REPORT

OF THE

Riparian Commissioners,

OF THE

STATE OF NEW JERSEY.

For the Year 1872.

TRENTON, N. J.:
PRINTED AT THE STATE GAZETTE OFFICE.
1873.

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REPORT.

To His Excellency Joel Parker, Governor of the State of New Jersey:

The Commissioners appointed under the act approved March 31st, 1869, entitled "Supplement to an act entitled 'An Act to ascertain the rights of the State and of riparian owners in the lands lying under the water of the bay of New York and elsewhere in this State,'" approved April 11th, 1864, respectfully report:

Since the last annual report of the Commissioners very frequent adjourned meetings have been held to receive applications from parties who desire or propose to acquire lands of the State under tidewater, by grant or lease, and for the transaction of business connected with the discharge of their duty.

All applications to the Commissioners acted on, from the commencement have been made by parties claiming to be shore owners, and no grants or leases for any of the lands of the State, have been made through the Commissioners to any parties not shore owners.

Under the act approved March 21st, 1871, extending to riparian owners in all parts of the State, the benefit of the acts providing for the grant or lease of the State's land under tidewater in front of their lands, applications, some informal and preliminary, others formal, have been made from owners of the shore, and of islands on, and in the tidal waters of the Delaware river and bay, of shores on Maurice river, on the waters of bays or inlets on the Atlantic coast, the tidal waters of Raritan river and bay, and of Staten Island sound, or the strait between Newark and Raritan bays. Some of these informal or preliminary applications were made to further the interests of the applicants, connected with the business of planting and growing oysters. As no uniform system to control, foster, and protect the planting and growing of oysters has been adopted by the State, and it seemed to the commissioners probable that at an early day, this interest would be provided for and protected by legislative action applicable to all parts of the State, where the business is or may be carried on, it is deemed by those who proposed to apply for grants, and the Commission, at present, not wise to press the making of grants for lands of the State under tidewater for oystering purposes.

The several grants and leases, and applications for grants and leases, acted on by the Commissioners during the year, with the names of the parties to whom a grant or lease has been made, or who

were applicants, with the locality of the several tracts, the length of each on the bulkhead line, and other particulars, are set forth in the report of the Engineer of the Commission hereto annexed, to which reference is made for the details connected therewith:

Including the granting by the State to the New Jersey West Line Railroad Company, the compensation for which was, by direction of the last Legislature, adjusted by the Riparian Commissioners—the total of the principal sums paid or secured to be paid to the State, as compensation for grants made by the State during the year is, - - - - - - - -	$149,875 00
Rentals secured to the State on land leased by the State during the year, equals the interest on - -	13,000 00
Total of grants and rentals for leased lands (representing the latter, by a principal sum which will yield interest equal to the rental) effected during the year,	$162,875 00
There have been during the year, twenty-eight applications for grants or leases, which are set forth in the Engineer's report, and numbered from one to twenty-eight inclusive, on which the Commissioners have acted. Number twenty-nine is the renewal of an application. In all of them, the prices, either as compensation in full, or rentals have been fixed as specified in such report, and the final papers are in various stages of progress, some having been already prepared. As soon as the final papers can be completed, they will be signed by the Commissioners. In the twenty-nine applications here referred to, the principal of the compensation fixed, either as compensation in full, or including a sum as principal, which will produce interest equal to the annual rentals, amounts to the sum of	235,435 00
The application number thirty, specified in the engineer's report, was acted on by the Commissioners prior to the last report, and will, when the final papers are perfected, yield a rental which will be equal to the interest annually on - - - - - - - -	76,900 00
The principal of the foregoing grants, leases, and applications, including as principal, in the cases of such as may be leases, the sum which would produce as interest, the amount of the annual rentals fixed, amount in the aggregate to - - - - - - - -	$475,210 00

The Commission also, before the late report, fixed the rental in the case of the application formerly made and still pending, designated in the Engineer's report as No. 31, which rental would equal the interest annually on the principal sum of $125,000.

In the case last named the matter has, for reasons beyond the control of the Commissioners, remained in suspense.

In some cases of applications now progressing toward completion, the Commissioners cannot at present report whether the parties will finally take an absolute grant or a lease, and therefore cannot state the separate aggregates of payments of compensation in full to be made and of the principal sums, the interest on which will be equal to rentals fixed.

The act approved April 4, 1872, entitled "An act to cede to the Mayor and Common Council of Jersey City certain lands of the State now and heretofore under the tide waters of Communipaw bay, and to establish a tide water basin adjacent thereto," conveyed to the mayor and aldermen of Jersey City a portion of the land of the State under water in the bay south of Jersey City for public uses, adjacent to and north of the tide water basin established by the same act. The lands under water thus granted to Jersey City are by the act to be so improved that at least one-third of the area granted shall be flowed by the tide water and be made navigable for such vessels as the citizens or inhabitants of said city, or persons doing business therein may, under the control and regulation of the city, desire to use the basin and wharves thus formed and constructed.

The Commissioners in discharge of the duties required of them by the Legislature in and by the third section of that act, in accordance with the requirements thereof regarding the circumstances of the case, and taking into consideration the public purposes to which the lands granted by the act are to be applied, fixed and determined that the said city should give to the State a bond for the sum of one thousand dollars, payable in one year, with interest at the rate of seven per centum per annum, as a proper and equitable compensation for the title conveyed by the act. Such action of the Commissioners was duly communicated to the Board of Aldermen of Jersey City, and a resolution accepting the action of the Commissioners and directing the bond to be given was passed by that board at the last regular meeting, which resolution it is understood awaits the action of the mayor of the city.

The advantages of the dock and wharf privileges, when the premises shall have been improved as contemplated by the act, will be shared by all the citizens of the State interested in commerce. There was no other locality adjacent to Jersey City where a grant could be made by the State of lands under water to be improved for use by the public. As the improvements necessary to utilize such premises for public use could not be made by the State, but can very properly be made by the city to its own great advantage, accommodating also all citizens of the State doing business on the waters and shores of the Hudson river and New York bay or contiguous thereto, the arrangement by which such improvements shall be made and the

accommodations ultimately provided for the public by the dock and wharf privileges contemplated, fully justify the grant made by the State to Jersey City.

The Commissioners, to further the interests of commerce, have slightly changed and thereby straightened the exterior line of piers in the Hudson river for a short distance immediately south of Castle Point. The new line is represented on the map accompanying the report of the Engineer submitted herewith. A deflection or angle in the line in that locality has thereby been removed; the continuous exterior pier line is more in conformity with the general course of the river, and the free open area for the navigation of the river is not at all affected thereby. As the bulkhead line remains unaltered, the length of the piers running out from it to the exterior pier line as altered will be sufficient for and adapted to the vastly increased length of the ocean steamers now employed in commerce.

In a former report the then recent decision by the Court of Appeals of the State of New York, in The People vs. The Central Railroad Company of New Jersey, 42 N. Y. Rep., p. 283, June, 1870, was referred to. That court reversed the judgment of the court below, from which the appeal was taken, which had adjudged that the State of New York had control over and the power through its courts to remove or abate as a nuisance structures on the New Jersey side of the Hudson river and New York bay, on land under water below low water mark, and had directed the Central Railroad Company of New Jersey to remove all erections and improvements used by it on the west side of the river extending out below low water mark, and required the sheriff of the city and county of New York to remove them in case the company did not. The Court of Appeals of the State of New York, by the decision referred to, establishes conclusively the sovereignty and jurisdiction of New Jersey over the land under water lying west of the middle of Hudson river and bay of New York, and over docks, wharves and improvements contiguous to the New Jersey shore. After the decision by that court the case was removed to the Supreme Court of the United States, and such proceedings were had in the latter court that the case was finally dismissed at the last term thereof. Thus the decision rendered by the Court of Appeals remains unaffected. A copy of the clear and conclusive opinion of the court, which is the court of last resort in the State of New York, is submitted herewith.

The Court of Errors and Appeals of the State of New Jersey, the court of last resort in this State, in Stevens vs. Paterson and Newark Railroad Company, 5 Vr., 532, Nov. Term, 1870, the last decision reported in New Jersey affecting the right of the State to land under its tidal waters, directly decided, as it had before been decided, that the title to such land is in the State; and held that the State of New Jersey is the absolute owner of the land in all navigable water within its territorial limits, and that such land can be granted by it

to any one, either public or private. A copy of the opinion in that case is also submitted herewith.

The many improvements that have been made by filling in and otherwise on lands granted or leased by the State along the shore of the Hudson river, and those contemplated, and that will be made on other lands hereafter granted or leased by the State, make, and will cause such changes in the appearance of the premises improved, and of the whole shore front, that it has become necessary to commence the selection of suitable points along the upland, where the permanent monuments originally designed by the plan adopted by the State, shall be located, or solid fixed structures be designated, when practicable, by which the exterior lines for solid filling and exterior pier lines, also the lines or boundaries of lands heretofore, and hereafter granted or leased by the State, may always be ascertained and resurveyed when necessary, with certainty and precision. During the year as many points as now seem necessary, have been selected and accurately designated, by and under the immediate supervision of the Engineer of the Commission. Suitable permanent monuments marked "R. C. 1872," will be located at such of the points as are not already sufficiently indicated by existing monuments or structures. The points have been selected as nearly as practicable opposite, and near to angles in the exterior line of solid filling. Accurate maps are nearly complete, on which such points or monuments will be represented precisely as located. It is intended to file the maps in the clerk's offices of the counties in which the monuments are or shall be located from time to time, as the increasing number of grants and leases may require, or in the recording offices of such counties, and also in the office of the Secretary of State.

The examinations necessary to ascertain whether encroachments are made on the lands of the State under water, require at all times the attention of the Commissioners and the Engineer. Considering the extent of the shore lines on tidal waters, encroachments rarely occur. Where parties by their persevreance in making encroachments, and their unwillingness to comply with the laws allowing them to acquire the title of the State, have made it necessary, the Commissioners have requested legal proceedings to be instituted on behalf of the State against such parties.

From the commencement of the operations of the Commissioners in discharge of the duties assigned them on behalf of the State, a record of their proceedings has been kept; and it affords gratification, that their resolutions, decisions, and acts, without an exception, have been adopted, made, and performed by them unanimously. There has been no instance on final action in any matter, of a dissenting vote or voice.

The increased duties of the Commission have necessarily added very greatly to the labors and responsibility of Hon. Robert Gilchrist, Attorney General, which with a difference in views between

him and parties interested in some of the applications, have caused delay in perfecting some of the papers. Such increased duties have also added very greatly to the labors and responsibility of R. C. Bacot, Esquire, Engineer, and the Commissioners again express their appreciation of the valuable services of those gentlemen. Reference is also made to the very important suggestions of the engineer in his report to this Commission, hereto annexed, and the maps appended thereto for the purpose of illustrating matters set forth in the report.

All which is respectfully submitted this 7th day of December, A. D. 1872.

F. S. LATHROP,
CHARLES S. OLDEN,
PETER VREDENBURGH,
BENNINGTON F. RANDOLPH,
} *Commissioners.*

REPORT OF THE ENGINEER.

ENGINEER'S OFFICE,
JERSEY CITY, December 4, 1872.

To the Board of Riparian Commissioners :

GENTLEMEN :—Since the first of April, 1872, the following grants and lease of lands under the tidewaters of the Bay of New York and the Hudson River, have been made for the amounts named, viz :

To the New Jersey West Line Railroad Company, grant of about 60 acres in Communipaw Cove, south of Jersey City, at - - - - - - - - -	$125,000 00
To the Hoboken Land and Improvement Company, grant of 45 lineal feet on the bulkhead line at Hoboken, at $50 per foot, - - - - - - - - -	2,250 00
To the German Trans-Atlantic Steam Navigation Company, of Hamburgh, Germany, grant of 452 feet 6 inches on bulkhead line, at Hoboken, at $50 per foot. - - - - - - - - -	22,625 00
To William E. Dodge, lease of 260 feet on the bulkhead line, at Jersey City, at $50 per foot, - - - -	13,000 00
Total, - - - - - -	$162,875 00

The deeds for the above grants and lease have been delivered to the parties named, and the amounts paid and secured to be paid to the Treasurer of the State.

The applications for leases of lands under water during the same period, and the prices fixed by the board for the same are as follows:

No.	LOCATION.	LIN. FEET.	PRICE.	AMOUNT.
1	E. B. Wakeman, and others, South Cove, J. C...	650	$25 00	$16,250
2	A. V. Schenck, Raritan river.....	1,386	1 00	1,386
3	John L. Brownell, Hudson river.....	380	5 00	1,900
4	" " " "	530	5 00	2,650
5	" " " "	655	5 00	3,275
6	" " " "	418	5 00	2,090
7	" " " "	608	5 00	3,040
8	" " " "	416	5 00	2,080
9	" " " "	650	3 00	1,950
10	" " " "	1,850	3 00	5,550
11	" " " "	328	3 00	984
12	" " " "	340	3 00	1,020
13	" " " "	4,920	3 00	14,760
14	John Lyle & Newcomb, " "	2,135	5 00	10,675
15	" " " "	550	5 00	2,750
16	Wetmore & Phelps, " "	310	5 00	1,550
17	" Dana & Phelps, " "	600	5 00	3,000
18	Wm. W. Phelps, " "	347	5 00	1,735
19	" " " "	360	5 00	1,800
20	Phelps & Baylis, " "	292	5 00	1,460
21	Phelps & Coe, " "	412	5 00	2,060
22	Wm. Walter Phelps, " "	365	5 00	1,825
23	The Englewood Dock and Turnpike Company, Hudson river.....	66	5 00	330
24	Otto Kohler, Hudson river.....	176	30 00	5,280
25	Robert Annett, " "	125	25 00	3,125
26	" " " "	786	10 00	7,860
27	" " " "	1,770	5 00	8,850
28	" " " "	400	5 00	2,000
				$111,235
29	Heirs of James G. King—renewal of application, Hudson river.....	2,484	50 00	124,200
				$235,435
	LEASES APPLIED FOR AND NOT PERFECTED AT DATE OF LAST REPORT.			
30	Morris and Essex Railroad Company, Hoboken.	1,538	50 00	76,900
31	James Brown, Weehawken.....	2,500	50 00	125,000
				$437,335
	RECAPITULATION.			
	Grants and lease made—amount.....	.....	.....	$162,875
	Leases applied for since April 1, 1872.....	.....	.....	235,435
	Leases not perfected at date of last report.....	.....	.....	201,900
	Total.....	.....	.....	$600,210

Surveys have been made of each tract above mentioned, and maps prepared of location and boundaries, showing the distances from the shore to the exterior lines for solid filling and for piers.

The prices fixed by the board for these lands have been graduated according to the proximity of the several tracts to the centres of business, their capability of improvement, &c. The parcels charged at three and five dollars per lineal foot lie between Fort Lee Landing (ten miles north of Castle Point at Hoboken), and the northerly boundary line of the State, (eighteen miles from Castle Point.) Within these limits the almost perpendicular walls of the Palisades shut out communication inland with the Hudson river and leave but a narrow width of shore space, rendering the probability of commercial improvement in this location very remote.

During the past season progress has been made in perfecting the maps and official data of the commission by examinations of the west shore of the Hudson river from Weehawken northwardly to the State line.

The surveys of this portion of the work, it will be remembered, were but partially finished by the Commission in 1864, in order that the more important sections, embracing the Jersey City and Hoboken water fronts with the bays and coves southerly thereof, might be completed.

Points selected at convenient distances and where changes in the direction of the exterior lines occur, have been established on the shores of the Hudson river, from which the exact distances and positions of the exterior lines for solid filling and for piers can be readily determined. Permanent stone monuments have been prepared and will be set at these points, and their location recorded on the map of the Commission.

For convenience of reference by surveyors and riparian owners I would suggest that duplicate copies of the maps of these sections of the river front, showing the location of monuments and the distances to the exterior lines, be filed in the clerks' office of the counties of Hudson and Bergen.

For the purpose of affording suitable pier accommodations for an important line of steamships about locating upon our water front, a slight extension eastwardly of the exterior pier line (about opposite the Hoboken ferry) was deemed necessary. The length of the vessels now being constructed for this line will be four hundred and seventy-five feet, the space between the lines of solid filling and for piers established by the Commission of 1864 at this point was but four hundred feet.

The average variation in position of the pier line is about fifty feet, and the change in no way interferes with the general direction of the exterior lines—or with convenient navigation—the Hudson river about this point reaching its greatest expansion.

The advantages so clearly pointed out by the Commission of 1864, as peculiar to the water front of the western shores of the river and

bay have been already verified, to a great extent, by the establishment at Jersey City and Hoboken, of five important lines of steamships engaged in the European trade, while the completion of the extensive system of docks, warehouses, and basins, now in course of construction at Harsimus Cove, Jersey City, will tend still further to develop commercial enterprise and improvement.

To preserve these advantages, all encroachments beyond the exterior lines now established should be prevented—as chiefly by maintaining the free and uninterrupted flow of the tides and currents of the river and bay, and the continuance of commercial prosperity be expected.

The accompanying maps show the location of the several tracts of land under the waters of the bay of New York and the Hudson river above referred to, and also all grants or leases of such lands heretofore made by the State; also the position of the tidewater basin in Communipaw bay, and the lands under water adjoining said basin granted by the State to the mayor and common council of Jersey City, by act approved April 4th, 1872.

Respectfully submitted,

ROBERT C. BACOT.

JERSEY CITY, January 8, 1873.

To His Excellency Joel Parker, Governor:

DEAR SIR:—The steamship companies engaged in the European trade, and established on our shores, are as follows:

1. The Cunard line, to Liverpool, at Jersey City.
2. The White Star line, to Liverpool, at Jersey City.
3. The South Wales Atlantic Steamship line, to Cardiff, Wales, at Jersey City.
4. The North German Lloyd line, to Bremen, at Hoboken.
5. The Baltic Lloyd line, to Bremen, at Hoboken.
6. The Hamburgh Steamship line, to Hamburgh, at Hoboken.

At the time of writing my report, I was not aware that the 4th and 5th lines at Hoboken were distinct companies. The German Transatlantic Steam Navigation Company, which will form the 7th line, are now constructing their piers and docks at Hoboken, and will have their first vessel to sail for Hamburgh in May next.

I expect to procure some interesting data, giving the amount and value of imports and exports by the above lines, to and from these shores during the year, which I will send you in a day or so.

Very respectfully,

ROBT. C. BACOT.

NEW YORK, January 10, 1873.

Honorable R. C. Bacot:

DEAR SIR:—I send herewith a memorandum (marked No. 1,) of the steamers running to and from Hudson county, to ports and places in Europe.

Commencing January 1, 1873, there will be seven steamers weekly each way, of an average tonnage of over 2,300 tons each, or say 16,000 tons weekly into port and a like number outward bound.

I also send a memorandum (marked No. 2,) showing the cargoes taken out in December last, the aggregate value for that month being about five and a half millions of dollars.

The imports for the same month exceeded in value sixteen millions of dollars.

I estimate the value of the exports of American productions by these steamers for the year 1873 at fully one hundred millions of dollars, and the value of imports of the same at over two hundred millions of dollars.

During the year 1872 about 110,000 passengers and emigrants arrived by these steamers.

I regret that my memoranda are so brief; but the time allowed would not admit of my extending my inquiry.

Truly yours,

F. S. LATHROP.

JERSEY CITY, January 10, 1873.

To His Excellency Joel Parker, Governor:

DEAR SIR:—The enclosed data, prepared by Judge Lathrop, and referred to in my note of the 8th inst., will give an idea of the important commercial interest established upon the shores of Jersey City and Hoboken.

Hoping the same may prove of interest,

I am yours, very respectfully,

ROBT. C. BACOT.

CUNARD LINE, TO LIVERPOOL.

STEAMER.	TONS.
Scotia,	3,865
Russia,	2,959
Cuba,	2,780
Calabria,	2,727
Aleppo,	2,103
China,	2,061
Hecla,	1,850
Java,	2,780
Malta,	1,540
Olympus,	1,219
Palmyra,	1,389
Samaria,	1,694
Siberia,	2,537
Tarifa,	2,118
Abyssinia,	2,075
Algeria,	2,104
Parthia,	2,214
Batavia,	1,627

(18 steamships.)

This line sends, usually, two steamers a week, the days of sailing being Wednesday and Saturday; but during the winter months, from December 1st to March 1st, owing to the heavy weather, they send but one steamer a week.

WHITE STAR LINE, TO LIVERPOOL.

STEAMERS.	NET TONS.
Oceanic,	2,349
Atlantic,	2,366
Baltic,	2,209
Republic,	2,186
Adriatic,	2,458
Celtic,	2,374

(6 steamers.)

This line sends one steamer a week, the day of sailing being Saturday.

HAMBURG AMERICAN PACKET COMPANY, TO HAMBURG.

STEAMERS.	NET TONS.
Bavaria,	2,074
Borrussia,	2,132
Saxonia,	2,591
Cimbria,	2,964
Hammonia,	1,852
Holsatia,	3,025
Allemannia,	2,619
Westphalia,	3,176
Silesia,	3,060
Germania,	1,811
Thuringia,	1,934
Frisia,	(gross) 3,500
Vandalia,	1,913
Frankfurt,	1,725

(14 steamers.)

This line sends one steamer a week, the day of sailing being Thursday.

NORTH GERMAN LLOYDS, TO BREMEN.

STEAMERS.	GROSS TONNAGE.
America,	2,614
New York,	2,528
Hermann,	2,774
Hansa,	2,908
Bremen,	2,551
Deutschland,	2,881
Weser,	2,871
Rhein,	3,075
Hannover,	2,584
Koln,	(net) 1,700
Main,	3,069
Ohio	2,413
Donau,	3,075

(13 steamers.)

This line sends one steamer a week, the day of sailing being Saturday.

THE BALTIC LLOYDS.

From foot of Fourth street, Hoboken.

This line has two steamers and expects three more, from two to three thousand tons each.

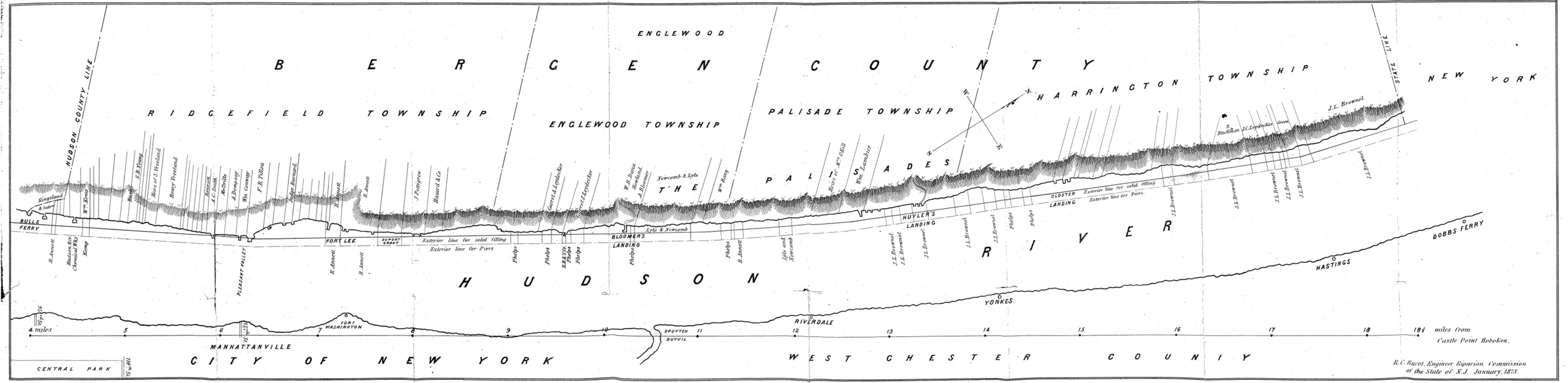
THE GERMAN TRANS-ATLANTIC STEAMSHIP NAVIGATION COMPANY.

This line has one steamer per week, of about 3,000 or 3,500 tons burden. Length of steamships now building for this line, 475 feet.

THE NORTH WALES, OR CARDIFF LINE, TO CARDIFF, WALES.

STEAMERS.	TONS.
Glamorgan,	3,000
Pembroke,	2,500
Carmarthean,	2,500

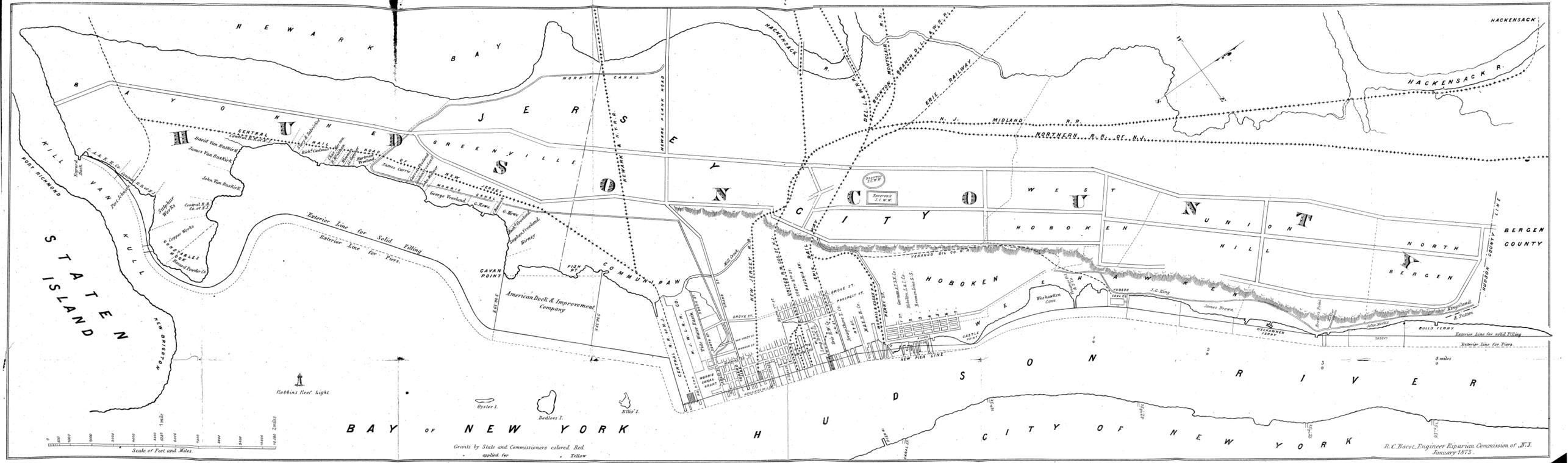
(3 steamers.) One steamer fortnightly.



Note Tracts colored Red Grants or Leases made by the State
do , Yellow , , , applied for.

R.C. Racot, Engineer Riparian Commission of the State of N.J. January, 1873.

Miller's Lith. 137 Broadway, N.Y.


NEWARK BAY
BAYONNE
HUDSON
JERSEY CITY
GREENVILLE
KILL VAN KULL
STATEN ISLAND
PORT RICHMOND
NEW BRIGHTON
BAY OF NEW YORK
HUDSON RIVER
CITY OF NEW YORK
HOBOKEN
WEST HOBOKEN
UNION HILL
NORTH BERGEN
WEEHAWKEN
HACKENSACK
HACKENSACK R.
BERGEN COUNTY
HUDSON COUNTY
MORRIS CANAL
CENTRAL R.R. Co. of N.J.
ERIE RAILWAY
N.J. MIDLAND R.R.
NORTHERN R.R. OF N.J.
DEL. L. & W. R.R.
MONTCLAIR & BRONSON D.L. & W. R.R.s
HACKENSACK R.R.
C.A.S.P.R.R. Co.
Exterior Line for Solid Filling
Exterior Line for Piers.
CAVAN POINT
FISH PT.
COMMUNIPAW
American Dock & Improvement Company
Reservoir J.C.W.W.
VENANGO OIL CO.
NEW PIER LINE
CASTLE POINT
Weehawken Cove
Hudson Coal Co.
J.C. King
James Brown
Weehawken Ferry
Bull's Ferry
Exterior Line for solid Filling
Exterior Line for Piers.
Robbins Reef Light
Oyster I.
Bedloes I.
Ellis I.
Scale of Feet and Miles
Grants by State and Commissioners colored Red.
applied for Yellow
R.C. Bacot, Engineer Riparian Commission of N.J.
January 1873.

OPINION.

NEW YORK COURT OF APPEALS, June, 1870.

THE PEOPLE OF THE STATE OF NEW YORK, v. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.	*On appeal from the decision of the General Term of the Supreme Court, First Judicial District.*

Opinion of the court by

E. DARWIN SMITH, J. The protest with which the defendants commence their answer, wherein they declare and insist that the court had no jurisdiction over the person of the defendants, or over the subject of the action or pretended cause of action set forth in the complaint, and that the said complaint does not state facts sufficient to constitute a cause of action, presents the leading and controlling point upon which this action depends.

The voluntary appearance of the defendants in the action gave the Supreme Court jurisdiction of their persons. Their submission to answer, after their demurrer presenting the question of jurisdiction had been overruled, did not waive their right to raise the question afterward, that the court had no jurisdiction of the subject matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action. (*Code, section* 148). The cause of action set forth in the complaint is clearly one of equitable cognizance; and as the jurisdiction of the Supreme Court is co-extensive with the boundaries of the State, it clearly had jurisdiction of such cause of action, if the place where the nuisances complained of were erected and existed, was within the territorial limits of the State.

It is quite clear, that upon no other ground have the courts of this State any power, either in equity, or by indictment and criminal proceedings, to abate a nuisance. The *locus in quo* must be within the legal limits of some county of the State, and the process for the abatement of such nuisance must go to the proper sheriff for execution, within the limits of his county.

The claim of jurisdiction over the *locus in quo*, and over the sub-

ject matter of the cause of action as stated in the complaint, and asserted in the judgment at special term, and in the opinion at general term, is confessedly based upon the agreement or treaty made between the States of New York and New Jersey in 1833.

Judge Ingraham, in the opinion at general term, given upon the decision of the demurrer, when this question was distinctly presented to the court, said: "That the right" to maintain the action "if it existed, is to be found in that agreement or treaty." The construction of this agreement, therefore, presents for the consideration of this court, the principles upon which this action turns, and which involve the decision of the cause.

As, in the construction of all acts of the Legislature, it is a cardinal rule to consider the cause or object of making it, and the mischief sought to be removed or remedied; so it will be expedient, I think before proceeding to a discussion of this agreement or treaty, to consider the occasion which led to it, and the circumstances attending its execution and adoption by the State.

Before the making of this treaty or convention, this State claimed that its territorial limits opposite the city of New York, extended to low water mark on the west shore or side of the Hudson river. In the first title of the first chapter of the revised statutes entitled "of the boundaries of the State" the description in tracing the line of the State eastwardly from the Delaware river, proceeds in the line of the forty-first degree of north latitude, till it reaches a "*rock on the west side of Hudson river;* thence it runs southerly along the west shore at low water mark of the Hudson river, of the Kill Von Kull, of the sound between Staten Island and New Jersey, and of Raritan bay to Sandy Hook," and including all the islands in the bay of New York.

The Montgomery charter of the city of New York granted in 1730, also in bounding that city runs the south line from "Red Hook on the Long Island shore, across the North river so as to include Nutters' Island, Bedloe's Island, Rucking Island, and the Oyster Islands, to *low water mark on the west side of the North river*, or so far as the limits of the province extend, then so as to run up along the west side of the said river, at low water mark until it comes directly opposite to Spuyten Duyvil creek." New Jersey, it clearly appears, did not assent to or acquiesce in this claim.

From a message of the governor of this State to the Legislature, dated March 11, 1831, (*vide Senate Documents of* 1831, *No.* 55) and accompanying papers, it appeared that the State of New Jersey in June, 1829, had commenced a suit in the Supreme Court of the United States against this State, claiming that "the said State of New Jersey was justly entitled to the exclusive jurisdiction and property of and over the waters of Hudson river, from the forty-first degree of north latitude, to the bay of New York to the *filum aquæ* or midway of the said river, and to the midway or channel of said bay of New York, and the whole of Staten Island sound, together

with the land covered by the water of the said river, bay and sound in the like extent."

It appears from said message that New Jersey had also, in 1827, applied through commissioners to have the controversy, in respect to the boundary, submitted to the said Supreme Court, as an impartial tribunal, to arbitrate between the parties, which had been declined by this State, but finally in 1832, the Legislature passed an act (*vide Sess. Laws, Chap.* 6, *p.* 6), authorizing the governor to appoint three commissioners on the part of this State, to meet commissioners appointed or who might be appointed by the State of New Jersey, "to negotiate and agree respecting the territorial limits and jurisdiction of the State of New York and the State of New Jersey."

The act further provided that the agreement duly made and signed by the commissioners should be binding on the State, when confirmed by the respective Legislatures and approved by Congress. The Legislature of New Jersey passed a similar act, and the commissioners of the two States duly met and made, and signed the agreement referred to, which was afterward ratified by the Legislature of this State and New Jersey, and approved by Congress, the first article of which is as follows:

"ARTICLE 1. The boundary line between the two States of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked to the main sea, shall be the middle of the said river, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan bay, to the main sea, except as hereinafter otherwise particularly mentioned."

The language of this article is certainly very clear and explicit. Aside from the *exception* at its close, it leaves no room for constructive doubt or misconstruction, in regard to its meaning or effect. It fixes definitely the boundary line between this State and New Jersey, at or in the middle of the Hudson river, and of the bay of New York, and of the waters between Staten Island and New Jersey, and of the Raritan bay, to the main sea. It relinquished, in legal effect, whatever right or claim this State formerly had to the bed of the Hudson river between Manhattan and Staten Islands, and low water mark on the Jersey shore, In this particular, it yielded the precise point in controversy with that State. For, as is said by the Attorney-General of this State, in a statement of the case communicated by Governor Throop with his message to the Legislature above referred to, "the principal prayer of the bill," referring to the bill filed by New Jersey in the Supreme Court of the United States, and served upon the Governor and the Attorney-General of this State, "is, that the eastern boundary line between your complainants (the State of New Jersey,) and the State of New York, may, by the order and decree of this honorable court, be ascertained and established, and the right of property, jurisdiction and sovereignty of your com-

plainants to the *filum aquæ*, or middle of said Hudson river, from the forty-first degree of north latitude, on the said Hudson river, through the whole line of the eastern shore of the State of New Jersey, as far as said river washes and bounds the said State of New Jersey, down to the bay of New York, and to the channel or midway of said bay, and all the waters lying between New Jersey shore and Staten Island."

The boundary line, it appears, is thus established between the two States, precisely as prayed for by New Jersey in the said bill of complaint, at and in the middle of the Hudson river, and other waters therein mentioned.

This article does not profess to convey, grant or relinquish any rights on the part of either State. It simply declares that the boundary line between the two States at the place, &c., "shall be the middle of the said river," &c.

Whatever doubt may have existed before upon the subject, immediately upon the adoption and ratification of this convention or treaty, the sovereignty and jurisdiction of the respective States extended and attached to that portion of the said river, and other waters assigned to each State respectively by said article, up to the line of the boundary therein fixed and established.

All doubt or conflict in respect to the territorial limits or boundary of the respective States, so far as the same relate to or affected the Hudson river and the bay of New York, and other waters therein mentioned, was, and is thus removed and extinguished.

This establishment of the boundary line between the two States, clearly left and fixed the *locus in quo*, the place where the nuisance complained of in this action and sought to be abated thereby, are erected and situated within the undoubted territorial limits and boundaries of the State of New Jersey.

This view, in respect to the *locus in quo* of said nuisances, and of the subject matter of this action, seems necessarily to be conclusive, and require a reversal of the judgment below, and a dismissal of the complaint, unless the jurisdiction of the court can be sustained upon other grounds.

The next inquiry in order, I think, on this question, relates to the exception at the close of the said article, in these words: "except as herein otherwise particularly mentioned."

The next article in said treaty is as follows:

"ARTICLE 2. The State of New York shall retain its present jurisdiction of and over Bedloe's and Ellis' Islands, lying in the waters above mentioned, and now under the jurisdiction of that State."

This article fulfills the office of an *exception*, as it takes out something embraced in the general description, and which would otherwise be granted, and explains and gives point and force to this exception in article first. These islands are situate west of the boundary line fixed by the first article of the said convention, and would have passed to New Jersey without this exception. The first

article simply fixes the boundary line between the States, and this exception takes from the territory thus assigned to New Jersey these islands, and limits and restricts the boundary line, so far as the same would otherwise give them to New Jersey.

The second article, therefore, ratifies this exception in the first article, and gives it full force and effect. The right of absolute sovereignty, which includes all the power of government, all the authority, executive, judicial and legislative, which the several States possess and exercise, subject to the constitutional supremacy of the national government, doubtless belongs to New Jersey over the domain and territory of said State.

This right of governmental control may doubtless be modified by compact between the States. And this brings us to the inquiry, how far, if at all, the State of New Jersey had made a binding provision, by treaty, for the cession and extinguishment of any of her territorial or governmental rights to the State of New York, over the waters or land referred to in said treaty? When these commissioners for the two States had thus fixed and established the boundary line between the two States, as fixed and defined in said first and second articles of said treaty, they doubtless clearly saw that their work was unfinished. The act for the appointment of said commissioners passed by this State, empowered them to negotiate and agree respecting the territorial limits and *jurisdiction* of the State of New York and the State of New Jersey; and the act for the appointment of commissioners by New Jersey, is entitled, "An act for the settlement of the territorial limits and *jurisdiction* between the States of New Jersey and New York," and, I presume, contains similar powers.

But whatever may have been the powers conferred by these acts on the commissioners, and it is now a matter of no consequence, since their agreement or treaty has been confirmed by both the State Legislatures and ratified by Congress, the commissioners doubtless consider that under the authority to agree respecting "*the jurisdiction between these States*," they were authorized to agree upon and determine the mode in which the said States should exercise, use and enjoy their respective rights in, to and upon, and over the waters of the said river and bay, through the centre of which they had just, in said first article, run an imaginary line, fixing the boundary between said States, and how the vast domestic and foreign commerce which then covered, and was destined in the future to crowd and cover these waters, might be best protected, controlled and governed without conflict between the authorities of said States, or between the citizens thereof.

It is quite apparent, I think, that they well and wisely considered that the necessities of the case, the welfare of these States, the exigencies of commerce, and the interests of the city and port of New York in particular, in whose prosperity as the commercial metropolis of the country, New Jersey had, in a large degree, a com-

mon interest, required that there should be a unity of control over said waters, and a single and exclusive jurisdiction exercised over them by one of the said States. And this control or *jurisdiction*, in the language used in that treaty or agreement, was very properly conceded to this State in the following article :

" ARTICLE 3. The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the Bay of New York, and of and over all the waters of Hudson river lying west of Manhattan Island, and to the south of the mouth of Spuyten Duyvil creek, and of and over the lands covered by the said waters to low water mark on the westerly or New Jersey side thereof, subject to the following rights of property and of jurisdiction of the State of New Jersey." This provision in the treaty most clearly and distinctly gives and grants to, and vests in the State of New York, full, complete and undoubted control, government and jurisdiction of and over all the waters therein mentioned. Such was the clear intent and purpose of this provision; and, so far as it was essential to the proper exercise of such jurisdiction, it gives a control also of and over the land covered by such waters. It doubtless was designed in the clause of said provision in these words: " Of and over the lands covered by the said waters to low water mark," to disembarrass the jurisdiction so conferred over the said water, from all pretense of right to interfere therewith arising from the legal maxim, that the owner of the soil owned all above it, "*cujus est solum, ejus est usque ad cœlum.*" So that the jurisdiction over the *water* should be absolute and unquestioned for all practical purposes.

It clearly could not have been the intention in these words to re-cede to New York what had just been relinquished, in respect to the boundary between the two States in the first article, or to nullify the force of such article, for it declares expressly that the rights over the water so granted were subject to the rights of property and of jurisdiction of the State of New Jersey, following:

1st. That the State of New Jersey shall have the exclusive right of property in and to the land under the water lying west of the middle of the Bay of New York, and west of the middle of that part of Hudson river which lies between Manhattan Island and New Jersey.

2d. That the State of New Jersey shall have exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of said State, and of and over all vessels aground on said shore, or fastened to any such wharf or dock, except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York, which now exist or which may hereafter be passed.

3d. The State of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of said waters, provided that the navigation be not obstructed or hindered.

These provisions clearly show that it was not the intention of New

Jersey, in giving jurisdiction to New York over the *waters* of such State, to relinquish any of the important rights of property which were acquired by or conceded in the first article of the said treaty.

The whole object of New Jersey in making the treaty, and the whole point of the controversy between the States, so far as that State is concerned, would be defeated by a construction of the treaty which involved such a consequence.

Under the claim previously made by this State to the title to low water mark on the New Jersey shore, this State, if such claim had been conceded or established, would have had the right to control all erections and improvements on the New Jersey side of the river below low water mark, and would necessarily have had complete governmental authority and jurisdiction to that point. The proprietary rights of New Jersey would have ended at low water mark, and that State would have been practically excluded from the Hudson river and the bay, and debarred all right to erect wharves, piers or other improvements upon the sea shore, except by leave and license first obtained from this State.

It was this very claim, and the legal rights and consequences resulting from it, if allowed, which New Jersey had long resisted. This was in legal effect renounced and abandoned by this State in the first article of said treaty; and New Jersey, as a sovereign, independent, co-equal State, acquired thereby, if she did not before possess, all the rights of proprietorship in said river and bay, west of the centre thereof, possessed by this State east of the same centre line.

Certainly, this third article could not have been intended, whatever may be its legal effect or construction, to restore to this State rights so long and so earnestly and persistently claimed by New Jersey, and thus so formally renounced by this State in the first article of said treaty. These three sub-divisions or provisions of this third article seem to me to have been entirely unnecessary. The giving of jurisdiction to this State over the waters of said river and bay, did not imply jurisdiction over the land covered by such waters, much less of land upon the shore not covered by water; but these provisions were doubtless inserted for greater caution to exclude all claim or ground for claim to that effect, and to save all misunderstanding in the future on that subject, They show that nothing in the shape of property was granted or yielded to New York, or intended to be in any way parted with or surrendered by New Jersey. The right in respect to the fisheries is expressly excepted and reserved as a State right, which pertained in public waters to the citizens of the State, so far as the same was capable of private use or of State appropriation.

The provision that the State of New Jersey shall have exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of said State, is an unqualified assertion in the compact, that the right to build, construct and repair, and

maintain wharves and docks, piers and other erections and improvements on the shore of New Jersey, was a right of property retained and reserved as appurtenant to the soil of the State, and to the proprietorship of the bed of the river and bay, and involves and includes a declaration that complete jurisdiction and control over the whole subject of wharves and docks on the shore of said river and bay belongs to the State of New Jersey. The word "shore" is obviously used in this provision in a general sense, as equivalent to side or margin of the river and bay, and not in the strict sense as applicable to the particular space between high and low water mark, as is its meaning when applied to the land at the edge or border of the sea or arm of the sea where the tide ebbs and flows.

But it is preposterous to suppose that these wharves and docks, referred to in said article, were to be constructed upon the dry land, remote from the water, or above low water mark. As with the wharves then erected and in use contiguous to said waters, so the wharves and docks thereafter to be made and erected, were doubtless to be constructed below low water mark, and to extend sufficiently far into the deep water of the river or bay to answer the ordinary purposes for which such erection was made.

The care taken to provide that, under the concessions of jurisdictions over the waters of said river and bay, no right should exist or be exercised upon the *land* or over the soil of New Jersey, upon the shore or over the bed of the river or bay, and to exclude every pretence for any such claim or right, is particularly shown in the provision, that New Jersey should have exclusive jurisdiction of and over all vessels aground on the shore of said State, or fastened to any wharf or dock on such shore, except that the said vessels shall be subject to the quarantine or health laws and laws in relation to passengers of the State of New York, which now exist or which may be hereafter passed.

This provision, and particularly the language of the *exception*, seem to me to be the key to this whole compact, so far as it relates to this question of jurisdiction.

Confessedly, vessels afloat upon the waters of the bay or the river are, and were intended to be, subject to the exclusive jurisdiction of New York; but whenever they were fastened to any wharf or dock upon the New Jersey shore, or were aground upon said shore, they became attached to the soil of New Jersey, and were under her exclusive jurisdiction.

The moment they became thus affixed to the land of New Jersey, in the bed of the river, or on the shore, the jurisdiction of New York over them was to cease, except in the language of said proviso: "They shall be subject to the quarantine or health laws, in relation to passengers, of New York."

This exception explains the object and nature of the jurisdiction intended to be given to New York. It was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that

did or might float upon the surface of said waters, and over all the elements and agents, or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace.

By this exception, it was designed that vessels afloat upon said bay and river should not escape or evade the quarantine laws, and the laws relating to passengers of New York, by coming to anchor on or near the New Jersey shore, or by becoming attached to the wharves or docks on said shore or adjacent thereto, but in all other particulars they were left subject to the laws of New Jersey.

The next article in the agreement (article 4,) shows the character of the jurisdiction designed to be given to this State over these waters quite distinctly. It is as follows:

"ARTICLE 4. The State of New York shall have exclusive jurisdiction of and over the waters of the Kill Von Kull, between Staten Island and New Jersey, to the westernmost end of Shooter's Island, in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that State, and for executing the same; and the said State shall also have exclusive jurisdiction for the like purposes of and over the waters of the sound from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the said State of New York."

The remaining articles of said agreement, all fairly considered, conduce to the same construction, and confirm the view that the jurisdiction conferred upon this State over the waters of said river and bay, was a qualified and limited jurisdiction, conferred for police and sanitary purposes, and to promote the interests of commerce in the use and navigation of said waters, and was not designed to confer or create control over the lands or domains of New Jersey, or to give to this State any right to interfere with her complete political or governmental jurisdiction as a sovereign State of and over her own soil and its appurtenances, and of and over every description of property of any appreciable value within her territorial limits.

The 5th article contains the same provisions in substance contained in the third, in respect to all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay west of a line drawn from the lighthouse at Princess bay, to the mouth of Mattewan creek, and confers exclusive jurisdiction over such waters upon the State of New Jersey, subject to the same rights of property and jurisdiction of New York over wharves and docks, and the right of regulating the fisheries between the shore of Staten Island and the middle of

said waters, as is contained in the said third article in respect to the same subject over the waters therein mentioned.

Articles 6th and 7th of said treaty give to said States equal concurrent jurisdiction over all of said waters for the service of criminal process issued under the authority of either State, against any person accused of any offence committed in such State, or on board of any vessel being under the exclusive jurisdiction of such State, or committed against the regulations made or to be made by either State, in relation to the fisheries mentioned in the 4th and 5th articles of said treaty, and of civil process issued against any person domiciled in either State, or against property taken out of either State to evade its laws; but such process was not to be served upon or on board of any vessel aground upon, or fastened to the shore of either State, or fastened to a wharf adjoining thereto.

These articles, I think, properly interpreted, concur in showing that it was the intention of this treaty that both States should retain the absolute control of and over its own soil, and over everything annexed or attached to it, and over every ship, vessel or other floating craft attached to any wharf or pier, or located in any dock upon its shore, or aground in the waters adjoining its shore, and of and over all persons living or being upon such wharves or vessels, and the property therein; and that each State intended to throw the shield of its State law and State sovereignty, over all such ships, vessels, persons and property.

A crime committed upon any vessel fastened to any wharf on the shore, or upon any vessel aground in the waters adjoining the shore of New Jersey, and west of the centre of said river or bay, except those offences specified in the said third article against the quarantine or health laws, and the laws in relation to passengers of New York, would be, I think, clearly an offence against the peace and dignity of New Jersey, cognizable exclusively in her courts, and as much so as if said offence had been committed inland, and within her unquestioned bounds.

And this consideration seems to me conclusively to dispose of this case, so far as the nuisance complained of relates to the public health, and to the material used in filling up and making the erections complained of, for such nuisance is a misdemeanor, and indictable at common law in the criminal courts of the county where it is located, and it seems to me quite clear, that the persons engaged in erecting or maintaining, or continuing said nuisance thus, if the finding is true, necessarily affecting the public health of the people of New Jersey, and particularly of the inhabitants of its neighboring city of Jersey City and of its vicinity, could not be lawfully indicted and convicted in the city and county of New York, for the erection and continuance of such nuisance, or elsewhere than in the proper county where such nuisance existed in the said State of New Jersey.

But in the finding of fact of the learned judge at special term, it is found that the erections complained of are an encroachment upon

and into the said harbor and river. And, as matter of law, it was also found "that the said erections were a common and public nuisance, and that it is the right and duty of the State of New York, in protecting the interests of the people and the commerce and navigation of the said bay and river, to interpose and have the same abated by judicial proceedings. Upon the facts, it is difficult for me to see how erections extending from the land on the shore over flats covered with shallow water, ranging from one and nine-tenths feet to four and one-tenth feet deep, and extending into the river and bay simply far enough to meet navigable waters, and no further than these "would be required," as the fact is found, "for the use of a permanent ferry," such as is now constructed and in use, could be an injury to navigation and commerce upon said waters. To call such erections made in the manner and for the purpose stated, a nuisance, seems to me an entire misnomer, and that such erections, instead of being a nuisance, and injurious to commerce and navigation, are really works and improvements, adapted as they were obviously designed, to promote and facilitate trade, commerce and navigation.

I can conceive of no value in the waters of this bay and river to these States as navigable waters, if they are not to be used, and may not be approached on either side by wharves and piers, and other erections, extending from the land sufficiently far into the same to reach the navigable waters thereof, and thus connect and allow intercourse and trade between the land and vessels upon the water. But assuming, as I suppose we must, that this finding upon the facts is to be unquestioned here, and it is doubtless conclusive upon this court, so far as the court below had power to adjudicate upon the question, and that such erections are obstructions and injurious to the navigation of the waters of said bay and river, still such finding cannot transfer the *locus in quo* of such nuisance from the State of New Jersey to this State.

The finding can have no further force than as a finding that such erections and extensions from the land on the New Jersey side of the river and bay as public navigable waters. Upon this finding, the original question recurs, is such nuisance within the legal and governmental jurisdiction of this State?

It is part of the argument of the learned counsel for the people, that the exclusive jurisdiction of New Jersey over wharves, docks and improvements upon her shore, does not attach till such wharves, docks and improvements are constructed, and that New York has the exclusive right to decide what, and when and how such erections shall be made.

This argument I think entirely unsound and untenable, as I have endeavored to show, and that the jurisdiction of New Jersey over wharves, docks and improvements on her shore, extends to and embraces the whole subject of wharves, docks and improvements, and includes the power to prescribe when and where, and how they shall

be erected, and to exercise all the control over them that government can possess over the property of its citizens.

But it is insisted by the counsel for the plaintiff, "that inasmuch as New York has the exclusive political jurisdiction, the exclusive charge and regulation of navigation, and the exclusive right to legislate on that subject, or to act upon it through its public authorities, the exclusive right to decide what is an obstruction belongs to New York."

This is simply an assertion of a claim that, in a controversy virtually between these two sovereign States, in regard to their relative rights, the courts of this State are entitled to decide the question conclusively in our own courts; that is, one party to a controversy has the jurisdiction and the right, judicially, to determine the question in dispute. These erections had been made under the authority of the State of New Jersey. That State, through the parties called into court in this action, denies the jurisdiction of the courts of this State; denies the fact of the nuisance, and insists that the erections in question are proper and lawful improvements, erected upon her own shore and land to enable her citizens to participate in the commerce of the world in the common use of the navigable waters between the States.

The argument to sustain the jurisdiction of our courts upon the basis urged by the plaintiffs' counsel, it seems to me, is entirely untenable, and in conflict with the fundamental principle of law and justice, that no party shall be judge in his own cause. If these erections are really a public nuisance, affecting the navigation and use of these great public waters between the two States, situate and erected, as they clearly are, within the territorial limits of the State of New Jersey, it ought certainly to be presumed, until the contrary appeared, that that State would protect its own interests and the interests of the country and of the commercial world in such waters, by abating such nuisance, in due time, through its own judicial tribunals.

But if it appears by any judicial act or decision, that such nuisance was maintained by the authorities of that State, and that the courts of that State had failed to do their duty in abating them, upon proper proceedings for that purpose, certainly such facts would not constitute a basis or ground upon which the courts of this State could assert and maintain its jurisdiction for the abatement of such nuisances.

The jurisdiction asserted for this State really belongs to the general government. In the case of the *State of Pennsylvania* v. *The Wheeling Bridge Company and others*, (13 *How. U. S.*, 579), Chief Justice Taney said: "The Ohio being a public navigable stream, Congress has undoubtedly the power to regulate commerce upon it. They have the right to prohibit obstructions to its navigation, to declare any such obstruction a public nuisance, and to direct the mode of proceeding in the courts of the United States to remove it,

and to punish any one who may erect or maintain it;" and this case, and the case of the *State of New Jersey* v. *This State*, (5 *Peters*, 284), show that, in the absence of such legislation by Congress, the proper court of the United States has original jurisdiction in equity over controversies between States, and over nuisances affecting public navigable waters within the limits of the Union. But this is another, and it seems to me, an unanswerable argument against the claim of jurisdiction over these erections, asserted in the judgment and decision rendered at the special term (and which it is due to the learned judge who tried the cause to say, was rendered in obedience to the decision of the general term, from which he dissented), that the court has no power to enforce such jurisdiction or carry such judgment into effect. The judgment directs, orders, and adjudges that the said defendants do remove the said erections, bulkheads, piers, wharves and railroads, and earth, stone, dirt, animal and vegetable matter, and other materials of which they are composed, and restore the said river and bay to the condition in which it was before said erections were made, within one year after service on the defendants's attorney of a copy of the said judgment, and in case the said defendants shall fail to make such removal, as aforesaid, the sheriff of the city and county of New York is thereby directed to remove the same and to abate said nuisance."

The defendants are a corporation organized under the law of New Jersey, and must be deemed non-residents of this State. The judgment, therefore, cannot be enforced by process of attachment and proceedings as for a contempt, as against citizens of this State. Such an attempt and proceeding would obviously prove utterly abortive. But the mode of enforcing this judgment in default of the defendants to remove the said erections, is prescribed in the judgment itself. It directs the sheriff of the city and county to remove the same and abate said nuisance.

Can the Supreme Court protect its officer, and punish all persons resisting him in the execution of this judgment? Most clearly, I think it cannot.

A judgment that imposes such duties, and subjects a public officer to the perils incident to, and which will obviously attend the attempt to enforce it, cannot be a lawful and valid judgment; must be utterly void for want of jurisdiction in the court to render the same.

The judgment below should therefore be reversed; and, as it clearly appears that a new trial could not change the essential facts of the case, the complaint should be dismissed with costs.

OPINION.

STEVENS *v.* PATERSON AND NEWARK R. R. CO.

The following opinion was delivered :

BEASLEY, CHIEF JUSTICE. The principal question which has been argued in this case is that respecting the interest of the State in the lands lying between high and low water marks in tidal rivers. In some of its aspects this subject is a familiar one to our courts; but, on this occasion, the point is, for the first time, distinctly presented, whether it is competent for the Legislature to grant the soil under the water, so as to cut off the riparian owner from the benefits incident to his property from its contiguity to the water.

Notwithstanding the apparent skepticism of counsel upon the subject, I am constrained to think that some of the matters which were handled in the discussion before the court, are to be considered as at rest. In my opinion, it is entirely indisputable that the proprietors of New Jersey did not, under the grant from the Duke of York, take any property in the soil of navigable rivers within the ebb and flow of the tides. This was the very point of decision in *Arnold* v. *Mundy*, 1 *Halst.* 1; *Martin* v. *Waddell*, 16 *Pet.* 367; and *Den. ex dem. of Russell*, v. *The Associates of Jersey City*, 15 *How.* 426.

Second, that this title to the soil under navigable water, which the common law of England placed in the king, was transferred by the revolution to the people of this State. The cases above cited completely establish this proposition.

And, lastly, in the case of *Gough* v. *Bell*, 2 *Zab.* 441, it was declared that the owner of lands along the shore of tide waters could extend his improvements by wharves and filling up over the shore in front of his lands to low water mark, unless prevented by the State, provided he did it so as not to interfere injuriously with navigation.

Thus far I regard the law in this State as founded in adjudications which ought not to be questioned, and which cannot be disturbed. Assuming, then, as I do, the foregoing propositions as data in the discussion now before the court, the point of inquiry is narrowed to the single question which was regarded as left open in the case last cited, *viz.*, whether the owner of lands on tide water has such a right to the use of the water that the State cannot authorize any improve-

ments in front of his lands which will destroy or abridge that right without compensation.

In the discussion of this topic, I will consider briefly, first, the right, so called, of the riparian proprietor; and in the second place, the rights of the State over the sea shore.

First, then, with regard to the rights of the owner of the upland. In the case of *Gough* v. *Bell*, in this court, I observe that Mr. Justice Nevius and Mr. Justice Potts put their opinion on the ground that the riparian owner, at common law, was invested with certain rights in the water as appurtenant to his estate. And in the case of *Gould* v. *The Hudson River Railroad Company*, 2 *Seld.* 544, Mr. Justice Edmonds, in a dissenting opinion, expresses a similar view.

I have not found that any other judge has ever based a decision on such a ground. The theory on which those opinions are founded seems to me the result of misconception. "The riparian proprietor has a right," says Mr. Justice Potts, "though his strict legal title is bounded by the high water line, to the water as appurtenant to the upland; a right of towing on the banks, of landing, lading and unlading; a right of way to the shore; a right to draw seines upon the upland, and of erecting fishing huts. He has the right of fishery, of ferry, and every other which is properly appendant to the owner of the soil; and he holds every one of these by as sacred a tenure as he holds the land from which they emanate." The error in this statement arises from overlooking the fact that some of the rights enumerated belong to the riparian proprietor as a member of the community, and that others of them belong to him in his character of owner of the soil. Not one of the privileges in the water which are ascribed to him emanate from his ownership of the land. In common with every other citizen, he can fish in the water, and pass and repass to and from the water along the shore. But he has not these rights by virtue of his property; they attach to him as an individual, and he holds them in common with other citizens. They are part *reurm communium*. Then, again, it is true, it is lawful for him to land on the bank, and to dry his nets, and to build fishing huts there. But the right to do these things, and which are not privileges in the water, appertain to him in the ordinary way, as the owner of the land. The case is merely this: the man who owns the land next to navigable water is more conveniently situated for the enjoyment of the public easement than the rest of the community. But a mere enumeration of the advantages of that position falls far short of showing that such proprietor has, in the *jus publicum*, by the common law, more or higher rights than others. It will be observed that in the sentences above quoted, it is averred that the rights referred to emanate from the ownership of the soil; this is certainly true as to certain of them, such as the right to erect fishing huts, &c., but with respect to the usufruct of the water being appendant to the land, in any legal sense whatever, that is the point to be proved, and it is simply assumed. The question is one of mere tradition, precedent, and ancient authority. When and by whom was it ever claimed, from the days of Bracton to the present time, that the ownership of the upland drew to it any rights in the sea shore, or peculiar uses of the water? In the opinion commented on, no common law authority is cited, and the few American cases referred to are so manifestly misapplied that it is not necessary to subject them to criticism. My examination has been so thorough that I feel confidence in saying that none of the ancient authorities can be found—and they, of necessity, must be our guides in this inquiry—which give countenance to the notion that any such privileges as those claimed are appurtenant to the bank or *ripa* of navigable water. Indeed, so far has the bank owner been from making claim to any peculiar privileges of this kind, that the reverse has occurred, and the contested question has been, whether his land, for the convenience of the public, was not subject to certain servitudes; whether such land might not be crossed in going to and returning from the water; whether the right to tow boats along the bank or to land, or to dry nets upon it, was not a public right incident to the use of the water. These and similar questions have been mooted in the courts, some of which remain unsolved to the present day, while others have been decided, though not without hesitation and difficulty, in favor of the riparian proprietor. In all these controversies, extending from ancient through modern times, I do not find that it was ever even suggested that, as an incident to his estate, the owner of the *terra firma* along the line of tide water was possessed of any peculiar privileges, with the exception of those of alluvion and dereliction—privileges which are, perhaps, countervailed by the loss to which he is subject from the washing away of his land. That this is the true position of the land-owner at the common law, will, I think, more clearly appear when I come to set forth the rights of the king in the sea shore, to which subject I now proceed.

The language of the old books is, "that the sea is the king's proper inheritance," and he is styled "the lord of the great waste," "*tam aquæ quam soli.*" *Co. Litt.* 107, 260 *b*; *Colles* 17; 3 *Leo.* 75; 2 *Malloy* 375.

And this was property susceptible of transference. There are some antique instances of grants by the kings of England of certain portions of land under the sea. Lord Hale recites several transfers of this description. *Hale, de jure maris*, 14–28. It is true that such conveyances, at least in modern times, did not pass the property disencumbered of the public right of navigation and fishing; but still it is clear that the tenure of the soil carried with it certain valuable rights. In fact, it appears to have been possessed of the ordinary incidents of property on *terra firma*. It could be put to any use not inconsistent with the public easements with which it was burthened. If it was unlawfully appropriated or interfered with, the law afforded it protection. There are cases, both ancient and modern, showing that this *districtus maris*—this land covered with water—was a pro-

perty susceptible of valuable uses. Thus, in the celebrated case of the *Royal Fishery in the Banne, Davies' Rep*, 149, it is said: "The city of London, by a charter from the king, hath the river Thames granted to them, but because it was conceived that the soil and ground of the river did not pass by that grant, they purchased another charter, by which the king granted to them *solum et fundum* of the said river; by force of which grant the city to this day receives rents of those who fix posts, or make wharves or other edifices on the soil of said river." It cannot fail to be observed how entirely this case explodes the assumption that the riparian proprietor has any common law right to extend his front, either by filling in or by the erection of a wharf. Such acts would have been trespasses on the private property of the sovereign.

The modern case illustrative of the same subject, to which I will particularly refer, is that of the *Attorney-General* v. *Chambers*, 11 *De Gex, M. & G. Rep*, 206. This was an information against certain owners and lessees of a district abutting on the sea shore. The information alleged that by the royal prerogative, the sea shore and the soil, and all mines and minerals lying under the sea, and all profits arising therefrom, belong to her majesty, &c.; that there were very valuable veins or strata of coal lying under that part of said district which was contiguous to the sea shore; that the sea shore vested in her majesty extended landwards as far as high water mark in ordinary spring tides, or, at all events, far beyond high water mark at neap tides; and that the defendants had encroached upon and worked valuable mines under the shore. The general right of the queen as stated was admitted, the only question which was put in controversy being as to the extent of such right. A verdict was taken, by consent, for the crown, and the court decided that the right of her majesty to the sea shore landwards is, *prima facie*, limited by the line of the medium high tide between the spring and neap tides. This decision was made in the year 1854.

From these two cases it seems to me most conspicuous that the ownership of the shore under the sea drew to it all the usual rights of property. It could be leased out for wharves or worked as a coal mine. We are also to bear in mind that the sea shore could be granted in gross—that is, without being parcel of the upland. *Hall on the Rights of the Crown, &c., p.* 19. I also refer, for a number of examples in which claims of the crown similar to the foregoing have been successfully enforced, to an article in *vol. vi., p*, 99, *of the Law Magazine and Law Review.* From this essay it appears that "the advisers of the crown, for the last quarter of a century, have exercised unusual vigilance respecting, and been most active in realizing the royal claim to the fore shores."

Among other notable instances the following one is thus described: "An earlier case was one of an information for intrusion, filed in 1833, by Sir William Hone, when Attorney-General, in the Court of Exchequer, to establish the right of the crown to a tract of land containing about two hundred and seventy acres, formerly overflowed by the tide, situate near the city of Chester, on the south bank of the Dee, a tidal navigable river. The suit terminated in favor of the crown, and the land was subsequently sold by the crown." Nor do I find the royal right anywhere, in the long line of adjudications upon the subject, called in question with respect to its general features. It is admitted, in the fullest extent, in the conspicuous modern cases. *Lord Advocate* v. *Sinclair of Foss, L. R.*, 1 *Scotch Appeals* 174; and *Gann* v. *The Free Fisheries of Whitstable*, 11 *House of Lord Cases* 192.

Indeed, I think it is safe to say that no English lawyer, speaking either from the bench or bar, has ever asserted that the owner of the land along the shore of navigable water has any peculiar right, by reason of such property, to the use of the water or of the shore. And it seems entirely incredible to suppose that such a right as this could have existed, and that no allusion should have ever been made to it. It is obvious that many of the controversies which have been before the courts would have been largely affected by the existence of such a right. Such would have been the effect in the case of the *Duke of Buccleuch* v. *The Metropolitan Board of Works*, the report of which has come to hand since the argument on the present occasion. *L. R.*, 5 *Exchequer* 221. The facts of the case are thus stated: "The Duke of Buccleuch, the plaintiff, had a certain interest under a lease and two agreements from the crown in a mansion in Parliament street, the back of which was parallel to and bounded by the river Thames; and the Metropolitan Board of Works, the defendants, had constructed, by force of an act of parliament, an embankment between the back of the plaintiff's premises and the river. For the purpose of this construction the board of works had found it necessary to remove the area or mass of water which formerly used to run at the back of the premises between high and low water mark, and also to take away a causeway or jetty running from the foot of some stairs on the plaintiff's land across the shore to low water mark. It will be observed that the facts of this case were, in all essential particulars, the same as those embraced in the one now before this court, with the exception that in the reported case the plaintiff had a jetty in controversy extending from his land to low water mark. The act under which the defendants had erected their embankment required, where land was taken, compensation to be made, and directed that in estimating 'the purchase money or compensation to be paid by the promoters,' regard should be had 'not only to the value of the land to be purchased, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers,'" &c. The plaintiff's claim for compensation was two-fold: first, for the destruction of the jetty or landing place; and, second, for the taking away of the water which used to flow along the river side of the premises.

The court held that the only damages the plaintiff was entitled to were those resulting from the destruction of the jetty or landing place; but that the general damage occasioned by the interposition of the embankment of the defendants along the water front of the premises were *damna absque injuria*. This was regarded as a case of great importance, and was fully argued and considered, and yet it was not intimated, either by counsel or any of the judges, that the plaintiff, as riparian proprietor, had any right, the deprivation of which was a legal injury or afforded even any just ground for complaint. In the whole case there is not a hint of the supposed existence of such a right.

From these authorities, and many others which might be cited, it appears to me to be plain, that by the rules of the ancient law, the owner of land along the shore was entitled to no right as an incident of such ownership, except the contingent ones before referred to of alluvion or dereliction; and that, on the other hand, the title to the soil under tide water was in the sovereign; and that such title was attended with the usual concomitants of the ownership of realty. And it consequently followed from this result, that in order to enable the owner of the upland to fill in or wharf out below the line of high water, it was absolutely necessary to adopt some principle different from those of the common law. And this, as I understand, was the foundation on which the majority in this court placed themselves in the decision of the case of *Gough* v. *Bell*. That final decision was a concurrence in the view expressed by Chief Justice Green, in his opinion delivered in the Supreme Court; and that view was, as I apprehend, the only one which could invest the claim of the land-owner to extend his lands by artificial means below the line of high water with the faintest semblance of legality. As such claim could not rest on the common law, it was indispensable to invoke and sanction a custom or local usage variant from the common law. How far such a custom, as a mode of acquiring a title to real estate, can be made to harmonize with legal principles, it is not necessary to inquire, for as before remarked, I consider the existence and legality of such a usage to be *res adjudicata* in this state. Admitting its legal existence, then, the inquiry presses as to its effect in law. It confers a right by the legal exercise of which, the bank-owner may encroach on the public property between high and low water marks. If such a right existed by force of the common law, as an incident of property, it is obvious it could not be destroyed or substantially impaired by the legislative power, without compensation. The question is, whether this customary right has the same quality and efficiency as though it appertained to the land by force of the common law.

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 fore shore between high and low

water marks, and which license, when executed, became irrevocable. The shore-owner acquired his indefeasible right by the acquiesence of the public in the performance of the act. That this was the view of the judges whose opinions prevailed in the decision of *Gough* v. *Bell* is, I think, clearly manifest. I have above observed that the true doctrine with respect to this local custom is embodied in the opinion read in the Supreme Court by Chief Justice Green. In that opinion, this clear statement with respect to the necessity of the execution of the license, as a pre-requisite to the acquisition of a legal right on the part of the land-owner, is to be found, viz., "In New Jersey, as we have seen, the title of the state extends as at common law, to 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. That every encroachment upon the shore or other part of the public domain may, at all times, be restricted or controlled by the legislature, is admitted. That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied. But in the absence of such legislative restriction, where no nuisance is created, the riparian proprietor may appropriate the shore between high and low water mark to his own use." This language is too clear and explicit to need explanatory comment. That the local custom of the state which was recognized and enforced by the court, operated as a simple license to the riparian owner to enlarge his possessions at the expense of the public domain, and which license was revocable at any time before execution, is the clear doctrine of the adjudication in question. It has no reach beyond this. And from that time to the present, I do not perceive that the judiciary of this state have been in any doubt upon this subject. Whenever the doctrine has been referred to, the question has been treated as being entirely at rest. In the year 1856, in the case of *The State* v. *The Mayor and Common Council of Jersey City*, 1 *Dutcher* 525, certain lands lying under the flow of the tide were thrown out of a tax assessment for the reason that the title to such lands was in the state, and Mr. Justice Elmer, with characteristic directness of expression, defines the public title thus: "It must now be accepted as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains under the water. It may be granted by the state to a stranger at any time before it is actually reclaimed and annexed to the upland. Such is unquestionably the common law, and I am aware of no alteration of it in this respect in New Jersey." In this opinion, Chief Justice Green and Justices Ogden and Haines concurred. Again, after an interval of several years, the rule was

treated by the same court as established. I refer to the case of *Stewart* v. *Fitch and Boynton*, 2 *Vroom* 19. This was a suit by a riparian owner for the use of certain flats by the rafts and lumber of the defendants, and among other reasons given for dissent to the legality of the plaintiff's claim, the court said: "But it also appears that the flats on which the rafts were anchored were all below high water mark, and, at high tide, covered to the depth of two feet, and that no part had been in any wise improved or reclaimed, and that, consequently, the title to them was not in the plaintiff, but in the state of New Jersey." From these cases, I think it is evident that from the date of the decision of *Gough* v. *Bell* up to the time of the present controversy, the question now under consideration has not been considered an open one by the courts of this state. And such, too, appears to have been the legislative and public understanding of the effect of this leading decision just mentioned, at the time that it was rendered. This, I think, is manifest from the provisions of the act of 1851, entitled "An act to authorize the owner of lands upon tide waters to build wharves in front of the same. "*Nix. Dig.* 1025. By the first section of this act it is declared "that it shall be lawful for the owner of lands situate along or upon tide waters to build docks or wharves upon the shore in front of his lands, and in any other way to improve the same, and when so built upon or improved, to appropriate the same to his own exclusive use." Thus we find in this provision, and in similar provisions in many other laws, the local custom sanctioned in the case of *Gough* v. *Bell* assuming a statutory form and subject to certain general regulations. 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 pre-requisite on the side of the proprietor, to be converted into a legal right. Nor should it fail to be observed that even if we were to admit the indefeasibility of this customary right of the shore owner, such concession could not have much effect in securing him against the exercise of legislative power. By force of such a doctrine, the land lying between the high and low water lines could not be taken from him without compensation; but below the low water line, the public right and control would be still absolute. But I have said such concession cannot be made. The bank-owner has, by the local custom of the state, but an inchoate right before the reclamation of the land below the water; nor does he gain anything in this respect by the statute just referred to. That act did not add anything to the efficiency of the local custom as a mode of acquiring title. It left that right as it found it—a pure license, revocable before execution. Such acts, bearing the form of legislative licenses, are not uncommon, and their effect has been clearly defined. It has never been thought that the privileges conferred by them were vested rights in the sense of debarring the public from revoking them at pleasure. Two cases in point, which have arisen in Pennsylvania, I will refer to as illustrative of

the principle. By a statute of that state, all persons owning lands adjoining navigable streams were authorized to erect dams in such streams, and appropriate the water to the uses of their mills. In the cases of *The Susquehanna Canal Co.* v. *Wright*, 9 *Watts & Serg.* 9; and *The New York and Erie Railway* v. *Young*, 33 *Penn.* 175, it was declared that the rights acquired under this act were not indefeasable, but were subordinate to the rights of the commonwealth. This result was justified by the theory that such licensees took their privileges under the implied condition that they should be held in subordination to the requirements of the public. These decisions go to the point that a legislative permisson to appropriate to individual use a part of the *jus publicum*, does not, *per se*, deprive the public of a right to resume the privilege granted, unless it appears that it was the intention to vest such privilege irrevocably in the licensee. The wharf act of this state clearly leaves, in this respect, nothing in doubt, for it expressly announces that after the riparian proprietor has, in point of fact, erected his wharf or made any other improvement below the high water line, then, and not till then, the land so appropriated shall become his own. Prior to this event, he has no rights in the water or the land under it, either by the statute or by the local custom, which are not subservient to the legislative will.

The steps which I have thus far taken have led me to this position: that all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has 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 possession has been taken, be regulated or revoked at the will of the legislature. The result is, that there is no legal obstacle to a grant by the legislature to the defendants, of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark. It may be true that by such an appropriation, the plaintiff will sustain a greater inconvenience than will other citizens whose land does not run along this river. But the injury to all is in its essence and character the same, the difference being only in degree. All persons who have occasion to approach this river over that part of the bank occupied by the railroad of the defendants, may, perhaps, experience some inconvenience from the interposition of such works: the railroad, therefore, is somewhat of an impediment to the public rights of fishery and navigation. But no one, it is presumed, will pretend that such impediment is, on that account, illegal, if authorized by the legislative authority. Nor can the plaintiff complain because a difficult access to the water is a greater hardship to him, owing to the easy use of the water, in connection with his property in its natural condition, than it is to those who live at a distance from it. If it were true that no public improvement can be made which, in its execution, will affect the property of one citizen more injuriously than it will

that of another, many of the greatest works of the times would become impossible. No railroad or canal can be constructed which will not greatly benefit the lands of some persons, and injure almost as greatly those of others. Every citizen is required at times, to contribute something, by way of sacrifice, to the public good. Such partial evils is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authorities in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of such control, gives no legal claim to compensation. The principle seems universally conceded that, unless in certain particulars protected by the Federal constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute. By force of the constitutiom of this state, private property cannot be taken, even for public use, without just compensation. But the dominion of the legislature over the *jura publica* appears to be unlimited. By this power they can be regulated, abridged, or vacated. We have seen that, by the common law, the king was the proprietor of the soil under the navigable water, and this being regarded as a private emolument of the crown, was susceptible of transfer to a subject. But such transfer did not divest or diminish, at least after *Magna Charta*, the public rights in the water, and consequently the grantee of the crown held the property in subjection to the common privilege of fishery and navigation. The consequence was, that the king could not deprive the subjects of the realm of these general rights. This was a power that resided in parliament, and not in the monarch. But that such a parliamentary power existed, appears never to have been questioned by any English authority, nor do I perceive that its exercise was ever regarded as a legal wrong, or even as an unusual hardship to the owner of the land along the shore. In the year 1780, this authority of parliament to put to use the land under tide water, thus intercepting the land owner, was fully recognized by Lord Mansfield. The case referred to is that of *The King* v. *Smith, Douglass* 441. The city of London, under an act in the time of George III., had erected piles on the bed of the Thames, near Richmond, within high water mark, about the distance of twenty-nine feet from the shore, for the purpose of making a towing-path for horses, adjoining and contiguous to a wharf in the possession and the property of the defendants, or of those under whom they claimed. The defendants cut down one of these piles, which was proved to have been erected between the high and low water marks, opposite to the said wharf. For this act an indictment was found, and the defendants were convicted. The case came before the court on a motion to arrest judgment. In the argument of this case none of the distinguished counsel employed for the defence questioned the right of parliament to appropriate the land in question in the manner specified, if the Thames, at the point in question, was within the reach of the tide,

the entire predication being that such was not the fact. The conviction was sustained. I think the power of parliament, in affairs of this character, is not to be denied. Nor was this one of those severe prerogatives which existed only in consequence of the theoretic omnipotence of the legislative branch of the British government. Whatever the theory, we know what the practice has been, and it is scarcely too much to say that, since the days of the revolution, no instance can be found of any Englishman being deprived of any right of property by act of parliament. A statute putting to use the land under tide water was regarded as legitimate—not because the power of parliament was unlimited, but because the control over the public domain was unlimited. And, in fact, the absence of a power to control and put to use the public interests in the navigable waters would be an imperfection in the civil polity of any people. I do not find that it has ever been supposed that such a power did not exist in any of the American states. By a statute of the state of Delaware, a citizen was authorized, for the purpose of improving his lands, to close the mouth of a navigable creek, and such statute was pronounced to be constitutional, and the act done under it legal, by the Supreme Court of the United States. *Wilson* v. *Blackbird Creek*, 2 *Peters* 245. In *Glover* v. *Powell*, 2 *Stockt.* 211, a similar law was enforced, and in the case of *The Mayor of Georgetown* v. *The Alexandria Canal Company*, 12 *Peters* 91, it was held competent for congress, acting as the local legislature, to authorize the erection of the canal in question, although the same was admittedly injurious to the interests of the riparian owners. This same doctrine was enforced in the case of *Gould* v. *Hudson R. R, Co.*, 12 *Barbour* 616; 2 *Selden* 522, on a scale of the greatest magnitude, the road of the defendants being located along the Hudson, and intervening for many miles between the water and the land of the bank-owners. See a collection of cases to the same effect, in *Angell on Tide Waters* 92-108. It is upon this principle that water, in large quantities, is taken from our rivers to feed our canals, and that dams are placed, to the destruction of navigation, in our rivers for the uses of manufactories. Our state affords many instances of a display of this power in this form.

With regard to the hardships oftentimes incident to the exercise of such a power, the courts can have no concern. Such considerations address themselves exclusively to the law-makers. It is the office of the court to declare, if the law leads to such results, that the legislature has the authority to regulate or destroy at its pleasure, and for the common welfare, the public rights in navigable rivers, and that if individuals are in consequence thereof, incidentally injured, such loss is *damnum absque injuri*. If compensation be made for such damage, it is on the part of the state a mere gratuity, for neither the riparian proprietor nor any other citizen whose property has been impaired can claim such redress as a matter of legal right. In all such cases the appeal must be to the sense of justice of the legislature.

The result being that the legislature can authorize the laying of this road in front of the land of the plaintiff without compensation, the next question is, has such a privilege been conferred on the defendants?

The claim is, that the legislature has granted to these defendants the use of a part of the public domain. The state is never presumed to have parted with any part of its property, in the absence of conclusive proof of an intention to do so. Such proof must exist, either in express terms or in necessary implication. I shall not cite authorities to sustain so familiar proposition. With respect to this statute now drawn in question, and by the supposed force of which the defendants have erected their works, I fully concur in the view expressed by Mr. Justice Depue, in the opinion read by him in the Circuit Court. I think there are no terms used in this statute which, fairly interpreted, imply an intention to confer on the defendants the privilege asserted, nor does such privilege necessarily result from the general powers conferred. This plea, therefore, presents no bar to the action of the plaintiff.

With respect to the question raised in the argument, touching the sufficiency of the facts stated in the plaintiff's declaration to sustain his suit, I will merely say that it seems to me that a legal cause of action is shown.

The substantial allegation is, that in consequence of the works of the defendants he is prevented from passing from his land to the river Passaic, which at present is a public highway.

Now it is true that, as the defendants have put these obstructions in this river without authority of law, such obstructions are a public nuisance. But I think it is a nuisance which, according to the allegations on the record, inflicts a peculiar damage on the plaintiff, and if that be so, it is admitted this action is well brought. The plaintiff, until the state interferes and deprives him of the privilege, has the right to pass directly from his property on to the shore of this navigable river. He has been deprived of the right by the tort of the defendants, and this is a damage which, apparently, is individual and peculiar to himself. If a ditch should be dug in a public highway, in front of the door of a dwelling house, so as to cut off access to and from such house, no one would doubt that the occupier of such house sustained a greater inconvenience from the public nuisance than the body of the community. The character of the present tort, as it respects the plaintiff, is precisely of this nature. I think the facts stated support the action.

The judgment in the Circuit Court should be affirmed.

THE CHANCELLOR (dissenting.) The main question in this case which we are called upon to decide, and which has been so fully argued is, whether the owner of lands bounding on navigable tide waters has any right either in the shore, or to have his land retain its natural connection with, and adjacency to those waters, which cannot be taken from him without compensation.

The question is an important one, and its consequences of great moment. On the one hand, every owner of lands on such waters who has purchased and held them in the belief that this adjacency to the water added to their value, and was an incident that could not be taken from him, must lose this supposed right without compensation. And the owner of docks and wharves built by permission of the state, and only valuable for purposes of commerce, may have their value destroyed by a grant to a stranger of ten feet under water adjacent to them. On the other hand, the state will be entitled to the profits and advantages of a sale of all the fisheries the water fronts in its bounds, which, in front of the lands on the Hudson river and bay of New York, and especially of the docks and wharves erected there, will be of immense value and contribute greatly to the financial prosperity of the state, to the advantage of all the inhabitants and inflict injury on no one except those who have purchased rights, and built wharves, piers, or docks, with indiscreet confidence in the opinions of lawyers and judges, the declarations of legislators as to the rights of the riparian owner, the legislation of the state seemingly conferring certain rights, and in the apparent current of public opinion. The tendency of recent legislation upon this subject has been to take from the owners of lands along the shore, for the benefit of the state treasury, all such rights as are not vested in them as property, by laws which cannot constitutionally be altered or repealed.

And it is the duty of this court of the last resort to determine the extent of those rights as a strict question of law, without regard to the wisdom, justice, or policy of the legislation which affects them. This duty the courts must perform, without stopping to consider whether the taking away by force of legislation, rights once given, where the power to take back exists, might not injure the credit of the state. The good faith and expediency of such matters are for the legislature alone.

The rights contended for on part of the shore-owner are placed upon three grounds: first, the general principles of the common law; secondly, the principles of the common law as they have been adopted by the legislature, courts, officials, lawyers, and people of New Jersey, and applied to the navigable tide waters in the state; and, thirdly, the statute of 1851, commonly known as the wharf act, and its supplements.

As to the common law, it must be assumed that by the decisions in this state the right of soil on the shore to ordinary high water mark is vested in the state.

And the question here is, has the shore-owner, as incident to his land, a right to retain its adjacency to the waters, and the profits and benefits to be derived from it? The common law recognizes and secures to lands in other cases such rights and benefits derived from their natural situation relative to other lands. Such are the right to

support of the natural soil, and the right to have water courses flow upon and from the land unobstructed and uncorrupted. These are rights, if not in the adjoining land, yet to have the control and dominion of the owners of the adjoining lands so modified and limited as not to interfere with them. An adjoining owner, although absolute proprietor of the soil to any depth, cannot remove that soil, so as to deprive his neighbor of the natural advantage of its support. The owner of lands through which a stream runs has no right in the water while yet on the lands above him. Yet he has a right to have the natural flow of the stream preserved, so that it may come to his land and he have the benefit of it. It is a right of property.

On the same principle the advantage which the adjacency of navigable tide waters naturally flowing by his land, is to that land by its situation, should be held to be a right, property of which the owner cannot be deprived. There is no reason for support from soil, or the free flow of fresh water streams that does not equally apply to this. The maxim *aqua currit et debet currere* is as applicable to tide water as to fresh water rivers of the same size, and for the same reason should be applied to them by the courts. The principles of law as to the right to advantages accruing from natural situation should be uniform, except where some reason exists for difference in their application. None does here.

The right of an owner of lands upon tide waters to maintain his adjacency to it, and to profit by this advantage, is founded upon a natural sense of justice that pervades the community, which, although the decisions of the courts may overcome, neither they nor the subtle and artificial reasoning of learned juris-consults will ever eradicate. To this, reference is made by the Chief Justice, in his opinion in this court in the *Keyport Case*, 3 *C. E. Green* 516, where he says "that the public sentiment, from the earliest times to this day, and the whole course of legislative action in this state, had recognized a natural equity, so to speak, in the riparian owner to preserve and improve the connection of his property with the navigable water."

The hardy, enterprising pioneers who have extended and are extending this country into the western wilderness, enter and purchase government lands, and select those adjacent to navigable streams, even when in other respects inferior, on account of the great advantage arising from this natural situation, in full confidence that this advantage cannot be wrested from them and sold to some intervening speculator who shall come out, after their lives of sacrifice and privation have given value to these once worthless banks. And the united moral sentiment of the public would condemn legislatures and courts who should mould the law so as to deprive them of these fair, natural advantages of their location. So, when two centuries ago the bold emigrants who founded this republic, in exercising the choice of location that was conceded to them as an inducement to undergo the hardships of this new life, selected, as the most valuable, lands on the banks of the Passaic and Hudson

rivers for their adjacency to those waters, in preference to richer well-watered lands in the interior, it seems eminently unjust to take from them the natural advantages of such location, even if the object is to fill the treasury of the state, and relieve from taxation lands in the interior, to which the water power and minerals—the natural wealth which creates their value—are left undisturbed, as incidents belonging to them which cannot be interfered with. If the rule of the common law is more narrow, these rights here should be settled by a more liberal rule than that applied in England to lands parceled out to his followers and favorites by the Norman conqueror.

But in the English authorities or decisions we find little on the subject of these rights of adjacency. There, the soil under water was vested in the king, in trust for the public. Grants for public or private use were made only by parliament, who had unlimited power to dispose of all private property and rights, with or without compensation. Any grant by parliament gave right. Yet in the case of *Bell* v. *The Hull and Selby R. R. Co.*, 6 *M. & W.* 699, upon a grant by act of parliament of a right to build a railway in a navigable river, on condition that compensation should be made to the owner of any wharf that should be injured by it, it was held by the Court of Exchequer that the owner of a wharf not taken or touched by the railway, but the access to which was rendered less convenient, was entitled to compensation on the ground that he was *injured*, which could not be unless he had a *right* to the access that was affected. The word used signifies deprivation of right. The recent case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works*, 5 *Ex.* R. (*L. R.*) 221, decided in the Exchequer Chamber, as I understand it, admits this right and is based upon it. The plaintiff, in 1810, leased from the crown, for sixty-two years, crown lands, part of the grounds of the old palace of Whitehall, extending from Whitehall street to the Thames, separated from the Thames at high water mark by a high wall, beyond which was the shore; in the lease and the plan annexed to it, this wall was the limit of the lands demised. The usual words, with all ways, passages, waters, easements, advantages, and appurtenances thereunto belonging, were added. This lease had been renewed in 1858, for ninety-nine years. There were steps down from the garden to a door in the wall, of which the plaintiff had the key, from which a wharf, called a jetty, four feet wide, projected into the Thames to low water, which had been used by the lessee since 1818 to bring coals and other articles to the premises. This jetty was not mentioned in the lease or renewal, or marked upon the plan. The defendants, in constructing the Thames embankment, had destroyed the jetty and raised the embankment which extended into the river over and beyond the shore, to a height much above the old wall, and laid out a road on this embankment. The arbitrators who assessed the damages awarded £200 for destroying the jetty and access over it to the water; £5,000 for the amenities, consisting of the view over and beyond the river, the privacy and

protection from noise and dust; and over £2,000 for other matters. None were claimed or allowed for cutting off access to the river from other parts of the garden, from which the wall, the limit of the demise, rendered such access impossible. The only property or easement taken was the jetty and the access to the water over it. The third plea denied that the plaintiff had any right in the jetty or any easement over it. The judgment in both courts was for the plaintiff on that plea, and every judge held that he had an easement or right of access to the water over it: some intimated that he had a right to the soil in the shore. Now, as the lands demised were the private domain of the crown, held for the personal benefit of the sovereign, a demise of these could not, by implication, convey a right or easement in the shore held as sovereign in trust for the people. This result could only be reached on the ground that the land, the domain of the crown, had attached to it a right of access to the river over the shore, which, like other appurtenances, passed with the land, where not cut off by a wall which the tenant had no right to remove.

The only part of the award which the court held to be illegal was the £5,000 allowed for the amenities, and this did not include the damage by cutting off the access to the river beyond the wall.

The case settles the doctrine that lands of the crown have the right of access to navigable waters over the shore in front, held by the sovereign in trust for the public; that this right passed with the land when demised to a subject, without being specified, and is property which cannot be taken without compensation when compensation is required.

Chief Justice Taney, in *Martin* v. *Waddells' Lessee*, 16 *Pet.* 414, speaks of the disappointment to the expectation of the people who had settled this, and encountered the hardships of emigration to the new world, "if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake or bathe in its waters, without becoming a trespasser."

Against this doctrine of right by adjacency, the case of *Gould* v. *The Hudson River Railroad Co.*, 12 *Barb.* 616, affirmed by the Court of Errors in New York, (2 *Seld.* 522,) is urged as establishing the contrary doctrine—that is, that the riparian owner on tide waters has no right of access to the waters or other rights to these waters which is property, and which cannot be taken or granted by the state at pleasure. This case, in the state where it is authority, establishes that doctrine. But neither the reasoning on which the result is founded, or any established standing or reputation of the judges by whom it was decided, in my view, are sufficient to induce this court to disregard the principles settled in like cases, which should be followed in this, or the respect due to a like number of judges of our own state, of equal learning and ability, who have held the contrary doctrine. The opinion of Justice Barculo in the court below is unsatisfactory, and does not consider the real point in question—the right to the *natural* advantages of the situation which in other cases is held to be property.

He compares it to the case of loss of custom by change of roads and of the course of travel; and to the case of a building injured by excavations of the line by the adjoining owner, without noticing the established right of adjoining owners to the support of the *natural* soil by the adjoining soil—a right, from the natural situation of the premises, similar to that under consideration, and which would have led him to the contrary conclusion. The opinion of the Court of Errors was concurred in by five of the eight judges who composed the court; one did not hear the cause; one other did not concur; and Justice Edmunds delivered a dissenting opinion. The opinion of the court by Justice Watson is founded mainly, if not entirely, on the decision in *Lansing* v. *Smith*, 8 *Cow.* 146, and 4 *Wend.* 9. That was a suit by the owner of a wharf in the Albany basin, a part of the Hudson river, separated from the rest of the stream by a pier and lock for the convenience of the canal navigation. The injury sustained by Lansing was not that he was cut off from the river, but that access to it, or the residue of it, was rendered inconvenient by the pier and lock, an inconvenience which he suffered in common with all owners of wharves and water fronts on the basin.

In the opinion of the Supreme Court, by Justice Sutherland, he says the claim of the plaintiff as riparian proprietor was "to the natural flow of the river, with which the state had no right to interfere by erections in the bed of the river, or in any other manner," and that "the proposition appears to the court too extravagant to be seriously maintained. It denies to the state the power of improving the navigation of the river by dams or any other erections which must affect the natural flow of the stream, without the consent of all the proprietors on the adjacent shore within the remote limits which may be affected by the erection." This is a very different claim from that of the right of the state to cut off the owner from access to the river. The judge so understood it, for immediately after this he says "the right of the plaintiff to navigate to and from his dock is not denied; all that is contended for on the part of the defendants is, that the mode in which that right is to be exercised is subject to be controlled and regulated by the legislature as, in their judgment, the interest and convenience of the public may require."

There are two distinct principles laid down: 1. That the owner has a right to navigate from his dock. 2. That the state has the right to regulate the navigation of the river, even when it affects the mode in which that right is to be exercised. And a third, to be drawn by implication, that the state has not the power to take away the right, but only to regulate its exercise.

The power of the state to regulate the use, by the public, of highways, either on land or water, is conceded. Where a fresh water river, above tide, is navigable, it is often a public highway, though

the title of the bed is in the adjoining owners; the right of the state to regulate the navigation may be admitted, while it cannot cut off the owner or affect his title to the soil.

There is nothing in the decision of the Court of Errors, or in the opinions, to present a different view of the case, except the remark in the opinion of Chancellor Walworth that "the legislature might authorize erections in front thereof, [the plaintiff's wharf] as in the case of Smith's wharf, on the Thames," referring to the case of *Rex* v. *Smith, Doug.* 425, evidently founding this *dictum* on that case, without reflecting that it was based on the omnipotent power of parliament. Gould's case thus stands by itself; it is entitled to the respect which belongs to the character and learning of the judges of the majority who decided it.

The decision in *Bailey* v. *Phil., Wil., & Balt. R. R. Co.*, 4 *Harrington* 389, is only upon the right of the state to place over a navigable stream a bridge without a draw, that affected all wharves above it alike. This is the right to regulate the use of the stream by the public, the same point as adjudged in *Lansing* v. *Smith.*

The right of the state over the artificial highways laid out or constructed by its authority, would seem to be clear on principle; they are not privileges belonging to land from its natural situation, but provided by legal regulations which contain provisions for the vacation of these very ways. Yet there is much force in the reasoning of Justice McLean, in delivering the opinion of the court in *New Orleans* v. *The United States*, 10 *Pet.* 720, where he declares that the sovereign power cannot close the streets of a city or deprive the inhabitants of their use, because such use is essential to the enjoyment of urban property. And if, for the purpose of raising funds for the public or municipal treasury, the legislature should provide that the streets in any of our large cities should be vacated and the land sold, or a few feet in front of each house sold to a stranger, the courts would find some principle upon which such an imposition could be prevented.

The right on the principles of the common law which I for convenience call the right of adjacency, consists in the right of ferriage, of landing boats alongside a wharf, or land by the shore, and unloading goods upon or taking them from it, the right of fishing from the shore, and drawing nets upon it, of entering upon it from the land, for bathing or procuring water, and such other benefits as can be enjoyed only by the adjoining owner, peculiar to him, and not common to the rest of the public.

These rights founded upon the same principles as those before mentioned—settled principles of the common law—and thus supported by natural principles of justice, have, together with the right of wharfing out peculiar to New Jersey, been recognized as rights by so many learned and able judges that they are entitled to be considered as settled, although there is no case in which it was the matter decided. In the case of *Bell* v. *Gough*, in this court, Judges

Potts, Ogden, and Nevius, in their opinions, expressly state this to be the law; in that cause, when in the Supreme Court, Chief Justice Green, (1 *Zab.* 462,) states that in the soil of navigable rivers below high water mark, there has undoubtedly existed from a very early period rights of the riparian proprietors, which have been recognized by the legislature, inconsistent with the idea of that exclusive property in the state recognized by the common law.

On the trial of the case of *Bell* v. *Coles*, in which I was counsel, Judge Grier, upon the entry of the verdict, said in open court that the judgment would give the plaintiff possession, but it must not be considered as entitling her to cut off the access of the defendants to the water, or to fill up the land, and signified his opinion that the recovery might be of no value to her unless profit could be made out of the premises as they were. These observations were so decided, that the counsel of the plaintiff advised her that although she owned the lands under water, it was necessary for her to purchase the right to fill in of the defendants, before she could proceed. And in consequence of this, before the exceptions taken by the defendants were drawn or sealed, a negotiation was begun, the result of which was, that a strip of land along the shore was purchased of the Coles family by Mrs. Bell. This fact is mentioned, as there is no full report of the case to show that this declaration of Judge Greer was regarded, and had effect at the time. His opinion, as far as it is of value, was in favor of rights of adjacency.

The opinion of Judge McLean, in *Bowman's Lessee* v. *Wathan*, 2 *McLean* 376, is clearly and decidedly in favor of such rights. And in the opinion delivered in this court in *Barnett* v. *Johnson*, 2 *McCarter* 489, Justice Vredenburgh, in speaking of similar rights, claimed in that case by adjacency to a canal, says "that a right so essential, so universal in its exercise in all time and among all nations, exists, not as was said in *Gough* v. *Bell*, by a common law local to New Jersey, but by a law common to the whole civilized world."

But whatever might be the common law of England, the law of this state, as recognized for more than a century by successive legislatures, by the courts, judges, and state officials, has established these rights of adjacency, including that of reclaiming lands under water, as a right of the shore-owner.

The legislature have recognized this right in a number of special acts for shutting out the tides. I have found forty acts of this kind of the colonial legislature, and more than thirty of the state legislature before the new constitution. All of these provide for shutting out the tides, and of course include the shore as part of the land to be reclaimed. A number of them expressly provide for the lands between ordinary high and low water, and the creeks, on which the marshes provided for in most of them lay, are navigable waters; several of these tracts are on the shores of the Delaware, and Delaware bay. The declared object is to improve and reclaim meadows

and marsh lands overflowed by the tide, and this marsh includes the shore.

All these acts, including that of February 10th, 1711, to stop the tides in the creek around Burlington islands, said to be the first private act of the colonial legislature, mention the persons benefited as the owners of these marshes.

The first general act to improve tide swamps and marshes, passed November 29th, 1788, in its first line mentions the *owners* of marsh or swamp exposed to the overflow of the tide and capable of being laid dry. The proviso to the first section declares that no navigable water should be stopped, the use of which, by the public, would be of half the value of the improvement. The banks authorized are such as are necessary to secure the marsh from the overflow of the tide. The fifth section provides for the survey and valuation of the lots belonging to each owner, *usually* overflowed by the tide, for the purpose of assessing the expenses. The whole act unmistakably shows the object to be to provide for lands on navigable streams and elsewhere, usually overflowed by the tide; these lands constitute the shore, and this shore is treated and considered as owned by individuals, and they are made liable to the expenses of the enterprise. The various supplements to this act, which is itself in force, extending down to 1855, are to the same effect. The legislature have thus for one hundred and forty years acknowledged a right in the shore by owners of adjoining lands. Perhaps the recognition was founded on the idea that they owned the fee to low water mark, now held to be a mistake, but the right is admitted.

The series of acts regulating fisheries on the Delaware, commencing with that of December 24th, 1784, (*Pamph. Laws* 179,) to the act of 1808, with its supplements, still in force, all acknowledge property in these fisheries by protecting the interests or claims of those who are styled owners of the fisheries. They protect these owners in the almost exclusive enjoyment of these rights in front of their lands, between lines drawn at right angles to the shore.

Fisheries were devised by wills and conveyed by deeds, and the courts sustained actions of ejectment for them. Yet there had been no actual grant of them by the state.

The *dicta* in *Gough* v. *Bell* go far enough in disregarding such repeated, continued, and consistent legislation. But the decision of that cause is not adverse to these rights: it is founded on them. And the opinions of the judges, regarded as establishing the right of the state to the fee, are not inconsistent with them, but expressly acknowledge them. They recognize the right to reclaim, which, if absolute, is almost equivalent to the ownership acknowledged by this legislation. We are now asked to go far beyond this, and hold that this legislation is to be disregarded by the courts in establishing the law in the state—a position which seems to me to have no parallel in the history of jurisprudence. Continued legislative recognition of no doubtful character for a century and a half, is to be set aside upon

the divivided opinion of courts of other states, whose judges are not familiar with our law, even were they the most learned in their own.

The people of the state had claimed and exercised the right of building wharves in front of their lands from the earliest times, and until the suit in the Circuit Court of the United States brought by *Waddell's Lessee* v. *Martin*, for the purpose of testing the rights of the proprietors of East Jersey to the lands under water, I find no law or private act to authorize the building of wharves. Chief Justice Kirkpatrick had declared in 1821, in his opinion at circuit in *Arnold* v. *Munday*, 1 *Halst.* 10, that "the intermediate space between the high water and low water mark may be exclusively appropriated by the owners of the adjacent land by building thereon docks, wharves, store-houses, salt-pans, or other structures which exclude the re-flow of the water." Upon this, no doubt, the practice was continued with confidence, notwithstanding the title to lands under water was, by the decision at bar, settled to be in the state.

In 1834 the East Jersey proprietors made a lease to Waddell for the purpose of establishing their right to the said soil under tide waters; and then the conflicting claims of the state and the proprietors drew the attention of the public; and the purchasers of the claim in Harismus Cove of Nathaniel Budd, who derived title from the proprietors, one of these purchasers being Willis Hall, the former attorney-general of New York, demanded of Budd that he should procure the title of the state. This he obtained by the passage of the act of 1836, granting it to him. The case of *Waddell's Lessee* v. *Martin* was tried in the United States Circuit Court in October, 1837, and under the charge of Judge Baldwin, a verdict was rendered for the plaintiff. The state taking from Martin the burthen of this litigation, caused this suit to be removed to the Supreme Court, on exceptions to the charge, and the result was the decision of that court in June, 1842, by which the judgment below was reversed, and the right of the state to the lands under the tide waters established, as it has been before in the state courts, in the case of *Arnold* v. *Munday*. But the decisions and opinions in both these cases only established that right as to lands below low water mark, and decided nothing as to the shore. From this time, frequent applications were made to the legislature by riparian owners, for leave to build wharves and reclaim and appropriate the shore and lands under water in front of their shore line.

Mrs. Bell, who, by purchase at a foreclosure sale, had acquired the right of her father, Nathaniel Budd, to the tract which he held, both under the proprietors and the state, laid claim to and entered upon a part of that tract, originally part of the shore, but which the Coles family, the riparian proprietors, had filled in before the act of 1836, by which the state granted it to Budd. The suit brought by Gough, the tenant of the Coles family, brought in question the right of the riparian proprietors in the shore as against the state. The first decision of that case in the Supreme Court in July, 1847, (1 *Zab.*

156,) set aside the verdict for the defendant, on the ground that the title of the state was to high water mark, and had passed by the act of 1836. After a second trial, the case was argued before the Supreme Court on a special verdict, and the decision given in July, 1850, was for the plaintiff, on the ground that, in this state, by a principle established by continued custom, approved by the legislature and the courts, the riparian owner had a right to fill in and reclaim the shore in front of his lands, and to appropriate the land so reclaimed. And the court of Errors, to which the cause was removed in June, 1852, affirmed this decision on substantially the same grounds. In all these decisions it was held by the courts that, by the common law, the state owned the fee of the shore, and that the right to reclaim and appropriate was based upon a change in the common law, made like many changes which have been made, to adapt it to the condition and circumstances of the people.

This change of the common law was shown by the common and universal impression among the people and of the bar and of the courts, and more especially by the frequent and repeated admission by the legislature in their acts for more than a century. A single admission or mistaken recital made by the legislature of an erroneous principle as law, will not make it such, but a continued series of admissions for a century by successive legislatures, with no declaration to the contrary, may well be held to work a change of the law as effectually as a statute passed by the same body. It has the power to change the law, and the will of the sovereign power thus plainly manifested, is law.

But the judges in expressing their opinions in this case, although unanimous, or nearly so, in the decision of the case, were divided in limiting the extent of the right of the riparian owner. All admit a right of the owner in the shore to some extent; some state it as a right vested in the owner as property; others speak of it as existing during the acquiescence of the state. The Chief Justice, and Justices Elmer, Carpenter, Nevius, Potts, and Ogden, all hold that by a local common law established in New Jersey, the riparian owner had acquired rights different from those he held at the common law. This was the view of every Justice of the Supreme Court, except Justice Randolph.

The counsel for the state, in the argument in the Supreme Court of the United States, in *Martin* v. *Waddell's Lessee*, stated that it was an established custom in the state for the riparian owner to wharf out. And the boundary commissioners of 1807, consisting of Aaron Ogden, Alexander C. McWhorter, William S. Pennington, James Parker, and Lewis Condict, some of them eminent lawyers, all thoroughly versed in the history and customs of the state, in their correspondence with the commissioners of New York, quote, with approbation, the position of Judge Swift on this point. They state that it accords with the usage and common understanding of the people of the United States. Swift, in this quotation, holds "that

the owner has the exclusive right of wharfing and erecting piers in front of his lands on navigable waters, and that no man has a right to do any act in front of another's land which can affect the soil, as wharfing or erecting piers, for in this there is an exclusive property." And although this would seem to include the right of the soil which, since *Bell* v. *Gough*, has been held to be in the state, yet it shows the view of these commissioners as to the usage and common understanding in New Jersey. In Massachusetts, Maine, and Connecticut, the rule is established that the riparian owner may reclaim the shore in front of him; in Massachusetts this is said to be founded on the ordinance of 1641; but since that ordinance ceased to be in force, which was more than two centuries ago, the same rule has been adhered to by the courts as the law of that state, because in accordance with the spirit of that ordinance and the opinions and circumstances of the people.

For these reasons it is clear to me that this right of wharfing out and reclaiming did not depend upon the mere acquiescence or silence of the state. Some of the judges named above have, in their carefully-guarded opinions, coupled it with that acquiescence, without stating that the right depended upon it. All speak of it as a *right*, and a right or property is inconsistent with the idea of acts done by permission, whether by acquiescence or otherwise. And the courts of this state should not now, by adding such an inconsistency to the discordant opinions of its judges on this matter of riparian rights, give force to the sarcasms of Justice Greer. The opinion of Judge Elmer, in *The State* v. *Jersey City*, 1 *Dutcher* 525, while it sustains the assessment, on the ground that the assessors had the right to assess the value of a strip of land along the shore five feet wide, itself worthless, by adding to it the value of the *right* to reclaim, says that the right may be taken away by the state at any time before it is exercised. There is no reason to believe that the other members of the court who concurred in the judgment sustaining the assessment assented to this view. It is like holding that a guest invited to stay at the house of a friend until informed that it was no longer convenient, had a right in the house that was property, and liable to taxation, if the assessor came around in the interval.

For these reasons I am of opinion that, independent of the rights by adjacency recognized in the principles of the common law and the *jus gentium*, and independent of the wharf act, the riparian owner in New Jersey has, by the principles established by the acknowledgment of successive legislatures, of her jurists and courts, and the general and settled opinion of the citizens, the right to wharf out in front of his lands without the permission of the legislature, provided he does not interfere with the rights of others or the public right of navigation in the river, and that this right is property.

This right is also claimed to be annexed to the land as an incident, by the wharf act of 1851. The question on that act is, whether it annexed the right as an incident to the estate, or whether it was enacted

as a general law to regulate the filling in until altered or repealed by the legislature.

It is a clear principle that where the common law has annexed to property, as an incident, a privilege or right which constitutes part of its value, that incident cannot be taken away by a change or repeal of the law. For example, the common law vests in the grantee of one hundred acres of the surface of the soil, the right to all below it including fountains of water and oil, minerals and metals, except gold and silver, also the exclusive right to occupy the space above it *usque ad cœlum*. No general or special act could give to a stranger the oil wells, the coal beds, or iron or lead ores below the surface, or to the owner of two lots in a city separated by the lot of such stranger the right to erect a building twenty feet above the surface of the part of the intervening lot not built upon, even if the building is supported upon the lands on each side, and at no point rests upon or touches this lot. Yet the right, to the space above and all below rests upon the *lex loci rei sitæ*, which, before the rights were vested, could have provided that the minerals and oil springs in all lands granted should remain subject to the disposition of the government. But not only by the common law, but by the principles of universal law common to all civilized nations, known as the *jus gentium*, these rights above and below pass to the grantee, unless accepted by general law of special provision; they are part of the property, and as sacred as any other part of it. The right to the flow of fresh water streams is property, whether claimed for water power or for purposes of irrigation, or domestic or agricultural use. These cannot be taken away and given to an individual or appropriated and sold by the state for replenishing the treasury, or even by a general law declaring that the mines and minerals below the surface or the vacant space above it, should not belong to the owner of the surface until he purchased them of the state.

There can be no difference in this respect whether these incidents are annexed to the subject matter by the provision of the common law or by statute. Both are equally law, and only of force while law. The common law is in force by statutory enactment, at any time repealable.

If, with the other principles of the common law brought into this state, the rule in England that the gold and silver mines (which, as royalties, were the king's) did not belong to the owner of the soil, and the legislature, to free the people from these last vestiges of feudal or kingly oppression, had declared that these mines should belong to the owner, they would vest in him as part of his freehold, and could not be taken from him any more than his coal beds, or than the rights of wardship and primer seizin and other feudal rights could be revived and claimed as in the state, by repeal of the law abolishing them. In England these things could be accomplished by the omnipotence of parliament, but not in a free government, where the right of sovereign to take from the subject is limited and restrained.

The rights to minerals, to use water power, and to occupy the space above lands by buildings upon them, might be in some measure modified by laws passed for the professed purpose of regulating their use, and requiring payment to the state for licenses for such purposes; but if such payments were exacted as showed they were not for the purpose of enforcing proper police regulations, but for forfeiting the property to the state under this pretence, it would never be permitted.

The only question, then, is, did the wharf act of 1851 annex to lands along the shore the right to reclaim the shore in front of them, and vest this right in the owners as property? This act was passed at the next session of the legislature, after the second decision of the Supreme Court, in *Gough* v. *Bell*, which was in July, 1850, and before the final determination of that case in the Court of Errors, in July, 1852. The general opinion of the people and of the profession throughout the state had been disturbed by that decision, modified as it was, to preserve the rights of the plaintiff. The fair inference to be drawn from the history of the claims of the riparian owner, and of the legislation and controversies relating to them, and from the language and provisions of the act itself, is, that it was passed to settle these controversies for the future, and to insure to the owner those rights in the shore which it had been supposed were vested in him, securing to the public the use of the shore until actually reclaimed, and to vest in a local board, at that time one of the most competent and pure in the state, the power of determining in each case whether any wharfing beyond the shore would injure navigation. The public records show that the leading counsel of Gough was a member of the senate, and that the act was introduced in that body and carried through by myself. But I hold that the intention and object of a legislator, or the draftsman of a law, gathered from other sources than the law itself or legislation on the same subject, ought not to be considered in the construction of an act. The law must be construed in the sense which it conveys to those whose rights and duties are to be controlled and governed by it; they are to regard the language in which it is promulgated to them. The secret or individual intention of the legislator, which, from want of candor or of skill in expressing it, is not promulgated, is no binding part of the law. This must be the rule in every government that regards the rights of the subject, especially in a free or representative government; in an absolute or despotic monarchy, the real intention of the sovereign will be looked for by his sycophants as of more importance than the rights of his subjects,

It cannot be reasonably supposed that in the situation of the unsettled opinion of the courts as to riparian rights, the object of the legislation was, in this stage of the controversy, to pass an act which should *seem* to settle these rights, and yet by fixing no rights, to leave it open, not only in the courts, but to future changes in legislation—in other words, to confer rights only until the next session of

the legislature. It was not intended to settle the controversy in the suit then pending; no legislation could divest the right then vested in the Coles family, or affect the grant of lands under water made to Budd, or the right conferred upon the Associates of the Jersey Company to reclaim in front of Poules Hook, even without the proviso introduced, to except those grants.

The words used in the act are such as are usual and proper to declare the law on the subject matter, and adapted to confirm or alter it, whichever was intended. If the law was settled that the shore-owner had the right to reclaim absolutely, the words were proper to confirm that; if settled that he had such right until interfered with by the state, the words were proper to confirm that right, and to alter the law by abolishing the restriction, which was done by declaring absolutely, without annexing such restriction, that it was lawful for him to do it. The intention to make this right on the shore absolute is rendered more clear by the requirement of license for filling in lands below low water mark.

When a right is conferred by general law, it is not usual or proper to use words of grant such as are used in deeds. But words are used such as are proper to create, confirm, or change the rule of law, and such are used here. They are the same words that are used in many acts where the object, or rather the effect, to be produced was to confer a right of property. In the two great monopolies that have attracted most attention in this state—the bridges over the Passaic and Hackensack and the Joint Railroad and Canal Companies—the right was created by the words "it shall not be lawful," the correlative of the words here. And as to the bridge company, these words have been held both in this court and the Supreme Court of the United States, to vest rights as property not to be taken away by repeal. And although that court, in *Rundle* v. *The Delaware and Raritan Canal Company*, 14 *How.* 80, founded its judgment upon the case of *The Monongahela Navigation Company* v. *Coons*, 6 *W. & S.* 101, and *The Susquehanna Canal Company* v. *Wright*, 9 *W. & S.* 9, which hold that a license granted by the state may at any time be revoked and repealed, yet they remark "that the princples asserted in these cases are peculiar, but, as they affect rights to real property in the state of Pennsylvania, they must be treated as binding precedents in this court." From which it must be inferred that such principles would not have been recognized unless forced upon that court by the highest courts of Pennsylvania.

In twelve private acts passed in the four years between 1845 and 1850, the right to wharf out is granted to individuals by the same words, and in three acts by the words "are authorized and empowered." In seven private wharf acts passed by the legislature of 1851, concurrently with the wharf act, the words used are, "it shall be lawful." Yet no one can doubt but that these acts were intended to vest, and did vest a right, and, if they did, it cannot be taken away by repeal.

The right to reclaim the shore is granted by the first section, consisting of four lines; no other part of the act, save the exception in the eighth section, relates to the shore. It is a single declaration that it is lawful for the shore-owner to reclaim the shore, and when reclaimed, to appropriate it to his exclusive use; it went at once into effect, without condition or limitation.

The second section gives the right to reclaim below low water. It does this by exactly the same words—"it shall be lawful." To these words in this section a construction is given by the provision in the eighth section that nothing in the act contained should prevent the state from appropriating to public use lands lying under water, in the same manner as if that act had not been passed. This proviso has no signification if the second section did not, without it, vest a right beyond legislation. It demonstrates that the legislature understood and intended that the words "it shall be lawful," as used in the first and second sections, should vest a right beyond recall, without this provision for the case in which these lands under water should be needed for public use; they did not intend a grant or gift by which the state should be compelled to pay for these lands, if taken before money had been expended for improvements thereon. And although this provision does not apply to the shore, as it regards only "lands under water," carefully distinguished from the shore, in the first part of this section, yet it demonstrates what was understood and intended by the words "it shall be lawful." The act was so understood by landholders and the public. In every locality where the shore was of value, strips of land adjoining the shore were sold at prices founded upon the value of the right conferred, and which never would have been paid for a revocable permission.

If the lands taken by the defendants had been below low water instead of on the shore, the provision in the eighth section would have taken them out of any right granted by the wharf act. It is well settled that whatever right the state may have in taking lands for public uses, it may delegate to any person or corporation authorized to construct works intended for public use.

The conclusions to which I have arrived are these:

1. That the owner of lands upon tide-waters has a right to the natural advantages conferred on his land by its adjacency to the water, which, like the right to have fresh water streams flow unobstructed and unpolluted upon and from his land, and like the right to support for the natural soil by the adjacent soil, is an incident to the land, and is property.

2. That by the law of New Jersey, being the common law as adopted here, altered to suit the circumstances and necessities of the people and the genius of our government, the right to wharf out from the lands situate on tide waters over the shore in front, has become an incident to such lands and a right of property.

3. That by the wharf act of 1851, the right to fill in and appro-

priate the shore is conferred upon the shore-owner as an incident to his property.

Lastly. That all these rights, being incidents to an estate which add to its value, are property, and cannot be taken away by general or special legislation, except by the power of eminent domain for public use and upon compensation.