there? A. I think so, yes.

30 No Cross-Examination.

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FREDERICK C. ROLLMAN, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Mr. Rollman, where do you live? A. I live, when in Atlantic City, 4503 Atlantic Avenue.

40

Frederick C. Rollman—Direct

Q. And are you in business in Atlantic City?

A. No, my business is in Philadelphia.

Q. What is your business? A. I am in the wholesale dry goods business.

Q. And where is 4503 Atlantic Avenue with reference to Berkeley Square? A. Well, it is on the opposite side of Atlantic Avenue from Berkeley Square, slightly north, if you call this north, of Berkeley Square. In other words, it is between Berkeley Square and Kingston Avenue. 10

Q. It is on the north side of Atlantic Avenue?

A. North side of Atlantic Avenue.

Q. Have you any knowledge of the tidal conditions along the beach front at Berkeley Square?

A. No.

Q. Have you any knowledge of the line of high water there? A. Yes. 20

Q. And how long have you known of that situation? How long have you been in Atlantic City?

A. I have been in that locality since 1904, July of 1904.

Q. Continuously? A. Well, during six months of the year.

Q. That is, the summer months? A. Summer months.

Q. Have you had occasion to notice or observe the location of high water line at the foot of Berkeley Square during that period of time? A. Well, in the earlier periods, yes; later years I haven't paid much attention to it. 30

Q. How about the year 1908? A. Yes.

Q. And what opportunity had you to observe the location of high water line at the foot of Berkeley Square? A. Well, the opportunities I had—I would take frequent trips just around the 40

Frederick C. Rollman—Direct

block, around Kingston Avenue to the boardwalk and then back over Berkeley Square from Plaza Place.

Q. Now, in 1908 do you remember about what time you came up—left Atlantic City and re-  
10 turned to Philadelphia? A. It was always in Oc-  
tober.

Q. Now, in that fall, the fall of 1908, did you observe where the ordinary line of high water was with reference to the Kelley bulkhead? A. Well, I don't know what the Kelley bulkhead is.

Q. The bulkhead that has been spoken of here as the Kelley bulkhead ran from Kingston Avenue to Berkeley Square, in front of the property owned by Mr. Reichner. A. I know of a bulkhead  
20 that was the bulkhead of the Newton property before his present bulkhead was built, that is about thirty feet inside of the present bulkhead, might be twenty-eight, thirty-two feet, something like thirty feet.

Q. And the bulkhead we are speaking of runs in an easterly direction from Berkeley Square to Kingston Avenue? A. Yes.

Q. Do you know the location of that bulkhead? A. Yes; that was the continuation of this one.

30 Q. Now, with reference to that bulkhead where was the ordinary line of high water in the fall of 1908? A. Well, the high water always came up to that bulkhead or near it; any unusually high tides it would sometimes cross the bulkhead and get into the Newton gardens and upon the streets there.

40 Q. But can you tell us whether or not an ordinary tide would reach the bulkhead? A. It would reach the bulkhead.

## Frederick C. Rollman—Cross

Q. Now, what was the condition of the tides in the year 1909 with reference to that bulkhead?

A. As far as I can recall, now they were practically the same.

Q. Now, do you remember the fact of the bulkhead being built around what is now the Vare property, around the house? A. That bulkhead is further oceanward than the one we have been speaking about. 10

Q. Do you remember the fact of that being built? A. I do.

Q. Now, after that was built can you tell us what the location of the ordinary high water was with reference to that bulkhead at the foot of Berkeley Square? A. Well, the water would come up to that, it was further out. 20

Q. And how long did that condition of affairs exist? A. That I couldn't tell you.

Q. Do you remember when Mr. Lambert began his operations there? A. No, I don't.

Q. You don't know when that was? A. I know operations were commenced and carried out but I couldn't give you any dates.

Q. Well, now, can you tell us whether or not the high water continued to come up to the Vare bulkhead until Mr. Lambert started his operations? A. Well— 30

Q. Or whether there was any cessation? A. Well, I couldn't tell you that.

## CROSS-EXAMINATION by Mr. Cole:

Q. You said that the ordinary high tide came to or near the bulkhead. Is that correct? A. Yes, this first bulkhead called the Kelley bulkhead, I believe. 40

## Frederick C. Rollman—Cross

Q. Now, was that in front of the Kelley property that you are talking about or in front of the Newton property? A. Well, I don't know what the Kelley property is.

10 Q. The Kelley property is on the up-town side of Berkeley Square? A. Where now the Vare mansion is?

Q. Yes. Is your testimony addressed to that bulkhead or addressed to Mr. Newton's bulkhead below? A. Well, it was one continuous bulkhead.

Q. And there were times during this period you are testifying to when ordinary high tides did not come to the bulkhead—is that correct? A. Well, they generally came up there. The tides vary, as you know.

20 Q. Exactly so, and there were ordinary high tides that did not come to this bulkhead, weren't there? A. Probably, yes.

Q. Now, just what do you mean by ordinary high tide? A. Ordinary high tide, I would say, is a tide not influenced by a strong wind or storms.

Q. What about the moon? A. Beg pardon?

30 Q. What about the moon? A. The moon? Well, I don't consider that a storm, that is an ordinary tide.

Q. But the moon has influence on the tides? A. Yes, the moon causes all tides.

Q. Did you make a special business of observing the condition of the tides? A. No.

Q. Kept no record of it, I suppose, of course? A. No.

40 Q. What was there about the conditions at the time that the tide did not come to the bulkhead? A. I don't quite understand.

Frederick C. Rollman—Cross

Q. Well, you said there were times when the ordinary high tide did not reach the bulkhead. Now, was there anything peculiar about the condition of the weather? A. No, I guess not.

Q. Just ordinary conditions? A. Ordinary conditions.

By Mr. Starr: Q. These times when you say the tide would come near the bulkhead how far would it be away? A. Oh, it might be a foot or two away. The seagrass would be washed up mostly all the time after a tide, up against the bulkhead. 10

Q. Is that what you mean when you say it came near the bulkhead—only a foot or two away? A. Yes.

Q. You still live down at that address in Atlantic City? A. Yes. 20

Mr. Starr: I wanted to put Mr. Rightmire, the engineer, on to give us a distance, a measurement, but I understand he hasn't his book here. He will get his book and I will call him later, if your Honor will permit it.

The Vice Chancëllor: Yes.

Mr. Starr: That is all. We rest.

### Complainant's Rebuttal

10 Mr. Cole: I want to offer in evidence an agreement between Jesse R. Turner and wife and L. Irving Reichner, dated the blank day of September, 1908, which agrees to convey to Reichner, among other things, the premises beginning 275 feet south of Atlantic Avenue and running along Berkeley Square thirty-nine feet southerly, and running all the way through from Berkeley Square to Millidgeville Avenue, 165 feet.

Said paper marked exhibit C-11.

20 The Vice Chancellor: Is that the same property which was in the deed of November 19<sup>th</sup>, 1908?

Mr. Cole: Yes, except this is the agreement, the option, in other words, on which the deed was based.

The Vice Chancellor: The same description?

Mr. Cole: The same description.

30 Mr. Starr: Now, I object, if your Honor please. In the first place the paper itself is not signed by Mr. Reichner, and for that reason I do not see how he could be bound by the terms of the paper itself, and, in any event, it is inadmissible and irrelevant so far as Mrs. Vare is concerned.

The Vice Chancellor: I understand it is the agreement under which the subsequent deed from Turner to Reichner was made.

Mr. Cole: Yes. If there is any question about it I will prove it by Mr. Turner.

40 Mr. Starr: I do not think the agreement itself is material or competent.

## Complainant's Rebuttal

The Vice Chancellor: I will let it be filed subject to your objection.

Mr. Cole: Now, I offer original deed dated September 28th, 1911, from James H. Aiken and Mrs. Reichner and her husband, grantors, to Ida Vare. That deed was acknowledged the day of its date, and recorded at Mays Landing in book 471 of deeds, page 32. Now, that conveys beginning at a point in the easterly line of Berkeley Square, 236 feet south from the southerly line of Atlantic Avenue, and runs— 10

The Vice Chancellor: That would be the 275 less 39?

Mr. Cole: Yes, sir; and runs eastwardly, parallel with Atlantic Avenue, eighty-two and one-half feet, that is the depth, and southwardly, parallel with Berkeley Square, 78 feet, so on around. 20

Said paper marked exhibit C-12.

The Vice Chancellor: Judge Cole, you have not yet proven Turner's title.

Mr. Cole: No; I am going to prove that.

The Vice Chancellor: I assumed you were but call your attention to it. You stand under a deed made by Turner in 1916, and you have not gone back of that. 30

Mr. Cole: For the purpose of making a *prima facie* case we simply proved the title in Lambert from Turner.

The Vice Chancellor: Yes, that is as far back as you went. I don't know yet how your title connects.

Mr. Cole: We own beginning 275 feet, that is our claim. 40

## Complainant's Rebuttal

Mr. Starr: No, you don't claim but 314.

10 Mr. Cole: Mr. Turner owned 275 feet. Now, Mrs. Kelley conveyed to Hilton to a point 275 feet. Now, after that Mrs. Kelley conveyed or agreed to convey to Harry R. Young and Mr. Jeffries and Turner—I am not sure just how, but anyhow those three had title beginning 275 feet. It was finally merged in Turner running to the ocean. Now, Turner conveyed to Reichner beginning 275 feet and running 39 feet, making 314, then he conveyed to Lambert beginning 314 feet, that is the land in dispute.

20 The Vice Chancellor: And Reichner conveyed to Vare?

Mr. Cole: Well, that is what I thought, that is, Reichner, the husband, I thought conveyed to Vare but it seems that Mrs. Reichner conveyed to Vare.

The Vice Chancellor: Well, you said Mrs. Reichner and husband, didn't you?

Mr. Cole: Yes; the deed is made as coming from Mrs. Reichner and husband and not from him and the wife.

30 The Vice Chancellor: Well, did they both sign the deed?

Mr. Cole: Oh, they both signed the deed.

The Vice Chancellor: I guess that is all they need to do.

40 Mr. Cole: I don't know. I gave it to you the way the deed is made. My thought about it is there was a little effort to do something, there is a kink there I don't understand. Maybe it will come out as we go along.

## Nicholas J. Jeffries—Direct

NICHOLAS J. JEFFRIES, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:

By Mr. Cole: Q. Mr. Jeffries, where do you live? A. Atlantic City. 10

Q. And how long have you lived here? A. Thirty-one years.

Q. What is your business? A. At the present time I am in the real estate and bath-house business.

Q. How long have you been in the bath-house business? A. Twenty-six years.

Q. Do you know the property at Berkeley Square and the Ocean, Atlantic City? A. I do.

Q. Are you the Nicholas J. Jeffries named in this quit-claim deed of April 10th, 1908, to Jesse R. Turner? A. I am. 20

Mr. Cole: I offer that.

Said paper marked exhibit C-13.

Mr. Cole: This deed is dated April 10, 1908, signed by Nicholas J. Jeffries and his wife, acknowledged on the 23rd of April, the same year, and recorded at May's Landing on the 26th of May, of the same year, in book 384 of deeds, page 192, and it quit-claims, among other things, the following: "Description No. 2. Beginning at a point in the easterly line of Berkeley Square 275 feet southwardly from the southerly line of Atlantic Avenue; thence (1) southwardly, along the easterly line of Berkeley Square to the Atlantic Ocean; thence (2) eastwardly, along said Atlantic Ocean to the westerly line of Millidgeville 30 40

Nicholas J. Jeffries—Direct

Avenue; thence (3) northwardly, along the westerly line of Millidgeville Avenue to a point 275 feet southwardly from the southerly line of Atlantic Avenue; thence (4) westwardly, parallel with Atlantic Avenue, 165 feet to the place of beginning.”

10

Q. How long have you known that property?

A. Since the winter of 1902 and 1903.

Q. Have you since that time made any observations concerning the tides in front of the Berkeley Square property? A. I did up until the time of that deed, and I have frequently since been along there, but I haven't known in a general way since 1908—that is, only in a general way since that date, I haven't known particularly.

20

Q. Were you on the ground from time to time from 1902 to 1908? A. I was.

Q. Do you recall what has been referred to here as the Kelley bulkhead? A. Do I know it? I don't understand.

Q. I say, do you recall the Kelley bulkhead—what has been referred to here as the Kelley bulkhead? A. Yes, sir, I do.

Q. And do you recall what has been referred to as the Vare bulkhead? A. I don't know about the Vare, that has been since then, I don't know, only I have been down and saw the bulkheads, but I wouldn't know without I was shown it on the map.

30

Q. Now, where was ordinary high water line with relation to this property of Kelley's and yours in 1908, when you conveyed? A. When you say an ordinary high water you get all twisted up. The water at times, the majority of the times, in 1908, wouldn't come up to it by—well,

40

of course, it is irregular, this end was further

Nicholas J. Jeffries—Direct

than the other, and it would possibly be—run along twenty or thirty feet, something like that, possibly more. You can't fix a line. You can only look at it one day and it would be one place, and another day another. But, generally speaking, it didn't come up there, only what we except as a storm tide. 10

By the Vice Chancellor: Q. Twenty or thirty feet away from the Kelley bulkhead? A. Yes, towards the Atlantic Ocean, that would be one end of it, and the other end would be a little further, in 1908, when we sold it, but, of course, there might come a tide in a few weeks and wash it away—so that it would wash up to the bulkhead, but at that particular time when that deed was executed these are the figures that I am speaking of. 20

By Mr. Cole: Q. How was it with relation to the other points beginning with 1902? A. Now, in 1902, in April, along in April is when I remember it mostly. We made a contract to buy it, agreement of sale, and then in April it was transferred, and during the time of the contract, before we had taken title or about the time we had taken title of Mr. Turner, or—I came in it a little later—during the agreement of sale it did not come up to the Kelley bulkhead but along somewhere about the same way, maybe a little less beach, but just about when we had taken title to it, or after it, we had a storm and that came and washed it away, so that the tide came up to the bulkhead for a few weeks, and then in a few months hardly it built out again. It is a movable proposition, the tide is, and it is hard to establish the tide, but, generally speaking, that bulk- 30 40

Nicholas J. Jeffries—Direct

head was what we would call clear of the water.

Q. Did that hold true during all the period from 1902 to 1908? A. So far as I have ever noticed it would wash away and build out, but, generally speaking, it would build out all the time,  
 10 each time it would seem to hold itself out a little more, which it holds out at the present time.

Q. When did you first become interested in this property? A. Somewheres, I say, about—I think it was a sixty or fifty day agreement, we have sixty days after April of 1903, if I remember rightly.

Q. I show you an agreement dated February 25th, 1903, between Hannah E. Kelley, of the one part, and Harry R. Young, of the other part,  
 20 which agreement provides for the sale of property in Atlantic City described as “All the land and premises lying and being between Columbia Avenue and Tallahassee Avenue, Atlantic Avenue and the Atlantic Ocean, except twenty-eight lots heretofore sold,” and ask you whether that refers to the property in question? A. That is the agreement I spoke of, that I haven’t seen since that date. I can show it on the map.

Q. Show his Honor what that describes. A.  
 30 (Indicating on map) There is eight lots runs down here, then all of this, and eight lots up this side, making in all twenty lots and the beach front, 500 feet of beach front, from Newton bulkhead up, 500 feet up this way.

By the Vice Chancellor: Q. The numbered lots on the map only run down to the Kelley bulkhead, 275 feet. A. Yes; we went beyond. There was  
 40 another map you do not seem to have here. Does no one have that map? We made a new map, put

Nicholas J. Jeffries—Direct

in two more lots in front of these original lots that was up here. We had all the way around it, from Atlantic Avenue down to the beach, 500 feet above Newton's, which was below here, and then down to Newton's and then up to Atlantic Avenue again.

Q. But at this time I thought this had been conveyed by Mrs. Kelley, all of these lots? A. Only 275 feet. 10

Q. That wasn't in yours? A. No, sir; we went from 275 feet.

Q. Out? A. To the Atlantic Ocean.

By Mr. Cole: Q. The important point is, does that include this land in question here? A. Yes.

Q. And were you interested in this agreement and the land? Your name does not appear to be mentioned. A. Not at that time. 20

Mr. Cole: This agreement says for the sum of \$95,000, and it was acknowledged on the day of its date and recorded the 26th day of February of the same year, in book 284 of deeds, folio 199, and endorsed on the agreement is this: "For and in consideration of the sum of two hundred and fifty dollars I hereby assign, set over and transfer unto Jesse R. Turner his heirs and assigns, an undivided one-half interest in, to and of the within contract within made by Hannah E. Kelley. In witness whereof I have this 25th day of February, A. D., 1903, hereunto set my hand and seal. (signed) Harry R. Young." I offer that. 30

Said paper marked exhibit C-14.

Q. How long was it after the date of that agreement that you became interested in this 40

Nicholas J. Jeffries—Direct

property? A. I don't know exactly but it was shortly, it was only a matter of weeks, I don't remember exactly, I haven't the deed here, the deed possibly is somewhere or a record of it, I was always interested in it, that was the real estate I was interested in with Mr. Young, that is what I was interested in but did not appear as interested until later on, until that deed you are speaking of.

Q. Can you give us some idea of how many times you were on this property yearly from 1902 until you sold out? A. Oh, I cannot, I did not keep a record for any particular reason, but I would be down the boardwalk—of course I was interested in that property, as to how the tide was washing it, how it was building up, and I would be there—possibly it would average once a week, maybe, through the summer, and possibly every two or three weeks through the winter, something like that, because I was great for walking down that way anyway.

Q. Did you during any of the time that you were interested in this property have any claim made to you, or hear any made, that you were not the owners of this property?

Mr. Starr: Objected to as immaterial.

The Vice Chancellor: What is the purpose if it, Judge?

Mr. Cole: I thought if he had heard anything from Mr. Reichner or Mr. Aiken we ought to know it. Mr. Vare and Mrs. Vare now claim through them. I won't press it if counsel objects.

The Vice Chancellor: I do not see any force to it. I think I will have to sustain the

Nicholas J. Jeffries—Cross

objection. The mere fact that the claim was not made I apprehend is not operative to bar or in any way modify rights which might otherwise exist.

CROSS-EXAMINATION by Mr. Starr:

Q. Mr. Jefferies, I understand that you first became interested in this property by an assignment of the contract between Kelley and Young in March, 1903? A. No, no, I didn't mean to give that inference. I became interested—I was the first one interested in it, as regards this deal, as a matter of fact. That is, interested on the real estate point of view, not as an owner. I was the one that got the proposition up to sell the property from Mrs. Kelley. There was another party in it who doesn't appear here, Mrs. Conrow and Mr. Turner. 10 20

Q. And when was that? A. That was in February of 1903.

Q. Then the contract was made between Mrs. Kelley and Young, February, 1903, and then you became interested in that contract by an assignment which is dated the 12th of March, 1903—is that right? A. I don't know what the dates are. I don't know what you mean by "interested," whether you mean as an owner or what. 30

Q. Well, now, wasn't an interest assigned to you? A. Yes. That is what you mean by interested. Well, I don't remember the dates. We have deeds. Mr. Young made me over half of his interest which made me a quarter owner of the property.

Q. And did you retain your ownership in that property until you sold out to Mr. Turner in 1908? 40

## Nicholas J. Jeffries—Cross

A. Yes; and then I sold to—there was other deeds, I don't remember the date I sold to Newton, I made a quit-claim deed, we divided the property and Mr. Turner took this part that that quit-claim deed is for and I took the other part that was left.

10 Q. Your interest in the proposition ceased when you quit-claimed to Turner? A. In that particular property ceased.

Q. At any time during the period that you were interested in this proposition did you see the water washing the bulkhead? A. Oh, yes, I saw such a thing, I so stated, at storm tide.

Q. How many times did you see the water wash the bulkhead? A. Well, nearly every storm, every storm tide.

20 Q. Did you ever see it wash it at any other time except the storm tides? A. It might wash it on a spring tide, on what the farmers call 'pogee tide.

Q. How often would you be down there, Mr. Jefferies? During the year 1907 how many times were you down there? A. I have already stated possibly once a week in the summer-time, possibly once every two weeks, it might have been some weeks I wouldn't be down there.

30 Q. Did you make it a point to be there when the tide was high? A. No, but I know when it is high tide.

Q. You didn't go down there for that purpose? A. No—sometimes I did, before I sold the property I did.

Q. How many times did you go down there for that purpose, to locate the high tide? A. I don't know that. No man, unless he expects something like this to come up, is going to keep a record how

## Nicholas J. Jeffries—Cross

many times he went, but I would know more about the high tides than an ordinary person because I know when it is high tide.

Q. When you first knew the bulkhead how far was it from the level of the sand to the top of the bulkhead? A. I don't know; I didn't measure; I don't know how high the bulkhead is. 10

Q. You don't know how high the bulkhead was out of the sand? A. I don't know.

Q. How high was the bulkhead out of the sand when you sold it in 1908? A. I don't know, because I never measured the bulkhead, I can tell you how far the water would roll up ordinarily.

Q. Did you ever measure the distance between the water and the bulkhead? A. No, I never have, I have—but I haven't those figures—the sand between the boardwalk, the dry sand between the boardwalk. 20

Q. When you sold to Turner in 1908 I understood you to say the water came up within twenty or thirty feet of the bulkhead? A. It runs that way most all the time, it would change, no man can establish a high water line on the beach there, because if there is no wind or anything the moon changes it, it will run through the whole cycle in fourteen days. 30

Q. How many times were you there in 1908? A. I don't know, I didn't tally them up, I told you.

Q. You never lived in that neighborhood, did you, Mr. Jefferies? A. No, I never lived there.

Q. And I suppose your observation was merely from the fact that you were walking down the beach? A. No, more than that, I was mightily interested in that beach there. 40

Nicholas J. Jeffries—Cross.

Q. How many times were you down there for the purpose of ascertaining by observation where the high water line was? A. You couldn't find that out, because I didn't keep a record of that.

The Vice Chancellor: I have seen a single  
10 storm cut away the beach so that high water mark was back of where houses had been.

The Witness: Is that so?

Mr. Cole: Yes. I have stood right in this building, right on this floor, and it seemed to me all there was left dry was the size of a three-cent piece.

The Vice Chancellor: No; I have refer-  
20 ence to the ordinary high water mark extending to where the houses had been by reason of a single storm cutting away the beach. In other words, the high water mark moved back after the storm, and it gradually filled up again and went out.

Q. I understood you to say when the deed was made to Turner the waters did wash the bulk-head? A. No, you didn't understand me. Now, which deed are you talking about? There are two deeds, one deed I did say and the other I didn't.

Q. Which deed did you mean? A. The deed to  
30 Turner, the original deed from Hannah Kelley—no, it was to Young, wasn't?

Q. I am speaking about the deed to Turner. A. Why, the title changed hands in Camden, and I think it is somewheres about the 15th of April, 1903, and a day or two before the title passed, having an agreement in February, there came one of these storms that the Judge is speaking about  
40 right now and it washed that sand away so that fo-

## Nicholas J. Jeffries—Cross

a little time the water did wash the bulkhead, that is, at the lower end of it, and it may have washed up possibly there, but that filled right out again, as I say.

Q. What do you mean by "the lower end"? A. Well, there is two ends, we say down town here, you are from Camden, and we say— 10

Q. I know, but opposite what street? A. Well, where it joins Newton.

Q. That is Berkley Square? A. Possibly, I don't remember the names, they change the names.

Q. That was in what year? A. That was in 1903.

Q. Well, now, did the water wash the bulkhead in 1908 at all? A. Not in 1908, only at storm tides, of course, it washed it. 20

Q. But I mean the ordinary tide? A. Well, you can't use that word, ordinary tide.

By the Vice Chancellor: Q. That is the only word the law seems to use, but I don't know how the law ever discovered what it meant. A. I don't know either. The most of the tides, we will say, the majority of the tides wouldn't come to the bulkhead in 1908.

Q. That is the time you say it came within twenty or thirty feet? A. Yes, somewheres there. 30

By Mr. Cole: Q. Mr. Jefferies, you have made a business, haven't you, of watching the tides? A. Well, I happen to be a navigator and astronomer, and it is sort of a kindergarten thing, the tide is, and I do watch them and keep that up, and I write the tide for Atlantic City, being no one else does—the Government don't, so I am posted about the tide, know some little about it. 40

## Nicholas J. Jeffries—Cross

By the Vice Chancellor: Q. You recognize, don't you, Mr. Jeffries, that the two tides in the same day are at different heights? The higher tide may be in the morning or may be in the evening, but each day has its two tides, one of which is always higher than the other? A. That is true, all things else being equal, of course.

Q. I mean under normal conditions. Now, what would you call ordinary high tide? A. I don't know.

Q. The average between the two? A. I don't know. On the beach front I wouldn't know what to say was an ordinary tide.

Q. Well, you recognize also, don't you, that one week under normal conditions the tide would be lower than it is another week, the high tide would be lower one week than it is another week, where the position of the moon has changed? A. That cycle is every two weeks, of course the intervening week would be lower.

Q. Now, which do you call the ordinary high tide, the tide that is high by reason of the moon change or the tide which preceded it? A. Well, I wouldn't know any way to establish a high water mark but by actually taking dat as for any length of time, and then you can't do it, because your beach is going to wash away, and then there are conditions that will happen that you don't notice. Clear off in the ocean, like enough, a storm we don't get will swell our tide up and we might have normal weather here, and yet that tide a layman would say would be a normal tide, but it is not by reason of being forced in by an invisible storm.

Q. Then again you have a heavy surf on, do you not, by reason of a storm at sea? A. Yes.

## Nicholas J. Jeffries—Cross

Q. A storm that has not been observed here? A. Yes.

Q. And those waves force the water up on the beach further than it would otherwise? A. I don't call that a tide. I call that a run of the sea. But, of course, you would say that was the mark. 10

Q. Well, what do you call the high water mark? Is it where the waves run up on the beach or is it the level of the ocean? A. What I should term the high water mark would be if there were no sea—that is, only the normal conditions, that would be the high or low water, normal proposition, because the other must be abnormal, it is forced, it is a forced proposition, the other must have either forced it back or in, but of course it leaves it open to argument, one might claim one thing and another another. 20

Mr. Starr: The criterion in the cases seems to be, if your Honor please, I haven't examined it very carefully, but just from the head notes, the high water line is that line which marks the destruction of vegetation. That seems to be the criterion by the cases. If the tide covers an area sufficiently long to destroy vegetation that is found by some of the cases to be the line of high water mark, the line of high water. 30

The Vice Chancellor: That might make a criterion in some cases, but vegetation does not begin on our wild beaches until you get back of the sand dunes. In other words, sand piles over or blows from the beach and forms in the wild beaches, or did form in the days when the beaches were 40

Nicholas J. Jeffries—Cross

wild, a line of sand dunes, some of which I have seen on the wild beaches of South Jersey that were as high as this buildng or higher, running in a low parallel to the ocean. The water never would come up on them, it could not, never would reach them even at storm tides. They were on the highest part of the beach and there is no vegetation until after you get beyond those sand hills and on to the grass or meadow in the rear. If you would dig down through those sand hills far enough you would find meadow because the sand has gradually blown over it; you will sometimes find a sod in these sand hills if you dig down, showing there has been grass there. I can see how in a fresh meadow, where there is no drifting sand, vegetation would be a fair criterion, but I cannot see how it could be where there is drifting sand.

By Mr. Starr: Q. Mr. Jeffries, have you seen grass growing down at the water's edge? A. If you will allow me to clarify that—

Q. Yes. A. I don't want to take the time of the the Court—that is true inland, which you all know who have ever been in the meadows, because the edge of the high water you have the rankest vegetation, you can stop on the edge of a creek—any educated person on those lines, which I happen to have been out with your riparian commissioners, and they only need to look at the meadows to tell the ordinary high water, the beach, that is, as the Judge stated, no man can tell where that high water is because it shifts every day, the tides

Nicholas J. Jeffries—Cross

is shifting every tide, and that is a loose proposition of unknown factors, you can get no equation in any example.

By the Vice Chancellor: Q. What about the vegetation line, is that on the beach? A. I never saw a place like that, particularly our kind of beach. There will be vegetation up on the sand hills, as the Judge says, if it is there long enough it will grow, but some of your highest sand hills don't have it on, and it is hard for it to grow without you put something on there to obstruct it, it won't grow where it is subject to the ordinary tide because that shifts so, and it could not seed and get a hold. 10

Mr. Cole: Judge Starr has kindly consented that the record may show the offer of a deed dated March 30th, 1903, recorded April 16th of the same year, in book 287 of deeds, page 59, Hannah E. Kelley to Jesse R. Turner and Harry R. Young, conveying, among other things, beginning in the west line of Millidgeville Avenue 275 feet south of Atlantic, thence south to the Atlantic Ocean, west by same 165 feet to the east line of Berkley Square. 20

Mr. Starr: Well, now, will you produce that deed so that we can have the benefit of the description? 30

Mr. Cole: I will produce either the deed or a copy.

Said paper considered marked exhibit C-15.

Mr. Cole: Also deed dated April 15th, 1903, recorded April 22nd, same year, in book 287 of deeds, page 355, Harry R. 40

Jesse R. Turner—Direct

Young and his wife to Nicholas J. Jeffries, which conveys, among other things, "one-half of my entire interest in premises as in deed in book 287, page 59."

10 Said paper considered marked Exhibit C-16.

The Vice Chancellor: That makes Turner and Jefferies the owners each of one-half.

Mr. Cole: Well, we already have a deed from Jeffries to Turner, that puts all the title in Turner now.

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20 JESSE R. TURNER, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says—

By Mr. Cole: Q. Mr. Turner, you are the Jesse R. Turner that has been referred to here? A. Yes, sir.

Q. Do you know this property beginning 314 feet south of Atlantic on the easterly side of Berkley Square, running to the ocean? A. 30 Yes, sir.

Q. How long have you known it? A. I have owned it since 1903.

Q. And had you known the property before that? A. No; I never knew it before I bought it.

Q. And you are the Turner who conveyed to Reichner beginning—at least, made the agreement with Reichner, beginning 275 feet south and running 39 feet, are you? A. Yes, sir.

40

Jesse R. Turner—Direct

The Vice-Chancellor: That is in evidence, is it not?

Mr. Cole: Yes.

Q. Can you recall—did you afterwards deed this property to Reichner? A. Did I deed it to him? 10

Q. Yes. A. Yes, sir.

Q. As referred to in the agreement? A. Yes, sir.

The Vice-Chancellor: This was 275 feet, extending 39 feet south?

Mr. Cole: That is right.

Q. I notice in this agreement that you made with Mr. Reichner this language: "And it is further agreed that whereas the said party of the first part"—that is you and your wife—"have executed a bond and mortgage to L. Irving Reichner, executor of the estate of Maria York Griffith, to secure the sum of \$5,000, dated September 21st, 1908 on the premises first above described, the said party of the second part agrees to take said premises subject to said mortgage of \$5,000, and which amount is to be deducted from the price of \$32,000 cash aforesaid to be paid by the said party of the second part; in case, however, for any reason said mortgage for \$5,000 should not be accepted by said L. Irving Reichner, executor of the estate of Maria York Griffith, and the money paid said Jesse R. Turner, this clause shall become null and void and the full \$32,000 in cash shall be paid as above set out." Was the property sold subject to that mortgage? 20 30

Mr. Starr: Objected to as immaterial.

I do not see the relevance, if your Honor please. 40

Jesse R. Turner—Direct

The Vice-Chancellor: I do not know. It will have to be developed, I suppose. Can you state what the purpose is, Judge?

10 Mr. Cole: My thought is this: It seems to me, in view of the possible construction of this agreement from Kelley to Hilton and the deed, that it becomes a question of intent, that all the transactions from Kelley down touching this property become relevant. Now, here is Reichner, with whom we made the agreement for the sale of the property on which the Vare building is, which was recorded and was notice to Vare, and also the deed, and he, Reichner, in his agreement agrees to take a mortgage  
20 on this very property by meets and bounds, beginning 275 feet. Subsequently his wife gets a deed from Hilton for 236 feet running to the ocean, and he joins in a deed to convey that to Aiken, and from Aiken to Vare. I think, therefore, it is pertinent to show how these people were dealing with this property.

The Vice Chancellor: You may introduce it subject to Judge Starr's objection, if you think it has any value.

30 (Question repeated).

A. It was sold subject to that mortgage, but I never understood the mortgage, I never got no money all right.

Q. Now, when you took title from Mrs. Kelley did you give back a mortgage as a part of the consideration? A. Did I give back a mortgage to who?

40 Q. Mrs. Kelley. A. Yes.

Jesse R. Turner—Direct

Q. Is that the mortgage (exhibiting paper to witness)? A. \$12,500?

Q. Yes. A. Yes, that is the mortgage.

Q. And did you pay that \$12,500? A. Yes, sir.

Mr. Cole: I offer the mortgage, dated March 30th, 1903. 10

The Vice Chancellor: Is the deed from Kelley to Mr. Turner in evidence?

Mr. Cole: Yes, that is read in evidence, I haven't the physical possession of it yet, but Judge Starr allowed me to put it in from his brief, and I am to offer the deed later perhaps. The mortgage is dated March 30th, 1903, which was the date of the deed, and is from Turner and wife, *et als.*, to Hannah E. Kelley, consideration \$12,500, 20 acknowledged the 15th day of April, 1903, and recorded on the 16th of April, 1903, in book 72 of mortgages, page 69, with the Clerk's cancellation as of December 5th, 1908. That mortgage expresses itself to be a purchase money mortgage on property beginning at a point in the westerly line of Millidgeville Avenue 314 feet south of the southerly line of Atlantic Avenue, southwardly along that Avenue to the ocean, 30 and thence westwardly, along the ocean 165 feet to the easterly line of Berkley Square, and several courses back.

Mr. Starr: I object to that as immaterial.

The Vice Chancellor: Let it be filed.

Said paper marked exhibit C-17.

By Mr. Cole: Q. Mr. Turner, have you been on this property? A. Have I been on it? 40

Jesse R. Turner—Direct

Q. Yes. A. Yes, sir.

Q. When were you first on it? A. I couldn't say just when I was on it, pretty soon after we bought it.

Q. And were you on it every year thereafter?

10 A. Yes, sir.

Q. How often would you say? A. Oh, I should judge I would be down there probably twice a month, maybe more.

Q. While you were there did you make observations as to the conditions of the tides? A. Yes, sir.

By the Vice Chancellor: Q. Let me ask you, Mr. Turner, if, when you got your deed for this property in March, 1903, March 30th, the Kelley  
20 bulkhead had been entirely completed? A. Why, it seems to me it had, if I am not mistaken, I think it was completed.

Q. Do you remember whether it had been filled in fully back of it so that everything was leveled off? A. Really I couldn't positively say about that.

By Mr. Cole: Q: Now, you recall the bulkhead that has been referred to as the Kelley bulkhead? A. Yes, sir.

30 Q. Now, will you tell us where what has been referred to as ordinary high water line, high water mark, was from 1903, when you took title, until you sold to Vare, with relation to that bulkhead? A. I don't think there was a time in ordinary tides, not once, from the time I bought it until I sold to Reichner that the high water come to that bulkhead, not once, I don't think, that is, an ordinary  
40 tide.

Jesse R. Turner—Direct

Q. Did you cause any one to investigate as to the condition of the tide in 1909? A. Yes, I had it surveyed by the city surveyor, Hackney.

Q. Ahemead & Hackney? A. Yes, sir.

Q. Now, do you remember the fact that you bargained to sell to Lambert? A. I don't remember 10  
the date exactly.

Q. Well, you remember the fact, do you? A. Yes, sir.

Q. And you remember the fact that you afterwards deeded it to him? A. Yes, I deeded it to him.

Q. Now, at that time had the Vare bulkhead been built? A. When we deeded to Lambert?

Q. Yes? A. Yes, and a house built on it.

Q. What was the condition of ordinary tide with 20  
relation to the Vare bulkhead at the time you conveyed to Lambert? A. I think we had outside of Vare's bulkhead thirty or forty feet.

By the Vice Chancellor: Q. That was 1916, wasn't it? A. 1914, I think—at least they had twenty feet anyhow outside of Vare's bulkhead that an ordinary tide didn't touch.

Q. Well, the deed is March 10th, 1916, I don't know when the agreement was.

Mr. Cole: The agreement was made in 30  
1914.

A. They had an option on it.

Mr. Cole: That has been offered. I have forgotten its date.

By Mr. Cole: Q. Now, you got a riparian-deed in 1908, did you not? A. Yes, sir, I got a riparian deed, not in 1908, later on, I guess about 1914 or 40  
1915, I got the riparian deed.

Jesse R. Turner—Direct

The Vice Chancellor: Dated May 11th, 1914.

Q. Oh, yes, that is right. Where was high water line with relation to a point 314 feet south of Atlantic Avenue? A. When I got the riparian deed?

10 Q. Yes? A. Why, I think the survey will tell you.

Mr. Starr: I object to that.

Q. Never mind about the survey. You were there A. I should judge it was about forty or fifty feet from Vare's at ordinary high water.

Q. Has there ever been a time since you became interested in this property when ordinary tide washed into the Kelley bulkhead or Vare bulkhead? A. Well, no, not since I owned it, never, an ordinary high tide never touched that bulkhead since I owned it.

20 Q. I notice in the deed to Reichner from you a provision about the existence of high water line and that Reichner is not to apply for riparian deed. A. That was in the deed, yes, sir.

Q. At the time you made that agreement and the time you made the deed to Reichner was high water line oceanward of 314 feet? A. Yes, considerably.

30 Q. When you sold to Lambert did you get any money? A. Why, not exactly money in cash he had spent a whole lot of money on it.

Q. How much money did he spend there—do you know?

Mr. Starr: I object to that, unless it is shown this witness has some primary knowledge.

Jesse R. Turner—Cross

Q. Do you know what money was spent there, of your own knowledge? A. Why, I don't know exactly, but anybody could almost tell what was spent there by going down and looking at it.

Q. Have you looked at it? A. Yes, sir.

Q. How much money was spent there? A. I think he has spent at least— 10

Mr. Starr: I object.

The Vice Chancellor: What is the relevancy of that?

Mr. Cole: I want to show what was done on the ground, that shows possession.

Mr. Starr: That is not part of your case.

Mr. Cole: All right; I won't press it.

The Vice Chancellor: You have already proven your possession, I think, or it has been conceded. 20

CROSS-EXAMINATION By Mr. Starr:

Q. Mr. Turner, you have a purchase money mortgage on this property owned by Lambert, have you not? A. Yes, sir.

Q. Mr. Lambert did not actually pay you any cash? A. Not in hard cash, only in that way.

Q. He gave you a purchase money mortgage for the entire consideration? A. Yes, he give me a purchase money mortgage. 30

Q. Yes, he first had an option? A. Yes.

Q. To purchase the property? A. Yes.

Q. And that option was made before he started any improvements? A. Yes.

Q. And he was to pay you so much for the property and he was to get all over that price that he could sell it for—is that right? A. Yes. 40

## Jesse R. Turner—Cross

Q. Now, at the time that option was made had you acquired a riparian grant? A. I think not.

Q. Then you got the riparian lease so that you could turn it over to Mr. Lambert—A. So that we could—

10 Q. —pursuant to this option? A. So that he could improve it.

Q. Why didn't you apply for the riparian grant before? You had owned the property since 1903. A. Well, I didn't think it was necessary.

Q. You never made any attempt to improve it in any way? A. Never did, no.

Q. The property from the time you bought it until you made the option to sell to Lambert laid idle? A. Laid idle.

20 Q. No income from it? A. No income from it.

Q. And nothing done with it? A. Nothing done with it.

Q. Now, tell us how far the ordinary line of high water was from the bulkhead when you first knew this property—from the Kelley bulkhead? A. When we first knew it I think it was about—I should judge about ten or fifteen feet, when we first bought it, from the bulkhead.

30 Q. And was there brush and piling outside of the bulkhead then? A. Not that I remember.

Q. Did you see any piling or brush or sand bags on the outside of the bulkhead? A. I don't remember it, no, sir; I don't remember any brush or piling.

Q. Was there anything put in front of the bulkhead to protect it? A. Not that I know of, not since I owned it.

## Jesse R. Turner—Cross

Q. Was it there when you bought it? A. I don't remember any brush there when I bought it.

Q. Was there brush along there in 1908 or piling outside? A. Not in 1908, no, not that I know of.

Q. How often were you down on the property, Mr. Turner? A. I used to go down quite often. 10

Q. Well, how often? A. I couldn't say how often, maybe once or twice a month, or maybe I might not go there some months, but I got down there frequently, I was interested and of course I would go down there occasionally.

Q. Now, how often would you go down there? A. As I said before, I got there maybe once or twice a month. 20

Q. Did you make any special effort to be there when the tide was high? A. Yes, I have been there when there has been storm tides.

Q. You haven't answered my question. Did you go there for the purpose of locating high water line? A. Yes, I have done that.

Q. How often have you done that? A. Two or three times.

Q. Two or three times in how many years? A. Oh, well, maybe three or four years. 30

Q. And did you make any record of the location of the tide? A. No, sir, I did not.

Q. Didn't put it down on paper? A. No, sir.

Q. Did you realize that it was important so far as your ownership was concerned to know where high water was? A. I didn't think it was important, no, sir, only to make me ground, that is all.

Q. Do you remember when the Reichner house was built on Berkeley Square? A. I do. 40

## Jesse R. Turner—Cross

Q. And were there any brush or piling in front of the bulkhead at that time? A. Not that I know of.

Q. Didn't see any? A. Not at that time, no, sir.

10 Q. Now, look at this photograph, D-4: Do you recognize that house marked "A" on that photograph as the house that Reichner built on Berkeley Square just inside of the Vare property? A. This here (indicating), you mean?

Q. Yes. A. Why, yes. I never took particular notice of that house though.

Q. Does that look like the house? A. Yes, I think so.

20 Q. Well, there is piling in front of the bulkhead there, isn't there? A. Yes, if you call this piling. I remember this, all right, but they were put there to put in a bulkhead, as I understood, and they let it go down again. I seen that but I didn't think that was intended to save sand, I considered they had started a bulkhead there and had given it up.

Q. Now, how far were those piling outside of the bulkhead? A. I suppose they were about thirty or thirty-nine feet. I wouldn't say but I would surmise about that.

30 Q. Did you ever measure it? A. No, sir.

Q. That was on your property, wasn't it? A. On my property.

Q. Or, rather, property that you claim. Did you make any objection to the putting of those piling on that property? A. These piling were put there before I owned it, if I remember right.

40 Q. Well, now, you do remember that there was piling there? A. I remember that piling.

## Jesse R. Turner—Cross

Q. When did you first observe those pilings there? A. I couldn't say.

Q. Were the piling there when you bought first? A. I think so, I ain't sure.

Q. What did you mean a minute ago when you said there wasn't any piling there? A. I thought you meant piling for to save sand, or brushing, or something like that, and I thought you meant the other way, to run lengthways with the beach. 10

Q. Now, was there ever any bulkhead built outside of the Kelley bulkhead until Mr. Vare built his bulkhead? A. Not that I know of.

Q. Was there any attempt to build any bulkhead? A. Not that I know of.

Q. What do you mean when you say you thought the piling were put there to start a bulkhead? A. That piling I kind of thought was put there for that. I remember that piling all right, I remember that well, but I d'nd't know what they were put there for. 20

Q. And those piling extended all the way from Kingston Avenue down to the Newton tract at Berkeley Square, didn't they? A. I don't know about that; I couldn't say whether they were or not.

Q. Were there any in front of the Reichner property on Kingston Avenue? A. I don't know whether there was or not, I don't remember. 30

Q. You mean to say that you were down there at times and you observed the location of high water and you can't tell us whether the piling were there or not? A. I couldn't say whether there was piling in front of there but I remember these few piling in front of Reichner's, but I didn't think they were put there to save sand. 40

## Jesse R. Turner—Cross

Q. Here is another picture, D-3. It has been testified that the house that is marked "A" is the Reichner house built back of the Vare property, and "B" is the house next to the beach on Kingston Avenue. Now, did you notice any piling on the beach in front of the bulkhead there?

10

A. This is the beach here (indicating)?

Q. This is the beach here (indicating), yes. Did you see any piling there? Did you ever see those piling there? A. Well, I don't remember them, no.

Q. Did you ever see the water touch that bulkhead, the Kelley bulkhead? A. I have seen a high water, yes, at storm tides; I never seen an ordinary tide come up to it.

20

Q. How did you happen to be down there when storm tides were on? A. Because I knew it was a storm tide and I wanted to see it.

Q. Did you go down there especially to see whether there was any storm tides? A. I would always know when there was a storm tide without going down there. I didn't always go down when there was a storm tide, but I have been down there once or twice to see how far it comes and I did see it.

30

Q. And the times you went down there there was a storm tide on, and you went there for the purpose of seeing whether it was going to damage your property? A. Sometimes I did yes.

Q. How many times did you go down there in 1903, Mr. Turner? A. I couldn't say.

Q. Have you ever lived in that neighborhood? A. No, sir.

40

Q. Did you ever do any work on it? A. No, sir.

## Jesse R. Turner—Cross

Q. Well, now, was there any changes in the location of the high tide as you remember it from 1903 until you sold in 1908? A. Yes, yes; it cut in and cut out. I have seen when an ordinary high water wouldn't come only about five foot inside of the boardwalk.

Q. Yes, but was there any time at all that you ever saw this bulkhead washed by the ordinary high tide? A. I never did; no, sir.

Q. In eight years? A. Never did in my life that I know of, no, sir.

Q. What would be the object of putting those piling in front of the bulkhead? A. I never give that a consideration.

Q. And it was on your property that you claim now? A. Yes.

Q. And you never made any investigation to find out why the piling was there? A. No, I never did.

Q. Who put it there? A. I don't know who put it there.

Q. And you don't know when it was put there? A. I don't know when it was put there.

Q. And you never made any inquiry? A. I never did.

Q. Was the beach ever washed out there by storms? A. Washed out more or less, yes, it always moves—the tide moved several times in that eight years.

Q. Well, then, did the tide come up to the bulkhead? A. Never seen it come to the bulkhead, no, sir, never.

Q. Now, where was the high tide in 1908 with reference to the Kelley bulkhead? A. In 1908 I should judge the high water went—in 1908 would go at least forty feet from that bulkhead.

## Jesse R. Turner—Cross

Q. Forty feet? A. Yes.

Q. Exactly forty feet? A. Not exactly, no, but I just simply—just imagine that, I couldn't tell you that, I never measured it, you know.

10 Q. You never made any record of it? A. I never made no record of it.

Q. Why did you insert this provision in the Reichner contract that high water was oceanward of a line 314 feet if there was no doubt about the fact? A. Well, do you want me to tell you why?

Q. Yes, why did you put it in? A. Why, because I was afraid Reichner would try to put a job up on me and I had that put in a-purpose.

20 Q. It was a fact that the high tide was beyond? A. It surely was the fact, yes, sir.

Q. And you made no measurement at the time? A. No measurement, but you could see where the tide came though.

Q. And you had nobody go down there and examine it? A. No.

Q. And what month was that? A. What month?

Q. What month did you observe the tide beyond 314 feet? A. I couldn't tell you that.

30 Q. How many times during 1908 were you down there? A. I couldn't tell you that.

Q. Do you know what month the agreement was made? A. Why, no.

Q. And how many times were you there in that month? A. I couldn't tell you that.

Q. Or when the deed was made? A. I couldn't tell you that.

40 Q. Do you remember the day the agreement was signed between you and Reichner? A. No, sir.

Jesse R. Turner—Cross

Q. It is not dated. You don't know what date it was? A. I don't know what date it was, no, I don't know.

Q. Were you down there on that day to see where the tide was—the day the agreement was signed? A. No, I don't think so. 10

Q. How long before the agreement was signed had you been there to see where the tide was? A. I couldn't tell you that.

By Mr. Cole: Q. Did you afterwards learn that Reichner did put up a job on you? A. I afterwards learned that he tried to, yes.

Mr. Starr: I object to that, if your Honor please. We are not responsible for Mr. Reichner. I don't think it is material.

The Vice Chancellor: No; I don't think it is. 20

Q. Do you know whether or not Mr. Lambert put anything on this ground you sold to him after you agreed to sell it to him? A. He put some lumber on the ground, yes.

Q. What part of the ground was that on? A. Right in front of Vare, I think.

Q. How long was it there? A. Oh, it was there quite a while.

Q. How much lumber? A. Oh, quite a little, quite a lot of lumber there. 30

Q. And was that out of the water? A. Yes.

Q. Do you know whether or not Mr. Reichner started to foreclose this mortgage referred to in the agreement of—

Mr. Starr: Objected to as immaterial and irrelevant.

Q. Wait until I finish—started to foreclose this mortgage referred to in the—A. I didn't understand that. Tell me that again. 40

## Jesse R. Turner—Cross

Q. Do you know whether or not Mr. Reichner filed a bill in the Court of Chancery to foreclose this mortgage referred to in this agreement of yours, with the purpose of cutting out your rights under this agreement fixing the high water line?

10 A. Yes.

Mr. Starr: Objected to as immaterial.

The Vice Chancellor: Well, you can show the foreclosure but I do not think you can show his purpose.

By Mr. Starr: Q. Now, Mr. Turner, the lumber that you say Lambert put there: Do you know when he started to put the lumber there? A. I don't know when he started to put it there. Pretty soon after he got the option.

20 Q. Had he built any bulkhead at that time? A. No.

Q. Where was the lumber put? A. Put right up there close to Vare's place on the beach.

Q. Wasn't it put on the street in front of Vare's property? A. Some on the street and some in front of Vare's.

Q. You mean to say that lumber was put on the beach in front of the Vare bulkhead? A. Yes, sir.

30 Q. How much of it? A. I couldn't say how much, a wagon-load or two.

Q. And when was that done? A. Pretty soon after he got the option.

Q. Can't you tell us when it was? A. No, I can't.

Q. What year? A. I don't know. The agreement will tell when it was. I couldn't tell you.

Archibald S. Lambert—Direct

ARCHIBALD S. LAMBERT, recalled:

By Mr. Cole: Q. After you secured the option from Mr. Lambert to buy this property did you place anything on the land? A. Lumber, cinders, stone.

Q. How much lumber? A. 10,000 feet was the first order I bought of sheath lumber. 10

Q. And where was it put? A. Below the bulkhead, 30 feet below Vare's bulkhead, towards the ocean.

Q. Was any of it put on the lot, outside of the street? A. On my lot, all was put on the lot.

Q. Did the tide sweep it? A. No, indeed.

Q. Where is the high tide now with relation to this bulkhead, the Vare bulkhead? 20

Mr. Starr: I object to the testimony.

A. 75 feet.

Mr. Starr: It is immaterial as to where the high water is now.

Mr. Cole: I understand it is material, my friend covered a period right along.

The Vice Chancellor: I think it may be shown. It may be of mighty little value but it might be of some. 30

Mr. Starr: Conditions have changed there. The bulkhead has been built out in front of the property.

Q. Where is ordinary high tide now? A. 75 feet below the Vare bulkhead.

Q. How long have you known this property? A. 1914, July sometime.

Q. Has high water, ordinary high water, ever reached the Vare bulkhead since you have known 40

## Archibald S. Lambert—Cross

it? A. No, never came there, only a storm tide, we had one or two storm tides there that came up.

Q. Now, you gave back to Mr. Turner a purchase money mortgage, did you not? A. I did, 10 yes.

Q. Did you give your bond? A. I did.

Q. At that time were you responsible financially? A. I certainly were.

## CROSS-EXAMINATION by Mr. Starr:

Q. Mr. Lambert, when did you first know this property? A. 1914, first of July, of June or July.

Q. First of July? A. Yes, I have known of it, then Mr. Turner tried to sell it to me. 20

Q. You had no knowledge of the location of the property prior to that time? A. Well, yes, walking up and down the boardwalk.

Q. Well, did you take any particular notice of it? A. Yes; I was looking for investments at the time.

Q. What was the first thing you did on the property toward improving it? A. I had some piling and lumber sent there after I got an option on it. 30

Q. And what was the first thing you did with reference to construction work? A. To drive the piling.

Q. Where was the piling driven? A. In the center of each street, Kingston Avenue and Berkeley Square.

Q. And then you started to fill in? A. No, we started to put on the sheath plank and then fill 40 in.

## Archibald S. Lambert—Cross

Q. Well, filled in later? A. Yes.

Q. Now, isn't it a fact that the storm came there and broke down your bulkhead and that after that high water came up to the Vare bulkhead?

A. No.

Q. Never touched the Vare bulkhead? A. The storm did, yes. It washed down cottages on the beach. 10

Q. But after the storm had subsided and your bulkhead had been carried away didn't the ordinary tide at that time strike the Vare bulkhead? A. No, it did not.

Q. Now, how many bulkheads did you built there next to the Vare property? A. How many did I build?

Q. Yes. A. I built two. 20

Q. And the nearest one to Atlantic Avenue was located where? A. One was built 25 feet inside of the park act, the park line there, and the next one I built out 5 feet inside of the boardwalk.

Q. Where was the bulkhead located which was next to the Vare property? A. Next to the Vare property?

Q. Yes. A. That was 25 feet inside of the boardwalk, running parallel with the beach.

Q. Wasn't there a bulkhead right up close to the Vare property? A. Well, Reichner left a little piece of land there when he built there, a three foot strip of sand, so he could get his steps down to the beach. 30

Q. Well, you built a bulkhead there? A. Why, he made me do it.

Q. Whether he made you or not you did it? A. He objected to me walking on a little strip of sand, that little strip of sand. 40

## Archibald S. Lambert—Cross

Q. When was it built there? A. In August, 1914.

Q. That was one of the first things you did? A. I built the one outside first.

Q. So that the bulkhead that was built on the  
10 outside—A. Yes.

Q. —was built before August, 1914? A. No, I won't say that. It was built sometime in August or September. The man who did the work for me he will know, of course, he has got an account of it on his books; you can find out from him.

Q. I show you Exhibit C-4 and call your attention to the bulkhead on the left-hand side of the picture. That is the bulkhead you built there, isn't it, right next to the Vare property? A. I  
20 built all the bulkheads that have been built and completed my work, had my ground filled up, and Dr. Thompson wouldn't let me make my return on the curb line, so I had to do away with that one and come back on the property line.

Q. And when was that put there? What month? A. I don't know; I don't know. The man who did the work will explain to you a little better than I can.

Q. You don't know that? A. No.

30 Q. Isn't it a fact that the bulkhead that you put there in front of the shanty or in front of the building was put there to protect the building? A. No, indeed. Reichner objected to me running my pipe line across that little piece of ground there, and then I objected to him keeping his tent out on my beach and I notified him not to put any tent on my property.

40 Q. Now, look at this photograph, C-5: Isn't there a bulkhead there in front of the shanty to

## Archibald S. Lambert—Cross

protect the shanty? A. No, indeed. I put that there to build a little cottage there.

Q. It is a fact that the bulkhead is there, isn't it—and extends from Berkeley Square to the end of this shanty? A. Enough to take in a 50 foot lot.

Q. Please answer my question. A. Yes, I put that there to take in a lot. 10

Mr. Starr: I move that be stricken out. I am entitled to have my question answered.

The Vice Chancellor: I think so.

Q. This picture shows that bulkhead supporting the shanty, doesn't it? A. What bulkhead?

Q. The bulkhead around the shanty. A. No. The shanty occupies 20 feet of property and the bulkhead is supposed to take in 50 feet of property. 20

Q. There is no foundation under this shanty, is there? A. On piling.

Q. And that is the shanty you had the lettering on? A. Yes.

Q. Shown in the photograph? A. I thought I had that right.

Q. And you put up a fence in front of the Reichner property so that poeple on the porch couldn't see the boardwalk, didn't you? A. A sign, "For sale. Apply to owner or any broker." It was located just so you could see over it and under it. 30

Q. It is right on a line with the beach—isn't that a fact? Now, answer my question.

Mr. Cole: I object. However, if you want to go into that, Judge, then I will go right into it and we will thresh it all out. 40

Estell D. Rightmire—Direct

The Vice Chancellor: I hope you can keep out the family or personal quarrel.

Mr. Starr: All right.

The Vice Chancellor: I have enough difficulties to contend with this proposition without dealing with that feature.

10

By Mr. Cole: Q. Why did you build this bulkhead, if it is a bulkhead, about which Judge Starr has asked you, that is near the shanty? A. I was advised to build a cottage out there by Mr.—

Q. Well, were you going to build the cottage?

A. I anticipated doing it.

Q. Was it built for the purpose of a foundation for your cottage? A. It certainly was, yes.

At this point a recess was taken until 2  
20 o'clock p. m.

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Hearing of the cause resumed after recess, in the presence of the respective counsel heretofore noted.

ESTELL D. RIGHTMIRE, re-called:

30 By Mr. Starr: Q. Mr Rightmire, on page 24 of the testimony you were asked with reference to the distance between Atlantic Avenue and the concrete bulkhead, and then you were asked another question with reference to the Vare bulkhead, and you gave the distance as 310 feet. Now, which bulkhead were you referring to when you gave the distance of 310 feet south of Atlantic Avenue? A. Why, according to my notes it is  
40 the Vare bulkhead, 310 feet.

Daniel L. Collins—Direct

Q. 310 feet, and the concrete bulkhead is how much? A. That is four feet less than that, or 306.

By the Vice Chancellor: Q. By the concrete bulkhead you mean the Newton bulkhead? A. Yes, sir.

10

No cross-examination.

DANIEL L. COLLINS, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:

By Mr. Cole: Q. Did you know John W. Hilton, to whom Mrs. Kelley conveyed the Berkeley Square property? A. Yes, sir; his name is John M. Hilton.

20

Q. Do you know if he bought that property for himself or for some one else? A. No; Mr. Hilton agreed to take title for Mr. Ryon and myself.

Q. And you are the Collins that has been referred to here as Ryon & Collins? A. Yes, sir.

Q. How long have you known the property? A. I beg pardon?

30

Q. How long have you known the property on Berkeley Square? A. For the last twenty years at least.

Q. Who was it that had to do with the building of the bulkhead known as the Kelley bulkhead in front of the property? A. I myself with Mr. Ryon.

Q. Do you recall some posts that appear upon one of these pictures, being outside of this bulkhead? A. I do.

40

Daniel L. Collins—Direct

Q. Do you know the occasion of their being placed there? A. I do.

Q. When was it? A. It was either—my recollection is that it was in the year 1902, after W. S. Higbee had completed the bulkhead for Mrs. Kelley running from Bartram Avenue to Berkeley Square.

Q. If you know, why were they placed there? A. In the beginning Mr. Ryon and myself had agreed to purchase from Mrs. Kelley four rows of lots located between Bartram Avenue and Berkeley Square, extending from Atlantic Avenue down 275 feet. John Leeds had a contract with her to level off the hills and bring that particular piece of ground up to the established city grade. We had a two or three months' settlement. I think it was about ten days or two weeks previous to the date of our settlement; there was a storm came up and washed about three to four feet of the beach away, which naturally took at least two, if not part of three, lots lying on the extreme end out, consequently we wouldn't agree to make settlement with Mrs. Kelley.

By the Vice Chancellor: Q. May I interrupt you to ask whether that storm came after Leeds had done the grading or before? A. Leeds, Judge, was not quite through grading, and when the storm came up it was two or three weeks before the date of our settlement was to have taken place.

Q. Do you remember whether it took away any part of his grading? A. Yes, that is what I mean to say, that storm cut from three to four feet of the beach away, consequently it took at least a lot or a lot and a half inside of our exterior line, cut that out, so that it wasn't up to grade. For that

Daniel L. Collins—Direct

reason we would not make settlement, and that is when it was that Mrs. Kelley and ourselves entered into an agreement to build this bulkhead in question, and in so doing she gave us an extension for some two or three months, one reason because the ground had washed away, and another was that the block known as 26—she had arranged to place a lot of separate mortgages on those lots to pay off the present—or to pay off the blanket mortgage that existed on that block, and on account of so much of it being washed away down towards the Berkeley Square end and she could not make settlement, because the mortgages would not take the mortgages, and for that reason she gave us an extension until the bulkhead was built and the sand thrown back of the bulkhead to bring it up to the regular established grade. 10 20

By Mr. Cole: Q. I think you yet have not answer the question about these posts. How did they come to be there outside of this bulkhead? A. Right after the bulkhead was built then Mrs. Kelley gave a contract to a man named Cooney to sink piling and build a brush bulkhead from Bartram Avenue down to Berkeley Square.

Q. Now, did you see the agreement that was entered into between Mr. Hilton and Mrs. Kelley for the purchase of this property and the map which was a part of it? A. I had charge of having it prepared. 30

Q. You and Mr. Ryon, then, were the real interested parties in this property—is that right? A. We were the real owners.

Q. Did Mr. Hilton have any financial interest? A. None whatever. 40

Daniel L. Collins—Direct

Q. Did you notice the condition of high water line with relation to the Kelley bulkhead after it had been built? A. After it had been built?

Q. Yes. A. Yes, sir.

10 Q. Where did high water line stand in relation to the Kelley bulkhead? A. Up at the upper end of Columbia Avenue, during the normal high water mark, the water would be at least 75 feet from the bulkhead, but down towards the Berkeley Square end it came in there from at least twenty to twenty-five feet from the bulkhead.

Q. How long were you interested in that property financially? A. I would say about seven years before we got rid of all of our lots.

20 By the Vice Chancellor: Q. Did you say—I am asking because I don't recall whether you said that you knew—where the ordinary high water line was at the time your deed was made, which was the 30th or 31st of December, 1901? A. No, I hadn't been asked that question yet.

Mr. Cole: I am coming to that.

By Mr. Cole: Q. Now, where was ordinary high water with relation to this 275 feet south of Atlantic Avenue in December, 1901? A. That was before we took title, do you mean?

30 Q. Yes. A. Before—previous to that agreement being signed with Mrs. Kelley and ourselves, the water—

The Vice Chancellor: Has that been offered in evidence—the agreement prior to the deed?

Mr. Cole: Yes, sir.

The Vice Chancellor: Do you remember its date?

40 Mr. Cole: That has the map to it, you know. This is dated August 3d, 1901.

Daniel L. Collins—Direct

A. (Continuing) Previous to the time of the agreement being gotten up Mrs. Kelley and myself were down on the ground, as I wanted her to sell us eight lots running from Atlantic Avenue down instead of seven, as per her map, she wouldn't do it. 10

Mr. Starr: I object, if your Honor please, to the conversation with Mrs. Kelley.

The Vice Chancellor: I do not think that that would be competent, but you can state what you saw on the ground.

A. (Continuing) At the time that that agreement was signed at the upper end of Columbia Avenue the water was not within 100 feet of where the bulkhead now is, from 75 to 100 feet, and from 25 to 50 feet from the bulkhead at the foot of Berkeley Square. 20

By the Vice Chancellor: Q. Now, when you say the tide what do you refer to? A. What I refer to there is as to where the high water mark of the Atlantic Ocean came up on the beach.

Q. Where the water would wash the beach? A. Yes, sir.

Q. Now, you said 100 feet. A. Seventy-five to 100 feet up at the Bartram Avenue end, and from 25 to 40 feet down at the Berkeley Square end. In other words, the beach cut in going down the beach. 30

By Mr. Cole: Q. Now, looking ahead from August, 1901, during these seven years you were interested in the property, did ordinary high water ever reach landward of 275 feet south of Atlantic Avenue? A. Not that I ever saw, no, sir, except during a storm tide. 40

Daniel L. Collins—Direct

Q. You knew that Mrs. Kelley was doing this work on the land oceanward of the 275 feet line, didn't you? A. I did; in fact, at the time the agreement was made I had a verbal agreement with Mrs. Kelley.

10 Mr. Starr: I object to that.

Q. The court says you can't tell that. A. Well, all right.

The Vice Chancellor: The deed from Mrs. Kelley was made later, was it not?

Mr. Cole: December.

The Vice Chancellor: No, from Mrs. Kelley, out side of the 275 feet.

Mr. Cole: Oh, yes.

20 The Vice Chancellor: I mean later than the time when she put the piling there?

Mr. Cole: Oh, yes; Mrs. Kelley had this work done after she conveyed to these people and after that she made this deed. In other words, she was in possession of the land outward.

The Vice Chancellor: March 30th, 1903, she conveyed to Turner outside of the 275 feet.

Mr. Cole: Right.

30 By the Vice Chancellor: Q. Now, you are referring to a time prior to March 30th, 1903? A. Yes, sir.

Q. When the piling was put there? A. This was the first ground, Judge, that Mrs. Kelley sold and the first bulkhead that was built down the beach.

Q. And she put the piling there before she made the deed to Turner outside of the 275 feet? A.

40 Yes, sir.

By Mr. Cole: Q. Now, do you know the Vare bulkhead? A. Yes, sir.

Daniel L. Collins—Direct

Q. Do you recall when that was built? A. I know about when.

Q. Have you paid any attention to ordinary high water line with relation to that bulkhead since it has been constructed? A. I have.

Q. What have you found or observed? A. That the ocean does not come to it from 25 to 40 feet. 10

By the Vice Chancellor: Q. Are you referring to the present time? A. Sir?

Q. What time are you referring to? A. Since the bulkhead has been built.

By Mr. Cole: Q. Do you know where the present high water line is with relation to that bulkhead? A. Yes, sir.

Q. Where? A. I would say it was at least 40 to 60 feet beyond the bulkhead. 20

Q. Now, having in mind the Kelley bulkhead, how many bulkheads have there been constructed on the Newton property on the opposite side of the street? A. In the beginning Mrs. Kelley and ourselves made an agreement with W. S. Higbee to build a bulkhead from Bartram Avenue.

Mr. Starr: I object to that.

Q. I don't care about that specifically. Now, without regard to any agreement, how many bulkheads have been built on the Newton property? A. Four. That is what I meant to say. One from Bartram Avenue to Berkeley, and then Newton built the bulkhead from Berkeley to Tallahassee, and then he built another from Tallahassee to Jackson, and then he afterwards built another bulkhead from Tallahassee to Jackson. 30

Q. Now, I have in mind the bulkhead on the Newton property, on the westerly side of Berkeley Square. How many bulkheads have been built there? A. Two. 40

Daniel L. Collins—Direct

Q. Is one of them a concrete bulkhead? A. The present bulkhead there now is a concrete bulkhead.

Q. Where is that with relation to the Kelley bulkhead? A. From 35 to 37 feet oceanward of the Kelley bulkhead.

10 Q. Now, were you instrumental in having a deed made from Hilton, one of these deeds offered in evidence here? A. I was.

Q. Beginning 236 feet? A. Yes, sir.

Q. Who requested that? A. L. Irving Reichner.

Q. Is he the same Reichner that is referred to in the agreement made by Turner? A. Yes, sir.

20 Q. Did he approach you about the matter? A. He did.

Q. Did he tell you why he wanted it? A. He told me that he wanted it in order to—

Mr. Starr: I object, if your Honor please, to conversation with Mr. Reichner.

Mr. Cole: I think it is competent. They say they claim through him.

30 The Vice Chancellor: I know, but do you contend that they can be embarrassed by statements he has made touching his own title on matters other than boundary? I think those statements are allowed in some cases where there is a dispute of corners of boundaries, but I do not know of any other case where it is allowed.

Q. Did this conversation you had with Mr. Reichner or what he said to you involve the question of the boundary of his property? A. Yes,

40 sir.

Daniel L. Collins—Direct

Q. What did he say about it?

Mr. Starr: I object to that, if your Honor please. I do not think the gentleman can violate the rules of evidence by merely asking him whether or not it was with relation to the boundary when it is perfectly apparent it had nothing whatever to do with that situation. 10

The Vice Chancellor: I do not believe it is competent, Judge Cole. You may introduce it conditionally, in case it is reviewed the court of errors will have it, but I feel convinced it is not competent.

Mr. Cole: Well, I would like to have the testimony in.

The Vice Chancellor: Well, you may put it in and it can stand as a part of the record for purposes of review, if you find it is competent. 20

Q. When did he see you? A. He came to my office. He 'phoned from Philadelphia asking me if he could meet me at my office at a certain time.

Q. Do you recall when that was—what year?

A. No, I cannot.

Q. Was it before the first Hilton deed was signed? A. Oh, yes. 30

Q. And was the Hilton deed made as a result of the conversation or request? A. It was.

Q. What did he say to you?

Mr. Starr: I make the same objection, if your Honor please.

The Vice Chancellor: Yes. You may testify to it—

Mr. Starr: For the same reason.

The Vice Chancellor:—with that understanding. 40

Daniel L. Collins—Direct

A. He asked me whether or not I thought I could get Hilton and his wife to execute a quit-claim deed. I asked him for what purpose. "Oh," he said, he just merely wanted to quiet the title or perfect the title, something to that effect. "Well,"  
 10 I said, "If that is all it is done for why I think I can get it signed for you." In the meantime he had the deed prepared and had it in his pocket, and I called Hilton up on the telephone, went over to his house, told him what Mr. Reichner wished—

Mr. Starr: Does your Honor think this is competent, this conversation?

The Vice Chancellor: I do not believe it is but it may be introduced for what it is worth.

20 Mr. Starr: I object to it on the ground stated before.

Mr. Cole: I want the testimony in.

The Vice Chancellor: Very well. Go ahead.

• Q. I don't know that I care about the conversation you had with Mr. Hilton but as a result did Hilton sign the deed? A. As a result Hilton and his wife signed the deed.

30 Q. Now, after that did Mr. Reichner come to see you again? A. He came to me to ask me if I could get them to sign another quit-claim deed.

Q. How long was it after the making of the other deed? A. Quite sometime after that, I would say at least one or two years, from memory.

Q. Where did he see you? A. He 'phoned me from Philadelphia and came down to the office.

Q. What did he tell you then?

40 Mr. Starr: I object to that, on the same ground.

Daniel L. Collins—Direct

The Vice Chancellor: I will let it go in under the same conditions. Up to this time I have not heard any part of the testimony relate to boundaries, especially public boundaries.

Mr. Cole: Well, except that he says he wanted to quiet the title. I do not know what he means. 10

The Vice Chancellor: You may introduce it. I do not think it is competent, though.

Q. What did he say to you the second time he came?

Mr. Starr: I renew my objection.

The Vice Chancellor: Yes, you may have the benefit of your objection. 20

A. He asked me if I thought I could get Hilton and his wife to execute another quit-claim deed.

Q. Now, tell us the whole conversation.

Mr. Starr: I object, on the same ground.

A. Well, am I to proceed?

The Vice Chancellor: Yes, proceed, under the same conditions.

A. (Continuing) I told him I didn't know whether he would or not. He said, "Well, will you go over with me and see if he will?" I said, "Yes, we will try it." So he got in the machine, we went over to Pleasantville, found Mr. Hilton at his house. I introduced him to Mr. Reichner, told him what our purpose was, and Mr. Hilton absolutely refused to sign the deed. 30

Q. Well, did Mr. Reichner give any reason for coming back the second time for a deed?

Mr. Starr: I object to that, if your Honor please. 40

Daniel L. Collins—Cross

The Vice Chancellor: You may answer it, under the same conditions.

A. He said the first deed was not just as he wanted it and he would like to get the other signed. Mr. Hilton under no conditions would  
10 sign the deed.

Q. What became of the deed? A. I gave it back later. In the meantime we left the deed with Mr. Hilton and his wife for several days, thinking he might change his mind, and afterwards I got the deed and gave it to Mr. Reichner.

Q. So that Mr. Reichner had it returned to him, did he? A. Yes, sir.

CROSS-EXAMINATION by Mr. Starr:

20 Q. Mr. Collins, when were the posts in front of the Kelley bulkhead placed there? A. I would say that they were placed there sometime in the fall of 1902, or, in other words, after the bulkhead was completed.

Q. And after you made settlement with Mrs. Kelley? A. After we had made settlement?

Q. Yes. A. I think they started to work in sinking those piling outside of the bulkhead before we had made settlement.

30 Q. Now, when was the contract made between Mrs. Kelley and Hilton? A. I think it was made somewhere either in July or August of 1901.

Q. And you got the deed for the property in December, 1901, did you not? A. I think so.

Q. Now, what was done between August or July, 1901, and December, 1901, with reference to protecting the property? A. What was done?

Q. Yes. A. Between 1901 and which?

40 Q. Between July or August, 1901, and December, 1901.

## Daniel L. Collins—Cross

The Vice Chancellor: Between the time you got your agreement and your deed.

A. My recollection is that Leeds was still grading off the hills and filling up the holes and planting brush to catch the sand.

Q. And where was that brush planted? A. All along the beach. 10

Q. Where with reference to the Kelley bulkhead? A. Inside of the 275 feet and outside of the 275 feet, in rows.

Q. So that between the time you bought and the time you got title Leeds was putting brush piling both in and outside of where the Kelley bulkhead was finally put? A. I didn't say he was at it all the time.

Q. Well, it was put there? A. Yes, sir. 20

Q. Between Kingston Avenue and Berkeley Square? A. From Columbia Avenue to Berkeley Square, all the way down.

Q. When was this storm in the fall of 1901? What month? Do you remember? A. My recollection is that we were to have made settlement with Mrs. Kelley sometime in the fall of the year of 1901, and I think it was two or three weeks previous to the date of that settlement there was a storm or a tide came up and washed from two to four foot of the beach away. 30

Q. Yes, and then it was that you determined not to take the property unless there was some protection there—is that right? A. We determined that we would not make settlement until Mrs. Kelley had put that ground back,—

Q. Yes. A. In the condition that she was to have put it in at the time that we were to have made settlement, which was that the lots were to 40

Daniel L. Collins—Cross

be graded off and covered with manure to keep the sand from blowing away, and the streets were to be built and widened, curbed, and have eight inches of gravel all the way down to 275 feet, from Atlantic Avenue down 275 feet, as per her

10 map.

Q. Now, as a matter of fact, how far did Leeds got the tract leveled off before the storm came?

A. I think it was leveled off at least—almost down to the 275 feet limit.

Q. What do you mean by “almost”? How many feet from it? A. Well, in some places he might have had it finished up to that point, other places might not have been finished.

20 Q. How about between Kingston Avenue and Berkeley Square? A. He was filling in not only from Kingston Avenue but the entire two blocks.

Q. You haven't answered my question. How far from the 275 feet line in the block between Kingston Avenue and Berkeley Square had he finished before the storm came? A. I would say it was practically all done except perhaps one or two weeks' work there.

Q. You still haven't answered my question. A. I don't know how to answer it then.

30 Q. How far in feet was it? A. I can't tell you accurately, that far back, just the exact number of feet.

Q. Can you approximate? A. I would say from 25 to 40 in some places.

Q. On the inside of where the bulkhead was? A. There was no bulkhead there then.

Q. Well, where it was put finally? A. Yes, sir.

40 Q. Which end did Leeds commence to work on—the upper end, Columbia Avenue, or Berkeley

Daniel L. Collins—Cross

Square? A. My recollection is that Leeds started in to grade off block 24, which is from Columbia Avenue to Millidgeville, now known as Kingston.

Q. Now, from the time you agreed to buy that property until the conveyance was made did the water come up to the 275 feet line? A. Not that I ever saw, no, sir. 10

Q. The ocean never washed that line? A. It had previous to that.

Q. No, I am speaking about between the time you agreed to buy, in July and August, and when you got your deed? A. No, sir, not that I ever saw.

Q. Never came over that line? A. Not that I ever saw except it was a storm tide or the full of the moon or a northeast storm at sea which we didn't get here. 20

Q. Well, then, it did come up there—the water did come up there? A. I said before that it came up there at the storm tide, yes, sir.

By the Vice Chancellor: Q. I understand you to say that in that storm tide you spoke about it even washed away some of the land? A. Yes. I understood Judge Starr to mean whether or not the ocean had washed up to there previous to these storm tides. 30

By Mr. Starr: Q. And the reason you wouldn't settle was that you were apprehensive you wouldn't get all the land you were entitled to? Isn't that the fact? A. The reason I wouldn't settle—

Q. Now, answer that, Mr. Collins.

The Vice Chancellor: Answer it yes or no, if you can. 40

Daniel L. Collins—Cross

(Question repeated.)

A. Yes and no.

Q. When did you make the bargain with Higbee to build the bulkhead? A. I don't recall.

10 Q. Before or after you got the deed? A. I am not positive about that.

Q. Well, wasn't it understood when you got the deed from Mrs. Kelley that you were to build the bulkhead to protect the property? A. No, sir, it was not understood that way.

Q. Well, can you say whether or not you bargained with Higbee to build it before you got your deed? A. Yes, sir, I can say that I bargained with Higbee and I also bargained with Mrs. Kelley,—

20 Q. Before you got the deed? A. —whereby she was to bear part of the expense.

Q. Yes, before you got the deed? A. I can't say about whether it was before we got it, I think it was, of course.

30 Q. And I understand from your statement now that the high water, the ordinary high tide, never came up to the 275 feet line at any time from the day you bargained to buy this property until it was conveyed to you,—is that right or not? A. No, I didn't say that.

Q. Well, did it come up to that line? A. Why, sure it did. I said that before we were finished a storm tide came up and washed from two to four feet of the beach away, before we made settlement, and on account of that and on account of Mrs. Kelley not being able to get her money on her mortgages in block 26 she gave up an extension agreement.

4

Daniel L. Collins—Cross

Q. Yes. Well, then, at the time you got the deed, on the 30th of December, 1901, water did come up to the 275 foot line?

The Vice Chancellor: Any ordinary tide? A. After the beach was cut away by that storm but not previous to that.

Q. Yes, the ordinary tide came up there, 275 feet? A. Not every ordinary tide, no, sir. 10

Q. After the storm cut away the beach the ordinary tide flowed to the 275 feet line,—isn't that a fact? A. Not every ordinary tide, no sir.

Q. Well, some of the ordinary tides? A. Yes, some of them did.

Q. Now, wasn't it your understanding and didn't you believe that when you bought this property and got a deed for it, on the 30th of December, 1901, that you were getting to high water, ordinary high water? A. I knew different from that. 20

Q. You didn't believe that? A. I knew different.

Q. And didn't you know that the ordinary high water at the time you got your deed was inside of where the Kelley bulkhead was finally put? A. I absolutely know that it was not.

By the Vice Chancellor: Q. What do you mean, Mr. Collins, when you speak of ordinary high tides? A. I mean, Judge, when you take one day with another. For instance, the tide—the high water mark today may be at a certain point, tonight it may be ten or fifteen feet oceanward of that, or it may be ten or fifteen feet anywhere of that; tomorrow it may be entirely different from where it was the day before. Now, what Mrs. Kelley and I did was this: When we were trying 30 40

Daniel L. Collins—Cross

to get her to agree to sell us eight lots she said, "I don't know whether I will do it or not, we will go down on the ground first and measure it off."

Mr. Starr: If your Honor please, I do not ask for all of this conversation. I object to it.

10 Q. I did not mean to go into all of that. I simply meant to ask you what you mean by the term ordinary high water mark.

By Mr. Starr: Q. How much of the expense of restoring the beach and putting in the bulkhead did Mrs. Kelley bear? A. My recollection is that Mrs. Kelley bore three-quarters of the expense of building the bulkhead, but we were to hire men to shovel the sand from the ocean side of that  
20 bulkhead over the top of it and have the sand leveled off at our expense.

By the Vice Chancellor: Q. I think Mr. Leeds said that he got his money for leveling it off after you had shoveled it over from Mrs. Kelley, didn't he? A. Pardon me. I think if you will look the testimony over I think you will see that Mr. Leeds said we paid him for scooping the sand down; we hired men to shovel it over the bulkhead and then Leeds scooped it down and we paid  
30 him for it.

Q. Three-quarters did you say, she paid on the bulkhead? A. Sir?

Q. Did you say one-quarter or three-quarters she paid? A. My recollection is that Mrs. Kelley paid three-quarters of the bill for the building of the bulkhead.

By Mr. Starr: Q. She was not obliged to pay any portion of it under the agreement, was she?

40 A. Which agreement do you have reference to?

Daniel L. Collins—Cross

Q. Under the agreement by which you bought the land. A. No, there was nothing said about bulkhead in that agreement at all.

Q. Now, when did you first know that there was any question as to the location of high water line in 1901, on December 30th? A. I never did know at that time there was any question about the high water line. 10

Q. No, but when did you first know there was any question? When did Mr. Reichner first raise the question? A. When did he first raise the question?

Q. Yes. A. I think it was right after the time that I had sold him the cottage on the east side of Berkeley Square and the lot on the ocean side of that cottage, that is, on the Atlantic Avenue side of the Vare house. 20

By the Vice Chancellor: Q. Who did you say first raised the question? A. L. Irving Reichner.

By Mr. Starr: Q. And the question was raised in this way, was it not? That when you sold the property, or, rather, when the conveyance was made at your suggestion by Hilton to Reichner for that property you have just spoken about there was some mention in the title policy about riparian rights,—isn't that a fact? A. No, sir, it is not a fact. They all knew that no riparian rights had ever been taken out on that property at that time. 30

Q. No, but wasn't there an exception in title policy as to the rights of the State? A. I never saw the title policy.

Q. Did you have a conversation with Reichner about the exception being in the policy? A. No, sir, not to my knowledge. 40

## Daniel L. Collins—Cross

Q. And isn't that the occasion of the first conversation you had with Reichner about the location of high water line? A. No, sir.

10 Q. And didn't Mr. Reichner at that time ask you whether or not high water line was inside or outside of the Hannah Kelley bulkhead when you purchased? A. I don't know just what time it was that Reichner spoke to me about it, but I told him that he could see from the map that was on file at May's Landing where the high water mark was at the time that Hilton took title from Kelley.

Q. Didn't you tell him then that high water line when Hilton purchased from Kelley was inside of where the bulkhead was subsequently put? A. No, sir.

20 Q. That is a fact, is it? A. Yes, sir.

Q. And isn't it a fact that you went around and got affidavits from people who were supposed to have knowledge of that situation showing that high water line was inside of the 275 foot tract? Now, answer the question yes or no. A. No.

Q. Well, did you get any affidavits from anybody? A. No.

Q. Did you know of any affidavits being made? A. I had understood that there were several gotten.

30 Q. Did you secure any of those affidavits? A. No.

Q. At the time of this investigation about the high water line Mr. Bourgeois represented Mr. Reichner, did he not? A. I think so.

Q. And weren't you in consultation with Reichner and Bourgeois with reference to securing affidavits as to the location of high water line in 1901?

40 A. There were several affidavits that they wanted gotten.

## Daniel L. Collins—Cross

Q. Answer the question, please. Isn't it a fact that you were in consultation with Mr. Bourgeois with relation to getting affidavits to show the location of the line in 1901? A. I couldn't say that I ever was in conversation with Mr. Bourgeois on that subject.

10

Q. Well, do you say that there was no conversation about securing affidavits? A. There was between Reichner and myself.

Q. And wasn't it in the presence of Mr. Bourgeois on some occasion? A. I don't think so.

Q. And were you instrumental in taking Mr. Reichner over to Mr. Hilton? A. No, sir, I was not.

Q. Did you go with Reichner to Hilton? A. Reichner went with me.

20

Q. Reichner went with you? A. In other words, Reichner had me to go over to Hilton.

Q. And didn't you bring Mr. Hilton back to Mr. Bourgeois' office? A. No, sir, I did not.

Q. Where was the deed executed—the quit-claim deed from Hilton to Reichner? A. My recollection is that the quit-claim deed was executed over in Hilton's cottage on Park Avenue.

Q. Who took the acknowledgment? A. I think I did. I am not positive.

30

Q. Then, of course, it was acknowledged in your presence? A. I think I took the acknowledgment.

Q. Are you sure about that? A. No, I didn't say I was sure.

Q. Now, isn't it a fact that that deed was prepared and signed and acknowledged in Mr. Bourgeois' office by Mr. Bourgeois? A. I couldn't say so, no; I couldn't say so, I don't know.

40

Daniel L. Collins—Cross

Mr. Cole: Here is the deed. It was acknowledged before Mr. Collins.

A. (Continuing) My recollection is I took the acknowledgment.

10 Mr. Cole: I saw one there acknowledged before Mr. Collins.

Q. I call your attention to Exhibit D-8: Is that the quit-claim deed that was obtained by Reichner from Hilton? A. I couldn't say whether it is or whether it is not.

Q. Don't you know that there was a quit-claim deed obtained from Hilton to Aiken? A. I know that there were several papers signed by Hilton to either Aiken or Reichner but I have no copy of either one.

20 Q. Now, where were they signed? A. As I said to you before, my recollection was that they were signed over in Mr. Hilton's cottage.

Q. How many quit-claim deeds did Hilton execute? A. I can't say just how many he did execute.

Q. Can't you remember that? A. I think two or three.

Q. Well, did he execute any of them in your presence in Mr. Bourgeois' office. A. I don't think he executed any in my presence in Mr. Bourgeois' office and yet he might have.

30 Q. You did not object to Hilton executing the quit-claim deed, did you? A. I don't know that I did.

Q. Hilton held title for Ryon & Collins? A. Yes, sir.

Q. And whenever you gave instructions he made deeds,—isn't that a fact? A. He did not the last time, no.

40 Q. Well, until the last time? A. Yes, sir.

Daniel L. Collins—Cross

Q. Now, isn't it a fact that you endeavored to locate persons who had knowledge of the high water line in 1901, in order that affidavits might be obtained? A. Not for that purpose, no, sir.

Q. Well, for any purpose? Did you locate persons in order to have them testify or make an affidavit as to the existence of high water line in 1901? A. I approached several different people as to their recollection as to where the high water mark was at that time, yes, sir. 10

Q. And didn't you secure affidavits? A. No, sir.

Q. Didn't you get affidavits from Mr. Higbee? A. I don't think I did.

Q. Well, will you swear you did not? A. No, I will not.

Q. Did you get any from Mr. A. B. Bowen? A. Me? Myself? 20

Q. Either you or you were in company with somebody who got the affidavit. A. I don't know what Reichner did.

Q. No, but in your presence? Didn't you consult with these gentlemen in reference to making affidavits? A. I think I asked them the question.

Q. And didn't you ask them to make affidavits? A. I don't think I did.

Q. Will you swear you did not? A. No, I won't swear I did not. 30

Q. It was for the purpose of establishing the existence of high water line inside of 275 feet, wasn't it? A. Yes, that is what Reichner wanted.

Q. And that is what you were trying to get for him? A. No, I wasn't trying to get it either.

Q. Who else did you approach in order to secure these affidavits? A. I don't know that I saw anybody outside of Higbee and Bowen. 40

## Daniel L. Collins—Cross

Q. How about the colored man that sunk the piling? Did you get an affidavit from him? A. No, sir.

Q. Did you try to get an affidavit from him? A. Well, the man—

10 Q. Answer the question. A. Let me answer your question, will you. The man that had to do with that thing, the sinking of the piling for the bulkhead,—his name was Turner.

Q. Well, did you go see him about getting an affidavit? A. Yes, sir.

Q. In order to establish the fact that high water was inside of 275 feet in 1901? A. No, to establish the fact as to where it really was at that time.

20 Q. Well, weren't you supposed to be operating in the interest of Mr. Reichner? A. That is what I was wanted to do.

Q. Yes, and you understood that he wanted proof to show that the high tide was inside of 275 feet,—isn't that a fact? A. That is what he spoke of, yes, sir.

Q. And you knew that he wanted that shown? A. Yes, sir.

30 Q. Now, didn't you, in company with Mr. Reichner and a Notary Public in Mr. Goldenburg's office, go around to get these affidavits? A. In the presence of who?

Q. Mr. Reichner and a Notary Public in Mr. Goldenburg's office? A. I don't think that we saw any one except W. S. Higbee and Bud Bowen.

Q. Well, did you go around with a Notary Public from Mr. Goldenburg's office? A. I don't know where he was from.

40 Q. Well, a Notary, then? A. I don't know whether he was a Notary or what he was.

Daniel L. Collins—Cross

Q. Some person to take an affidavit? A. I couldn't say whether he was or not.

Q. Well, did you get the affidavit signed? A. I don't know whether he did or not.

Q. Well, weren't you there? A. No; they just merely had the use of my machine.

Q. And weren't you present when Mr. Reichner and these gentlemen were talking about making affidavits? A. I wasn't present when they were talking about the affidavits, no, sir.

10

Q. At no time? A. No, sir. I just merely took Reichner around in my machine.

Q. Didn't you know that these affidavits were being obtained or being gathered together by Mr. Reichner in order to fortify an application to be made to the Riparian Board for a Riparian Grant? A. I knew that is what he was trying to get.

20

Q. And you were doing all you could to assist him? A. No; I wasn't doing all I could to assist him either.

Q. Isn't it a fact that you took those affidavits to Mr. Bourgeois and gave them to him? A. I don't think I took those affidavits to Mr. Bourgeois at all.

Q. Will you swear that you did not? A. No.

30

Q. Did you know that Mr. Bourgeois had the affidavits? A. No, I didn't know it.

Q. Did you ever see them in Mr. Bourgeois' possession? A. Did I ever see them in Mr. Bourgeois' possession?

Q. Yes. A. No, sir.

Q. Did you ever talk to Mr. Bourgeois about it? A. I can't say that I did.

40

## Daniel L. Collins—Cross

Q. Now, how many affidavits were gathered together? A. I think, if my memory is correct, Reichner got three.

Q. Who were they? A. I think it was Higbee and Bowen, and I don't recollect the other man.

10 Q. Wasn't there another Bowen? A. There is another Bowen.

Q. Well, did you get his affidavit too? A. I didn't get any of the affidavits.

Q. What about Parsons? Did you get an affidavit from Mr. Parsons? A. I did not.

Q. Well, was there an affidavit gotten from him? A. I don't know whether Reichner got one or not, I did not.

Q. You did not go with Reichner to get it? A. No.

Q. Now, what became of those affidavits, Mr. Collins? A. I haven't the slightest idea.

Q. Mr. Bourgeois had them, didn't he? A. I don't know anything about what Bourgeois had.

Q. How did Mr. Reichner know that Mr. Higbee and Mr. Bowen worked on that bulkhead? A. How did he know it?

Q. Yes. A. I think that Mr. Bowen did some work for Mr. Reichner.

30 Q. Didn't you tell Mr. Reichner? A. I don't think I did.

Q. Well, now, will you swear you did not? A. No.

Q. Do you know the name of the Notary who took the affidavits for Mr. Higbee and Mr. Bowen? A. I do not.

Q. And, Mr. Collins, didn't Reichner pay your expenses going around and assisting in getting  
40 these affidavits? A. No, sir, he did not.

## Daniel L. Collins—Cross

Q. Didn't give you any money at all? A. No, sir, not me.

Q. Who did he give any money to for doing that? A. I think he paid the man that was with us.

Q. Who was it? A. I don't recollect his name. 10  
He was a Notary Public.

Q. You don't know where he was from either? A. No, sir.

Q. What office was he connected with? A. I don't remember which office he was from.

Q. Would you recognize the form of the affidavits that were prepared? A. I don't think I would, no, sir.

Q. Do you know who drew the affidavits? A. No, I do not. 20

Q. I show you a paper and ask you whether or not you recognize that as a draft of the affidavit that was obtained at that time? A. I couldn't say whether it is or not.

Q. Does it look like it? A. I couldn't remember that.

Mr. Starr: I will have it marked for identification.

Said paper marked Exhibit D-13 for identification. 30

Q. Do you remember telling Mr. Reichner that you would be willing to make an affidavit showing the tidal conditions in 1901? A. As to what?

Q. At this place? A. As to what?

Q. Well, locating the high water line in 1901. A. I might have told him that, I don't know.

Q. Did you make the affidavit? A. I don't think I was ever asked to. 40

## Daniel L. Collins—Cross

Q. Can't you remember whether you did or not?

A. I would say no.

Q. That you did not make an affidavit? A. I would say I did not.

Q. Wasn't there an affidavit prepared by Mr. Bourgeois that you took? A. That I took?

Q. Yes. You made an affidavit that was prepared by Mr. Bourgeois, didn't you? A. I don't remember whether I did or not.

By Mr. Cole: Q. Do you know whether Mr. Reichner is alive or not? A. I know he was.

Q. How long ago? A. A few weeks ago.

Q. Where is his home? A. His office is in the Land Title Building, Philadelphia; just where he is stopping at now I don't know.

20 Q. Does he still have a property down here on Berkeley Square or in that section? A. I was talking with him a few weeks ago on the telephone and he told me he had disposed of it.

Q. All right. Now, you started to say that you knew that you were not getting title to high water line in your deed from Mrs. Kelley. Now, how did you know that? A. Simply because I had intended to buy the balance of the ground from her oceanward of 275 feet to the board-walk, and in anticipation of getting that ground she agreed and did—

30 Mr. Starr: I object, if your Honor please.

Mr. Cole: I think we have a right to have this. He developed from this witness the fact that he knew he was not getting title to high water. Now, I am trying to have him say why he knew he was not getting more than the metes and bounds of his lot.

40

Daniel L. Collins—Cross

Mr. Starr: I object to any oral arrangement or agreement with Mrs. Kelley.

The Vice Chancellor: Yes, I think I will have to exclude his agreement with Mrs. Kelley.

Mr. Cole: No, but may it please your Honor, the record shows that on cross-examination this witness in response to a question said that he knew that he was not getting anything beyond the 275 feet mark. Now, haven't I the right to show why he knew it? 10

The Vice Chancellor: Yes, provided you do not show it by conversations with Mrs. Kelley or somebody else. If you can show it from his own knowledge touching the physical features of the land you may do so, but the mere fact that he stated that he knew on cross-examination does not entitle him to disclose a source of knowledge that is not otherwise competent. 20

By Mr. Cole: Q. Well, apart, Mr. Collins, from any conversation that you had with Mrs. Kelley, how did you know that you were not getting title to high water line? A. She entered into an agreement with Mr. Hilton— 30

Mr. Starr: Well, I object to that. The agreement is here and speaks for itself.

The Vice Chancellor: I do not think the witness can testify to parole agreements. To impress upon his statements their reliability, I do not see any objection to his testifying that he wanted to buy to high water mark and could not, that he tried to buy and could not and had to be 40

Daniel L. Collins—Cross

content with something less, and that therefore the matter was impressed upon his mind, but so far as any statements are concerned I cannot see how they are competent.

10 Q. Did you undertake to buy from Mrs. Kelley any land oceanward of 275 feet south of Atlantic Avenue?

Mr. Starr: I object to that, if your Honor please.

The Vice Chancellor: He may answer that for the purpose of showing that his eyes were especially directed to this land and that his intellect was especially impressed with the physical features of the land, and for no other purpose.

20 Q. (Repeated) Did you undertake to buy from Mrs. Kelley any land oceanward of 275 feet south of Atlantic Avenue? A. We did.

Q. Would she sell to you?

Mr. Starr: I object to that, if your Honor please.

The Vice Chancellor: Objection overruled.

A. She would not.

30 Q. And after you had made the agreement to buy to a point 275 feet south of Atlantic and after you got your deed for that who was in possession of the land oceanward thereof? A. At that time?

Q. Yes. A. Mrs. Kelley.

Q. Were you ever in possession of any of it under your deed? A. No, sir.

40 By Mr. Starr: Q. How was she in possession of it? A. How was she in possession of it?

## Daniel L. Collins—Cross

Q. Yes. A. Because she had title to it.

Q. Is that the only way that you say she was in possession of it? A. She not only had title to it but she had men there working on the ground outside of the 275 foot limit.

Q. Filling in the property that you bought?

A. No, sir, not filling in at all.

10

Q. Well, what was she doing with it, then?

A. Building, as I said before, these brush bulkheads from Colubia Avenue to Berkeley Square.

Q. I thought you said they had been put there before you got your deed? A. No, sir. I didn't say any such thing. I said they were working there.

The Vice Chancellor: Maybe I am mistaken about that but my recollection is that it was afterwards.

20

A. (Continuing) They were working there at it and they were still working there at it after we had gotten our deed.

Q. A moment ago, Mr. Collins, didn't you say that John Leeds put brush piling and brush bulkheads on both sides of the 275 foot line before you got your deed? A. If you will allow me I will tell you just what took place.

Q. No, didn't you say that in your testimony?

The Vice Chancellor: I don't think he did. I think he made a distinction between laying brush and putting brush down with piling.

30

A. I will tell you how it took place if you will allow me, tell you how it was done.

By the Vice Chancellor: Q. Go on and explain it, straighten it out. I am all mixed up on it.

A. Before the date settlement was to have taken

40

## Daniel L. Collins—Cross

place between Hilton and Kelley there was a storm came up and washed from two to four feet of that beach away, which meant that we weren't getting the ground filled up to the established city grade and the streets built with eight inches of gravel, curbed, etc., as we was  
10 to have. On the strength of that Mrs. Kelley and Mr. Ryon and myself, or Hilton in behalf of Ryon and myself, entered into an agreement whereby she was to bear a certain proportionate part of building this bulkhead from Bartram Avenue to Berkeley Square. After that was done—oh, in the meantime, when they started to build the bulkhead—the bulkhead was about completed from Bartram Avenue to Kingston  
20 Avenue, when the boiler, I think, outside of the boardwalk,—another storm came up and washed the foundation away beneath the boiler and it was lost for three or four weeks, we couldn't find the boiler, finally they found it buried down underneath the boardwalk. After we got that straightened up then Higbee continued with the bulkhead from Millidgeville Avenue, which is now Kingston, to Berkeley Square. At the same time we had men on the outside of that bulkhead  
30 throwing sand over on the inside and John Leeds leveled that off. He at once started in with another contract with Mrs. Kelley to build brush bulkheads out beyond our present bulkhead, he also built a continuation of this bulkhead for Mrs. Kelley from Bartram avenue on up to Columbia Avenue and from Berkeley Square on down to Tallahassee Avenue, which Mrs.  
40 Kelley still owned and hadn't sold us.

John P. Ashmead—Direct

Q. Now, had Leeds done some brushing before you got your deed or not? A. Yes, he had started in to brush on the outside before we got the deed.

Q. And did he put down any pilings? A. Yes.

Q. Before you got the deed? A. You sink the piling first on the outside and then fill in between the piling with brush. 10

By Mr. Starr: Q. And he also put some brush piling or the same sort of construction on the inside of where the bulkhead was subsequently built? A. No, that was previous to the bulkhead being built.

Q. Then I was right, wasn't I, Mr. Collins, when I said a moment ago that you testified that before the bulkhead was built there Leeds had put brush piling on both sides of the line where the bulkhead was subsequently built? A. All the way down, yes. 20

Q. Yes. A. To catch sand there, that is right, to keep the sand from blowing away.

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JOHN P. ASHMEAD, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:— 30

By Mr. Cole: Q. You are a civil engineer and surveyor? A. I am.

Q. And have been for how long? A. Thirty-five years.

Q. And you were or still are a member of the firm of Ashmead & Hackney,—or doesn't the firm exist any more? A. Yes. 40

John P. Ashmead—Direct

Q. Now, I show you a map with the legend "Map of the premises situate in Atlantic City, N. J. Survey made July 28, 1909. By Ashmead & Hackney, Civil Engineers." Did you make the survey? A. I did.

10 Q. Did you make the map? A. I did. Well, I wouldn't say about making the map. It was made under my direction.

Q. What was the object in making the survey down there? A. To show the high water line of that date.

By the Vice Chancellor: Q. When was that made? A. July 28th, 1909.

By Mr. Cole: Q. Now, I notice on the map the word "Bulkhead." Did you find that bulkhead there? A. I did.

20 Q. Is that the bulkhead in front of what is known as the Vare property? A. It is.

Q. Now, I notice a red line that runs at right angles with Berkeley Square. A. That is a line that I run upon the ground and put in some stakes across there.

Q. Where was that point from Atlantic Avenue? A. It was 314 feet south of Atlantic Avenue.

30 Q. Where did you find high water line with relation to that 314 feet line? A. At Berkeley Square it was seventy feet southward and on Millidgeville sixty-seven feet south of that line.

Mr. Cole: I put the map in evidence.  
(Said map marked Exhibit C-18.)

Q. How long have you been working on the Atlantic City beach? A. Since 1884.

40 Q. Have you surveyed to high water line from time to time? A. I have made a great many surveys.

John P. Ashmead—Cross

Q. Extensively, have you not? A. How is that?

Q. (Repeated) Extensively, have you not? A. Yes, sir.

CROSS-EXAMINATION by Mr. Starr: 10

Q. On July 28th, 1909,— A. Yes, sir.

Q. You made this observation? A. I did.

Q. Only on that one day? A. That date that is shown on the map.

Q. Was it the morning or afternoon? A. I think it was in the afternoon; I wouldn't be positive about that.

Q. What time? A. I couldn't say about that.

Q. What day of the week was it? A. I couldn't say about that.

Q. What was the condition of the moon? A. I don't know. 20

Q. What was the condition of the wind? A. I couldn't tell that.

By the Vice Chancellor: Q. Well, was it high water? A. That is a high water line as I found it on that date, as it is marked, high water mark as shown by a line of trash.

Q. Well, was it high water when you were there or did you take it from the mark that the high tide had left? A. Left that day. 30

Q. Could you see any other marks of other high tides there? A. No, the last—never see except the last one, unless there has been a higher tide sometimes before.

Q. Could you tell which had been the last tide? A. Oh, yes, no trouble about that at all.

Q. Well, were there any marks of higher tides there? A. I don't remember about that on that particular day. 40

## John P. Ashmead—Cross

By Mr. Starr: Q. Was there any evidence of sea weed on the inside of that line? A. I don't think so.

Q. Or trash of any kind? A. That is the line—that is the high water line as marked by the tide  
10 of that particular day.

Q. Answer my question. A. I couldn't say.

Q. You don't know whether there was any other rubbish or trash or sea weed closer to the bulkhead than the line that you indicate? A. I wouldn't like to say; it has been too long.

Q. You don't know whether it was high tide when you were there or not? A. I know that was the mark of the high tide.

Q. Do you know whether it was high tide when  
20 you were there? A. No, I don't think it was.

Q. Do you know the state of the tide when you were there? A. No; I cannot say about that.

By the Vice Chancellor: Q. Do you know whether the tide of that day had been a storm tide or an unusual tide? A. I know that was a usual tide. We never made these surveys only when the tides were running about normal, that is when we made them. We never made these  
30 surveys to show high water line after a storm or at a time like that, or with the wind blowing northeast hard.

Q. But you didn't take the moon into account? A. No.

By Mr. Cole: Q. Do you recall whether you had any special instructions when you went down there? A. No, I don't remember.

Q. Did you seek an opportunity to find high  
40 water line as far oceanward as you could? A.

## William I. Martin—Direct

No; I took it as I found it on that particular day.

Q. Did you wait for that particular day? A. No, I don't think so. I think that we had an order to make that survey and went down there and made it.

Q. Do you recall for whom you made it? A. I think it was made for Mr. Turner.

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WILLIAM I. MARTIN, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:—

By Mr. Cole: Q. Mr. Martin, what is your business? A. Motorman, trolley car.

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Q. At one time did you work for the government? A. Yes, sir.

Q. When? A. I went to the government house about 1886 or 1887, I think.

Q. When was that? A. 1886 or 1887, somewhere about there I went there.

Q. How long did you work for the government? A. Seven years.

Q. So that you left the government employ when? A. About 1903.

30

Q. And you were working in the life station, were you not? A. Yes, sir.

Q. Where? A. Annapolis Avenue.

Q. Did you patrol the beach in the vicinity of Berkeley Square during that period? A. Well, it was not Berkeley Square then but I passed by.

Q. Well, where Berkeley Square now is? A. Yes, sir.

40

## William I. Martin—Direct

Q. Do you recall the bulkhead that runs parallel with Atlantic Avenue, which has been referred to in this case as the Kelley bulkhead?

A. Yes, sir.

10 Q. During those years did you notice where ordinary high water came with relation to that bulkhead? A. Yes, sir.

Q. Where did it come?

The Vice Chancellor: About what time did you ask?

Mr. Cole: 1887 to 1904.

A. Well, most of the time the tide wouldn't come within—I should say within fifty to one hundred feet of that bulkhead.

20 Q. You are now speaking of the ordinary tide? A. Ordinary tide.

By Mr. Starr: Q. Now, you were a life saver in what years? A. Sometime between 1887—I think it was about 1887.

Q. You started in 1887? A. Something like that.

Q. And worked for the government several years? A. Seven years.

Q. Oh, seven years? A. Seven years, somewhere about 1893 when I went away from there.

30 By the Vice Chancellor: Q. Just a moment. You were there from 1887 to 1903? A. Yes, sir.

By Mr. Starr: Q. No, 1887 to 1893? A. 1893.

Q. You said you went in 1886 or 1887 and worked there for seven years, that would make it 1893,—is that right? A. Something like that.

By Mr. Cole: Q. Is that the latest time,—1893? A. I was there after the bulkhead was built.

40 By the Vice Chancellor: Q. The bulkhead was built in 1902. Were you there after 1902? A.

## William I. Martin—Direct

Well, I was there—I didn't leave that station until after that was built.

By Mr. Cole: Q. Now, let us get that straight. You see, if you went there in 1887 and only worked seven years that would only be 1894, you left a long while before that bulkhead was built. Is that right? A. Oh, I mean 1897 instead of 1887. 10

Q. You mean you went to work in 1897? A. Yes, instead of 1887.

By the Vice Chancellor: Q. Well, then, you were there until 1903 or 1904? A. Yes, sir. Now, that is right. I mean 1897 instead of 1887. That is my mistake.

By Mr. Starr: Q. Now, Annapolis Avenue is where? A. Annapolis Avenue is Annapolis Avenue. 20

Q. I know, but where is it? A. Down Chelsea.

Q. Is it east or west of Berkeley? A. It is east.

Q. It is east of Berkeley? A. I should call it east. It is, yes.

Q. Where was your beat? A. Well, every other night my beat was down to Ventnor, half-way to Longport. 30

Q. Down there at night-time, were you? A. Yes, sir.

Q. Your beat was at night? A. My beat was in day-time as well.

Q. What time in the day or night did you go past this place? A. Different times.

Q. Now, before the bulkhead was put there how far from Atlantic Avenue did ordinary high water extend? A. You have asked me something more than I can answer, I don't know. 40

William I. Martin—Direct

Q. You don't know? A. I couldn't tell you.

Q. When did you first know that you would be called upon to state your recollection as to the location of high water line during those years? A. When this bulkhead was being built.

10 Q. No,—you understood then you were going to testify? A. No, I didn't know nothing about it.

Q. When did you know you were going to testify? A. I didn't know it.

Q. Until when? A. Until now.

Q. Until today? A. Until today.

Q. And was there anything to impress upon your mind the location of this high water line in 1901 and 1902? A. Anything?

20 Q. Yes. A. Yes.

Q. Before this bulkhead was built there? A. Oh, no.

By Mr. Cole: Q. Did you walk along the beach in front of this bulkhead? A. Yes, sir.

Q. You say that you did not know that you were going to testify in this case until today. Who told you to come here? How do you happen to be here? A. Mr. Collins asked me.

30 Q. Well, how long ago? A. Well, I couldn't give you the date.

Q. It has been several days ago? A. Yes, it has been several days.

Q. You knew then that you were coming here to testify about where high water line was according to your recollection? A. Yes.

By Mr. Starr: Q. Had Mr. Collins ever spoken to you about the location of high water line before he asked you to come here to testify? A.  
40 He asked me if I ever remembered it.

William I. Martin—Direct

Q. Did he ever speak to you before that time?  
A. No, sir.

Q. Say anything to you about it? A. No, sir.  
By the Vice Chancellor: Q. I want to have you testify a little more definitely about that bulkhead. You remember distinctly, do you, when it was put there,—when that was built? A. Yes, sir. 10

Q. And at that time you were engaged regularly in making your beats along this beach as a life saving guard? A. Yes, sir, four times daily.

Q. And are you sure that you from your observation remember accurately about the tides along there? A. Yes, sir.

Q. You don't think there is any possibility of your being mistaken about that? It is claimed here by some people that the ordinary high tide at the time that bulkhead was built reached up to it and even beyond that point. You feel sure that it did not? A. It did not reach that bulkhead at ordinary high tide. 20

Q. What do you call an ordinary high tide?  
A. Well, that is a pretty hard matter to establish, a grade for high water. You can stick a stake up on the beach today at high tide and it will either not come to it or else it will wash it down another high tide. 30

Q. Where would you walk the beach,—on the strand? A. Yes, sir.

Q. Did you ever have occasion to walk at high tide? A. Yes, sir.

Q. Where would you walk then? A. An ordinary high tide we would walk on the outside of this bulkhead. It took a very strong tide for us to have to crawl over the bulkhead. 40

William I. Martin—Direct

Q. But sometimes tides did drive you over the bulkhead? A. One time while we were there, after the bulkhead was built, there came a storm and I would say that it washed fully two feet of the sand away, then a good full tide it would  
10 come up to the bulkhead and we were forced to climb over it.

By Mr. Starr: Q. Was there a boardwalk along there after the bulkhead was built? A. A boardwalk where?

Q. Along the front of Berkeley Square. A. Yes, sir.

Q. Couldn't you patrol the boardwalk? A. Why, we had no place of getting off there at the end of our beat.

20 Q. Do you mean to say you didn't walk along the boardwalk at all? A. Oh, yes, but it didn't go to the end of our beat.

Q. Do you know when the boardwalk was built? A. Do I know when what?

Q. When the boardwalk was built. A. I think it was built sometime in 1901, started about that time, I am not sure.

Q. Well, while the bulkhead was being built didn't the water come up to it? A. No, sir.

30 Q. You say the high tide was from fifty to one hundred feet away. Which was it,—fifty or one hundred? A. Well, now, I never took that trouble to measure, I was only just giving you an estimate.

By the Vice Chancellor: Q. Was the low tide out beyond the boardwalk? A. Sometimes, other times it would be inside.

40 Q. Was the beach at that point very flat or a steep beach? A. Why, it was pretty high at that point.

Charles P. Leek—Direct

Q. I mean level. Was it what you call a shelving beach? A. Well, it was just about that what you would call a shelving beach, yes, sir.

Q. About the average Atlantic City beach? A. About the average right along there by that particular point.

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CHARLES P. LEEK, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:—

By Mr. Cole: Q. Mr. Leek, what is your business? A. Boat building.

Q. Were you at any time in the government employ? A. Yes, sir. 20

Q. At the life saving station? A. Yes, sir.

Q. During what year? A. I went in the life saving station down here on December 1st, 1900.

Q. How long did you stay? A. I was there until the last day of May, 1902.

Q. Had this bulkhead known as the Hannah Kelley bulkhead been built before you left? A. Yes, sir.

Q. Do you remember it? A. I do. 30

Q. Did you patrol the beach in front of that bulkhead? A. I did.

Q. During all those years you were there— A. Yes, sir.

Q. Where was the ordinary high water in front of that bulkhead with relation to the bulkhead?

A. I should say anywhere from thirty to fifty to sixty feet on the outside with an ordinary 40 tide.

Charles P. Leek—Cross

Q. Did you pass between ordinary high water and that bulkhead in making your patrol? A. Yes, sir.

10 Q. Was there a time when you could not pass between because of the tide? A. Once or twice, I know, when we had a storm tide, at that time we had to crawl over the bulkhead. I remember it very particularly because at that time we used to come back to the station and cuss Mr. Collins because he built the bulkhead and on account of this storm we had to climb up over it.

CROSS-EXAMINATION by Mr. Starr:

20 Q. Now, you went there on the first of December, 1900 A. Yes.

Q. And stayed there until May, 1902? A. Yes.

Q. When was the bulkhead built? A. I should say the last part of 1901.

Q. 1901? A. Yes, to my recollection.

Q. What month? A. Well, I can't just tell you the month, I don't know.

Q. The bulkhead that you are speaking about is located where? A. Right at Berkeley Square.

30 Q. Where does it extend to? A. Well, just about a—what I call a half a square, maybe you call it a square, below it.

Q. In which direction? A. South.

Q. Do you mean toward Ventnor? A. Yes.

40 Q. Then the bulkhead that you are speaking of began at Berkeley Square and extended a half a square toward Ventnor? A. Well, now, at that time—I don't know as I could tell you the exact square; I know where the bulkhead is, I could go to it and all that, but to just tell you the street I can't.

## Charles P. Leek—Cross

Q. And you can't tell us the street now? A. Well, I know it is Berkeley Square and that is all I do know.

Q. And you think it is towards Ventnor? A. Well, I just imagine it,—one end or the other is toward Ventnor, I don't know just which end it is now. 10

Q. And that is the bulkhead you are speaking about? A. Yes.

Q. Now, far from Atlantic Avenue was the ordinary high water before the bulkhead was put there? A. Oh, I should say, ordinary high water, around, three hundred, three hundred and fifty feet, something like that.

Q. Three hundred to three hundred and fifty feet? A. Something of that order. 20

Q. While they were building this bulkhead did the water ever come to it that you observed? A. I don't think so.

Q. Never came anywheres near it? A. Not until that storm came.

Q. Well, after the storm came did it? A. It did.

Q. Came up then? A. Yes.

Q. How long did that last? A. The storm?

Q. No, the water washing the bulkhead. A. Oh, not such a great while. I imagine it was a week or two when the water came up to the bulkhead, and then it made up, the beach made up again on the outside. 30

Q. Did you have any particular time for going along there? A. We did.

Q. Any particular time with relation to the tides? A. We were always bound to hit the tide dead high water at some time, because our beat 40

## Isaac Strickland—Direct

was—we went out tonight at one time, we went out tomorrow night at another time.

Q. Did you always hit it at Berkeley Square?

A. How is that?

10 Q. Did you always hit it at Berkeley Square,—  
the high tide? A. No, sir.

By Mr. Cole: Q. Were you at the Annapolis Avenue station? A. Yes, sir.

Q. Was Mr. Martin there at the time you were there? A. He was.

By Mr. Starr: Q. Mr. Martin, where was this bulkhead located that you have spoken of in your testimony? A. I couldn't tell you.

Q. You don't know between what streets? A. The streets wasn't named then, I don't think.

20 Q. Well, do you know? A. I know it is the bulkhead that Mr. Collins built at that time.

Q. You don't know where it is located? A. No, sir.

Q. Between what streets? A. No.

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ISAAC STRICKLAND, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:—

30 By Mr. Cole: Q. What is your business? A. In the coast guard service.

Q. How long have you been in the service? A. Nineteen years.

Q. Where is your station? A. Annapolis Avenue.

40 Q. All that time? A. I have been at Annapolis Avenue station since December 4th, 1903.

## Isaac Strickland—Cross

Q. Do you know the bulkhead that has been referred to here as the Hannah Kelley bulkhead?

A. Yes, sir.

Q. How long have you known it? A. Why, ever since I have been here, ever since 1903.

Q. Did you patrol the beach in front of that property? A. Every other night since that time until December 15th, 1910, when they abandoned the station. 10

Q. During the time you patrolled that beach in front of that bulkhead where was ordinary high water line in relation to that bulkhead? A. Well, I should think it was from 25 to 30 feet in ordinary high water outside of the bulkhead, I should say 30 feet.

Q. Was there an occasion when the tide came over the bulkhead? A. Well, in a full tide, storm tide. 20

Q. Did you walk in front of this bulkhead from time to time? A. Occasionally, most every night, —every other night.

Q. Was it dry? A. Yes, sir.

## CROSS-EXAMINATION by Mr. Starr:

Q. Do you remember seeing some brush piling there? A. Yes, sir,—there was no brush but I saw piling. 30

Q. Piling? A. Yes, sir.

Q. Did the water come up to that at ordinary high tide? A. Well, it might come up there at full tide, yes, sir, but in ordinary high tide it did not come there.

Q. There was nothing happened at that time, in 1903, to impress upon your recollection the location of high water? A. I don't know anything at all about it. 40

Timothy H. Parker—Direct

Q. Was it good hard walking along the bulkhead? A. Well, it is sand, you know what sand is.

Q. Well, was it hard? A. Well, hard at times.

Q. How close to the bulkhead would you walk?

10 A. Well, I would walk right close, right close up to the bulkhead, then I walked 25 to 30 feet on the outside of it, low water I walked clear outside of the boardwalk.

By the Vice-Chancellor: Q. Did you often patrol the beach at high tide? A. At high tide?

Q. Yes. A. Yes, sir. Where you patrol the beach for fifteen years, your Honor, you must certainly patrol the beach at high tide sometimes, at nights.

20 Q. And you are sure you passed this point frequently at high tide? A. Yes, sir, occasionally often, often.

By Mr. Starr: Q. Did you patrol it at night? A. Yes, sir.

Q. Your patrolling was at night? A. Night and day-time and thick weather.

Q. You never made any mental note or record of the tides there? A. No, just my business, that was all.

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TIMOTHY H. PARKER, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:—

By Mr. Cole: Q. Captain, what is your business? A. At the present time?

40 Q. Yes. A. Nothing.

Timothy H. Parker—Direct

Q. Well, you were in the government employ, weren't you? A. Coast guard service, yes, sir.

Q. How long? A. 38 years.

Q. Where were you stationed? A. Longport, Atlantic City, Absecon.

Q. Do you know what has been referred to here as the Hannah Kelley bulkhead, Berkeley Square? 10

A. Well, I think I do.

Q. Ever patrol that beach? A. No, sir.

Q. Do you know anything about high tide with relation to that bulk-head? A. Yes, sir.

Q. What do you know about it? A. Well, I know that—of course, the high tide—that is a question that has been argued on a good bit, to establish a regular high tide, but I have been on—I don't know whether this is within the rule or not,— 20

Q. Well, what years do you know about? A. From 1905 to 1911.

Q. Very well. Now, tell us what you know about ordinary high tide with relation to the Hannah Kelley bulkhead in front of Berkeley Square? A. Well, the relation—in regards to what I know about the high tide, when I went down to Annapolis Station there was some changes, but we could barely get under the boardwalk with a boat, that is in 1905; then it commenced making up, making up, until finally we had to go down—I think it was—to Bartram Avenue to get out, but I suppose by hauling so much sand away from there— 30

Mr. Starr: Well, I object.

Q. Captain, let us see if we can't get a little closer. Have you ever noticed where ordinary high water came with relation to the Hannah 40

Frank P Gandy—Direct

Kelley bulkhead from 1905 up to date? A. Well, Yes, sir.

Q. Was it inside or outside of the bulkhead?

A. Well, yes, I have noticed it very frequently by taking a walk down that way, of course my walking was in the day-time.

10 Q. Well, no matter when it was, what have you noticed with relation to high water? Did it come to the bulkhead or not? A. Not ordinarily, what most of the people term an ordinary tide, ordinary high water.

Q. Within what distance did it come to the bulkhead? A. Well, anywhere from fifteen to thirty feet, the like of that.

20 CROSS-EXAMINATION by Mr. Starr:

Q. Well, now, that is in 1905? A. Yes, sir.

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FRANK P. GANDY, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:—

By Mr. Cole: Q. What is your business? A. Contractor.

30 Q. Where do you live? A. 28 North Sovereign Avenue, Chelsea.

Q. Did you build the Vare bulkhead in question? A. Yes, sir.

Q. When did you build it? A. I think it was the year of 1909, something like that.

The Vice Chancellor: Which bulkhead?

Mr. Cole: The Vare bulkhead.

40 Q. During that time did you notice where ordinary high water came with relation to that bulk-

## Frank P. Gandy—Cross

head? A. Well, I know the tide never bothered me any, never interfered with my work.

Q. How long were you there? A. I suppose a week.

Q. Did you work on the outside of it? A. Worked all around there.

Q. And worked all time of the tides? A. Yes, sir. 10

Q. Did you know anything about the tides in front of that property other than during the time you worked there? A. Not before that, no, sir.

Q. Did you know anything about it afterward? A. Well, I worked all around there ever since.

Q. Has the ordinary high tide ever come to the Vare bulkhead so far as you noticed? A. Well, I don't know between that time and 1915, but I worked there in 1915, the tide was a good ways from the bulkhead. 20

Q. How was it then? A. Well, an ordinary tide was about twenty feet inside of the boardwalk.

Q. How far would that be from the Vare bulkhead, about? A. About a hundred.

Q. Do you mean that you actually built the Vare bulkhead yourself? A. Yes, sir.

Q. Alone, or did you have help? A. Oh, I had help. 30

## CROSS-EXAMINATION by Mr. Starr:

Q. Mr. Gandy, did you build the bulkhead? A. Yes, sir.

Q. Around the Vare property? A. Yes, sir.

Q. For whom? A. Budd Bowen, Ansley Bowen.

Q. And that was in 1909? A. I don't know what year, I should judge it was 1909 or 1910, something like that. 40

## Frank P. Gandy—Cross

Q. Well, you had no knowledge of the situation or the tidal conditions until you worked on that bulkhead? A. No, I didn't, not before that.

Q. And you had no knowledge of the tidal conditions after you stopped work there until 1915?

10 A. Well, then is when I went back to work, I built the bulkhead for Lambert.

Q. After he started in bulkheading? A. Yes, sir; I built the bulkhead for Lambert.

Q. So that you had nothing to do with the property or had no knowledge of the tidal conditions from 1909, or whenever it was you worked on the Vare bulkhead, until you went back there for Lambert in 1915? A. Nothing any more than maybe walking up and down the beach. I didn't do any work in that neighborhood.

20 By Mr. Cole: Q. Did you notice whether there were any tents on that ground outside of the Vare bulkhead during the time you were there or any other time? A. Yes.

Q. What were they used for? A. Well, the children played in them.

Q. How far were they oceanward of the Vare bulkhead? A. Anywheres from the Vare bulkhead out 50 or 75 feet, there was no trouble to play there.

30 Q. How many tents did you notice? A. Well, I couldn't tell. A dozen.

Q. More than one? A. Yes, I will say a dozen.

By Mr. Starr: Q. That was in 1915? A. Yes.

By the Vice Chancellor: Q. What did you mean when you said the tide did not disturb your work? Did you mean the tide did not come up to where you were working? A. Yes. If it comes up we have to quit.

40

Daniel L. Collins—Direct

Q. How long were you working there? A. I judge I was about a week on that job.

Mr. Starr: Judge Cole wants me to admit this map, which he hands me, in evidence and concede that Mr. Risley, who made the map, if here would testify that on the 21st of October, 1914, he took measurements of the location of high water line and that they are as shown on the map. Now, I have no doubt but what Mr. Risley would so testify. 10

Mr. Cole: He has gone to Washington, he is in the employ of the government and I cannot get him.

Mr. Starr: I understand he took the measurements on that day, one measurement at Kingston Avenue and the other at Berkeley Square. 20

Mr. Cole: That is my understanding of it.

(Said map marked Exhibit C-19.)

Mr. Cole: We rest.

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DANIEL L. COLLINS, re-called:

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By Mr. Starr: Q. I want to ask you again—do you know Wilbert Higbee? A. Yes, sir.

Q. Now, didn't you go with Mr. Reichner and ask Mr. Higbee to make an affidavit with reference to the location of high water line in 1901? A. I don't think I did. Mr. Reichner might have asked him. 40

Ansley B. Bowen—Direct

Q. Well, were you with him? A. I might have been with him, Reichner might have been with me in my car.

Q. Well, how did Reichner know Higbee? A. How did Reichner know Higbee?

10 Q. Yes. A. I couldn't say how Reichner knew Higbee.

Q. Now, didn't you go with Mr. Reichner also to Mr. Ansley Bowen for the purpose of getting an affidavit? A. I might have taken Reichner to see Ansley Bowen in my car.

Q. Answer my question. A. I am answering you to the best of my knowledge. I am not going to say something I am not positive about.

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ANSLEY B. BOWEN, re-called:

By Mr. Starr: Q. Mr. Bowen, did Mr. Collins come with Mr. Reichner to see you with reference to getting an affidavit as to the tidal conditions in 1901 at Berkeley Square? A. I don't think Reichner was with Collins, I don't think he was.

30 Q. Collins came alone? A. I think so. I wouldn't swear to that but I think he did.

Q. Came for what purpose? A. Why, to know whether I knew whether the tide washed up to that bulkhead, inside of it, or not.

Q. Did he ask you to make an affidavit? A. Yes; I did, I think.

Q. You made an affidavit for him? A. I think I did.

Ansley B. Bowen—Cross

CROSS-EXAMINATION by Mr. Cole:

Q. Where was it that Mr. Collins saw you? A. I was building a boat-house for Reichner at Kingston Avenue and the Thorofare at that time.

Q. Had Mr. Reichner ever spoken to you about the matter at all? A. Yes, he had asked me if I remembered where the high water mark was. 10

Q. And was that before or after Mr. Collins came to see you? A. Well, I think that was about the time, not the very day; I couldn't say whether it was afterwards or before.

Q. How did Mr. Reichner come to ask you if you knew where high water line was in 1901? A. I don't know how he came to ask me.

Q. Where did you say this was? A. I was building a boathouse for him. 20

Q. He came down to see you? A. Yes.

Q. Now, when was that, by-the-way? A. That was in 1908, I think.

Q. What month? A. I wouldn't be positive about that.

Q. Well, then, just tell us what he said to you? A. He asked me if I remembered where the high water mark was when that bulkhead was built.

Q. High water mark was with relation to what? A. The tide, I suppose. 30

Q. What did you tell him? A. Why, I told him I thought it came to 12 to 15 feet inside of the bulkhead.

Q. Then what did he say? A. What?

Q. Did he ask you to make an affidavit? A. I had made an affidavit before that.

Q. I thought you said you weren't certain whether Reichner saw you first or whether Collins did? A. That is what I did say. I am not 40

## Ansley B. Bowen—Cross

certain yet whether Reichner was before Collins came or afterwards.

Q. Did Mr. Reichner tell you why he wanted that information? A. No, he did not.

Q. Did you ask him? A. I did not.

10 Q. Now, let me see if I understand you: At this time you are not clear whether it was Reichner or Collins who first spoke to you,—is that right? A. I don't know whether it was Reichner or Collins spoke to me first but Collins got the affidavit.

Q. But the important thing I want to get is whether Collins got that affidavit from you before or after Reichner had spoken to you? A. I couldn't tell you which.

20 Q. Do you know whether Reichner had communicated to Collins what you had told him? A. I do not.

Q. Did Collins say anything to you about having talked to Reichner about it? A. No, he did not.

Q. Did you tell him that Reichner had asked you that question? A. I did not.

Q. Who took your affidavit? A. I think Collins took it.

Q. In this same boat-house? A. Oh, no.

30 Q. Where? A. I think at his office. I wouldn't be positive about that.

Q. Who were present? A. I don't know whether he or Ryan, I couldn't say about that.

Q. You mean you don't know which one took the affidavit? A. No, I wouldn't swear which one took it.

40 Q. I thought you said Collins took it? A. I said I thought he did.

## Ansley B. Bowen—Cross

Q. Then you are not clear about that? A. I think some of you have that affidavit.

Q. It may be. I haven't seen it. A. Mr. Bourgeois, or some one. They was all given to Mr. Bourgeois at the time.

Q. Who gave it to Mr. Bourgeois? A. They said Mr. Collins did, Reichner told me Collins— 10

Q. Just a moment, sir. You have testified now that it was given to Bourgeois. Did you see it given to him? A. I did not.

Q. How do you know it was given to him? A. Reichner said it was given to him.

Q. Is that the only way you know? A. Yes.

Q. Did you ever see it after you signed it? A. I never did.

Q. You don't know now whether it was Ryon or Collins who took it? A. I don't know. 20

Q. How did you come to be at Ryon & Collins' office? A. I went there with Collins in his car.

Q. And yet you don't know whether it was Ryon or Collins who was present? A. I don't remember whether it was Collins or Ryon who took it.

Q. Well, were they both present when you signed it? A. I wouldn't say they were.

Q. And Reichner afterwards told you that it had been lodged with Mr. Bourgeois? A. Yes. 30

Q. Did he tell you why? A. Because they had employed Bourgeois.

Q. To do what? A. Why, this same suit, I suppose.

Q. Suit for what? A. To try to claim this riparian grant.

Q. Did Reichner tell you that? A. No, he didn't tell me that.

## Ansley B. Bowen—Cross

Q. Who told you that? A. I didn't say any one told me that.

Q. Well, what do you know about this claim,—the object of getting this affidavit? A. I don't know anything about it.

10 Q. Didn't you just say the object of getting the affidavit was to get ready for this claim? A. Oh, some sort of claim to riparian grant, I said.

Q. Who told you that? A. No one told me that.

Q. It is only your guess? A. Sure.

Q. In other words, it is your guess now that the object of getting the affidavit was in order that he, Reichner, could get the riparian grant,—isn't that right? A. Sure.

20 Q. Reichner didn't tell you that? A. Well, I wouldn't say he did.

Q. Don't you think he did tell you that? A. I wouldn't say it.

Q. Isn't it a fact that Mr. Reichner told you that the object of having this affidavit as to where high water line was, was in order that he could make an application for high water rights, riparian rights? A. He told me he had applied for a grant.

Q. Who did? A. Mr. Reichner.

30 Q. Before you made the affidavit? A. No, I think it was afterwards.

Q. Then wasn't this affidavit you signed to be used for the purpose of getting the riparian grant? A. I didn't know that it was.

Q. You thought that, though, didn't you, from what Reichner told you? A. Not until after he told me he had applied for a grant.

40 Q. When he told you he had applied for a grant—was that before or after you had made your affidavit? A. Afterward.

## Ansley B. Bowen—Cross

Q. Did anybody undertake to assist your recollection at that time as to where high water line was? A. They did not.

Q. Did Mr. Collins? A. He did not.

Q. Did Mr. Reichner? A. No, sir, he did not.

Q. So that Reichner asked you and you told him and then you made the affidavit? A. Told him what? 10

Q. Where high water line was in 1901. A. I don't think Reichner said a thing to me until after I had made this affidavit, I don't think he did.

Q. Well, no matter when it was, he asked you, didn't he? A. Yes.

Q. And the affidavit you made was made by you without anybody's solicitation or without any intimation or suggestion as to where high water line was? A. That is right. 20

Q. You did it on your own volition without any help? A. He just asked me if I remembered where the high water line was, that is all.

By Mr. Starr: Q. Who asked you? A. Why, Collins first and then Reichner asked me afterwards.

By Mr. Cole: Q. You worked for Vare, of course,—built this house, didn't you? A. No, sir. 30

Q. Who did? A. I built the house for Aiken, not Vare.

Q. Well, Aiken is Vare, isn't he, in this matter? You knew that was being built for Vare? A. I never knew Mr. Vare until after the house was completed.

Q. Didn't you know at the time you were building this house in Aiken's name you were building it for Vare? A. No, sir. 40

Wilbert S. Higbee—Direct

Q. When did you first find it out? A. Not until the following summer, after the house was completed.

10

WILBERT S. HIGBEE, re-called:

By Mr. Starr: Q. Mr. Higbee, did Mr. Collins ever come to you with relation to making an affidavit as to the location of high water line in 1901? A. Now, I don't know whether he came in person or whether it came through his office, but I was asked if I could make a statement as to where the high water came, where the high water mark was when I built the bulkhead or the Hilton house, and I made an affidavit to the effect, if I remember correctly, that—

20

Q. Well, we don't care anything about that. Did you see Mr. Collins in connection with it? A. I don't know that I did in person.

Q. Who sent you the affidavit,—do you remember? A. I couldn't say positively.

Q. And you don't know where it was sworn to? A. No, I can't say that.

30

Q. Did you talk with Mr. Collins about it at all? A. I don't think I did. Now, I don't know,—I would like to explain myself,—I don't know just how it came about, but at the same time I turned over my bill, the expense in building the cottage and bulkhead, which was shown me here the other day, and who received it I can't say.

Q. Did you give it to Mr. Collins or to Mr. Reichner? A. Well, I can't say positively. It

40

appears to me at this time that Mr. Reichner came

Wilbert S. Higbee—Direct

to the house where I was living in the summer-time.

Q. Was Collins with him? A. I am not sure.

No cross-examination.

Mr. Starr: Now, if your Honor please, 10  
reserving the right to examine Mr. Bourgeois, who is engaged in another court to-day and cannot be present, we rest.

The Vice Chancellor: (After discussion)  
Judge Cole, will you let Mr. Bourgeois dictate to the stenographer a statement of what he would testify to, if present, and file it?

Mr. Cole: Yes, I will consent to that.

20

Both rest.

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The following is the letter of Mr. Burgeois above referred to:

**Letter of George A. Bourgeois**

May 14, 1917.

Charles C. Babcock, Esq.,  
Guarantee Trust Building,  
Atlantic City, N. J.

10

Dear Sir:—

In response to your inquiry about some affidavits touching the Reichner property, I would state that several years ago, probably eight, I represented Mr. Reichner in a proceeding concerning lands of Mr. Reichner lying on the Easterly side of Kingston Avenue in Atlantic City, and there was delivered to me, as nearly as I can recall, six affidavits severally made by persons whose names I do not at all recall. These affidavits contained statements with reference to the high water mark, but I do not at all remember the contents of them further than the subject-matter to which they related.

20

They were never used by me and so far as I remember were never read by me. My recollection is that they were handed to me and the proceeding was terminated without requiring the use of them, and that when they were handed to me they were filed among the papers and later when the necessity for use of them had passed, Mr. Daniel L. Collins called at the office and they were delivered to him.

30

I have made careful search through the files of our office, and have also caused careful search to be made through them on two different occasions by a clerk thoroughly familiar with all the files in the office, and they cannot be located.

40



## Conclusions

ed this court then proceeded to final hearing on the issue of title.

10 A or nearly all of the *locus in quo* appears to have been below or oceanward of the line of ordinary high tide of the ocean at some time prior to this date. Both complainant and defendant have acquired from the state riparian leases covering the disputed territory; but both riparian leases contain the usual provision that the lease shall be void and of no effect if the person to whom the lease is made is not the owner in fee of the fast land adjoining the land in which the right of the state is conveyed. The riparian lease to defendant contains a further clause that it is made subject to any rights which were acquired by Jesse R. Turner under a former riparian lease made to Turner by the state covering the same territory. Complainant now enjoys any rights acquired by Turner under that riparian lease.

20 Part of the controverted territory, though covered by the descriptions contained in these two riparian leases, has now become "fast land" by reason of accretions from the ocean; the title to that part of the *locus in quo* accordingly requires no riparian grant for its support, unless such accretions are to be deemed artificial; the outer or oceanward part of the *locus in quo* is still probably below the line of ordinary high water mark, and title to that portion apparently can only be claimed under the state.

30 It is conceded that August 3d, 1901, Hannah E. Kelley was the owner of a large tract of land extending from Atlantic Avenue to the Ocean, and as such owner was then owner of the

40

## Conclusions

*riparia*. No title or rights had at that time ever existed in any of the territory oceanward of the Kelley tract except the rights of the state therein. Atlantic Avenue runs parallel to the Ocean and the Kelley tract embraced the territory lying between the Ocean and Atlantic Avenue from Columbia Avenue on the east to Tallahassee Avenue on the west. 10

The primary dispute at the foundation of the present controversy arises from a deed of conveyance made by Mrs. Kelley to John M. Hilton for a large portion of the Kelley tract. That deed described the land conveyed as commencing at Atlantic Avenue and extending toward the Ocean to a line parallel to Atlantic Avenue and 275 feet distant therefrom. As will hereinafter be more fully pointed out, that deed was obviously made upon the assumption on the part of the parties thereto that the tract conveyed did not extend to the Ocean, but left land owned by Mrs. Kelley between the Ocean and the extreme southerly boundary of the tract thus conveyed. Upon that assumption Mrs. Kelley subsequently (in 1903) conveyed to Jesse R. Turner and Harry R. Young the land lying between the southerly boundary line described in the Hilton deed and the Ocean, that deed calling for the Ocean as the southerly boundary of the tract conveyed. It is under the rights conferred by that deed that complainant now holds. 20 30

Defendant claims that although the deed from Mrs. Kelley to Hilton did not purport to extend to the Ocean, it in fact did so extend, because, as it is now alleged by defendant, the ordinary high water mark of the Ocean was at 40

## Conclusions

that time within 275 feet of Atlantic Avenue, and Hilton accordingly became riparian owner by operation of that grant. Under that assumption defendant has acquired the benefits of a quit claim deed from Hilton extending from a  
10 point 236 feet south from Atlantic Avenue to the Ocean.

It will thus be observed that complainant claims the ownership of the *ripa* under the deed from Mrs. Kelley to Young and Turner which claim assumes that her earlier deed to Hilton did not constitute Hilton riparian owner, and defendant claims the *ripa* under a deed from Hilton, which claim assumes that the deed from Mrs. Kelley to Hilton did convey the *ripa*.

20 Accordingly the major portion of the testimony has been directed to the ascertainment of the line of ordinary high tide of the Ocean at the date of the deed from Mrs. Kelley to Hilton with a view of ascertaining whether that deed constituted Hilton the riparian owner. If it did the subsequent deed from Mrs. Kelley to Turner and Young for the territory extending from the southerly boundary named in the Hilton deed to the Ocean, under which deed complainant claims to have acquired the *ripa*, would  
30 obviously convey nothing.

A proper examination of this issue necessitates a more detailed statement of the Kelley-Hilton conveyance, its terms, and the map with reference to which it was made.

As already stated it is conceded that Hannah E. Kelley prior to August 3d, 1901, owned the tract of land extending northerly and southerly  
40 from Atlantic Avenue to the Ocean and extend-

## Conclusions

ing easterly and westerly from Columbia Avenue to Tallahassee Avenue. The legal title to a portion of the tract was in one Henderson Synnamon, but that circumstance is conceded to be immaterial.

Prior to August 3d, 1901, Mrs. Kelley had caused the tract to be laid out in streets, blocks and lots, and had filed in Atlantic County Clerk's Office a map of the tract which delineated those physical features. That map discloses streets extending north and south from Atlantic Avenue to the Ocean and numbered lots between the streets. These several streets, in order, beginning with the most easterly street, are Columbia Avenue, Bartram Place, Millidgeville Avenue (now called Kingston Avenue), Berkley Square, and Tallahassee Avenue. As the land now in controversy lies oceanward of the tier of lots easterly of and adjacent to Berkeley Square, only that portion of the map between Millidgeville Avenue and Berkley Square need be specifically shown. The following is a copy of that portion of the map.

Conclusions

ELECTRIC RAIL ROAD

ATLANTIC AVE.

|               |                |      |      |                   |               |
|---------------|----------------|------|------|-------------------|---------------|
| 85            | 50             | 82-6 | 82-6 | 50                | 82-6          |
| 15            | BERKLEY SQUARE | 8    | 1    | MILLIDGEVILLE AVE | 15            |
| 16            |                | 9    | 2    |                   | 16            |
| 17            |                | 10   | 3    |                   | 17            |
| 18            |                | 11   | 4    |                   | 18            |
| <del>26</del> |                | 26   |      |                   | <del>24</del> |
| 19            |                | 12   | 5    |                   | 19            |
| 20            |                | 13   | 6    |                   | 20            |
| 21            |                | 14   | 7    |                   | 21            |
| 85            |                | 82-6 | 82-6 |                   | 82-6          |

ATLANTIC OCEAN

## Conclusions

August 3d, 1901, an agreement was executed by Mrs. Kelley and John M. Hilton by the terms of which Mrs. Kelley agreed to sell to Hilton on terms specifically named certain specified portions of her tract. That part of the tract lying between Millidgeville Avenue and Berkley Square is described in that agreement as follows: "Also beginning at the southwest corner of Atlantic and Millidgeville Avenues and runs thence (1) southwardly in the west line of Millidgeville Avenue two hundred and seventy-five feet, thence (2) eastwardly parallel with Atlantic Avenue, one hundred and sixty-five feet to the east line of a fifty feet wide street called Berkley Square, thence (3) northwardly in the east line of said Berkley Square, parallel with Millidgeville Avenue two hundred and seventy-five feet to the southerly line of Atlantic Avenue, thence (4) eastwardly in the Southerly line of Atlantic Avenue one hundred and sixty-five feet to the place of beginning. Being lots numbered 1 to 14 inclusive, in Block 26 of lands belonging to Hannah E. Kelley situate between Atlantic Avenue and the Atlantic Ocean from Columbia Avenue to Tallahassee Avenue, in Atlantic City aforesaid, and duly laid out in Blocks and lots by the said Hannah E. Kelley, a map or plan of which is filed in the Clerk's Office of the County of Atlantic at May's Landing, New Jersey, and a copy of which is attached hereto, and made a part hereof."

It will be observed that this description of the land between Millidgeville Avenue and Berkley Square embraces fourteen specific lots, and is a rectangular tract the southerly boundary of

## Conclusions

which is described as parallel to Atlantic Avenue and 275 feet distant therefrom; and further that the map a copy of which is attached to the agreement, discloses fractional lots not numbered, lying between the 275 feet boundary line and the Ocean as delineated on the map. It should also be here added that the agreement of sale embraced all the lots lying between Bartram Place and Millidgeville Avenue, and also those lying between Columbia Avenue and Bartram Place, designated as lots 1 to 21 inclusive in Block 24, and that the description of these lots was in like manner to a line 275 feet south of and parallel with Atlantic Avenue; and also that the map discloses fractional lots between the Ocean and the said lots numbered from 1 to 21.

From the manner in which the land to be conveyed is described in this agreement by reference to the map attached to it, it is entirely obvious that the parties to the agreement did not undertake to extend the land on which the agreement operated to the Ocean, but, on the contrary, attempted to stipulate for the sale of a tract of land to a definite straight line distant 275 feet southerly from and parallel with Atlantic Avenue without including land which the map disclosed as lying between the Ocean and the 275 feet line. It is this boundary line 275 feet southerly from Atlantic Avenue which defendant now claims was, at the date of this agreement, in fact in the Ocean and hence, it is claimed, the conveyance made pursuant to the agreement in fact included the *ripa* even though the parties to the agreement may have intended and believed to the contrary.

## Conclusions

The conclusion that the parties to this agreement, and the conveyance which followed it, did not intend to convey to the Ocean is not only apparent from the manner in which the land is described and the delineations of the map annexed to the agreement, but is also reasonably apparent from certain covenants contained in the agreement, and in the conveyance subsequently made pursuant to the agreement, which covenants related to the unsold portion of the Kelley tract. The agreement contains a series of restrictive building covenants subject to the operation of which the contemplated conveyance was made, and also provides that the same restrictive covenants should be inserted in all deeds of land thereafter made by Mrs. Kelley of the remaining portion of her tract, and then provides as follows: "that all lands which shall hereafter be made by accretions from the Atlantic Ocean, or which shall accrue to her to the northward of the present board walk by reason of the same being moved oceanward or by reason of the lines of the present Ocean Front Park being moved oceanward, shall be subdivided into lots of the same size as those shown on the map aforesaid; that the streets shown on the map aforesaid shall be continued to the high water line of the Atlantic Ocean; and that all of the following covenants and restrictions shall be binding and enforceable upon such additional lots which shall accrue to her by reason thereof."

It is claimed by defendant that this covenant has reference only to accretions to that part of the Kelley tract which is not southerly of the

## Conclusions

land described in the agreement; but it seems impossible to attribute to it that restricted application. When it is considered that the description of the land to be sold does not purport to extend to the Ocean and that the general description of her entire tract refers to the Ocean as its southerly boundary, and that the description is made with reference to a map which shows land between the land to be sold and the Ocean and that the primary interest of the purchaser would necessarily be in the preservation of the restrictive covenants in land to be sold in front or Oceanward of the tract purchased, it seems impossible to conclude that the stipulation above quoted was not intended to bind Mrs. Kelley to observe those restrictive covenants as to land thereafter acquired by her through accretions in front of the tract to be conveyed pursuant to the agreement.

The deed from Mrs. Kelley to Hilton, pursuant to the agreement already considered, was made December 31, 1901. That deed contains a description of the land in the same language as the agreement and contains the same covenants as the agreement. Whether that part of the covenants contained in the agreement and deed of conveyance which confirmed all subsequent accretions to Mrs. Kelley was operative to vest in her equitable title to the accretions thereafter forming, as against a person claiming the accretions under Hilton, if the 275 feet boundary line should now be found to have then been in fact oceanward of high water mark, I think it unnecessary here to consider.

## Conclusions

In suits to quiet title the complainant, who must be adjudged to be in peaceable possession before jurisdiction over the issue of title can be assumed, is given the benefit of his peaceable possession and defendant then assumes the burden of the affirmative of the issue of title and carries the burden of establishing a title in conformity with the specification of title which the statute requires such defendant to set forth in his answer. Accordingly at the hearing defendant assumed the burden of establishing that the line or ordinary high tide of the Atlantic Ocean was shoreward of 275 feet from Atlantic Avenue at the point shown as lot 14 on the Kelley map when the title passed from Mrs. Kelley to Hilton.

The difficulty in establishing a fact of that nature more than sixteen years after the date under investigation is apparent from the nature of the testimony adduced at the hearing. Conflicting testimony, due to the frailty of memory of witnesses after so long an interval of time, is inevitable in almost any case; but the ascertainment of the location of the line of ordinary high tide of the Atlantic Ocean on a nearly level sand beach upon which the uninterrupted waves of the ocean wash, introduces many elements of uncertainty not incident to ordinary issues. When a deed calls for the ocean as a boundary the boundary is certain for all time, for it extends to the ocean whether high water mark of the ocean recedes or encroaches by natural accretions or erosions. But the accurate ascertainment of the location of the line of ordinary high tide on our South Jersey ocean

## Conclusions

front at a given date sixteen or seventeen years prior to the period of investigation approaches the impossible. An inch of elevation may represent many feet of distance in the shoreward point to which the waves of the ocean extend, and each successive wave varies in force and height; and to this must be added the circumstance that the influence of the moon and sun causes every tide—even the two tides of each day—to vary in height, and there must also be recognized the additional circumstance that winds and storms, whether present or recent and whether near or far removed, also render the tides abnormal, and even barometric pressure materially affects their height. These and divers other circumstances disclose the imperative necessity for accurate data, if certainty is to be attained, where the issue involved is whether ordinary high tide of the ocean was a few feet shoreward or oceanward of a given point at a given time. On a fresh water river the line of vegetation may form a reasonably accurate guide, and on inland salt waters, especially where steep banks exist, the water stains on the coarse salt grasses afford an aid; but on an almost level ocean washed sand beach, where no vegetation exists either below or above the line of high tide, the difficulties presented in the absence of scientific data are almost unsurmountable. The mark impressed upon the sands by the preceding high tide signifies little unless the conditions surrounding that high water mark are taken into account, and the debris deposited on the beach, if any, by preceding high waters signifies little unless it is known whether such deposit has been the result of a storm tide.

## Conclusions

In my judgment the evidence in this suit does not justify a finding that the line of ordinary high tide of the ocean was shoreward of the line 275 feet southerly of Atlantic Avenue or even reached that line at the time title passed from Mrs. Kelley to Hilton.

10

A detailed review of the testimony seems unnecessary. Some witnesses have testified that at what they called ordinary high tide the water did extend shoreward of at least some parts of the line in question; others have testified to the reverse. The witness for defendant whose testimony most impressed me was John Leeds. His work on the premises was of a nature to appropriately impress upon his memory the tidal conditions there existing at the time his work was performed, and his statement is that the line of ordinary high tide was fifteen or twenty feet inside the 275 feet boundary line. Others in like position to observe have testified to substantially the same. On the contrary witnesses for complainant whose testimony seems entitled to equal weight have testified that the line of ordinary high tide was outside or oceanward of the 275 feet line. These witnesses include members of the life guard who patrolled the beach daily or twice daily for a period of time from long before to after the time of inquiry.

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30

Most of the testimony has been directed to conditions existing in March, 1902, and subsequent thereto. This arises from the fact that in March, 1902, the erection of a bulk-head was begun on the 275 feet boundary line. This was some two or three months after the deed from

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## Conclusions

Mrs. Kelley to Hilton was made and over six months after the agreement of sale which conferred the equitable title on Hilton. That bulk-head was begun at a point easterly of the locality now in question and was being constructed in a westerly direction on the line here in controversy. The testimony of several of the witnesses of defendant who worked on that structure is to the effect that when that bulk-head had been built about one-half of its proposed length—probably to about Millidgeville Avenue—a severe storm occurred which washed away the engine which was used in connection with the work and thus interrupted the work for a time. Mr. Bowen, who was inspector on that work, testified that that storm washed away the beach about two feet in depth at the vicinity of Berkley Square, and that prior to that storm the tides had not interfered with their work, but that after the storm the tide came fifteen or twenty feet inside the line of their proposed work at Berkley Square. The testimony of other witnesses of defendant who were employed on that work is consistent with the view that prior to that storm the tides did not reach the line of their work, but after the storm it did extend beyond that line in the vicinity of Berkley Square owing to the washout caused by that storm. The single fact that the stationary engine which supplied power for the work on the bulk-head was located fifteen or twenty feet outside or oceanward of the line of the bulk-head up to the time of the storm strongly indicates that ordinary tides did not reach the line in question. The circumstance that in March or April, 1902, a storm washed

## Conclusions

away that part of the beach in such manner as to cause ordinary tides to extend landward of the 275 feet line in question is obviously immaterial if, in the year 1901, when the Hilton title was acquired by him, the exterior line of his grant extended only to a point shoreward of high water mark. Ocean City Ass'n vs. Shrever, 64 N. J. Law, 550. 10

I am convinced that the deed from Mrs. Kelley to Hilton was not only designed to extend to a line above the line of ordinary high tide and to leave in Mrs. Kelley the title to the land lying between that line and the ocean, but also that the line thus established was in fact above the line of ordinary high water.

Another claim of defendant yet remains to be examined. 20

March 30, 1903, Mrs. Kelley conveyed to Turner and Young the land lying between the 275 feet boundary line and the Ocean, and by mesne conveyances Turner became the sole owner under that conveyance. The final deed to Turner in severalty was dated April 10, 1908. In the meantime (January 20, 1908) Hilton conveyed to Yocum lot 14 on the Kelley map. This conveyance was made by describing that lot by metes and bounds and did not call for the Ocean as a boundary. By mesne conveyances one Aiken became owner of lot 14 on the Kelley map September 1, 1908. All these deeds in the Aiken title contain the same description as that in the deed from Hilton to Yocum. Defendant Mrs. Vare now owns lot 14 under the Aiken title, but the deed from Aiken to defendant Mrs. Vare contains a description calling for the ocean 30 40

## Conclusions

as a boundary. November 19, 1908, Turner, as grantee of Mrs. Kelley of the land outside of lot 14 extending to the Ocean, executed a deed to one Reichner for a lot adjacent to and oceanward of lot 14 and of the same size as lot 14.

10 That deed describes the lot by metes and bounds and does not call for the Ocean as a boundary, and contains the following covenant: "Provided however and it is hereby expressly agreed and understood that this conveyance is for a definite tract of land and that the said party of the second part, his heirs or assigns, derive no title to lands oceanward of the tract hereby conveyed by reason of the said Atlantic Ocean

20 at any time in the future encroaching upon said land hereby conveyed, and upon said ocean receding from lands hereby conveyed the title to said lands oceanward of said lands hereby conveyed remains in said Jesse R. Turner his heirs and assigns, it is also understood and agreed that in no case shall the said party of the second part, his heirs or assigns, have right to apply for a Riparian Grant in front of the lands hereby conveyed, such a right being expressly reserved to the said Jesse R. Turner his heirs

30 and assigns, it is hereby agreed that the present high water line is oceanward of the lands hereby conveyed, which lands do not border on the Atlantic Ocean, but that land now owned by Jesse R. Turner in front of lands hereby conveyed, do border on Atlantic Ocean and that he, the said Jesse R. Turner, his heirs and assigns, have the exclusive right of applying for said

40 Riparian Grant under all circumstances."

## Conclusions

Notwithstanding the above covenant, Reichner, by quit claim deed dated August 31st, 1909, conveyed to Aiken territory embracing lot 14 on the Kelley map and all land outside thereof extending to the Ocean. The deed from Aiken to defendant Mrs. Vare accordingly includes whatever rights Aiken may have acquired by the quit claim deed which he received from Reichner. 10

Defendant has accordingly made claim that the deed from Turner to Reichner of November 19, 1908, although purporting to extend only thirty-nine feet south from lot 14 of the Kelley map, *i. e.* from the 275 feet boundary line heretofore described, and although containing the covenant above quoted, in fact extended to the Ocean because the Ocean was at that time less than thirty-nine feet southerly of the southerly line of lot 14. In consequence of that claim testimony of witnesses has been heard touching the location of ordinary high tide November 19, 1908. It should also be noted that Aiken, prior to his conveyance to defendant, also procured quit claim deeds from both Hilton and Yocum covering the territory between the northerly line of lot 14 and the Ocean. 20 30

The same or even greater difficulties have been encountered in defendant's effort to establish that in the fall of 1908 the line of ordinary high tide was landward of twenty-nine feet south of the southerly boundary of lot 14 as shown on the Kelley map. All witnesses appear to agree that the beach front has gradually made out or oceanward from 1901 or prior thereto to the present time, but do not agree 40

## Conclusions

as to the line of high tide in 1908, and I am convinced that upon the whole evidence no finding can be adequately supported to the effect that in 1908 the line of ordinary high water was not oceanward of the exterior boundary described in the deed from Turner to Reichner, that is, a line distant 314 feet southerly from and parallel to Atlantic Avenue. But, should it be adequately established that at the date of the Turner-Reichner deed ordinary high tides extended shoreward of that line it is difficult to see how Reichner, or defendant claiming under him, could acquire title to the accretions as against Turner contrary to the covenants of Reichner's deed above quoted.

20 My conclusions are that the deed of December 30, 1901, from Mrs. Kelley to Hilton, which deed embraced lot 14 on the Kelley map, did not constitute Hilton a riparian owner, but that, on the contrary, Mrs. Kelley at that time remained the owner of "fast land" outside or oceanward of lot 14 which land so owned by her extended from lot 14 to the Ocean; that Turner, as grantee of Mrs. Kelley by mesne conveyances became the riparian owner and that  
30 his riparian ownership was not divested by the deed of November 19th, 1908; and that on May 11th, 1914, as such riparian owner, Turner was entitled to receive from the state the riparian lease of that date. It follows that complainant, as grantee of Turner, became the owner of so much of the *locus in quo* as may now be above the ordinary line of high tide, and lessee, under the Turner riparian lease, of so  
40 much of the *locus in quo* as may at this time

## Final Decree

be outside or oceanward of the ordinary line of high tide.

I will advise a decree pursuant to the prayer of the bill.

Submitted: July 7, 1917.

10

Determined: July 18, 1917.

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**Final Decree**

*(Filed Sept. 7, 1917.)*

IN CHANCERY OF NEW JERSEY

20

Between

ARCHIBALD S. LAMBERT,

Complainant,

and

IDA M. VARE,

Defendant.

On Bill to  
Quiet Title.

This cause coming on to be heard in the presence of C. L. Cole, solicitor for and of counsel with the complainant, and Charles C. Babcock and Lewis Starr, solicitors for and of counsel with the defendant, and the bill, answer, replication, proofs and exhibits in the cause having been read and considered and the arguments of respective counsel having been heard and the Chancellor having considered the same and it appearing to his satisfaction that the defendant's claim in the

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## Final Decree

answer as amended to the lands and premises described in the bill as ALL that a certain lot or piece of land and premises situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey, described as follows:

- 10 "BEGINNING in the Easterly line of Berkley Square, at the distance of three hundred and fourteen feet Southwardly from the Southeasterly corner of Atlantic Avenue and Berkley Square, and extending thence Southwardly, along the Easterly line of Berkley Square and the extended line thereof to the Riparian Commissioners exterior line in the Atlantic Ocean; thence Eastwardly, along the same, one hundred and sixty-five feet, more or less, to a point where the same would be
- 20 intersected by the projection of the Westerly line of Kingston (formerly Millidgeville) Avenue, extended; thence Northwardly, by said extended line and the Westerly line of Kingston Avenue, to a point therein three hundred and fourteen feet Southwardly from the South-westerly corner of said Kingston and Atlantic Avenues; thence Westwardly, parallel with said Atlantic Avenue, one hundred and sixty-five feet to the place of beginning, which deed is recorded in the Clerk's Office of Atlantic County at Mays Landing, New
- 30 Jersey, in Book 550 of Deeds page 465, &c."
- is not valid and that she has no such estate or interest in as was claimed by her and set up in the answer as amended in this cause, and the complainant appearing to be entitled to the relief prayed in his bill.

40 It is on this 5th day of September 1917, by Edwin Robert Walker, Chancellor of the State of

## Final Decree

New Jersey, ordered, adjudged and decreed and the said Chancellor by virtue of the power and authority of this court does hereby order, adjudge and decree that the lands and premises aforesaid to which said defendant made claim in the answer as amended as aforesaid, said defendant has no estate, interest in or encumbrance upon the same or any part thereof. 10

And that in respect to all said lands and premises so far as relates to any claim thereon by or on behalf of said defendant, in the answer as amended the title of the complainant in and to the same for every part thereof is hereby determined, fixed and settled and declared to be good; and that the defendant do pay to the complainant his costs of suit to be taxed which taxation shall include the sum of 20  
 expended for certified copies of papers offered in evidence, and a counsel fee of \$150. dollars, and that he have execution therefor according to the rules and practice of this court.

Respectfully advised

E. B. LEAMING, V. C.

E. R. Walker, C.

A true copy,  
 Robert H. McAdams. 30  
 Clerk.

**Exhibit C-1**

Deed Jesse R. Turner, *et ux*, to Archibald S. Lambert, dated March 10, 1916, recorded March 11, 1916 in the office of the Clerk of Atlantic County at May's Landing, New Jersey, in Book No. 550 of Deeds, page 465 &c., consideration \$4600  
 10 conveys lands and premises in Atlantic City, BEGINNING in the Easterly line of Berkeley Square, 314 feet Southwardly from the Southeasterly corner of Atlantic Avenue and Berkeley Square; thence Southwardly along the Easterly line to Berkeley Square and the extended line thereof to the Riparian Commissioners exterior line in the Atlantic Ocean; thence Eastwardly along the same 165 feet more or less to a point where the  
 20 same would be intersected by the projection of the Westerly line of Kingston, (formerly Milledgeville) Avenue, extended, thence Northwardly by same to a point therein 314 feet Southwardly from the Southwesterly corner of Kingston and Atlantic Avenues; thence Westwardly parallel with said Atlantic Avenue 165 feet to beginning.

**Exhibit C-2**

30 Lease, State of New Jersey to Jesse R. Turner, dated May 11, 1914, recorded in office of Riparian Commissioner in Book U. Folio 134 &c., leases all the right, title and interest which the State of New Jersey may now have, or may hereafter have in and to any lands now or formerly flowed by tide-water, or that may be at any time hereafter  
 40 flowed by tide-water, lying at Atlantic City, in

## Exhibit C-2

the County of Atlantic and State of New Jersey, within the following described bounds:

BEGINNING at a point in the Westerly line of Millegeville Avenue, distant 314 feet South from the Southwest corner of Millegeville and Atlantic Avenues, thence South, along the West line of Millegeville Avenue, extended 113  $\frac{3}{10}$  feet more or less to the interior or inland line of the Atlantic City Public Park being the North line of the EIGHTEENTH TRACT in the grant by the State of New Jersey to the City of Atlantic City, dated December 27, 1906; thence West along said interior or inland line of said Public Park as granted, 165 feet to the East line of Berkeley Square, extended thence North along the East line of Berkeley Square extended 113  $\frac{3}{10}$  feet to a point; thence East 165 feet to beginning.

With the right and privilege under covenants and conditions of this lease to appropriate lands under water above described to his or their exclusive private uses.

Said lease contains the following provision:

PROVIDED, that if the said JESSE R. TURNER is not the owner in fee of the fast land adjoining the land in which the right, title and interest of the State of New Jersey are conveyed by this instrument, then this conveyance shall be void and of no effect, in so far as it purports to convey the right, title and interest of the State of New Jersey in any land in which the State of New Jersey has any right, title and interest, lying directly in front of any land of which the said JESSE R. TURNER is not at the time of the making of this lease the owner in fee.

**Exhibit C-3**

Certified copy of deed, Jesse R. Turner, *et ux*, to L. Irving Reichner, dated November 19, 1908, recorded November 21, 1908, in the office of the Clerk of Atlantic County in Book No. 392 of Deeds, page 371, &c. conveys lands in Atlantic City BEGINNING at a point in the West line of Milledgeville Avenue, 275 feet South from the South line of Atlantic Avenue; thence (1) South along said West line of Milledgeville Avenue, 39 feet; thence (2) West and parallel with Atlantic Avenue, 165 feet to the East line of Berkeley Square, thence (3) along said East line of Berkeley Square 39 feet; thence (4) East and parallel with Atlantic Avenue, 165 feet to beginning.

20

**Exhibit C-3**

(This is marked by the stenographer C 3 and which should be C 4) is a photograph of the *locus in quo*.

30

**Exhibit C-4**

(This is marked by the stenographer C 4 and which should be C 5), is a photograph of the timber approach to Berkeley Square.

**Exhibit C-6**

Photograph of the piling running to Berkeley Square.

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**Exhibit C-7**

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Photograph marked December 11, 1914, 3:30 p. m. H. B. Smith, Photo.

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**Exhibit C-8**

Photograph marked December 11, 1914, 3:30 p. m., H. B. Smith, Photo, and shows the washing away of piling. 20

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**Exhibit C-9**

Marked December 11, 1914, 3:30 p. m. H. B. Smith, is a photograph of *locus in quo*.

**Exhibit C-10**

10 Certified copy of articles of agreement between Hannah E. Kelley, *et al* and John M. Hilton, with map attached, dated August 3, 1901, recorded December 5, 1901, in the office of the Clerk of Atlantic County, in Book #266 of Deeds, page 230 &c., by which the parties of the first part agreed to sell the party of the second part lands in Atlantic City.

20 BEGINNING at a point 135 feet West of Columbia Avenue in the West line of a 50 feet wide street known as Bartram Place, at its intersection with Atlantic Avenue and runs; thence (1), South in the West line of Bartram Place, parallel with Columbia Avenue 275 feet; thence (2) West parallel with Atlantic Avenue 165 feet to the East line of Milledgeville Avenue, a 50 feet wide street; thence (3) North in the East line of Milligeville Avenue parallel with Columbia Avenue 275 feet to the South line of Atlantic Avenue, thence (4) East in the South line of Atlantic Avenue 165 feet to the place of beginning.

30 ALSO BEGINNING at the Southwest corner of Atlantic and Milledgeville Avenue and runs thence (1) South in the West line of Milledgeville Avenue 275 feet; thence (2) East parallel with Atlantic Avenue 165 feet to the East line of a 50 feet wide street called Berkeley Square; thence (3) North in the East line of Berkeley Square parallel with Milledgeville Avenue 275 feet to the South line of Atlantic Avenue; thence (4) East in the Southerly line of Atlantic Avenue 165 feet to beginning.

40 BEING Lots Nos. 8 to 21 inclusive in Block 24; and Lots Nos. 1 to 14 inclusive in Block 26 of lands

## Exhibit C-10

belonging to Hannah E. Kelley, situate between Atlantic Ave and agreement granted the following clause:

"And as and for a further consideration  
 "for the purchase and sale of the above  
 "described premises the parties of the first 10  
 "part do stipulate and agree that they will  
 "insert all of the foregoing covenants,  
 "conditions and restrictions in any or all  
 "deeds, which they shall make conveying  
 "any of the land which they or either one  
 "of them now own, bounded by Columbia  
 "Avenue, Atlantic Avenue, Tallahassee  
 "Avenue and the Atlantic Ocean, and  
 "shown on the map attached to and form-  
 "ing part of the agreement between the 20  
 "said Henderson Synnamon, Hannah E.  
 "Kelley and John M. Hilton of record at  
 "Mays Landing, N. J., in deed book 263  
 "folio 80 &c. and also in deed book 266  
 "folio 262 &c. That they accept and im-  
 "press upon all of the land shown on the  
 "map aforesaid the conditions, covenants  
 "and restrictions aforesaid. That all lands  
 "which shall hereafter be made by accre-  
 "tion from the Atlantic Ocean or which 30  
 "shall accrue to them to the Northward of  
 "the present boardwalk by reason of the  
 "same being moved oceanward or by reas-  
 "on of the lines of the present Ocean front  
 "park being moved Oceanward shall be  
 "subdivided into lots of the same size as  
 "shown on the map aforesaid: that the  
 "streets shown upon the map aforesaid  
 "shall be continued to the high water line 40

## Exhibit C-11

10 “of the said Atlantic Ocean and that the  
 “foregoing covenants, conditions and res-  
 “trictions shall be binding and enforceable  
 “upon such remaining and additional lots  
 “which shall accrue to them by reason  
 “thereof, in the same manner and by the  
 “same persons mentioned in the restric-  
 “tions first aforesaid.”

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**Exhibit C-11**

20 Agreement between Jesse R. Turner and Mary  
 Elizabeth, his wife and L. Irving Reichner, dated  
 September 1908, unrecorded. Consideration  
 \$32,000 for the sale of lands in Atlantic City,  
 FIRST, BEGINNING at a point in the West line of  
 Milledgeville Avenue 275 feet South from the  
 South line of Atlantic Avenue, thence (1) South  
 along said West line of Milligeville Avenue 39  
 feet; thence (2) West and parallel with Atlantic  
 Avenue 165 feet to the East line of Berkeley  
 Square; thence (3) North along said East line of  
 Berkeley Square 39 feet; thence (4) East and par-  
 30 allel with Atlantic Avenue 165 feet to beginning.  
 SECOND, BEGINNING at the Southwest corner of  
 Atlantic Avenue and Berkeley Square; thence (1)  
 South along the West line of Berkeley Square,  
 158 feet thence (2) west and parallel with Atlan-  
 tic Avenue 85 feet to the East line of Tallahassee  
 Avenue; thence (3) North along said East line of  
 Tallahassee Avenue 158 feet to the South line of  
 Atlantic Avenue; thence (3) East along said line  
 of Atlantic Avenue 85 feet to beginning. Said  
 40 agreement contains the following provisions.

## Exhibit C-11

Said deed to contain the following covenant and agreement effecting the first above described tract

“Provided however and it is hereby expressly agreed and understood that this conveyance is for a definite tract of land, and that the said party of the second part, his heirs or assigns, derive no title to lands oceanward of the tract hereby conveyed by reason of the said Atlantic Ocean at any time in the future encroaching upon said land hereby conveyed, and upon said ocean receding from lands hereby conveyed the title to said lands oceanward of said lands hereby conveyed remains in said Jesse R. Turner, his heirs and assigns; it is also understood and agreed that in no case shall the said party of the second part, his heirs or assigns, have the right to apply for a riparian grant in front of the lands hereby conveyed, such a right being expressly reserved to the said Jesse R. Turner, his heirs and assigns; it is hereby agreed that the present high water line is oceanward of the lands hereby conveyed, which lands do not border on the Atlantic Ocean, but that land now owned by said Jesse R. Turner in front of lands hereby conveyed, do border on Atlantic Ocean, and that he, the said Jesse R. Turner, his heirs and assigns, have the exclusive right of applying for said riparian grant under all circumstances.”

It is also understood and agreed that both tracts of land above described are under and subject to any restrictions that may now be on same.

**Exhibit C-12**

Deed James H. Aiken, Cephise A. Reichner and L. Irving Reichner, her husband to Ida Vare, dated September 28, 1911, recorded October 10, 1911 in the Office of the Clerk of Atlantic County in Book 471 of Deeds page 32 &c. Consideration \$100

10 conveys lands in Atlantic City, BEGINNING at a point in the East line of Berkeley Square 236 feet South from the South line of Atlantic Avenue; thence (1) East parallel with Atlantic Avenue 82 1/2 feet; thence (2) South parallel with Berkeley Square 78 feet; thence (3) West parallel with Atlantic Avenue 82 1/2 feet to the East line of Berkeley Square; thence (4) North along the same 78 feet to beginning.

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**Exhibit C-13**

Quit-claim deed Nicholas J. Jeffries, *et ux.*, to Jesse R. Turner, dated April 10, 1908, recorded May 26, 1908 in the office of the Clerk of Atlantic County in Book 384 of Deeds, page 192 &c. conveys *inter alia* Lands in Atlantic City.

DESCRIPTION No. 2. BEGINNING at a point in the East line of Berkeley Square 275 feet South from the South line of Atlantic Avenue; thence (1) South along the East line of Berkeley Square to the Atlantic Ocean; thence (2) East along said Atlantic Ocean to West line of Milledgeville Avenue; thence (3) North along the West line of Milledgeville Avenue to a point 275 feet South from the South line of Atlantic Avenue; thence (4) West parallel with Atlantic Avenue 165 feet to

30 beginning.

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**Exhibit C-14**

Agreement for the sale by Hannah E. Kelley to Harry R. Young, dated February 25, 1903, recorded February 26, 1903, in the office of the Clerk of Atlantic County in Book 284 of Deeds, page 199 &c of Lands in Atlantic City, lying and being between Columbia Avenue and Tallahassee Avenue, Atlantic Avenue and the Atlantic Ocean, excepting thereout 28 lots theretofore sold. Endorsed on the back of this agreement is the following. 10

For and in consideration of the sum of Two Hundred and Fifty Dollars I hereby assign, set over and transfer unto Jesse R. Turner, his heirs and assigns, and undivided one-half interest in, to and of the within contract within made by Hannah E. Kelley. 20

In witness whereof I have this 25th day of February, A. D. 1903, hereunto set my hand and seal.

Witness: HARRY R. YOUNG (Seal)

**Exhibit C-15**

Deed Hannah E. Kelley to Jesse R. Turner and Harry R. Young, dated March 30, 1903, recorded April 16, 1903 in the office of the Clerk of Atlantic County in Book 287 of Deeds page 59 &c. conveys LOT NO. 2 BEGINNING in the West line of Milledgeville Avenue 275 feet South from the Southwest corner of Atlantic and Milledgeville Avenues; thence (1) South along the West line of Milledgeville Avenue to the Atlantic Ocean; thence (2) west along the Atlantic Ocean 165 feet to the East line of Berkeley Square; thence (3) North 30 40

## Exhibit C-17

along the East line of Berkeley Square to a point 275 feet from the Southeast corner of Atlantic Avenue and Berkeley Square; thence (4) East parallel with Atlantic Avenue 165 feet to beginning.

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**Exhibit C-16**

Deed Harry R. Young & wife to Nicholas J. Jeffries. Dated, April 9, 1904. Recorded Apl. 11, 1904, in Book 301 of Deeds p. 100 & conveys lands as described in Exhibit C-15.

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**Exhibit C-17**

Mortgage Jesse R. Turner and Mary E., his wife, and Harry R. Young and Hannah E., his wife, to Hannah E. Kelley, dated March 30, 1903, recorded April 16, 1903 in the office of the Clerk of Atlantic County in Book 72 of Mortgages, page 69, in the sum of \$12,500 payable in five years with interest at 6% conveys Lands in Atlantic City, BEGINNING at a point in the West line of Milledgeville Avenue distant 314 feet South of the South line of Atlantic Avenue; thence (1) South along the West line of Milledgeville Avenue to the Atlantic Ocean; thence (2) West along the Atlantic Ocean 165 feet to the East line of Berkeley Square; thence (3) North along the East line of Berkeley Square to a point 314 feet South of the South line of Atlantic Avenue; thence (4) East parallel with Atlantic Avenue 165 feet to beginning.

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**Exhibit C-18**

Map of premises situate in Atlantic City, New Jersey survey made July 28, 1909 by Ashmead and Hackney, C. E.

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**Exhibit C-19**

Map of property situate in Atlantic City, New Jersey, October 21, 1914, additions made December 2, 1914, survey and map by W. I. Risley, C. E. and Surveyor.

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**Exhibit D-1**

Map showing property South of Atlantic Avenue between Berkeley Square and Kingston Avenue, Atlantic City, New Jersey, scale one inch to thirty feet, E. D. Rightmire, C. E. and Surveyor, Atlantic City, N. J.

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**Exhibit D-2**

Deed Henderson Synnamon and Hannah E. Kelley to John M. Hilton, dated December 31, 1901, recorded January 6, 1902, in the office of the Clerk of Atlantic County in Book 268 of Deeds, page 52 &c. Consideration \$44,000 conveys.

Lands in Atlantic City, BEGINNING at the South- 40

## Exhibit D-2

west corner of Atlantic and Milledgeville Avenues; thence (1) South in the West line of Milledgeville Avenue 275 feet; thence (2) West parallel with Atlantic Avenue 165 feet to the East line of a 50 feet wide street called Berkeley Square; thence (3) North in the East line of said Berkeley Square parallel with Milledgeville Avenue; 275 feet to the South line of Atlantic Avenue; thence (4) East in the South line of Atlantic Avenue 165 feet to beginning. Said deed contains the following provision.

And the said party of the first part does hereby stipulate and agree that she will insert all of the following covenants, conditions and restrictions in all deeds, which she shall make, conveying any of the land which she now owns, bounded by Columbia Avenue, Atlantic Avenue, Tallahassee Avenue and the Atlantic Ocean; and shown on the map attached hereto, and filed in the office of the Clerk of Atlantic County at May's Landing, N. J. that she accepts and by virtue of this agreement does impress upon all of the land shown on the map aforesaid, the covenants, conditions and restrictions hereinafter set forth; that all lands which shall hereafter be made by accretions from the Atlantic Ocean, or which shall accrue to her to the northward of the present boardwalk by reason of the same being moved oceanward or by reason of the lines or the present Ocean Front Park being moved oceanward, shall be sub-divided into lots of the same size as those shown on the map aforesaid; that the streets shown upon the map aforesaid shall be continued to the high water line of the Atlantic Ocean; and that all of the following covenants, conditions and restrictions shall be

## Exhibit D-2

binding and enforceable upon such additional lots which shall accrue to her by reason thereof. The covenants, conditions and restrictions above mentioned shall be as follows: 1. That no portion of any building shall at any time be erected within fifteen feet of the front property line of any street or avenue bounding said lot or lots, nor within ten feet of the rear dividing line, nor within three feet of the northerly dividing line, nor within three feet of the southerly dividing line of said lot or lots measuring from the main body of any building, provided, however, that bay windows may be added to sides and fronts of said building but shall not extend more than three feet from the main body thereof; and provided also that the front porch or front veranda of said building may be erected not nearer than five feet from the front property line on any street or avenue bounding said lot or lots. All side yards shall be maintained and kept on the southerly or ocean side of the building erected on any lot or lots. It is expressly agreed, however that the above restrictions shall not be construed so as to prevent the steps or approaches to any porch or house from being built from the front property line of any lot or lots to the porch or main body of any building but said steps or porches shall not be covered but open and free from overhead and lateral obstructions to view, except foundation and rail; and all porches and verandas, except side porches and verandas, shall be constructed without temporary or permanent obstructions to view and air, other than supports roof and rail. Fronts of all buildings shall face the front property line of the lots as laid out on said maps; corner lots considered as having one front to wit, on avenues run-

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## Exhibit D-2

ning southerly from Atlantic Avenue, and all buildings to be erected on lots between Bartram Place and Columbia Avenue, in Block 24 shall face Bartram Place, and not Columbia Avenue;

10 2. That no building of a value less than thirty-five hundred dollars shall be erected on said lot or lots. 3. That the foundation for all dwelling houses shall be erected and set so that the top of the porch floor shall not be higher than eight feet above the grade of the streets or avenues as now established. 4. Private dwellings only shall be erected on said land, and no more than one private dwelling house under the same roof shall be erected upon any one of said lots as marked and laid out on said map, and said lines as laid out

20 on said map shall not be changed except where one person shall own two or more adjoining lots, in which case restrictions as to side lines shall apply only to outside lines of said adjoining lots; this exception is to be exercised only when one owner of adjoining lots desires to erect one private dwelling under one roof, covering more than one lot, and cannot be applied to rear dividing lines. 5. That no building or any part thereof, erected on said lot or lots shall be used as a slaughter

30 house, piggery or any other nuisance tending to destroy the helth and peaceableness or proposed character of the neighborhood. No apartment house, warehouse, store house, coal yard, saloon, boarding house, hotel, gambling house, carpenter or paint shop, store or building for general merchandise business or like building for any business shall be erected upon any portion of said land, nor shall any business of any

40 kind or character be conducted thereon. The

## Exhibit D-2

selling of beer, wine or any intoxicating liquors is prohibited on the said land. 6. All buildings shall be connected with the sewerage system and no drainage of any kind, or filth shall be allowed to drain in the soil. No privy wells, or artifices for holding drainage or deposit of any kind shall be constructed on said lot or lots if connection can be made with sewage system. 10

7. No stable or stables for livery purposes or for private use shall be erected on said lot or lots. The above restrictions and reservations are hereby placed upon said land in pursuance of a general, plan of the owner to enhance the value by beautifying and making more healthful the occupancy of said land and said restrictions and reservations are so created, as a part consideration for the purchase and sale of said lots, and each and every purchaser shall abide by such covenants and be entitled to enforce the rigid observance of the same against any person or persons violating the same, they being made for the mutual benefit of all purchasers, and the said grantor, her heirs and assigns, will insert in and make a part of each and every deed of conveyance by her or them, of her or their remaining restricted property, comprising the tract shown on the map aforesaid, like covenants, conditions and restrictions. And it is also expressly covenanted and agreed between the parties hereto, that the above restrictions shall attach and run with the land, they being assumed by the purchaser and grantor in part consideration of the purchase and sale thereof and shall be binding upon their heirs and assigns, whether included in subsequent conveyance or otherwise; and it shall be lawful for the said Hannah E. Kelley or 20 30 40

## Exhibit D-5

any of her heirs or assigns, if the owner of any lot or lots, to institute and prosecute any proceedings in law or equity, for damages or for injunctions against the person or persons having violated or threatened to violate any of the conditions and restrictions herein set forth.

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**Exhibit D-3**

Photograph marked No. 5.

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**Exhibit D-4**

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Photograph marked No. 4.

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**Exhibit D-5**

Deed John M. Hilton and Hannah, his wife, to Howard H. Yocum, dated January 25, 1908, recorded February 3, 1908 in the office of the Clerk of Atlantic County in Book 373 of Deeds, page 423 &c. Consideration \$4800.00 conveys Lands in Atlantic City, BEGINNING at a point in the East line of Berkeley Square 236 feet South from the South line of Atlantic Avenue; thence (1) East and parallel with Atlantic Avenue 82 1/2 feet; thence (2) South and parallel with Berkeley Square 39 feet; thence (3) West and parallel with Atlantic Avenue 82 1/2 feet to the said East line of Berkeley Square; thence (4) North along the same 39 feet to beginning.

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**Exhibit D-6**

Deed Howard H. Yocum to Cephise A. Reichner, dated February 3, 1908, recorded February 24, 1908 in the office of the Clerk of Atlantic County in Book 377 of Deeds page 293 &c. Consideration \$1.00 &c. conveys Lands in Atlantic City, BEGINNING at a point in the East line of Berkeley Square 236 feet South from the South line of Atlantic Avenue; thence (1) East and parallel with Atlantic Avenue 82 1/2 feet; thence (2) South and parallel with Berkeley Square 39 feet; thence (3) West and parallel with Atlantic Avenue 82 1/2 feet to the East line of Berkeley Square; thence (4) North along the same 39 feet to beginning. 10

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**Exhibit D-7**

Deed Cephise A. Reichner and L. Irving Reichner her husband, to James H. Aiken, dated September 1, 1908, recorded September 1, 1908 in the office of the Clerk of Atlantic County in Book 390 of Deeds, page 144 &c. Consideration \$1.00 &c conveys lands in Atlantic City, BEGINNING at a point in the East line of Berkeley Square 236 feet South in the South line of Atlantic Avenue; thence (1) East and parallel with Atlantic Avenue 82 1/2 feet; thence (2) South and parallel with Berkeley Square 39 feet; thence (3) West and parallel with Atlantic Avenue 82 1/2 feet to the East line of Berkeley Square; thence (4) North along the same 39 feet to beginning. 30

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**Exhibit D-8**

Quit-claim deed John M. Hilton and Hannah H. his wife, to James H. Aiken, dated August 31, 1909, recorded September 3, 1909 in the office of the Clerk of Atlantic County in Book No. 411 of Deeds, page 106 &c. Consideration \$1.00 &c conveys.

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Lands in Atlantic City, BEGINNING at a point in the East line of Berkeley Square 236 feet South of the South line of Atlantic Avenue; thence (1) East and parallel with Atlantic Avenue 82 1/2 feet; thence (2) of that width or breadth throughout South between parallel lines parallel to Berkeley Square to the ordinary high water mark of the Atlantic Ocean.

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**Exhibit D-9**

Quit-claim deed Howard H. Yocum to James H. Aiken, dated September 1, 1909, recorded September 3, 1909 in the office of the Clerk of Atlantic County in Book 411 of Deeds, page 103 &s. Consideration \$1.00 &c. conveys. Lands in Atlantic City, BEGINNING at a point in the East line of Berkeley Square 236 feet South of the South line of Atlantic Avenue; thence (1) East and parallel with Atlantic Avenue 82 1/2 feet; thence (2) of that width or breadth throughout, South between parallel lines parallel to Berkeley Square to the ordinary high water mark of the Atlantic Ocean.

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**Exhibit D-10**

Quit-claim deed, Cephise Reichner and L. Irving Reichner, her husband, to James H. Aiken, dated August 31, 1909, recorded September 3, 1909 in the office of the Clerk of Atlantic County in Book 411 of Deeds page 105 &c. Conveys Lands in Atlantic City, BEGINNING at a point in the East line of Berkeley Square 236 feet South of the South line of Atlantic Avenue; thence (1) East and parallel with Atlantic Avenue 82 1/2 feet; thence (2) of that width or breadth throughout, South between parallel lines parallel to Berkeley Square to the ordinary high water mark of the Atlantic Ocean.

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**Exhibit D-11**

Quit-claim deed James H. Aiken to Ida Vare, dated October 9, 1911, recorded October 10, 1911, in the office of the Clerk of Atlantic County in Book 471 of Deeds, page 35 &c. Consideration \$100 conveys

Lands in Atlantic City, and State of New Jersey, BEGINNING at a point in the East line of Berkeley Square 236 feet South from the South line of Atlantic Avenue; thence (1) East parallel with Atlantic Avenue 82 feet and 6 inches; thence (2) South to the ordinary high water mark of the Atlantic Ocean; thence (3) West along the ordinary high water mark of the Atlantic Ocean 8 feet 6 inches more or less, to the East line of Berkeley Square; thence (4) North in and along the same to beginning.

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**Exhibit D-12**

Lease the State of New Jersey to Ida M. Vare, dated September 14, 1915, recorded November 1, 1915 in the office of the Clerk of Atlantic County in Book No. 546 of Deeds, page 243 &c., rental \$115.50, principal sum \$1650.00 leases

10 Lands now or formerly flowed by tide-water, lying at Atlantic City, in the County of Atlantic and State of New Jersey within the following described bounds, BEGINNING at a point in the East line of Berkeley Square distant 236 feet South from the Southeast corner of Berkeley Square and Atlantic Avenue; thence South along the East line of Berkeley Square extended 191  $\frac{3}{10}$  feet to the interior or inland line of the Atlantic City Public Park, being the North line of the  
 20 Eighteenth Tract in the grant of the State of New Jersey to the City of Atlantic City, dated December 27, 1906; thence East along said interior or inland line of said Public Park as granted, 82  $\frac{5}{10}$  feet; thence North parallel with Berkeley Square extended and 82  $\frac{5}{10}$  feet East at right angles therefrom 191  $\frac{3}{10}$  feet to a point distant 236 feet South from the South line of Atlantic Avenue; thence West parallel with Atlantic Avenue 82  $\frac{5}{10}$  feet to beginning.

30 "THIS LEASE IS MADE EXPRESSLY SUBJECT to the rights, title and interest, if any, acquired by Jesse R. Turner under a lease of the lands under water hereinbefore described, with other lands, made by the State of New Jersey to said Jesse R. Turner bearing date the eleventh day of May, nineteen hundred and fourteen, and recorded in the office of the Board of Commerce and Navigation in  
 40 Liber U., folio 134 etc.

## NEW JERSEY

# Court of Errors and Appeals

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BETWEEN

ARCHIBALD S. LAMBERT,  
*Complainant-Respondent,*

AND

IDA M. VARE,  
*Defendant-Appellant.*

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### Respondent's Brief.

#### FACTS.

The pertinent facts of this case are fully and accurately set forth in the conclusions of the learned Vice Chancellor, and all the facts, as we see it, essential to the decision of the single fundamental question involved are set forth in appellant's brief, so we need not burden this brief with a repetition of them. The question at issue is, Who of the parties to this suit is the owner of the land described in the bill to quiet title? The preliminary question of peaceable possession in the complainant was conceded by the appellant, leaving only the question of legal title to be determined by the Vice Chancellor. If we correctly apprehended the argument of counsel for the appellant before the Vice Chancellor, his client's claim was rested wholly upon the rights of a riparian owner, it being claimed that at one of two

certain periods, or both, high water covered a part of the locus, and that in legal consequence the accretions which constitute a major part of the premises in question is the property of the appellant. The question of where high-water line was at the periods contended for by the appellant was a question of fact which was decided adversely to her contention. It will serve no useful purpose to analyze that finding of fact or make here any reference to the testimony. This Court will necessarily have to read the testimony to see if there is a justification for the Vice Chancellor's decision on this question of fact. We content ourselves with saying that assuming that this Court may feel that a different conclusion might have been sustained it is not so plain that the Vice Chancellor was wrong as to justify or require a reversal on that ground.

#### LAW.

We contended before the Vice Chancellor and contend here that irrespective of the question of where high-water line was in fact at the period contended for by the appellant that there were legal barriers in the way of a decree in her favor. The principles contended for by the appellant in the brief of her counsel and the cases cited to support the same seem to us to miss the real point. We feel that the Vice Chancellor's conclusions are unanswerable and that nothing that we may add can further illuminate the subject, but we add the following:

Mrs. Kelly owned all the land from Atlantic Avenue to the Ocean. She agreed with Hilton to convey 275 feet, beginning at Atlantic Avenue, and this agreement was followed by a deed. The description mentions no monument. The land is described by metes and bounds. The map accompanying the agreement and deed shows high-water line to be oceanward of the 275 feet. Moreover, the language in the deed makes it obvious that

both grantor and grantee were recognizing a title in the grantor oceanward of the 275 feet, which would not have been so had the Ocean washed within the limits of the 275 feet. Again, Hilton, her grantee, saw Mrs. Kelly actually working on the land oceanward of the 275 feet, and spending her money in protecting and improving the same. This followed immediately upon the grant to Hilton and continued for a long period of time. This conduct on the part of Kelly, with acquiescence on the part of Hilton, not only makes it plain that both parties were recognizing that Hilton's grant was for a definite strip of land, including nothing beyond the 275 feet, but estopped Hilton, and therefore his grantees, from asserting anything to the contrary. The subsequent grant from Kelly to Young emphasizes that all parties were recognizing a title in Mrs. Kelly for all land beyond the 275 feet. The agreement with Young is accompanied by a map which shows the lots sold to Hilton and lots oceanward thereof with the high-water line oceanward of the Boardwalk. This agreement was recorded, and it was notice to all parties after the date of record. The conduct of Richner and the defendant plainly indicate an attempt upon their part to defeat a title which all parties at the time were assuming to be in Kelly. It was wholly unnecessary for Mrs. Kelly to expressly reserve accretions. The deed to Hilton provided that she was to insert like covenants and restrictions in *all* remaining land owned by her within the area of the map. *All* included the land in question. The language used is idle and meaningless unless it be said that it was understood that the title to the land oceanward of the 275 feet was still in Mrs. Kelly and subject to the restrictions. No one had the temerity to assert to the contrary until long after the complainant had been in the peaceable possession of the premises, expended a large sum of money in improving and protecting the same, and after he had constructed a building or sign that was offensive to the husband of the

appellant. Then we have Turner purchasing and paying a very substantial sum. His deed to Richner contains a plain agreement that high-water line is oceanward of the land being conveyed, and that he alone shall have the right to apply for a riparian grant. This deed was promptly recorded, and is in appellant's chain of title. If the agreement was enforceable against Richner it is enforceable against the appellant. It is unnecessary to determine that it is a covenant which runs with the land, for if it be only a personal covenant, and appellant had notice of it, her conscience is charged. She was bound by notice because the deed was recorded. In this posture *Brewer* against *Marshall*, cited by appellant, is against the claim of the appellant. The recent case of *Winslow v. Newcomb*, 100 *Atlantic*, page 613, is also in point.

It would be most inequitable and atrocious to defeat the respondent, who is an innocent purchaser for value and who had a right to rely upon the record and the physical conditions at the time he purchased from Turner. Equity will certainly estop Richner from asserting anything contrary to his agreement. It would be unconscionable for him to seek to avoid it—and the appellant can rise no higher. The State is no party to this proceeding, and is asserting no claim against the respondent, whose riparian lease antedates appellant's. We know of no rule of law or equity that forbids parties agreeing as to where high-water line is, or that the right to riparian grant has existed in favor of one as against the other. If it be true that Richner had the right in fact to apply for a riparian grant, and he for a valuable consideration agreed that he would not and that Turner might, this Court would say, if necessary, that Richner's grant should be held for the benefit of Turner. It must be presumed that the parties agreed that the land oceanward of the Richner grant was of value, and that that entered into the consideration for the grant from Turner to Richner. We see no question

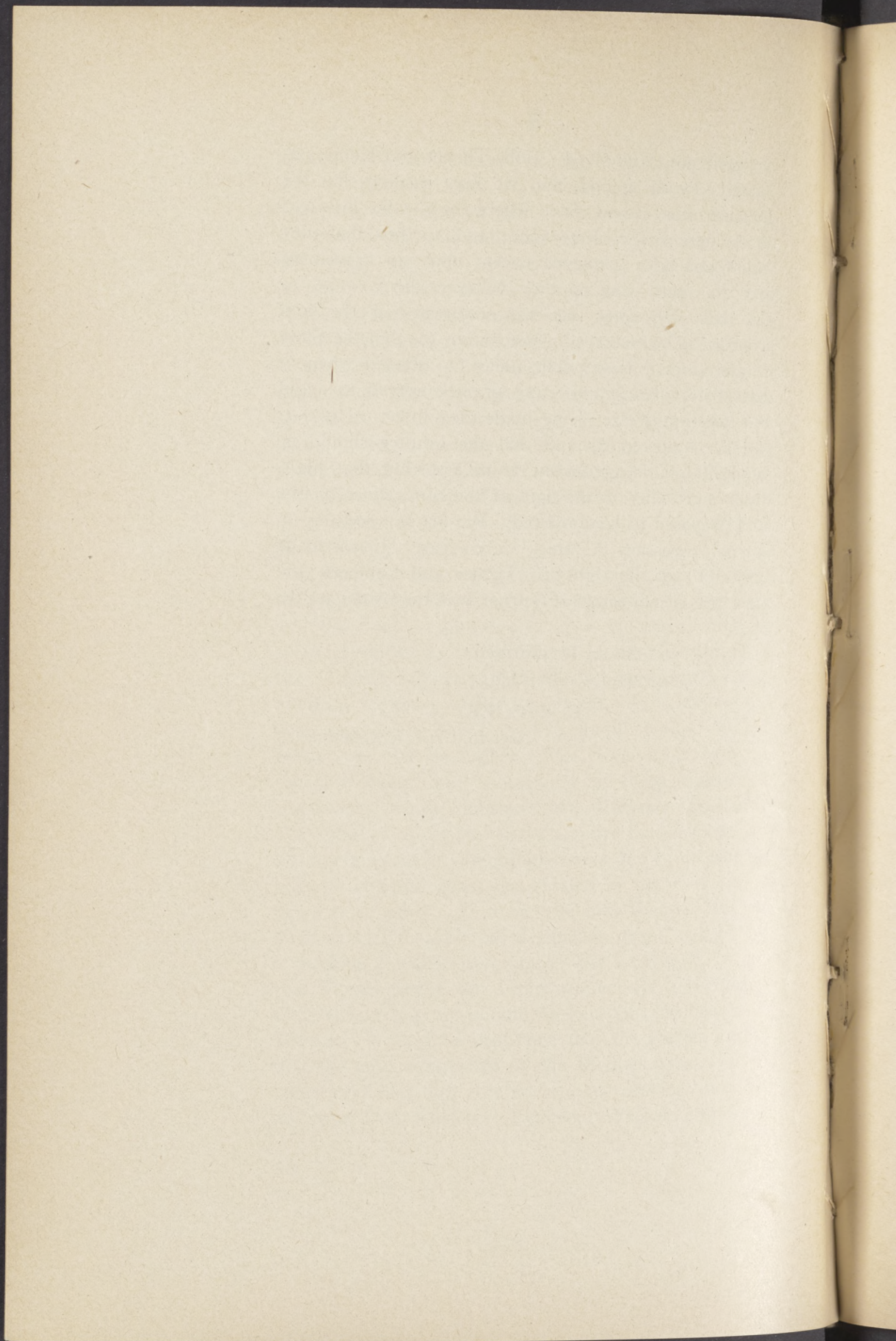
of public policy involved. Both Turner and Kelly concededly owned upland, and we may assume that the question arose as to, first, where high-water line was on the date of the conveyance; and, further, that they would not have conveyed except upon an agreement that the facts were as they believed them to be, to wit, that high-water line was oceanward of the land proposed to be conveyed. We do not see that the State is interested or how public policy is affected when in that posture the grantor and grantee agreed to avoid that question of fact being made the subject of investigation by the courts and that the grantee should be estopped by his agreement from asserting that high-water mark was on the date of the conveyance on the land proposed to be conveyed. We are not seeking to, nor is it necessary to, attack Vare's lease. It was made subject to all the rights of Turner and Lambert, and therefore is ineffectual if Turner was the owner of the ripa.

The decree should be affirmed.

Respectfully submitted,

C. L. COLE,

*Solicitor for Respondent.*



# NEW JERSEY COURT OF ERRORS AND APPEALS.

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BETWEEN

ARCHIBALD S. LAMBERT,  
Complainant-Respondent,

AND

IDA M. VARE,  
Defendant-Appellant.

ON APPEAL.

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## BRIEF

ON BEHALF OF DEFENDANT-APPELLANT, IDA M. VARE.

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### STATEMENT OF CASE.

This appeal brings up for review the decree of the Court of Chancery, declaring that the complainant is seized of a title in fee to the lands and premises described in the complainant's bill, and also holding that the defendant, Ida M. Vare, has no estate or interest in the same, or any part thereof.

The *locus in quo*, the title to which is involved in this matter, begins in the easterly line of Berkley Square at a point  $3\frac{1}{4}$  feet south of Atlantic Avenue, and extends along Berkley Square to the interior line of the Ocean Park of Atlantic City of a depth eastward of  $82\frac{1}{2}$  feet.

The complainant's claim of title is by virtue of a deed made by Jesse R. Turner and wife to the complainant, dated March 10, 1916, recorded in the Atlantic County Clerk's Office, in Book 550 of Deeds, page 465 (Exhibit C 1, c. p., 296).

The title of the defendant, as set up in the answer, (as amended, c. p., 11), is by virtue of a deed made by James H. Aiken to the defendant, dated October 9, 1911, recorded in the Clerk's Office aforesaid in Book 471 of Deeds, page 35 (Exhibit 11, c. p., 315), and a riparian lease from the State of New Jersey to the defendant, dated September 14, 1915, recorded in the Clerk's Office aforesaid in Book 546 of Deeds, page 243 (Exhibit D 12, c. p., 316).

The deed from Aiken to Vare (Exhibit D 11), conveys all the property southward of a line 236 feet south of Atlantic Avenue to the ocean.

The lease from the State to Vare (Exhibit D 12), grants all the land under water southward of a line 236 feet south of Atlantic Avenue to the interior line of the Park.

It will be observed, therefore, that if any portion of the *locus in quo* is found to be above ordinary high water line, it is included within the boundaries set forth in the deed, Aiken to Vare (Exhibit D 11), and the remaining portion of the locus found to be below ordinary high water line is covered by the riparian lease from the State to Vare (Exhibit D 12).

The complainant contends that when the deed was made by Turner to him (Exhibit C 1), the former was possessed of a leasehold estate therein by virtue of a riparian lease dated May 11, 1914 (Exhibit C 2, c. p., 296), which

conveyed the rights of the State to Turner in a tract of land southward of a line 314 feet south of Atlantic Avenue.

Consequently the question to be decided is which one of the parties has the title of the State in the *locus in quo*, by virtue of either of the two riparian leases.

The lease to Turner, to whose rights the complainant succeeded, is earlier in point of time, but it contains a provision that if Turner is not the owner in fee of the fast land adjoining the land in which the right, title and interest of the State is conveyed, then the conveyance shall be void and of no effect, so far as it purports to convey the right of the State in any land in which the State has any right, lying directly in front of any land of which the said Turner was not, at the time of the making of the lease, the owner in fee.

The point, therefore, with regard to the validity of the Turner lease, is whether or not Turner was, in 1914, the owner in fee of the fast land adjoining the lands under water, thus leased by the State to him.

The riparian lease to Vare contains the same provision, with the additional clause that the same is made subject to the right, title and interest, if any, acquired by Turner by virtue of the prior lease.

Under the terms of the deed from Turner to Lambert (Exhibit C 1), no interest was acquired by the latter in any land northward of a line 314 feet south of Atlantic Avenue, regardless of where the Court may locate ordinary high water line immediately east of Berkley Square.

It will be perceived, therefore, that a settlement of controverted question in this case requires the ascertainment of the location of ordinary high line of the Atlantic Ocean,

upon either or both of two dates, to wit, December 31, 1901, and November 19, 1908, the significance of which dates will appear later when reference is made to the conveyances which were passed at those times respectively.

#### GROUNDS OF APPEAL.

The principal ground of appeal is the determination by the learned Vice Chancellor, upon the whole case, that the complainant had title to the premises in question, and that the defendant, Ida M. Vare, had no title thereto.

#### BRIEF AS TO LAW AND FACT UPON THE QUESTION OF TITLE TO THE LOCUS IN QUO.

##### FIRST.

Ordinary high water line has been variously defined in the adjudicated cases, and the following is an abstract of the authorities which we have been able to gather together upon this point:

The term "high water mark" with reference to tide-lands is the line on the shore which is reached by the limit of the flux of the usual tide.

*Taylor Sands Fishing Co. vs. State Land Board,*  
*Ore., 108 Pac., 126.*

The "high water mark" is the line which the river impresses on the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.

*State, ex rel &c. vs. Longfellow, Mo. 69, S. W., 374.*

By "high water mark" is meant those points along the shore where water rises to such a height as may reasonably be anticipated, but does not include such extraordinary freshets as cannot be anticipated.

*Eardman vs. Watab Rapids Power Co., Minn. 127, N. W., 487.*

"High water mark," as used in reference to the sea as a river in which the tide ebbs and flows, should be construed to mean the line reached by the periodical flow of the tide, and not the line marked by the advance of waters caused by the winds and storms, freshets or floods.

*Howard vs. Ingersoll, 54 U. S., 381.*

By the ordinary high water mark of a navigable stream is meant the point up to which the presence of water is so continuous as to leave a distinct mark by evasion, destruction of vegetation, or other reasonably recognized characteristics; and where the bank at a particular place is of such character that the high water mark cannot be easily determined, other places on the bank may be resorted to for determining the high water mark.

*Diana Shooting Club vs. Husting, Wis. 145, N. W., 816.*

High and low water marks mean the high and low points of variation of the waters under ordinary conditions unaffected by extreme and continued freshets or extreme and continued drought and not the highest or lowest point reached by the waters during such periods.

*Flisrand vs. Madson, S. D. 152 N. W., 796.*

*Flisrand vs. Madson, S. D., 152 N. W., 796.*

## SECOND.

The contention of the appellant Vare is that the proofs establish the fact that on December 31, 1901, the line of ordinary high water was a few feet inside or toward the north of a line 275 feet south of Atlantic Avenue, and that the tract of land conveyed by Kelly to Hilton, described in deed dated that day (Exhibit D 28; c., p. 307), was washed by the ocean notwithstanding the description did not carry the land conveyed to the water's edge. As a natural consequent of this, Hilton became the owner of the ripa, and such line continued to be the ordinary high water mark so far as the rights of the State were concerned, regardless of the construction of the bulkhead in the early part of 1902 or the accretions which resulted from such construction, and the efforts made by the owners of the land at that time, by the use of brush piling, etc., to hold the sand.

All accretions, therefore, inured to the benefit of Hilton as such riparian owner.

The location of high water line in 1901, as claimed by the defendant, Vare, was established by the following evidence:

JOHN S. LEEDS: In 1901 and 1902 Hannah Kelly improved the beach in the immediate vicinity of the *locus in quo*. The bargain for this work was made by Leeds with Mrs. Kelly before the latter sold, to Ryan and Collins, the land which was subsequently conveyed to Hilton. (C., p. 103, l. 1.)

The Kelly bulkhead was built because Mrs. Kelly had sold 275 feet of fast land to Ryan and Collins, and it was necessary to protect that area in order that the contract

with Ryan and Collins could be carried out. After the bulkhead was built it was filled back, and the expense was divided between Ryan and Collins and Hannah Kelly. (C., p. 110; c., p. 135, l. 5.)

The ordinary high water line was fifteen to twenty feet inside the Kelly bulkhead line. (C., p. 105, l. 1; c., p. 134, l. 29.)

The land to a point 275 feet south of Atlantic Avenue could not have been filled in to city grade even if there had been no storm tides. (C., p. 136, l. 18.)

Ordinarily, day in and day out, before the beach was disturbed, the high water line came somewhere within the line of the Kelly bulkhead, possibly fifteen or twenty feet. (C., p. 105, l. 4.)

The brush jetty, like a worm fence, was placed inside of the line of the Kelly bulkhead, about twenty feet toward Atlantic avenue. (C., p. 105, l. 15.)

The brush piling, which was inside of where the bulkhead was subsequently built, had been covered up or washed away before the bulkhead was built. (C., p. 106, l. 14.)

JOHN W. COONEY: This witness bid for the work of sinking piling for the Kelly bulkhead, and as the result of which he became acquainted with the tidal conditions at that point.

In 1902 he also worked on the Newton bulkhead, which adjoined the Kelly bulkhead on the south. (C., p. 116, l. 10.)

The Newton bulkhead was on a line with the Kelly bulkhead, farther toward the west, and the water interfered with the work so that they very rarely got in a full day. (C., p. 116, l. 23.)

After the Kelly bulkhead was built he put in piling, brush and sand bags for Mrs. Kelly, about eighteen or twenty feet outside of her bulkhead toward the ocean from Berkeley Square. (C., p. 117, l. 13.)

Ordinary tides, uninfluenced by conditions of wind or storm, would wash about eighteen or twenty feet inside the Kelly bulkhead. (C., p. 118, l. 10.)

After the bulkhead was built, under ordinary conditions, the tide would hit the bulkhead all the time pretty much. (C., p. 118, l. 31.)

Bulkheads make beach and prevent tide from coming to it, and bulkheads are usually built between high and low water mark. (C., p. 119, l. 12.)

High water ran 20 feet above the line of the Kelly bulkhead. Some days had to knock off, could not work; the water would drive workmen out. (C., p. 120, l. 18.)

The brush was where the ordinary tides would wash it; such tides as were uninfluenced by winds. (C., p. 121, l. 3.)

FRANK MARTIN: This witness passed the *locus in quo* nearly every day, and ordinary high water was inside of the line of the Kelly bulkhead. (C., p. 99, l. 18, *et seq.*)

ANDREW MARCUS, in 1901, had occasion to observe the line of high water mark at Berkeley Square. At that time he was working on the Newton bulkhead, which was built on the same line from Atlantic Avenue as the Kelly bulkhead. When the bulkhead was there, the ordinary high water line was ten to twenty feet inside towards Atlantic Avenue. (C., p. 146, l. 1.)

Ordinary high tides washed the Kelly bulkhead. (C., p. 146, l. 14.)

This witness was working in that neighborhood during the summer of 1901. (C., p. 146, l. 30.)

A. D. BOWEN was the foreman for W. S. Higbee, who built the Kelly bulkhead. The latter was constructed in the spring of 1902. (C., p. 55.)

Water ran up on the beach 12 to 15 feet inside of the line of the bulkhead, and when the tide was running the fullest the men could not work on the top of the tide. (C., p. 46, l. 8.)

W. S. HIGBEE, the contractor who built the bulkhead, stated that at high tide there were times when the men could not work on the bulkhead and went back to work on the building, which was being constructed at the same time, and that the tide ran twenty feet inside of the bulkhead toward Atlantic Avenue. (C., p. 61, l. 30.)

RICHARD T. BOWEN, who is one of the men who worked on the bulkhead, stated that after the storm-tide, almost every ordinary high water came up to the bulkhead. (C., p. 71, l. 30.)

MAHLON W. NEWTON, in no wise interested in the result of this litigation, has knowledge of the locality since 1900. After the Kelly bulkhead was built, water splashed against it, although Mr. Newton had no recollection just where the high water was before the bulkhead was built. (C., p. 76, l. 33.)

Ordinary tide would splash the bulkhead. (C., p. 77, l. 12.)

High tide would be about where the bulkhead was located. Sometime the tide would come inside of it, very often inside of it. (C., p. 77, l. 38.)

Every ordinary tide would sweep the Kelly bulkhead. (C., p. 82, l. 26 *et seq.*)

We contend, therefore, that the result of this proof is to establish, the fact that the high water line was inside of the Kelly bulkhead when the conveyance to Hilton, Exhibit D 2, was made.

We further contend that the testimony produced by the complainant and his witnesses was not sufficient to warrant the learned Vice Chancellor in finding the contrary of this fact.

NICHOLAS J. JEFFRIES did not pretend to testify as to the location of high water line in 1901. He had known the property since the winter of 1902 and 1903. As a matter of fact, he did not become interested in the property as an owner until February, 1903. (C., p. 178, l. 12.) He was on the ground from 1902 until 1908. Mr. Jeffries stated generally "that bulkhead was what we would call clear of the water." (C., p. 177, l. 40.) Mr. Jeffries did, however, say that in 1908 the ordinary high tide was twenty to thirty feet outside of the Kelly bulkhead, "but generally speaking it did not come up there, only what we except as a storm tide." (C., p. 177, l. 1.)

It may be possible that after the Kelly bulkhead was erected, and by reason of the changed conditions of the beach, for a time the water did not reach the bulkhead, but a fair inference to be gathered from the testimony of Mr. Jeffries is that the tidal conditions changed from time to time, and we submit that his testimony, in view of the limited opportunity he had for observation, and the time of the same did not in any way destroy the effect of the

evidence of the men who were actually employed in the building of the bulkhead, as to the location of ordinary high water at that time.

Even Mr. Jefferies conceded that at Berkeley Square the water did wash the bulkhead at a point where the Kelly bulkhead joined the Newton bulkhead. (C., p. 185, l. 1.)

JESSE R. TURNER, it must be remembered was the real complainant in the case. He had a purchase money mortgage covering the property claimed by Lambert for the entire purchase price.

He had no knowledge of the tidal conditions prior to 1903, when he bought. (C., p. 190, l. 32.) Speaking of the Kelly bulkhead, Mr. Turner says (C., p. 194, l. 35): "I don't think there was a time in ordinary tides, not once, from the time I bought until I sold to Reichner that the high water came to that bulkhead, not once, I don't think, that is, an ordinary tide." This is the extent to which his evidence went.

Evidently, Mr. Turner had no very vivid recollection of the conditions on the beach, because he could not recall, when he first testified, that there were any brush pilings on the outside of the Kelly bulkhead, notwithstanding the fact that they were located upon property which he claimed to have bought from Hilton in 1903. When the photographs were shown to him, he did recall that the brush pilings were there, but he thought they had something to do with the bulkhead which some person had attempted to construct, although it is perfectly apparent, from inspection of the photograph, that this could not have been the situation. (C., p. 200, l. 10.) He does say that the ordinary line of high water, when he bought in 1903, was ten

or fifteen feet from the bulkhead. (C., p. 198, l. 26.) It seems to us that his testimony is not to be given very much weight, because of these discrepancies, and his apparent interest in the result of the litigation, as well as the fact that he made no effort to improve the property claimed to be owned by him, but let it remain idle and unproductive, and made no application for riparian grant until 1914, after the Vare property had been built, when the option was given to Lambert. (C., p. 198.) It is remarkable also that this witness, who claimed to own the lot outside of the 314 feet line, which was undoubtedly beach property in 1908 and 1909, as shown by the photographs introduced in evidence, never made any effort to locate high water line until Lambert appeared in 1914, and secured the option to purchase. Furthermore, Turner never made any investigation as to the erection of the bulkhead, or the piling in front of it. It also seems to us that the evidence of this witness did not disclose the fact that he had viewed the property sufficiently in 1903 up to 1908, when he sold to Reichner, to warrant him in having any definite notion as to where the high water line was. Certainly his testimony ought not to be have been accepted, as against evidence of the defendant's witness who actually worked on the bulkhead.

WILLIAM I. MARTIN, one of the Coast Guards, was not aware until within a few days before the trial that he would be asked to fix the line of high water in 1901. He says from 1897 to 1904 "most of the time the tide wouldn't come within, I should say within fifty to one hundred feet to the bulkhead. (C., p. 250, l. 16.) It is significant that D. L. Collins, the principal witness for the complainant, secured the attendance of this witness.

On cross examination Martin did not pretend to be accurate in his statement of distances, for he says, "I never took that trouble to measure. I was only just giving you an estimate." (C., p. 254, l. 32.)

This witness was recalled (C., p. 258), and was unable to locate the bulkhead about which he was testifying, and did not know between what streets it was located.

CHARLES P. LEEK, another Life Guard, was on duty between December 1, 1900, and the last day of May, 1902. (C., p. 255, l. 22.) He places the ordinary high water line anywhere from thirty to fifty to sixty feet outside of the Kelly bulkhead with an ordinary tide. His recollection was that the bulkhead was built in 1901. (C., p. 256, l. 22.) He also says that the bulkhead about which he was testifying began at Berkeley Square and ran toward Ventnor. (C., p. 257, l. 1.) This witness evidently was uncertain as to the bulkhead about which he was testifying.

With the exception of Daniel L. Collins, the above mentioned witnesses were the only ones who attempt to testify as to conditions in 1901 and 1902. We submit that so far as the life guards are concerned, their recollection would not be as vivid as the recollection of Leeds, Cooney, Marcus, Higbee and Bowen, who were all in one way or another identified with the construction of the Kelly bulkhead or an adjoining one and would have more forcibly impressed upon their minds the difficulties encountered in that work. The life guards could only know from mere patrolling the beach from time to time, both at high tide and low tide, without having the existence of any matter drawn to their attention which would cause them to remember exact conditions.

Furthermore, the fact that the bulkhead was built and the brush piling was put on both sides of it, is an important factor to show that for some reason it was necessary to protect the beach at that place. It is manifest that the object of the bulkhead was to keep the water back, and the whole situation is explained by the following extract from the testimony of Daniel L. Collins, the complainant's main witness, on cross-examination. (C., p. 228, l. 25.)

“Ques. And I understand from your statement now that the high water, the ordinary high tide, never came up to the 275 feet line at any time from the day you bargained to buy this property until it was conveyed to you—is that right or not?

Ans. No, I didn't say that.

Ques. Well, did it come up to that line?

Ans. Why, sure it did. I said that before we were finished a storm tide came up and washed from two to four feet of the beach away, before we made settlement, and on account of that, and on account of Mrs. Kelly not being able to get her money on her mortgages in Block 26, she gave us an extension agreement.”

It also appears from the testimony of Collins that the bulkhead was the result of the fact that the water did come up beyond the 275 feet line, and that the bulkhead was built in order that the agreement with Ryan and Collins, to secure 275 feet, could be carried out.

Collins seemed to have some sort of a mental reservation when he was testifying as to ordinary high water, but it is perfectly apparent, when reading his evidence, that the bulkhead was built in order that the agreement to sell 275 feet of fast land could be carried out.

This is also shown by the testimony of Leeds, to the effect that Mrs. Kelly had the bulkhead built and paid a portion of the expense because she had agreed to sell 275 feet of fast land.

We submit that Collins' testimony should not be given credence to show that the high water was outside of the 275 feet line, because his attitude as a witness was entirely different from his attitude in 1909 when he was attempting to assist Reichner in establishing the fact contrary to his present contention. There can be no doubt but that he assisted in the securing of affidavits from Bowen, at least, and possibly the other witnesses, which were to be used to support the contention now made as to the location of high water line inside of the bulkhead. Not only that, but the statement of Mr. Bourgeois (C., p. 274, l. 1) was that these affidavits were given to Collins, notwithstanding his statement that he hadn't any idea what became of them. (C., p. 238, l. 20.)

In 1909, Collins, when he was securing these affidavits, was either attempting to bolster up a fraudulent claim at that time, or his testimony at the trial below, in his effort to show that the high water line was twenty or thirty feet outside of the bulkhead, is untrue. Collins' testimony is shifty, uncertain and unreliable, and undoubtedly indicative of his general character. It may be that if these affidavits were produced they would show that some of the witnesses which Collins secured for the complainant had, in 1909, made sworn statements contrary to their testimony in this case.

The learned Vice Chancellor appeared to place more reliance upon the testimony of the lifeguards, with respect to the location of high water line in 1901 than any of the other witnesses.

It seems to us that their testimony must necessarily be more or less general in character, because of the lapse of nearly sixteen years before they knew they would be called upon to recollect the location of high water line at the time to which their testimony was directed.

It has always appeared to us that those witnesses, who had worked upon the bulkhead and the beach, in and around the latter, would have a better recollection of the location of the high water line than any of the other witnesses who testified.

### THIRD.

Mrs. Vare was the owner of the ripa when the riparian lease was made to her on September 14, 1915. (Exhibit C 12.)

Assuming that it be established in the case that Hilton became the riparian owner upon the conveyance to him by Kelly on December 31, 1901 (Exhibit D 2; C., p. 307), the various conveyances introduced in evidence vest in the defendant, Vare, the ownership of the land along the water's edge.

Hilton, by deed dated January 20, 1908 (Exhibit D 5; C., p. 312), conveyed to Yocum a tract of land described as beginning 236 feet south of Atlantic Avenue, and extending in a southerly direction 39 feet. This carried the title to the line of the Kelly bulkhead, and if the high water line was shoreward of the latter, Yocum then became the riparian owner.

Yocum, by deed dated February 3, 1908 (Exhibit D 6; C., p. 313), conveyed to Cephise A. Reichner a tract of land by the same description as in the last mentioned deed, and it follows that if high water line was inside the

Kelly bulkhead the grantee in such deed became the riparian owner.

By deed dated September 1, 1908 (Exhibit D 7; C., p. 313) Cephise A. Reichner and L. Irving Reichner, her husband, conveyed to James H. Aiken a tract of land by the same description as contained in the two last mentioned conveyances, which made Aiken the shore owner, if the original high water line was on the line of the Kelly bulkhead or landward thereof.

In order to remove any doubt as to the fact that Aiken was to be vested with a title as riparian owner, a quit-claim deed was made by Hilton to Aiken, dated August 31, 1909 (Exhibit D 8; C., p. 314), which conveyed the land from a line 236 feet south of Atlantic Avenue to the Atlantic Ocean.

On the same day, a quit-claim deed (Exhibit D 10, C., p. 315) was made by Cephise A. Reichner and L. Irving Reichner, her husband, to Aiken, containing the same description.

On September 1, 1909, Yocum quit-claimed his interest as shore owner to Aiken by deed dated that day (Exhibit D 9, C., p. 314), which deed contained a description carrying the title to the water's edge.

By virtue of all of these conveyances Aiken became seized of the land beginning 236 feet south of Atlantic Avenue and extending to the water's edge. The title thus vested in Aiken was conveyed to Vare by deed dated October 9, 1911 (Exhibit D 11, C., p. 315), which described the land as beginning 236 feet south of Atlantic Avenue and extending to the high water line of the ocean.

The tracing of the title forward from Hilton to Vare establishes beyond question that in 1911 Mrs. Vare became the riparian owner, which would support the riparian lease made in 1915.

The cases upon which the defendant, Vare, relies in support of this proposition are the following:

*Ocean City Asso. vs. Shriver*, 64 L., 550.

*Ocean City Hotel Co. vs. Sooy*, 77 L., 527.

*Dewey Land Co. vs. Stevens*, 83 Eq., 314.

*Kirk vs. Dempsey*, 85 L., 308.

Ordinary high water line cannot be artificially changed in derogation of the rights of the State.

This Court in *Kirk vs. Demsey*, *supra*, held that where an owner of land washed by ordinary tides fills in land under water, he is not bound by the high water line thus created, but may have a riparian lease based upon the original high water line as it existed before the extension of the shore line by such filling, and his right to the grant depends upon his ownership of the original ripa at the time the grant is made, and that the rights of the State cannot be interfered with by having the ordinary high water line artificially changed, and when such alteration is made by the owner of the fast land along tidal waters, the high water line, so far as the State is concerned, remains where it existed prior to such change.

#### FOURTH.

The restrictions in the agreement between Kelly and Hilton, dated August 3rd, 1901 (Exhibit C 10, C., p. 300) and the same restrictions inserted in the deed from Kelly to Hilton (Exhibit D 2) which conveyed the ripa to the grantee, do not create an estoppel or have any effect upon the legal result if, as a fact, the tidal waters of the ocean washed the lands conveyed.

The contention of the complainant, Lambert, as we understand it, is that the restrictions above referred to amount in law to a reservation of any accretions, and that Hilton would have been estopped, and, consequently, Vare, as his grantee, is now estopped, from asserting that the conveyance carried the title to the water's edge, notwithstanding the ocean was not designated as a boundary.

In the first place, we contend that the language inserted in the agreement of sale, and the deed subsequently executed by Kelly to Hilton, above referred to, does not warrant the interpretation sought to be ascribed to it by counsel for the complainant, nor the construction put upon it by the learned Vice Chancellor.

There is no reservation of title to accretions.

Mrs. Kelly was then the owner of a large tract of land bounded by Tallahassee and Columbia Avenues in Atlantic City, running from Atlantic Avenue to the ocean. The purpose of the covenants was to impress upon all of the land in that vicinity owned by her, or any which might accrue to her by accretions or change in the line of the boardwalk or inland park, the various restrictions, in order that the locality might be continued as a popular residential section. If such covenants had been limited to the land expressly conveyed to Hilton by a description which ran 275 feet south of Atlantic Avenue, regardless of the location of the ocean, there might be some foundation for the claim that there was an implied reservation, although we do not concede that such a reservation could have been effectual as against the rights of the State.

Mrs. Kelly agreed to insert the conditions and restrictions set forth in the agreement in all deeds which she might make conveying any land located between Columbia Avenue, Atlantic Avenue and Tallahassee Avenue and

the Atlantic Ocean, in order that the restrictions would be impressed upon all her land. Then follows the provision that all lands which shall hereafter be made by accretion, or which shall accrue to her to the northward of the present boardwalk by reason of the same being moved oceanward, or by reason of the line of the present Ocean Park being moved oceanward, shall be subdivided into lots of the same size as shown on the map, and that the streets shown thereon should be continued to the high water line, and that all such covenants, conditions and restrictions should be binding and enforceable upon such remaining or additional lots which shall accrue to her by reason thereof, in the same manner and by the same persons mentioned in the said restrictions.

The purpose and intent of such a provision is manifest. As long as Mrs. Kelly remained the riparian owner she would have been obliged, under such deed, to impress the restriction upon any additional lands which might accrue to her.

But, as a matter of law, she ceased being the riparian owner when she conveyed the land to Hilton to the water's edge. Consequently, no accretions would or could accrue to her after she had made such conveyance. She lost all title as riparian owner, and if high water line remained as it originally was in 1901, a short distance inside of the Hannah Kelly bulkhead, the land oceanward of a line 275 feet belonged to the State, and, of course, could not be reserved by her. If, however, by ordinary and natural recession of the ocean, accretions did accrue, they became vested in the riparian owner, who was Hilton. This is the irresistible result based upon the rule of law unquestionably recognized in New Jersey, that a conveyance of a tract of land which is washed by the ocean denudes all

right or interest in a grantor in any accretions which may arise thereafter.

No accretions having accrued to Mrs. Kelly, that clause in the deed referring thereto became ineffectual so far as she was concerned, and she was not in a position to impress the restrictions upon any additional land created by the ocean receding. The effect of the restriction was that whoever became possessed of land outside of the limits of the land conveyed to Hilton, occasioned by natural accretions, would be vested in a title subject to the covenants created by Mrs. Kelly. This would be occasioned by the acceptance of a deed to the water's edge containing the restrictive covenants.

If, however, the high water line continued to be coincident with or a short distance inside of the Kelly bulkhead, certainly it cannot be claimed that there could have been any reservation of title outside of the bulkhead as against the rights of the State.

The result, therefore, is that no land did accrue to Mrs. Kelly which could be the subject of the restriction, even if the language can be construed as an implied reservation.

Our contention, as to the proper interpretation to be put upon the language contained in the restrictions and covenants above referred to, is confirmed by the use, by Mrs. Kelly of the same language in a deed which purported to convey to Turner and Young the land outside of the Kelly bulkhead, made in 1903 (Exhibit C 16), which is the source of Lambert's title. The description contained in this last mentioned deed begins at 275 feet south of Atlantic Avenue, and extends to the Atlantic Ocean, and yet the same covenant was inserted in such deed. Under no possible theory can it now be claimed that Mrs. Kelly

by implication reserved to herself the accretions made by the ocean receding from a point where the high water line existed when such conveyance was made, and yet the same restriction is incorporated in the deed.

This is conclusive evidence, in our judgment, that the purpose of the covenant was not to reserve accretions, or in any way affect the legal intendment resulting from a conveyance of the land to the water's edge, but was merely created as a general scheme of restriction affecting the whole tract, in order to maintain a uniform system of building, and insure a standard of the use of the tract as a residential district.

It is also claimed that the map attached to the contract of sale between Kelly and Hilton (C., p. 280) has some significance, because it apparently shows a portion of a lot between a line 275 feet south of Atlantic Avenue and the ocean, as delineated by irregular lines, southward thereof. There is nothing on the map to show that the line of the water, attempted to be laid out, referred to high or low water mark. The significance of this map, as claimed by counsel for Lambert, entirely disappears from the case upon an examination of the agreement of sale between Kelly and Young for the tract of land which is the source of Lambert's title. The agreement introduced in evidence by the complainant (Exhibit C 14; C., p. 305) did not have attached to it any map. We obtained from the County Clerk's office a certified copy of the agreement as it appears of record, and the map attached thereto shows that the line of ocean was southward of the line of the boardwalk, which admittedly is not an accurate location. The relevancy of the map, appended to Exhibit C 10, to show an intention to convey inconsistent with the legal result under well de-

finer principles of law recognized in New Jersey, is entirely dispelled.

Furthermore, there is a well recognized rule which has been the subject of judicial sanction in New Jersey, in the case of *Philadelphia Brewing Company vs. McOwen* 76 L., 636, which, in our judgment, renders it impossible for this Court to find that there is any implied reservation or estoppel created by the covenants contained in the deed to Hilton. (Exhibit D 2.)

This Court, in the latter case, held that there is no rule of law which prevents one of two grantees of a common grantor from asserting against the other a title different from or paramount to that derived from the common grantor. In the Brewing Company case, as well as the case now under consideration, claim was made of a title which did not derive from the common grantor, but which was, by virtue of a paramount title, obtained directly from the State.

See also 16 Cyc., 716, and cases there set forth.

Judge Cole has consented that a certified copy of the agreement between Kelly and Young, showing the map which was not attached to the original offered in evidence, may be considered as in the case.

Another principle of law, which seems to be applicable to this situation, is that laid down by the Supreme Court in the case of *Young vs. Columbia Investment Company*, 77 L., 410. Under the Riparian Act, the shore owner is given a certain status so far as a right, to apply to the State for a riparian grant, is concerned. The riparian owner is the only person primarily recognized as a proper applicant for a grant. The State is not permitted to make a grant to any other person, except upon notice of the owner of the ripa.

We contend, therefore, that under the authority of the last mentioned case, it is against public policy to permit parties to contract against the well recognized status of a riparian owner. In other words, parties cannot agree in opposition to the legal results which flow from a certain state of facts; certainly not as against a title which is derived from the State.

We also contend that this question is controlled by the argument which will be made later as to the effect of the covenant contained in the deed from Turner to Reichner (Exhibit C 3; C., p. 298), and that the limitation or restriction did not run with the land situated oceanward of a line 275 feet south of Atlantic Avenue.

#### FIFTH.

It seems to us, therefore, if it be found, as a fact, that high water line in 1901 was located, as claimed by Mrs. Vare, that the latter was entitled to a decree establishing her claim. If, however, it becomes necessary for a settlement of the title to ascertain where high water line was in November, 1908, when Turner conveyed to L. Irving Reichner by Exhibit C 3, we claim that high water line was inside of 314 feet south of Atlantic Avenue, and by the last mentioned conveyance, Reichner became the shore owner, and nothing was reserved by Turner which could be subsequently conveyed to Lambert.

The proofs show that on November 19, 1908, high water line was inside of 314 feet south of Atlantic Avenue. It is unnecessary to ascertain the exact location of the water line upon this date, if it be made to appear that it was shoreward of a line 314 feet south of Atlantic

Ave. Manifestly, if this be true as a fact, Turner did not retain any title to the land oceanward of 314 feet, which would be a foundation for the present claim asserted by Lambert.

#### SIXTH.

The following abstracts of the evidence, we contend, establish conclusively that the defendant's claim regarding the location of the line in 1908, is supported by the testimony:

MAHLON W. NEWTON testified that in 1907 and 1908 high water line was inside of where the concrete bulkhead now stands. (C., p. 79, l. 28.) The concrete bulkhead is 306 feet south of Atlantic Avenue. (See testimony of Rightmire, C., p. 212.) The bulkhead around the Vare house is 310 feet south of Atlantic Avenue. (C., p. 212.)

FORREST B. ENGLISH, who is in no way interested in the result of this litigation, except that he is a friend of Congressman Vare, has a summer home at Plaza Place, two blocks west of Berkeley Square, and since 1904 has had knowledge of the tidal conditions at the latter place. The ordinary high tide in 1908 touched the old wooden bulkhead that Mr. Newton built. This is the bulkhead which is a continuation of the Hannah Kelly bulkhead. (C., p. 126, l. 14.) The ordinary high tide came up to and touched this bulkhead usually every day. (C., p. 126, l. 34.) This condition continued until the time that the Vare bulkhead was built. (C., p. 128.) Of course, the line of high water was changed when the improvements were made by Lambert in 1914.

HENRY F. MICHELL, a Philadelphia business man, bought property on Kingston Avenue in 1909, and in that year the ordinary high water came up to the Kelly bulkhead. (C., p. 138 *et seq.*)

JOSEPH D. SWOYER, another Philadelphia business man, purchased property on Berkeley Square in 1907, and until 1915 had observed tidal conditions particularly. In 1908 and 1909, the ordinary high water came up to the Kelly bulkhead. (C., p. 142.) This condition continued until the changes were made by Lambert in 1914. (C., p. 142.)

FREDERICK C. ROLLMANN, another Philadelphia business man, has been acquainted with the tidal conditions of the beach at the point involved since 1904. The ordinary high water would come up to the Kelly bulkhead and unusual tides would sometimes cross the bulkhead and get into the Newton gardens and up the streets. The ordinary tide would reach the bulkhead. (C., p. 168.) These conditions continued until Lambert started his operations.

WILLIAM S. VARE, husband of the defendant, became acquainted with tidal conditions at Berkeley Square about July 1, 1910, when he occupied a house on the east side of Kingston Avenue, the porch of which overlooked the Kelly bulkhead. In 1910, the ordinary high water between Berkeley Square and Kingston Avenue came to the Kelly bulkhead. (C., p. 151). The house located immediately adjoining the *locus in quo*, which he subsequently bought, was erected in 1910, and after the cottage was built and the bulkhead built around it, high water daily covered the beach and came up against the bulkhead in front of the cottage and around the same, to the Kelly

bulkhead towards Kingston Avenue. (C., p. 152.) This condition continued until the changes were made by Lambert. (C., p. 153.)

E. D. RIGHTMIRE, a civil engineer, made observations of the location of high water line beginning from the middle of August to the 1st of September, 1909, with the following result: August 14, 276 feet south of Atlantic; August 16, 275 feet south of Atlantic; August 17, 275 feet south of Atlantic; August 18, 305 feet south of Atlantic; August 19, 305 feet south of Atlantic; August 27, 310 feet south of Atlantic; August 28, 310 feet south of Atlantic; August 29, 310 feet south of Atlantic; August 30, A. M., 310 feet, P. M. 290 feet south of Atlantic; August 31, 290 feet south of Atlantic; September 1, 290 feet south of Atlantic. (C., p. 27 *et seq.*)

The photograph, Exhibit D 4, shows the condition at the foot of Berkeley Square in December, 1908 (testimony of A. B. Bowen, p. 149). It shows the foot of Berkeley Square and the place where the Kelly and the Newton bulkheads adjoin. The bulkhead is 275 feet south of Atlantic Avenue. It also shows that the trash and seaweed and the pilings, which were placed by Cooney outside of the Kelly bulkhead in 1902 as he said 15 or 20 feet towards the ocean. It is perfectly apparent from this photograph, that the line of high water was less than 39 feet south of the bulkhead which would make it closer to Atlantic Avenue than 314 feet in 1909.

These photographs corroborate the testimony of the defendant's witnesses as to the high water line at that time.

Exhibit D 3 is another picture of the same place except the camera is pointed in an easterly direction, whereas, the camera in Exhibit D 4 was pointed northerly. This photograph was taken at the same time because it shows the dwelling house built for Reichner in the same condition and it also shows seaweed washed close to the bulkhead line and inside the piling, which was placed there by the witness, Cooney.

We contend that the complainant did not produce any evidence of a reliable character sufficient to overcome or destroy the effect of the testimony in this respect, of the defendant's witnesses.

We further contend that there is no contradictory evidence at all in the case, with the exception of the bare statement of Turner, that in 1908, when the conveyance was made by him to Reichner, high water was oceanward of a line 314 feet south of Atlantic Avenue. None of the other witnesses in any way corroborate this statement.

Mr. Jeffries, the witness for the complainant, (C., pp. 176-183) says in 1908 high water line ran along twenty to thirty feet outside of the bulkhead, and generally speaking, the tide did not come up to the bulkhead, except in a storm tide. If this statement be true, it is conclusive evidence that the deed from Turner to Reichner conveyed to the high water line, and the former retained nothing that he could subsequently sell to Lambert.

The complainant, Lambert, had no knowledge of the tidal conditions in 1908, because he had no acquaintance with the property until July, 1914.

Even Collins does not attempt to show that the high water in 1908 was oceanward of a line 314 feet south of Atlantic Avenue.

Martin's knowledge only extended to 1904; Leek left the coast service in 1902. Captain Strickland had knowledge of the beach from 1903 to 1910. He says (C., p. 259, l. 14) that during all of the time ordinary high water was between twenty-five and thirty feet outside of the Hannah Kelly bulkhead.

Captain Parker, another witness for the complainant (C., p. 262), who had knowledge of the beach from 1905 to 1911, said that the tide was anywhere from fifteen to thirty feet outside of the Kelly bulkhead.

The stipulation with reference to Mr. Risley was that he made an observation on one day, October 21, 1914, and high water line at that time was oceanward of the point 314 feet south of Atlantic Avenue. This, of course, is not helpful to show what the condition was in 1908, and it only was an observation on one day, without any testimony to establish what the surrounding conditions were.

Mr. Ashmead made an observation on July 28, 1909, and found high water line oceanward of 314 feet south of Atlantic Avenue. There is nothing to show what the other conditions were, in fact, Mr. Ashmead was not present at high tide; he merely took the observation from the line of water on the beach. It only happened on one day, and we submit is not to be accepted as evidence in contradiction of the testimony of the other witnesses. (C., p. 245 *et seq.*)

The conclusion, therefore, is that at no time from December 31, 1901, until Lambert began his operations in 1914, was ordinary high water oceanward of a line 314 feet south of Atlantic Avenue. Certainly the evidence shows it was inside of 314 feet in 1908. This being so, the conveyance from Turner to Reichner made the latter the

riparian owner, and no land was reserved by the former outside thereof, which he could subsequently convey to Lambert. Hence the title of the latter fails.

#### SEVENTH.

After the conveyance by Turner to L. Irving Reichner, by deed dated November 19, 1908 (Exhibit C 3), Turner did not retain any title which could be transmitted to Lambert.

Manifestly, if the original high water line, uninfluenced by artificial conditions, continued to be, so far as the State was concerned, as we contend it existed in 1901, Turner could not and did not convey any legal title to L. Irving Reichner by Exhibit C 3, and, consequently, there is no foundation for the claim of Lambert made under the Turner deed. If, however, it be found as a fact that the proper high water line in 1908 was oceanward of a line 275 feet south of Atlantic Avenue but landward of 314 feet south therefrom, then L. Irving Reichner became in 1908 the shore owner, by virtue of the Turner deed. (Exhibit C 3.)

See cases cited under the third division of this brief.

#### EIGHTH.

The title acquired by L. Irving Reichner as shore owner was vested in the defendant, Vare, at the time the State made its lease to her.

The Turner deed to L. Irving Reichner was dated November 19, 1906, and described the property as beginning 275 feet south of Atlantic Avenue, and running southward 39 feet. (Exhibit C 3; C., p. 298.)

On August 31, 1909, Reichner, together with his wife, conveyed (Exhibit D 10; C., p. 315) to James H. Aiken land beginning 236 feet south of Atlantic Avenue and running to the Atlantic Ocean. This made Aiken the shore owner, regardless of what is found to be the location of the high water line in 1901, if in 1908 it was landward of 314 feet south of Atlantic Avenue.

Aiken's title, acquired under this deed, was conveyed to Vare October 9, 1911 (Exhibit C 11; C., p. 315), by a description which begins 236 feet south of Atlantic Avenue and extending to the Atlantic Ocean.

It is unquestionably the fact, therefore, no matter what the Court may conclude to be the essential time to establish high water mark, whether in 1901 or 1908, that in 1911 the land beginning 236 feet south of Atlantic Avenue and extending to the ocean was vested in Aiken, and, on the last mentioned day, conveyed to Vare, which became the foundation of the riparian lease to her.

#### NINTH.

The covenant inserted in the deed from Turner to Reichner (Exhibit C 3; C., p. 295) does not control a disposition of the questions involving this case.

This covenant is as follows: (C., p. 15, l. 10.)

“Provided, however, and it is hereby expressly  
 “agreed and understood, that this conveyance is for  
 “a definite tract of land, and that the said party of  
 “the second part, his heirs or assigns, derive no title  
 “to lands oceanward of the tract hereby conveyed  
 “by reason of the said Atlantic Ocean at any time in  
 “the future encroaching upon said land hereby con-

“veyed, and upon said ocean receding from lands  
 “hereby conveyed the title to said lands oceanward  
 “of said lands hereby conveyed remains to said Jesse  
 “R. Turner, his heirs and assigns; it is also under-  
 “stood and agreed that in no case shall the said  
 “party of the second part, his heirs or assigns, have  
 “the right to apply for a riparian grant in front of  
 “the lands hereby conveyed, such a right being ex-  
 “pressly reserved to the said Jesse R. Turner, his  
 “heirs and assigns; it is hereby agreed that the pres-  
 “ent high water line is oceanward of the lands here-  
 “by conveyed, which lands do not border in the At-  
 “lantic Ocean, but that land now owned by Jesse R.  
 “Turner in front of lands hereby conveyed do bor-  
 “der on Atlantic Ocean, and that he, the said Jesse  
 “R. Turner, his heirs and assigns, have the exclusive  
 “right of applying for said riparian grant under all  
 “circumstances.”

We contend that the argument of counsel of complainant as to the effect of this covenant is not to be accepted for the following reasons:

A. The said covenant is a personal one and does not run with the lot described in the deed, because it had reference to and affected lands which were not the subject matter of the conveyance.

B. The defendant, Vare, does not claim title to the *locus in quo* by virtue of the deed from Turner to Reichner, in which the covenant was inserted.

High water line in 1901, as well as in 1908, was inside of a line 314 feet south of Atlantic Avenue, and the agreement on the part of Reichner not to apply for a riparian grant referred to land oceanward of the 314 feet line which was then under water, the title to which was in the State.

If it be found, as a fact, that high water line in 1901 was no farther oceanward than a line 275 feet south of Atlantic Avenue, Turner had no title to convey to Reichner, and the covenant would not be enforceable for that reason. Vare's title under such condition, therefore, would not be derived through the deed from Turner to Reichner. If high water line be established, as a fact, outside of the 275 feet line but inside of a line 314 feet south of Atlantic Avenue, then L. Irving Reichner became the shore owner, and Turner retained no title to the land oceanward thereof, which could be the subject matter of the covenant.

C. For the reasons stated in a former part of this brief, with relation to the effect of the restrictions contained in the deed from Kelly to Hilton (Exhibit D 2), we further contend that, as a matter of public policy, the agreement on the part of Reichner not to apply for a riparian grant, or to be possessed of any interest in land then under water, is not enforceable, particularly against the State.

D. It was not legal for Turner and Reichner to establish an arbitrary high water line contrary to the fact, and in opposition to the well established rule of law as shown by the cases herein cited, that where property, no matter by what description conveyed, is washed by the water, the grantee in such a deed becomes the riparian owner, and, under the statute, can be the only one to whom the riparian grant can be issued, except after being given an opportunity for a term of six months, to apply for a grant, upon notice given by some stranger.

E. The covenant in the Turner deed is not enforceable against the defendant Vare, upon the doctrine of estoppel, for the reasons set forth in the cases cited in support of this division of the brief.

The following authorities are cited to support the claim made in this point.

The leading case on this subject is Spencer's case, reported in 5 Rep., 16 and printed and commented on in 1 Smith's Leading Cas., 115. There Spencer demised a house and lot to S. for years. S. covenanted for himself, his executors, and administrators, that he, his executors, administrators or assigns would build a brick wall on part of the land demised. S. assigned the term to J. and J. to Clark. Spencer sued Clark for a breach of the covenant to build the wall. The court by the first resolve, held, that a covenant only bound the assignee when it was concerning a thing in esse, parcel of demise, not when it related to a wall to be built. By the second resolve, they held, that if the covenant had bound the assigns by express words, it would have bound the assignee, although it was for a thing to be newly made, as it was to be upon the thing demised, but that if the covenant was for a thing to be done collateral to the land, or did not touch or concern the thing demised, in any sort, as if it were to build a house upon other lands of the lessor, the assignee should not be charged, although the covenant was for the covenantor and his assigns.

The two principles thus settled, have always been acknowledged as law, to wit :

That the assignee when not named, is not bound by a covenant, except it relates to a thing in case at the time; and that when named, he is not bound by a covenant col-

lateral to the land, but only for things to be done on, or concerning the land.

The case of *Mayor of Congleton vs. Pattison*, 10 East, 130, confirms these positions. In that case the plaintiff demised to Clayton, mills in Congleton; he covenanted for himself and assigns, to hire no one to work in the mills but inhabitants of Congleton. Clayton assigned to Pattison who was sued on the covenant. Held. Although the thing to be done was on the premises demised, yet as it did not affect the use of them, but only the value of other lands of the lessors in Congleton by relieving them of a release of poor rates, the Court held the assignee was not bound.

In order that a covenant may run with the land, that is, that its benefit or obligation may pass with the ownership, it must be with respect to the thing granted or demised, and the act covenanted to be done or omitted must concern the land or estate conveyed.

*National Bank vs. Segus*, 39 L., 173.

The owner of real estate sold a portion of it, and covenanted with the purchaser that neither he nor his assigns would sell any more from off the residue of the tract. Suit brought against the alienee of the grantor by the alienee of the covenantor. Held. To charge land with the burden of a covenant there must be some privity of estate between the covenantee and the assignee of the lands so burdened (Turner and Vare in this instance) or he will not be charged with the covenant. Here there is no privity.

*Brewer vs. Marshall*, 18 E., 337; 19 E., 537.

A tunnel company, in the course of the condemnation proceedings to acquire a right of way under the property

of a railroad company, executed a covenant that it would not at any time thereafter institute proceedings to condemn any right or interest whatever under any lands belonging to such railroad company lying between certain boundaries where the tunnel was located. Held. That the covenant was not one running with the land, and therefore, did not pass to defendant, who acquired property of the tunnel company under foreclosure of a mortgage.

*Morris &c. R. Co. vs. Hoboken, 68 E., 328.*

In a deed from A. to C. the latter covenanted, for himself and heirs and assigns, that neither he nor they would claim any damage arising to the land conveyed from the building on the adjoining land, belonging to A. of a railroad then to be built. C's grantee brings a suit for damages. The defendant sets up the covenant as a release. Held. The covenant contained in the deed from A. to C. was not available by the defendant as a defense for the reasons, (1) that the covenant was not a grant of an easement, or of a right in the nature of an easement, and that if it be a covenant real, it did not at law run with the lands and bind the alienee of the covenantor, and (2) that the covenant, being contained in a deed inter partes, must be construed as a covenant inter partes with A. individually for his personal indemnity against the recovery of damages from him.

*Costigan vs. P. R. R., 54 L., 233.*

If the lessee covenant for him and his assigns, that they will make a new wall upon part of the thing demised, it shall bind the assignee. But if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, then the assignee shall

not be charged, though he be named in the covenant. The covenant is a mere personal covenant not affecting the thing demised.

*Conover vs. Smith, 17 E., 51.*

*See Anson on Contracts, 307-311.*

The general rule, except between lessor and lessee, or in cases where a right in the nature of an easement is created, prevents the burden of a covenant from running with the land, even in cases where the benefit might.

*Bordentown vs. Anderson, 81 L., 434.*

#### TENTH.

The riparian lease to Vare cannot be attacked collaterally.

Assuming that it has been established in this case that Vare was the riparian owner when the lease was made to her in 1915, and that Turner was not the riparian owner when the lease was made to him in 1914, then it follows that so far as the title of the State is concerned, the former lease is entitled to be recognized as against the latter lease, notwithstanding it is later in point of time.

The State, of course, was not and could not be a party to the covenant contained in the Turner deed to Reichner, and, consequently, was not bound by the terms thereof. The State had the statutory power to make a lease to the person who was in fact the riparian owner, and such lease, when made, would be a complete acquisition of the State's rights in the lands described therein. In other words, the transaction was a perfectly valid and legal one so far as the State was concerned, and the defendant, Vare, under

the terms of her lease, became legally vested with the State's title. It results therefore, that the title of the defendant, Vare, under the State's grant thus legally made, is paramount to any right or interest of the complainant, Lambert, regardless of the covenant.

If the covenant ran with the land, or the defendant, Vare, was bound by the terms thereof not to apply for a grant, yet if such an application be made, and the State convey to her its interest in the *locus in quo*, this Court, in the present proceeding, at least, cannot, in any way, according to the established rules of law, make a decree which could have the effect of rendering the State's lease ineffectual and void.

We contend that under the cases, the complainant, Lambert, is not entitled, by reason of the covenant contained in the Turner deed, to attack collaterally the State's grant:

It has been repeatedly held in this State and elsewhere that the validity of the State's grant cannot be attacked. Such grant is from the sovereign power, and is protected from collateral attack, except through false suggestions appearing on the face of the grant.

*Gough vs. Bell*, 22 L., 441, 486.

*Elizabeth vs. Central*, 53 L., 491.

*Polhemus vs. Bateman*, 60 L., 163.

*Sooy Oyster Company vs. Gaskill*, 69 Atl., 1064.

*McCarter vs. Sooy*, 75 Atl., 211.

Inasmuch as the only objection urged by the complainant upon this branch of the case against the validity of the lease to Vare is that it was secured in violation to the covenant contained in the deed from Turner to Reichner, it is perfectly apparent that such covenant can-

not be accepted as the basis of a collateral attack upon the State's lease.

We contend, therefore, that no matter what may be the determination of the Court as to the essential time for the ascertainment of the location of the high water line, whether in 1901 or 1908, the title to the *locus in quo*, at the time of the filing of this bill was in the defendant, Vare, and a decree to that effect should have been entered.

#### ELEVENTH.

The learned Vice Chancellor erred in permitting the introduction, in evidence, of a mortgage dated March 30, 1903, made by Turner and wife to Hannah E. Kelly (Exhibit C 17; C., p. 193, l. 9), and also erred in permitting the complainant to introduce testimony that the property conveyed by Hannah E. Kelly to Turner, under Exhibit C 11, was sold subject to a mortgage.

We contend that it was entirely immaterial and irrelevant as to whether or not the lands and premises, on the oceanward side of a line 314 feet south of Atlantic Avenue, were sold by Kelly for cash, or subject to a mortgage, and the complainant should not have been permitted to introduce this evidence.

The petition of appeal alleges this is one of the grounds for reversal. (C., p. 4, l. 16.)

#### TWELFTH.

The learned Court also erred in permitting the complainant to introduce conversations between the witness,

Daniel L. Collins, and L. Irving Reichner. (C., p. 220, *et seq.*)

The petition of appeal alleges this error was one of the causes of reversal. (C., p. 4, l. 30.)

This testimony referred to conversations between Collins and Reichner. There seems to be no ground whatever for the introduction of the same. Reichner was not a party to the suit, the testimony was not binding upon the defendant, Vare, and it was entirely hearsay, and we insist that the introduction of this testimony was erroneous.

Upon the whole case, therefore, we most respectfully contend that the decree of the Court below should be reversed.

Respectfully submitted,

LEWIS STARR,

CHARLES C. BABCOCK,

Solicitors for and of Counsel with Defedant, Vare.



