

NOTICE OF APPEAL
NEW JERSEY SUPREME COURT

William H. Perrine, Trustee, Plaintiff, vs. John Warner, Defendant.	}	In Tort. Notice of Appeal.	10
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The defendant hereby appeals from the Judgment of the New Jersey Supreme Court entered in the above entitled cause in favor of the said plaintiff against the defendant, on the fourth day of May, nineteen hundred and twelve, to the Court of Errors and Appeals, in the last resort in all causes. 20

To LEWIS STARR, ESQ.,
Attorney of Respondent..

A. H. SWACKHAMER,
Attorney of Appellant.

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GROUNDS OF APPEAL
NEW JERSEY COURT OF ERRORS AND
APPEALS

10	William M. Perrine, Trustee, (Plaintiff) Appellee, vs. John Warner, (Defendant) Appellant.	} In Tort. } Grounds of Appeal.
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The defendant states the following grounds of appeal.

20 First—That by the record it appears that judgment was given for the plaintiff below, whereas by the law of the land, judgment ought to have been given for the defendant below and against the plaintiff.

Second—The trial Judge directed the jury to render a verdict for the plaintiff, whereas the said Judge should have non-suited the said plaintiff.

30 Third—The said Judge decided that the plaintiff had such title to the lands and premises described in the declaration in said cause as would sustain an action of trespass against the defendant for walking and hunting upon said lands.

Fourth—The said Judge decided that upon the reclamation of the said marsh lands from the over-flow

GROUNDS OF APPEAL

of the tides by the owner of the adjoining uplands, the title to said re-claimed flats vested in said owner to said uplands and passed to the plaintiff as lessee who had the exclusive right of possession to said flats, notwithstanding the lands so re-claimed had been abandoned to the tides more than thirty years.

Fifth—The said Judge decided that neither the State nor the citizens thereof have any right to hunt or fish on the tide waters of the State which flow and re-flow over the lands once re-claimed by an adjoining owner of uplands, but which have been abandoned to the tides for more than thirty years.

A. H. SWACKHAMER,

Attorney of Appellant.

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STATE OF CASE
NEW JERSEY COURT OF ERRORS AND
APPEALS

10	William M. Perrine, Trustee, Plaintiff-Appellee, vs. John Warner, Defendant-Appellant.	}	On Appeal.
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20 The parties hereto, by their respective attorneys, hereby agree upon the following state of case, to be used in the above named Court upon the argument of the appeal taken from a judgment entered in the New Jersey Supreme Court in favor of the plaintiff, after trial before the Honorable C. L. Cole, Circuit Court Judge, and a jury:

30 1. On November 2, 1911, the plaintiff was in possession, so far as it was possible for him to be in possession of land submerged at every high tide, of the lands and premises described in the declaration filed in this cause, being part of what is known as Supawanna Meadow Company, his right of possession accruing, inter alia, by virtue of a lease made by William T. Hilliard, Treasurer, of Supawanna Meadow Company, to Joseph H. Ward, dated August 23, 1884, covering the premises in question, and an assignment of said lease dated March 12th, 1903, made by Maria E. Ward, and others, widow

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and heirs of said Joseph H. Ward, deceased, to the said plaintiff.

2. On July 26, 1905, the Riparian Commissioners gave permission and license by a revocable license to William M. Perrine, his successors or assigns to use and occupy for agricultural purposes or hunting, gunning and fishing or for any other lawful use whatever, that portion of the land situate between the boundary of the lands described in the lease aforesaid and low water mark of Salem Creek and Delaware River, for the sum of Fifty Dollars (\$50.) per year, payable semi-annually in advance, which license was in force on November 2, 1911. 10

3. The premises described in the declaration are included within the limits of the Supawanna Meadow Company, organized pursuant to a return of Commissioners, duly appointed under the terms of an Act of the Legislature of the State of New Jersey entitled "An Act to enable the owners of the tide swamps and marshes to improve the same and the owners of meadows already banked in and held by different persons, to keep the same in repair," passed November 29, 1788, and the various supplements thereto and acts amendatory thereof. 20

4. The lease aforesaid, made by Ward and subsequently assigned to the plaintiff, was legally executed under the terms of the acts mentioned in the last preceding paragraph. 30

5. In addition to the lease mentioned in paragraph 1 hereto, the right of possession, vested in the plaintiff, is derived from various conveyances, made by the persons named as owners of said meadow lands

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in the report of Commissioners aforesaid and their heirs.

6. That from 1835 and prior to 1878 the plaintiff's grantors, lessors and predecessors in title were in the actual possession of the lands and premises described in the lease mentioned in paragraph No. 1
10 hereof, comprising all of the lands and premises described in the plaintiff's declaration and used the same for agricultural purposes generally.

7. The lands described in said declaration were formerly part of the banked in meadow of the said Supawanna Meadow Co., which had been re-claimed from the tide some time before the year eighteen hundred and thirty-five. In 1878, the bank surrounding said meadow became broken down and although one or two ineffectual attempts were made to repair the same,
20 the bank was never entirely rebuilt, and since 1878 the lands in the possession of the said plaintiff, under his said lease, conveyances and license, have been subject to the ebb and flow of the tide and covered at high water and exposed at low tide. The original banks have been washed away and in many places no traces of where they were can be found, except where the sides were reinforced by stone, the line of the latter being exposed at low tide.

8. Since the tide has been permitted to ebb and
30 flow over the premises in question, the plaintiff and his predecessors in title, through whom he obtained his title, exercised the right of gunning, fishing, trapping and hunting over the same, built and used shooting blinds thereon, closed the ditches and breeches in the

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bank with posts and piling, which piling, however, permitted the water to ebb and flow, but prevented trespassers coming on the meadow in boats. The plaintiff also maintained watchmen to exclude trespassers therefrom and forbade all persons from going on the same for any purpose whatever. Since the tide has been permitted to ebb and flow over the same the said meadow has been individually assessed to the plaintiff and the prior owners thereof and taxes paid on the same yearly. 10

9. Prior to November 2, 1911, the plaintiff had caused to be posted, public notices signed by himself, forbidding trespassing on the lands described in the said declaration, such notices being posted, conspicuously, adjacent to the highways bounding on said lands and adjacent to all usual entrance ways to the same, both on the water and land sides. 20

10. On November 2, 1911, the defendant, carrying a gun, went on and walked upon the lands described in the declaration and inside the old original bank, which lands were then in possession of the plaintiff, in the sense that he paid taxes thereon and made use of the same for the purposes above indicated, notwithstanding the same were submerged at high tide.

11. After the plaintiff had closed the taking of his testimony, the defendant made a motion for non-suit, the grounds being stated as follows: 30

"MR. DAVIS: If your Honor please, I want at this time to make a motion for non-suit on several grounds: The first one is that there is a difference be-

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tween the actual acreage included in the map which is in evidence and the assessed acreage, a difference of, I think, something like a hundred and some acres, and that being true, the part of that land which was included in the old bank being something like six hundred and some acres as appears by a notation on the corner of the map and the part or so much thereof as is conveyed by
10 lease being four hundred and some acres, it does not lie within the mouth of the plaintiff to say just what portion of that this supposed trespass was committed upon, and therefore for that reason he ought not be able to maintain an action of trespass, without showing that the trespass was actually committed upon an actual part which he holds by lease, and that he has failed to do; failed to show what portion included within that old bank or the new bank, either, that was excluded from
20 the lease and from the actual assessment.

The second reason is that when the Supawanna Meadow Company refused to put up the bank and let this meadow go out to the tide without any intention of reclaiming it, that they were divested of title and the meadow land then became a part of the title land of the state, just as the bottom of the river, just as any part of the shore or any part of the river. They had put themselves out of any position in which they could convey title and from that time on it has been just as any
30 other portion of the title land over which the State exercises any dominion at all.

The third point which I want to call your Honor's attention is the statute which has passed last year which took fresh meadow—and this is admitted by counsel on

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the other side—out of the trespass act and said that a trespass where notices had been posted where everything had been done just as has been in this case—that in such a case when a person was proved to be guilty of trespass, that he should be fined not less than ten dollars and I think a hundred dollars except fresh water meadow. It explicitly took that out of the statute and made an exception of that, and our contention is that this is the exception, that no trespass can be maintained because of the statute of last year. 10

THE COURT: I will deny the motion to nonsuit and allow you an exception.

(Whereupon, the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.) 20
(Seal)."

12. After the motion to non suit was refused, Mr. Davis, the attorney of the defendant, made the following statement to the Court:

"MR. DAVIS: If your Honor please, I do not see that there is very much for the jury to pass upon. We want this case determined. We want the questions of law involved settled by the highest Court in New Jersey, and while in this case the plaintiff denies that he was where he is said to have been seen we want the question of law determined, and so we admit that we were on this land where he is alleged to have been seen, and that question alone is about the only question that I see the 30

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jury could pass upon in the case. Aside from that the whole thing is a question of law entirely.

THE COURT: If he puts in no defense, I shall instruct the jury accordingly. I understand you do not intend to put in any defense?

10 MR. DAVIS: I do not. I move for a direction of a verdict for the defendant.

THE COURT: It is denied.

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

(Seal)."

20 13. After the motion for direction in favor of the plaintiff was refused, the following is a recital of what occurred at the trial:

"MR. STARR: I move for a direction for the plaintiff for nominal damages.

30 THE COURT: Gentlemen, as this case is made, it being an action in trespass, claim being made by the plaintiff that the defendant trespassed upon his land, and the proof indicating to my satisfaction that there was a trespass upon land to which the plaintiff either had title or a possession that was superior to the right of the defendant, and the proof showing that there was

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an entry which in law in my judgment amounted to a trespass and there being no justification, it is my duty to charge you that you must find a verdict for the plaintiff that the defendant is guilty, and as there is no proof in this case of any substantial damages, your verdict will be for six cents, so that you will find the defendant guilty and assess the damages against him at six cents.

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

(Seal)."

14. Judgment has been entered in favor of the plaintiff in accordance with the foregoing.

Signing of the exceptions is waived.

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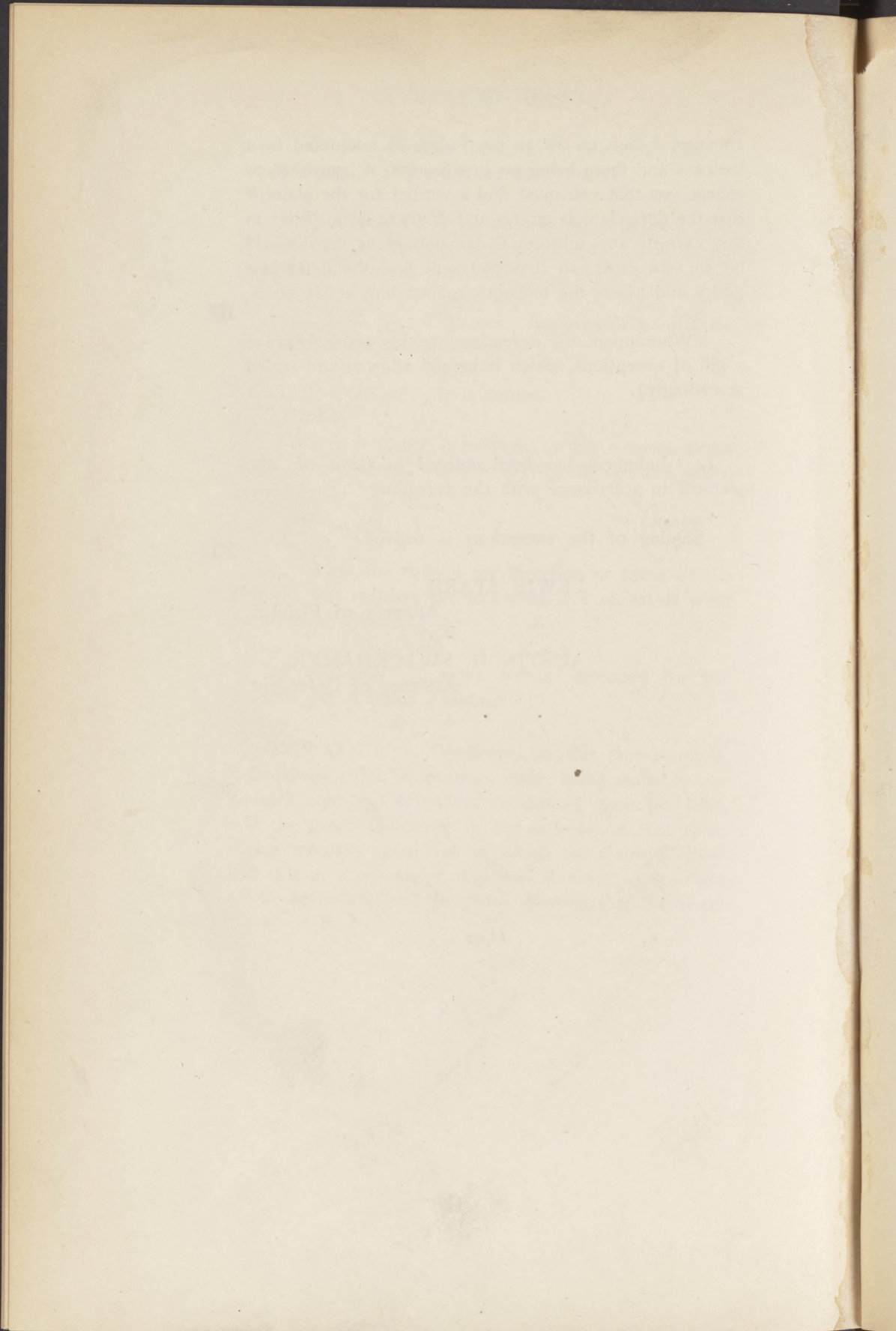
LEWIS STARR,

Attorney of Plaintiff.

AUSTIN H. SWACKHAMER,

Attorney of Defendant.

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New Jersey Supreme Court

SALEM COUNTY: ss.

As of the 14 day of November 1911, John Warner the defendant in this suit, is summoned to answer unto William M. Perrine, Trustee, the plaintiff therein, in action of tort and thereupon the plaintiff by Lewis Starr, his attorney, complains for that, whereas, the said defendant on the second day of November nineteen hundred and eleven, at Salem, in the County of Salem aforesaid, and within the jurisdiction of this Court, with force and arms &c. broke and entered the close of the said plaintiff; to wit: 10

All that certain tract or meadow land or marsh, situate in the township of Lower Penn's Neck, County of Salem and State of New Jersey, lying and being within the bounds of what is known as the Supanna Meadow Bank Company, bounded on the south and west by the Salem Creek and Delaware river, on the north and east by upland of William M. Perrine, trustee, James Butcher, William Johnson, Millicant B. Tyler, and others, excepting however, therefrom a piece or tract of land known as Hickory Island; 20
to wit at Salem aforesaid, and that his feet in walking trod down, consumed and spoiled the grass and herbage growing thereon of great value, to wit, of the value of One Hundred Dollars, and did then and there force and break open, break to pieces and damaged and spoiled divers gates and fences of the said plaintiff of great value, to wit: the value of One Hundred Dollars, and

also did then and there put, place and erect and caused to be put, placed and erected, divers blinds and other structures in and upon said close and kept and continued said blinds and other structures so there put, placed and erected, without the leave or license and against the will of the said plaintiff for a long space of time, to wit, from the said second day of November, nineteen hundred and eleven, and thereby and therewith during all the time aforesaid, greatly encumbered the
10 said close aforesaid, and hindred and prevented the said plaintiff from having the use, benefit and enjoyment thereof, in so large and ample a manner as he might or otherwise would have done, to wit, at Salem aforesaid, and during all of said period last mentioned did remain in and upon said close and gun, hunt and fish thereon without the leave and license and against the will of the said plaintiff, and other wrongs to the said plaintiff then and there did to the damage of the said plaintiff
20 One Hundred Dollars, and therefore he brings his suit.

AND ALSO FOR THAT WHEREAS, the said defendant above mentioned, on the second day of November, nineteen hundred and eleven, at Salem, in the County of Salem aforesaid, and within the jurisdiction of this Court, with force and arms did break and enter certain lands and premises, situate in the Township of Lower Penn's Neck, in the County of Salem aforesaid, of which the plaintiff was then and there the owner, occupant, lessee and licensee, to wit the lands and premises
30 more particularly described in the first count hereof, the same not being fresh meadow land; and did trespass on said lands and take with him and carry thereon a gun, after public notice on the part of the plaintiff, as owner, occupant, lessee and licensee, of said lands, forbidding any trespass thereon, and without the leave and license

and against the will of the said plaintiff; such notices having been before that time posted conspicuously adjacent to the highways bounding on said lands, and adjacent to all usual entrance ways to said lands, and other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, whereupon the said plaintiff says that he is injured and has sustained damages to the amount of One Hundred Dollars, and therefore he brings his suit

LEWIS STARR, 10
Attorney of Plaintiff.

NEW JERSEY SUPREME COURT

As of the 14th day of November 1911.

William M. Perrine, Trustee,)

vs.)

John Warner.)

In Tort.

Plea.

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And the said defendant by Davis & Davis, his attorneys, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the said plaintiff hath 30
above thereof complained against him and of this, he, the said defendant, puts himself upon the country, etc.

DAVIS & DAVIS,
Attorneys for Defendant.

NEW JERSEY
COURT OF ERRORS AND APPEALS.

WILLIAM M. PERRINE,
Trustee,
Plaintiff-Respondent,

vs.

JOHN WARNER,
Defendant-Appellant.

ON APPEAL FROM
SUPREME COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

STATEMENT OF FACTS.

This is an action for trespass to lands.

The agreed state of the case shows that the premises, described in the plaintiff's declaration, were formerly part of the banked-in-meadow of the Supawanna Meadow Company, which company was organized pursuant to the Meadow Act of November 29, 1788, and the various supplements thereto and acts amendatory thereof, found in Comp. St., page 3241, *et seq.* The land had been reclaimed from the tide sometime before the year 1835. From the latter year, and until 1878, the predecessors in title of the plaintiff were in the actual possession of the *locus in quo*, and used the same for agricultural purposes generally.

In 1878, the bank surrounding the meadow became broken down, and, although one or two ineffectual attempts were made to repair the same, it was never entirely rebuilt, and, since 1878, the said land has been subject to the ebb and flow of the water, covered at high tide, and exposed at low. The original banks have been washed away, and, in many places, no traces of where they were can be found, except where the sides were reinforced by stone, the line of the latter being exposed at low tide. (C. p. 6, l. 17, *et seq.*)

On August 23, 1884, William T. Hilliard, treasurer of the Meadow Company, made a lease, of the *locus in quo*, to Joseph H. Ward, which lease, and the interest of Ward and his estate in the same, was assigned to the plaintiff on March 12, 1903. (C. p. 5, l. 1.)

The lease was legally executed under the terms of the Meadow Act and its supplements. (C. p. 5, l. 27.)

Since 1878, the owners of the lands and premises, embraced within the Meadow Company limits, have permitted the tide to ebb and flow over the *locus in quo*, and, after the plaintiff acquired the lease in 1903, the plaintiff exercised the right of gunning, fishing, trapping and hunting over the same, built and used shooting blinds, closed the ditches and breaches in the bank with posts and piling, which piling, however, permitted the water to ebb and flow, but prevented trespassers from coming on the meadow in boats, maintained watchmen to exclude trespassers, and forbade all persons from going on the same. (C. p. 6, l. 30, *et seq.*)

Plaintiff and his predecessors in title have been assessed, and paid taxes on the meadow ever since it has been out to the tide. (C. p. 7, l. 8.)

On November 2, 1911, when the act of trespass,

described in the plaintiff's declaration, occurred, the right of possession of the plaintiff existed by virtue of the lease and assignment thereof, above mentioned (C. p. 4, l. 30), and conveyances made by the owners of said meadow lands, mentioned in the report of Commissioners filed pursuant to the terms of the Meadow Act, and their heirs. (C. p. 5, l. 32.)

On November 2, 1911, the plaintiff was in possession of the said lands so far as it was possible for him to be possessed of land submerged at every high tide. (C. p. 4, l. 25.)

Prior to November 2, 1911, the plaintiff had posted notices forbidding trespassing on the *locus in quo*. (C. p. 7, l. 12.)

On November 2, 1911, the defendant committed the act of trespass alleged in the plaintiff's declaration. (C. p. 7, l. 20.)

The declaration contained an ordinary count of trespass *quare clausum fregit*, to which the defendant interposed a plea of not guilty.

At the close of the plaintiff's case, the defendant moved to non-suit, upon various grounds, the main one of which being that when the Meadow Company refrained from putting up the bank, and permitted the same to go out to the tide, without any intention of reclaiming it, the owners were divested of title, and the lands then became a part of the tidal land of the State. (C. p. 8, l. 20.)

The motion to non-suit was refused.

Thereupon the attorney of the defendant stated that the defendant admitted the trespass, but desired to have the question of law passed upon by the Court, and would not produce any evidence. (C. p. 9, l. 32.) A motion was made that binding instructions be given for the defendant, which was refused.

The plaintiff then moved for a verdict for nominal

damages, which motion was granted, and judgment, in favor of the plaintiff, has been entered thereon accordingly. (C. p. 11, l. 17.)

GROUND OF APPEAL.

The grounds for appeal, found on pages 2 and 3 of the printed case, as briefly stated in the appellant's brief, are that the rights which the shore owner acquired in the land, were in the nature of a license, which became extinguished upon the destruction of the banks and other works, by which the land was reclaimed from the tide.

RESPONDENT'S POINTS.

The judgment was proper, because the plaintiff had such a title or right of possession in the lands as would entitle him to the exclusive possession thereof against any act of trespass by the appellant.

The respondent's claim is supported:

First. By the Meadow Act above referred to.

Second. By the local common law of the State, as declared in *Gough vs. Bell*, 3 Zab. 524.

Third. The trespass of the appellant cannot be justified under the plea of general issue.

First Point.

The Meadow Act of 1788 (see Comp. St., page 3241) provides that if the owners of a majority of the number of acres, in any body or tract of marsh or swamp, exposed to the overflow of the tide, and capable of being laid dry and put in proper state for improvement by one general bank or dam, are desirous to improve the same, and the whole cannot agree, such owners, desirous of improvement, may apply to the Court of Common Pleas of the county in which the marsh lies, which Court shall appoint commissioners to view the premises, hear the parties and lay out banks, or other works necessary to secure the marsh from the tide, in such place or places as may appear most safe and beneficial to the whole of the owners, and make an actual survey thereof, describing the beginning, courses and distances, and where the banks shall join the fast land, and also fix a name for the company, and appoint a time and place for the first meeting, and deliver a certificate of their proceedings to the Clerk of the court from which they received their appointment. The act also provides that the expense of erecting and maintaining banks, etc., shall be defrayed by a tax laid upon the meadows secured from the overflow of the tide. Managers are appointed by the owners of the land lying within the bank, who are required to cause all the parcels of land belonging to each owner, usually overflowed by the tide, and lying within the bounds of the proposed bank, to be carefully and strictly measured, and a plot thereof to be made, carefully and strictly measuring the quantity held by each owner, and cause a valuation to be made, by persons appointed by the owners, of the meadow ground of each owner separately, and

make an estimate of the sums necessary to defray the expense of making the banks, and other works necessary to keep the tide from overflowing the meadows, until the meadows shall be laid dry, and put in a proper state of improvement, and shall assess the costs ratably on the meadow agreeably to the valuation and quantity each owner may have within the bank, and state the assessment in a regular duplicate, which duplicate shall be delivered to the treasurer. Provision is also made for the collection of the assessments by sale by the treasurer, for such length of time as may be requisite, of so much of the meadow within the bank belonging to or in the possession of the delinquent owner, as may suffice to discharge the assessment. The act provides for further inspection and repair work, assessment to pay expenses, and annual meeting for the election of officers. The act also provides for repair of banks, already improved, where some of the owners refuse to keep their part of the works in good repair, and for the repair of the whole, the expense of which is to be paid by a tax levied upon the entire meadow. Managers are charged with the duty of stopping sudden breaches.

By supplement passed January 22, 1829, it became lawful for the owners of any tract of meadow land, lying within the bounds of any Meadow Bank Company, organized under the original act, to cause the same to be subjected to the overflow of the tide in such manner, and for such time or times as the company shall, at their annual meetings, direct and appoint.

Comp. St. 3251, Sec. 31.

The constitutionality of legislation of this character was sustained in the Pequest River case, where

the opinion of Chief Justice Beasley, as reported in 41 Law, page 175, refers to the great antiquity of meadow banking laws, and the effect to be given rights acquired thereunder, because of such ancient usage.

The owners of the mud flats, subject, however, to the ebb and flow of the tide, but abutting the upland, took advantage of this legislation for the purpose of creating the Supawanna Bank Company for the mutual benefit of all concerned.

The company was organized in 1835, and, for over forty years, the land thus reclaimed and improved was used for general agricultural purposes.

It is quite apparent that the State, by the legislation referred to, intended to confer upon the owners of such meadow land, the right to use and occupy the same to the exclusion of all others. There was no exception in favor of the State, and the right of the latter, by reason of its original ownership of the land between high and low water mark, became extinguished. The estate of the owner, thus acquired, as against the sovereignty of the State, is identical to that existing under the doctrine expressed in *Gough vs. Bell*, which will be discussed hereafter. The ownership in the improved land became indefeasible as against the State, and all others claiming under it.

This legislation must necessarily be construed as a recognition, by the State, of the right of the owners of meadow lands thus improved, and included within the bounds of a meadow company, to acquire a fee simple title. Therefore, the jurisdiction and authority of the State over the same terminated absolutely. No other interpretation can be given the legislative purpose. After the marsh lands were thus improved, the State was necessarily estopped

from asserting title to land, which was, under appropriate legislative sanction, enhanced in value by turning back the tide, and removing the same from the public domain.

Chief Justice Beasley, in *Stevens vs. Patterson & Newark Railway Company*, 34 *Law*, 547, stated that the Legislature, in passing the Meadow Acts, put in statutory form, and subject to certain general regulations, the local custom sanctioned by the case of *Gough vs. Bell*. He uses this language:

“The right of the bank owner was dealt
“with by the Legislature, not as an incident
“of property already vested, but as a priv-
“ilege which required the element of public
“acquiescence and the performance of a pre-
“requisite on the side of the proprietor, to be
“converted into a legal right.”

He also says, on page 549:

“That the riparian owner, by the common
“law, had no peculiar rights in this public do-
“main as incidents of his estate, and that the
“privileges he possesses by the local custom,
“or by force of the Wharf Act, to acquire
“such rights, can, before the possession has
“been taken, be regulated or revoked at the
“will of the Legislature.”

This is a judicial declaration that the rights acquired under the provisions of the Meadow Act, are similar to those sanctioned in *Gough vs. Bell*.

Furthermore, the dissenting opinion of the Chancellor, Zabriskie, in the same case, also concedes the effect of such reclamation of submerged lands, and he similarly construes the rights of the owners thereof.

If, for any reason, this Court should recede from the rule expressed by the Chief Justice in the case of *Stevens vs. Patterson*, and hold that the riparian owner does possess a property right in the bed of a navigable water in front of his land, then it would seem that the reclaiming of the land, in which such right exists, amounts to more than the exercise of a mere license or privilege, but such title is converted into an absolute estate by the acquiescence of the State, which cannot be afterwards vested in or repossessed by the latter, no matter what happens to the land itself. The State is estopped from interfering with this indefeasible estate, thus created and brought into existence by its own conduct. If the State has no right to become revested with the title, certainly the landowner can compel a recognition, by all persons, of his exclusive right of possession.

Another effect of the Meadow Act legislation, is to create a status with reference to the land thus improved, so that the same may be dealt with as any other species of private property. It becomes applicable to all incidents respecting such ownership, and subject to the following rules stated by Vice-Chancellor Grey in *Simpson vs. Morehead*, 65 Eq. 630, viz.:

"I know of no adjudication which declares
 "that a title to lands once vested in a private
 "person is taken away from him, and given
 "to the State, by the fact that the tide water
 "happens to overflow the lands." * * * *
 "The theory that mere submergence takes
 "away private title, is quite too uncertain to
 "be made the means of changing ownership
 "of lands."

Second Point.

We claim that the case at bar must, necessarily, be controlled by the opinion of the Court of Errors in *Gough vs. Bell*.

The contention is made by the appellant here, that the title of a shore owner to the land originally between high and low water mark, but reclaimed by a wharf, bank, or other structure by which the tide is excluded, exists only during the time the water is kept from flowing over the same, and that the State becomes repossessed of ownership at once upon the owner permitting the land to again become subject to ordinary tidal conditions.

It is also urged that the doctrine sanctioned by *Gough vs. Bell* is susceptible of such construction.

We respectfully submit that the language of the opinions, both in the Supreme Court and the Court of Errors, amply supports our claim that the ownership of the shore owner thus acquired, becomes substantially a fee simple title, indefeasible, and cannot be lost by permitting the lands to again become subject to the tide. The following language of the Chief Justice, who delivered the opinion in the Supreme Court, is particularly pertinent in this regard:

“It is strictly a sovereign right. The proprietary rights were at an early period severed from the sovereignty, and were vested in the proprietors, in whom, and in their grantees, they still remain. The only title which the State claims to the soil is by virtue of its sovereignty, for the protection of the public or common rights. But where the soil of navigable rivers is permanently appropriated without prejudice to the pub-

“lic rights, and where the State tacitly acquiesces in such appropriation, there would seem to be but little reason in her setting up a title as proprietor of the soil for no public use.” 2 *Zab.* 461.

“No public inconvenience has resulted from the practice, and no serious detriment has been occasioned to the common rights of the people of the State; on the contrary, the facilities of commerce and navigation have been increased, lands, which otherwise would have remained worthless, have been by private enterprise reclaimed and made available, and property of great and increasing value has been added to the wealth of the State. The lands thus improved have been held and enjoyed as private property, and have been taxed as such, without a doubt being entertained as to the validity of the title.” 2 *Zab.* 465.

“The very numerous meadow acts, both public and private, to be found upon the statute book, are not regarded as an exception to the truth of this remark. They do not purport to authorize the riparian proprietors to appropriate to their use any part of the public domain. On the contrary, they authorize the owners of meadows to improve their own land, and for this purpose they subject a body of landholders to common regulations, and, in some instances, authorize the construction of dams across navigable streams. The great body of meadow thus to be improved lay above ordinary high water mark, or did not properly constitute the shore of navigable streams.

“These acts, therefore, cannot with propriety
 “be regarded either as a recognition by the
 “Legislature of the title of the proprietors to
 “lands lying between high and low water
 “mark, nor, on the other hand, as a grant of
 “a right to the exclusive appropriation of the
 “public domain.” 2 *Zab.* 466.

The following extracts from the opinions of the Judges of the Court of Errors, which Court unanimously affirmed the conclusion reached by the Chief Justice, are particularly instructive in determining the character of the estate of the landowner after reclamation:

“By the common law of New Jersey, the
 “owners of land bounding on such rivers have
 “an absolute and exclusive right to wharf
 “out and otherwise reclaim and improve the
 “adjoining shore to the ordinary low water
 “line, and to the use of the same for fisheries
 “and all other lawful purposes not obstruct-
 “ing the navigation. This right is incom-
 “patible with and excludes the right of
 “ownership, which in England exists in the
 “crown, and an encroachment upon which is
 “there called a *pour-presture*, or enclosure
 “of the King’s *demesne*, and which, it is there
 “held, he may seize and abate, or license and
 “rent at his pleasure, and which, if it existed
 “here, would be vested in the State.” 3
Zab. 669.

“The State cannot, directly or indirectly,
 “divest him of any one of these rights, except
 “by the constitutional exercise of the power
 “to appropriate private property for public
 “purposes; and any act of the State short of

“such an appropriation, which attempts to transfer any of these rights to another without the consent of the proprietor, is inoperative and void, and can afford no justification to the grantee against an action of trespass.” 3 *Zab.* 676.

“These principles seem clear of difficulty; they treat the rights of riparian owners as property right, to be guarded and protected, while they preserve the common law rule in reference to the rights of the public and the State, leaving to the Legislature the power of regulating, improving and securing the property they hold in trust for the common benefit of the people, and to the individual citizen his private rights. And leaving it there, it is left where it is safe to leave it.” 3 *Zab.* 681.

“As appurtenant to his riparian ownership, the right to exclude the influx of the tide by the erection of embankments, docks, or wharves, provided he does not impair or interfere with the common right of navigation or fishery or any other common right; that he cannot be deprived of these rights either by the prerogative of the crown or by parliamentary or legislative power, except it be upon the doctrine of eminent domain, when he is to be compensated by the government for the rights of which he is divested for public or private good.” 3 *Zab.* 685.

“If the lessors of Gough had the privilege, under the local custom of New Jersey, of reclaiming the shore in front of their farm, without injuring the rights of navigation or invading the sovereignty of the State

“(which I think they had) they have, by the
 “application of their labor and capital upon
 “that shore, acquired a vested right in the
 “place reclaimed.” 3 *Zab.* 693.

“Although contrary to my first view, I
 “have come to the conclusion that the reason-
 “ing of the Chief Justice is right on this
 “point, and that the acquiescence by the
 “people of the State for a century in such ap-
 “propriation of the public domain has
 “created a rule of law that we must notice,
 “and that where a shore owner has filled in
 “on the shore opposite his lands with the ac-
 “quiescence of the State, he owns it.” 3
Zab. 696.

A careful consideration of the entire opinions of all the learned Judges, both in the Supreme Court and Court of Appeals, who sat in the Goff case, will fail to disclose any intimation or suggestion that the Court intended to decide that the title, acquired by the reclaiming owner, should, if the lands were restored to the ebb and flow of the tide, be terminated as to such owner, and the State become repossessed of its original title in the same. The question to be decided in this case is, can it be determined, by a proper interpretation of the doctrine supported by *Gough vs. Bell*, that the State becomes reinvested with its former title to land which it lost, to the abutting riparian owners, by acquiescence in the reclamation, merely because such owners, for either short or long period, permitted the water to overflow the same.

We submit that there is nothing in the case of *Gough vs. Bell*, or any of the other authorities cited in the appellant's brief, which will give judicial

sanction to such limitation of the share owner's rights.

The right to reclaim tidal lands existed long before the Wharf Act was passed in 1851, and that legislation does not control this situation.

After a very careful and exhaustive examination of the authorities in New Jersey and elsewhere, we have not found any case in which this precise question has been raised, or any so similar as to form a precedent, except *Morehead vs. Simpson*, 65 *Eq.* 623. There Vice-Chancellor Grey passed upon substantially the same issue as here involved, and, in support of our contention, we adopt the following language of the learned Vice-Chancellor:

"The counsel for defendant contends that
 "the lands leased by the owners of the mea-
 "dows have been suffered to go out to the
 "tide, and that this submergence re-estab-
 "lishes the State's title to those lands and
 "justifies all persons in going as they please
 "upon the tidewaters which may cover such
 "lands.

"Some of the principles laid down by de-
 "fendant's counsel regarding such lands are
 "indisputable. One of them is that the State
 "of New Jersey was, in its right as sover-
 "eign, the owner of all that belt of land lying
 "at high-water mark within the tidal waters
 "of the State, and thence out into the sea or
 "river, so far as there can be any ownership
 "of lands. That, in substance, is the holding
 "in the leading cases of *Arnold vs. Mundy*, 1
 "*Halst.* 1, and *Martin vs. Waddell*, 3 *Harr.*
 "495.

"It is, however, equally indisputable that

“under the local common law of this State
 “there has from the earliest times existed a
 “right whereby the private owner of lands at
 “high-water mark had the privilege of re-
 “claiming the lands of the State lying under
 “tidewater in front of his ownership, which
 “right, when exercised, vested in such re-
 “claiming owner the title of the State in the
 “lands reclaimed. That was declared by the
 “Court of Appeals in *Bell vs. Gough*, 3 Zab.
 “624, in 1852. That right (with some limita-
 “tions as to wharfing imposed by the Act of
 “1851) remained exercisable, at the option of
 “any such owner, up to the time of the
 “passage of the riparian act, providing a
 “specific plan of acquiring the State’s title
 “through riparian commissioners. Under
 “the privilege of reclamation, the owners of
 “lands lying at high-water mark, in front of
 “which the tidewater mud flats were located,
 “reclaimed them from the waters by banking
 “them in. They, by this sort of reclamation,
 “acquired the title of the State to these non-
 “navigable mud flats (now called banked mea-
 “dows) which lie adjacent to tidal streams.
 “This is plainly shown by many acts of the
 “Legislature of this State, arranging for the
 “methods of banking those mud flats as
 “private property, the raising of money
 “therefor by a system of *quasi* taxation of
 “the lands within the bank, and many pro-
 “visions which clearly recognize ownership
 “of the reclaimed lands as vested in the own-
 “ers who had reclaimed them. Many of
 “these statutes are of great antiquity, so an-
 “cient as to have been passed in Colonial

“times, preceding the organization of the
 “State itself. Judicial decisions have recog-
 “nized the validity of these meadow banking
 “laws, notably the *Pequest River Case*, 12 Vr.
 “175, in which Chief Justice Beasley, in view
 “of their great antiquity, refused to consider
 “a challenge of their constitutionality.

“The ownership of the title of these
 “banked meadows was thus acquired by the
 “riparian owners from the State and it in-
 “cludes thousand acres in the Counties of
 “Camden, Gloucester, Salem and Cumber-
 “land. The meadow company, created under
 “the meadow statutes, consisted of the asso-
 “ciated owners of those meadow lands which
 “could be conveniently protected by one bank.
 “In the use of the reclaimed lands the owners
 “often voluntarily permit them to be over-
 “flowed by the tidewater for their improve-
 “ment by the deposit of silt and mud. It
 “sometimes happens that the banks break and
 “the tidewater comes over them against the
 “will of the owners, who spend large sums to
 “exclude it immediately, and after exclusion
 “cultivate as before. At other times, al-
 “though the breaches in the banks letting in
 “the water may be occurred against the ef-
 “forts of the owners, yet after they have hap-
 “pened the owners permit the lands to be sub-
 “ject to the overflow of the tide, sometimes
 “for short periods, sometimes for long ones.
 “It is this situation which the defendant’s
 “counsel insists restores title in the re-
 “claimed lands to the State and subjects them
 “while that overflow continues, to the entry
 “of all the citizens of the State for all pur-
 “poses of gunning, fishing, etc.

"It will, I think, be found that the meadow
 "statutes recognize such overflows and con-
 "tinued subjection to tidewater as incidents
 "of meadow ownership and regulate the
 "method of again erecting the banks, irre-
 "spective of the length of time the meadows
 "may have been permitted to remain 'out to
 "the tide,' the phrase used in South Jersey to
 "describe the overflowed condition. I know
 "of no adjudication which declares that a
 "title to lands, once vested in a private per-
 "son, is taken from him and given to the
 "State by the fact that tidewater happens to
 "overflow the lands.

"The custom in South Jersey (where most
 "of the tide meadows lying in this State are
 "located) as is shown by the meadow-bank-
 "ing book entries in the various County
 "Clerks' offices, is to again exclude the tide
 "from the flooded meadows by re-banking
 "them, oftentimes locating the bank in a new
 "place. This is done at any time the owners
 "may choose to put up the banks again. The
 "periods between the going 'out to the tide'
 "and the re-banking are often many years.

"The theory that mere submergence takes
 "away private title is quite too uncertain to
 "be made the means of changing the owner-
 "ship of lands. Does the first overflow di-
 "vest the owner of his title? If not, how
 "many are required to pass a good title to
 "the State? The learned counsel has re-
 "ferred to a particular piece of banked
 "meadow in which he is himself interested,
 "which has for a long time, because of dif-
 "ficulty in maintaining the banks, subjected

"the owners to great expense. For several
 "years the tidewater has flowed over it for
 "almost as much of the time as it has been ex-
 "cluded. Can it be said, if the owners be
 "willing to allow a continued overflow until
 "the deposit of mud from the tidewater has
 "raised the bed of the meadow and make
 "more easy the maintenance of the bank, or
 "if they want time to raise more money to
 "pay for the banks, they have lost their title
 "to their lands by submergence in the mean-
 "while?

"The section of the Meadow Act (59) re-
 "ferred to by counsel, which enables a ma-
 "jority of the owners to order an overflow,
 "has nothing to do with any change in the
 "ownership of the lands. It is obviously in-
 "tended to enable a majority of the owners
 "to provide for a temporary overflow. Noth-
 "ing in that section indicates that if the
 "meadows are overflowed without a majority
 "vote the title to the lands would be affected.

"It seems to me to be unquestionable that,
 "if the lands be once reclaimed, the title to
 "such lands remains in the several reclaim-
 "ing owners whether the tidewater after-
 "wards overflows them or not.

"The defendant's doctrine, if applied to
 "the ownership of banked meadow lands,
 "would prevent the private owner from im-
 "proving them by allowing an overflow and
 "thus securing the advantage of the deposit
 "of mud thereon from the flowing tide. This
 "practice is common wherever such lands are
 "owned; sometimes the owner overflows his
 "meadows every winter, sometimes for sev-
 "eral years continuously.

“It may, I think, be truthfully said, that in
 “no case has the overflow of such meadows
 “by the tide, whether it happened by accident
 “or design, ever been accompanied by a pur-
 “pose to abandon the property. Almost in-
 “variably, during the period when overflow
 “is permitted, some acts of ownership over
 “the submerged lands are asserted by the
 “owners.

“In the case now before me the banked
 “lands, though overflowed by tidewater, were
 “leased by the owners to the defendant, who
 “evidently did not consider them to be
 “abandoned, for he, after using the lands
 “himself under the leases, has now assigned
 “them to the complainant, Simpson, for a
 “valuable consideration.

“There is a marked difference between the
 “overflow of flats adjoining a river, which
 “almost invariably deposits mud upon them
 “and thus raises their level and improves
 “them for agricultural use, and the action of
 “the sea at the tidewater line, which some-
 “times deposits an accretion, and at others,
 “by erosion, carries away the fast land, with
 “no known or certain habit of doing either
 “one or the other. In the one case the over-
 “flow can be used with certainty for pur-
 “poses of deposit and improvement, the lands
 “being readily identifiable by their owners
 “on every recession of the tide. In the other
 “the very substance of the fast land may be
 “permanently removed so that no means of
 “marking its bounds may remain.

“An interesting discussion of the question
 “may be found in the opinion of the late

“Chief Justice Depue in the case of *Ocean*
 “*City vs. Shriver*, 35 *Vr.* 550, 556, in the Court
 “of Appeals, with a collation of the cases and
 “views of learned writers on the subject.
 “The highest authorities all in substance de-
 “clare that, if the owner’s overflowed land be
 “left again uncovered by the recession of the
 “water, he shall have it as before if he can
 “make out where and what it was, ‘for he
 “cannot lose his property in the soil though it
 “for a time become a part of the sea.’ ”

No more conclusive reasons can be advanced, than
 those expressed in the above opinion, to support the
 contention that the State does not become revested
 with its former title to lands originally under water
 mark, but afterwards improved and reclaimed, by
 the owners merely permitting the tide to cover the
 same.

No Abandonment Was Shown.

The title acquired by the owners of the meadow
 land is not lost by their conduct in permitting the
 meadows to go out to the tide. Independently of
 the general doctrine that mere failure to occupy
 land, or exercise rights incident to its ownership or
 use, will not be sufficient to divest the title of a
 former owner, it is perfectly apparent here that
 there was no intention on the part of the plaintiff
 below, or his predecessors in title, to voluntarily
 abandon whatever rights they had acquired in the
locus in quo, either by the Meadow Act or reclaim-
 ation of the land under the ancient local custom.
 They exercised every power of possession which it

was possible for them to exercise over land which was submerged at high water. Pedestrians could walk on the land when the tide was out, and, to that extent at least, it may properly be claimed that they were in actual possession. They paid taxes, they maintained watchmen to exclude trespassers, closed the breaches and ditches to prevent trespassers from coming on the meadow in boats, and did every other possible act which would demonstrate to the world that they intended to retain and exercise all vested or acquired estates. To this extent, therefore, we claim that there was actual possession of the lands from the time the banks were washed away until the act of trespass complained of.

"Abandonment" is a word that has acquired a technical meaning. It is defined to be the relinquishment of a right—the giving up of something to which we are entitled.

Mallett vs. Uncle Sam Gold Mine Co., 1 Ver. 204.

Property is said to be abandoned when it is thrown away, or its possession is voluntarily forsaken by the owner.

Eads vs. Brazelton, 22 Ark. 509.

To constitute an abandonment, there must be a clear, unequivocal and decisive act of the party—or act done which shows a determination in the individual not to have a benefit which is designed for him.

Breedlove vs. Stump, 3 Yerg (Tenn.) 257;
Dawson vs. Daniel, 2 Flipp (U. S.) 309.

To constitute abandonment there must be a concurring of the act of leaving the premises vacant so

that they may be appropriated by the next comer, and the intention of not returning.

Judson vs. Malloy, 40 Cal. 309.

Failure to occupy land for an indefinite time, does not constitute abandonment of title.

Lowels vs. Minot, 73 Atl. 1025.

A full legal title to land can be divested by abandonment, only where the circumstances are sufficient to raise an estoppel, or when possession is acquired by one in consequence of the abandonment and held under a claim of right for the statutory period of limitation.

Trustees of Caledonia County Grammar School vs. Kent, 77 Atl. Rep. 877.

Where it appeared that a company extended its lines from time to time, as fast as public business and growth of population warranted, and that it was engaged in good faith in extending a line over a certain street extending from the City into the County of Camden, when interrupted by a rival company, the right to occupy such street will not be held to have been abandoned by the non-user for twenty years, in the absence of any limit by such act on the time within which the right should be exercised.

West Jersey Traction Co. vs. Camden Horse R. Co., 52 N. J. Eq.

We submit that where a meadow becomes flooded because of the destruction of banks, and the owners, instead of restoring the latter, permit the meadow to remain out to the tide, they do not necessarily evince an intention to voluntarily abandon the property to the State. In this particular case, the inten-

tion was quite the contrary, as disclosed by the conduct of the owners. Refraining from making repairs to a bank, thereby permitting the tide to ebb and flow, is precisely the same situation as causing the same to overflow by some affirmative act. The State sanctions such overflow by Section 31 Meadow Act, Comp. St. 3251. Substantially such condition exists here.

Comment on Brief of Appellant.

The appellant seems to reply mainly upon the opinion of Chief Justice Beasley in the Stevens-Paterson case, where in his usual vigorous style, he declares that the State is the absolute owner of the lands in all navigable water within its tidal limits, and such land can be granted to any one, either public or private, without making compensation to the owner of the shore. The Chancellor, who delivered the dissenting opinion, held that the riparian owner, as an incident to his land, had a property interest in soil covered by the tide in front of the shore, which property interest could not be taken by the State, except under the power of eminent domain for public use, and upon compensation.

Of course, it will be conceded that in the Stevens case no question of reclamation arose. Both the prevailing and dissenting opinions assume the existence of the principle established by *Gough vs. Bell*. Furthermore, the right of the shore owner, under the Meadow Act, is recognized, and it is stated that such privilege, which is the subject matter of acquiescence, becomes converted into a legal right. The title of the shore owner is characterized as being an indefeasible one. Therefore, we contend that

neither of the opinions support the contention that this indefeasible title is lost by failure to continue to turn back the tide.

The plain inference to be gathered from the opinion of *State vs. Jersey City, 1 Dutcher, 525*, is that when the land under water is actually reclaimed and annexed to the upland, it becomes part and parcel of the latter. If this is the correct doctrine, then the same incidents of ownership as attaches to the original upland, would apply to that which becomes part thereof by reclamation.

The decision of the Supreme Court in *Stewart vs. Fitch, 2 Vr. 17*, has no bearing whatever upon this question because the flats, for the use and occupation of which a suit was brought, had never been improved or reclaimed in any way. There could be no pretense whatever that the title was lost to the State.

The case of *Railroad Company vs. Yard, 14 Vr. 632*, seems to support, inferentially at least, the views of Chancellor Zabriskie in the Stevens case, to the effect that the abutting landowner had some sort of an interest in the land under water in front of his property, which could be made the subject of taxation. The precise question here involved, however, was not, in any way, touched upon in the decision of that case.

It might be added, in passing, that the case of *State vs. Jersey City, 1 Dutcher, 525*, seems to recognize the soundness of the conclusion of the Chancellor in the Stevens case, by holding that there could be increased value of the land along the water, because of the right to reclaim.

The appellant's counsel states the important question to be "Can a licensee of submerged flats, disconnected in title or possession from the adjoining upland, maintain trespass against the defendant, who chanced to be walking upon these submerged flats with a gun at low tide?" This statement of the case begs the question. There is no proof that the plaintiff was a licensee of submerged flats, disconnected in title or possession from the adjoining land. The plaintiff acquired, by his lease, whatever rights the meadow owners had in the lands within the limits of the Bank Company, and it must necessarily be assumed that the owners of the land in the company also were owners of the adjoining shore, otherwise, the Meadow Act would not be applicable to the situation.

In addition to the lease, under which the plaintiff claims right of possession, it appears by the case that subsequently he acquired the legal title of all the owners of the lands included within the limits of the meadow company.

Therefore, not only does he possess the leasehold estate, created under the terms of the Meadow Act, but he also owns the reversionary interests of the several owners, thus creating a title in fee which would confer the right to prevent trespassing, independently of any actual possession, if the same did not conclusively appear in the facts agreed upon.

Third Point

While all parties are anxious to have a judicial determination of the important question involved in this case, it would seem that the pleadings do not properly raise that issue. The declaration alleges a trespass, the plea is not guilty.

Under such issue, the defendant cannot justify the trespass upon the ground that the plaintiff was not owner of the property, or that the title to the *locus* was in the State, and that any citizen had a right to go upon the same.

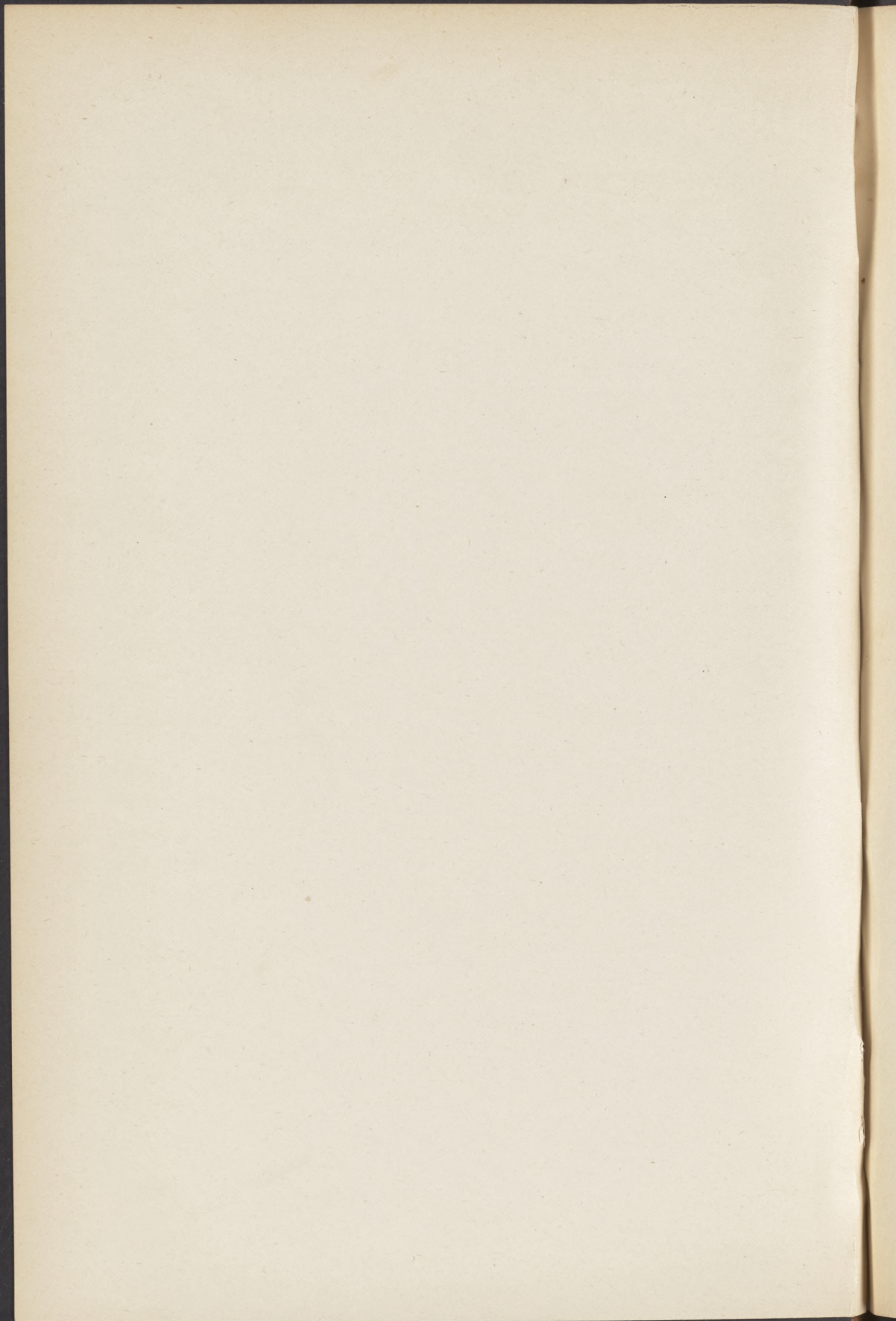
Almost this precise question was settled in *Shreves vs. Liveson*, 2 *Law*, 247, where it was held that in trespass for taking oysters from the river where the plaintiff had planted them, the defendant cannot show, under the general issue, that the river was a public river, and that it was lawful for all citizens to take them; but that matter must be pleaded specially.

See also:

Hetfield vs. Central R. R. Co., 29 *Law*, 571;
Pipe Co. vs. D. L. & W., 62 *Law*, 254-273;
Chitty Pleadings, Vol. , p. 505.

We submit that the judgment should be affirmed.

LEWIS STARR,
Of Counsel with Respondent.



New Jersey Court of Errors and Appeals

William H. Perrine, Trustee,	}	Action at Law.	10
Plaintiff-Appellee,			
vs.		Appeal from Supreme Court	
John Warner,			
Defendant-Appellant			

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an action of trespass for breaking and entering plaintiff's close, and the locus in quo is a tract of marsh land, on which the tide ebbs and flows. 20

The Treasurer of the Supawanna Meadow Company, on the twenty-third day of August, eighteen hundred and eighty four, executed a lease of the meadow land included within the bounds of said Company, including the locus in quo, to Joseph H. Ward, for a period of ninety-nine years, and on March 12, 1913, the heirs of the said Joseph H. Ward, then deceased, assigned the said lease to the plaintiff. Prior to the formation of the Supawanna Meadow Company the said meadows had 30 been a part of the land under water of the Delaware River and Salem Creek, submerged at high tide and exposed at low tide. After the formation of the Company, the mud flats were reclaimed by a bank which excluded the tide, and the land was used for agricultural purposes.

In 1878, or prior thereto, this bank was washed away

and since that time the tide has ebbed and flowed over the meadow, including the locus in quo, precisely as it had before the erection of the bank, by which the flats were reclaimed.

This was the condition at the time the plaintiff took an assignment of the Ward lease, and what he got under that assignment was not meadow lands, but land under the Delaware River below high water mark and only visible at ebb tide. The plaintiff, and his cestue que
10 trust, used these flats as a gunning and fishing preserve and so far as it was possible, excluded the public from any participation in the pleasure or profit derived from gunning or fishing there. The plaintiff made no other use of it and none could be made, although it appears that he has paid tax on the meadows since the assignment to him of the lease.

The defendant, believing that, as one of the citizens of the State, he had a right to gun or fish in or over the tide waters of the State, went upon these flats at low
20 tide and carried with him a gun intending to kill such lawful game as he could find thereon, and as a consequence of such alleged trespass, this suit was brought.

The contention of the plaintiff is that by virtue of his lease, he has such exclusive right of possession to the locus in quo as will enable him to sustain this action. And such claim is based upon the idea that these flats, having once been reclaimed by banking in and used for agricultural purposes, the owner of the flats, during
30 such reclamation period, and his successors and assigns, have acquired a title to the lands of which they cannot be divested notwithstanding the lands have ceased to be reclaimed and have, for more than thirty years, formed a part of the bed of the river over which the tide ebbs and flows as it was wont to do from time immemorial prior to such reclamation.

From the foregoing statement, it will be observed that the issue involved is whether the banking out of the tide from the submerged flats and the improvement of the meadow during the period of reclamation conferred upon the owners of the reclaimed land a fee simple title irrevocable; or whether the right acquired in the land was a license or privilege which became inoperative upon the abandonment of the bank and other works by which the land was reclaimed from the submergence of the flats by the tides. 10

TITLE IN THE STATE.

The title to the lands under tide water is held by the Supreme Court of the United States to be governed by the local state laws, and an examination of the authorities in the different states will disclose that the authority of the state over the shore between high and low water mark varies greatly in the different states. Thus, in Connecticut, the owner of the upland has practically a fee in the flats under water so that he could convey them separate from the upland; while in New York the title is prima facie in the state. An able article by William S. Tallinghurst, in *Harvard Law Review*, Volume 18, page 341, distinguishes the law on this subject in the different states and points out the reasons for lack of uniformity. 20

The law in the different jurisdictions is the same however, in holding that the state controls the use of the land below High water mark until it is appropriated by the owner of the upland for wharfing purposes or for agriculture by filling in or otherwise reclaiming the marsh from the tide; and in New Jersey, it is settled by a line of decisions in this court that the State is the absolute owner of the land under tide water. It is equally well 30

settled that the shore owner may reclaim the land between high and low water marks for the purposes above mentioned; but it is nowhere held that the exercise of such privilege gives to the reclaiming owner a title to the land so reclaimed; on the contrary, it has been held that the privilege is a mere license revocable before execution.

Chief Justice Beasley, in *Stephens vs. Paterson and Newark R. R. Company*, 5 Vroom. 532, says:

- 10 "My consideration of this branch of the subject has led to the conviction that such privilege has not the effect suggested in the above inquiry. The local custom in question was nothing more than a license on the part of the public to the land-owner, enabling the latter to fill in or wharf out along the freeshore between high and low water marks, and which license, when executed, became irrevocable. The shore owner acquired his indefeasible right by the acquiescence of the public in the performance of the act."
- 20

In this case, the older cases of *Arnold vs. Mundy*, (1st Halst., page 10) and *Gough vs. Bell* (2 Zab., 469) were reviewed. In the latter case, Chief Justice Green says:

- 30 "In New Jersey, as we have seen, the title to the state extends as at common law to high water mark but it is high water mark as it actually exists. Where the waters have receded by alluvion or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high water line."

In the case of *State vs. The Mayor and Council of Jersey City* (1 Dutch. 525) Justice Elmer says:

"It must now be accepted as the established law

in New Jersey that the right of the owner of lands bounding on the navigable rivers, extends only to the actual high water mark, and that all below that mark belongs to the State."

In the case of *Steward v. Fitch, et al.* (2 Vr., 17) suit was brought for use and occupation of certain mud flats over which the tide ebbed and flowed, and water stood about two feet upon them at high tide. Said flats had not in any way been improved or reclaimed, and it was held that title to them was consequently not in the plaintiff but in the State of New Jersey, and the plaintiff could not sustain his action. 10

In *Railroad Company vs. Yard* (14 Vr.) the question was whether certain land below high water mark, and over which the tide ebbed and flowed, should be taxed. There was a tract of thirty acres which had been conveyed by a corporation to Jay Gould, Trustee, who subsequently conveyed the same to the plaintiff in error. The land was assessed at seventeen thousand five hundred dollars per acre; ten and a quarter acres had been reclaimed and improved and the improvements thereon were assessed at two hundred fifty four thousand two hundred and seventy five dollars. The plaintiff in error objected to the assessment of the nineteen acres unimproved land, over which the tide ebbed and flowed, on the ground that it was below high water mark and the title was consequently in the State. 20

Justice Depue, citing *Gough v. Bell, Stephens v. Paterson and the State v. Mayor and Council of Jersey City*, sustained the contention of the plaintiff in error, on the ground that the title to the land was in the State and consequently, the land was not taxable. 30

Martin v. Waddell, 3 Harr 495 U. S. Sup. Ct.
Paul v. Hazelton, 8 Vr. 106.

Woodcliff v. Jersey City R. R. Co., 43 Vr. 137.
Bell v. Gough, 3 Zab. 624.
22 L. N. S. 337 Note.

The case of Stephens vs. Paterson and N. R. Co., supra, in which the notable forensic debate took place between the Chief Justice, who read the majority opinion of the Court and the Chancellor, who filed a dissenting opinion in this court, is the leading case in this State, and the principle of law is there settled that the riparian owner has a bare license to wharf out, embank or otherwise improve the tide-flowed flats, which license may be revoked by the State at any time before the privilege is exercised:

The important question supervenes then: Can a licensee of submerged flats, disconnected in title or possession from the adjoining upland, maintain trespass against the defendant who chanced to be walking upon these submerged flats with a gun at low tide? It will not be questioned, of course, that the plaintiff can have no greater right in the land than his lessor.

It is the insistence of the defendant, that the right of the plaintiff, based as it is upon an executed license, will not protect his merely transitory possession after he has ceased to exercise the license. His possession, as well as his right of possession, depends upon reclamation, and when the land ceased to be reclaimed and was reflowed by the tide, the plaintiff's interest in the land disappeared. He had no possession because he could not remain on the land. *Pedis possessio* is necessary to actual possession. There was no use the plaintiff could make of the flats to which land is adapted. Upon the disappearance of the bank, the land sought its original state and became a part of the bed of the river. And

the legal conclusion is, that the State again acquired its dominion over the land in the interest of the public.

Obviously, the ~~local~~ custom or common law, which permitted the owner of the upland to fill in or bank the submerged adjoining flats from the tide, and thereby to acquire a right in the reclaimed land which the state could not disturb, had for its object encouragement to improve such lands and render them valuable for agricultural purposes, so that there would be profit and benefit both to the State, by reason of raising revenue, 10 and to the owner of the upland, by increasing his acreage and resulting crops. But there can be no excuse or reasonable justification for depriving the public of its ancient right of fishing and fowling upon those lands after they have been abandoned to the tides, and the reason for preserving plaintiff's right no longer exists.

It is further submitted that the plaintiff suffers no loss if the legal contention of defendant is upheld; because if he desires to use these flats for any purpose contemplated by the Meadow Act, under which the lands were originally reclaimed, he needs but to invoke the same kind of legal proceedings for the reclamation of the flats, or he may, without any application to the court, independently erect a new bank in the place of the old, and thereby regain what, by his own negligence or that of his lessor, he has lost to the State for the use of the public. 20

CASE RELIED UPON BY PLAINTIFF. 30

It was supposed that the question here raised was of first impression in this State; indeed a thorough search in the reports of foreign jurisdictions discloses no case in point; but attention is called to *Simpson v. Moorehead*, (20 Dick., 623) relied upon in the court below,

in which appears a dictum of Vice Chancellor Grey, supposed to uphold the doctrine that a right once acquired by the reclaiming owner cannot be lost by abandonment of the land to the tides. That it is a mere dictum is discoverable in the language of the Vice Chancellor on page 628, in which he says:

10 "The question which has been very interestingly argued here touching the ownership of the reclaimed meadow lands, lying subject to the flow of the tides, and the effect of subsequent submergence &c., or any other question challenging the complainant's ownership and right of possession, cannot be raised here by the defendant under the peculiar circumstances of this case. The defendant, himself, is the grantor of those privileges and rights to the complainants, which he now disputes. He cannot be heard to deny the effect of his own deed. It is inequitable that he should be permitted to do so."

20 The most that can be said of that part of the opinion which deals with the question of ownership in reclaimed lands after the works, by which the lands have been reclaimed, have got out of repair and no longer exclude the tide, is that it is an expression of an opinion by a learned judge of what the law should be as applied to the facts in the case before him. It should first be noted that in that case there was no abandonment of the meadow to the tide; on the contrary, the
30 opinion is based upon an absence of any evidence of an intention to abandon the meadow. The bank was still up, although out of repair, and as stated by the Vice Chancellor, "were leased by the owner to the defendant, who evidently did not consider them to be abandoned for he, after using the lands himself under the leases, has now assigned them to complainant, Simpson,

for a valuable consideration." Evidently the phrase "using the lands" meant such a use as is commonly made of meadow land—the improvement of the soil for farming purposes.

The fact that the bank was out of repair, was no evidence of abandonment of the meadow or that the meadow could not be farmed, notwithstanding the broken condition of the bank.

That the learned Vice Chancellor was considering a case where the meadow was only temporarily exposed to the tide is further evidenced by what he says at bottom of page 630. He says: 10

"The theory that mere submergence takes away private title, is quite too uncertain to be made the means of changing the ownership to lands. Does the first overflow divest the owner of his title? If not, how many are required to pass a good title to the state?"

He certainly could not have applied this argument to such a case as the one at bar where the flats have been flowed by the tide for a period of thirty-five years. If the inquiry as to how many tides are required to pass title to the State, is pertinent, it might, with equal propriety, be inquired, how many tides the reclaiming bank must exclude from the submerged flats to pass title from the State to the riparian owner. It will hardly be contended that a bank thrown up to exclude the tide temporarily from the land would vest title in the riparian owner whether it was done for that purpose, or not. 20 30

The argument based upon the section of the Meadow Act authorizing the cutting of the bank and the flooding of the meadow for the purpose of improving it, is not applicable in this case, because the submerging of the meadow under authority of statute is not abandonment of the meadow, but discloses a contrary intention. Fur-

thermore, in the case of *Simpson v. Moorehead*, the lessor was the owner of the upland and leased to plaintiff both the upland and adjoining flats; so that the lease to the complainant drew with it all the rights which are inherent in the riparian owner by reason of adjacency to tide water independent of rights acquired by excluding the tide.

10 It is not considered necessary to notice any claim which may be urged by the plaintiff based upon the riparian grant, as it is not pretended that the locus in quo was covered by that grant; nor is the plaintiff's title strengthened by the fact that he and his assignors voluntarily paid taxes on these submerged flats, which were absolutely worthless for farming or any other purpose. Had the plaintiff protested, the tax would have been set aside. The inference is, that the assessment was so insignificant as not to be worth noticing, or that he preferred to pay it, believing that a tax receipt would be some evidence of title. That it is no evidence of title, need not
20 be argued here.

There is absolutely no merit in plaintiff's claim. The defendant was hunting on tide-flowed flats which had not been under the plow of the husbandman or used for any agricultural purposes whatever for over thirty years, during which every vestige of reclamation has been washed away. And the case shows that the manifest object the plaintiff had in procuring the lease, was that he, together with those for whom he held, could
30 create an extensive game preserve and play the part of overlords in the public domain.

It is respectfully submitted that the judgment of the court below should be reversed.

J. WARREN DAVIS,
AUSTIN H. SWACKHAMER,
Counsel for Appellant.

NOTICE OF APPEAL
NEW JERSEY SUPREME COURT

William H. Perrine,	}		
Trustee,			
Plaintiff,		In Tort.	
vs.		Notice of Appeal.	10
John Warner,			
Defendant.	)		

The defendant hereby appeals from the Judgment of the New Jersey Supreme Court entered in the above entitled cause in favor of the said plaintiff against the defendant, on the fourth day of May, nineteen hundred and twelve, to the Court of Errors and Appeals, in the last resort in all causes. 20

To LEWIS STARR, Esq.,
Attorney of Respondent..

A. H. SWACKHAMER,
Attorney of Appellant.

GROUNDS OF APPEAL
NEW JERSEY COURT OF ERRORS AND
APPEALS

10	William M. Perrine, Trustee, (Plaintiff) Appellee, vs. John Warner, (Defendant) Appellant.	}	In Tort. Grounds of Appeal.
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The defendant states the following grounds of appeal.

20 First—That by the record it appears that judgment was given for the plaintiff below, whereas by the law of the land, judgment ought to have been given for the defendant below and against the plaintiff.

Second—The trial Judge directed the jury to render a verdict for the plaintiff, whereas the said Judge should have non-suited the said plaintiff.

30 Third—The said Judge decided that the plaintiff had such title to the lands and premises described in the declaration in said cause as would sustain an action of trespass against the defendant for walking and hunting upon said lands.

Fourth—The said Judge decided that upon the reclamation of the said marsh lands from the over-flow

GROUNDS OF APPEAL

of the tides by the owner of the adjoining uplands, the title to said re-claimed flats vested in said owner to said uplands and passed to the plaintiff as lessee who had the exclusive right of possession to said flats, notwithstanding the lands so re-claimed had been abandoned to the tides more than thirty years.

Fifth—The said Judge decided that neither the State nor the citizens thereof have any right to hunt 10 or fish on the tide waters of the State which flow and re-flow over the lands once re-claimed by an adjoining owner of uplands, but which have been abandoned to the tides for more than thirty years.

A. H. SWACKHAMER,

Attorney of Appellant.

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STATE OF CASE
NEW JERSEY COURT OF ERRORS AND
APPEALS

10	William M. Perrine, Trustee, Plaintiff-Appellee, vs. John Warner, Defendant-Appellant.	}	On Appeal.
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20 The parties hereto, by their respective attorneys, hereby agree upon the following state of case, to be used in the above named Court upon the argument of the appeal taken from a judgment entered in the New Jersey Supreme Court in favor of the plaintiff, after trial before the Honorable C. L. Cole, Circuit Court Judge, and a jury:

30 1. On November 2, 1911, the plaintiff was in possession, so far as it was possible for him to be in possession of land submerged at every high tide, of the lands and premises described in the declaration filed in this cause, being part of what is known as Supawanna Meadow Company, his right of possession accruing, inter alia, by virtue of a lease made by William T. Hilliard, Treasurer, of Supawanna Meadow Company, to Joseph H. Ward, dated August 23, 1884, covering the premises in question, and an assignment of said lease dated March 12th, 1903, made by Maria E. Ward, and others, widow

STATE OF CASE

and heirs of said Joseph H. Ward, deceased, to the said plaintiff.

2. On July 26, 1905, the Riparian Commissioners gave permission and license by a revocable license to William M. Perrine, his successors or assigns to use and occupy for agricultural purposes or hunting, gunning and fishing or for any other lawful use whatever, that portion of the land situate between the boundary of the lands described in the lease aforesaid and low water mark of Salem Creek and Delaware River, for the sum of Fifty Dollars (\$50.) per year, payable semi-annually in advance, which license was in force on November 2, 1911. 10

3. The premises described in the declaration are included within the limits of the Supawanna Meadow Company, organized pursuant to a return of Commissioners, duly appointed under the terms of an Act of the Legislature of the State of New Jersey entitled "An Act to enable the owners of the tide swamps and marshes to improve the same and the owners of meadows already banked in and held by different persons, to keep the same in repair," passed November 29, 1788, and the various supplements thereto and acts amendatory thereof. 20

4. The lease aforesaid, made by Ward and subsequently assigned to the plaintiff, was legally executed under the terms of the acts mentioned in the last preceding paragraph. 30

5. In addition to the lease mentioned in paragraph 1 hereto, the right of possession, vested in the plaintiff, is derived from various conveyances, made by the persons named as owners of said meadow lands

STATE OF CASE

in the report of Commissioners aforesaid and their heirs.

6. That from 1835 and prior to 1878 the plaintiff's grantors, lessors and predecessors in title were in the actual possession of the lands and premises described in the lease mentioned in paragraph No. 1
10 hereof, comprising all of the lands and premises described in the plaintiff's declaration and used the same for agricultural purposes generally.

7. The lands described in said declaration were formerly part of the banked in meadow of the said Supawanna Meadow Co., which had been re-claimed from the tide some time before the year eighteen hundred and thirty-five. In 1878, the bank surrounding said meadow became broken down and although one or two ineffectual attempts were made to repair the same,
20 the bank was never entirely rebuilt, and since 1878 the lands in the possession of the said plaintiff, under his said lease, conveyances and license, have been subject to the ebb and flow of the tide and covered at high water and exposed at low tide. The original banks have been washed away and in many places no traces of where they were can be found, except where the sides were reinforced by stone, the line of the latter being exposed at low tide.

8. Since the tide has been permitted to ebb and
30 flow over the premises in question, the plaintiff and his predecessors in title, through whom he obtained his title, exercised the right of gunning, fishing, trapping and hunting over the same, built and used shooting blinds thereon, closed the ditches and breeches in the

STATE OF CASE

bank with posts and piling, which piling, however, permitted the water to ebb and flow, but prevented trespassers coming on the meadow in boats. The plaintiff also maintained watchmen to exclude trespassers therefrom and forbade all persons from going on the same for any purpose whatever. Since the tide has been permitted to ebb and flow over the same the said meadow has been individually assessed to the plaintiff and the prior owners thereof and taxes paid on the same yearly. 10

9. Prior to November 2, 1911, the plaintiff had caused to be posted, public notices signed by himself, forbidding trespassing on the lands described in the said declaration, such notices being posted, conspicuously, adjacent to the highways bounding on said lands and adjacent to all usual entrance ways to the same, both on the water and land sides. 20

10. On November 2, 1911, the defendant, carrying a gun, went on and walked upon the lands described in the declaration and inside the old original bank, which lands were then in possession of the plaintiff, in the sense that he paid taxes thereon and made use of the same for the purposes above indicated, notwithstanding the same were submerged at high tide.

11. After the plaintiff had closed the taking of his testimony, the defendant made a motion for non-suit, the grounds being stated as follows: 30

"MR. DAVIS: If your Honor please, I want at this time to make a motion for non-suit on several grounds: The first one is that there is a difference be-

STATE OF CASE

tween the actual acreage included in the map which is in evidence and the assessed acreage, a difference of, I think, something like a hundred and some acres, and that being true, the part of that land which was included in the old bank being something like six hundred and some acres as appears by a notation on the corner of the map and the part or so much thereof as is conveyed by
10 lease being four hundred and some acres, it does not lie within the mouth of the plaintiff to say just what portion of that this supposed trespass was committed upon, and therefore for that reason he ought not be able to maintain an action of trespass, without showing that the trespass was actually committed upon an actual part which he holds by lease, and that he has failed to do; failed to show what portion included within that old bank or the new bank, either, that was excluded from
20 the lease and from the actual assessment.

The second reason is that when the Supawanna Meadow Company refused to put up the bank and let this meadow go out to the tide without any intention of reclaiming it, that they were divested of title and the meadow land then became a part of the title land of the state, just as the bottom of the river, just as any part of the shore or any part of the river. They had put themselves out of any position in which they could convey title and from that time on it has been just as any
30 other portion of the title land over which the State exercises any dominion at all.

The third point which I want to call your Honor's attention is the statute which has passed last year which took fresh meadow—and this is admitted by counsel on

STATE OF CASE

the other side—out of the trespass act and said that a trespass where notices had been posted where everything had been done just as has been in this case—that in such a case when a person was proved to be guilty of trespass, that he should be fined not less than ten dollars and I think a hundred dollars except fresh water meadow. It explicitly took that out of the statute and made an exception of that, and our contention is that this is the exception, that no trespass can be maintained because of the statute of last year. 10

THE COURT: I will deny the motion to nonsuit and allow you an exception.

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

(Seal).” 20

12. After the motion to non suit was refused, Mr. Davis, the attorney of the defendant, made the following statement to the Court:

“MR. DAVIS: If your Honor please, I do not see that there is very much for the jury to pass upon. We want this case determined. We want the questions of law involved settled by the highest Court in New Jersey, and while in this case the plaintiff denies that he was where he is said to have been seen we want the question of law determined, and so we admit that we were on this land where he is alleged to have been seen, and that question alone is about the only question that I see the 30

STATE OF CASE

jury could pass upon in the case. Aside from that the whole thing is a question of law entirely.

THE COURT: If he puts in no defense, I shall instruct the jury accordingly. I understand you do not intend to put in any defense?

10 MR. DAVIS: I do not. I move for a direction of a verdict for the defendant.

THE COURT: It is denied.

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

(Seal)."

20 13. After the motion for direction in favor of the plaintiff was refused, the following is a recital of what occurred at the trial:

"MR. STARR: I move for a direction for the plaintiff for nominal damages.

30 THE COURT: Gentlemen, as this case is made, it being an action in trespass, claim being made by the plaintiff that the defendant trespassed upon his land, and the proof indicating to my satisfaction that there was a trespass upon land to which the plaintiff either had title or a possession that was superior to the right of the defendant, and the proof showing that there was

STATE OF CASE

an entry which in law in my judgment amounted to a trespass and there being no justification, it is my duty to charge you that you must find a verdict for the plaintiff that the defendant is guilty, and as there is no proof in this case of any substantial damages, your verdict will be for six cents, so that you will find the defendant guilty and assess the damages against him at six cents.

10

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

(Seal)."

14. Judgment has been entered in favor of the plaintiff in accordance with the foregoing.

Signing of the exceptions is waived.

20

LEWIS STARR,

Attorney of Plaintiff.

AUSTIN H. SWACKHAMER,

Attorney of Defendant.

30

New Jersey Supreme Court

SALEM COUNTY: ss. As of the 14 day of November 1911, John Warner the defendant in this suit, is summoned to answer unto William M. Perrine, Trustee, the plaintiff therein, in action of tort and thereupon the plaintiff by Lewis Starr, his attorney, complains for that, whereas, the said defendant on the second day of November nineteen hundred and eleven, at Salem, in the County of Salem aforesaid, and within the jurisdiction of this Court, with force and arms &c. broke and entered the close of the said plaintiff; to wit: 10

All that certain tract or meadow land or marsh, situate in the township of Lower Penn's Neck, County of Salem and State of New Jersey, lying and being within the bounds of what is known as the Supanna Meadow Bank Company, bounded on the south and west by the Salem Creek and Delaware river, on the north and east by upland of William M. Perrine, trustee, James Butcher, William Johnson, Millicent B. Tyler, and others, excepting however, therefrom a piece or tract of land known as Hickory Island; 20
to wit at Salem aforesaid, and that his feet in walking trod down, consumed and spoiled the grass and herbage growing thereon of great value, to wit, of the value of One Hundred Dollars, and did then and there force and break open, break to pieces and damaged and spoiled divers gates and fences of the said plaintiff of great value, to wit: the value of One Hundred Dollars, and

also did then and there put, place and erect and caused to be put, placed and erected, divers blinds and other structures in and upon said close and kept and continued said blinds and other structures so there put, placed and erected, without the leave or license and against the will of the said plaintiff for a long space of time, to wit, from the said second day of November, nineteen hundred and eleven, and thereby and therewith during all the time aforesaid, greatly encumbered the
10 said close aforesaid, and hindred and prevented the said plaintiff from having the use, benefit and enjoyment thereof, in so large and ample a manner as he might or otherwise would have done, to wit, at Salem aforesaid, and during all of said period last mentioned did remain in and upon said close and gun, hunt and fish thereon without the leave and license and against the will of the said plaintiff, and other wrongs to the said plaintiff then and there did to the damage of the said plaintiff
20 One Hundred Dollars, and therefore he brings his suit.

AND ALSO FOR THAT WHEREAS, the said defendant above mentioned, on the second day of November, nineteen hundred and eleven, at Salem, in the County of Salem aforesaid, and within the jurisdiction of this Court, with force and arms did break and enter certain lands and premises, situate in the Township of Lower Penn's Neck, in the County of Salem aforesaid, of which the plaintiff was then and there the owner, occupant, lessee and licensee, to wit the lands and premises
30 more particularly described in the first count hereof, the same not being fresh meadow land; and did trespass on said lands and take with him and carry thereon a gun, after public notice on the part of the plaintiff, as owner, occupant, lessee and licensee, of said lands, forbidding any trespass thereon, and without the leave and license

and against the will of the said plaintiff; such notices having been before that time posted conspicuously adjacent to the highways bounding on said lands, and adjacent to all usual entrance ways to said lands, and other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, whereupon the said plaintiff says that he is injured and has sustained damages to the amount of One Hundred Dollars, and therefore he brings his suit

LEWIS STARR, 10
Attorney of Plaintiff.

NEW JERSEY SUPREME COURT

As of the 14th day of November 1911.

William M. Perrine, Trustee,

vs.

John Warner.

} In Tort.

} Plea.

20

And the said defendant by Davis & Davis, his attorneys, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the said plaintiff hath above thereof complained against him and of this, he, the said defendant, puts himself upon the country, etc. 30

DAVIS & DAVIS,
Attorneys for Defendant.

New Jersey Court of Errors and Appeals

William H. Perrine, Trustee,	}	Action at Law.	10
Plaintiff-Appellee,			
vs. "		Appeal from Supreme Court	
John Warner,			
Defendant-Appellant			

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an action of trespass for breaking and entering plaintiff's close, and the locus in quo is a tract of marsh land, on which the tide ebbs and flows. 20

The Treasurer of the Supawanna Meadow Company, on the twenty-third day of August, eighteen hundred and eighty four, executed a lease of the meadow land included within the bounds of said Company, including the locus in quo, to Joseph H. Ward, for a period of ninety-nine years, and on March 12, 1913, the heirs of the said Joseph H. Ward, then deceased, assigned the said lease to the plaintiff. Prior to the formation of the Supawanna Meadow Company the said meadows had 30 been a part of the land under water of the Delaware River and Salem Creek, submerged at high tide and exposed at low tide. After the formation of the Company, the mud flats were reclaimed by a bank which excluded the tide, and the land was used for agricultural purposes.

In 1878, or prior thereto, this bank was washed away

and since that time the tide has ebbed and flowed over the meadow, including the locus in quo, precisely as it had before the erection of the bank, by which the flats were reclaimed.

10 This was the condition at the time the plaintiff took an assignment of the Ward lease, and what he got under that assignment was not meadow lands, but land under the Delaware River below high water mark and only visible at ebb tide. The plaintiff, and his cestue que
10 trust, used these flats as a gunning and fishing preserve and so far as it was possible, excluded the public from any participation in the pleasure or profit derived from gunning or fishing there. The plaintiff made no other use of it and none could be made, although it appears that he has paid tax on the meadows since the assignment to him of the lease.

20 The defendant, believing that, as one of the citizens of the State, he had a right to gun or fish in or over the tide waters of the State, went upon these flats at low tide and carried with him a gun intending to kill such
20 lawful game as he could find thereon, and as a consequence of such alleged trespass, this suit was brought.

The contention of the plaintiff is that by virtue of his lease, he has such exclusive right of possession to the locus in quo as will enable him to sustain this action. And such claim is based upon the idea that these flats, having once been reclaimed by banking in and used for agricultural purposes, the owner of the flats, during
30 such reclamation period, and his successors and assigns, have acquired a title to the lands of which they cannot be divested notwithstanding the lands have ceased to be reclaimed and have, for more than thirty years, formed a part of the bed of the river over which the tide ebbs and flows as it was wont to do from time immemorial prior to such reclamation.

From the foregoing statement, it will be observed that the issue involved is whether the banking out of the tide from the submerged flats and the improvement of the meadow during the period of reclamation conferred upon the owners of the reclaimed land a fee simple title irrevocable; or whether the right acquired in the land was a license or privilege which became inoperative upon the abandonment of the bank and other works by which the land was reclaimed from the submergence of the flats by the tides.

10

TITLE IN THE STATE.

The title to the lands under tide water is held by the Supreme Court of the United States to be governed by the local state laws, and an examination of the authorities in the different states will disclose that the authority of the state over the shore between high and low water mark varies greatly in the different states. Thus, in Connecticut, the owner of the upland has practically a fee in the flats under water so that he could convey them separate from the upland; while in New York the title is prima facie in the state. An able article by William S. Tallinghurst, in *Harvard Law Review*, Volume 18, page 341, distinguishes the law on this subject in the different states and points out the reasons for lack of uniformity.

20

The law in the different jurisdictions is the same however, in holding that the state controls the use of the land below High water mark until it is appropriated by the owner of the upland for wharfing purposes or for agriculture by filling in or otherwise reclaiming the marsh from the tide; and in New Jersey, it is settled by a line of decisions in this court that the State is the absolute owner of the land under tide water. It is equally well

30

settled that the shore owner may reclaim the land between high and low water marks for the purposes above mentioned; but it is nowhere held that the exercise of such privilege gives to the reclaiming owner a title to the land so reclaimed; on the contrary, it has been held that the privilege is a mere license revocable before execution.

Chief Justice Beasley, in *Stephens vs. Paterson and Newark R. R. Company*, 5 Vroom. 532, says:

- 10 "My consideration of this branch of the subject has led to the conviction that such privilege has not the effect suggested in the above inquiry. The local custom in question was nothing more than a license on the part of the public to the land-owner, enabling the latter to fill in or wharf out along the freeshore between high and low water marks, and which license, when executed, became irrevocable. The shore owner acquired his indefeasible right by the acquiescence of the public in the performance of the act."
- 20

In this case, the older cases of *Arnold vs. Mundy*, (1st Halst., page 10) and *Gough vs. Bell* (2 Zab., 469) were reviewed. In the latter case, Chief Justice Green says:

- 30 "In New Jersey, as we have seen, the title to the state extends as at common law to high water mark but it is high water mark as it actually exists. Where the waters have receded by alluvion or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high water line."

In the case of *State vs. The Mayor and Council of Jersey City* (1 Dutch. 525) Justice Elmer says:

"It must now be accepted as the established law

in New Jersey that the right of the owner of lands bounding on the navigable rivers, extends only to the actual high water mark, and that all below that mark belongs to the State."

In the case of *Steward v. Fitch, et al.* (2 Vr., 17) suit was brought for use and occupation of certain mud flats over which the tide ebbed and flowed, and water stood about two feet upon them at high tide. Said flats had not in any way been improved or reclaimed, and it was held that title to them was consequently not in the plaintiff but in the State of New Jersey, and the plaintiff could not sustain his action. 10

In *Railroad Company vs. Yard* (14 Vr.) the question was whether certain land below high water mark, and over which the tide ebbed and flowed, should be taxed. There was a tract of thirty acres which had been conveyed by a corporation to Jay Gould, Trustee, who subsequently conveyed the same to the plaintiff in error. The land was assessed at seventeen thousand five hundred dollars per acre; ten and a quarter acres had been reclaimed and improved and the improvements thereon were assessed at two hundred fifty four thousand two hundred and seventy five dollars. The plaintiff in error objected to the assessment of the nineteen acres unimproved land, over which the tide ebbed and flowed, on the ground that it was below high water mark and the title was consequently in the State. 20

Justice Depue, citing *Gough v. Bell, Stephens v. Paterson and the State v. Mayor and Council of Jersey City*, sustained the contention of the plaintiff in error, on the ground that the title to the land was in the State and consequently, the land was not taxable. 30

Martin v. Waddell, 3 Harr 495 U. S. Sup. Ct.

Paul v. Hazelton, 8 Vr. 106.

Woodcliff v. Jersey City R. R. Co., 43 Vr. 137.
Bell v. Gough, 3 Zab. 624.
22 L. N. S. 337 Note.

The case of Stephens vs. Paterson and N. R. Co.,
supra, in which the notable forensic debate took place
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20 the defendant who chanced to be walking upon these
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It is the insistment of the defendant, that the right
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will not protect his merely transitory possession after
he has ceased to exercise the license. His possession, as
well as his right of possession, depends upon reclama-
tion, and when the land ceased to be reclaimed and was
30 reflowed by the tide, the plaintiff's interest in the land
disappeared. He had no possession because he could
not remain on the land. *Pedis possessio* is necessary to
actual possession. There was no use the plaintiff could
make of the flats to which land is adapted. Upon the
disappearance of the bank, the land sought its original
state and became a part of the bed of the river. And

the legal conclusion is, that the State again acquired its dominion over the land in the interest of the public.

Obviously, the ~~local~~ custom or common law, which permitted the owner of the upland to fill in or bank the submerged adjoining flats from the tide, and thereby to acquire a right in the reclaimed land which the state could not disturb, had for its object encouragement to improve such lands and render them valuable for agricultural purposes, so that there would be profit and benefit both to the State, by reason of raising revenue, 10 and to the owner of the upland, by increasing his acreage and resulting crops. But there can be no excuse or reasonable justification for depriving the public of its ancient right of fishing and fowling upon those lands after they have been abandoned to the tides, and the reason for preserving plaintiff's right no longer exists.

It is further submitted that the plaintiff suffers no loss if the legal contention of defendant is upheld; because if he desires to use these flats for any purpose contemplated by the Meadow Act, under which the lands were originally reclaimed, he needs but to invoke the same kind of legal proceedings for the reclamation of the flats, or he may, without any application to the court, independently erect a new bank in the place of the old, and thereby regain what, by his own negligence or that of his lessor, he has lost to the State for the use of the public. 20

CASE RELIED UPON BY PLAINTIFF. 30

It was supposed that the question here raised was of first impression in this State; indeed a thorough search in the reports of foreign jurisdictions discloses no case in point; but attention is called to *Simpson v. Moorehead*, (20 Dick., 623) relied upon in the court below,

in which appears a dictum of Vice Chancellor Grey, supposed to uphold the doctrine that a right once acquired by the reclaiming owner cannot be lost by abandonment of the land to the tides. That it is a mere dictum is discoverable in the language of the Vice Chancellor on page 628, in which he says :

10 "The question which has been very interestingly argued here touching the ownership of the reclaimed meadow lands, lying subject to the flow of the tides, and the effect of subsequent submergence &c., or any other question challenging the complainant's ownership and right of possession, cannot be raised here by the defendant under the peculiar circumstances of this case. The defendant, himself, is the grantor of those privileges and rights to the complainants, which he now disputes. He cannot be heard to deny the effect of his own deed. It is inequitable that he should be permitted to do so."

20 The most that can be said of that part of the opinion which deals with the question of ownership in reclaimed lands after the works, by which the lands have been reclaimed, have got out of repair and no longer exclude the tide, is that it is an expression of an opinion by a learned judge of what the law should be as applied to the facts in the case before him. It should first be noted that in that case there was no abandonment of the meadow to the tide; on the contrary, the
30 opinion is based upon an absence of any evidence of an intention to abandon the meadow. The bank was still up, although out of repair, and as stated by the Vice Chancellor, "were leased by the owner to the defendant, who evidently did not consider them to be abandoned for he, after using the lands himself under the leases, has now assigned them to complainant, Simpson,

for a valuable consideration." Evidently the phrase "using the lands" meant such a use as is commonly made of meadow land—the improvement of the soil for farming purposes.

The fact that the bank was out of repair, was no evidence of abandonment of the meadow or that the meadow could not be farmed, notwithstanding the broken condition of the bank.

That the learned Vice Chancellor was considering a case where the meadow was only temporarily exposed 10 to the tide is further evidenced by what he says at bottom of page 630. He says:

"The theory that mere submergence takes away private title, is quite too uncertain to be made the means of changing the ownership to lands. Does the first overflow divest the owner of his title? If not, how many are required to pass a good title to the state?"

He certainly could not have applied this argument 20 to such a case as the one at bar where the flats have been flowed by the tide for a period of thirty-five years. If the inquiry as to how many tides are required to pass title to the State, is pertinent, it might, with equal propriety, be inquired, how many tides the reclaiming bank must exclude from the submerged flats to pass title from the State to the riparian owner. It will hardly be contended that a bank thrown up to exclude the tide temporarily from the land would vest title in the riparian owner whether it was done for that purpose, or not. 30

The argument based upon the section of the Meadow Act authorizing the cutting of the bank and the flooding of the meadow for the purpose of improving it, is not applicable in this case, because the submerging of the meadow under authority of statute is not abandonment of the meadow, but discloses a contrary intention. Fur-

thermore, in the case of *Simpson v. Moorehead*, the lessor was the owner of the upland and leased to plaintiff both the upland and adjoining flats; so that the lease to the complainant drew with it all the rights which are inherent in the riparian owner by reason of adjacency to tide water independent of rights acquired by excluding the tide.

10 It is not considered necessary to notice any claim which may be urged by the plaintiff based upon the riparian grant, as it is not pretended that the locus in quo was covered by that grant; nor is the plaintiff's title strengthened by the fact that he and his assignors voluntarily paid taxes on these submerged flats, which were absolutely worthless for farming or any other purpose. Had the plaintiff protested, the tax would have been set aside. The inference is, that the assessment was so insignificant as not to be worth noticing, or that he preferred to pay it, believing that a tax receipt would be some evidence of title. That it is no evidence of title, need not
20 be argued here.

There is absolutely no merit in plaintiff's claim. The defendant was hunting on tide-flowed flats which had not been under the plow of the husbandman or used for any agricultural purposes whatever for over thirty years, during which every vestige of reclamation has been washed away. And the case shows that the manifest object the plaintiff had in procuring the lease, was that he, together with those for whom he held, could
30 create an extensive game preserve and play the part of overlords in the public domain.

It is respectfully submitted that the judgment of the court below should be reversed.

J. WARREN DAVIS,
AUSTIN H. SWACKHAMER,
Counsel for Appellant.

NEW JERSEY
COURT OF ERRORS AND APPEALS.

WILLIAM M. PERRINE,
Trustee,
Plaintiff-Respondent,

VS.

JOHN WARNER,
Defendant-Appellant.

ON APPEAL FROM
SUPREME COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

STATEMENT OF FACTS.

This is an action for trespass to lands.

The agreed state of the case shows that the premises, described in the plaintiff's declaration, were formerly part of the banked-in-meadow of the Supawanna Meadow Company, which company was organized pursuant to the Meadow Act of November 29, 1788, and the various supplements thereto and acts amendatory thereof, found in Comp. St., page 3241, *et seq.* The land had been reclaimed from the tide sometime before the year 1835. From the latter year, and until 1878, the predecessors in title of the plaintiff were in the actual possession of the *locus in quo*, and used the same for agricultural purposes generally.

In 1878, the bank surrounding the meadow became broken down, and, although one or two ineffectual attempts were made to repair the same, it was never entirely rebuilt, and, since 1878, the said land has been subject to the ebb and flow of the water, covered at high tide, and exposed at low. The original banks have been washed away, and, in many places, no traces of where they were can be found, except where the sides were reinforced by stone, the line of the latter being exposed at low tide. (C. p. 6, l. 17, *et seq.*)

On August 23, 1884, William T. Hilliard, treasurer of the Meadow Company, made a lease, of the *locus in quo*, to Joseph H. Ward, which lease, and the interest of Ward and his estate in the same, was assigned to the plaintiff on March 12, 1903. (C. p. 5, l. 1.)

The lease was legally executed under the terms of the Meadow Act and its supplements. (C. p. 5, l. 27.)

Since 1878, the owners of the lands and premises, embraced within the Meadow Company limits, have permitted the tide to ebb and flow over the *locus in quo*, and, after the plaintiff acquired the lease in 1903, the plaintiff exercised the right of gunning, fishing, trapping and hunting over the same, built and used shooting blinds, closed the ditches and breaches in the bank with posts and piling, which piling, however, permitted the water to ebb and flow, but prevented trespassers from coming on the meadow in boats, maintained watchmen to exclude trespassers, and forbade all persons from going on the same. (C. p. 6, l. 30, *et seq.*)

Plaintiff and his predecessors in title have been assessed, and paid taxes on the meadow ever since it has been out to the tide. (C. p. 7, l. 8.)

On November 2, 1911, when the act of trespass,

described in the plaintiff's declaration, occurred, the right of possession of the plaintiff existed by virtue of the lease and assignment thereof, above mentioned (C. p. 4, l. 30), and conveyances made by the owners of said meadow lands, mentioned in the report of Commissioners filed pursuant to the terms of the Meadow Act, and their heirs. (C. p. 5, l. 32.)

On November 2, 1911, the plaintiff was in possession of the said lands so far as it was possible for him to be possessed of land submerged at every high tide. (C. p. 4, l. 25.)

Prior to November 2, 1911, the plaintiff had posted notices forbidding trespassing on the *locus in quo*. (C. p. 7, l. 12.)

On November 2, 1911, the defendant committed the act of trespass alleged in the plaintiff's declaration. (C. p. 7, l. 20.)

The declaration contained an ordinary count of trespass *quare clausum fregit*, to which the defendant interposed a plea of not guilty.

At the close of the plaintiff's case, the defendant moved to non-suit, upon various grounds, the main one of which being that when the Meadow Company refrained from putting up the bank, and permitted the same to go out to the tide, without any intention of reclaiming it, the owners were divested of title, and the lands then became a part of the tidal land of the State. (C. p. 8, l. 20.)

The motion to non-suit was refused.

Thereupon the attorney of the defendant stated that the defendant admitted the trespass, but desired to have the question of law passed upon by the Court, and would not produce any evidence. (C. p. 9, l. 32.) A motion was made that binding instructions be given for the defendant, which was refused.

The plaintiff then moved for a verdict for nominal

damages, which motion was granted, and judgment, in favor of the plaintiff, has been entered thereon accordingly. (C. p. 11, l. 17.)

GROUND OF APPEAL.

The grounds for appeal, found on pages 2 and 3 of the printed case, as briefly stated in the appellant's brief, are that the rights which the shore owner acquired in the land, were in the nature of a license, which became extinguished upon the destruction of the banks and other works, by which the land was reclaimed from the tide.

RESPONDENT'S POINTS.

The judgment was proper, because the plaintiff had such a title or right of possession in the lands as would entitle him to the exclusive possession thereof against any act of trespass by the appellant.

The respondent's claim is supported:

First. By the Meadow Act above referred to.

Second. By the local common law of the State, as declared in *Gough vs. Bell*, 3 Zab. 524.

Third. The trespass of the appellant cannot be justified under the plea of general issue.

First Point.

The Meadow Act of 1788 (see Comp. St., page 3241) provides that if the owners of a majority of the number of acres, in any body or tract of marsh or swamp, exposed to the overflow of the tide, and capable of being laid dry and put in proper state for improvement by one general bank or dam, are desirous to improve the same, and the whole cannot agree, such owners, desirous of improvement, may apply to the Court of Common Pleas of the county in which the marsh lies, which Court shall appoint commissioners to view the premises, hear the parties and lay out banks, or other works necessary to secure the marsh from the tide, in such place or places as may appear most safe and beneficial to the whole of the owners, and make an actual survey thereof, describing the beginning, courses and distances, and where the banks shall join the fast land, and also fix a name for the company, and appoint a time and place for the first meeting, and deliver a certificate of their proceedings to the Clerk of the court from which they received their appointment. The act also provides that the expense of erecting and maintaining banks, etc., shall be defrayed by a tax laid upon the meadows secured from the overflow of the tide. Managers are appointed by the owners of the land lying within the bank, who are required to cause all the parcels of land belonging to each owner, usually overflowed by the tide, and lying within the bounds of the proposed bank, to be carefully and strictly measured, and a plot thereof to be made, carefully and strictly measuring the quantity held by each owner, and cause a valuation to be made, by persons appointed by the owners, of the meadow ground of each owner separately, and

make an estimate of the sums necessary to defray the expense of making the banks, and other works necessary to keep the tide from overflowing the meadows, until the meadows shall be laid dry, and put in a proper state of improvement, and shall assess the costs ratably on the meadow agreeably to the valuation and quantity each owner may have within the bank, and state the assessment in a regular duplicate, which duplicate shall be delivered to the treasurer. Provision is also made for the collection of the assessments by sale by the treasurer, for such length of time as may be requisite, of so much of the meadow within the bank belonging to or in the possession of the delinquent owner, as may suffice to discharge the assessment. The act provides for further inspection and repair work, assessment to pay expenses, and annual meeting for the election of officers. The act also provides for repair of banks, already improved, where some of the owners refuse to keep their part of the works in good repair, and for the repair of the whole, the expense of which is to be paid by a tax levied upon the entire meadow. Managers are charged with the duty of stopping sudden breaches.

By supplement passed January 22, 1829, it became lawful for the owners of any tract of meadow land, lying within the bounds of any Meadow Bank Company, organized under the original act, to cause the same to be subjected to the overflow of the tide in such manner, and for such time or times as the company shall, at their annual meetings, direct and appoint.

Comp. St. 3251, Sec. 31.

The constitutionality of legislation of this character was sustained in the Pequest River case, where

the opinion of Chief Justice Beasley, as reported in 41 Law, page 175, refers to the great antiquity of meadow banking laws, and the effect to be given rights acquired thereunder, because of such ancient usage.

The owners of the mud flats, subject, however, to the ebb and flow of the tide, but abutting the upland, took advantage of this legislation for the purpose of creating the Supawanna Bank Company for the mutual benefit of all concerned.

The company was organized in 1835, and, for over forty years, the land thus reclaimed and improved was used for general agricultural purposes.

It is quite apparent that the State, by the legislation referred to, intended to confer upon the owners of such meadow land, the right to use and occupy the same to the exclusion of all others. There was no exception in favor of the State, and the right of the latter, by reason of its original ownership of the land between high and low water mark, became extinguished. The estate of the owner, thus acquired, as against the sovereignty of the State, is identical to that existing under the doctrine expressed in *Gough vs. Bell*, which will be discussed hereafter. The ownership in the improved land became indefeasible as against the State, and all others claiming under it.

This legislation must necessarily be construed as a recognition, by the State, of the right of the owners of meadow lands thus improved, and included within the bounds of a meadow company, to acquire a fee simple title. Therefore, the jurisdiction and authority of the State over the same terminated absolutely. No other interpretation can be given the legislative purpose. After the marsh lands were thus improved, the State was necessarily estopped

from asserting title to land, which was, under appropriate legislative sanction, enhanced in value by turning back the tide, and removing the same from the public domain.

Chief Justice Beasley, in *Stevens vs. Patterson & Newark Railway Company*, 34 *Law*, 547, stated that the Legislature, in passing the Meadow Acts, put in statutory form, and subject to certain general regulations, the local custom sanctioned by the case of *Gough vs. Bell*. He uses this language:

“The right of the bank owner was dealt
“with by the Legislature, not as an incident
“of property already vested, but as a privilege
“which required the element of public
“acquiescence and the performance of a prerequisite
“on the side of the proprietor, to be
“converted into a legal right.”

He also says, on page 549:

“That the riparian owner, by the common
“law, had no peculiar rights in this public domain
“as incidents of his estate, and that the
“privileges he possesses by the local custom,
“or by force of the Wharf Act, to acquire
“such rights, can, before the possession has
“been taken, be regulated or revoked at the
“will of the Legislature.”

This is a judicial declaration that the rights acquired under the provisions of the Meadow Act, are similar to those sanctioned in *Gough vs. Bell*.

Furthermore, the dissenting opinion of the Chancellor, Zabriskie, in the same case, also concedes the effect of such reclamation of submerged lands, and he similarly construes the rights of the owners thereof.

If, for any reason, this Court should recede from the rule expressed by the Chief Justice in the case of *Stevens vs. Patterson*, and hold that the riparian owner does possess a property right in the bed of a navigable water in front of his land, then it would seem that the reclaiming of the land, in which such right exists, amounts to more than the exercise of a mere license or privilege, but such title is converted into an absolute estate by the acquiescence of the State, which cannot be afterwards vested in or repossessed by the latter, no matter what happens to the land itself. The State is estopped from interfering with this indefeasible estate, thus created and brought into existence by its own conduct. If the State has no right to become revested with the title, certainly the landowner can compel a recognition, by all persons, of his exclusive right of possession.

Another effect of the Meadow Act legislation, is to create a status with reference to the land thus improved, so that the same may be dealt with as any other species of private property. It becomes applicable to all incidents respecting such ownership, and subject to the following rules stated by Vice-Chancellor Grey in *Simpson vs. Morehead*, 65 *Eq.* 630, viz.:

“I know of no adjudication which declares
 “that a title to lands once vested in a private
 “person is taken away from him, and given
 “to the State, by the fact that the tide water
 “happens to overflow the lands.” * * * *
 “The theory that mere submergence takes
 “away private title, is quite too uncertain to
 “be made the means of changing ownership
 “of lands.”

Second Point.

We claim that the case at bar must, necessarily, be controlled by the opinion of the Court of Errors in *Gough vs. Bell*.

The contention is made by the appellant here, that the title of a shore owner to the land originally between high and low water mark, but reclaimed by a wharf, bank, or other structure by which the tide is excluded, exists only during the time the water is kept from flowing over the same, and that the State becomes repossessed of ownership at once upon the owner permitting the land to again become subject to ordinary tidal conditions.

It is also urged that the doctrine sanctioned by *Gough vs. Bell* is susceptible of such construction.

We respectfully submit that the language of the opinions, both in the Supreme Court and the Court of Errors, amply supports our claim that the ownership of the shore owner thus acquired, becomes substantially a fee simple title, indefeasible, and cannot be lost by permitting the lands to again become subject to the tide. The following language of the Chief Justice, who delivered the opinion in the Supreme Court, is particularly pertinent in this regard:

“It is strictly a sovereign right. The proprietary rights were at an early period severed from the sovereignty, and were vested in the proprietors, in whom, and in their grantees, they still remain. The only title which the State claims to the soil is by virtue of its sovereignty, for the protection of the public or common rights. But where the soil of navigable rivers is permanently appropriated without prejudice to the pub-

“lic rights, and where the State tacitly acquiesces in such appropriation, there would seem to be but little reason in her setting up a title as proprietor of the soil for no public use.” 2 *Zab.* 461.

“No public inconvenience has resulted from the practice, and no serious detriment has been occasioned to the common rights of the people of the State; on the contrary, the facilities of commerce and navigation have been increased, lands, which otherwise would have remained worthless, have been by private enterprise reclaimed and made available, and property of great and increasing value has been added to the wealth of the State. The lands thus improved have been held and enjoyed as private property, and have been taxed as such, without a doubt being entertained as to the validity of the title.” 2 *Zab.* 465.

“The very numerous meadow acts, both public and private, to be found upon the statute book, are not regarded as an exception to the truth of this remark. They do not purport to authorize the riparian proprietors to appropriate to their use any part of the public domain. On the contrary, they authorize the owners of meadows to improve their own land, and for this purpose they subject a body of landholders to common regulations, and, in some instances, authorize the construction of dams across navigable streams. The great body of meadow thus to be improved lay above ordinary high water mark, or did not properly constitute the shore of navigable streams.

“These acts, therefore, cannot with propriety
 “be regarded either as a recognition by the
 “Legislature of the title of the proprietors to
 “lands lying between high and low water
 “mark, nor, on the other hand, as a grant of
 “a right to the exclusive appropriation of the
 “public domain.” 2 *Zab.* 466.

The following extracts from the opinions of the Judges of the Court of Errors, which Court unanimously affirmed the conclusion reached by the Chief Justice, are particularly instructive in determining the character of the estate of the landowner after reclamation:

“By the common law of New Jersey, the
 “owners of land bounding on such rivers have
 “an absolute and exclusive right to wharf
 “out and otherwise reclaim and improve the
 “adjoining shore to the ordinary low water
 “line, and to the use of the same for fisheries
 “and all other lawful purposes not obstruct-
 “ing the navigation. This right is incom-
 “patible with and excludes the right of
 “ownership, which in England exists in the
 “crown, and an encroachment upon which is
 “there called a *pour-presture*, or enclosure
 “of the King’s *demesne*, and which, it is there
 “held, he may seize and abate, or license and
 “rent at his pleasure, and which, if it existed
 “here, would be vested in the State.” 3
Zab. 669.

“The State cannot, directly or indirectly,
 “divest him of any one of these rights, except
 “by the constitutional exercise of the power
 “to appropriate private property for public
 “purposes; and any act of the State short of

“such an appropriation, which attempts to
 “transfer any of these rights to another with-
 “out the consent of the proprietor, is inopera-
 “tive and void, and can afford no justifica-
 “tion to the grantee against an action of
 “trespass.” 3 *Zab.* 676.

“These principles seem clear of difficulty;
 “they treat the rights of riparian owners as
 “property right, to be guarded and protected,
 “while they preserve the common law rule in
 “reference to the rights of the public and the
 “State, leaving to the Legislature the power
 “of regulating, improving and securing the
 “property they hold in trust for the common
 “benefit of the people, and to the individual
 “citizen his private rights. And leaving it
 “there, it is left where it is safe to leave it.”
 3 *Zab.* 681.

“As appurtenant to his riparian owner-
 “ship, the right to exclude the influx of the
 “tide by the erection of embankments, docks,
 “or wharves, provided he does not impair or
 “interfere with the common right of naviga-
 “tion or fishery or any other common right;
 “that he cannot be deprived of these rights
 “either by the prerogative of the crown or by
 “parliamentary or legislative power, except
 “it be upon the doctrine of eminent domain,
 “when he is to be compensated by the govern-
 “ment for the rights of which he is divested
 “for public or private good.” 3 *Zab.* 685.

“If the lessors of Gough had the privilege,
 “under the local custom of New Jersey, of
 “reclaiming the shore in front of their farm,
 “without injuring the rights of navigation or
 “invading the sovereignty of the State

“(which I think they had) they have, by the application of their labor and capital upon that shore, acquired a vested right in the place reclaimed.” 3 *Zab.* 693.

“Although contrary to my first view, I have come to the conclusion that the reasoning of the Chief Justice is right on this point, and that the acquiescence by the people of the State for a century in such appropriation of the public domain has created a rule of law that we must notice, and that where a shore owner has filled in on the shore opposite his lands with the acquiescence of the State, he owns it.” 3 *Zab.* 696.

A careful consideration of the entire opinions of all the learned Judges, both in the Supreme Court and Court of Appeals, who sat in the Goff case, will fail to disclose any intimation or suggestion that the Court intended to decide that the title, acquired by the reclaiming owner, should, if the lands were restored to the ebb and flow of the tide, be terminated as to such owner, and the State become repossessed of its original title in the same. The question to be decided in this case is, can it be determined, by a proper interpretation of the doctrine supported by *Gough vs. Bell*, that the State becomes reinvested with its former title to land which it lost, to the abutting riparian owners, by acquiescence in the reclamation, merely because such owners, for either short or long period, permitted the water to overflow the same.

We submit that there is nothing in the case of *Gough vs. Bell*, or any of the other authorities cited in the appellant's brief, which will give judicial

sanction to such limitation of the share owner's rights.

The right to reclaim tidal lands existed long before the Wharf Act was passed in 1851, and that legislation does not control this situation.

After a very careful and exhaustive examination of the authorities in New Jersey and elsewhere, we have not found any case in which this precise question has been raised, or any so similar as to form a precedent, except *Morehead vs. Simpson*, 65 Eq. 623. There Vice-Chancellor Grey passed upon substantially the same issue as here involved, and, in support of our contention, we adopt the following language of the learned Vice-Chancellor:

"The counsel for defendant contends that
 "the lands leased by the owners of the mea-
 "dows have been suffered to go out to the
 "tide, and that this submergence re-estab-
 "lishes the State's title to those lands and
 "justifies all persons in going as they please
 "upon the tidewaters which may cover such
 "lands.

"Some of the principles laid down by de-
 "fendant's counsel regarding such lands are
 "indisputable. One of them is that the State
 "of New Jersey was, in its right as sover-
 "eign, the owner of all that belt of land lying
 "at high-water mark within the tidal waters
 "of the State, and thence out into the sea or
 "river, so far as there can be any ownership
 "of lands. That, in substance, is the holding
 "in the leading cases of *Arnold vs. Mundy*, 1
 "*Halst.* 1, and *Martin vs. Waddell*, 3 Harr.
 "495.

"It is, however, equally indisputable that

“under the local common law of this State
 “there has from the earliest times existed a
 “right whereby the private owner of lands at
 “high-water mark had the privilege of re-
 “claiming the lands of the State lying under
 “tidewater in front of his ownership, which
 “right, when exercised, vested in such re-
 “claiming owner the title of the State in the
 “lands reclaimed. That was declared by the
 “Court of Appeals in *Bell vs. Gough*, 3 Zab.
 “624, in 1852. That right (with some limita-
 “tions as to wharfing imposed by the Act of
 “1851) remained exercisable, at the option of
 “any such owner, up to the time of the
 “passage of the riparian act, providing a
 “specific plan of acquiring the State’s title
 “through riparian commissioners. Under
 “the privilege of reclamation, the owners of
 “lands lying at high-water mark, in front of
 “which the tidewater mud flats were located,
 “reclaimed them from the waters by banking
 “them in. They, by this sort of reclamation,
 “acquired the title of the State to these non-
 “navigable mud flats (now called banked mea-
 “dows) which lie adjacent to tidal streams.
 “This is plainly shown by many acts of the
 “Legislature of this State, arranging for the
 “methods of banking those mud flats as
 “private property, the raising of money
 “therefor by a system of *quasi* taxation of
 “the lands within the bank, and many pro-
 “visions which clearly recognize ownership
 “of the reclaimed lands as vested in the own-
 “ers who had reclaimed them. Many of
 “these statutes are of great antiquity, so an-
 “cient as to have been passed in Colonial

“times, preceding the organization of the
 “State itself. Judicial decisions have recog-
 “nized the validity of these meadow banking
 “laws, notably the *Pequest River Case*, 12 Vr.
 “175, in which Chief Justice Beasley, in view
 “of their great antiquity, refused to consider
 “a challenge of their constitutionality.

“The ownership of the title of these
 “banked meadows was thus acquired by the
 “riparian owners from the State and it in-
 “cludes thousand acres in the Counties of
 “Camden, Gloucester, Salem and Cumber-
 “land. The meadow company, created under
 “the meadow statutes, consisted of the asso-
 “ciated owners of those meadow lands which
 “could be conveniently protected by one bank.
 “In the use of the reclaimed lands the owners
 “often voluntarily permit them to be over-
 “flowed by the tidewater for their improve-
 “ment by the deposit of silt and mud. It
 “sometimes happens that the banks break and
 “the tidewater comes over them against the
 “will of the owners, who spend large sums to
 “exclude it immediately, and after exclusion
 “cultivate as before. At other times, al-
 “though the breaches in the banks letting in
 “the water may be occurred against the ef-
 “forts of the owners, yet after they have hap-
 “pened the owners permit the lands to be sub-
 “ject to the overflow of the tide, sometimes
 “for short periods, sometimes for long ones.
 “It is this situation which the defendant’s
 “counsel insists restores title in the re-
 “claimed lands to the State and subjects them
 “while that overflow continues, to the entry
 “of all the citizens of the State for all pur-
 “poses of gunning, fishing, etc.

"It will, I think, be found that the meadow
 "statutes recognize such overflows and con-
 "tinued subjection to tidewater as incidents
 "of meadow ownership and regulate the
 "method of again erecting the banks, irre-
 "spective of the length of time the meadows
 "may have been permitted to remain 'out to
 "the tide,' the phrase used in South Jersey to
 "describe the overflowed condition. I know
 "of no adjudication which declares that a
 "title to lands, once vested in a private per-
 "son, is taken from him and given to the
 "State by the fact that tidewater happens to
 "overflow the lands.

"The custom in South Jersey (where most
 "of the tide meadows lying in this State are
 "located) as is shown by the meadow-bank-
 "ing book entries in the various County
 "Clerks' offices, is to again exclude the tide
 "from the flooded meadows by re-banking
 "them, oftentimes locating the bank in a new
 "place. This is done at any time the owners
 "may choose to put up the banks again. The
 "periods between the going 'out to the tide'
 "and the re-banking are often many years.

"The theory that mere submergence takes
 "away private title is quite too uncertain to
 "be made the means of changing the owner-
 "ship of lands. Does the first overflow di-
 "vest the owner of his title? If not, how
 "many are required to pass a good title to
 "the State? The learned counsel has re-
 "ferred to a particular piece of banked
 "meadow in which he is himself interested,
 "which has for a long time, because of dif-
 "ficulty in maintaining the banks, subjected

"the owners to great expense. For several
 "years the tidewater has flowed over it for
 "almost as much of the time as it has been ex-
 "cluded. Can it be said, if the owners be
 "willing to allow a continued overflow until
 "the deposit of mud from the tidewater has
 "raised the bed of the meadow and make
 "more easy the maintenance of the bank, or
 "if they want time to raise more money to
 "pay for the banks, they have lost their title
 "to their lands by submergence in the mean-
 "while?

"The section of the Meadow Act (59) re-
 "ferred to by counsel, which enables a ma-
 "jority of the owners to order an overflow,
 "has nothing to do with any change in the
 "ownership of the lands. It is obviously in-
 "tended to enable a majority of the owners
 "to provide for a temporary overflow. Noth-
 "ing in that section indicates that if the
 "meadows are overflowed without a majority
 "vote the title to the lands would be affected.

"It seems to me to be unquestionable that,
 "if the lands be once reclaimed, the title to
 "such lands remains in the several reclaim-
 "ing owners whether the tidewater after-
 "wards overflows them or not.

"The defendant's doctrine, if applied to
 "the ownership of banked meadow lands,
 "would prevent the private owner from im-
 "proving them by allowing an overflow and
 "thus securing the advantage of the deposit
 "of mud thereon from the flowing tide. This
 "practice is common wherever such lands are
 "owned; sometimes the owner overflows his
 "meadows every winter, sometimes for sev-
 "eral years continuously.

"It may, I think, be truthfully said, that in
 "no case has the overflow of such meadows
 "by the tide, whether it happened by accident
 "or design, ever been accompanied by a pur-
 "pose to abandon the property. Almost in-
 "variably, during the period when overflow
 "is permitted, some acts of ownership over
 "the submerged lands are asserted by the
 "owners.

"In the case now before me the banked
 "lands, though overflowed by tidewater, were
 "leased by the owners to the defendant, who
 "evidently did not consider them to be
 "abandoned, for he, after using the lands
 "himself under the leases, has now assigned
 "them to the complainant, Simpson, for a
 "valuable consideration.

"There is a marked difference between the
 "overflow of flats adjoining a river, which
 "almost invariably deposits mud upon them
 "and thus raises their level and improves
 "them for agricultural use, and the action of
 "the sea at the tidewater line, which some-
 "times deposits an accretion, and at others,
 "by erosion, carries away the fast land, with
 "no known or certain habit of doing either
 "one or the other. In the one case the over-
 "flow can be used with certainty for pur-
 "poses of deposit and improvement, the lands
 "being readily identifiable by their owners
 "on every recession of the tide. In the other
 "the very substance of the fast land may be
 "permanently removed so that no means of
 "marking its bounds may remain.

"An interesting discussion of the question
 "may be found in the opinion of the late

“Chief Justice Depue in the case of *Ocean City vs. Shriver*, 35 Vr. 550, 556, in the Court of Appeals, with a collation of the cases and views of learned writers on the subject. “The highest authorities all in substance declare that, if the owner’s overflowed land be left again uncovered by the recession of the water, he shall have it as before if he can make out where and what it was, ‘for he cannot lose his property in the soil though it for a time become a part of the sea.’ ”

No more conclusive reasons can be advanced, than those expressed in the above opinion, to support the contention that the State does not become revested with its former title to lands originally under water mark, but afterwards improved and reclaimed, by the owners merely permitting the tide to cover the same.

No Abandonment Was Shown.

The title acquired by the owners of the meadow land is not lost by their conduct in permitting the meadows to go out to the tide. Independently of the general doctrine that mere failure to occupy land, or exercise rights incident to its ownership or use, will not be sufficient to divest the title of a former owner, it is perfectly apparent here that there was no intention on the part of the plaintiff below, or his predecessors in title, to voluntarily abandon whatever rights they had acquired in the *locus in quo*, either by the Meadow Act or reclamation of the land under the ancient local custom. They exercised every power of possession which it

was possible for them to exercise over land which was submerged at high water. Pedestrians could walk on the land when the tide was out, and, to that extent at least, it may properly be claimed that they were in actual possession. They paid taxes, they maintained watchmen to exclude trespassers, closed the breaches and ditches to prevent trespassers from coming on the meadow in boats, and did every other possible act which would demonstrate to the world that they intended to retain and exercise all vested or acquired estates. To this extent, therefore, we claim that there was actual possession of the lands from the time the banks were washed away until the act of trespass complained of.

“Abandonment” is a word that has acquired a technical meaning. It is defined to be the relinquishment of a right—the giving up of something to which we are entitled.

Mallett vs. Uncle Sam Gold Mine Co., 1 Ver. 204.

Property is said to be abandoned when it is thrown away, or its possession is voluntarily forsaken by the owner.

Eads vs. Brazelton, 22 Ark. 509.

To constitute an abandonment, there must be a clear, unequivocal and decisive act of the party—or act done which shows a determination in the individual not to have a benefit which is designed for him.

Breedlove vs. Stump, 3 Yerg (Tenn.) 257;
Dawson vs. Daniel, 2 Flipp (U. S.) 309.

To constitute abandonment there must be a concurring of the act of leaving the premises vacant so

that they may be appropriated by the next comer, and the intention of not returning.

Judson vs. Malloy, 40 Cal. 309.

Failure to occupy land for an indefinite time, does not constitute abandonment of title.

Lowels vs. Minot, 73 Atl. 1025.

A full legal title to land can be divested by abandonment, only where the circumstances are sufficient to raise an estoppel, or when possession is acquired by one in consequence of the abandonment and held under a claim of right for the statutory period of limitation.

Trustees of Caledonia County Grammar School vs. Kent, 77 Atl. Rep. 877.

Where it appeared that a company extended its lines from time to time, as fast as public business and growth of population warranted, and that it was engaged in good faith in extending a line over a certain street extending from the City into the County of Camden, when interrupted by a rival company, the right to occupy such street will not be held to have been abandoned by the non-user for twenty years, in the absence of any limit by such act on the time within which the right should be exercised.

West Jersey Traction Co. vs. Camden Horse R. Co., 52 N. J. Eq.

We submit that where a meadow becomes flooded because of the destruction of banks, and the owners, instead of restoring the latter, permit the meadow to remain out to the tide, they do not necessarily evince an intention to voluntarily abandon the property to the State. In this particular case, the inten-

tion was quite the contrary, as disclosed by the conduct of the owners. Refraining from making repairs to a bank, thereby permitting the tide to ebb and flow, is precisely the same situation as causing the same to overflow by some affirmative act. The State sanctions such overflow by Section 31 Meadow Act, Comp. St. 3251. Substantially such condition exists here.

Comment on Brief of Appellant.

The appellant seems to reply mainly upon the opinion of Chief Justice Beasley in the Stevens-Paterson case, where in his usual vigorous style, he declares that the State is the absolute owner of the lands in all navigable water within its tidal limits, and such land can be granted to any one, either public or private, without making compensation to the owner of the shore. The Chancellor, who delivered the dissenting opinion, held that the riparian owner, as an incident to his land, had a property interest in soil covered by the tide in front of the shore, which property interest could not be taken by the State, except under the power of eminent domain for public use, and upon compensation.

Of course, it will be conceded that in the Stevens case no question of reclamation arose. Both the prevailing and dissenting opinions assume the existence of the principle established by *Gough vs. Bell*. Furthermore, the right of the shore owner, under the Meadow Act, is recognized, and it is stated that such privilege, which is the subject matter of acquiescence, becomes converted into a legal right. The title of the shore owner is characterized as being an indefeasible one. Therefore, we contend that

neither of the opinions support the contention that this indefeasible title is lost by failure to continue to turn back the tide.

The plain inference to be gathered from the opinion of *State vs. Jersey City, 1 Dutcher*, 525, is that when the land under water is actually reclaimed and annexed to the upland, it becomes part and parcel of the latter. If this is the correct doctrine, then the same incidents of ownership as attaches to the original upland, would apply to that which becomes part thereof by reclamation.

The decision of the Supreme Court in *Stewart vs. Fitch*, 2 Vr. 17, has no bearing whatever upon this question because the flats, for the use and occupation of which a suit was brought, had never been improved or reclaimed in any way. There could be no pretense whatever that the title was lost to the State.

The case of *Railroad Company vs. Yard*, 14 Vr. 632, seems to support, inferentially at least, the views of Chancellor Zabriskie in the Stevens case, to the effect that the abutting landowner had some sort of an interest in the land under water in front of his property, which could be made the subject of taxation. The precise question here involved, however, was not, in any way, touched upon in the decision of that case.

It might be added, in passing, that the case of *State vs. Jersey City, 1 Dutcher*, 525, seems to recognize the soundness of the conclusion of the Chancellor in the Stevens case, by holding that there could be increased value of the land along the water, because of the right to reclaim.

The appellant's counsel states the important question to be "Can a licensee of submerged flats, disconnected in title or possession from the adjoining upland, maintain trespass against the defendant, who chanced to be walking upon these submerged flats with a gun at low tide?" This statement of the case begs the question. There is no proof that the plaintiff was a licensee of submerged flats, disconnected in title or possession from the adjoining land. The plaintiff acquired, by his lease, whatever rights the meadow owners had in the lands within the limits of the Bank Company, and it must necessarily be assumed that the owners of the land in the company also were owners of the adjoining shore, otherwise, the Meadow Act would not be applicable to the situation.

In addition to the lease, under which the plaintiff claims right of possession, it appears by the case that subsequently he acquired the legal title of all the owners of the lands included within the limits of the meadow company.

Therefore, not only does he possess the leasehold estate, created under the terms of the Meadow Act, but he also owns the reversionary interests of the several owners, thus creating a title in fee which would confer the right to prevent trespassing, independently of any actual possession, if the same did not conclusively appear in the facts agreed upon.

Third Point

While all parties are anxious to have a judicial determination of the important question involved in this case, it would seem that the pleadings do not properly raise that issue. The declaration alleges a trespass, the plea is not guilty.

Under such issue, the defendant cannot justify the trespass upon the ground that the plaintiff was not owner of the property, or that the title to the *locus* was in the State, and that any citizen had a right to go upon the same.

Almost this precise question was settled in *Shreves vs. Liveson*, 2 *Law*, 247, where it was held that in trespass for taking oysters from the river where the plaintiff had planted them, the defendant cannot show, under the general issue, that the river was a public river, and that it was lawful for all citizens to take them; but that matter must be pleaded specially.

See also:

Hetfield vs. Central R. R. Co., 29 *Law*, 571;
Pipe Co. vs. D. L. & W., 62 *Law*, 254-273;
Chitty Pleadings, Vol. , p. 505.

We submit that the judgment should be affirmed.

LEWIS STARR,
Of Counsel with Respondent.

