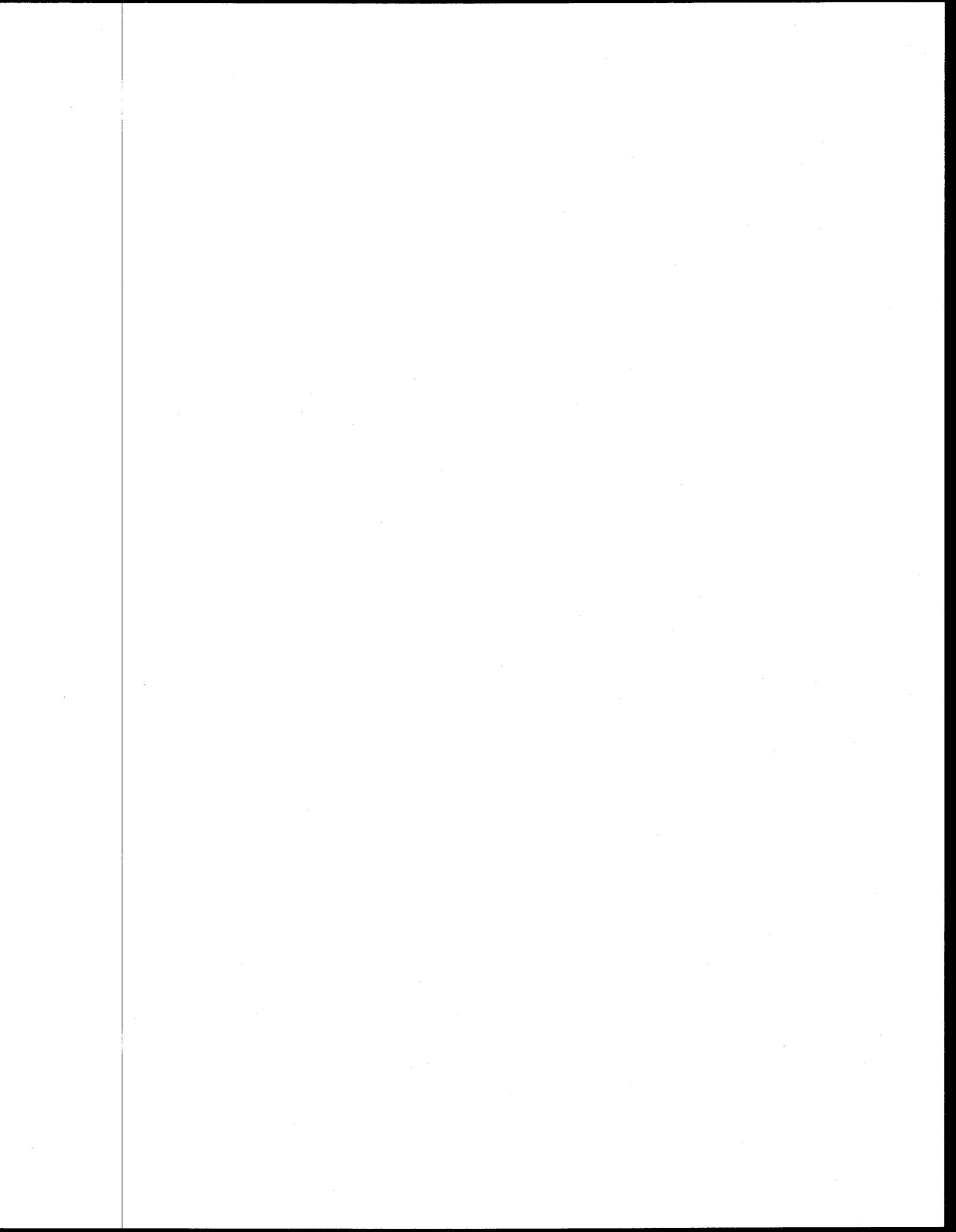


SC_5



1 for identification.

2 THOMPSON: If the court please, I will state, by way
3 of an opening statement, that this is a quiet title
4 action, involving lands which we expect to
5 show appear upon this map, marked for identification
6 and which land appears to be in colored crayon. The
7 plaintiff claims to be the owner of that land and
8 we expect to prove, that she acquired title to same,
9 through original government patent from the United
10 States, and we expect to show that this land is
11 bordered on the West, by the Pacific Ocean and on
12 the South, we expect to show that the land goes to
13 the center of the Carmel River, our theory being,
14 it is not a navigable stream and the land adjoining,
15 takes to the middle under the Code Section. This,
16 (Indicating on map) is the land in dispute, the
17 defendant, Carmel Sanitary District, a couple of
18 years ago, had an act passed through the Legislature,
19 granting to the Carmel Sanitary District, the right
20 title and interest of the State of California, in
21 and to a large tract of land, which runs up the
22 Carmel River a mile or two and across the river and
23 down on the other bank and includes this particular
24 land as well as considerable other land. Under the

1 THE COURT: I think I will hear all of the argument at or
2 time, but, personally, I don't believe the testimony
3 of the geologist would be very helpful to me.

4 WYCKOFF: Suppose we let this stand and finish the
5 evidentiary testimony here, and after I get a
6 letter from him I will ask your honor to hear it
7 because this is not a case where the plaintiff is
8 suffering for an early disposal of the case.

9 THE COURT: For the purposes of Mr. Thompson's motion for
10 none- suit in order that he may have his point,
11 I would like to have the argument at one time.

12 - - - - -

13 J.H. STEWART, being first duly sworn, testified
14 as follows:

15 THOMPSON: You have been a resident of Carmel Valley for
16 many years? A 59 years.

17 Q And how old were you when you came to the Carmel
18 Valley 59 years ago? A 7 years old.

19 Q You have lived there ever since? A Yes, I have
20 lived in the valley ever since.

21 Q What is your business? A My business now is
22 orchards. I have an orchard up the valley a little
23 ways.

24 Q Will you state, in a general way, how much you know

1 morning if there could be some interpretation of
2 what that amount of sand piled there means and
3 what might have been the condition in 1872 when
4 the survey was made.

5 THOMPSON: I don't see the theory of it, and if they res-
6 their case, I wish to make a formal motion for
7 non-suit on the ground that it has not been proved
8 the land in dispute was tide lands, and that is
9 the only condition under which the State of
10 California had any right in these lands; there is
11 no proof that the river is navigable, and the only
12 thing left is the theory that it is navigable
13 and it has not been shown that it is or that they
14 are tide lands.

15 THE COURT: Of course, a geologist's theory of the con-
16 ditions as they existed, when the survey was made
17 of the meander line will not be of any help, or
18 would it be material, in absence of a showing
19 that the government surveyors knew of that condition
20 at that time.

21 WYCKOFF: They knew where the north bank of the Carmel
22 River was.

23 -----

24 Argument between Counsel

1 about the mouth of the Carmel River, and how much
2 you have seen of that in the last 59 years?

3 A I will state that I lived near the mouth of
4 the river 38 years continuously.. I had an interest
5 in a dairy there for 39 years, and I had occasion
6 to be around that place every day, in fact, I had
7 my cows pastured down there all summer at the mouth
8 of the river and in winter time us boys
9 were spearing these steelheads night and day. We
10 would go down at low tide, and we would wait for
11 them at night so we were pretty well familiar with
12 that part of the country.

13 Q Did you ever go swimming in that little lagoon?

14 A Yes, sometimes 3 and 4 times a day when the
15 neighborhood boys came along, sometimes once, and
16 sometimes not every day, but it was lots of times
17 anyway. I came there in March, 1871.

18 THE COURT: Then you were about 15 years old in 1874?

19 A No, I was only 10. I was born in 1864.

20 WYCKOFF: This patent is dated the first of July, 1874,
21 but was not to be recorded until October 1st, 1875.

22 THE COURT: You came there in 1871? A Yes.

23 Q At that time you were 7 years of age? A Yes.

24 Q 3 years later, 1874, when this was patented, you

1 were 3 years older, so you were 10 years old
2 when this patent was issued? A Yes.

3 THOMPSON: At the time you were ten years old, where were
4 you living? A Right near the mouth of the river -
5 west of the old mission.

6 Q And that year you saw the river over it? A Yes,
7 I could see it from the house, at that time.

8 Q What do you know about the place where the Carmel
9 River has entered the Pacific Ocean in the last
10 59 years? A It is practically the same place.

11 There has been very little change. Sometimes it
12 runs North and sometimes it empties the other way
13 a little ways, but it has been for the most part
14 in the same place it is right now for the last
15 59 years.

16 Q It has not varied very much? A No, only for
17 short times. Sometimes when it is low it would
18 be forced by the tide to run north. I have seen
19 it as much as 4 times, at least 3 times, going
20 pretty well north. If the river recedes a little,
21 the tides force it that way, and it keeps emptying
22 out that way.

23 Q During the 59 years, how many times was it opened
24 by hand - by artificial means? A I could not

1 CARMEI MARTIN, being first duly sworn, testified
2 as follows:

3 THOMPSON: Your name is Carmel Martin? A Yes.

4 Q You are one of the heirs mentioned, in the deed
5 from your mother and children, to J.F. Devendorf?

6 A Yes.

7 Q And a son of John Martin? A Yes.

8 Q And you are a practicing attorney at law, in the
9 State of California and have been for several years?

10 A Yes.

11 Q You were born and raised in Monterey County, I believe

12 A Yes, sir.

13 Q Will you state, in a general way, how familiar you have
14 been with the mouth of the Carmel River. A I will
15 state I was born near the Carmel Mission, right near
16 the mouth of the river, July 5, 1879. After I
17 arrived at school age, we used to wade the river,
18 beginning in the early part of March of each winter,
19 and go to the Bay School, which is near the mouth
20 of the San Jose Creek and part of the time, we waded
21 the river right at the point where this question of
22 title is concerned and part of the time further up
23 the river. That continued until I was perhaps 12,
24 or 14 years of age and then the bridge was built

1 government plats, did you have in making your
2 survey? What calls in the plat and what part
3 of the government plat did you use in making this
4 particular map? A Well, the calls for the bound-
5 ary, you mean?
6 Q The calls for the boundary. A It comes down the
7 Pacific Ocean, until it comes to the mouth of the
8 Carmel River and then up the north bank of the
9 river, I believe is what the field notes say. I
10 don't remember just now.

11 Re-cross examination

12 -----
13 WYCKOFF: That is your interpretation of something, and
14 you have deliberately omitted all courses and
15 distances on the map contained in the meander line,
16 of the survey, from which you plotted it. A I
17 omitted the meander lines, yes.

18 Q You have omitted plotting those? A Yes.

19 -----
20 At this time a recess is taken until 1:45 P.M. of
21 the same day, at which time court reconvenes and the
22 following proceedings are had:

23 THE COURT: Who is A. M. Allan?

24 THOMPSON: He defaulted.

1 and when the river was high we crossed the bridge,
2 about a mile from the property in question. Also,
3 all of our family, when we were young folks, we
4 used to spear Steelhead Trout or salmon, as we
5 called them, in the mouth of this river all winter
6 long, from the opening of the river in the late
7 fall, generally around the early part of December
8 of each year, we would fish for Steelhead and spear
9 them in this river and, in order to spear them, you
10 had to get right into the stream; you could not
11 spear them from the bank, you had to get right down
12 into the water and we were in the water, all the way
13 from our ankles up, until the law went into effect,
14 prohibiting the spearing of Steelhead, which was
15 15 or 20 years ago, I believe. Besides that, we
16 used to hunt Ducks there all of the time and in
17 the spring after the Steelhead and Trout stopped
18 running then we would fish for the **small** Steelhead
19 trout with a fishing rod. We did not use rods
20 however, we simply used a piece of can pole, to
21 fish, and we continued fishing for trout, more or
22 less all through the summer season, until the water
23 got somewhat stagnant, by being impounded for a
24 long period of time, when the trout tasted of the

1 brackish water, and then we would stop fishing,
2 until the dusk season started again, which was
3 early in the fall.

4 Q Well, so you are about 51 years of age now? A Yes.

5 Q And you have known that river ever since you were
6 a boy? A I have.

7 Q And I will refer you now to a map, which has been
8 identified here, and ask you if you are familiar with
9 the land shown in green there - the land in dispute
10 in this action. A Yes, I am.

11 Q And you were one of the grantors who granted that
12 property, in green, with other land, to J.F.
13 Devendorf? A Yes, I might say I went down there,
14 with Mr. Severance at the time he was running the
15 line. I was with him at the time he made that
16 survey.

17 THE COURT: Is that the 1908 survey? A 1907, I think.
18 The property was granted in 1908, but the survey
19 was made the year before.

20 THOMPSON: Now that southern boundary of the property,
21 shown in green, was where, in respect to the middle
22 of the Carmel River at the time of that survey
23 in 1907 was made? A My instructions to Severance at
24 that time were to run the survey to the center of

1 the river.

2 Q Now, there is also a letter "H" there, which has
3 been designated by Mr. Severance to be the actual
4 mouth of the river where it enters the ocean -
5 you have been familiar all of these years with
6 that entrance to the ocean, have you? A Yes,
7 I have, excepting from 1904 to 1907, I was away
8 at college and during that time I was not familiar
9 with it.

10 Q That is, as a matter of fact, the exact spot where
11 you used to get the Steelheads? A Yes, the mouth
12 of the river where it is now, and as to where it
13 was in 1907, is approximately in the same vicinity.
14 As a matter of fact, during all of these years
15 that I have been familiar with it, the mouth has
16 been in the immediate vicinity where it is now.
17 In fact, as a rule, it was a little bit further
18 south, maybe 100 yards further south than now, by
19 reason of the fact that at that particular point
20 there is a natural channel in which the river the
21 majority of the time is, being there is rocks on
22 both sides of it and a depression between those
23 rocks and as a usual thing the river gets in that
24 channel and seeps through, until it gets to the

1 ocean, except twice to my memory, the river has
2 run to the north of its present location to
3 the north and emptied in the sea up by the
4 rocks that are practically underneath this point.

5 THE COURT: Indicating a point on Plaintiff's Exhibit
6 1, for identification. A Where the sand and
7 rocks join.

8 THOMPSON: You might mark that.

9 THE COURT: Mark it "CML" will you, Mr. Martin? Now
10 that "CML" indicates the point where the river
11 emptied in on two different occasions. A Yes,
12 that I recall. That was back when I was about 15,
13 because in going from school we stopped to swim
14 there every night.

15 THOMPSON: When was the other time? A 1927.

16 Q Those are the only two times in the last forty
17 years, that you know of? A That I can recall,
18 and that was only during the winter and then it
19 barred up in the late spring. It shifted back to
20 its usual mouth, the following winter.

21 Q What do you know in regard to navigation in the
22 Carmel River? A Using the term from the standards
23 of commerce, why there never has been any navigation
24 of any kind on that river.

1 Q Has there ever been any travel over the Carmel River
2 or any part of it for trade or commerce? A No.

3 WYCKOFF: May I interrupt a moment? When was it before
4 1927 that the witness testified the river ran to
5 the north? A I was about 15 years old and that
6 would be about 1894.

7 THEOMPSON: About 35 years ago? A Yes, about that.

8 Q What do you know about the Carmel River, as to
9 whether it is susceptible of being used for trade and
10 commerce? A It is entirely too shallow.

11 Q No possibility of it? A No, absolutely not. There
12 has never been a boat come in there that I ever
13 heard of, in fact, I never saw anybody ever attempt
14 it.

15 Q Has it ever been used for flotation of logs? A No,
16 the only navigation, to answer the question - the
17 only navigation or use of the water at all, has been
18 using row boats or hunters going after ducks and that
19 was on the water that has been impounded in the bar,
20 when the bar is across the mouth, and it is still wat

21 Q That is just when - just one particular spot in the
22 river? A In the lagoon.

23 Q It is a sort of a lagoon or pond made by the barring
24 of the actual entrance into the ocean? A Yes, that

1 is it.

2 Q It is similar to the Carrapatos and Mal Poso and
3 San Jose Creeks. In all of those creeks, after the
4 winter's waters go down, there is a small lagoon
5 remains inside of the bar, particularly the San Jose
6 Creek. I am not so familiar with the Garropatos,
7 although I have seen it.

8 Q There has never been any navigation on any of those?

9 A No.

10 Q Do you know about when the Pacific Improvement Co.,
11 dam was built up the Carmel Valley in the Carmel
12 River? A No, I don't know the date, although I
13 know it was many, many years ago.

14 Q Somewhere around 1885, possibly? A I judge so,
15 because about that time my father granted a water
16 right to the Pacific Improvement Co., and as I
17 remember hearing them talk about it, it was about
18 that time that the dam was built, although I don't
19 know the date.

20 Q Can you state anything in regard to the difference
21 between the flow down the Carmel River then after
22 the dam was built? A Well, I believe since that
23 dam was constructed I don't believe there was much
24 change in the flow of water.

1 Q How about now? A Well, now there is considerably
2 less, of course, because of the large dam that
3 is in the river now. It impounds a lot of the
4 water and the water that used to flow on past the
5 dam in the spring of the year is now practically
6 all retained by the large dam.

7 Q About when was the large dam built? A It seems
8 to me 10 or 12 years ago, but I don't know that
9 date positively, that is just a statement on my
10 part to the best of my recollection.

11 Q Have any of the settlers along the Carmel River
12 ever used the Carmel River as a means of conveying
13 their products to market? A No.

14 Q And the river is not capable of doing that? A No,
15 if there was a high flood, there might be at that
16 particular time sufficient water for a larger boat
17 to go on it, but the current is so severe when
18 there is much water that they cannot make any
19 progress at all.

20 Q This is a mountain creek, is it? A Yes, and a
21 lot of precipitation in it.

22 Q And during a portion of the year, does it prac-
23 tically dry up? A It dries up for quite a long
24 distance from the mouth upstream for several

1 miles, in fact I think last summer it was dry
2 for a distance of 12 or 15 miles up the river.

3 Q Well, in the vicinity of the mouth, during what
4 portion of the year does it go substantially dry?

5 A With the usual winter it ceases to flow into
6 the lagoon along the latter part of June, and,
7 if it is a dry winter, earlier than that, and
8 remains dry until the rains come in the fall.

9 Q Somewhere along in December? A Yes, the early
10 part of December, generally.

11 Q Not even a small boat could go down the river
12 for half the year, is that correct? A No.

13 Q Now, during all of these years, what has been
14 customary right at the mouth of the river in
15 respect to barring by the sand or anything? A If
16 the rains are not very heavy in the early part of
17 December sometimes it remains barred even from
18 December up to January, until there is sufficient
19 rain falls in the mountains, to cause enough water
20 to come down to raise up the small lagoon that
21 remains in the mouth of the river to force it
22 over the top of the bar unless somebody assists
23 in cutting through the bar or cutting the channel
24 to help it get through, but usually it opens

1 sometime during the month of December and usually
2 remains open. It may be closed up for a few days
3 at times and unless it is an exceptionally dry
4 winter then it remains open until the month of
5 June, or sometimes the latter part of May, and
6 generally in recent years it is barred up by the
7 first of July.

8 Q And then what are the conditions around there,
9 after it is barred up, until the next winter's rain?

10 A There is a small lagoon forms in the mouth of
11 the river when the river gets very shallow. At
12 first there is a little stream flowing in it and
13 gradually, as the summer comes on, the stream dries
14 up and the lagoon starts to recede and when the
15 supply of water ceases to come in, then evaporation
16 takes place and the lagoon starts to shrink and
17 shrinks up to a point just about where this eastern
18 boundary of this green place is.

19 Q Referring to the eastern boundary of the southern
20 part of the property, described in green? A Yes.

21 THE COURT: On Plaintiff's Exhibit 1 for identification?

22 THOMPSON: Yes. A And remains that way until the high
23 equinoxial tides start to come in, generally during
24 the latter part of September, we have some rough

1 seas and the seas roll up on the bar between the
2 lagoon and the ocean and there are some waves
3 sometimes splash over, and there is a certain amount
4 of seepage starts to seep through.

5 Q And the subterranean flow of the Carmel River,
6 do you know whether people have dug holes there
7 for their cows, or what do you know about that?

8 A Yes, there is some water in the sand all through
9 the summer by digging down 2 or 3 feet.

10 Q There is a subterranean flow, although the surface
11 seems dry? A Yes.

12 Q You are familiar with the property there of Mrs. Otey?

13 A Yes.

14 Q And in a general way, will you describe what it is?

15 A This portion of it here that runs up into the
16 channel of the river, the southern part of it, is
17 generally in the water, both in summer and in winter,
18 particularly the western part if it, from a point
19 a little bit south of this angle here, you get into
20 a sand bar.

21 THE COURT: Mark it "CM2".

22 THOMPSON: I will show you a line -

23 THE COURT: Mark that on the map.

24 THOMPSON: "CM2" ?