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ART. VI.—*Statements of all Legal Proceedings instituted by the Law-Officers or otherwise on behalf of the Crown, with respect to the Title of the Crown to the Bed or Shores of the Sea, or the Beds or Shores of Tidal Navigable Rivers, against Corporate Bodies or Private Individuals, from the year 1830 up to the present time.*

Of the Nature and Object of the Suit in each Case, &c.

Of the Length of Time during which each Suit was Pending, &c.

Of the terms on which, &c., any such proceedings have been settled, &c.

[Made up to July 17, 1857; ordered by the House of Commons to be printed, June 3, 1858.]

ENGLISH law may be said to be developed by fits. At one time one subject (in marked predominance over others) engages the attention of the courts; at another time, another subject. On looking into the earlier reports, subsequent to the Year-books, we find that cases of slander and libel were having the run of the courts, and constituted out of proportion the largest class of cases decided; later, and down to the present time, the same is true. In Lord Mansfield's time it is now Corporation law, now Insurance, now Bills of Exchange, that each, at different periods chiefly occupies the courts. Sometimes ejectment and other forms of trespass, with covenant and questions relating to land, are in the preponderance; sometimes questions arising out of commerce; sometimes matters of pleading and practice. A subject, after having been thus turned over, ventilated, winnowed, and sifted, milled, and rendered more or less fit for every day use, will frequently, as it appears, cease to attract any further attention; the fashion of bringing before the tribunals controversies connected with it subsides; interest respecting it fades out, and for generations, perhaps, its

name will hardly once be heard in Westminster Hall. Thus the subject of the crown's rights to the soil of the seashores, to the bed of the sea, and to the bed and soil of the shores of navigable rivers, after having scarcely been stirred—there are not half a dozen exceptions—since the date of the treatise *De Jure Maris* (which is commonly attributed to Lord Hale), has of late years sprung into life again, has been much canvassed, and made wear a somewhat more compact and finished appearance than heretofore. For an insular people, it indicates very little of tendency to litigiousness, very little tenacity of rights which Englishmen generally have been found to prize, that there should have been in our law, until the other day, no precise, and, if we may so speak, workable definition of the seashore.

By Justinian the seashore is thus defined, "Est autem littus maris quatenus hybernus fluctus maximus excurrit." In the treatise *De Jure Maris*, it is said to be the land between the high and low water-mark, and between those marks at ordinary tides—that is to say, between the ordinary flux and reflux of the sea; but Lord Hale, if he were the author, is not very positive on this point, and seems to have left it in doubt. One writer of acknowledged authority on such matters tells us, "*Costera maris* be words well known,¹ but their confined definition is hard to be found out; yet certainly they contain the shore and the banks, for by the statute 27 Eliz. cap. 24, an act was made for the mending of the bank and sea-work on the sea-coasts [in the county of Norfolk]; but in the 7th chapter of Maccabees, coasts have a larger extent, for there Demetrius, son of Seleucus, departed from Rome, and came to a city on the sea-coasts; and in Justin, treating of Alexander the Great, it is reported of him that he entered into Lycia and Pamphylia, and won and conquered all the sea-coasts. This (the author gravely proceeds) could be taken for no less than whole countries; for Alexander's great mind and huge army, could not march on a molehill or small tract of ground,"² &c. &c., and so on,

¹ Seashore, according to Johnson's *Dictionary*, means "the coast of the sea,"

which is pretty much *idem per idem*.

² Callis, Sewers 55.

in the way in which it was not uncommon with the old law-writers to maunder, when, from the state of the law, they had nothing specific to communicate in regard to the matter in hand. A late decision seems very materially to have improved the definition of foreshore, by adapting it better to practical purposes. However, under it the area of the shore seems to be narrowed not inconsiderably below what it has hitherto been understood to be; for the line of high water-mark is not only depressed below that of the Roman law, but below that of the treatise *De Jure Maris*. In *A. G. v Chambers*,¹ the rule laid down by two Common Law Judges, and adopted by the Lord Chancellor, was this:—The landward boundary of the seashore around England and Wales, is the *medium* line of high water of all tides occurring in the ordinary course of nature throughout the year.”² The soil below this mark, which is sometimes covered with water, and sometimes dry, is now settled to be, *prima facie*, in the Crown; the idea, once entertained, that it belonged to the adjacent manor, is no longer tenable. The rule is, that the Crown is proprietor of the *littus maris*, so defined as above, as the Crown is of the *fundus maris*; but the former is not an absolute or inflexible rule, at least it may always be shown that the right to the *littus maris* has been granted to the lord of the adjacent manor; there is no instance, we believe, of a grant of the *fundus maris* as such.

The proprietor of the adjacent soil has sometimes been said to be the only person to whom the foreshore can be granted out, and in America this seems to be the settled doctrine; but here, as has been stated by high authority, “it may belong to a subject, and to him in gross, which possibly may suppose a grant before time of memory.”³ A grant of the foreshore to the lord of the adjacent manor would not, it is

¹ 4 De G., M., and G., 206, decided by the Lord Chancellor (Lord Cranworth), assisted by Alderson, B. and Maule, J.

² This is the declaration of the line, made on the order on further directions in the cause *A. G. v Chambers*, dated January 22, 1855, and expresses the rule in more popular terms than are used in the judgments as given in the report of 4 De G., M., & G., 206.

³ *De Jure Maris*, Harg. Law Tracts, p. 26; see *Constable's case*, 5 Rep., 107 a, 2 Rol. Abr., 170.

obvious, make it part of the manorial territory ; the boundaries of the manor must necessarily have been fixed and settled by perambulations, or metes, or other means, previously to the grant to the lord of the manor ; the shore therefore would still remain *dehors* the manor, and would not pass by a conveyance of the manor *simpliciter* ; and so the right to the shore and the right to the manor might come into the hands of different individuals. The seashore, however, is always within and part of the county ; it may be part of the manor, but, *prima facie*, it is not within the parish next contiguous or adjacent. The onus of proof that it belongs to the manor lies on the claimant ; and on a question of rateability the onus is on the party claiming the rate, to prove that it is within some parish ; for, *prima facie*, it is extra-parochial. The proof may be by means of perambulations, common reputation, known metes, and bounds, &c. From all this it follows that the owner of a pier, part of which is below low water-mark, part between high and low water-mark, and part above high water-mark, is not rateable for the part between high and low water-mark, unless on the part of the rating parish it is made out that the foreshore belongs to it. The part above high water-mark is of course rateable under the usual conditions in the parish in which it lies ; the part below low water-mark lies in no county (except in the case of an arm of the sea, within the points of the shore), in no case can it be within the manor or parish ; and it is wholly unsusceptible of rates.¹ The same things would be true in respect of the wire or line of a submarine telegraph, and of all jetties, stairs, landing-places, &c., on the seashore, or on the banks of tidal navigable rivers. The same is probably the law in respect of coal-mines, but not of any other description of mines. A coal-mine, as regards any portion of its workings which may be below low water-mark (as in the case with some of the mines in Cumberland, which are wrought to great distances under the bed of the sea,) is not rateable ; as regards the portion

¹ See Com. Dig., tit. Navigation, A. De Jure Maris, Harg. Law Tracts, 26, 27 ; Reg. v. Masson, 4 Jur. N. S. 111.

between high and low water mark, it may be rateable if it can be proved that the foreshore is part of the parish.

Hence the Norfolk Estuary Act, 1857, provides that the Norfolk Estuary Company, incorporated for the purpose of reclaiming from the sea, &c.; the two tracts of land, &c., being parts of The Wash, situate between the counties of Norfolk and Lincoln, shall embank, &c.; and that so much of the land as shall be so embanked, shall be deemed and considered as locally situate in the county of Norfolk, except such parts thereof as are thereafter declared to be situate in any parish in the said county of Lincoln, and the Queen in council is empowered to declare to what parish embanked lands are to belong, or to constitute distinct new parishes within the said tracts.

The usual mode of proving the shore to belong to the adjacent proprietor, is by showing the usual getting of sea weed, shingle, sea-sand, licensing others to do so, enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening thereon, presentment of encroachments in the Court Baron of the manor, and punishment of the same there.¹ Sea-weed growing below low water, the lord of the adjacent manor even proving his right to the seashore, cannot set up a claim to the exclusive right of cutting, unless in virtue of a royal grant, because, as has been said, the *fundus maris* is in the Crown.²

In the United States of North America the settled principle is this:—The people have the absolute proprietary interest in the seashores, and the shores of navigable rivers where the tide ebbs and flows, though the soil of them may, by grant or prescription, become private property. In the state of New York, the rule laid down with respect to seaweed is:—That if it be cast on the seashore by slow degrees and gradual accumulation, it belongs as a marine increase, to the riparian proprietor;³ and there, no more than in this

¹ Harg. Law Tracts, p. 26; Constable's case, 5 Rep., 107; Calmady v. Rowe 6 C. B., 861; Duke of Beaufort v. May, &c., of Swansea, 3 Exch., 413; Sadleir v. Biggs, 4 H. of Lds 485.

² Benest v. Pipon, 1 Knapp, P. C., 60.

³ Ewans v. Turnbull, 2 Johns, R. Supreme Cr't. of N. York, p. 314, 315, decided temp, Kent, C. J.

country, is it the property of the first occupant. In Connecticut the courts hold a riparian proprietor on a navigable river, or arm of the sea, not to be entitled to the seaweed which grows in the bed below low water-mark, it belongs to the public;¹ and generally the land under navigable waters, in front of the upland, as it is called in America, that is permanently dry land as we call it, is in the state.²

With respect to land relict by the sea, accretions or *batture*, the *cantilena* is well-known which, in English law, gives gradual formations of this kind to the adjacent proprietor, sudden to the Crown; the one being an instance of the maxim *de minimis non curat lex*—that which cannot be perceived in its progress is taken as if it never existed at all; the other following from the fact of the property in the bed of the sea being vested in the Crown, and therefore not diverted out of it, by becoming by some convulsion or accident of nature, at once uncovered and left dry by the sea. The Roman, Spanish, and French laws were much and fully discussed, and, according to Chancellor Kent, with profound research, in a case before the Supreme Court of Louisiana.³ As to the parochiality of accretions, or tracts of land left by the retirement of the sea in this country, it seems, that although the shore itself is *prima facie* extra-parochial, yet that, as it may be within a parish, so may its accretions, and be titheable according to the treatise *De Jure Maris*.⁴ As to the rule of the English law respecting gradual accretions going to the adjacent land; it is the common law of most countries in Europe, as stated by Puffendorf:—*Illa incrementa, cum sensim fiant, publicis reditibus, parum momenti videntur afferre; inde multis civitatibus humatnum fuit visum, istas alluviones concedere iis quorum fundis accesserunt Quod si tamen alluviones*

¹ Chapman v. Kimball, 8 Connect. R., 38; 3 Kent Comment., 522, n.

² Furman v. City of New York. 5 Sandf. Sup. Cr't. R., 16; Gould v. Hudson Riv. Co., 12 Barlow's R., 616; Rundel v. Delaware Railway Co., 14 Howard R., 80.

³ Municipality, No. 2, v. The Orleans Cotton Press, 18 Louisiana R., 122. See R. v. Lord Yarborough, 3 B. and C., 391.

⁴ Harg. Law Tracts, 27; see R. v. Oldsworth, Id., 30.

*magni sint momenti, et quæ mensuram privati fundi longe excedant ad publicum pertinere indicabuntur.*¹

Such being the nature in law of accretions, or land derelict by subsidence where the sea is retiring, what is the case when the sea is gaining on the land? Supposing a deed conveying the seashore for a given length, measured along the coast line or seabord, can there be a case in which this space of land shifting in situation may vest in the grantee at different times? The case of a moveable freehold, put in Co. Litt. 48 b, is familiar; but it is there laid down that there may be such a thing as a moveable freehold, in a given quantity of land fixed in situation of which, part from time to time may be vested in A, and the other vested in B, which is obviously not the case now before us. But upon considering that the bed of the sea is in the Crown, and that the right to the seashore is *prima facie* in the Crown, and can only be in a subject by express grant from the Crown, and not under a grant of the adjacent manor, as implied therein (for the sea-shore forms no necessary part of or appurtenant to the manor as such), we see that the Crown, by a grant of the seashore, would convey its own right in respect of the seashore; that is, not the right to that soil which at the date of the grant is between the medium high water-line and the low water-line, but to that which, from time to time, shall be between those boundaries; so a grant of wreck or of treasure-trove places the grantee exactly in the position of the Crown with respect to the subject-matter of it for all future time: he takes all that the Crown could have taken had the grant never been made. The result is, that where the grantee has a freehold in that which the Crown grants, his freehold shifts as the sea recedes or encroaches, and the same will be the case of *his* grantee, unless the sub-grant is made with proper restrictions and exceptions. Such deeds will be construed with an eye to the rule of the common law on the subject of accretions, and as the boundaries of the shore seaward and landward shift, the property conveyed also shifts; so where the sea is gaining

¹Puffend., De Jure Nat. and Gent., lib. iv. cap. vii. s. 12.

on the land imperceptibly, the land thus added to the bed of the sea accrues to the Crown.¹ These principles are occasionally found to be applicable on questions respecting the right of taking away boulders, gravel, &c., on the sea-beach, and also sometimes on questions respecting oyster-beds, the right to take fish, shells, the forming of railway lines, &c. The principle of the sovereign being owner of the bed of the sea around the coast, and for a breadth of at least three miles from it, would be applicable to determine, on appeal to the courts, some questions between submarine telegraph companies, and persons sailing or fishing in the sea over the cable, one of which—namely, the interference caused by such a company's buoys with fishermen's nets off the north-western coast—was made matter of complaint in parliament in the course of last session, when the answer given was, that the buoys in question were only temporary, having been put down for purposes connected with the repair of the cable, &c., and would be removed as soon as practicable.²

The principle which gives the seashore to the sovereign has been stated to be this, that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriate soil,³ or perhaps it may be considered as a consequence of a permanent bed of the sea having been held to be vested in the Crown, inasmuch as the shore, being covered by the sea twice in every twenty-four hours, partakes more of the nature of the bed of the sea than the adjacent land above high water-mark, which is permanently dry, and therefore the shore may be regarded as belonging to the bed of the sea, and to vest in the Crown as a kind of prolongation or part of that bed; but, however that may be, it is certain 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 foreshores. Accordingly the matter has awakened a deep interest in the maritime districts, and among landed proprietors,

¹ *R. v. Yarborough*, 3 B. & C., 91; *In Re Hull & Selby Railw. Comp. Scratter v. Brown*, B. & C., 494; 5 M. & W., 327.

² 150 Hans. Parliam. Debates, col. 1732.

³ Per Lord Cranworth, 4 De G., M., & G., 218.

persons interested in harbours, quays, mines, &c., whose property may turn out to be affected by these claims, which have so long lain dormant as to have been to a great extent overlooked altogether. Such is the degree of this interest, that the parliamentary paper, the title of which we have placed at the head of this article, is now we understand out of print, probably because it gives a view of the nature of the cases in which claims have been raised, with some means of estimating the expenses of a contest, and states the course which has been adopted in each case. We have thought it possible by this article to promote the objects of such inquirers.

The principal points in the law of the foreshore, so far as it has hitherto been developed in the English courts, have been stated, together with references to other systems of law, and to some American cases and authorities, which, though not of direct weight here, frequently afford arguments of a superior character, and deal with certain questions on this subject in such a style as might not impossibly supply the *ratio decidendi*, when those or similar questions arise in our own courts. We may now point out the state of things shewn by the proceedings by the Crown, to which we have adverted.

Since the 1st of September, 1833, no fewer than twenty-four suits have been instituted on behalf of the Crown, in assertion of its rights to the foreshore in Great Britain and Ireland, and the Isle of Man. These proceedings have been chiefly in the form of informations of intrusion in the Exchequer, and informations in Equity to establish the rights of the Crown. One of them took the singular shape of a plaint in the county court of Sussex, entitled, "Her Majesty's Attorney-General against William Knight." and issued in May, 1857, in the Attorney-Generalship of Sir Richard Bethell, to assert the right of the Crown to certain seashore near Littlehampton, in that country, between high and low water-marks, and to recover nominal damages for a trespass committed by the defendant in removing boulder stones from the shore in question. The proceedings were com-

menced by the Attorney-General upon the representations of a body of landed proprietors whose estates adjoined the seashore, as to the injuries which they sustained from a practice very extensively carried on, of removing boulder stones from the beach, whereby serious damage was being caused to the adjoining frontage, and the measures taken by the landowners for the protection of their estates from the sea were rendered nugatory. Towards high tide the sea breaks upon that coast at times with tremendous force. The plaint was heard, and judgment given in favour of the Crown, the defendant being ordered to pay five shillings damages, and 17s. 10d. for costs.

In two similar cases in 1856 and 1857, subpoenas issued out of the Court of Exchequer to answer an information for intrusion, against a person who had been in the habit of taking shingle from the shore, and both resulted from complaints made by the owners and occupiers of property under the east cliff at Dover, that the defendant had removed large quantities of shingle from the beach, thereby weakening the defences of the frontage properties against the force of the tides. In each case the suit was discontinued before the information was filed; the defendant in the first having paid one shilling as an acknowledgment of his trespass; and in the second, having paid the amount of a royalty after the rate of eightpence for thirty loads of shingle, the quantity improperly removed. An earlier case was one of an information for intrusion, filed in 1833 by Sir William Horne when Attorney-General, in the Court of Exchequer, to establish the right of the Crown to a tract of land containing about 270 acres, formerly overflowed by the tide, situate near to the city of Chester, on the south bank of the Dee, a tidal navigable river. The suit terminated in favour of the Crown, and the land was subsequently sold by the Crown to the Marquis of Westminster, for the sum of £7500. Perhaps the most remarkable of all these cases was the information filed in 1844, in the Court of Chancery, to establish the right of the Crown to the bed and shores of the river Thames, within the flux and reflux of the tides, and to cer-

tain encroachments upon those shores which have been made under licences granted by the Corporation of London, who were admitted to be conservators of the river, but who claimed also to be owners. The result was in favour of the Crown, after an expenditure for cost incurred on its behalf of upwards of £5125, terms of arrangement being to come to which may be seen in the Thames Conservancy Act, 20 & 21 Vict. cap. cxlvii. (local and personal). The corporation thereby withdrew all claim to the ownership of the bed and soil of the river, and admit that the Queen's Majesty is seised for herself, her heirs, and successors, of the fee-simple and inheritance in possession of the bed and soil of the Thames, &c. The corporation paid £5000 to the Queen, and by the act the Crown is entitled, in addition, to one-third of the proceeds of all sales and grants of foreshores, to be made after December 31, 1853, by the conservators thereby appointed. Shore is in the act defined to mean "the shores of the river, so far as the tide flows and reflows between high and low water-marks, at ordinary tides." No one can embank without licence, s. 54. There is next a curious provision, that in the case of land so embanked with licence, it shall vest in the persons owning the land, in front of which the embankment is made, for the same estates and interests, &c., that such person has originally, and to be of freehold tenure if that land is freehold, and to be of copyhold tenure if the frontage owner's original land be of copyhold tenure, s. 55. Now, it is clearly that a copyhold must be time out of mind, and cannot begin at this day; it must have been demised or demisable from time immemorial. A copyhold is not a creature of law, but of custom and fact; it cannot be created by *operation of law*, and though it has been said that a copyhold may be created by the express words of an act of parliament, because the act might operate as an estoppel to any man, to say that it had not existed time out of mind, that was only obiter and extrajudicially.¹ However, there are precedents in the private acts of 35 Henry VIII., cap. 13, and 37 Henry VIII., cap. 2, for cre-

¹ Revell v. Jodrell, 2 T. R., 425; Townley v. Gibson, 2 T. R., 705.

ating copyhold tenure by statute. A matter not of speculation like this, but of practical importance, settled by the Thames Conservancy Act, is the following:—The owner of a vessel when sunk by mere accident in the Thames was not bound, the Court of Common Pleas decided some years back, to place a buoy to denote the spot and so prevent accidents,¹ but by s. 86 of this act, power is given to the conservators to raise sunken vessels, and to sell the vessel to defray the expenses, if the master of the vessel refuses after notice in writing, and within the time mentioned in the notice, to proceed to weigh and raise the vessel, and, if it be impossible to weigh it, the conservators may blow it up, &c., with gunpowder.

It may be well to bear in mind, in connection with the subject of claims on behalf of the Crown to seashore, that by a late act the commissioners of woods, &c., are empowered, with the consent of her Majesty, to make arrangements for the adjustment or settlement of any doubtful or disputed rights or claims of the Crown to any real property, the management or control whereof would, if such rights or claims were established in favour of the Crown, be vested in, or devolve upon them,² &c.

As is well known, there are in various parts of the coast mines or coal-pits carried on under the sea. For instance, the submarine excavations of the Howgill coal-pits, west of Whitehaven, in Cumberland, extend more than 1000 yards below low water-mark, and about 600 feet below the bed of the sea. Doubtless, the law considers the property in all such mines to be vested in the Crown; so of mines under the seashore. The case of the Attorney-General *v.* Chambers, and other defendants above referred to, proves among other cases this. It was an information in Chancery, filed to establish the right of the Crown to certain tidal navigable rivers in Carmarthenshire, and to the mines of coal under, and to certain alleged encroachments upon, the said shores, and the result is substantially in favour of the royal

¹ *Brown v. Mallet*, 5 C. B., 599.

² 16 and 17 Vict. c. 56, s. 5.

claims, an arrangement having been made with most of the parties, under the statute just mentioned, in this, and the parties in two other informations filed for the same objects. The costs of the Crown in these proceedings, which were commenced in 1845, therefore before the Crown was made capable by statute of recovering costs when successful, has been estimated at £5000. In pursuance of part of the arrangement, the Crown granted a lease for thirty-one years of a part of the land recovered, together with certain smelting-works erected on it, reserving the minerals, and full liberty to work the same, at a rent equal to the value of the land alone, by virtue of 8 and 9 Vict., c. 99, s. 2, which empowers the commissioners of woods, &c., to do this when buildings have been erected on the land in ignorance of the Crown's title. In another case, the attention of the Crown officers having been called to the fact, that the lessees of Lord Mostyn were raising large quantities of coal from under the western shore of the river Dee, opposite the manor of Mostyn, in Flintshire, being part of a larger quantity of marshes and sands, to which the title of the Crown had been found by inquisition in the third year of William and Mary, an information was filed in Chancery in assertion of the claim of the Crown, but it was discontinued, in compliance with the joint opinion of the then attorney and solicitor-general, and two other learned gentlemen, on a view of all the facts of the case, and the evidence which the defendant appeared to be in a condition to adduce. Another information to establish the right of the Crown to coals, and mines of coal lying under another part of the western share of the Dee, is still pending.

In like manner, the claim to other submarine mines has been attended with success. The Botallack mine is described as one of the most wonderful of the excavations of Cornwall. It is a copper mine, containing also tin and iron; it is situate at the extremity of the great copper and tin lodes, which run eastward through Cornwall, as far as the Dartmoor Hills. At one period the working left a profit of £300,000; but the veins have of late become thinner

and poorer in the direction in which alone they are workable. It was formerly worked for tin; copper was found in it in 1841. This mine extends horizontally 480 feet under the bottom of the ocean, or, below low water-mark, at a depth of twenty fathoms below the sea level, measured vertically. An information, filed 10th Sept., 1855, against Lord Falmouth and others, his lessees, to establish the right of the Crown to the minerals in this mine, resulted in favour of the claim, Lord Falmouth accepting terms of arrangement. These were, that he should accept a lease from the Crown or the Duchy of Cornwall, of so much of the Botallack mine as is situate under the shore and bed of the sea below high water-mark, for twenty-nine years, from 10th Sept., 1855, at royalties of one seventy-second part of the monies for which the tin, and one fifty-fourth part of the monies for which the copper, and all other minerals except tin, raised from the said mine, within the above limits, should have been made merchantable, but all claims to royalties in respect of minerals raised prior to the above date were remitted. The mine, it is to be observed, is worked solely through the land of Lord Falmouth above high water-mark; in fact, the mine is entered in the side of a cliff beetling over the Atlantic; and, from the nature of the locality, the minerals under the sea probably could not be got by any other mode of access than the one which, at immense outlay, has been rendered effectual.

So railway companies have been restrained, on the information of the Attorney-General, from using such parts of their railways as were constructed without the licence of the commissioners of woods, &c., and from constructing floating piers and other works, on the seashore, or below high water mark; and such companies have been obliged to come into the terms offered on the part of the commissioners.

Some proceedings by the Lord Advocate of Scotland respecting the river Clyde, terminated by an adverse decision of the House of Lords, as regarded certain pecuniary claims made on behalf of the Queen; but the right to the alveus of the river was held to be undoubtedly in the Crown, and the

same right has been established in two cases arising in respect to the alveus of the river or Firth of Tay, and fifty-four parcels of it have been sold to different individuals and companies.

There is another class of cases in which the title of the Crown to property of this description has been admitted, since 1830, without litigation. These peaceful successes are very numerous, and comprise parcels of land, varying of from four perches to 289 acres in extent, and leases have been granted at rents, in all cases it would seem, of the full estimated value of the land, &c., demised. In cases where sea-beach has been leased in addition to the rent, a royalty is reserved of so much a ton on the stones carried away off it. The 289 acres just mentioned, is a tract of land called Ferriby Sands, formerly overflowed by the tidal waters of the Humber, which was reclaimed and is maintained at the expense of certain individuals to whom they have been leased for twenty-one years from 5th April, 1841. In numerous cases of this class, the Crown's interest in the lands has been sold for sums varying from £4 10s. to £60,000, which sum is the purchase-money of fifty-nine acres formerly overflowed by the tidal waters of the Mersey, and reserved to the Queen under the provisions of the Birkenhead Docks Act. The Manchester, Sheffield, and Lincolnshire Railway Company have paid £6250 for about thirty-three acres adjoining the docks belonging to the company, and reclaimed and embanked at their expense under 8 and 9 Vict., cap. ccii., the Great Grimsby Dock Act. Free grants have been made in some instances, comprising in the whole land to the extent of between 300 and 400 acres.

Besides all this, in a very large number of acts of parliament, private and otherwise, passed between 1830 and the close of the session of parliament of 1857, clauses have been inserted either containing provisions for the protection of the interests of the sovereign in lands subject to the flow of the tide, or recognition of the title of the Crown to particular portions of the bed of the sea, or the shores of the sea, or of navigable rivers below high water-mark, and vesting

the property of her Majesty therein in corporations or individuals, or containing provisions empowering the Crown, or the commissioners of woods, &c., to make leases or conveyances thereof, in England, Scotland, and Ireland. In many cases, also, sums have been paid to the Crown for permission to take stones and raise gravel from the sea-beach, to build bridges, to lay down sewage pipes, &c., on the shore of the sea or navigable rivers; facts showing the vigilance with which these rights are claimed.

Some reference has before been made to the submarine mines of Cornwall. In the course of the present year a curious question has arisen and been settled (by statute) respecting them. The question was, who is entitled to the minerals on the coast of that county, lying between high and low water-mark, and also to the minerals below low water-mark, but won by the extension of workings commenced above low water-mark; is the Queen the owner in right of the Crown, or the Prince of Wales in right of his Duchy of Cornwall? Both her Majesty's government and the Council of the Duchy, considering it to be highly desirable to have these questions set at rest without adverse litigation between her Majesty and the Prince of Wales, it was determined to obtain the opinion of the Right Hon. Sir John Patteson, "as a gentleman whose eminence as a lawyer, and whose independent character and position, will give such authority to his determination as to afford satisfactory ground for an act of parliament to give effect to it, if such a measure should be found necessary." Sir John accordingly made his determination or award, stating in substance, that having considered all the statutes, charters, documents, and the cases which had been produced or referred to by the council for the Crown and for the Duchy, and also all the arguments which had been adduced, he was of opinion that, as between the Crown and the Duke of Cornwall, the right to the minerals between high and low water-mark has passed to, and is vested in the Duke of Cornwall as part of the soil and territorial possessions of the Duchy; but that the right to the minerals below low water-

mark, remains, and is vested in the Crown ; although those minerals may be won by workings commenced above low water-mark, and extended below it. The award proceeded to express an opinion, that as these last-mentioned minerals obviously cannot be won by the Crown, otherwise than by workings commenced above low water-mark, in the soil and territory of the Duchy, provision ought to be made, that the Crown should be authorized by itself or its lessees to use all shafts and workings already made, or hereafter to be made, by the Duchy or its lessees above low water mark, for the purpose of winning the minerals below low water-mark ; and also to sink, make, and execute any new shafts or workings which may be necessary for that purpose, on the soil and territory of the Duchy above low water-mark. That the Crown, whilst using any of the workings made by the Duchy, should keep the same in good and proper order and repair, and should pay to the Duchy, for the use of the soil above low water-mark, one-tenth part of the net proceeds of the minerals won below low water-mark, after payment of all expenses, &c. Some objections having been made to the terms of this decision, on the part of the commissioners of woods, &c., *ex. gr.*, that the Crown would have no means of ascertaining what the net proceeds of the workings are, whereas the reservation to the Duchy of any fixed proportion of the gross proceeds might prevent the Crown from making advantageous arrangements with the frontage proprietors ; also that portions of the foreshore are claimed by lords of manors adversely to both the Crown and the Duchy ; and that, in cases of the substantiation of such claims, it would be reasonable that the Crown should be relieved from the obligation to pay any wayleave to the Duchy for the power of driving levels through the lands between high and low water-mark which in that case would be the property of individuals whom the Crown must compensate ; Sir John Patteson made a further award. He thereby decided that the right to the minerals under estuaries and navigable rivers, and other places in and part of the county of Cornwall, is as between the Crown and the Duchy in the

duchy, and stating that he had considered himself to have no authority with regard to cases in which the foreshore is claimed by private individuals; he decided that where such claim can be established, the Duchy can have no right to the minerals either between high and low water-mark, or below low water-mark, and the Crown will make its own terms with the owners of the land and foreshore, and will pay nothing to the Duchy. It was subsequently proposed on behalf of the Crown, and accepted on behalf of the Duchy, that when the workings by the Crown lessees were confined to foreshore land, pared of the possessions of the Duchy, the compensation to be made by the Crown should be one fifteenth part of the net dues or monies received from its lessees, in addition to compensation for any injury to wharves or other structures on the shore; and that, inasmuch as it would be impossible to fix by anticipation any rate of compensation which would meet the justice of every case where the workings were carried on upon land above high water-mark, and which might be occupied as farms or otherwise, such compensation should in case of dispute be settled by arbitration in each case as it should arise. Accordingly an agreement was entered into between the Crown and the Duchy, to submit a bill to parliament for ratifying the award, and this has been done, and "the Cornwall Submarine Act, 1858," ratifies the award with some variations. We have entered into these details on this subject, both because they comprise the settlement of an interesting question of law, and as they furnish another illustration of the importance which has been attached of late by the advisers of the Crown to its seashore and marine rights. One observation seems to arise upon the first section of the above-named statute (21 and 22 Vict., cap. 109), which enacts and declares all mines and minerals lying under the seashore, &c., within the said county of Cornwall, &c., are, &c., vested in the Prince of Wales in right of the Duchy of Cornwall, *as part of the soil and territorial possessions of the said Duchy*; but this declaration is not to extend to the mines and minerals in or under land below

high water-mark, which is part and parcel of any manor belonging to her Majesty in right of her crown. That appears to amount to a declaration that the seashore is part of the soil and territorial possessions of the Duchy, except in cases of seashore adjacent to any manor belonging to the Crown. If so, it follows that the right to sue for trespasses on the seashore of Cornwall, and the right to grant licences, or permission to build piers, jetties, &c., for the purpose of the pilchard fishery, &c., to take boulder stones, shingle, sand, &c., from the beach, is in the Duchy, and not in the Crown. Possibly it would have been better, certainly it would have been more in accordance with the usual mode of drawing acts of parliament in similar cases, to have inserted a clause shewing the right of getting sand below high water-mark, given by stat. 7 Jac. I., cap. 18, "to all persons resident and dwelling in the county of Cornwall, to fetch and take sea-sand at all places under the full sea-mark, where the same is or shall be cast by the sea, for the bettering of their land, and for the increase of corn and tillage at their wills and pleasures." Probably, however, the question will not soon arise in practice; still it is not wholly without some claim to consideration, because manure of sea-sand and blown-sand is extensively employed in this country (as it also is in Devonshire). The estimated quantity of sand (chiefly composed of comminuted sea-shells) which is annually conveyed from the coast, and spread over the interior as manure, is said to be not less than about 5,600,000 cubic feet; with respect to blown-sand, or sand which has drifted and been carried by the wind on to land above high water-mark, there seems to have existed in this country from very ancient times, a practice of going upon such land, exercised by the occupiers of other lands, and even lying in other parishes, and getting and taking away such sand for use as manure, or top-dressing, though it is certain that in law such practice cannot be supported on the footing of custom, as the sand, when so drifted and blown, becomes part of the soil, and there cannot be a custom to take a *profita prendre in alieno solo*.¹ Perhaps the nearest approach to an authority to the contrary,

is the case where a custom was pleaded for all persons residing in a parish, whose duty required them to amend the highways within the parish, to dig up and carry away stones and shingle from the plaintiff's close, being part of the waste land between high and low water-mark, without any question being there made whether or not such a custom was valid in law.²

We have chosen this subject as being one both of permanent and immediate interest, and having endeavoured to treat it so as to set forth the principal points in it, with illustrations which, perhaps, will not readily be found elsewhere. Collected together, we will express a hope in quitting it, that such proof may be discovered by the reader, of an intention and desire to render the article useful, as may make unnecessary any apology for its length.

¹ *Blewett v. Tregonning*, 3 A. and E., 554.

² *Oxenden v. Palmer*, 2 B. and Ad., 286.

NEW JERSEY

COURT OF

ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CASES.

JUNE TERM, 1869.

THE PATERSON AND NEWARK
RAILROAD COMPANY,
vs.
FREDERICK STEVENS.

On demurrer.

*Error to
Essez Circuit.*

For plaintiffs in error,
MR. PARKER,
MR. KEASBEY.

For defendants,
MR. BRADLEY,
MR. FRELINGHUYSEN,
MR. ABEEL.

NEWARK:

PRINTED AT THE DAILY ADVERTISER OFFICE.

1869.

New Jersey Court of Errors and Appeals.

New Jersey, ss—The State of New Jersey to our Circuit Court of the County of Essex, greeting. Forasmuch as in the record and proceedings, and also in the giving of judgment of a plea which was in our court before you, between Frederick Stevens and the Paterson and Newark Railroad Company, of a plea of trespass on the case, as is said, manifest error hath intervened to the great damage of the said, The Paterson and Newark Railroad Company, as by their complaint we are informed: we being willing that the error, (if any there be) 10 should in due manner be corrected, and full and speedy justice done to the parties aforesaid in their behalf, do command you, that if judgment be therefore given, then without delay you distinctly and openly send under your seal the record and judgment aforesaid, with all things concerning the same, to our Court of Errors and Appeals in the last resort in all cases, on the third Tuesday in June, instant, together with this writ, that the records and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to the constitution and laws of the State ought to be done.

20 Witness Abraham O. Zabriskie, Chancellor, at Trenton, this fourteenth day of June, eighteen hundred and sixty-eight. *uue*

H. N. CONGAR, *Clerk.*

PARKER & KEASBEY, *Att'ys.*

Belleville Avenue, southerly by lands of William M. Force, and easterly by said River. And the said plaintiff says that the Passaic river, where the same passes along in front of the said tract of land, and from thence downward to its mouth in Newark Bay, and upward for at least ten miles to the village of Passaic, (formerly called Acquackanonck,) is a public navigable river, in which the tide ebbs and flows; but that opposite to and along the said tract of land, the water of said river is usually sufficiently fresh for the purposes of watering cattle
10 and other animals, and of washing clothes, carriages and other articles, and the said plaintiff, (protesting that the said tract of land includes as part thereof the entire shore in front of the same, extending from ordinary high water mark to ordinary low water mark, and that the said plaintiff, and those whose estate he has, have always been, and the said plaintiff still is, seized and lawfully possessed, of said shore as of their and his lawful estate and possession, as parcel of the said tract of land) nevertheless says, that he, the said plaintiff and those whose
20 estate he has in the said tract of land, by reason of their said estate and possession therein, have always been used and accustomed to have and enjoy, and of right ought always to have had and enjoyed, and the said plaintiff still of right ought to have and enjoy full, free and uninterrupted access across the said shore, and every part thereof, in front of said tract of land, from every part of the said tract of land to the water of said Passaic River, and from the said waters to every part of the said tract of land, for himself and themselves, and his and their families, servants, laborers, horses, cattle, sheep, swine, and other animals, on foot and with wagons, carts, and other
30 vehicles, and to, into and from boats and other vessels, to pass and repass, for the purpose of washing, bathing, watering, fishing and navigation, and for the transportation of stores, manure, lumber, produce and all other articles whatsoever. And the said plaintiff and those whose estate he has in the said tract of land, by reason of their said estate and possession, therein, have likewise always had and enjoyed, and of right ought to have had and enjoyed, and the said plaintiff still of right ought to have and enjoy the right, privilege and ease-

ment, in connection with and as appurtenant to the said tract of land, of standing, walking or passing on and over the said shore, and of driving horses, cattle and swine thereon, and of depositing goods thereon, and of digging and taking gravel and sand, and gathering stones therefrom; and of erecting thereon embankments, wharves and other improvements, and filling up and reclaiming the same; and, (subject to the due regulations to be made under and by authority of the State of New Jersey,) the right of wharfing out, filling up and reclaiming the lands under water below low water mark in front of the said tract of land, and of having and enjoying the possession and use thereof in connection with the said tract of land, without any intervening obstruction or interference whatever. 10

Yet the said defendant, knowing the premises and contriving and intending to injure the plaintiff, recently, to wit: on the day and year last aforesaid, hath with its servants, contractors, and workmen, driven piles and posts into the said shore, and laid and erected stones and timbers, and hath placed other obstructions thereon, along the entire front of the said tract of land, whereby the plaintiff, his family, servants and laborers, and his horses, cattle, sheep, swine and other animals, are deprived of said access from the said tract of land to the said waters of the Passaic river, and from the said waters of the Passaic river to the said tract of land; and the said plaintiff has thereby been disturbed, hindered and obstructed in the use and enjoyment of his said right of access herein above described; and whereby also the said plaintiff has been obstructed, hindered and disturbed in the enjoyment of his said other rights, privileges and easements herein above set forth; 20 to the great damage and nuisance of the said plaintiff, whereby he hath sustained damage to a large amount, to wit: to the sum of twenty-five thousand dollars, and therefore he brings suit, &c. 30

G. N. ABEEL,
Attorney of Plaintiff.

Essex Circuit Court.

THE PATERSON AND NEWARK RAILROAD
COMPANY,

adsm.

In Case Plea.

FREDERICK STEVENS.

And the said defendants, by Parker & Keasbey their attorneys, come and defend the wrong and injury done when, &c., and say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that on the day and year in said Declaration mentioned, and at and before the time when the Act of the Legislature of New Jersey hereinafter mentioned was passed, approved and became a law, the said Passaic River where the same flows in front of the lands of the defendant in this said Declaration
10 mentioned, was a public navigable river in which the tide ebbs and flows, in which the said plaintiff had no rights or privileges other than such as were common to all the citizens of the State of New Jersey, and subject to be regulated and disposed of by the Legislature of said State, the waters of which river and the soil under the same, including the shore thereof, to the line of high water mark on the said lands of the plaintiff, were the property of the State of New Jersey, and vested in the said State as a part of the sovereignty thereof, and being so vested were subject to be alienated and disposed of by the
20 Legislature thereof; and the said defendants further say that they are a corporation created by an act of the Legislature of said State approved March seventh, eighteen hundred and sixty-four, with power to construct a railroad from the City of Paterson to the City of Newark, and that by a supplement to said act approved February twenty-second, eighteen hundred and sixty-six, it was among other things provided, "that it
"shall be lawful for the Paterson and Newark Railroad Com-
"pany to construct said road from some suitable point in the
"City of Paterson to a proper and convenient point in the
30 "City of Newark, and to connect the same with other rail-
"roads in either place on such terms and conditions as may be
"agreed upon."

And it " was further provided by said act,
 " That it shall be lawful to lay out, construct and run their
 " railroad along the Passaic River, from the village of Belle-
 " ville to any point in the City of Newark at or near Gover-
 " neur street, and to acquire the rights of the shore owners in
 " the manner prescribed in the charter of said company in
 " other cases, and may extend said road over said river; and
 " for that purpose may construct and maintain a bridge from
 " some convenient point in the City of Newark at or near
 " Gouverneur street, to a convenient point on the east side of
 " said river in the County of Hudson, and with a draw of the 10
 " width of sixty feet, to be located at a point convenient for
 " navigation in said river; said bridge shall be constructed
 " with a suitable passage way or walk for the accommodation
 " of persons crossing the river; and the said Paterson and
 " Newark Railroad Company may continue said railroad at the
 " distance of not less than one hundred and fifty feet east-
 " wardly of the river road or highway, and connect the same
 " with any other railroad or railroads on the east side of said
 " river, on such terms as may be agreed to; and may lay out
 " and construct the same, passing under or over the Morris & 20
 " Essex Railroad by a suitable bridge or arched passage way;
 " *provided*, that in passing by the lands of the Mount Pleasant
 " Cemetery, the said railroad shall not encroach upon the lands
 " thereof which are used for burial purposes in said cemetery,
 " but the said railroad shall be constructed entirely outside
 " and to the east of the present stone wall embankment of the
 " cemetery grounds and near the line of high water in said
 " Passaic River, and before entering upon said lands, the said
 " railroad company shall enter into an agreement with the
 " Mount Pleasant Cemetery Company to construct a suitable 30
 " stone wall not less than six feet high, on the line between
 " said railroad and the cemetery grounds," as by the record of
 the said act of the Legislature of New Jersey remaining
 amongst the rolls in the office of the Secretary of State at
 Trenton, may more fully and at large appear.

And the said defendants further say that by virtue of the
 provisions of the said act of the Legislature and the said sup-

plement thereto, and in pursuance of the powers thereby conferred upon and the grant thereby given to them, they the said defendants before and at the times when, &c., in the due and lawful exercise of said powers did survey and establish their route for the railroad authorized by their charter of incorporation, on the shore of said river between high and low water mark, the survey whereof after being adopted was duly deposited according to the provisions of said act in the office of the Secretary of State of New Jersey; and in order to the

10 construction of said road did drive piles into the shore of said river between high and low water mark in front of the said lands of the plaintiff, and did lay and place timbers and iron rails thereupon for the purpose of constructing a railroad track for the passing and repassing of engines and cars and the transportation of passengers and freight as authorized by law, and in so doing they the said defendants with such piles, timbers and rails unavoidably a little obstructed, hindered and disturbed the said plaintiff in passing and repassing from his said lands to the said river, and from the said river to his lands,

20 for the purposes mentioned in his declaration, creating no unnecessary obstruction and interfering as little as consistent with the construction of said railroad, with the access of said plaintiff to said river and with any supposed privileges of adjacency he may have therein; as they the said defendants lawfully might for the cause aforesaid, which are the supposed grievances in the said declaration mentioned and whereof the plaintiff hath above thereof complained against the defendants, and this they are ready to verify, wherefore they pray judgment of the plaintiff ought to have or maintain his aforesaid

30 action against them, &c.

PARKER & KEASBEY,

Defendant's Attorneys.

Essex Circuit Court.

vs.

THE PATERSON AND NEWARK RAILROAD
COMPANY.

In Case Demurrer.

And the said plaintiff as to said plea of the defendant by them above pleaded, (protesting that the shore of said river in front of the said lands of the plaintiff at the time of committing of the grievances in the said declaration mentioned, and at this present time were not and are not the property of the State of New Jersey, and were not and are not vested in said State as part of the sovereignty thereof or otherwise).

Nevertheless says that the said plea and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiff from having or maintaining his aforesaid action thereof against the said defendants, and that the said plaintiff is not bound by law to answer the same, and this he is ready to verify, wherefore by reason of the insufficiency of said plea in this behalf, the said plaintiff prays judgment and his damages by him sustained on occasion of the committing of the said grievances, to be adjudged to him, &c.

G. N. ABEEL,

Plaintiff's Attorney.

Essex Circuit Court.

THE PATERSON AND NEWARK RAILROAD
COMPANY.

adsm.

*In Case
Joinder in Demurrer.*

And the said defendants say that their said plea by them herein above pleaded and the matters therein contained, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action against them the said defendants, and the said defendants are ready to verify and prove the same, when, where, and in such manner as the said court shall direct and award.

Therefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the
10 said defendants pray judgment and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against the said defendants, &c.

PARKER & KEASBEY,

Defendant's Attorneys.

Essex Circuit Court.

FREDERICK STEVENS,

vs.

THE PATERSON AND NEWARK RAILROAD
COMPANY.} *In Case Demurrer.*

And the said plaintiff as to said plea of the defendant by them above pleaded, (protesting that the shore of said river in front of the said lands of the plaintiff at the time of committing of the grievances in the said declaration mentioned, and at this present time were not and are not the property of the State of New Jersey, and were not and are not vested in said State as part of the sovereignty thereof or otherwise).

Nevertheless says that the said plea and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the 10 said plaintiff from having or maintaining his aforesaid action thereof against the said defendants, and that the said plaintiff is not bound by law to answer the same, and this he is ready to verify, wherefore by reason of the insufficiency of said plea in this behalf, the said plaintiff prays judgment and his damages by him sustained on occasion of the committing of the said grievances, to be adjudged to him, &c.

G. N. ABEEL,

Plaintiff's Attorney.

Essex Circuit Court.

THE PATERSON AND NEWARK RAILROAD
COMPANY.

adsm.

FREDERICK STEVENS,

*In Case
Joinder in Demurrer.*

And the said defendants say that their said plea by them herein above pleaded and the matters therein contained, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action against them the said defendants, and the said defendants are ready to verify and prove the same, when, where, and in such manner as the said court shall direct and award.

Therefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the
10 said defendants pray judgment and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against the said defendants, &c.

PARKER & KEASBEY,

Defendant's Attorneys.

Essex Circuit Court.

FREDERICK STEVENS,

vs.

THE PATERSON AND NEWARK RAILROAD
COMPANY.

*In Case
On demurrer.*

Judgment.

And because the Court here will advise of and upon the premises before judgment is given thereon, a day is therefore given to the parties aforesaid here until the fourteenth day of June, A. D., 1869, to hear the judgment thereon, for that the Court is not yet advised thereof, at which day, before our said Court come as well the said Frederick Stevens, as the said, The Paterson and Newark Railroad Company, by their respective attorneys aforesaid, whereupon all and singular the premises aforesaid being seen and by the Court here fully understood, and mature deliberations being therefore had, it appears to the Court here that the said plea by the said The Paterson and Newark Railroad Company above in manner and form pleaded, and the matters therein contained are not sufficient in law to bar or preclude the said Frederick Stevens for having or maintaining his aforesaid action thereof against the said The Paterson and Newark Railroad Company, wherefore the said Frederick Stevens ought to recover his said damages by reason of the premises. ¹⁰

But because it is unknown to the Court here what damages the said Frederick Stevens hath sustained by means of the premises; the Sheriff is commanded that by the oath of twelve ²⁰

good and lawful men of his bailiwick, he diligently enquire what damages the said Frederick Stevens hath sustained as well by means of the premises as for his cost and charges by him about his suit expended, and that he send the inquisitions which he shall thereupon take to our said Court on the fourteenth day of June instant, under his seal and under the seal of those by whose oaths he shall take the inquisition, together with the writ to him thereupon directed.

10 The same day is given the said Frederick Stevens, at the same place at which day to wit on the fourteenth day of June, in the year aforesaid, before our said Court at Newark, comes the said Frederick Stevens, by Gustavus N. Abeel, his attorney, and the Sheriff, to wit, Andrew Teed, Esq., Sheriff of the said County of Essex, now here returns a certain inquisition indented, taken before him at Newark, in the County aforesaid, on the day and year last aforesaid, by the oath of twelve good and lawful men of his bailiwick; by which it is found that the said Frederick Stevens hath sustained damages by means of the premises to six cents over and above his costs and

20 charges by him about his suit in this behalf expended and for those costs and charges to thirty dollars, therefore it is considered that the said Frederick Stevens do recover against the said The Paterson and Newark Railroad Company, his damages aforesaid by the said inquisition above found, and also the sum of thirty dollars for his said costs and charges by the Court now here adjudged to the said Frederick Stevens, which said damages, costs and charges in the whole amount to thirty dollars and six cents, and the said The Paterson and Newark Railroad Company in mercy, &c.,

30

I hereby certify that the foregoing is a true copy of the record remaining in Essex Circuit Court, in a certain cause, wherein Frederick Stevens is plaintiff, and The Paterson and Newark Railroad Company is defendant.



As witness my hand and the seal of this court this fourteenth day of June, A. D., 1869.

HENRY T. DUSENBERRY, *Clerk.*

New Jersey Court of Errors and Appeals.

THE PATERSON AND NEWARK RAILROAD
COMPANY.

adsm.

FREDERICK STEVENS.

*In case
On demurrer.*

*Error to Essex
Circuit.*

Assignment of Error.

Afterwards, that is to say on the third Tuesday of June, eighteen hundred and sixty-nine, before the Court of Errors and Appeals of New Jersey, at Trenton, come the said The Paterson and Newark railroad Company, by Parker & Keasbey their attorneys, and say that in the record and proceedings aforesaid, and in giving the judgment aforesaid there is manifest error in this, to wit:

That by the record aforesaid it appears that judgment aforesaid was given against the said The Paterson and Newark Railroad Company, whereas by the law of the land the said judgment should have been given in favor of the said The Paterson and Newark Railroad Company. 10

PARKER & KEASBEY,

Attorneys of Plaintiffs in error.

New Jersey Court of Errors and Appeals.

FREDERICK STEVENS,

adsm.

THE PATERSON AND NEWARK RAILROAD
COMPANY.

} *In Case on demur-*
rer.
} *Error to Essex*
Circuit.
} *Joinder in*
error.

And hereupon afterwards, to wit: on the said third Tuesday in June, eighteen hundred and sixty-nine, comes into Court the said Frederick Stevens, by Gustavus N. Abeel, his attorney, and says that there is no error in the record or proceedings aforesaid, or in giving judgment aforesaid, and he prays that the Court may proceed to examine as well the records and proceedings aforesaid, as the matters above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

3 10

G. N. ABEEL,

Attorney of Defendant in Error.

Essex Circuit Court.

FREDERICK STEVENS,

vs.

THE PATERSON AND NEWARK
RAILROAD COMPANY.

*In Case
on demurrer.*

Reasons for Judgment.

The following reasons are assigned for the judgment given in this case:

The title of the plaintiff as the owner of lands bounded on tide-waters, ends at high water mark. Below the ordinary high water mark the title to the soil is in the State.

Except as against the State or its grantee, the riparian owner has certain rights of enjoyment in front of his upland, analogous to the rights which are incident to adjacency on a public highway.

The section of the defendants charter, set out in their plea, does not contain a grant in express terms, of lands, the ownership of which is in the State, nor does it indicate an intent on the part of the legislature to authorize an interference by the defendants, with the usual privileges of riparian owners.

The distinction between the grant of a mere franchise and a grant of a portion of the public domain, is broadly marked. With respect to the latter the rule is invariably adhered to, that in cases of doubt, the grant is to be construed in favor of the State, and most strongly against the grantee, who will take nothing not clearly given him by the grant.

To give to a legislative grant the effect of a conveyance to private uses of lands, the proprietorship of which is in the State, it must clearly appear that the legislature intended to make a grant of that character and description, or that the use of the public property is necessary to the enjoyment of the franchises which are granted.

These principles are illustrated in the following cases: *Townshend v. Brown*, 4 Zab. 80; *Jersey City v. the Morris Canal*, 1 Beasley, 548; *Morris Canal and Banking Co. v. the Central Railroad Co.*, 1 C. E. G., 419; *Keyport Steamboat Co. v. Farmers Tran. Co.*, 3 C. E. G., 512; the *M. & E. R. R. C.*, 2 Stock., 352; *Com. v. City of Roxbury*, 9 Gray, 451, 494; *Inhabitants of Marblehead v. County Commissioners of Essex*, 5 Gray, 451; *Com. v. the Boston and Maine R. R. Co.*, 3 Cush., 25; *Doe v. Archbishop of York*, 14 Q. B., 81.

In this case no consideration was received by the State for the alienation of public domain, nor does there appear to have been any intent by the legislature to aid the defendants in their enterprise by donating public property to their use.

The course of legislation for the last few years, shows the legislative appreciation of the great value of the lands under water which belong to the State. An intent to alienate any portion of them without any consideration, will not, in the absence of a formal grant in express words, be implied, except upon the clearest necessity to effectuate the purpose of the legislature in investing the grantee with public franchises.

The defendants cannot claim a right to occupy the lands in question by force of any implication from the powers which are granted to them. They may exercise and enjoy the franchise of laying out, constructing and running their railroad along the Passaic River, from the village of Belleville to the city of Newark, without appropriating any of the lands of the State. The succeeding clause empowering them "to acquire the rights of the shore owners" by condemnation, clearly indicates a legislative intent that the franchises which were granted should be exercised upon property which was private property. The term "shore-owners," as used in this connection, is not employed in a strictly technical sense, but in the sense of riparian owners.

Upon the assumption that the defendants are rightfully in the occupation of public property, the clause last referred to must, for the purposes of this case, be entirely excluded from consideration. If that clause is relied on to establish a grant by the State, it is manifestly conditional, upon making compensation to private individuals, which should precede the occupation of the lands taken. It was competent for the legislature to prescribe that condition, though the riparian owner had no rights in the lands under water which were not subject to legislative divestment without compensation.

If the section in question is viewed as an act of ordinary legislation by the legislature, as the law-making power of the State, and not as an instrument of grant of public domain, it will not aid the defendants. I concur in the views of Beasley, C. J., in the *Keyport Steamboat Company v. the Farmers Transportation Co.*, 3 C. E. G., p. 516, that the riparian owner has a natural equity to preserve and improve the connection of his property with the navigable water, and that the design to violate that equity by the legislature, will not be deduced from the words of any Statute, either general or special, except when it contains language not susceptible of any other rational construction.

For the reason that the act of the legislature set out in the plea, does not authorize the acts of the defendants complained of, judgment on the demurrer is given for the plaintiff.

DAVID A. DEPUE, *Judge.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE PATERSON AND NEWARK R. R. CO. }

vs.

FREDERICK STEVENS. }

'In Case.'

Error to Essex Circuit.

POINTS AND CASES

FOR PLAINTIFF, IN ERROR.

This is an action by an adjacent land owner, for alleged damages caused by an obstruction to a public navigable stream, by piles, &c., driven in the soil of the river between high and low water mark.

It is for consequential damages arising to the plaintiff below, in respect to his adjacent land, by acts done wholly within the banks of a navigable river, by a corporation acting, (as they insist,) under the express authority of the sovereign power, and with due care in the exercise of that authority.

Such an action will not lie.

The State owns the soil of the river to high water mark, and the title of the adjacent land owner stops with that line.

Arnold v. Mundy, 1 Halst. 67.

Martin v. Waddell, 16 Pet. 367

and cases hereafter cited.

State vs Jersey City & Dutch. 525

And we contend :

1. That even if this act of the Railroad Company was not authorized by the state as the owner of the soil, the *locus in quo*,—and even if the plaintiff below, as adjacent owner, is hindered and disturbed in the enjoyment of his common or peculiar privileges as such owner, yet,

This action will not lie, because the alleged unlawful act is a common public nuisance, for which no private action can be maintained, without showing special damage peculiar to the plaintiff, and not suffered in common with all the public ; and because this declaration shows no such special damage, and none such were in fact suffered.

*Bramerd v. C.R.R.R
7 Cush. 506
Hazard v. Stearns
15 Gray 1
Himmelman v. Union Canal
1 W & A 346
Brighton v. Fairhaven
7 Gray 271
Higbee v. C.A.R.R Co
4 C. C. 276*

Caledonian R. R. v. Ogilby, 29 Eng. Law and Eq. 22.

Ricket v. Metro. R. R. Co., 2 House of Lords, Cases 175.

Queen v. Metro. Board of Works, Q. B. Rep. (1869) parts 7 and 8, p. 358.

Winterbottom v. Lord Derby, 2 Exch. (1867) 316

Pierce v. Dart, 7 Cowen, 609.

Lansing v. Smith, 8 Cowen, 146.

Doughty v. Bunting, 1 Sandf., Sup. Ct. 1.

Butler v. Kent, 19 Johns. 223.

Fort Plain Co. v. Smith, 30 N. Y. 44.

Radcliffe v. Mayor of Brooklyn, 4 Coms. 195.

Thurston v. Hancock, 12 Mass. 220.

Lasala v. Holbrook, 4 Paige, 169.

Snyder v. Penn. R. R., 55 Pa., 340.

Blood v. Nashua & Lowell R. R., 2 Gray, 140.

Bost. & Worces. R. R. v. Old Colony R. R., 12 Cush., 605.

Farrand v. Chicago R. R., 21 Wisc, 435.

Angell on Highways, 215 and 216.

2. That the Act was not unlawful, but was distinctly authorized by the Legislature in behalf of the State—the absolute owner of the *locus in quo*.

Att'y Gen. v. Stevens, Saxton, 369.

Peavy v. Calais R. R., 30 Maine, 498.

Fall River Co. v. Old Colony R. R., 5 Allen, 221.

M. & E. R. R. v. Newark, 2 Stock, 352.

State v. Brown, 3 Dutch, 13.

Wright v. Carter, 3 Dutch, 76.

Stevens v. Pat. & Newark R. R.

Chancellor Zabriskie's May Term, 1869.

3. That if the Act was authorized—if the Charter does grant to the Railroad Company the right to run this road along and over the shore of the River, the Company are vested with the same immunities

that pertain to the sovereign, and are exempt from liability to individuals for consequential damages resulting from the judicious exercise of that power. That Railroad Companies with their franchises have the same immunity as agents for public works, and may appeal to the same principles in defence against actions of this character.

Sedg. on Damages, 110 and cases cited in note.
1 Shelford on Railways, 432.
Rundlé v. Del. & Rar. Canal, 14 How. 80.
N. Y. & E. R. R. v. Young, 46 Pa. St. 112.
Pottstown Gas Co. v. Murphy, 39 Pa. St. 257.

Marysville Bridge Co. vs Kirk 46 Pa St. R. 112 (130)

The cases intimating a contrary doctrine in this State are

Trusman v. Bel. Del. R. R., 2 Dutch, 148.
Hendrickson v. Johnson, 2 Harr. 129.
Ten Eyck v. Del. & Raritan Canal Co., 3 Harr. 201.
Bordentown & Amb. Turnpike Co. v. C. & A. R. R. Co., 2 Harr. 314.

4. That if the last proposition is true, this Company, being authorized to make this structure, on this spot, on the soil of a public highway, to modify the use of that highway for public convenience, were in the lawful exercise of their powers, and any injury resulting to individuals from the due and careful exercise of such powers, is *damnum absque injuria*.

M. & E. R. R. v. Newark, 2 Stockt. 352.
Trusman v. Bel. Del. R. R. Co., 2 Dutch, 148.
1 Redf. on Railways, 298.
Starr v. C. & A. R. R. Co., 4 Zab. 392.
Drake v. Hudson R. R. R., 7 Barb. 508.
Corey v. Buffalo & C. R. R., 23 Barb. 482.
Alexander v. Milwaukie, 16 Wisc. 249.
N. Y. & Erie R. R. v. Young, 33 Pa. St. 175.
Freeholders of Monmouth v. Red Bank Co., 3 C. E. Green, 91.
Wright v. Carter, 3 Dutch, 76.
Bost. & Worces. R. R. v. Old Colony R. R., 12 Cush. 605.
Snyder v. Penn. R. R., 55 Pa. St. 340.
Farrand v. Chicago R. R., 21 Wisc. 435.
Wager v. Troy R. R., 25 N. Y. 526.
People v. Kerr, 37 Barb. 357.
Radcliffe v. Mayor of Brooklyn, 4 Comst. 195.
Moses v. Pittsburgh R. R., 21 Ill. 516.
Currier v. West Side Elevated R. R., N. Y. Times, July 1, 1869.
Milburn v. Cedar Rapids, 12 Iowa, 246.
Hatch v. Vt. Cent. R. R., 25 Vt. 49.
Lackland v. North Missouri, 34 Mo. 259.
1 Redfield on Railways, 306 & notes.

See also,

Cal. Railway v. Ogilby, Ub. Sup.
Ricket v. Metrop. R. R., "
Queen v. Met. Board of Works, "

5. That if the Railroad Company were not so clothed with the power of the State, and the immunities of sovereignty for these purposes, but were only authorized to do what an individual might do on his own land (as has been held in some cases in our Supreme Court,) yet,—

This action will not lie, unless the Plaintiffs below can show that he has acquired by grant or otherwise, some right which operates to curtail the absolute dominion which the State has over its navigable rivers, or is entitled to some vested right or easement therein.

6. That he has no such vested right, or easement—no right or privilege beyond those which he holds in common with all the citizens, (though capable of a larger enjoyment of the common rights by reason of his adjacency)—no private right which the State cannot in its discretion and by its sovereign will, invade, impair, limit, or even destroy.

That it is not pretended that any such title arises from any grant of the State, express or implied.

That no such exclusive right to a part of the public domain can arise by prescription.

And that there is no such thing as a local common law peculiar to New Jersey, abrogating the English common law, and conferring upon the riparian owner any exclusive rights in the public waters.

And that no such rights were vested by the Wharf Act of 1851, which was a mere regulation of the mode of using the public property, liable to alteration or repeal—and now in fact repealed as to a large part of the navigable waters of the State.

- Bell v. Gough, 1 Zab. 156.
" " 2 " 441.
" " 3 " 624.
Gould v. Hudson R. R. R., 12 Barb. 616.
" " " 2 Seld. 522.
Furman v. City of N. Y., 5 Sand. Sup. Ct. 15.
" " " 10 N. Y. 567.
Lansing v. Smith, 8 Cowen, 146.
Susq. Canal v. Wright, 9 W. & S. 9.
Rundle v. Del. & Rar. Canal, 14 How. 80.
1 Red. on Railways, 324.
Washburne on Easements, 401.
Bailey v. Phil. W. & B. R. R., 4 Harrington, 389.
Angell on Tide Waters, 87.
Zimmerman v. Union Canal, 1 W. & S. 346.
Shrunk v. Schuyl. Nav. Co., 14 S. & R. 71.
Phila. & Trenton R. R. Case, 6 Whart. 25.
N. Y. & Erie R. R. v. Young, 33 Pa. St. 175.
Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112.
Commonwealth v. Alger, 7 Cush. 53.
Bost. & Worc. R. R. v. Old Colony R. R., 12 Cush. 605.
Fitchburgh v. Boston & Maine R. R., 3 Cush. 88.
Davison v. same, 3 Cush. 106.
Walker v. same, 3 Cush. 21.
Milbury v. Blackstone Canal, 8 Pick. 473.
Proprietors of Locks v. Nashua & Lowell, 10 Cush. 388.
Blood v. Nashua & Lowell R. R., 2 Gray, 140.
Com. v. Roxbury, 9 Gray, 451.
Brown v. Chadburne, 31 Maine, 319.
Rogers v. Kennebec R. R., 35 Maine, 319.
Abraham v. Great West., 5 E. L. & E. 258.
Caled. R. R. v. Ogilby, 29 E. L. & E. 22.
Duke of Buccleugh v. Met. Board of Works, 3 Exch. R. 306.
Milnor v. Railway Cos., 6 Law Reg. 6.
Inhabitants of Charlestown v. Middlesex, 3 Metc. 202.
Wilson v. Blackbird Creek, 2 Pet. 245.
Bell v. Coles, Report of Com'rs of lands under water, p. 59.
Keyport St. Boat Co. v. Farmers Trans. Co., 3 C. E. G. 13; 3 C. E. G. 511.
Stewart v. Fitch, et. al., 2 Vroom, 17.
State v. Brown, 3 Dutch, 13.
Nottingham v. Lambert, Willes, 111.
Freefishers of Whitstable v. Gaun, 11 House of Lords, 175,
103 Eng. C. L., 387,
106 Eng. C. L., 353.
Whitstable Fishers v. Foreman, 2 Com. Pleas, 688; 3 Com. Pleas, 577.
2 Austin on Jurisprudence, 641, 539, 550, &c., 560, &c.
Maine's Ancient Law, 29.
Pomeroy's Mun. Law, 19.

Com. v Fisher & Perin 462 (467)
State v. Jersey City & Dutch, 5'25
Coster v. Tide water Co 3 C. E. G. 5'26