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New Jersey Court of Errors and Appeals.

Between

THE ATTORNEY-GENERAL IN BEHALF OF THE STATE EX REL THE CITY OF ELIZABETH AND THE CITY OF ELIZABETH,
Complainants-Appellants,
and
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *et al.*,
Defendants-Respondents.

On Appeal from Final Decree advised by Vice Chancellor Emery.

BRIEF OF R. V. LINDABURY FOR RESPONDENTS.

STATEMENT OF THE CASE.

This case arose on an Information and Bill filed in the Court of Chancery.

The information and bill set up that from time immemorial a common highway existed in and across the state of New Jersey and through and across the city of Elizabeth, extending from a point on the Delaware River in the city of Trenton, to a point on Staten Island Sound in the city of Elizabeth, and connecting with the navigable waters of said Sound; that on the sixth day of November, 1874, the Central Railroad Company made an application to the Governor and Riparian Commissioners under the riparian act of this State for a grant of the lands under tide water

which lay in front of twelve certain tracts of riparian lands situate in the counties of Hudson, Essex, Union and Middlesex and fronting on the waters of the Bay of New York, the Kill von Kull and Staten Island Sound, where the tide ebbs and flows; that in said application said company stated and claimed that it was the owner of some of said tracts and by virtue of the written consent of the owners of the other tracts was invested with the rights of the riparian owners as to said tracts; that one of the said tracts, called the ninth, was described in said application as beginning at a point where the southeasterly extension of the centre line of Marshall street in the city of Elizabeth intersects the former ordinary high water mark in the northerly shore of Staten Island Sound, and as running thence southerly in said high water mark along the Sound and up Elizabeth Creek to South Front street, and thence northerly and easterly along the boundary lines of the Elizabethport and New York Ferry Company to the place of beginning.

The information and bill further alleged that annexed to the part of said application containing the said description of the ninth tract was a map or diagram purporting to display the said tract and the location of said highway in relation thereto, a copy of which map was annexed as "Schedule A" to the information and bill.

It is then charged that the Central Railroad Company never owned the said ninth tract or any part of it; that on the said sixth day of November, 1874, the American Dock and Improvement Company, the Central New Jersey Land Improvement Company and the Elizabethport and New York Ferry Company executed a written consent to the Riparian Commissioners

and to the Central Railroad Company and to all others whom it might concern, that a grant of land under water in New York Bay and elsewhere in front of the shore belonging to them might be made to said railroad company, a copy of which consent is annexed to the information and bill.

It is next charged that none of the said corporations executing said consent ever owned any land within the lines of the said highway or in front of or below the terminus thereof, nor any estate or interest therein, although the ferry company at the time of said consent owned two tracts of land included in the description of said ninth tract and fronting on Staten Island Sound, one of which lay southwest and the other northeast of said highway and bound thereon.

It is next charged that neither at the time of said application nor at any other time did the Central Railroad Company have a right to riparian ownership in or to said ninth tract, or any part thereof, except by virtue of said consent; that no other or further information was submitted to the Governor and Riparian Commissioners as to the title to or rights of riparian ownership or boundaries of said tract, or as to the location and terminus of said common highway than that contained in said application and that on the twelfth of November, 1874, the governor and commissioners in pursuance of and relying on said statements and information contained in the said application, made, executed and delivered a grant to said railroad company purporting to convey to said company certain lands in front of said ninth tract by a description set out in said information and bill.

It is further alleged that the statements contained in said application, together with the representations

on the said map to the effect that the railroad company was the riparian owner or owners of so much of said ninth tract as lay between the lines of said highway, were false and skillfully calculated to deceive and did deceive the governor and commissioners; that at the time the said application and grant were made the said highway was in fact extended to and connected with the navigable waters of said Sound and that so much of said grant as purports to convey the lands or any interest in the lands between the lines of said highway below original high water mark was obtained by means of said false suggestion and untrue statements in said application and is illegal and void.

The information and bill next charges that since the making and delivery of the said grant the railroad company has taken and held exclusive possession of that part of said highway lying within the boundaries of said grant, and claims the title and right to exclusive possession of the same by virtue of said grant, and that it has laid and maintained railroad tracks thereon and has used and still uses and occupies said part of said highway in its business of transporting persons and property for tolls, fares, etc., and has obstructed and prevented the use of the same as a public highway without any legal warrant, charter or grant therefore, "all of which liberties, privileges and franchises aforesaid the said railroad company, during all the time since the making and delivery of the said grant, have usurped and still do usurp upon the state," etc.

The information and bill next set up that on September 26th, 1888, the city of Elizabeth commenced an action of ejectment against the Central Railroad Company to recover possession of the part of said high-

way within the limits of said grant; that a verdict in favor of the plaintiff was returned at the Union County Circuit at the October term, 1889, but that said verdict was thereafter set aside on the advisory opinion of the Supreme Court on the ground that the said grant of the Governor and Riparian Commissioners was conclusive in a court of law. The information and bill charge that it is the intention and purpose of the railroad company on the new trial granted in the ejectment suit to again offer the said grant in evidence and to rely upon the same as a defense to the said action.

The prayer is that it may be adjudged and decreed that the said grant of the Riparian Commissioners in so far as it purports to convey the portion of said highway contained within the limits of the grant, or any part thereof, is illegal and inoperative, and that the Central Railroad Company, the Dock and Improvement Company, the Land Improvement Company and the Ferry Company have no estate or title in or to any part of said highway or right to possession thereof under or by virtue of said grant, and that the said grant may be corrected and reformed by striking out so much thereof as purports to convey the part of said highway referred to, or any estate, title or exclusive right of, in or to any land in front of the same, and that the Central Railroad Company may be restrained from offering or giving said grant in evidence on the trial of the ejectment suit, or from making defense to said action by means thereof.

The answer

(1). Denies that the highway referred to extends to or connects with the navigable waters of Staten Island Sound.

(2). Avers that at the time said grant was made the ferry company was the owner of the fee of the lands within the lines of said highway and that the railroad company was in possession of the same.

(3.) Avers that the Riparian Commissioners had full power and authority to make the grant, notwithstanding the railroad company may not have owned the *ripa* in fee and even without the consent of the ferry company.

(4). Denies that the grant was made solely in pursuance of and solely in reliance upon the statements contained in the application. Denies that the statements contained in the application together with the representations on the map were to the effect or purported that the railroad company was the riparian owner of so much of the ninth tract as lay between the lines of said highway. Also denies that the statements or representations contained in or appearing upon said application or map are false or were calculated or intended to mislead or deceive, or did in fact mislead or deceive the governor or commissioners. Also denies that so much of said grant as conveys the lands between the lines of said highway and low original high-water mark was obtained by means of false suggestion or untrue statements in said application.

(5). Admits that the railroad company took possession of the land in question on the making and delivery of the riparian grant and that it has since held such possession, but denies that the same is within the highway or that the highway has been obstructed. Admits that the railroad company has used the land in question for railroad purposes, as it believes it had and has a right to do, and that so to do was within its chartered powers.

(6). Avers that after the making and delivery of the riparian grant the railroad company entered into possession of said ninth tract and expended large sums of money in extensive improvements thereon and in connection with other lands lying on either side thereof and has ever since continued in possession; that because of the *laches* of the complainant in complaining or in seeking relief from the fraud alleged in the information and bill, it is inequitable that a decree be made adjudging the said grant to be illegal and inoperative or that said grant should be corrected and reformed by striking out so much thereof as conveys what is alleged to be a part of said highway; that defendants paid to the State the sum of $300,000 for the land described in said grant and that the complainants have not offered to repay or to return to the defendants or to any one of them, any part of said sum of $300,000, nor have the complainants tendered themselves ready to repay or return any part of said sum, and that until they have so offered to return or repay or tendered themselves ready so to do, they are not entitled to the relief prayed for.

The case came on to be heard before Vice Chancellor Emery upon the testimony taken in the ejectment suit, supplemented by oral evidence taken in the presence of the vice chancellor. The vice chancellor in due course filed his conclusions, holding that the charge of fraud and false suggestion was not made out, and advising a decree dismissing the information and bill. From the decree so advised this appeal was taken.

I submit that the decree should be affirmed for the following reasons:

I.

THE EVIDENCE UTTERLY FAILED TO SHOW THAT THE RIPARIAN GRANT WAS OBTAINED BY FRAUD OR FALSE SUGGESTION ON THE PART OF THE CENTRAL RAILROAD COMPANY OR OF ANY OTHER DEFENDANT IN THIS CAUSE.

1. *The claim that the Central Railroad Company made a false representation as to the ownership of the ripa is preposterous.*

(a) The records show that the ferry company, in virtue of whose ownership and by whose consent the railroad company applied for the grant, had title to the *ripa* by a chain of conveyances extending back to the Board of Proprietors (case on rule to show cause, pp. 150-182).

(b) Nor is there anything in the case to justify the argument that Elizabeth avenue was laid upon lands reserved for that purpose in the proprietary grants, and that, therefore, the title to the same did not pass to the grantees thereunder.

The proprietary grants show the usual general reservations for highways, which amount to nothing more than a conveyance of about five per cent. in excess of the amount charged for, ~~and~~ on the theory that this amount would probably be needed in the course of time for public highways, (case on rule to show cause, p. 225). Of course, under such grants, the fee for the whole tract passed to the grantee, and I know of no law by which it became divested upon the laying out of a highway. How or when Elizabeth avenue was created does not appear. Mr. Justice Dixon, in the opinion in 24 Vr., says that it was probably laid out in the seventeenth century. Upon what theory or under what act the fee of a highway laid out in Co-

lonial times became the property of the State, we are not told. So far as I know, the only effect of general reservations of this character in the proprietary grants was to entitle the colony or State to take lands for highways without compensation. But in such cases, all the public took, as I understand, was an easement, leaving the fee, and all that went with it, in the owner, his heirs and assigns.

(c) The statement as to the ownership of the *ripa* contained in the application for the riparian grant was not intended as evidence of the fact, to be accepted and acted upon by the commissioners, nor was it in truth so accepted or acted upon.

(1). Such an application constitutes a mere claim or pleading, and all that is required of an applicant is an honest statement of his case. If his title is in dispute, he can only be expected to set up his own claim and not that of his adversary, and the mere statement of such claim, although it afterwards is shown to be erroneous, can never be rightly held to constitute a false representation. A contrary view would put half the public grants and many of the judgments of the courts in jeopardy. In cases of applications for riparian grants, the commissioners are supposed and required to investigate for themselves and not to make grants except upon satisfactory evidence.

(2). The statement of title in the application was not in truth accepted or acted upon by the commissioners as evidence of the facts stated.

The bill charges that the grant was made without further evidence than that contained in the application and map. This charge is not supported by any proof, however, and it appears by the defendant's proofs that it was the practice of the commissioners,

at the time the grant was made (as it has been their practice ever since), to cause the title of applicants for riparian grants to be examined by their own attorney before such grants were made, (case, p. 24). It further appears that it was not the practice of the Riparian Commissioners to make a minute or record of the examination made of particular titles, (case, p. 33). The presumption, therefore, is that the commissioners ascertained for themselves, in this case, the character of the railroad company's title to the *ripa.*

That the commissioners did in fact do this, or that, in some way, they took proofs with respect to the title, is apparent in various ways—

1st. The minutes of the meeting of the commissioners of November 5th, 1873, show that it had been made to appear to them that the railroad company had only contracts or agreements for the conveyance of some of the parcels of the upland referred to in their application for a grant, and that they were not of record the riparian owners thereof, and it was consequently resolved that as to those parcels, before the making of the grant, the railroad company be required to procure the written consent of the shore owners of record, (case, p. 31).

2nd. The minutes of the meeting of the commissioners of November 7th, 1874, show that up to that time the railroad company had been unable to *"furnish evidence of title"* to certain of the tracts in front of which they had applied for riparian grants.

Further, it appears, by the minutes of the meeting of the Riparian Commissioners held November 3, 1873, that they were willing and resolved to grant to the Central Railroad Company, for the sum of $300,000, the riparian lands not only in front of the uplands

owned by the company, but also in front of the uplands *controlled* by the company.

Again, when the Riparian Commissioners later found that the Central Railroad Company did not have title to certain of the uplands in front of which it desired riparian grants, all that they required was the consent of the *record* owners of title, and this the railroad furnished them before the grant was made. In this consent it is to be observed that the ferry company only state that they *"claim to be the owners of the Ripa."*

It also appears that the grant was made in settlement of a controversy that existed between the commissioners and the railroad company with respect to certain encroachments alleged by the commissioners to have been made by the railroad company on the lands of the State in the South Cove at Jersey City.

The records of the commissioners show that, to settle this controversy and to obtain from the railroad company the sum of $300,000, the commissioners were willing and resolved to make a grant of riparian lands in front of all the uplands either owned or *controlled* by the company, and that where the commissioners found that the record title to the uplands was in another, all that they required was the consent in writing of the holder of such title.

I submit, therefore, that the grant cannot be held to have been induced by the statement contained in the petition with respect to the title.

That the commissioners had authority in their discretion, for a proper consideration, to convey the State's riparian lands to a party having simply a record title to the *ripa,* or to one having no record title but being in *control* of the *ripa,* or to one having

neither title nor control, cannot be doubted in view of the supplement to the act of 1864, approved March 27, 1874 (Gen'l Sts., Sec. 26, p. 2791).

See also on this point the opinion of Mr. Justice Dixon in the ejectment case, 24 Vr., at page 495; the opinion of Mr. Justice Van Syckel in *Polhemus* v. *Bateman,* 31 Vr., page 165, bottom; the opinion of Chief Justice Depue in *Ocean City Association* v. *Shriver,* 35 Vr., at page 565.

2. *The claim that the railroad company made a false representation in the application for the riparian grant as to the point at which Elizabeth avenue terminated, and that such representation induced the grant, is equally baseless.*

The statement in the bill of complaint is that the false representation was effected by annexing to the application a map on which Elizabeth avenue was exhibited as ending some two or three hundred feet away from the water. The original application was exhibited on the hearing in chancery and it then appeared that no map whatever was attached to it.

The complainant, however, contended that such a map as the bill charges was annexed to the application was in fact prepared by Jacob M. Clark on behalf of the Central Railroad Company and presented to the Riparian Commissioners either along with the application or afterward and before the grant was made, and that it was effective in inducing the grant.

A map was produced on the hearing which it was claimed by the complainant was the one made by Mr. Clark and presented to the commissioners. This map, however, both Mr. Conover and Mr. Payne say is in the handwriting of Mr. Bacot, the secretary of the

Riparian Commissioners, and not in that of Mr. Clark. These two witnesses are so well acquainted with the handwriting of Mr. Bacot and Mr. Clark, and have had such exceptional means of acquiring such acquaintance, that they could hardly be mistaken on this point, (case, pp. 34, 37). It is not of much importance, however, whether the particular map produced was made by Mr. Bacot or Mr. Clark, since it is clear that Mr. Clark did make for the railroad company and furnished to the commissioners a map substantially like the one produced on the trial and said to be in the handwriting of Mr. Bacot. Mr. Clark says that he surveyed the wharf lines as they then stood and reported them to the commissioners; that he prepared a map showing the wharf lines as he surveyed them for the information of the commissioners, and he identified a map produced on the trial of the ejectment suit as the one made by him. He says that it corresponds with another map produced as to the wharf lines, but is on a different scale. The probability is that one of the two maps shown to Mr. Clark is the one he prepared, and that the other, which he says is on a different scale, is the one produced on the hearing in this cause, and that this other was made by Mr. Bacot. Mr. Clark says that he made his map for the purpose of informing the commissioners where the railroad company's line was, its situation, shape, etc., and that it was not his business to locate the streets, (case on rule to show cause, p. 235, l. 40).

This is the only evidence in the case as to the circumstances under which the Clark map was made or the purpose for which it was presented to the commissioners.

What Mr. Clark evidently meant was that being re-

quested to survey and furnish to the commissioners the wharf lines of the railroad company's property, he did this and, for convenience, placed them upon a map of a portion of the Point tract, having no concern with regard to the streets either as they existed or as they were shown on the map. This is borne out by the fact that he evidently traced the portion of the tract shown on his map from Meyer's map of the city of Elizabeth of 1871, making no changes therein, but simply adding thereto the railroad company's wharf lines.

It does not appear that the Riparian Commissioners asked the railroad company for any other information than that contained in this survey of the wharf lines, or that, in furnishing this survey, Mr. Clark or the railroad company intended to make any representation except as to the those lines; nor does it appear, either by direct testimony or reasonable inference, that in making the grant, the commissioners relied at all upon anything shown on this map except the wharf lines. Indeed, it appears that there were then in existence and in general use not only the Meyer map of 1871, (case on rule to show cause, p. 190), but also a United States Coast and Geodetic Survey made in 1858, a Hydrographic Survey of Elizabethport made by General Newton in 1872, and the Coast Survey Chart of the bay and harbor of New York made in 1874 (the latter being the one from which Mr. Bacot made his enlarged map for the commissioners), all of which showed Elizabeth avenue as ending exactly where it is shown as ending on the Clark map. (Case, pp. 14-16).

I submit—

(a.) That the Clark map cannot be taken as a representation of anything beyond the wharf lines of the

railroad company thereon shown—that the tracing from Meyer's map was a mere vehicle for communicating to the commissioners the wharf lines, and no more constituted a representation as to anything else upon the tracing than the presentation of the Meyer map itself, with the wharf lines traced thereon, would have constituted a representation as to anything except those lines.

(b.) That if anything upon the Clark map except the wharf lines is to be taken as a representation of any fact, then such representation was only as to the existing condition of things and not as to legal rights. The point of the communication being as to the wharf lines, everything else shown upon the map was pictorial only and simply represented the situation as it then existed. If a house had been shown on the map with a man's name upon it, no one would have understood that any representation was intended with respect to that, except as to the then existence of the house and its then occupancy, and so a representation as to streets would have been understood to be a representation of what was found by a surveyor upon the ground—that is, of the streets as they actually appeared and were in actual use. Certainly, in the face of Mr. Clark's evidence as to the purpose of making and presenting the map, and in the absence of all evidence that it was made, presented or used for the purpose of showing the lawful, as distinguished from the actual, ending point of Elizabeth avenue, it cannot be held to have been intended or understood as a representation upon that subject.

(c.) That the representation as to the ending point of Elizabeth avenue, if it can be considered as a representation at all, was upon a subject with respect to

which the Riparian Commissioners had equal means of knowledge with the railroad company, and with respect to which, also, it was the practice of the Riparian Commissioners to obtain their own information and not to rely upon that furnished by applicants for riparian grants, and that there is, therefore, no presumption that they relied upon this information in making the grant.

That the commissioners had equal means of knowledge with the railroad company as to the point where, in law, Elizabeth avenue ends, is entirely clear.

The record in the ejectment case shows that the avenue has stopped short of the water's edge from a time before the memory of the oldest witness produced on the trial.

Chancellor Williamson's recollection carried him back two or three years further than that of any other witness, and he says that as early as he can remember (which is about 1822,) the *locus in quo* was in the possession of private persons, who operated a ferry therefrom, and that it so continued down to the trial. (case on rule to show cause, p. 348).

David Sanderson and every other witness for the complainant in all respects confirmed this testimony, for, although one or two of them declared, in answer to leading questions, that the public had used the road down to the water's edge without interruption from their earliest recollection down to about 1849, yet their own evidence showed that during all that time, there had been a dock existing at the foot of the avenue, large enough to admit of the driving of several teams upon it at once and of their turning around and driving off, and that this dock had been in the possession of the owners of a private ferry, and that the

public had never come to what they called the end of the avenue, except for the purpose of going on this dock to transact business with or be transported by the owners of the ferry.

The only attempt made by the plaintiff in the ejectment suit to show any use of this dock by any one except the ferry owners was by the witness Joseph A. Davis. He at first stated that fishermen, in the early days, landed their fish on the dock, and that the people from the surrounding counties came there and bought them. (Case on rule to show cause, p. 94).

Chancellor Williamson, however, soon straightened out his recollection on this point, and he then admitted that the fish were landed at an adjacent dock. (Case on rule to show cause, p. 98).

Chancellor Williamson confirmed this by his own evidence, and declared that no fish was ever landed at the railroad company's dock. (Case on rule to show cause, p. 350).

When the dock referred to was built does not appear, but it is probable that it was as early as 1816, for, in the answer of Aaron Ogden in the Gibbons chancery suit, it is stated that the ferry was removed from the New Point to the Old Point about the month of September, 1816. (Case on rule to show cause p. 385).

There, however, appears to have been a ferry operated from the Old Point before this time. When it was established does not appear, but it is stated on Meyer's Centennial Map that it was established in 1769.

The evidence, therefore, that Elizabeth avenue ends, in law, at the water's edge, is entirely documentary, and is found, if at all, in old maps, deeds and acts of the colonial and state legislature. Justice Van Syckel

submitted, for the consideration of the jury, in the ejectment suit, the recital in certain ancient deeds in the chain of title of the Elizabeth Point tract. The Supreme Court, however, relied upon recitals in the Colonial Act of 1765.

Now, all of these documents were equally open to the Riparian Commissioners and the railroad company. Besides, it appears not only that the Riparian Commissioners were in the habit of examining titles on their own account, but also that they examined, or, at least, took evidence with respect to the titles affecting this grant. (Case, pp. 24-30).

Under these circumstances, we submit that there is no presumption that the commissioners relied upon the representation, if it is to be considered as such, contained in the Clark map. See—

Farnsworth v. *Duffner,* 142 U. S. Rep., 43.

(d.) That the Riparian Commissioners had, from other sources, the same information as that conveyed to them by the Clark map (if that is to be considered as having been intended to convey to them any information with respect to the legal ending of Elizabeth avenue), and that, therefore, they cannot be presumed to have relied upon the Clark map.

As before noted, there were then in existence the three United States Government maps and the Meyer map of 1871. Every one of these four maps was official.

How, then, can it be presumed that in making the grant, reliance was placed upon the showing made by the Clark map, rather than upon that made by these others, each of which was an authority in itself?

(e.) That even if it be assumed that the Riparian Commissioners were led to believe by the Clark map that Elizabeth avenue in point of law, ended as thereon shown, it cannot be supposed that the grant was induced thereby; or, to state it differently, it cannot be supposed that if the commissioners had known the legal situation to be as now contended by the complainant and the State, they would not have made the grant.

It must be remembered that this grant was made in settlement of a controversey between the railroad company and the State; that it embraced a large tract of land, and that for it the State obtained not merely a settlement of the controversy, but also $300,000 in cash. How can it be supposed, therefore, that the commissioners would have refused to make the grant had they known that some time before 1765, Elizabeth avenue had been laid to the water's edge,, and that it had been recognized by the act of that date as having been so laid, had they also known that for at least fifty years, and probably longer, it had been in disuse by the public and had, during all that time, been in the exclusive use of the owners of the Point tract, and that this exclusive use by private persons had resulted in so little public inconvenience that the city had never attempted, in any public proceeding, to assert the public right? In other words, how can it be assumed that they would not have considered, or did not in fact consider, the benefit derived by the State from the settlement of the controversy and the $300,000 in cash as of greater account than this small section of a street which the public had gotten along without so well for fifty years that it had not thought it worth while, during all that time to assert its title thereto by any public or effective proceeding?

I submit that it is the law that a representation which would entitle a party to rescind a contract must be one so material that it plainly induced the contract; that it is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to enter into it; that the representation must be the very ground on which the transaction took place and must have so thoroughly induced it that, judging from the ordinary experience of mankind, the complaining party would not, in the absence of it, in all reasonable probability, have entered into the contract.

See *Pomeroy's Eq. Jur.*, Vol. 2, Sec. 890 and cases cited.
Story's Eq. Jur., Vol. 1, Sec. 191.

In the great case of *Atwood* v. *Small*, 6 Cl. and Fin. 232, 447, Lord Brougham thus states the rule:

> "Now, my lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but *must be made the very ground upon which this transaction took place,* and must have given rise to this contract."

In *Pulsford* v. *Richards*, 7 Beav., 87, 96, the rule is thus stated:

> "To use the expression of the Roman law, it must be a representation *dans locum contractui*, that is, a representation giving occasion to the contract; the proper interpretation of which appears to me to be the assertion of a fact on which

> the person entering into the contract relied, and in the absence of which *it is reasonable to infer* that he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether."

The complainant invokes the rule that, fraud being established, the burden shifts to the defendant to show that it was ineffective.

This rule, however, relates to cases of moral fraud or conscious deception, and has no relevancy to a case like the present where the representation, if made, was unquestionably believed to be true and such belief was based upon reasonable grounds. For I take it that no one, after reading the case made by the defendant in the ejectment suit, and particularly the testimony of Chancellor Williamson, Jacob M. Clark and James Moore, will doubt for a moment that when the grant was made, the railroad company believed that Elizabeth avenue stopped short of the Sound, and had a right to that belief. Indeed, it was defendant's counsel who offered, on behalf of the defendant, the evidence which, to their surprise, the Supreme Court interpreted as establishing the existence of the highway to the water's edge.

There is some doubt as to whether or not, in such a case, equity will intervene at all.

Thus, in *Pomeroy on Equity Jurisprudence,* Vol. 2, Sec. 888, it is said that

> "where a person makes a statement of fact which is untrue, but at the time of making it, he honestly believes it to be true, and this belief is based upon reasonable grounds which actually exist, the misrepresentation so made is not fraudulent either in equity or at law."

In *Southern Development Co.* v. *Silva*, 125 U. S., 247, the Supreme Court of the United States held that

> "in order to rescind a contract for the purchase of real estate on the ground of fraudulent representation by the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew that it was not true; that he made it in order to have it acted on by the other party; and that it was so acted upon by the other party to his damage, and in ignorance of its falsity, and with a reasonable belief that it was true."

But whatever may be the true rule on this subject, I submit that there is no authority for the proposition that a court of equity will relieve against an executed contract on account of an innocent misrepresentation, unless the complaining party is able to show, by clear and convincing evidence, that he was actually misled thereby to his injury.

3. *The evidence does not warrant the conclusion that Elizabeth avenue runs to the Sound.*

That it does not run to the Sound in fact is admitted, and it is so clear that it ought to be admitted that it has never run to the Sound within the recollection of any human being.

Whether or not it runs to the Sound as a matter of law must depend upon the correctness of the view, taken in the Supreme Court on the rule to show cause, and I submit that that view is incorrect and cannot be sustained; for, wherever the road may have run before 1765, I submit that by the act of that date, it was plainly and in terms vacated and a new road laid from the Point House westward, and that there is nothing in the said act or in its title or in the situa-

tion which should deprive the language of the Legislature of its due effect, or should lead any one to conclude that it means something different from what it so plainly says. (For copy of act see case on rule to show cause, p. 396).

II.

THE ATTORNEY GENERAL AND THE CITY OF ELIZABETH ARE GUILTY OF LACHES IN NOT EARLIER APPLYING FOR RELIEF.

The bill of complaint and the evidence taken in the ejectment suit show that ~~even~~ ever since the riparian grant was made the railroad company has had open, notorious and exclusive possession of the *locus in quo,* and that it has laid and during all the intervening time maintained railroad tracks thereon and has used the same in its business of transporting persons and property for tolls, fares, hire and reward.

All the facts upon which the State and the city base their claim for relief were open and accessible, and were presumably known to them from the time the grant was made. No explanation of the delay in seeking relief is offered in the bill of complaint or was shown at the hearing. Meantime every living participant in the transaction has died and the railroad company is consequently deprived of the ability to prove by those who took part in the transaction that the charge of fraud is baseless.

It was well said by the chancellor, in *Wood* v. *Chetwood,* 6 Stew., 9, 21, that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim *vigilantibus non dormentibus, jura subveniunt.*

In *United States* v. *Beebe, et als.*, 17 Fed. Rep., 36, a bill in equity was filed to set aside certain land patents executed by the United States Government on the ground that they were procured by fraud. The defendant demurred to the bill of complaint, and in support of the demurrer insisted that the claim was stale and on that ground should be overruled. The point was sustained by the court in an opinion reviewing a large number of cases. In considering whether or not such a defense was good against the United States, the court said:

> "It is well settled that when the United States becomes a party to a suit in the courts and voluntarily submits its right to judicial determination, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants." After discussing the question and reviewing the cases, the court concludes as follows: "These considerations lead to the conclusion—*first*, that the lapse of time constitutes a good defense to this suit upon the general principles of equity above stated and which would be administered as between two citizens litigating in this tribunal; and *second*, that the United States is bound by the same law."

In the same volume of the Federal Reporter, at page 561, will be found the cases of the *United States* v. *White, et als.* These cases also arose upon bills in equity by the United States to vacate land patents executed by the United States on the ground that they were procured by fraud. The bills of complaint here, also, were demurred to, and one of the questions submitted was whether or not the claims were stale. With respect to that point the court said:

> "Again the claim is stale. Although statutes of limitation do not run against the Government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States, as well as a natural person, is a complainant. When the United States comes into a court of equity as a suitor, it is subject to the defenses peculiar to that court. (Citing cases.) Six years elapsed between the issue of the patent and the filing of the bill, and no averment is made to show that the fraud was not discovered, or, by the exercise of ordinary diligence in the land office, might not have been discovered immediately after its consummation."

The demurrer was sustained and the bill dismissed.

This point was suggested to the chancellor on the argument of the demurrer but was overruled because not specified in the demurrer. It was, however, directly raised by the answer. The chancellor held that in the absence of any pleading challenging the action on the ground of *laches,* it might fairly be inferred that the extent of the grant as affecting the highway was not discovered until after the ejectment suit was brought. If this was a legitimate inference in the situation then existing, I submit that it is not now, after the attention of the complainant and the attorney general has been called to the point by the answer and they have made no response. The State, surely, cannot be presumed to have been ignorant of the extent of its own grant, and if it was so ignorant, it was for the attorney general or the city to show the fact and not for the defendant to show the contrary.

I submit, therefore, that an unexplained and unexcused delay of nineteen years in such a case, and under such circumstances as here exist and one attended

with such consequences in the loss of proof to the defendant, should close the ears of a court of equity to a complaint supported by no proof except of an inferential character and such as any living participant in the transaction might instantly and conclusively explain away.

III.

THE STATE CANNOT RESCIND THIS GRANT IN PART AND LET IT STAND AS TO THE REMAINDER AND RETAIN THE WHOLE OR ANY PART OF THE CONSIDERATION RECEIVED THEREFOR.

That a party who for fraud would rescind a single indivisible contract must rescind it *in toto* or not at all, and must restore, or offer to restore, all that he has received under it, so far as it is possible for him to do so, is a proposition which I had supposed to be elementary. It is so treated in all the text books and in all the cases I have examined. I cite the following:

2 *Kent's Commentaries,* 480.

Parsons on Contracts (8th Ed.), Vol. 2, pp. 795 and 905.

Masson v. *Bovet,* 1 Denio, 69, 74.

Yeomans v. *Bell,* 151 N. Y., 230.

Morse v. *Brackett,* 98 Mass. 205.

Barrie v. *Earle,* 143 Mass., 1.

Hunt v. *Silk,* 5 East., 449.

Curtis v. *Howell,* 39 N. Y., 211, 215.

Jewitt v. *Joseph Petit,* 4 Mich., 508.

Potter v. *Tetcomb Ex.,* 22 Me., 303.

Wolf v. *Dietzsch,* 75 Ill., 205.

Estes v. *Reynolds,* 75 Mo., 563.

Byard v. *Holmes,* 4 Vr., 119, 125.

Doughton v. *C. B. & L. Asso.,* 14 Stew., 561.

Conlon v. *Roemer,* 23 Vr. 58.
Pidcock v. *Swift,* 6 Dick., 408.
Henninger v. *Heald,* 7 Dick., 436. Affirmed 8 Dick., 694.

The case of *Winn* v. *Paterson,* 9 Pet., 663, cited in the brief of complainant in the court below, to the contrary effect, is not a case of recission at all and does not bear upon the question.

In the case at bar, the Central Railroad Company paid the State $300,000 as a single consideration for the total grant. It is now sought to annul an important part of that grant on account of an alleged innocent misrepresentation by the grantee at the time it was obtained. No offer is made to return the $300,000, or any part of it. Upon what principle of equity it is supposed that the State can have this relief I am unable to see.

In his opinion on the demurrer, in answer to the objection that the bill contains no offer to return the $300,000 received for the grant, the chancellor, although overruling the point because not specified in compliance with Chancery Rule 209, remarks *obiter* that it is doubtless correct that relief can only be granted upon equitable terms and that such terms will be at least the repayment of a proportionate part of any consideration paid for the grant, but that such proportion cannot be determined until the facts are disclosed.

If by this the chancellor meant that he has authority to set aside a part of this indivisible contract upon ordering a return of a portion of the indivisible consideration, I submit that he is without the support of a single authority in either ancient or modern judisprudence. Courts of equity may destroy the contracts of litigants, but they cannot make contracts for them.

IV.

THE BILL IS FATALLY DEFECTIVE IN THAT IT SHOWS NO TENDER TO THE CENTRAL RAILROAD COMPANY OF THE $300,000 PAID FOR THE GRANT, AND CONTAINS NO OFFER TO RETURN THAT SUM OR ANY PART OF IT UPON OBTAINING THE RELIEF PRAYED FOR.

That one who applies to a court of equity for the rescission of a contract on the ground of fraud must offer in his bill of complaint to restore what he has received under it is, as I have shown, elementary.

The controlling principle in such cases is that he who seeks equity must do equity.

The only possible question in this case is whether or not this maxim applies to the State.

The question arose in the Supreme Court of the United States as early as 1836 in *Brent* v. *Bank of Washington,* 10 Peters, 610, and in dealing with it the court said:

> "An individual asserting such a claim in equity against the bank * * * would be compelled to do equity before he could enforce his legal right; and we can perceive no reason why the United States should be exempt from this fundamental rule of equity, subject to which its courts administer their remedy."

In the case of *United States* v. *White,* 17 Fed. Rep., 561, one of the insistments in support of the demurrer was that the United States had not offered to return the money it received on the execution of the land grant, and did not offer to return it in its bill in equity. The court held that this point also was well taken. From the opinion on that point I quote as follows:

> "The money received is retained and no tender

> appears to have been made, nor is any offer to refund the money made in the bill. The United States, like an individual, when it comes into court and demands equity, must do equity, or at least offer to do equity. It has received the full value of the land in money—the same amount that it would have received had the land been sold and patented to an admittedly qualified purchaser. It cannot keep the money, and, in a court of equity, demand and receive a return of the land."

The same question arose in the Supreme Court of Arkansas in 1889 in *State* v. *Morgan,* reported in 12 S. W. Rep., 243. In that case the State had made a grant of public lands to the defendant and the bill was filed on behalf of the State to set aside the grant on the ground of fraud. The defendant answered the bill of complaint and the State demurred to the answer. The court overruled the demurrer and the State appealed. On appeal, the judgment overruling the demurrer was sustained for the reason that the complaint contained no offer to return the purchase money received by the State for the grant, and was therefore the first defective pleading. The court said:

> "It is a familiar principle of equity jurisprudence that when a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. In suits to set aside conveyances between private persons, this principle has been held to apply and require that the plaintiff restore the consideration he has in hand. (Citing cases.) It has been held that the sovereign is not bound by any statute of limitations, or barred by the *laches* of the officers in suits to enforce a public right; yet it must receive its relief in accordance with the general principles of equity and not in violation of their terms. (Citing cases.) In this case the

> state cannot retain the purchase money and taxes received from the defendant and ask to receive from a court of equity possession of the land improved by his betterments. It cannot escape a compliance with the terms that its laws impose upon others. The complaint contains no offer to comply with equitable terms. In that respect it is defective, and until it shall be so amended as to remedy this omission, the answer is sufficient. On account of this defect the demurrer to the answer should have been sustained, and its effect extended back to reach the complaint."

This point also, was suggested to the chancellor on the argument of the demurrer, but was overruled because not specified, as already stated. It was afterwards directly taken in the answer, and, I submit, is fatal to the complainant's case.

V.

NO OTHER QUESTION THAN THOSE ABOVE DISCUSSED IS PRESENTED BY THE RECORD, AND NO OTHER QUESTION AGITATED BY THE APPELLANTS IS A PROPER SUBJECT FOR CONSIDERATION IN A COURT OF EQUITY.

On final argument in the court below various questions were started by the learned counsel for the informant and complainant in addition to those above discussed, and as they may be bruited again in this court, it will not be out of place to briefly refer to them here.

First. It was contended that neither the lessors who consented to the grant to the Central Railroad Company, nor the railroad company itself could, under the riparian acts, obtain or take title from the Riparian Commissioners to the land in dispute, be-

cause no one of them was the owner of any land within the lines of the highway as it existed prior to November, 1874.

To this I reply:

(a.) That in so far as this presents a legal question it was raised and decided adversely to the plaintiff in the ejectment suit and the judgment of the Supreme Court in this respect can only be reviewed in a direct proceeding and not by way of appeal to the Court of Chancery.

(b.) That in so far as it presents a question of fact the uncontradicted evidence shows that the ferry company had title to the fee of the land within the limits of what is claimed to be the highway.

(c.) That the information and bill presents no issue upon this point. The information and bill is filed as a mere auxiliary to the ejectment suit and asks that the riparian grant be annulled and the Central Railroad Company restrained from offering it in evidence on the new trial in the ejectment suit solely upon the ground that it was obtained by fraud and false suggestion.

Second. It was further contended that if any one of the defendants was the riparian owner of the uplands within the lines of the highway contiguous to the *locus in quo,* its title was subject to public use as a highway and hence was not such a title as empowered its owner to take a riparian grant.

Here, again, a question of pure law is presented which is not only beside the issue raised by the record, but was decided adversely to the appellants in the Supreme Court. The answer to it is found in the opinion of the Supreme Court in the ejectment suit,

in the opinion of the Supreme Court of the United States in the Hoboken case and in the opinion of Vice Chancellor Pitney in the Morris & Essex case, reported in 18 Dick., 45, and afterwards affirmed in this court.

Third. It was also insisted that the true construction of the riparian grant in question, even if valid for any purpose, would not effect a vacation of the *locus in quo* as a public highway.

This point also is one entirely available to the city in the ejectment suit and not raised by the pleadings in this cause. Indeed it was thoroughly litigated in the ejectment suit and decided adversely to the plaintiff. The learned vice chancellor, although feeling himself bound by the decision in the ejectment suit, felt called upon to devote considerable time to its discussion. I shall not follow him in this since, as he observed, it presents a question which can only be dealt with in a direct review of the judgment at law. How the question can still be supposed to be an open one, however, in view of the opinion of the Supreme Court of the United States in the Hoboken case and of the decision of this court in affirming Vice Chancellor Pitney's conclusions in the Morris & Essex case, I am not able to understand.

Fourth. It was further claimed that on the authority of the case of *Illinois Central R. R. Co.* v. *Illinois,* reported in 146 U. S., the riparian grant was *ultra vires* because it covered more than one-half of the water front adjoining the built up portion of the city.

What there is in the Illinois Central Railroad case to justify this argument I cannot discover. Two grants were involved in that case. One, a strip of

water front two hundred feet in width, extending for a long distance along the shore front of the city; the other, a tract a mile wide in the bed of Lake Michigan in front of the city. It was held that the latter grant was void because the land was covered by the navigable waters of Lake Michigan. The former grant, however, was upheld because it did not extend into the navigable waters of the lake or sensibly interfere with navigation.

In the present case the grant does not extend beyond the line for piers as established by the State Riparian Commissioners and by the United States War Department. It is therefore not only the same in kind as thousands of others granted under our riparian acts, but is directly within the decision of the Supreme Court of the United States upholding the first of the Chicago grants.

The suggestion made in this cause in the court below, however, was not that the grant was void because it interfered with navigation, but because it conveyed too large a proportion of the city water front. The claim was that this grant in connection with other grants disposed of substantially the whole of the water front of the City of Elizabeth, leaving no public access to the Sound for a long distance. Whether the other grants which, together with this, conveyed substantially the whole water front, were made before or after the one under consideration, was not shown. Apparently counsel's contention goes only to the extent of claiming that the Riparian Commissioners could not, by one grant, convey the whole of the city's water front, or perhaps that they could not do it by successive grants. In the latter case, however, I suppose the contention would be that the last

of such grants only would be void. Such an argument could have no application to the present case since, so far as appears, an abundance of water front was left to the city after the grant in question. But there is plainly no limitation of this kind upon the power of the commissioners contained in the riparian act. The argument, therefore, must attack the act itself and the insistment must be, I take it, that the act is bad because it does not restrict the power of the commissioners to granting only such water front as a city may not need. That the power of the Legislature is not thus restricted is too plain for argument, but if an argument is needed it will be found in the opinion of Mr. Justice Field in the Illinois case.

I respectfully submit that the decree appealed from should be affirmed.

R. V. LINDABURY.

New Jersey Court of Errors and Appeals.

Between:
THE ATTORNEY-GENERAL, on behalf of the State *ex rel.* the City of Elizabeth and the City of Elizabeth,
Complainants and Appellants,

AND

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY *et al.*,
Defendants and Appellees.

On Bill, &c.

BRIEF FOR COMPLAINANTS.

The printed books submitted to the Court on this appeal are as follows:

(1.) The large volume containing the transcript of testimony taken on the trial of the ejectment suit of the City of Elizabeth *vs.* The Central Railroad Company in the Union County Circuit Court at its October term, 1889.

(2.) The substance of the exhibits offered on the trial of the ejectment suit.

(3.) The information and bill filed in the Court of Chancery by the Attorney-General and the City of Elizabeth to revoke so much of the grant of the riparian commissioners to the Central Railroad Company, under date of November 12, 1874, as purports to convey the foot of Elizabeth avenue to the Company, and for an injunction to prohibit the Company from offering that grant in evidence on a re-trial of the action in ejectment, together with the answer of the Company and the testimony taken in that suit in the Court of Chancery and the opinion of Vice-Chancellor Emery. And

(4.) A pamphlet containing a copy of the minutes of the Board of Riparian Commissioners relating to the grant of November 12, 1874.

There are three opinions in this litigation in the reports:

(1.) The opinion of the Supreme Court on the rule to show cause why a new trial should not be granted in the ejectment suit, rendered at the June term, 1891. (24 Vr., 491.)

(2.) The opinion of Chancellor Magie overruling the demurrer filed by the defendants to the information and bill. (16 Dick., 259.) And

(3.) The opinion of Vice-Chancellor Emery now under review.

A large part of the information submitted to the Court on this appeal perhaps is not relevant to the single question now to be considered, but it was thought better to submit to the Court of Chancery all of the evidence and exhibits taken and offered in the ejectment suit in order to be sure to have all that might be useful before the Court.

I.

A general account of the controversy between the City of Elizabeth and the Central Railroad Company, and the present status of the litigation in the law courts that grew out of it are as follows:

For more than half a century a controversy has existed between the City and the Company as to the right to possession of the foot of Elizabeth avenue. (See testimony in ejectment suit, pages 75-78.) From the earliest settlement of Elizabeth down to the year 1849, the public enjoyed uninterrupted passage by way of the avenue from the upland to the navigable waters of Staten Island Sound; but in or about that year the Railroad Company asserted a claim to the property within the lines of the avenue at its foot and the Street Commissioners were ordered to remove some obstructions which they had placed there. (*Ib.* top of page 77.)

It appears that in the year 1849 the Elizabethport and New York Ferry Company, which owned land adjoining the water on both sides of the avenue, made a lease of its property to the Railroad Company, and by virtue of that lease the latter company seems to have claimed the right to exclusive possession of the land in dispute. (*Ib.*, page 78, and exhibits, pages 145-8.) The testimony in the ejectment suit shows that there was some litigation about the matter in the fifties, but nothing definite or final was accomplished.

In September, 1888, the City began an action of ejectment against the Railroad Company. The case was tried at the October term, 1889, and the jury rendered a verdict in favor of the City. The trial of the case extended over a wide field of investigation; historic matter, ancient maps, statutes, rec-

ords of litigation concerning property adjoining the avenue, conveyances and the testimony of old people were offered on both sides, the City contending that the avenue (formerly called the Old Point road) always extended to and was connected with the navigable waters of the Sound, and the Railroad Company contending that the avenue terminated at or near the Old Point House, which is several hundred feet from the water at present, although formerly the water came up nearer to the house. The Company contended that the intervening land was private property and that the public had no rightful use of it except for the purpose of reaching ferryboats running from the foot of the avenue to Staten Island, New York, and elsewhere.

The Railroad Company obtained a rule to show cause why the verdict should not be set aside and assigned numerous reasons (case, page 425), whereby the Supreme Court was required to review all of the testimony offered on the trial and the points urged by the Company at the Circuit. Among the statutory matter of information submitted or referred to as evidence was an act passed by the Colonial Legislature of New Jersey in 1765, to be found in Allison's Laws, page 269. It is printed in full on page 31 of the Book of Exhibits. That statute, although offered or referred to on the trial by the defence, was held by the trial judge not to be evidence that the highway terminated at the Old Point House as the Company contended (see case, pages 396-8). The Supreme Court, in its opinion, declared, in construing the Act of 1765, that "It is reasonable to assume that at and after the passage of this act there was a public highway six rods wide, extending through this point tract *to the waters of the Kill*" (24 Vr., 491-3), and the Court adds, what is obviously true, "This conclusion obviates many of the grounds upon which the defendant

bases its application for a new trial." The verdict, however, was set aside because of the riparian grant now in question, *and for no other reason.* Referring to all of the other objections to the verdict, the Supreme Court said "Against the manner in which the evidence as to location was commented upon by the Judge, and submitted to the jury, *and against their verdict respecting it,* we think the defendant presents no just ground of complaint." Page 493.

The view of the act of 1765, which was expressed by Judge Van Syckel at the Union Circuit Court, and still more emphatically by the Supreme Court on the rule to show cause, concurred with the opinion of the late Chief Justice Hornblower, given to the authorities of the Borough of Elizabeth in June, 1850, shortly after he retired from the bench, and a few months after the controversy with the Railroad Company began. That interesting and exhaustive opinion is hereto appended.

It was assumed in the Court of Chancery that the opinion of the Supreme Court, as to the meaning of that statute, was binding, and consequently that all of the other evidence offered on both sides at the trial of the ejectment suit on the question at issue need not be considered for the purpose of ascertaining whether the highway did in fact extend to the water or not. According to the opinion of the Supreme Court the evidence offered on the part of the City was merely cumulative and unnecessary, and the evidence other than the statute of 1765 offered on the part of the Company, except the riparian grant, was ineffective. The Act of 1765, it will be remembered, was held to have precisely the opposite effect than that supposed by the Counsel for the Company when it was offered on the part of the defence. In a word, the statute of 1765, according to the opinion of the Supreme Court, alone

established the fact that the *locus in quo* was part of a public highway down to November 12, 1874, and still is, unless it was vacated by the riparian grant made to the Central Railroad Company on that day.

It will be noticed that the Supreme Court set aside the verdict simply for the reason that the Company had obtained a grant from the riparian commissioners in November, 1874, which, in its judgment, conveyed to the Company the *locus in quo,* or at least part of it, unless that grant, in so far as it purported to convey the *locus in quo* was obtained by false suggestion, and is, therefore, void to the extent to which it purports to convey the *locus in quo.* On the argument in the Supreme Court it was urged on the part of the City that the grant to the extent intimated was obtained by false suggestion and was, therefore, to that extent void. The Supreme Court, however, held that as the false statement did not appear upon the face of the grant it could not be adjudged void in a collateral proceeding. The jury, following the charge of the trial judge, ignored the grant, *and for that reason only the verdict was set aside.* (24 Vr., pages 497-8.)

The City was then advised that it could not safely proceed to a re-trial of the ejectment suit until the question as to the validity of that part of the riparian grant which purports to convey the *locus in quo* should be determined in its favor in a proceeding in which the validity of the grant could be adjudicated. Thereupon the Attorney-General filed the information now before the Court, the City appearing as relator, and was also joined as a complainant.

As the pleadings in the suit in Chancery apparently raise all the questions between the City and the Railroad Company that were litigated in the ejectment suit, we are not sure whether this Court

will consider itself bound by the decision of the Supreme Court on the rule to show cause. If this Court does not think that any question at present is open for discussion except the validity of that part of the grant of November, 1874, which purports to convey the foot of the avenue to the Company, the argument here, as in the Court of Chancery, of course, must be restricted to that issue only, and but a small part of the information before the Court need be examined; but if this Court should think that the question whether the *locus in quo* is part of a public highway or not on any evidence is open for discussion, then it would seem to be necessary to consider all of the testimony and exhibits before the Court, and in that event, we refer to the brief used by Counsel for the City in the Supreme Court on the argument of the rule to show cause, which is hereto annexed. We are willing to submit the case of the State and the City, in its broadest aspects, to the Court upon the argument contained in that brief.

II.

It is insisted by the appellants confidently that the riparian grant of November 12, 1874, in so far as it purports to convey the *locus in quo*, was obtained by false suggestion, and is to that extent illegal and void. Unfortunately the Governor and other members of the Board of Riparian Commissioners, who made the grant, and also its secretary, are dead, but we have a fairly complete history of the transaction in record form, and some very striking remarks as to the method by which the grant was obtained, in the testimony of Mr. Jacob

M. Clark, who, on behalf of the Railroad Company, furnished the riparian commissioners with information in the form of a map in order to enable them to make the grant. When the riparian grant was offered in evidence on the trial of the ejectment suit (case, page 187-8) Mr. Clark was asked by the counsel for the Company, page 188: "Q. Have you a copy of this grant? A. It appears on that map. Q. Is there not another map of this grant, a smaller one? A. I have not got it. [Another and a smaller map marked H was produced by counsel, and Judge Stevens read the description in the grant to the witness, who pointed out on the map H the lines of the grant.] Q. Was a map prepared *by the Commissioners* to illustrate this grant? A. *I don't know that there was, I have no recollection of it now.* Q. *Who made the lines for the Commissioners?* A. *I surveyed the wharf lines as then they stood, and reported them to the Commissioners.* Q. Did the Commissioners have a map prepared for them? A. I prepared a map showing the wharf lines as I surveyed them for the Commissioners, *for their information.* Q. For whom were you acting? A. *I was acting for the Central Railroad Company.* Q. Do you know where that map is? A. It was with the grant. Q. [Showing witness a map.] Is that it? A. *Yes, sir; that is it, in my writing.* Q. Does that correspond with the map you have shown, and whose lines you say correspond? A. As to the wharf line, but it is traced on a different scale."

Mr. Stevens: We desire to offer these two maps in evidence. The offer is objected to as irrelevant; maps admitted; exception prayed and allowed. The two maps were marked "Exhibit D. 37." (Testimony from line 18, on page 188, to line 7, on page 189.) Mr. Clark was further questioned concerning this map on cross-examination: "Q. Have you

got that little sketch which you made and took to the Riparian Commissioners when this grant of 1874 was made? A. (Same handed to counsel.) Q. Is that the original diagram you made for the benefit of the Riparian Commissioners? A. *It is one of them; I think I made two just alike.* Q. This is just like the other, isn't it? A. This one came back with the grant among the papers. Q. They were made for the purpose of your application—of the railroad company's application for a grant—were they not? A. Yes, they were made in connection with that application. Q. And for what purpose? A. *For the purpose of informing the Riparian Commissioners what they* [*i. e.,* the company] *needed.* That was the general position of our property, *so they could make a grant;* and informing them also what the shape of the wharf land was as it existed. Q. Do you pretend now to have laid down Elizabeth avenue correctly on that diagram? A. It is laid down the way I understood it at the time. Q. That is not my question; is that a correct representation of the foot of Elizabeth avenue according to your own opinion? A. I know nothing different. Q. Don't you know now according to your opinion that Elizabeth avenue runs 168 feet further down? A. I have no knowledge of it. Q. What is this? (Showing witness a paper.) A. That represents the ideas of counsel. Q. There is one of your own here, don't throw all your sins on counsel, just look out for your own; that map you made lately, didn't you? A. That was made at request of counsel in this case. Q. You made the map as engineer, didn't you? A. I made the map at request of counsel to show the *locus in quo,* how much was set up in the plaintiff's declaration and to distinguish the portion which counsel meant to defend. Q. And Elizabeth avenue, as you now understand it, goes down as far as the yellow color? A. I

don't understand anything about it. Q. So that if Elizabeth avenue goes down 168 feet east of Front street, the diagram you made for the enlightenment of the Riparian Commissioners, is erroneous, is it not? A. It is not erroneous at all in any sense, or under any hypothesis. Q. You did not understand my question or you would not have answered that way, just listen to the question. Q. (Previous question read.) A. I do not see that it was erroneous for the purpose of this diagram. *The information to the Riparian Commissioners,* where our property was, the situation of it, the shape, etc. It was not my business to locate the streets. Q. I will have to ask you the question again. You do not seem to understand it. If Elizabeth avenue, as a matter of fact, runs 168 feet southeast of Front street, then it was not correctly laid down on the map which you made for the enlightenment of the Commissioners? A. That is an other question. To that question, under your modification of the question, Elizabeth avenue is not correctly shown on this map, if your hypothesis is correct." (Testimony from page 234, line 23, to line 6 on page 236.)

The Company now alleges that the map had nothing to do with the application, and intimates that the Riparian Commissioners made their own investigation of the title of the riparian land, and made their own maps to display the location of the property. But this theory of the case is completely destroyed by the testimony of Mr. Clark. He declares distinctly that *the Commissioners did not make any map of their own,* that he made it to be used as part of the application and for the purpose of giving information to the Commissioners. He says that he made two maps, *just alike;* one of them came back with the grant and is in evidence; and the other *we find pasted in the records of the Riparian Com-*

missioners. The proof, therefore, that this grant was obtained by false suggestion is so overwhelming that one cannot hesitate to believe that the charge in the information is true.

In Bishop on Contracts, Section 653, it is said, "whatever falsehood enters into a negotiation the contract is not impaired thereby, unless in fact it produced the consent. *The presumption is that it did,"* and so in the case of Smith *v.* Ely, 7 H. of L., 750, it was held, "when a party has practiced deception with a view to a particular end, which has been attained by him, he cannot be allowed to deny its materiality. The *onus probandi* that the end was not so attained lies on the party who used the deception."

One of the small maps marked D. 39, made by Mr. Clark for the purpose stated in his testimony quoted above, of which we find a copy pasted in the official minutes of the riparian commissioners, at page 269, is sufficient evidence of misrepresentation when viewed by the light of the testimony and the application to avoid so much of the grant as was obtained by means of it. Story's Eq. Jur., Sections 187, 188 and 189. A. & E. Ency. of Law, 1st ed., vol. 21, p. 27, etc.

On the hearing an effort was made to get rid of the crushing effect of the small map made by Mr. Clark "for the information of the commissioners so they could make a grant," by offering one or two opinions doubting its authenticity, Mr. Payne said, when on the stand the first time, that he thought it was a copy of a map made by Mr. Bacot *from an original made by Mr. Clark.* (See testimony taken April 22, page 4.) Two days later he changed his mind and thought that the original was made by Mr. Bacot. Then Mr. Conover testified that in his opinion the map was made by Mr. Bacot. He was plainly mistaken. Mr. Clark, *with the map in his*

hand, while testifying on the trial of the ejectment suit at Elizabeth, said, *"I made that map; it is in my handwriting."* (Testimony, page 188, line 45.) He also stated that the commissioners did not make any map of the locality, or, rather, that he did not know of such a map. He says he made a map for them. (Page 118, line 30.) That is, of Tract 9 in the grant.

It should be noticed that two maps marked "Exhibit D. 39" were offered by the Company on the trial of the ejectment suit. (Page 189.) One purporting to show Tract 9 in the grant was also marked "H," and had been so marked evidently at the time it was made, and of course before it was offered in evidence. The map marked "39" and also marked "H" was made by Mr. Clark for the purpose of showing the land which, in his opinion, was conveyed to the Company in Tract 9, that is, the land bounded by the original high water mark and lying below that line.

The positive testimony of Mr. Clark, *the defendant's own witness,* cannot be overthrown by the changing opinion of Mr. Payne, or even by the opinion of Mr. Conover, given thirty years after the maps were made. Opinions as to the genuineness of handwriting, even the opinions of experts who have made long study of manuscript, are notoriously unreliable, and much less dependence can be placed on opinions as to the author of printed letters and lines on a map.

Another significant fact showing that the Commissioners had no other information before them as to the boundaries of the Company's property, or the streets running through it, but depended entirely upon the information in those respects furnished by the Company, may be found by examining the minutes of the riprarian commissioners relating to the grant. Those minutes indicate that

the commissioners relied upon the information given to them by the Central Railroad Company, as to the location and boundaries of its property, *and on nothing else*, just as Mr. Clark says they did. *There is not a word in the minutes intimating that the Commissioners caused a search of the title or a survey of the property to be made.* It is true they retained the late Mr. Barker Gummere to draw the deed, but it doesn't appear that they requested him to do anything else. An employment to draw the deed would not require Mr. Gummere to cause a search of the title or a survey of the property to be made, and there is not the slightest evidence in the case that he did anything else in the matter than he was employed to do. Indeed, we do not recall that it appears in the case that he even accepted the employment and drew the deed; but perhaps he did.

For these reasons we confidently submit that the grant in question in so far as it purports to convey the *locus in quo*, or any part of it, should be declared invalid. It is not necessary that the whole grant should be adjudged void. (Winn *v.* Paterson, 9 Pet., 663.)

III.

A large part of the argument on the part of the defendants in the Court of Chancery was based on the alleged staleness of the cause of action, and the supposed duty of the State to tender to the Railroad Company such part of the consideration for the grant as the Company paid for the ninety-four feet in dispute, that being the width of the avenue at its foot,

The grant, it will be remembered, was made in November, 1874. A little more than a year before that time this Court had decided the Hoboken case, 7 Vr., 540. In that case it was distinctly held, (1) that *"lapse of time, however long the right in a street is suspended, though coupled with a use by the owner, which would otherwise be adverse, will not make title by prescription against the public"* (page 544), and (2) that a grant by the State to a riparian owner, similar to the grant in the present case, would not give to the grantee the right to fill in below the terminus of a public highway and so deprive the public of right of access to navigable waters.

It is true the Hoboken case was decided upon a legislative license, included in a special charter, but it was treated in the opinion as a grant, and the views of the Court were sustained by citation of cases in which grants similar to that in question had been made. After referring to a few such cases, the opinion of Mr. Justice Depue declared: "In my judgment, these cases declare the law correctly on this subject. The essence of the gift [the street referred to had been dedicated] is the means of access to the public waters of the river, the advantage of which induced the growth of a city, by reason of its adjacency and connection with the important navigable waters of the Hudson, which gave a peculiar commercial value to the lots put in the market by the dedication, and which could only be preserved by maintaining unbroken the connection of the streets with the navigable river. Any obstructions of that access would not only derogate from the effect of the gift, but would also be a public nuisance." Page 548. It will be remembered that Elizabeth Avenue also was dedicated by John Stevens, and others, in pursuance of the statute of 1765. Besides, it had been decided as long ago as 1858

(State *vs.* Brown, 3 Dutch., 13), that an owner of the fee of land adjoining tidewater, in case the land was subject to public use as a highway, was not a riparian owner. (See comment on this case in 7 Vr., 550, &c.)

This was supposed to be the law of New Jersey upon which the public might safely rely until February 20th, 1888, when the case of Hoboken *vs.* Penn. R. R. Co. was decided by the Supreme Court of the United States (124 U. S., p. 656). It was commonly supposed that the decision of the Federal Court in that case overruled the decision of this Court in the Hoboken L. & I. Company case, so far as that case defined the effect of such grants on the title to land within the lines of highways, and it must be conceded that it requires a display of acute reasoning to reconcile the two cases. This was evidently the opinion of the very able jurist who presided at the trial of the ejectment suit case, pp. 409-410. That suit was brought by the City of Elizabeth in September, 1888, *only seven months after the decision in the Federal Court.* It is true that more than seventeen years have passed away since the suit was brought, but no one can justly blame either the Attorney General or the City for the delay. During that time, fortunately, the Supreme Court of the United States has modified its views expressed in the case of Hoboken *vs.* Penn. R. R., realizing the extremely dangerous character of the doctrine therein laid down, and has substantially adopted the views of this Court in the Hoboken L. & I. Company case. In the case of Illinois Central Railroad Co. *vs.* Illinois, 146 U. S., 387, it was held that it is beyond the power of the Legislature of any State to sell, or to authorize the sale of a substantial part of the water front of a city so as to deprive the public of means of access to navigable waters.

There is abundant evidence in the case showing that from the year 1849, when the Railroad Company first set up an ostensible claim to ownership of the *locus in quo,* down to the time when the ejectment suit was commenced in the Union Circuit in September, 1888, the public asserted its right and title to the property: (1) by ordering the removal of obstructions (Case, p. 77); (2) by means of the opinion of Chief Justice Hornblower, in January, 1850; (3) by the Meyer Map of 1856; (4) by the Commissioners' Map of 1869, made in pursuance of a special act of the Legislature providing for defining the lines of the streets of the city (Laws 1867, p. 210). (Col. James Moore, Chief Engineer of the C. R. R. Co., from the beginning was a member of the Commission that made the map marked "1869"); (5) by reason of the construction of a sewer through the *locus in quo,* which still exists and is in use, and also by the making of an assessment map as part of the proceedings to assess property for the cost of the sewer. (See Smith *v.* The State, 3 Zab., 712; Mayor Jersey City *v.* Morris Canal and Banking Co., 1 Beas., 12, 547-560-1; Laing *v.* United N. J. R. & T. Co., 25 Vr., 576-78; Cross *v.* Morristown, 3 C. E. Gr., 305-11-13; Bodine *v.* Trenton, 7 Vr., 198, 201; Price *v.* Plainfield, 11 Vr., 608-14; Domestic Telegraph Co. *v.* Newark, 20 Vr., 344-6.)

As to the objection that the State should have tendered to the Railroad Company the price supposed to have been paid for the foot of the avenue before filing the information and bill, or should offer to do so therein, it is sufficient to say that it is an effort to misapply a rule of procedure in equity which ought to be applied only when it is practicable to do so. It is true that the Company paid three hundred thousand dollars for the grant in question, but that grant covers numerous tracts

of riparian land in three counties, extending from Communipaw nearly to Perth Amboy. The riparian land included in the conveyance in front of the built-up part of the City of Elizabeth alone is 4,164.6 feet. Perhaps the entire grant covers strips of land twenty-five or thirty thousand feet in length and varying in value. If the State should come into Court and ask to rescind the entire grant it would be reasonable to say that the consideration should be returned, or an offer made to do so, but where it is sought to recover but a very small fraction of the land embraced in the grant, of unknown value as compared with the whole, or with the rest, it would be very unreasonable to say that the State should first, if possible, ascertain what, if anything, should be refunded and then offer to do so. The better course, because the only practicable course, is for the Court to grant relief upon such terms as may be considered equitable, and if those terms involve the payment by the State of a few dollars to the Railroad Company to ransom its property, the decree should so provide. This course has been adopted frequently, especially in recent years. "It has been held that an offer of restitution in the bill of complaint is not necessary, since the Court may require restitution as a condition of relief. In brief, restitution is not a condition precedent to the complainant's right to institute proceedings for rescission, but is a condition imposed by the Court in granting relief, which is based upon the maxim "He who seeks equity must do equity." A. & E. Ency. of Law, Vol. 24, p. 622, 2nd ed., citing Jervis *v.* Berridge, Eng. L. R. Ch. App., Vol. 8, 351; Thomas *v.* Beales, 154 Mass., 51, and other cases. This rule certainly has the support of practical good sense. In the case of Jervis *vs.* Berridge, Lord Selborne said, "I confess I was surprised to hear the argument that in such a case as the present an offer

upon the face of the bill to repay the moneys expended by the demurring defendant was necessary; my impression, during many years of practice at the bar, having always been to the contrary. In that impression as to what is at least the modern practice of the Court I am confirmed by several of the authorities which were mentioned at the bar, particularly by those referred to by Mr. Glasse at the close of the argument."

Here, perhaps, in strictness, the discussion of this matter on the part of the City should end for the present, but there are reasons why we feel justified in reminding the Court more fully of the present state of our riparian law relating to such disputes as this, in order especially to avoid the danger in future stages of this litigation of losing legal rights by silence or acquiescence, which it is not intended by any means to waive. If the following views of our riparian legislation, and of decisions on riparian questions, are correct, no time can be inopportune for their statement. The ultimate disposition of this case should not be affected or influenced by silence. In fact, the principal argument now made on the part of the defendants is based upon the charge that both the State and the City have hesitated too long to demand the public rights, and to state their reasons for doing so.

IV.

If the case is open for consideration here as widely as the answer indicates, we respectfully submit that the appellants are entitled to the judgment of this Court on a serious question that underlies the whole matter in controversy, viz.: Did the

riparian commissioners obtain power from the riparian act of 1864 (Gen. Stats., p. 2785), or from any of its supplements, (1) to *sell* land belonging to the State, or (2) to *vacate* public highways? It is not alleged in this case and cannot be successfully contended that the commissioners obtained any right to dispose of the property of the State from any other source. No one but the Legislature, or some one lawfully authorized by the Legislature, can dispose of property belonging to the State.

The title of the Act of 1864 is this: "An Act to ascertain the rights of the State and the riparian owners to the lands lying under the waters of the Bay of New York and elsewhere in the State," and the body of the act as originally passed in 1864 is in harmony with its title. Laws of 1864, p. 681.

In 1869 a supplement to the Act of 1864 was passed, entitled "A Supplement to an act entitled 'An Act to ascertain the rights of the State and the riparian owners to the lands lying under the waters of the Bay of New York and elsewhere in the State,' " approved April 11th, 1864, Laws of 1869, p. 1017. Under this supplement so entitled an effort was made to confer power on the commissioners to *sell* riparian lands from the New York State line to Enyard's Dock, which is at the foot of one of the streets of Bayonne, and by another supplement with a similar title—that of April 21st, 1871—to authorize the commissioners to sell land below high water mark to riparian owners in other parts of the State. How is it possible to sustain this alleged power to sell land and vacate highways by acts so entitled under a Constitution which declares that "every law shall embrace but one subject *and that shall be expressed in the title?*" Article 4, Section 7, paragraph 4. The following cases decided by this Court and by the Supreme Court furnish a very sound and lucid answer to the ques-

tion: *It cannot be done.* If a member of the bar and a surveyor should be employed to examine the title and ascertain the boundaries of a tract of land would such employment authorize them to sell the property? Rader *v.* Town of Union, 10 Vr., 509; Grover *v.* Trustees, &c., 16 Vr., 399; Hendrickson *v.* Fries, *Ib.,* 563; Daubman *v.* Smith, 18 Vr., 202-3; Jersey City *v.* Elmendorf, *Ib.,* 284; Bumsted *v.* Govern, *Ib.,* 273; Dobbins *v.* North Hampton, 21 Vr., 499. This question was raised in the case of Morris and Essex Railroad Company *vs.* Jersey City, 18 Dick., 45, but avoided by Vice-Chancellor Pitney for the reason that it appeared that the grant in question in that case was made under the Act of April 6th, 1871, entitled "An Act relative to the riparian commission" (Genl. Stats., page 2796), which was not a supplement to the General Riparian Act of 1864, the Vice-Chancellor saying, "In this it varies from the several supplements to the Act of 1864, most important of which is the Act of March 31st, 1869. These, by their terms, were mere supplements to the original act and therefore confined in their scope by the title of that act, while the Act of April 6th, 1871, is an independent act and its title is sufficiently broad, as it seems to me, to include the power to make the grant in question. At the time of its passage the riparian commission was an established institution in the State of New Jersey." Pages 48-9. The Act of April 6th, 1871, however, cannot avail the defendants in this case, because it only authorizes grants to be made by the riparian commissioners *with the concurrence of the Attorney-General* and that concurrence was not obtained in the grant in question.

V.

In considering the question as to the extent of the power of the Riparian Commissioners to grant to the Central Railroad Company the *locus in quo,* and the capacity of the Company to accept such a grant, we think it should be constantly borne in mind that the Riparian Act of 1869 applies only to the tidewaters of the Hudson River, New York Bay, and Kill von Kull, lying between Enyard's Dock on the Kill von Kull and the New York State line. Enyard's Dock is at the foot of one of the streets of the City of Bayonne, and hence the Riparian Act of 1869 *is not in force at the foot of Elizabeth Avenue.* In the case of Fitzgerald *vs.* Fraunce, 17 Vr., 536, it was held distinctly that "provision for grants of the State's lands under tidewater by the Commissioners elsewhere than within the territory designated in the Act of 1869 is made by the Act of March 21, 1871, which authorizes grants *to riparian owners only.*" In that case it appeared that Fraunce owned a strip of land along the Delaware River, a few feet wide, which was used for a fishery. Fitzgerald, who had purchased the interior and adjoining land, obtained a grant from the Riparian Commissioners in 1876 of the land under tidewater in front of the land owned by Fraunce. In a litigation between them as to the ownership of the land granted by the Commissioners, it was decided by this Court that Fitzgerald, *not being a riparian owner, could not take title from the Commissioners.* Speaking of the intervening strip owned by Fraunce, the Court said: "The intervention of it between the upland and the river front would make the grant of the State to the plaintiff inoperative as against his title" (page 598). On page 584 of the report of that case, it is said: "The power of the

Riparian Commissioners to make grants of the State's lands under water, under the Act of 1871, *is more restricted* than under the Act of 1869. Under the Act of 1871 *no one but a riparian owner can apply, and a grant by the commissioners to any one else would be ultra vires.*"

The statement, therefore, in the opinion of the Supreme Court, in this case (24 Vr., 495-6) that "the provisions of the supplement to the riparian act passed March 31, 1869, have been extended by subsequent legislation to all the tidewaters of the State in which exterior lines of solid filling had been or should be established by the Riparian Commissioners" is erroneous. It conflicts not only with the case of Fitzgerald *vs.* Fraunce, but with two other decisions of the Court of Errors and Appeals. See Bateman *vs.* Polhemus, 31 Vr., 163, and Ocean City Assn. *vs.* Shriver, 35 Vr., 550, and comment of Chancellor Magie on this point in 16 Dick., 259.

If the Ferry Company, having acquired title to the lands at the foot of the avenue on both sides, thereby became invested with title to the fee within the lines of the avenue subject to its use as a public highway, still that Company was not a riparian owner within the meaning of our riparian legislation, and of course could not grant to the Railroad Company a right to take title from the Riparian Commissioners for land below high water mark. Upon this point the case of Brown *vs.* The State, 3 Dutch., 13, seems to be conclusive. In that case it appeared that the owner in fee of a tract of land bordering on navigable waters had conveyed to a canal company a strip of land along the shore to hold "as long as used for a canal," that is, his title to the property was subject to the easement of a public highway. It was held that the grantor (Brown) was not entitled to a license under the Wharf Act to build docks and wharves in front of

such property, and that, although it might not be competent for the canal company under its charter to acquire the rights of riparian owners, they might prevent Brown from exercising that right. The Wharf Act, instead of speaking of "riparian owners" said "owners of land situate along or upon tidewaters," and the Chief Justice in his opinion clearly understood that expression to mean the present owner of an *immediate estate in possession,* and that it was not intended to confer the privileges of the Wharf Act upon individuals in whom the ultimate fee was vested subject to a present possession in others. The late Chief Justice Depue, in Fitzgerald *vs.* Fraunce, 17 Vr., 536, said the expressions quoted above are synonymous, page 594. (See Comment on the Brown case in Hoboken Land & Improvement Company *vs.* Hoboken, 7 Vr., 540, at page 550, and again in 17 Stew., 403, and 17 Vr., 594-5.) In the case of D. L. & W. Ry. Co. *vs.* Breckenridge, 10 Dick., 141, at page 148, it was said (referring to the Fitzgerald case) that a conveyance of a right for the purpose of fishing and for no other purpose in a tract of land would prevent the grantor from being considered the riparian owner of the lands within the meaning of the riparian laws.

VI.

We do not think it necessary, but perhaps it is proper that another aspect of this case should be presented to the Court.

The same result, as indicated above, would be reached if the matter should be viewed by the light thrown on a similar situation by the Supreme Court of the United States in deciding the case of

Illinois Central Railroad Company v. *Illinois,* 146 U. S., 387. That case practically overrules the case of *Hoboken* v. *Penn. R. R. Co.*, 124 U. S., 656, on which, no doubt, the defendants will rely. Before referring particularly to the decision in the Illinois case, it will be useful, perhaps, to sketch briefly the history of judicial opinion relating to the title to riparian lands and lands under water in this State where the tide ebbs and flows.

The respective rights of the State, the public and of riparian owners in and to land below highwater mark and in the waters below have been in litigation almost constantly in this State for nearly a century, and also in other States containing or bounded by navigable waters, and still the law on the subject in some respects remains unsettled. A complete solution of the problem not yet having been found, the long controversy seems to illustrate the truth that nothing is settled until it is settled right.

We have recently read the principal decisions in this State relating to estates and interests in land and water below highwater mark, commencing with *Arnold* v. *Mundy,* 1 Halstead, 1, and ending with *Morris and Essex R. R. Co.* v. *Jersey City,* 18 Dick., 45, and also the decisions of the U. S. Supreme Court on the same subject rendered on appeal from the courts of this State. We find that the course of opinion has been substantially as follows:

(1) That land below highwater mark, both in England and in this country before the Revolution belonged to the King, but was not in all respects his absolute individual property. The extent to which the property was held in trust for the public and the part that was the personal property of the King was never clearly defined.

(2) Between the Norman Conquest and the Reign of Henry III. land below highwater mark and the right to fish in waters near the shores of rivers and the sea where the tide ebbs and flows were occasionally treated as the absolute property of the King, and in several instances such lands and rights were actually granted by the King to certain of his subjects, and are still held in England by virtue of such grants or by prescription which presume such grants. (1 Hal., pp. 90-92.)

(3) That the English barons and people considered such grants to be in violation of their common rights and in the charter granted by Henry III. such grants made previous to the close of the right of Henry II. were confirmed and similar grants were prohibited in the future. It is said that not a single grant in derogation of the common right of fishery can be found in England made by a King since the granting of the charter of Henry III. (1 Halst., 92-93.)

(4) The same general laws and policy which controlled the shores and navigable waters of England also controlled the shores and navigable waters of the English colonies in America prior to the Revolution. The rights of Charles II. in such shores and waters in America passed to the Duke of York by the grant made in 1664, and confirmed ten years later, but whether such rights passed to the grantees of the Duke of York is considered doubtful. (*Gough* v. *Bell,* 1 Zab., 156, and para. in note, p. 169, 1 Hal., 94; Leaming & Spicer, page 613.)

In the case of *Arnold* v. *Mundy,* 1 Halstead, 1, a case that was thoroughly argued after extensive research by the ablest members of the bar, the Chief Justice, at the close of an elaborate opinion,

expressed the Court's legal judgment and historical view of the subject as follows:

> "Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all social rights, that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coast of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property indeed, strictly speaking, is vested in the sovereign, but it is vested in him, not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment.
>
> "I am of opinion that this great principle of the common law was, in ancient times, in England, gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves these common rights; that the kings themselves also, in some instances during the same period, granted them out to their courtiers and favourites; and that these seizures and these royal favours are the ground of all

the several fisheries in England now claimed either by prescription or by grant; that the Great Charter, as it is commonly called, which was nothing but a restoration of common right, though it did not annul, but confirmed, what had been thus tortiously done, yet restored again the principles of the common law in this as well as many other respects; and since that time no King of England has had the power of granting away these common rights, and thereby despoiling the subject of the enjoyment of them.

"I am of the opinion, that when Charles II. took possession of this country by his right of discovery, he took possession of it in his sovereign capacity; that he had the same right in it, and the same power over it, as he had in and over his other dominions, and no more; that this right consisted chiefly in the power of granting the soil to private citizens for the purpose of settlement and colonization, of establishing a government, of appointing a governor, of conveying to him all those things appurtenant to the sovereignty, commonly called royalties, for the benefit of colonists; but that he could not, and never did, so grant what is called the *Common Property* as to convert it into private property; that these royalties, therefore, which constitute that *Common Property,* of which the rivers, bays, ports, and coasts of the sea were a part, by the grant of King Charles, passed to the Duke of York, as the governor of the province exercising the royal authority for the public benefit, and that if they passed from the Duke of York to his grantees, *which is a very doubtful question,* then, upon the surrender of the government as appurtenant

thereto, and inseparable therefrom, they reverted to the Crown of England.

"And I am further of opinion, that, upon the Revolution, all these royal rights became vested in *the people* of New Jersey, as the sovereign of the country, and are now in their hands, and that they, having themselves, both the legal title and the usufruct, may make such disposition of them, and such regulation concerning them, as they may think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and therefore that the legislature, in the exercise of this power, may lawfully erect ports, harbors, basins, docks and wharves on the coast of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks, and bridges for the improvement of navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge, and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labor, and at their own expense, giving them reasonable tolls, rents, profits or exclusive or temporary enjoyments; *but still this power which may be thus exercised by the sovereignty of the state, is nothing more than what is called the jus regium, the right of regulating, improving, and securing for the*

common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

"From this statement it is seen that, in my opinion, the proprietors, as such, never had, since the surrender of the government, any such right to, interest in, or power over these waters, or the land covered by them, as that they could convey the same and convert them into private property; and that, therefore, the grant in question is void, and ought not to prevail for the benefit of the plaintiff, and, of course, that the rule to show cause must be discharged." (1 Hal. 92-94.)

We do not find that this statement of the law has ever been modified by any decision rendered in this state, except on one particular. Chief Justice Green, in his opinion in the case of *Gough* v. *Bell*, 2 Zab., 441, said (pages 458-9): "In *Arnold* v. *Mundy*, 1 Halst., 78, the Chief Justice said, 'A sovereign power itself cannot consistently with the law of nature and the constitution of a well ordered society make a direct and absolute grant of the water of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.' If by this proposition it is meant only to assert that *a grant of all the waters of the state to the utter destruction of the rights of navigation and fishery would be an insupportable grievance, it is undoubtedly true.* It might have been added that

such a grant would have been an infringement of the Constitution of the United States, but if it is intended to deny the power of the Legislature by grant, to limit common rights, or to appropriate lands covered by water to individual enjoyment to the exclusion of the public common rights of navigation and fishery, the position is too broadly stated." We collate these opinions of Chief Justice Kirkpatrick and Chief Justice Green because one, as modified by the other, agrees substantially with the last important decision of the Supreme Court of the United States on the same subject, in *Illinois Central R. R. Co.* v. *Illinois, supra.*

The decision in that case for the first time bravely declared that the legislature of a state in this country *has no power to alienate large tracts of public property to the detriment of the common right of navigation.* The late Justice Field, who wrote the opinion, says: "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide-waters within the limits of the several states, belong to the respective states in which they are found, with the consequent right to use or dispose of any portion thereof, *when that can be done without substantial impairment of the interests of the public in the waters*, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties." (Pollard's Lessee *v.* Hagan, 3 How., 212; Weber *v.* Harbor Commissioners, 18 Wall., 57; p. 435.)

It appears in the present case that the City of Elizabeth does not own a foot of water front, nor do the people of the city have any right of access

to the navigable waters adjoining the city northeast of Bayway, except via the *locus in quo.* (Quien's testimony, pages 34-35.) In other words, every foot of land below highwater mark along the entire built-up portion of the city has been sold to individuals and corporations, if the part of the grant now in question is valid; and if that part is invalid, the entire water front of the inhabited portion of the city, except ninety-four feet, is owned by individuals and corporations. It is doubtful if such a condition exists in any other city on earth. It is literally an "insupportable grievance."

The intimation in the quotation from Justice Field's opinion as to the limitation of the power of legislatures in this country to sell the common rights of the people so as entirely or largely to exclude individual enjoyment thereof is not new in this State. Before examining his opinion further it may be useful to notice similar expressions in our own reports. They appear sufficiently in the opinions in the case of *Gough* v. *Bell,* 1 Zab., 156, and 2 Zab., 441.

Gough v. *Bell,* 2 Zabriskie.

"The king, then, or the sovereign power, has the right to convey the soil under tide waters, *subject to public rights.* It must be something beneficial. May the grantee, then, not set up the grant against all the world, *except those in the exercise of the public rights, to which the grant is subject*"? (*Page 452.*)

"It is said in the books that the title to the soil of navigable rivers, and to the shores of the sea, and of the arms of the sea, is a branch of the king's prerogative, *of which he cannot divest himself; that the title is in him, in trust for the public;* that the rights of navigation and of fishery, and the use

of the shores of the sea, are common rights, of which the people cannot be divested, except by their consent. Hence they cannot be aliened by the crown. *Hale de Jure Maris* 11; *Angell on Tide Waters,* 21, 24, 25; *Brown* v. *Kennedy,* 5 *Har. L. T.,* 203.

"The authorities, upon this point, are by no means uniform, though the better opinion appears to be that, since *magna charta,* the English sovereign has no power to alien the public domain.

"Whatever doubts may exist in regard to the power of the king to dispose of common rights, there exists none in regard to the power of parliament. Parliament not only may, but does exercise the power of aliening the public domain, of disposing of common rights, and of converting arms of the sea, where the tide ebbs and flows, into arable land, to the utter destruction of the common rights of navigation and fishing. *Lowe* v. *Govett,* 3 *Barn. & Ad.,* 863; *The King* v. *Montague,* 4 *Barn. & C.,* 598." (Pages 456-7.)

[This statement, like most generalities, is not strictly true. In *Martin* v. *Waddell,* 16 Peters, at page 421, the U. S. Supreme Court said, "That the title to land under a navigable stream of water must be held subject to certain public rights cannot be denied. But the question still remains, what are such public rights? *Navigation, passing and repassing, are certainly among those public rights?*" Besides the omnipotence of parliament is not possessed by the legislatures of our states.]

"The only title which the state claims to the soil is by virtue of its sovereignty, for the protection of the public or common rights. But where the soil of navigable rivers is permanently appropriated *without prejudice to the public rights,* and where the state tacitly acquiesces in such appropriation there would seem to be but little reason in her

setting up a title as proprietor of the soil for no public use." Page 461.

"In *Griffith's Annual Law Register,* 1202-3, (1821-2) it is said, that when the original proprietors of New Jersey have, by conveyance, survey, or otherwise, alienated any part of the proprietary or common land, such grantees possess the soil, whether dry land or land covered with water (when the grants or surveys extend to or are bounded on rivers or waters) in as full right as such soil, rivers, and waters were held by the Duke of York, or Berkley and Carteret, in 1663-4, subject *to the 'jus publicum.'*" (Page 467.)

"In New Jersey, as we have seen, the title of the state extends, as at common law, to high water mark, *but it is to high water mark as it actually exists.* Where the water has 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." (Page 469.) [In the present case it will be remembered that the high and low water marks are concurrent, a dock having been built extending out to navigable water before the grant of November, 1874, was made.]

"I am of opinion, therefore, that the Act of November 8, 1836, did, and could, convey to Nathaniel Budd no title to soil from which the flow and reflow of the tide had been excluded by the improvements of the riparian proprietors at the time of the passage of the law; and inasmuch as it appears, by the evidence, that the place where the trespass had been committed had been reclaimed prior to the passage of the Act, *and was not then subject to the flow and reflow of the tide,* that the defendant has failed to sustain her plea, and that judgment must be rendered for the plaintiff." (Page 470.)

Gough v. *Bell,* 1 Zabriskie.

"The title to this country, according to the theory of the times, was that of discovery. It belonged to the British nation, but vested in the King as the head thereof, all below high water as a part of the sovereignty or regalia (2 Bacon's Abr., 177; 2 Blk. Com., 14, 104), *yet he held them, as he did the sea, and the arms thereof and the navigable rivers of Great Britain, in trust for the public.* And, although there are some old royal grants under which exclusive fisheries are held in the tide-waters, and others are also claimed by prescription, yet these grants of the King were considered a usurpation upon the common rights of the people, the powers of Parliament, and the sixteenth chapter of Magna Charta, whilst it confirmed all such grants as were prior in date to the reign of Henry III., restrained their being granted from that period. This is the view taken by Kirkpatrick, Ch. J., in *Arnold* v. *Mundy,* 1 Halst., 71-4, and is fully sustained by authorities there referred to." (Page 160.)

"But, laying aside all technical, narrow views of the case, the great rules that ought to have controlled this decision are those laid down by Justice Randolph in the text. That the King of England held this country as part of the public domain subject to the same restrictions as were then by law imposed upon him in England. *That he there held the great rivers and the soil thereof in trust for all his subjects, and could not alien or appropriate them to some of them in exclusion of others.* (Note at page 169.)

The same spirit pervades the opinion of this Court in the case of *Hoboken Land & Improvement Company* v. *Hoboken,* 7 Vr., 540.

Mr. Justice Field, in the opinion in the Chicago case, 146 U. S., p. 455, candidly admits that the Supreme Court could not find any authority where a

grant such as that under consideration was held invalid, adding, "for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, *in trust for the public.* The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and *cannot be alienated,* except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested." (Citing cases.)

The opinion of Mr. Justice Field, however, is clearly sustained by Wheaton in his work on the Law of Nations, page 64, 3rd ed.

The City of Chicago, according to Cram's Atlas, has forty miles of water front along the Chicago River and Lake Michigan, pages 124 and 726. At the time when the bill in that case was filed (1884) the city probably had less water front, its territory having since been enlarged. In the year 1869 the Legislature of Illinois attempted to grant to the Illinois Central Railroad Company, by statute, in the most positive terms, about one mile of the water front of the city (page 438), being the part in front of which a line of breakwater or cribs of wood and stone covering the front of the city between the Chicago river and Twelfth street had been built, with openings for the entrance and departure of vessels, thus enclosing a large part of

the lake for the uses of shipping and commerce, and creating an outer harbor for Chicago. It comprises a space about one mile and one-half in length from north to south, and varies in width from one thousand to four thousand feet. (Page 437.) It will be seen therefore that the grant in the Chicago case purported to convey but a small fraction of the entire water front of the city and only two-thirds of the harbor proper. In the present case if the grant of November 12, 1874, is valid the public have been deprived of every foot of water front along the built-up portion of the city, and but little, if any, remains in front of the uninhabited part of the city. The part of the grant purporting to convey the *locus in quo* is Tract No. 9. Tracts 8 and 10 lie northeast of Tract No. 9, and are along the water front of the city. Tracts 8 and 10 purport to convey no less than 3,716 feet of water front. *A glance at the map of the city will show that the riparian commissioners attempted to convey a vastly larger proportion of the water front of Elizabeth to the Central Railroad Company than the legislature of Illinois attempted to convey of the water front of Chicago to the Illinois Central Railroad Company.* The reasons therefore which induced the Supreme Court of the United States to hold the grant in the Chicago case to be invalid apply with greater force to the present litigation.

The opinion of Mr. Justice Field is extremely interesting. It is palpably in conflict with the case of *Hoboken* v. *Pennsylvania R. R. Co.*, 124 U. S., 656, and agrees substantially with the case of *Hoboken Land and Improvement Company* v. *Hoboken*, 7 Vr., 540. By a careful reading of the opinions in those three cases it will appear quite clearly that the Supreme Court saw the fatal consequences of its decision in the Hoboken case and had the good sense to ignore it. In the minority

opinion in the Chicago case Mr. Justice Shiras said that the case of *Hoboken* v. *Pennsylvania Railroad Company,* 124 U. S., 656, was "in many respects like the present," page 465, and so it was, and while it was not formally overruled by the Chicago case it was substantially overruled.

A few extracts from the decision in the Chicago case would seem to make it clear that the grant to the Central Railroad Company made in November, 1874, is invalid, not only as to the foot of Elizabeth avenue, but wherever it deprives the public of reasonable and convenient means of access to navigable waters. It says "as to the grant of the submerged lands the Act declares that all the right and title of the State in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Company for the distance of one mile and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot twenty-one south of and near to the roundhouse and machine shops of the company are granted in fee to the Railroad Company, its successors and assigns." The grant is accompanied with a proviso that the fee of the lands shall be held by the Company in perpetuity and that it shall not have the power to grant, sell or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor or impair the public right of navigation, or be construed to exempt the Company from any Act regulating the rates of wharfage and dockage to be charged in the harbor. (P. 450.)

The opinion then continues: "This clause is treated by the counsel of the Company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical

transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

"The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations the Act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers and wharves and other works as it might choose, and permit any kind of business to be conducted thereon, and to lease them out on its own terms, for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period and renew it at its pleasure. And the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation place no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the Act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally." (Pp. 450 and 451.) * * *

[It will be noticed that in the Chicago case the grant was limited so as to prevent the Company from obstructing or impairing the public right of navigation, or to prevent the legislature from regulating the rates of wharfage or dockage to be charged. In the present case the Central Railroad Company claims an absolute right to the property described in the grant to the exclusion of the public. Indeed, in this very case they deny the right of the public to pass over the *locus in quo* to reach navigable waters.]

"That the state holds the title to the lands under the navigable waters of Lake Michigan within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties. The interests of the people in the navigation of the waters and commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose no valid objections can be made to the grants. It is grants of parcels of lands under the navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied,

do not substantially impair the public interest in the lands and waters remaining that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power;

and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state.

"The harbor of Chicago is of immense value to the people of the state of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its Legislature can deprive the state of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended." (Page 452, line 10 to line 13 on page 454.) * * *

"It is hardly conceivable that the legislature can divest the state of control and management of this harbor and vest it absolutely in a private corporation. Surely such an act of the legislature trans-

ferring the title to its submerged lands and the power claimed by the railroad company, to a foreign state or country would be repudiated without hesitation as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city, a subject of concern to the whole people of the state, should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case. (Pages 454-5.) * * * The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated." (Page 455.)

Again, the opinion states, "every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan by the Act of April 16, 1869, *was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof*, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective." (Page 460.) And again the Court says, "it follows from the views expressed, and it is so declared and adjudged, that the state of Illinois is the owner in fee of the submerged lands consti-

tuting the bed of Lake Michigan, which the third section of the Act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the Act of April 15, 1873, repealing the same is valid and effective for the purpose of restoring to the state the same control, dominion and ownership of said lands that it had prior to the passage of the Act of April 16, 1869." (Pages 463-4.)

We submit herewith a map of the City of Elizabeth on which tracts numbers 8 and 9 are displayed in red. Tract number 9 fronts on Staten Island Sound and the Elizabeth river for a distance of 795 feet. (See defendant's exhibit 36, Book of Exhibits, p. 147.) Tract number 8 fronts on Staten Island Sound and Newark Bay in front of the most thickly settled part of the city for a distance of 3,369.6, making the total extent of the alleged grant in front of the built-up portion of the city 4,164.6 feet.

We also submit a diagram on which tract number 10 is displayed. That tract is north of the Central Railroad and fronts on Newark Bay for a distance of 345.6 feet.

It will be observed that a much larger proportion of the water front and harbor of Elizabeth is comprised within the grant in question than was comprised in the grant in the Chicago case.

If the grant of November 12, 1874, is invalid in so far as it purports to convey a large part of the water front and harbor of Elizabeth, it is necessarily invalid as to the *locus in quo*. We have a right to call the validity of the grant in question in this suit, and collaterally anywhere, if the riparian commissioners *had no power to make it. Fitzgerald* v. *Fraunce*. 17 Vr., 536.

This cause has been pending for more than seventeen years, and is now in the Court of last resort, whose paramount duty and purpose are to penetrate to the merits of a matter in litigation and decide it. The learned Judge who presided at the trial of the ejectment suit, and who studied the case carefully as the trial progressed, referring to the grant in question as one of the points of the defence, said to the jury, "I charge you, gentlemen, that there is nothing in that grant, so far as the evidence goes, which will defeat the plaintiff's right to recover if the public highway, prior to that grant, ran to the edge of the waters of the Sound. The case of the Hoboken Land and Improvement Co., in 7th Vroom, was decided by our Court of Errors and Appeals in June, 1873. The grant to the Central Railroad Company of New Jersey was made after that, in November, 1874. Presumably that grant was made subject to the law as it had been declared by our highest Court, *and was not intended to pass any greater right than would have been acquired under the rule of law laid down in that case.* You must accept this as the law for the purpose of this trial. The Court of review will determine that question, and an opportunity will then be had for a more careful consideration than I have been able to give the subject, as to how far the recent decision of the Supreme Court of the United States has changed or modified that rule of law as previously declared in the case in 7th Vroom." The Supreme Court in disposing of the rule to show cause felt constrained to take a different view of the effect of the grant, because of a then recent decision of the Federal Supreme Court,—a decision which that Court has since discredited. Complying with the contemporary status of the law the present information and bill were filed. The Chancellor overruled a demurrer, thus hold-

ing that a good cause of action was set forth. A Vice-Chancellor, on substantially the same facts, reached the opposite conclusion with evident reluctance, feeling bound to concur in views which his judgment did not approve. Without sparing labor, and with infinite patience, the city has urged this cause before the courts for many years, seeking a decision on the merits, confident that a trenchant examination of the law and facts will make it clear to any judicial mind (1) that the *locus in quo* has been part of an important public highway for more than two centuries; (2) that the riparian commissioners had no power to vacate it, and (3) that if they had known that they possessed power to vacate the old highway they never would have exercised it. All of the parties in interest and all of the material needed for a progressive decision are here.

JAMES C. CONNOLLY,
City Attorney.
FRANK BERGEN,
Of Counsel.

Meeting at Taylor's Hotel, Jersey City, September 19, 1873, at 12 o'clock M.

Present Commissioners:—*Lathrop, Randolph* and *McKeen.*

The following preamble and resolution was also adopted:—

WHEREAS, The Board has again considered the subject of the encroachments of the Central Railroad Company of New Jersey upon the lands of the State in the Cove south of Jersey City.

Resolved, That the whole subject including all claims they may present for the consideration of the Commissioners, be referred to the President and Commissioner Olden, with power to fix a price for a grant or lease of all lands owned by the State below high water mark, that they may recommend be granted by the State to the Central Railroad Company of New Jersey.

Meeting held at 63 William Street, New York, on Wednesday, Nov. 5, 1873, at 12 o'clock M.

Present Commissioners:—*Lathrop, Olden, Randolph* and *McKeen.*

THE COMMITTEE to whom was referred the subject of the Central Railroad Company of New Jersey, reported as follows:—

Resolved, That the sum of three hundred thousand dollars be fixed as the price to be paid by the Central Railroad Company of New Jersey, to the State for the lands below high water mark, adjacent to and in front of the uplands owned or controlled by said road, as stated in the schedules or list presented to this Commission.

And as it appears that the Central Railroad for one or more of the pieces or parcels of upland referred to, have contracts or agreements for the conveyance to them, but are not of record Riparian Owners.

Therefore be it resolved, That as to these parcels, the Central Railroad be required to procure from the shore owners of record, their written request or consent that a grant or lease be made to said Company, and upon payment or securing the consideration therefor.

That a grant or lease be made to the Central Railroad Company of New Jersey for said parcels, excepting grants and reservations made by the State, and grants and leases made by this Commission within the limits of the parcels applied for, or of either of them, excepting the grant or lease to the Newark and New York Railroad Company which is intended to be included in this grant or lease.

Which resolution was unanimously adopted:—

Commissioner LATHROP reported that he had requested Governor Parker to meet with the Board this day, to confer with them on the subject of the Central Railroad Company of New Jersey, and that the Governor stated that he could not be present on account of the death of a relative.

R. C. BACOT,
Sec'y.

Meeting at the Executive Chamber at Trenton, July 30th, 1874, at 12 o'clock M.

Present Commissioners:—*Lathrop, Olden, Randolph* and *McKeen* and *Gov. Parker.*

The following resolution was offered by Commissioner Randolph, and adopted.

Resolved, That all papers in relation to the matter of grant to the Central Railroad Company of New Jersey, be referred to Barker Gummere, Esq., Counsel

of the Board, to prepare the Deed according to the terms of the resolution passed this Board November 5, 1873. And that Commissioner Olden and the President be appointed a Committee to notify the Central Railroad Company of New Jersey of such action. The matter to be closed October 1, next for Cash.

R. C. BACOT,
Sec'y.

Meeting at the office of the President.
Nov. 7, 1874, at 11 o'clock A. M.

Present Commissioners:—*Lathrop, Olden* and *McKeen. Barker Gummere,* Counsel.

The matter of Deed to the Central Railroad Company of New Jersey was considered and referred to the Counsel of the Board to prepare same.

Meeting at Taylor's Hotel, J. C. Nov. 12, 1874, at 12 o'clock M.

Present Commissioners:—*Lathrop, Olden, Randolph* and *McKeen. Gov. Parker* and *B. Gummere,* Counsel.

The Commissioners signed certificate of Boundaries of tracts of land to be granted to the Central Railroad Company of New Jersey, and the price to be paid therefor which was ordered to be filed in the office of the Secretary of State, at Trenton.

The Counsel of the Board then presented and read Deed from the State of New Jersey to the Central Railroad Company of New Jersey for lands under water in New York Bay, &c., which was approved and then signed by the Commissioners and the Governor.

As the Central Railroad Company of New Jersey did not produce the Deed or muniments of title for the tract of land lying on New York Bay westerly from Constable Hook and easterly of and adjoining a tract, the title for which was produced, and the right of the State to land under water in front of the tract,

the title for which was not produced, was not included in the grant executed this day, for the State's land under water to the Company, and as if the Company as alleged own the tract, the title for which was not produced, and by reason thereof are riparian owners, the land of the State in front thereof to the exterior line for solid filling was as well as what is described in the grant executed this day, agreed to be conveyed by the State to the Company for the compensation to be paid as agreed upon. The compensation being for that land under water if they are riparian owners as stated, as well as for what was this day conveyed.

Resolved, That upon the production of title which satisfies the Commission, that the Company by Deed or assurances to the Company or to any person or party for the Company, own the said tract of land for which the title by the Company has not been heretofore produced to this Commission and the Commission shall be satisfied that the Company are riparian owners. A Grant be made by the State to the Company for the land of the State in front thereof without further or other than nominal consideration.

R. C. BACOT,
Sec'y.

Meeting at the Trenton House at Trenton, Nov. 24, 1874, at 1 o'clock P. M.

Present Commissioners:—*Lathrop, Olden, Randolph* and *McKeen.*

The Chairman reported that he had closed the delivery of the Deed or grant to the Central Railroad Company of New Jersey, delivering the same to John Taylor Johnston, Esq., President of the Company, and receiving three notes of the Central Railroad Company for $100,000 each, bearing date October 1, 1874, payable in 6, 9 and 12 months to the order of John Taylor Johnson, with interest from the date and endorsed by him to the order of the Riparian Commissioners, which notes amount to $300,000, which the

Company are to pay to the State as the consideration in the Deed or Grant, which notes are sealed in an envelope addressed to the "Riparian Commissioners" and deposited in the vault of the Union Mutual Insurance Company in the City of New York, subject to the order of the Commissioners.

And the Chairman further reports that before delivering the Deed he thought it important that the Central Railroad Company should enter into a contract to save the State harmless, from any claim that might be made by the Newark and New York Railroad Company, for a lease or grant of lands to that Corporation, and before closing the grant to the Central Railroad Company, he had a paper drawn and signed by the President of the Central Railroad Company and himself in behalf of this Commission, which is placed on file.

And the Chairman recommended that the notes be deposited in the Trenton Banking Company at Trenton, N. J., and that a receipt for the package be taken in the name of this Commission.

On motion:—*Resolved,* That the action of the Chairman is approved, and that the notes of the Central Railroad Company be deposited with the Trenton Banking Company and a receipt taken as recommended.

Meeting at the State House at Trenton,
Dec. 12, 1874, at 10 o'clock A. M.

Present Commissioners:—*Lathrop, Olden, Randolph* and *McKeen.*

The President laid before the Board three notes made by J. Taylor Johnston, President, received by him from the Central R. R. Co. of New Jersey for grant of lands in New York Bay, &c., together with a letter to be sent the Governor in reference thereto, being as follows:—

New York, November 14, 1874.

To his Excellency,

JOEL PARKER, *Governor,*

Dear Sir:—

I respectfully report that the Grant to Central Railroad Company of New Jersey has been this day delivered by John Taylor Johnston, Esq., President of said road, and, that in making settlement, I made a point that your understanding was, that the notes bear date Oct. 1, 1874 in place of November 12, 1874, as claimed by Mr. Frelinghuysen which Mr. Johnston acceded to and handed me three notes for $100,000 each, of Central Railroad, as follows:—

$100,000. New York, October 1, 1874.

Twelve months after date the Central Railroad Co. of New Jersey, promise to pay to the order of John Taylor Johnston One Hundred Thousand..... Dollars at the Bank of Commerce in New York, value received, with interest from date at the rate of six per cent. per annum. Central R. R. Co. of New Jersey per Samuel Knox, Treas.

John Taylor Johnston, President.

$100,000. New York, October 1, 1874.

Nine months after date the Central Railroad Company of New Jersey promise to pay to the order of John Taylor Johnston, One Hundred Thousand..... ....Dollars at the Bank of Commerce in New York, value received, with interest from date at the rate of six per cent. per annum. Central R. R. Co. of New Jersey per Samuel Knox, Treas.

John Taylor Johnston, President.

$100,000. New York, October 1, 1874.

Six months after date the Central Railroad Company of New Jersey promise to pay to the order of John Taylor Johnston One Hundred Thousand..... ....Dollars at the Bank of Commerce in New York, value received, with interest from date at the rate of six per cent. per annum. Central R. R. Co, of New Jersey per Samuel Knox, Treas.

John Taylor Johnston, President.

All of them endorsed by John Taylor Johnston, Esq., and payable to the order of the Riparian Commission which are sealed up and deposited in Bank for safe keeping until due, when they will be collected and the principal sum together with the interest will then be paid into the Treasury of the State unless otherwise ordered by the Legislature.

Truly and respectfully yours,

F. S. LATHROP,
Chairman.

On motion the said notes were sealed up and handed to Commissioner Olden to be deposited in the Trenton Banking Co. at Trenton, for safe keeping.

Commissioner Olden presented receipt from said Bank for said notes as follows:

Received, December 12, 1874, of Charles S. Olden, Riparian Commissioner, three notes of the Central Railroad Company of New Jersey for safe keeping, for one hundred thousand dollars each, dated 1st October, 1874, at six, nine and twelve months after date.

DICKINSON,
President of Trenton Banking Co.

IN CHANCERY OF NEW JERSEY.

To his Honor, Alexander T. McGill, Chancellor of the State of New Jersey.

Informing showeth unto your honor, John P. Stockton, attorney-general of the State of New Jersey, in behalf of the said State, and at and by the relation of the city of Elizabeth, a municipal corporation of said State, and also humbly complaining showeth unto your honor, your orator the said city of Elizabeth; that from time immemorial a common highway has existed through and across the said State, and through and across the said city, extending from a point on the Delaware river in the city of Trenton, to a point on Staten Island Sound in the city of Elizabeth, and connecting with the navigable waters of the said Sound, and that said highway has been for more than a century and now is, and of right should continue to be and remain a common highway, leading to, from and across the said State, and to, from and across the said city, equally free and open, for the use, benefit and advantage of the said State, and of the said city.

That on the sixth day of November, 1874, the Central Railroad Company of New Jersey made an application in writing to the governor of this State, and to the commissioners appointed under an act entitled "Supplement to an act entitled 'An act to ascertain the rights of the state and of the riparian owners in the lands lying under the waters of the Bay of New York, and elsewhere in this state, approved April 11, 1864,'" for a grant from the said state of the lands under tidewater which lay in front of twelve certain tracts of riparian lands, situated in the counties of Hudson, Essex, Union and Middlesex, fronting on the waters of the Bay of New York, the Kill Von Kull and the Staten Island Sound, where the tide ebbs and flows, which tracts were described in the said applica-

tion; that in the said application the said company stated and claimed that they were the owners of some of the said tracts of land therein described, and by the written consent and contracts in writing of the owners of the other tracts of lands therein described were invested with the rights of riparian owners as to said tracts; that the description of the ninth tract of land as set out in the said application is as follows:

Beginning at a point where the southeasterly extension of the centre line of Marshall street in the city of Elizabeth intersects the former ordinary highwater mark in the northerly shore of Staten Island Sound; thence southerly in said high water mark along the Sound and up Elizabeth Creek to South Front street; thence northerly and easterly along the boundary lines of the Elizabethport and New York Ferry Company to the place of beginning.

That annexed to the part of the said application, containing the foregoing description of the said ninth tract of land, was a map or diagram purporting to display said tract and the location of the said common highway in relation thereto, a copy of which map is hereto annexed, marked "Schedule A" and to which reference is hereby made.

And the attorney-general aforesaid at and by the relation aforesaid, and the said the city of Elizabeth further show that the Central Railroad Company of New Jersey never owned the said ninth tract of land, or any part thereof; that on the sixth day of November, 1874, the American Dock and Improvement Company, the Central New Jersey Land Improvement Company and the Elizabethport and New York Ferry Company, corporations created by or organized under the laws of this State, executed a certain paper writing, purporting to give consent to the said riparian commissioners and to the said railroad company and to all others whom it might concern, that a grant of land under water in New York Bay and elsewhere in front of the shore belonging to them might be made to said railroad company, a copy of which writing is hereto

annexed, marked "Schedule B" and to which reference is hereby made.

And the attorney-general aforesaid at and by the relation aforesaid, and the said the city of Elizabeth further show that none of the said corporations that executed said paper writing purporting to give consent to the making of a grant as aforesaid ever owned any land within the lines of said common highway or in front of or below the terminus thereof, nor any estate or interest therein; that at the time when said consent was given the said ferry company owned two tracts of land included in the description of the said ninth tract, and fronting on Staten Island Sound, one of said two tracts lying southwest and the other northeast of said common highway and binding thereon.

And the attorney-general aforesaid at and by the relation aforesaid, and the said the city of Elizabeth, further show that neither at the time the said application was made nor at any other time did the said railroad company have any right of riparian ownership in or to the said ninth tract of land, or in or to any part thereof, except by virtue of the writing aforesaid, purporting to give consent to the making of a grant; that no other or further information was submitted to the said governor and commissioners as to the title to, or rights of riparian ownership or boundaries of the said tract, or as to the location and terminus of the said common highway than that contained in the said application; being the description of said ninth tract, and said map or diagram, and that on the twelfth day of November, eighteen hundred and seventy-four, the said governor and commissioners in pursuance of, and relying on the said statements and information contained in the said application, made, executed and delivered, a certain grant to the said railroad company, purporting to convey to said company certain lands in front of said ninth tract described in said grant as follows:

"All that tract of land in the city of Elizabeth, in the county of Union and State of New Jersey, part of

which was formerly under but now is above the tide waters of the Arthur Kill or Staten Island Sound, and part of which is still under the tide waters of the said Sound, described as follows: Beginning at the original high water mark on the westerly shore of said Sound, at a point in line with the centre line of Marshall street extended southeasterly, and from thence running south twenty-eight (28) degrees and twenty-five (25) minutes east to the exterior wharf line established by the commissioners appointed under the authority of the act entitled 'An act to ascertain the rights of the state and of the riparian owners to the lands lying under the waters of the Bay of New York and elsewhere in this state,' approved April 11, 1864, and the supplements thereto (said exterior wharf line being at a distance of two hundred and twenty-two (222) feet and three-tenths (3-10) of a foot from the southeasterly line of Front street, measured to the centre line of Marshall street); thence along said exterior wharf line, first, south forty-six (46) degrees and thirty (30) minutes west one hundred and forty-five (145) feet and four-tenths (4-10) of a foot; second, south forty-four (44) degrees and forty (40) minutes, west, one hundred and fifty-seven (157) feet and eight-tenths (8-10) of a foot; third, south, sixty-one (61) degrees and twenty-four (24) minutes, west sixty-two (62) feet and five-tenths (5-10) of a foot; fourth, south, eighty-five (85) degrees, west, one hundred and thirty-nine (139) feet and two-tenths (2-10) of a foot; fifth, north, fifty-six (56) degrees and nineteen (19) minutes, west, two hundred and sixty-five (265) feet and six-tenths (6-10) of a foot; sixth, north, seventy-six (76) degrees, west, twenty-four (24) feet and five-tenths (5-10) of a foot (the last two courses above mentioned being along the Elizabeth river) to the original high water mark on the northerly shore of the Elizabeth river; thence, southeasterly along the original high water mark and northeasterly along the original high water mark of the Arthur Kill or Staten Island Sound to the place of beginning.

"And likewise any and all lands lying under water in front of that above described to any point or points to which the said exterior wharf lines may hereafter be legally extended, the same to be used agreeably to the terms of such extension.

"Together with all and singular the hereditaments and appurtenances thereunto belonging, and all the rights of the said State in said lands." Said grant being recorded in the office of the clerk of the county of Union, in Book 101 of deeds on page 355.

And the attorney-general aforesaid, at and by the relation aforesaid, and the said city of Elizabeth further show that the statements in the said application, together with the representation on the said map, that the said railroad company was the riparian owner or owners of so much of the said ninth tract of land as lay between the lines of said common highway, were false, and skilfully calculated and intended to mislead and deceive and did deceive the said governor and commissioners; that at the time the said application and grant were made the said common highway extended to and connected with the navigable waters of said Sound, and ran between the said two tracts of land owned by the said ferry company, as shown on the diagram hereto annexed marked "Schedule C" and to which reference is hereby made; and that so much of said grant as purports to convey to said railroad company the lands, or any interest in the lands, between the lines of said common highway and below original high water mark therein was obtained by means of said false suggestion and untrue statements in said application and is illegal and void.

And the said attorney-general, at and by the relation aforesaid and the said city of Elizabeth further show that since the making and delivery of the said grant the said railroad company have taken and held exclusive possession of that part of the said common highway lying below original high water mark, being a tract of land described as follows:

Beginning at a point in the southwesterly line or

side of the part of said common highway, now known as Elizabeth avenue, distant one hundred and sixty-eight feet along said line from the southeasterly line of Front street; thence southeasterly in direct continuation of said line of said common highway one hundred and thirty-two feet, more or less, to the exterior wharf line established by the commissioners appointed under the authority of the act entitled "An act, etc;" thence northeasterly along said wharf line to a point distant ninety-four feet at right angles from said line of said common highway; thence northwesterly parallel with said line of said common highway, and ninety-four feet distant therefrom one hundred and thirty-two feet, more or less, to a point distant one hundred and sixty-eight feet southeasterly from the said line of Front street and thence southwesterly ninety-four feet to the place of beginning; and claim the title and right to exclusive possession of the same by virtue of said grant and have laid and maintained railroad tracks thereon, and have used and still use and occupy said part of said common highway in their business of transporting persons and property for tolls, fares, hire and reward, collected by the said company, and have obstructed and prevented the use of the same as a public highway without any legal warrant, charter or grant therefor; all of which liberties, privileges and franchises aforesaid the said railroad company during all the time since the making and delivery of the said grant have usurped, and still do usurp upon the said the State of New Jersey to the great damage and prejudice of the said State.

And the attorney-general aforesaid at and by the relation aforesaid, and the said city of Elizabeth further show that on or about the twenty-sixth day of September, eighteen hundred and eighty-eight, the said the city of Elizabeth, commenced an action of ejectment against the said railroad company in the Circuit Court of the county of Union to recover possession of said part of said common highway; that in said action a plea was filed by the said railroad com-

pany claiming title to said part of said common highway; that in said action a demand for a bill of particulars of the said railroad company's claim or title to said part of said common highway was made by the said city, and in compliance therewith the said railroad company, among other things, stated that they claimed title to the said part of said highway under and by virtue of said grant; that said ejectment suit was tried at the October term eighteen hundred and eighty-nine of said Circuit Court; that on said trial said grant was offered in evidence on the part of the said railroad company and received; that a verdict of guilty in said cause was rendered against the said railroad company; that an order to show cause why said verdict should not be set aside and a new trial granted was thereupon made by the said Circuit Court, and certified in the Supreme Court of this State for its advisory opinion; that said application for a new trial was argued before said Supreme Court at its last February term, and all of the reasons alleged by the said railroad company against said verdict and for a new trial were decided to be invalid, except that depending upon the said grant; that said Supreme Court decided that the said city could not call in question, or the said Circuit Court pass upon, the validity of the said grant in said ejectment suit, and therefore, and on account of said grant only the said Circuit Court was advised by said Supreme Court to set aside said verdict and order a new trial of said cause; and in pursuance of said advisory opinion said verdict has been set aside, and a new trial of said cause ordered, and that it is the intention and purpose of the said railroad company, on the coming trial of the said cause to offer said grant in evidence, and to rely upon the same as a defence to the said action and to claim title to, and right to possession of said part of said common highway by reason thereof.

In tender consideration whereof and forasmuch as your informant and orator are without adequate rem-

edy in the premises at and by the strict rules of the common law, and can only obtain adequate relief in this honorable court where matters of this nature are properly cognizable and relievable.

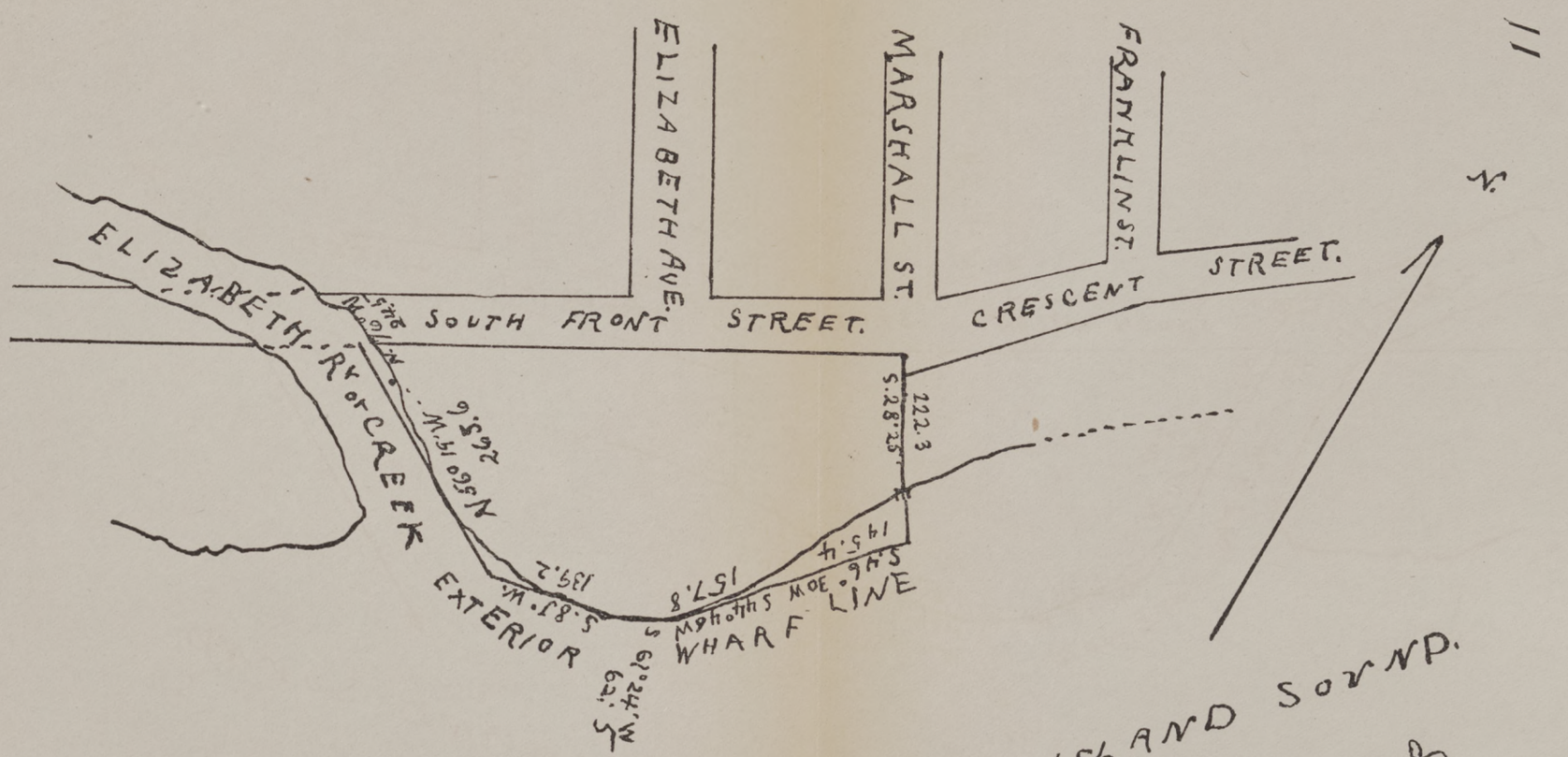
To the end, therefore, that the said the Central Railroad Company of New Jersey, The American Dock and Improvement Company, The Central New Jersey Land Improvement Company and The Elizabethport and New York Ferry Company, and their confederates when discovered may to the utmost of their respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid (but without oath) and that as fully and particularly as if the same were here again repeated and they and every of them distinctly interrogated thereto; and that it may be adjudged and decreed that the said grant dated November twelfth, eighteen hundred and seventy-four in so far as it purports to convey to the said the Central Railroad Company of New Jersey the said part of said common highway herein particularly described, or any part thereof, or any right as riparian owner to acquire lands under water in front thereof to any point or points to which the exterior wharf line may be extended is illegal and inoperative, and that the said the Central Railroad Company of New Jersey, The American Dock and Improvement Company, The Central New Jersey Land Improvement Company and The Elizabethport and New York Ferry Company, have no estate or title in or to any part of said common highway or right to possession thereof under or by virtue of said grant; and that the said grant may be corrected and reformed by striking out so much thereof as purports to convey to the said the Central Railroad Company of New Jersey said part of said common highway, and any estate, title or exclusive right of, in or to any land in front of the same; and that the said the Central Railroad Company of New Jersey may be restrained and prohibited from offering or giving said grant in evidence on the trial of said

ejectment suit, or from making defence to said action of ejectment by means thereof and that your honor may grant such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your informant and orator not only the State's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said the Central Railroad Company of New Jersey restraining said company from offering or giving said grant in evidence on the trial of the said ejectment suit now pending in the Union County Circuit Court, in which the city of Elizabeth is the plaintiff, and the said Central Railroad Company of New Jersey is defendant, or from making defence to said action of ejectment by means thereof; but also the State's writ of subpoena issuing out of and under the seal of this honorable court to be directed to the said the Central Railroad Company of New Jersey, The American Dock and Improvement Company, The Central New Jersey Land Improvement Company and the Elizabethport and New York Ferry Company, commanding said companies by a certain day and under a certain penalty to be therein expressed to be and appear before your honor in this honorable court, then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein as to your honor shall seem meet and as shall seem agreeable to equity and good conscience.

JOHN P. STOCKTON,
Attorney-General.

FRANK BERGEN,
Solicitor for and of Counsel with Relator and Complainant.



ARTHUR-KILL or STATEN ISLAND SOUND.

Schedule A.

Scale 200 ft per inch

SCHEDULE B.

Consent of The American Dock Improvement Company and others, that the Central Railroad Company of New Jersey shall receive a grant for riparian lands.

"Whereas, The Central Railroad Company of New Jersey is about to make application to the commissioners appointed under the act of the legislature of the State of New Jersey, approved March 31, 1869, entitled supplement to an act entitled 'An act to ascertain the rights of the state and of riparian owners in lands lying under the waters of the Bay of New York and elsewhere in this state, approved April 11, 1864, and the supplements thereto,' for a grant of lands under water in New York Bay and elsewhere;

And whereas, we, the undersigned, claim to be the owners of the shore on which some of said lands front or are bounded:

Now, therefore, we, whose names are hereto signed, for a valuable consideration to us paid by the said railroad company, hereby give our written consent as well to the said commissioners as said railroad company as to all others that it may concern, that the said land may be granted to the said The Central Railroad Company of New Jersey, their successors and assigns, by the said commissioners, as fully and completely, in all respects, as if the said railroad company were the owners of the said shore.

In witness whereof, we have hereunto respectively set our hands and seals, this sixth day of November, in the year of our Lord one thousand eight hundred and seventy-four.

AMERICAN DOCK AND IMPROVEMENT CO.,

(L. S.) Per JOHN TAYLOR JOHNSTON,

President.

CENTRAL NEW JERSEY LAND IMP. CO.,
(L. S.) Per JOHN TAYLOR JOHNSTON,
President.

ELIZABETHPORT & NEW YORK FERRY CO.,
(L. S.) Per JAS. C. FAIRBANK,
President.

JOHN TAYLOR JOHNSTON."

ELIZABETH AVE.
MARSHALL ST.
FRANKLIN ST
SOUTH FRONT STREET
CRESCENT STREET.
ARTHUR-KILL or STATEN ISLAND SOUND.
Schuhle C.
Scale 200 ft. per inch

DEMURRER OF DEFENDANTS TO AMENDED INFORMATION AND BILL OF COMPLAINANTS.

The demurrer of The Central Railroad Company of New Jersey, The American Dock and Improvement Company, The Central New Jersey Land Improvement Company and the Elizabethport and New York Ferry Company, defendants to the amended bill of complaint of the attorney-general in behalf of the State and *ex rel* the city of Elizabeth and the city of Elizabeth, complainants.

The defendants by protestation, not confessing all or any of the matters and things in the complainants' amended bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show, that the complainants have not in and by their said amended information and bill made or stated such a case as entitles them in a court of equity to any discovery from the defendants or to any relief against them as to the matters contained in the said bill or any of such matters.

And for further cause of demurrer the defendants show that it appears by the said amended information and bill that the same is exhibited against the defendants for distinct matters and causes for and in respect of which the city of Elizabeth has no interest such as entitles it to any relief against the defendants or any of them or the aid of the State in obtaining any relief or can be benefited by any decree against the defendants or is entitled to the co-operation or benefit of the attorney-general in obtaining any and so there is a misjoinder of parties complainants.

And for further cause of demurrer, these defendants show, that the said complainants, have not by their said amended bill and information, shown any sufficient matter of equity or entitle them to the re-

lief sought in and by their said amended information and bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, these defendants do demur thereto and humbly pray the judgment of this honorable court whether they should be compelled to make any further or other answer to the said amended bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

B. WILLIAMSON,
Solicitor of Defendants.

I certify that I have perused the complainants amended information and bill in the above-stated cause, and that the above demurrer is well founded in point of law.

B. WILLIAMSON,
Counsel with Defendants.

Duly verified.

ORDER OVERRULING DEMURRER.

This cause coming on to be heard before the court in the presence of Frank Bergen, of counsel with the informant and complainant, and R. V. Lindabury, of counsel with the defendants, and the chancellor having heard the arguments of the counsel of the respective parties on the demurrer filed in the above-stated cause:

It is, on this fourth day of March, in the year one thousand nine hundred and one, ordered that the said demurrer be overruled with costs, and the defendants answer the complainants' bill within thirty days after the date of service of a copy of this order on their solicitor, and if they fail to do so the said information and bill be taken as confessed against them.

W. J. MAGIE,
Chancellor.

ANSWER.

The joint and several answer of the defendants, The Central Railroad Company of New Jersey, The American Dock and Improvement Company, The Central New Jersey Land Improvement Company and The Elizabethport and New York Ferry Company, to the amended information and bill of complaint of the attorney-general, and *ex rel* the city of Elizabeth, and the city of Elizabeth, complainants.

These defendants respectively answering say:

They admit that a common highway has existed through and across the State of New Jersey, from the river Delaware to the city of Elizabeth, and through and across the city of Elizabeth, in the direction of and towards the navigable waters of Staten Island Sound, but they deny that said common highway extended to and connected with the said navigable waters.

They admit that the defendant, The Central Railroad Company of New Jersey, did make an application to the governor and riparian commissioners on the sixth of November, eighteen hundred and seventy-four, for a grant of lands under tide-water which lay in front of certain tracts of land in the several counties stated in the information and bill and as stated and described in said application.

They further admit that the defendants, The American Dock and Improvement Company, The Central New Jersey Land Improvement Company, and The Elizabethport and New York Ferry Company, did execute the paper writing referred to in the information and bill; they aver that said paper writing not only purported to, but did give consent to the riparian commissioners and to the defendant, The Central Railroad Company of New Jersey, that a grant of land under water in New York Bay and elsewhere in front of the shore belonging to them might be more to the defendant, The Central Railroad Company of New Jersey.

The defendants further answering say, that they deny the allegation of the information and bill, that none of the corporations executing said paper writing ever owned any land within the lines of said common highway, or in front of or below the terminus thereof, nor any estate or interest therein; they aver that the defendant, The Elizabethport and New York Ferry Company was the owner of the fee of the land within the lines of said common highway, and at the time of the making of the grant by the State of New Jersey through the riparian commissioners dated November twelfth, eighteen hundred and seventy-four, to the defendant, The Central Railroad Company of New Jersey, the last named company was in possession of the said land. They deny the allegation, that neither at the time the said application was made nor at any other time did the defendant, The Central Railroad Company of New Jersey, have any right of riparian ownership, in or to the ninth tract of land or in or to any part thereof, except by virtue of the paper writing aforesaid; they aver that the riparian commissioners had full power and authority to make the grant, notwithstanding said railroad company may not have owned the *ripa* in fee, and even without the consent of The Elizabethport and New York Ferry Company, owner of the fee within the lines of said common highway; that it was unnecessary that other or further information be submitted to the governor and riparian commissioners as to the title to, or rights of riparian ownership or boundaries of the ninth tract described in said application, or as to the location and terminus of said highway, than that contained in said application.

They admit that a grant was made, executed and delivered, by the governor and riparian commissioners to the defendant, The Central Railroad Company of New Jersey, dated November twelfth, eighteen hundred and seventy-four for the tract of land described in the information and bill, but they deny that said grant was made solely in pursuance of or solely in

reliance upon the statements and information contained in the application. They deny further, that the statements in said application, together with the representation on the said map were to the effect, or purported that said railroad company was the riparian owner of so much of the ninth tract described in the grant as lay between the lines of said common highway; they also deny that statements or representations contained in or appearing upon said application or map were false, or were calculated or intended to mislead or deceive, or did mislead or deceive the governor and commissioners. They admit the common highway did run between two tracts of land owned by the ferry company as stated in the information and bill, but they deny that said common highway extended to and connected with the navigable waters of the Sound; they further deny that so much of said grant as conveys to said railroad company the lands or any interest therein between the lines of said common highway, and below original high water mark therein, was obtained by means of false suggestion or untrue statements in said application, or that said grant is illegal and void as to said last mentioned lands.

They admit that the defendant, The Central Railroad Company of New Jersey, took possession of the land described in the information and bill on the making and delivery of said grant by the State of New Jersey, and have since held such possession, but they deny that the same is within the common highway, or that the common highway has been obstructed; that it is true that the defendant, The Central Railroad Company of New Jersey have used said land for railroad purposes, as they believe they had the right to do, and that so to do was within their chartered powers, and that they have not usurped upon the State of New Jersey to its great damage and prejudice.

These defendants admit what is said in the information and bill respecting the action of ejectment com-

menced in the Circuit Court of Union County and what occurred in consequence thereof.

These defendants further answering, say: That after the making and delivering of the grant by the State to the defendant, The Central Railroad Company of New Jersey, the said company entered into possession of the ninth tract of land therein described and expended large sums of money in extensive improvements thereon and in connection with other lands lying on either side of said ninth tract, and have ever since continued in possession; that because of the laches of the complainant in complaining, or in seeking relief from the fraud alleged in the information and bill it is inequitable that a decree be made by this court decreeing that said grant is illegal and inoperative, or that said railroad company has no estate or title in or to any part of what is alleged to be a common highway, or that said grant shall be corrected and reformed by striking out so much thereof as conveys to said railroad company what is alleged to be a part of said common highway, or any estate, title or exclusive right of, in or to land in front of the same, or that said company be restrained or prohibited from offering or giving said grant in evidence on the trial of said ejectment suit, or from making defence to said action of ejectment by means of said grant.

These defendants further answering say, that they paid to the State of New Jersey the sum of three hundred thousand dollars for the land described in said grant, and that the complainants or any one for them have not offered to repay or return to these defendants, or any one of them, any part of said sum of three hundred thousand dollars, nor have the complainants tendered themselves ready to repay or return to these defendants, or any one of them, any part of said sum of three hundred thousand dollars; and that until they have so offered to return or repay or tendered themselves ready so to do they are not entitled to the relief prayed for; and these defendants humbly pray

to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN L. CONOVER,
Solicitor for Defendants.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

(SEAL.) By

GEO. F. BAER,
President.

JOHN T. PRITCHARD,
Asst. Secretary.

THE AMERICAN DOCK AND IMPROVEMENT COMPANY,

(SEAL.) By

GEO. F. BAER,
President.

JOHN T. PRITCHARD,
Asst. Secretary.

THE ELIZABETHPORT AND NEW YORK FERRY COMPANY,

(SEAL.) By

GEO. F. BAER,
President.

JOHN T. PRITCHARD,
Asst. Secretary.

THE CENTRAL NEW JERSEY LAND IMPROVEMENT COMPANY,

(SEAL.) By

ROBERT W. DE FOREST,
President.

H. W. DOUTY,
Secretary.

STATE, COUNTY AND CITY OF NEW YORK. } *ss.*

The answer of the defendants, The Central Railroad Company of New Jersey, The American Dock and Improvement Company, The Elizabethport and New York Ferry Company, and The Central New Jersey Land Improvement Company, was taken this first day of October, in the year nineteen hundred and one, before me, under the respective common seals of the said corporations, as by said seals, thereto affixed, appear.

PIERRE P. GARVEN,
Master in Chancery of New Jersey.

The Baker Printing Co., Law Case Printers, 251 Market Street, Newark, N. J.

In Chancery of New Jersey.

April 22, 1902.

Between

THE ATTORNEY-GENERAL IN BEHALF OF THE STATE AND EX REL THE CITY OF ELIZABETH, AND THE CITY OF ELIZABETH,

Complainants,

and

THE CENTRAL RAILROAD CO. OF NEW JERSEY, THE AMERICAN DOCK IMPROVEMENT COMPANY, THE CENTRAL NEW JERSEY LAND AND IMPROVEMENT COMPANY, AND THE ELIZABETHPORT AND NEW YORK FERRY CO.,

Defendants.

The transcript of shorthand notes of testimony and proceedings in the above stated cause before Hon. John R. Emery, *V. C.*, at Newark, N. J., in the presence of C. Addison Swift and Frank Bergen, counsel for complainants, and John L. Conover and R. V. Lindabury, counsel for defendants.

JOHN C. PAYNE, sworn.

Direct examination by Mr. Bergen.

Q Where do you reside?

A Jersey City.

Q What is your occupation?

A I am a civil engineer.

Q Are you connected with the board of riparian commissioners now?

A I am secretary and engineer of the board of riparian commissioners.

Q How long have you held that position?

A I have been assistant engineer for perhaps twenty years, and the secretary and engineer for about five years.

Q Have you charge of the records of their applications in making grants of land under water?

A Yes, sir.

Q You were subpoenaed, I believe, to produce the application of the Central Railroad Co., dated on the sixth of November, 1874, for the grant in question; have you got that record here?

A I have a copy of the application.

Q Where is the original application?

A My impression is it is filed with the Secretary of State at Trenton.

Q They are not kept in your office?

A No, sir, they are filed with the Secretary of State after a certain time.

Q Have you got a copy of that application?

A There is a copy of the application.

Mr. Lindabury produces certified copy of application.

Q Just turn to your record in your book; does this show a map?

A No, the record of the application has no maps attached to it.

Q But is there a map there connected with it?

A But our map is attached to the certificate of the riparian commissioners of the boundaries and the price fixed by the commission on the application.

Q What page is that map in your book?

A The application is recorded in Liber B, page 247, and the certificate of boundaries to which the maps are attached in the book is Liber B, page 257.

Q (*By the Court.*) That is certificate of boundaries attached to the grant?

A It is certificate of boundaries made by the commissioners.

Q (*By the Court.*) Just tell exactly why that map of boundaries comes to be part of the proceedings, how does it come in?

A I think that it will be found that the application asks the commission to certify the boundaries and the price, and this certificate, as I understand it, is in accordance with that application and the law requiring them to furnish such a certificate.

Q (*By the Court.*) Well, that certifies the boundaries and the price paid and a map?

A I don't know what relevancy the maps have to this—

Q Now, on page 269 of this book I call attention to this map specially?

A Liber page 269, map No. 9, which includes the tract in question.

Q I suppose you don't know who made that map, do you?

A Yes, I think Mr. Bacot made that map, from the appearance of it.

Q Isn't it a copy?

A I think it is a copy of a map made by Jacob M. Clark.

Record offered in evidence and marked Exhibit C. 1.

Mr. Lindabury. There is no objection to the admission of this record in evidence, and no insistment that the original ought to be produced.

WILLIAM HOWARD, sworn.

Direct examination by Mr. Bergen.

Q You are the clerk of Union County, are you?

A Yes, sir.

Q How long have you been clerk?

A Since 1894.

Q You were subpoenaed to bring the record of the ejectment suit of the city of Elizabeth against the Central Railroad Company, begun in September, 1888 and tried in October, 1889. Have you got the record here?

A Yes, sir; I have the papers.

Q What papers are they?

A The papers pertaining to the trial, the pleadings and orders and notices filed in the suit, everything apparently.

Mr. Bergen. I offer in evidence the record in the ejectment suit, the declaration, plea, replication, verdict and rule setting the verdict aside.

Mr. Lindabury. I object to anything except the record proper, which consists of pleadings.

Admitted subject to objection.

It is admitted in the case that Governor Parker and all of the riparian commissioners who signed this grant of November 12, 1874, and Mr. Bacot, the secretary of the board, are dead.

JOHN C. PAYNE, recalled.

Direct examination by Mr. Bergen.

Q Kindly tell us where Enyard's dock is, referred to in the riparian act of 1869?

A It was at the foot of Ingham avenue, in the city of Bayonne, on the Kill von Kull, about half way between Constable Hook and Bergen Point.

LOUIS H. NOE, sworn.

Direct examination by Mr. Bergen.

By the Court.

Q You produce here a map, what is this map before you?

A It is a copy of an original map which Mr. Meyer made for us in exchange for the original which was given to Mr. Isham.

Q Mr. Isham has the original Joseph DeCamp map?

A Yes, sir.

Cross examination by Mr. Lindabury.

Q Have you seen the original?

A We had it in the office a great many years.

Q Do you know it is a true copy?

A Only it was made by Mr. Meyer for us and supposed to be an exact copy. Mr. Isham wanted the original map and we told him we would have a copy made.

By Mr. Bergen.

Q Mr. Meyer isn't living now?

A No, sir.

Q Does this purport to show Elizabeth avenue, this map?

A I always supposed the street on it was on the line of the present street.

Q What do you understand to be the representation of Elizabeth avenue on this map?

A That broad space colored brown towards the left of the map.

Q And coming to the south near Elizabethtown creek?

A Yes, sir.

Q Now, you will observe that by this copy the street doesn't appear to come quite to the Sound; I will ask you whether or not you have ever compared this copy with the original in that respect to ascer-

tain whether or not this correctly discloses the nearness of the approach of the avenue to the Sound?

A I never compared it.

Q So that you have no definite recollection as to whether or not in that respect this is an exact copy?

A No, I don't know about that.

Q Is there any date on that?

A Yes, 1797.

Map offered in evidence and marked Exhibit C. 2.

JOHN E. HARRUP, sworn.

Direct examination by Mr. Bergen.

Q What is your occupation?

A Bookkeeper in the Chancery Clerk's office.

Q Do you know whether the clerk in Chancery was subpoenaed to produce the record of the partition suit of Trumble vs. Gibbons, begun in 1821 and ended in 1824?

A I do.

Q Did you come as his deputy in that matter?

A I did.

Q Did you bring that record, including the map?

A I brought what records we have, but it doesn't include any map.

Q Have you any record in that suit?

A No, sir.

Q Do you know where that record is?

A I do not; couldn't find it; made diligent search for it among the old papers, but it could not be found.

By the Court.

Q When you speak of the records, you mean the original files?

A Yes, sir.

Q There is a record of the suit in the office?

A We couldn't find it.

Q What have you got there?

A This is another suit of a similar name.

Q I understand you to say that you made an examination and can't find the partition proceedings of Trumble against Gibbons, begun in 1821?

A That is right.

The Court. Did you have them in the ejectment suit?

Mr. Bergen. Yes, and on the rule to show cause in Elizabeth, and the map now hung up and marked 1824 was among the papers in the partition proceedings referred to; that is a copy.

Certified copy of the map filed September 7, 1824, offered in evidence and marked Exhibit C. 3.

OSWALD MEYER, sworn.

Direct examination by Mr. Bergen.

Q You reside in Elizabeth?

A Yes, sir.

Q You are a son of the late Ernest L. Meyer?

A Yes, sir.

Q Did you succeed to his business and have the custody of his records and maps, etc?

A Yes, sir.

Q Have you a copy of what we commonly call the Centennial Map?

A I have.

Q Have you got it with you?

A Yes, sir; this is the map. (Witness produced map.)

Q Is that the identical one used on the trial of the ejectment suit?

A Yes, sir.

Q I call your attention to another map on the easel here entitled Map of the city of Elizabeth, N. J., Ernest L. Meyer, 1856; do you know whether that is the original map used on the trial of the ejectment suit, or a copy?

A That is an exact copy of the original—all those lithographs, that is it would be the same kind of a map.

Q It is the duplicate which was used on that suit?

A Yes, sir.

Q Was there any other map made by your father under date of 1856 except that?

A No, sir, that is the only one.

MERTON E. DELAMATER, sworn.

Direct examination by Mr. Bergen.

Q Where do you reside?

A Elizabeth, at present.

Q What is your occupation?

A Surveyor.

Q By whom are you employed?

A Mr. Luster, the city surveyor, I am his assistant.

Q I show you the map or diagram marked D. 1, will you kindly tell us who made that?

A I made that map.

Q What is it intended to illustrate?

A It is a copy of the description in the book of exhibits which was furnished me, that is all I know about it, I copied the description.

Mr. Bergen. It describes defendant's exhibit No. 1, which appear on pages 9, 10 and 11 of the book of exhibits used in the ejectment suit.

Q Do you know how many acres there are in that strip of land?

A About eight, as I remember it.

Q I suppose you don't know where it is located, personally?

A I haven't the slightest idea.

Q You simply took the description in the printed book and plotted it out?

A Yes, sir.

By the Court.

Q What particular part of that description is this a plot of; just look at the book; does it take the whole of it?

A It is the whole description in this exhibit.

Q Now, I show you another map marked Exhibit D. 3; I want to ask you who made that?

A I made that.

Q What is it intended to illustrate?

A It is a map of the tract of land conveyed in that description; I don't remember what page it is on.

Q It appears in the book of Exhibits page 12, etc., do you know about how many acres it purports to be?

A No.

Q You simply plotted it as it appears in the books?

A That is all.

Q I show you another map which seems to be a map of the intersection of Front street and Elizabeth avenue, did you make that?

A No, I didn't make that.

Q Who did make it?

A Mr. Luster made it; I compared it with the description, that is all I know about it.

Q The description in the pleadings, the declaration and plea?

A All I know about this is Mr. Luster read the description; I don't know where he got it from, and I compared the map with the description and found it to be correct.

Three maps offered in evidence and marked Exhibits C. 4, C. 5, and C. 6.

Mr. Bergen also offers in evidence the charter of the Elizabeth and Somerville Railroad and the charter of the Somerville and Easton Railroad Co., and the act under which those companies consolidated or united for the Central Railroad Co., and the supplements to those acts, if any.

Objected to as irrelevant.

Mr. Bergen. There may be a question whether

the Central Railroad Co. had a right to take title to this land under this charter, that is all.

The Court. It may be admissible for the purpose of showing how the Central Road is entitled to make this application. Admitted subject to objection.

Mr. Bergen also offers a copy of the map from Smith's History of New Jersey; made in 1747.

10 Objected to as irrelevant and incompetent and not properly proven.

The Court. I will not admit this map unless the objection is withdrawn to it, as being a copy of Smith's map, instead of the map attached to Smith's History—instead of offering a copy of the history with the map. It will be admitted subject to being supplemented by that.

Mr. Bergen. I will agree to produce the original book with the map in it. Marked Exhibit C. 7.

20 All the evidence offered in the ejectment suit and the exhibits as contained in these printed books, or as referred to therein, are considered as now offered by the parties by whom they were then offered, and to stand as evidence in this case, so far as they may be relevant to the present issue, if offered here.

Mr. Bergen offers in evidence a map made by Mr. Meyer of tracts described in the deeds and noted on the map. Marked Exhibit C. 8.

30

COMPLAINANTS REST.

40

LOUIS H. NOE, recalled.

Direct examination by Mr. Lindabury.

Q When did you go to Elizabeth to practise law?

A In 1865 I went in Mr. Magie's office.

Q When were you admitted to the bar?

A 1869.

Q And thereafter did you practise law in Elizabeth?

A Ever since.

Q When did you become a partner of Judge Magie?

A In 1869, right away after my admission.

Q Are you acquainted with the map entitled "Map of Elizabeth, by Ernest L. Meyer and W. F. Wonderberg, in 1871?"

A Yes, sir.

Q Do you remember when that map was published; do you remember of the fact, I mean?

A Yes, sir; I remember it about the date of it.

Q Do you remember when Mr. Meyer became city surveyor, whether he was city surveyor before this date or not?

A He had been long before that time.

Q Do you remember his having somebody associated with him, named Wonderberg?

A Yes, sir.

Q Do you remember how they arranged their work, whether Wonderberg did city work or not?

A I understood Mr. Meyer couldn't do anything except city work, and Mr. Wonderberg did all the outside surveying for private parties.

Q Do you remember which of them got up this map, or how it was gotten up?

A I think the plottings were made by Mr. Wonderberg; I think Louis Quien did a good deal of work on it; he was with Mr. Wonderberg at that time.

Q Louis Quien is still living?

A Yes, sir.

Q And has been city surveyor of Elizabeth?

A Yes, sir, a number of years.

Q Is he now?

A Not now, no, sir.

Q Was Mr. Meyer city surveyor when this map was published?

A I think so.

Q That is your recollection, is it?

A Yes, sir.

Q Is this on file in the County Clerk's office in Union county?

A It is not now.

Q Has it been?

A I don't remember.

Q Do you know of any reason why it is not now, or simply that it is not?

A I am quite sure there isn't any copy of it there now.

Q It has been in use in Elizabeth ever since it was published, hasn't it?

A Yes, sir.

Adjourned until to-morrow.

April 24, 1902.

ATTORNEY-GENERAL,

vs.

CENTRAL R. R. Co.

Mr. Lindabury offers in evidence the minutes of the Riparian Commission of the State of New Jersey, so far as they relate to the grant of 1874 to the Central Railroad Co., and will have a certified copy of the same, which it is consented may be used instead of the original minutes.

Marked Exhibit D. 1.

Mr. Bergen. Notice has been served for Mr. Conover to produce the minutes of the respective boards of directors of the American Dock and Improvement Company, the Central New Jersey Land Improvement Company and the Elizabethport and New York Ferry Company, purporting to consent, or authorizing the consent of the said companies that the said railroad company might receive a grant of riparian lands, dated November 6, 1874, a copy of which is annexed to the information and bill in this case. I omitted to ask Mr. Conover for those minutes, and I would like to ask now if he has produced them?

Mr. Conover. We don't have them.

Mr. Bergen. Have you tried to find them?

Mr. Conover. No.

Mr. Bergen. I ought to call you as a witness to account for their absence.

The Court. Were they offered in the other case?

Mr. Lindabury. No.

Mr. Bergen. I will submit the notice then, and in response to the notice the statement of counsel is that he hasn't them.

At the time I offered the charter of the Central Railroad Company, or rather the constituent companies and legislation out of which the Central grew, I was under the impression that the power of the Central Railroad to take this grant, so far as it relates to the foot of the avenue, was made only that it might be discussed on the argument. From an intimation of your honor I began to fear afterwards that perhaps there should be a statement in the information and bill upon which that point could be based—a mere legal question—for that reason, I will ask to amend the information and bill by adding the following clause: "The Attorney-General, *ex rel,* The City of Elizabeth, and The City of Elizabeth further show that neither the Elizabethport and New York Ferry Company nor the Central Railroad Company of New Jersey had any legal authority or right to obtain or accept the grant dated November 12, 1874, and mentioned above, at

least in so far as said grant purported to convey the *locus in quo* in said ejectment suit; that the action of the Riparian Commissioners in making said alleged grant was *ultra vires*, especially in so far as it purports to convey said *locus in quo*, and that said grant and particularly the part which purports to convey to the Central Railroad Company of New Jersey the said *locus in quo* was and is illegal and void."

I would like to insert that amendment just before the paragraph in the information, which begins with the words, "In tender consideration whereof."

Mr. Lindabury. I object to this amendment, because if there be anything in that point, it appears on the face of the grant and could and should have been objected to in the law case, and could not, if it were correct, constitute a proper ground for a claim in the court of equity.

The Court. That amendment is opposed; it would seem to have a scope, if counsel is right, that entitles them to be heard formally on the question of adding that amendment. Is there any proof not now in on which you would rely in case that amendment is allowed?

Mr. Bergen. I think not.

Mr. Lindabury. I have no objection to their making any amendment they desire, providing we have the right to make a supplemental answer.

The Court. On the argument they may offer to make such amendment to the pleadings as will meet all the proofs that are in and to set out the position either of law or fact which they claim they are entitled to have relief on the facts proved.

Mr. Lindabury. I find that most of the maps on the wall are marked in evidence in the other cause. I think that all of them were in evidence and are identified by something in the books. I will, however, go along and call attention to them, so that they may be offered as a whole, and any that may have been omitted before may be in. I will proceed in the order in which they are hanging on the wall, and the first

map we will consider in evidence and use is a map of the city of Elizabeth made by Ernest L. Meyer and W. F. Wonderberg, 1871, to which attention was called the other day, although I don't know whether the minutes show it or not.

Next is entitled "A portion of the coast survey chart of the bay and harbor of New York, 1874," enlarged, signed by R. C. Bacot.

Next is a map R of part of Elizabethport, 1891.

The next is entitled "Sketch of the position of British forces at Elizabethtown Point after their return from Connecticut Farm, in the province of East Jersey, under the command of His Excellency Lieutenant General Kamphausen, on the 8th of June, 1780, by John Hills, Lieutenant 23rd Regiment and assistant engineer"; that is in evidence and the proof explaining it.

Next is entitled "Partition of 1790, Ferry Reserve Partition between Ogden and Jaques, made after partition of 1790."

Next is entitled "Ferry Reservation of 1824, the 29 acre tract, third tract of Tripertite Deed &c."

Next is map of New Manufacturing Town of Elizabethport, N. J. This is a reduction of the larger map already in evidence, 1835. This is the map discussed by Judge Van Syckle in his charge as the Kellogg Map, sometimes called the Ralph Map—a very important map in this general question.

Next is entitled "U. S. Coast and geodetic survey, Washington, January 4, 1892; certified from the original sheet in the archives of U. S. Coast and geodetic survey."

The next is entitled "Map of Elizabethtown, N. J. at the time of the Revolutionary War." This is the Meyer map, one copy of which Mr. Bergen put in evidence the other day and is said by Mr. Bergen, I think truly, to be based on the English Revolutionary map, which I offered a little while ago.

Next is a map entitled "Sketch L, showing the position of Ferry at and before 1835—from dictation—"

this is a map referred to in Ch. Williamson's evidence, as something he dictated to Mr. Clark the engineer, and which Mr. Clark prepared to show the Chancellor's recollection of the situation.

Next map is one showing the first and second returns from the proprietors for the *locus in quo* and adjacent property—the first one is dated 1753, and is shown by the red narrow strip.

The next map marked A and entitled "Showing lines of survey to executors of Adiniah Schuyler, March 26, 1763, in the vicinity of *locus in quo.*" This was made by Clark in 1889.

Mr. Bergen. This is really part of map N last referred to as showing property lines.

Mr. Lindabury. That "Point House" is put on and is no part of anything that is contained in the deeds which are sketched on N. Below is a sketch marked B, and this is an enlarged sketch from Hills Military map of 1780, already in evidence, and shows the red lines in red according to that sketch. There is no C.

The next map is marked D and is from the Chancery map of 1824, and it shows only one thing of account, and that is the property line running from the Old Point House back towards the right side of the map, and there is very much significance in this, because it was claimed and testified in the ejectment suit, that Elizabeth avenue when and in so far as it ever did reach the water, followed that property line and did not go straight down and did not cross the *locus in quo,* and you will find—I will call attention to some of the other maps—I think all the old maps that show it going to the river, show it following that property line.

The next is E, which is a sketch of position of ferry at and before 1835, from dictation. That means dictation by Chancellor Williamson.

Next is a sketch showing the riparian grant marked H; riparian grant is shown apparently in blue and

red, the red being wharf line and the blue the high water line. This also shows something more, it shows Front street; it shows end of the paving of Elizabeth avenue, and it shows below that towards the water the line up to which the defendant defended in that case.

Next sketch T, U. S. Coast survey, 1858. It shows Elizabeth avenue as ending at Front street, as does also the coast survey of 1871, which I called attention to some time ago, and which was adopted by the riparian commissioners apparently, or seems to bear the certificate of Mr. Bacot, then engineer.

The next and last is marked O and called Sections, and was prepared by Mr. Clark, and is to be examined in connection with his testimony, and shows, as I understand, by cross sectioning, the character of filling put in by the Central Railroad Co. after the grant. It will be used to show the work done, because they claim *laches* in this case.

LOUIS QUIEN, sworn.

Direct examination by Mr. Lindabury.

Q How old are you?

A 51 years.

Q Are you a native of Elizabeth?

A Yes, sir.

Q You are a civil engineer by profession?

A Yes, sir.

Q How long have you practised your profession?

A Since 1868.

Q Were you ever associated with Ernest L. Meyer in any work in the city of Elizabeth?

A Yes, sir.

Q Do you recognize the map of the city of Elizabeth, called the map of 1871, which is on the easel?

A Yes, sir.

Q Did you have anything to do with the making of that?

A Yes, sir; I made the greater part of it.

Q Yourself?

A Yes, sir.

Q When was it made?

A During the years 1869 and 1870 and finished in 1871.

Q When was it published?

A About 1871?

Q Who else did work upon it?

A Mr. Meyer.

Q Mr. Meyer has lately died, hasn't he?

A Yes, sir.

Q Within a month or two?

A Yes, sir.

Q Do you know at what age?

A I think about 76.

Q Was he ever city surveyor at Elizabeth?

A Yes, sir.

Q Do you know when he first became city surveyor?

A I think he was city surveyor from the time the city was incorporated up to about 1862.

Q When was it incorporated?

A 1855 or 1856.

Q And then was there a lapse?

A Then James Ryan was city surveyor for about a year, then Mr. Meyer was again until 1874, and I succeeded him.

Q How long were you city surveyor?

A Five years.

Q And then who succeeded you?

A Mr. Meyer.

Q How long did he continue to hold the office after that?

A Until about six years ago or seven years ago.

Q That map shows Elizabeth avenue and South Front street and other streets in the vicinity of the point where they intersect; do you know who put those on the map?

A Well, on this original drawing of this map, Mr. Meyer had made the plotting of the streets; it was in two sheets, the original drawing was, and he made the

plotting and I filled in the work afterwards, the buildings and all the lines.

Q Will you go over to that map; you will observe by that map Elizabeth avenue is made to end at South Front street?

A At Front street.

Q Isn't it South Front street at that point?

A No, sir.

Q Now, who was it that put that there or arranged that in that way.

A Mr. Meyer put the straight lines on.

Q On that whole map?

A On that whole half section; he had that part of it plotted in pencil.

Q What do you mean by that half section?

A The half that is there; there was two sheets—the lower half.

Q The half which follows the Sound?

A Yes, sir.

Q What was the reputation of Mr. Meyer as a surveyor at this time?

A A very careful man.

Q Of what country was he a native?

A Germany.

Q What reputation had he, if any, for historical accuracy?

A Very good.

Q He had made historical maps, hadn't he?

A Yes, sir; he knew more of the history of Elizabeth than any other man that I know of.

Q What historical work had he done?

A He published the Centennial map and he had a number of other maps under way that have never been published yet.

Q Showing historical matter?

A Yes, sir.

Q And historical situations?

A Yes, sir.

Q The Centennial map you referred to is one of those in evidence in this case?

A Yes, sir.

Q After the publication of this map of 1871, was it used in the city of Elizabeth to any extent?

A Yes, sir.

Q To what extent?

A Well, it was the only map, except the old one of 1856; it was the only map of Elizabeth at the time.

Q Did it or not supercede the old map in public use?

A Yes, it showed all the new lines of the street.

Q In general public use did it or not supercede the old map?

A Yes, sir.

Q Was this map taken in any way by the city council or public authorities?

A Well, the city subscribed for copies of it.

Q And was it put in use in the city departments?

A Yes, sir.

Q What did they do with the maps?

A They were distributed in the offices of the city.

Q And were they used in public schools?

A I don't remember, I couldn't say.

Q You were not a school commissioner?

A No, sir.

Q Well, from 1871 to 1874 was there any other map recognized by the officials or people generally in the city of Elizabeth, except that map, so far as you know?

A Not a general map of the city.

Q Was it or not used and recognized as authoritative in the city of Elizabeth in 1874?

Objected to.

A It was a map in general use at that time in all the offices—real estate men.

Q Now, I call your attention to a map against the wall entitled "A portion of the coast survey chart of the bay and harbor of New York, 1874"; were you acquainted with that map, or the map to which this is a section?

A I know the location of it—the territory.

Q I only want to know whether you have any general acquaintance with that map and know whether it was in circulation or not?

A No, sir.

Q Did you ever do any Governmment work yourself?

A Yes, sir.

Q But you have no recollection of seeing any copy of this in use?

A No, sir, I never seen that map.

Q Now, I call your attention to "map R, a part of Elizabethport 1891," can you tell me whether or not that represents the improvements on the *locus in quo* substantially as they exist at the present time?

A I think it does, I have made some survey of some of those tracts lately, and I think they are practically the same.

It is agreed that the present situation of the property as to improvements on the surface is substantially the same as it was in 1891, shown by Map R.

Q Do you know whether there has been any filling done there since 1891?

A I don't think there has.

It is agreed that there is no substantial change in the physical condition of the property in question since the trial of the ejectment suit and since the time to which Mr. Clark testified in connection with map O.

Q Now, I call your attention to Mr. Meyer's Centennial map, which shows Elizabeth avenue as running to the water and reaching the water on a curve; can you tell me whether or not the point at which it is thus shown to reach the water carries it over the *locus in quo* in this case?

A It isn't on the lines of Elizabeth avenue extended as it is now.

Cross examination by Mr. Bergen.

Q Who was city surveyor during the years 1867, 1868, and 1869 in the city of Elizabeth?

A Mr. Meyer.

Q During those years a commission was in existence, was it not, appointed under the statute or amendment to the charter to define and lay out the streets of the city?

A There was a commission appointed by the act of the legislature to lay out new streets in the city of Elizabeth.

Q And didn't they also have power to define the lines of existing streets?

A I know they monumented some of the lower streets.

Q And they filed maps of their work in the City Hall, didn't they?

A Yes, sir.

Q Covering the entire city?

A Not the entire city.

Q Covering this part of the city where Elizabeth avenue is, didn't they?

A Yes, sir, I think so.

Q Do you know who the members of that commission were?

A I remember some of them: Colonel Moore, of the Central Railroad; James Moore, A. M. W. Ball, Francis Harris, and I don't remember the rest of them; I remember those three.

Q Have you examined the map which those commissioners made under that statute you refer to in so far as it relates to Elizabeth avenue?

A No, sir, I haven't, not lately; I have at times examined all those maps.

Q Colonel Moore was the chief engineer, you say, of the Central Railroad Company at the time?

A I know he was at one time.

Q Wasn't he always?

A No, sir, he was at one time superintendent.

Q Wasn't he connected with the company from

the time that it was originally staked out, until his death, in some way or other?

A I think not.

Q Do you know when his connection with the company ceased?

A No, I do not; but I don't think he was connected with the company prior to 1861 or 1862.

Q Didn't he survey the road originally?

A I don't think so.

Q Do you know Mr. Wonderberg?

A Yes, sir.

Q Is he living now?

A No, sir.

Q Do you know when he died?

A He died in 1872.

Q You are familiar with the Meyer map of 1856, are you not?

A Yes, sir.

Q There it is on the easel, just look at it and tell us where Elizabeth avenue terminates according to that map.

Objected to.

Q Do you notice it there?

A Yes, sir.

Q Do you know of any proceeding between 1856 and 1871, whereby that part of Elizabeth avenue below Front street was vacated?

A I don't recollect now of any.

Re-direct.

Q I suppose during all this time there was investigations into the history of the situation of Elizabeth around there during that period of years, there was an investigation and inquiry of the history, etc. of Elizabeth, wasn't there?

A Yes, sir.

Q Mr. Meyer was a deep thinker and quite an investigator, wasn't he?

A Yes, sir.

Q And he was constantly examining?
A Yes, sir.

JOHN C. PAYNE, recalled.

Direct examination by Mr. Lindabury.

Q I am not sure whether you told us the other day when you became connected with the riparian commissioners, or not?

A In 1877.

Q Can you tell me what practice has existed from that time with respect to the investigations of titles to property in front of or in connection with riparian grants called for?

Objected to as irrelevant.

Admitted as introductory.

A The practice has been upon the receipt of an application for the board to consider the application and pass upon it, and, if granted, to prepare a map and description in the office of the commission, and up to four or five years ago sent that map and description, with the abstract of title furnished with the application, to the attorney of the board in the locality of the property. There were a number of attorneys in the different riparian counties, and upon the receipt of a certificate that the applicant was a riparian owner, or satisfactory certificate, the grant was executed.

Q Was that the practice when you first became connected with the board?

A Yes, sir.

Q Have you made any investigation to ascertain when it originated?

Objected to. Admitted.

A Yes, sir, I have examined the minutes of the commission and the minutes show that from the beginning of the work of the commission the applications referred to attorneys, at first it appears they

were referred to the attorney generals, and then along in 1873 the other attorneys were appointed, and matters were referred to other attorneys, Mr. Vredenburgh and Mr. Gummere and other attorneys, and in 1874 Judge Pancoast was appointed an attorney.

Q How long did the attorney general act?

A The minutes seem to show that up to 1874—I think I have a memorandum that I think it was about 1874 when he asked to be relieved of the examination of title, and then in this particular locality Mr. James B. Vredenburgh seems to have been appointed general examiner for the board.

Q What do you find with respect to Union County?

A I haven't examined the minute book any further than about 1875, and I don't find any reference to Union County in that examination, but in a list of attorneys I find that you were the attorney for Union County, but that is, I think, somewhat later than 1875.

Q It appears by the records that my appointment was after 1875, does it?

A Yes, sir.

Q You haven't ascertained who, if any one, was the attorney for the board in Union County in 1874?

A No, sir, I find no reference to Union County in particular.

Q Was it the practice then in 1874 for the board to have the titles examined by its own attorneys and on its own account?

A It appears so, yes, sir.

Q And that practise existed, according to your own knowledge, from the time you came there in 1877?

A Yes, sir.

Q Down to the present time?

A Yes, sir.

Q I show you a map entitled "A portion of the coast survey chart Bay and Harbor of New York, 1874, enlarged, R. C. Bacot," are you acquainted with that?

A Yes, sir, I recognize that as one of the enlarged copies that there were a great number in the office, and they were made by the direction of the board—made under Mr. Bacot's direction, and I recognize the map and Mr. Bacot's signature.

Q They were made for the use of the board?

A Yes, sir.

Q There is another riparian map here made in 1858; do you recognize this, "U. S. Coast and Geodetic survey made in 1858?"

A I recognize it from the character of the work, as being a coast survey map.

Q Do you know whether it is a copy of one in general use?

A I haven't made any general description of it; its general appearance indicates it is a copy of a coast survey map.

Q And what do you say as to the other, whether or not that enlarged, or the one from which it is enlarged—I am now speaking of the first one—is or in 1874 was in general use?

A I judge it was; it is a copy of a map in general use.

Q Still in general use, isn't it ?

A Yes, sir.

Q That is one you know to have been published by the U. S. government?

A Yes, sir.

Q And in general use?

A Yes, sir.

Mr. Lindabury. Here is a map that I had overlooked, entitled "Hydrographic survey of Elizabethport, N. J., executed and drawn under the direction of Brevet Major General John Newton, U. S. A., in the autumn of 1872." Are you acquainted with this map?

A I don't remember having seen this.

Q This also shows Elizabeth avenue at stopping

at Front street; although it doesn't show Front street by name; isn't that so?

A Yes, sir.

Q And it shows the Central Burnetizing Works, a building right in line of what is called by the complainant here, Elizabeth avenue, doesn't it?

A Part of the building is within the extension of the line.

Q Do you know what that term means "burnetizing"?

A I don't know.

LOUIS QUIEN, recalled.

Direct examination by Mr. Lindabury.

Q I show you a hydrographic survey of Elizabeth made by General Newton in 1872, look at it and tell us if you know whether or not it is an official publication of the United States Government?

A It is a copy of an official map that was made at that time.

Q Government copy: I mean one published by the government?

A Yes, sir, a copy from a map in their office; I know that I have a copy of this that I made.

By the Court.

Q You have made a copy from the Government office?

A Yes, sir.

By the Court.

Q And it is a map similar to this, as far as you can tell?

A Yes, sir.

Cross examination by Mr. Bergen.

Q That map is intended to show the coast lines, isn't it?

A It shows the lines of the shore and the soundings in the water and such points.

Q And intended for military and navy purposes?

A Intended for navigation, yes, sir.

Q One question I omitted to ask you. Referring to this map N, can you tell us with reference to the streets of the city of Elizabeth, where this red line on that N begins and where it ends; can you tell with reference to the city of Elizabeth where the red line on this map begins and where it ends?

A It begins about fifteen chains southwesterly of Elizabeth avenue on the Elizabeth river.

Q And where does it end?

A Near the line of the Central railroad.

Q Between those points is there any public means of access to the water from the city?

Objected to as irrelevant.

A At the foot of Livingston street.

Q Is that a public dock?

A Central Railroad Company dock.

Q Is it a public dock?

A Well, it is—

Objected to. Admitted.

Q Doesn't it belong to the Central Railroad Company?

A It belongs to the Central Railroad.

Q My question is between the points you have indicated, what docks are there between those points giving access to the river, at what streets?

A Well, there is one at the foot of Jersey street; it is a public ferry.

By the Court.

Q Where does that go to?

A Ferry to Staten Island.

Q Who owns that ferry, if you know?

A The New Jersey and Staten Island Ferry Company; there is no street there, except Bayway—there is none within that territory.

Q Then, as I understand, between the terminii of

that red line on that end there is no public means of access to the water front of the city, is there?

A No, sir; there is not.

Re-direct.

Q And yet you never heard of anybody in Elizabeth during your life time failing to get to the river between those points, if they wanted to?

A Well, there is a Central Railroad dock and a ferry dock; they have been open to the public.

Q There are other docks between the lines there?

A No, there are no other ones.

Q Isn't the dry dock there?

A That is on the southerly side of Elizabeth river.

Re-cross.

Q Is there any water front between the terminii of that red streak of that map N, owned by anybody except a private individual or a corporation, except possibly the foot of Elizabeth avenue, to your knowledge?

A There is not.

DEFENDANTS REST.

JOHN C. PAYNE, recalled.

Direct examination by Mr. Bergen.

Q You have examined the minutes of the proceedings of the riparian commmissioners in connection with this grant of November 12, 1874, to the Central Railroad Co., have you not?

A Yes, sir.

Q You haven't the minutes here have you?

A Yes, sir.

Q The same book you had the other day?

A No, sir, I didn't have the minute book the other day.

Q You have a copy of the minutes here?

A Yes, sir.

Q Can you turn to any information in those minutes indicating that the riparian commissioners made

any survey or search or investigation of the title to the property at the foot of Elizabeth avenue, being the ninth tract in the riparian grant, of their own motion; can you turn to it in the minutes; is there anything in the minutes relating to any action on their part in reference to the title of that property?

A Yes, sir.

Q Turn to the minutes.

A (Witness produced minute book.)

Q Can you turn to any information in the minutes indicating that the riparian commissioners had any survey made of this property at the foot of Elizabeth avenue or search of the title to that property, being tract No. 9 in the riparian grant, of their own motion, or did they simply depend upon the information given to them by the applicants?

Objected to. Objection sustained.

By the Court.

Q Turn in the minutes which you have there to any minute which you would say to you indicates the search or survey. What minutes do you turn to?

A I should say the minute appearing at the meeting of July 30, 1874, on page 19 of book 2 of the minutes.

Q Read that minute.

A "Resolved, that all papers in relation to the matter of grant to the Central Railroad Co. of N. J. be referred to Barker Gummere, Esq., counsel of the board, to prepare the deed according to the terms of the resolution passed this board November 5, 1873, and that Commissioner Olden and the President be appointed a committee to notify the Central Railroad Co. of N. J. of such action; the matter to be closed October 1 next for cash."

By the Court.

Q Where is that resolution of November 1873, what page?

A The resolution appears in book 1, page 169,

meeting of November 5, 1873. "The committee to whom was referred the subject of the Central Railroad Co. of N. J., reported as follows: Resolved, that the sum of three hundred thousand dollars be fixed as the price to be paid by the Central Railroad Co. of N. J. to the state for the lands below high water mark adjacent to and in front of the uplands owned or controlled by said road as stated in the schedules from the list presented to this commission, and as it appears that the Central Railroad for one or more of the pieces or parcels of upland referred to, have contracts or agreements for the conveyance to them, but are not of record riparian owners, therefore be it resolved, that as to these parcels, the Central Railroad be required to procure from the shore owners of record their written request or consent that a grant or lease be made to said company, and upon payment or securing the consideration therefor, that a grant or lease be made to the Central Railroad Co. of N. J. for said parcels, excepting grants and reservations made by the state and grants and leases made by this commission within the limits and the parcels applied for or either of them, excepting the grant or lease to the Newark and New York Railroad Co., which is intended to be included in this grant or lease, which resolution was unanimously adopted."

Mr. Lindabury. The one that precedes that ought to be read with that, in order to be understood.

The Court. That can be read in as yours, if you want it read now. Now, you read at the request of Mr. Lindabury, and as defendants' evidence, the resolution of September 19, 1873.

A It appears in book 1, page 164. "The following preamble and resolution was also adopted: Whereas, the board has again considered the subject of the encroachments of the Central Railroad Co. of N. J. upon lands of the state in the cove south of Jer-

sey City, Resolved, that the whole subject, including all claims they may present for the consideration of the commissioners be referred to the president and commissioner Olden with power to fix a price for a grant or lease of all the lands owned by the state below high water mark that they may recommend be granted by the state to the Central Railroad Co. of N. J."

Q Now, do you find anywhere in the minutes any information indicating that Mr. Gummere made any search or caused any survey to be made of tract No. 9 mentioned in the grant of November 12, 1874?

A I should have to answer that as an inference from what I find in the minutes.

Q (Question read) Or did any more than draw the deed in pursuance of that resolution?

A I should have to refresh my memory by referring to the minute that I have in mind, as to whether it answers your question or not.

Q Just refer to any minute that in your judgment may refer to the subject of the question?

A In the minutes of November 7, 1874, book 2, page 25, is the following minute: "The matter of deed to the Central Railroad Co. of N. J. was considered and referred to counsel of the board to prepare the same;" and the minutes of November 12, 1874, book 2, page 26: "The commissioners signed certificate of boundaries of tracts of land to be granted to the Central Railroad Co. of N. J. and the price to be paid therefor, which was ordered to be filed in the office of the secretary of state at Trenton. The counsel of the board then presented and read the deed from the State of New Jersey to the Central Railroad Co. of N. J. for lands under water in New York bay, etc., which was approved and then signed by the commissioners and the governor." Then there is a long note referring to certain tracts for which the company had not been able to furnish evidence of title, that would be included in the grant without extra compensation therefor. Then, in the minutes of November

24, 1874, page 27, the chairman reported that he had delivered the deeds to the Central Railroad Co.

Cross examination by Mr. Lindabury.

Q Was it the practice to record in the minutes the fact that these titles had been searched and surveys made?

A No, sir, it hasn't been since I have been connected with the board.

Q Do you find the actual noting in any of the minutes back to 1874 of the fact of surveys made or title searched?

A No, sir, the application upon being granted was referred to the engineer for the preparation of maps and descriptions.

Q Then what?

A And then the engineer prepared them, and the next minute would be the execution of the grant without any further reference to the matter.

Q In the meantime these abstracts were made?

A Yes, sir, all the work was done.

Re-direct.

Q Have you any custody or knowledge of any document indicating that the commissioners had any survey or search made of this property at the foot of Elizabeth avenue prior to the making of the deed of November 12, 1874?

A Yes, sir.

Q Other than what you have mentioned?

A The liber that I had with me yesterday shows maps attached to the certificate of boundaries and that I took as evidence that the maps were made by the commission.

Q Don't you know that that map was made by Mr. Clark?

A No, sir.

Q Do you know who did make it?

A I think I stated yesterday my impression is from the examination of the map, it was made by Mr. Bacot.

Q I ask you if you know?

A I judge it from the map.

Q Did you see the map made by Mr. Clark, the loose map we had the other day?

A No, I don't remember that I saw that.

Q I show you now the small Clark map, Exhibit D. 37, which I think you had the other day, and ask you if you didn't compare that with the map pasted in the records, which you produced here on Tuesday?

A I don't remember seeing this map, I might possibly have done so. From an examination of this map I have before me, I should say Mr. Bacot made this map.

Mr. Lindabury. There is no doubt but that it is Mr. Bacot's work.

Q In the conversation the other day with Mr. Swift, didn't you say to him that you recognized this map as Mr. Clark's map?

A That map? I couldn't have said so.

Q Or the one pasted in the book?

A I couldn't have said so, no, sir.

Q Are you sure you didn't say so to him?

A I couldn't have said so.

Q I refer to the little map that was shown to you at the last hearing, didn't you say to Mr. Swift that you recognized that as a map made by Mr. Clark?

A I should have to ask you to show me that map again, because this map you now show me I am sure was made by Mr. Bacot, and if I said the other day that map was made by Mr. Clark, I was mistaken, or he was; this map, I am sure, was made by Mr. Bacot.

Re-cross.

Q I show you an envelope endorsed "Riparian Commissioners, State of N. J., Grant of Central Railroad Co. of N. J. and maps," do you recognize that handwriting?

A I do, yes, sir, that is Mr. Bacot's handwriting; that is Mr. Bacot's script; he printed very neatly.

Q I will show you the contents of that, it being

made up of the grant and copies of all the maps; you can look at them and state whose work they are as a whole?

A Some of the work on the map, for instance of the New York Bay tract, some of that is in Mr. Bacot's handwriting.

By Mr. Bergen.

Q In whose handwriting is the rest of it?

A Some of it I don't recognize. This map I have before me is map No. 1, it is the map of the first tract.

By the Court.

Q Can you recognize that as a map personally made by Mr. Bacot, or some portions of it?

A Some of it is made by Mr. Bacot and some made by myself; I was connected with the office as far back as 1874, and I recognize on that map tract No. 1, part of my own work and part of Mr. Bacot's, and some work that I don't recognize; I think it was made by Mr. Harrison, who was employed by Mr. Bacot.

Q How long did you work with Mr. Bacot, how many years?

A Why, I have been connected with the firm of Bacot & Post since 1867; I have always been connected with Mr. Bacot in some way or other until his death, three or four years ago.

Q And did that connection make you familiar with his handwriting?

A Yes, sir; I did work under his control, and I did some of this very work in 1874.

Re-direct.

Q Take this map No. 1 you speak of, you say you made part of that map?

A Yes, sir.

Q From what source did you get the information from which you made the map?

A I got that from surveying; there were some questions as to bearings and I see a reference to the date

of certain bearings, and I remember I was making a study of the bearings of the different lines, and I see on that in my handwriting the bearing of 1874, and I remember that was part of the study I was making.

Q Were you making a map at that time of the general neighborhood there?

A I did so much work there in that locality in the West Line suits; I made all of the maps in the West Line suits, and I can't now recall just what particular piece of work I was on.

Q And you can't tell what particular part of this map you made and what part Mr. Bacot made, can you?

A Yes, sir; I recognize certain figures and words on the map that I made, and I recognize some that Mr. Bacot made, and I recognize some that I am pretty sure Mr. Harrison made—Edlow W. Harrison; he was then associated with Mr. Post.

Q Have you compared the copy of the minutes offered in evidence in this case with the minutes in the books that you have produced here, whether they agree?

A No, sir, I haven't seen the copy.

Re-cross.

Q You said day before yesterday that you became connected with the riparian commissioners in 1877, do I now understand you had connection with Mr. Bacot earlier?

A I began my professional work with the firm of Bacot and Post in 1867.

Q And that connection led you to do some work for the riparian commission.

A In 1871, 1872, 1873 and 1874.

JOHN L. CONOVER, sworn.

Direct examination by Mr. Lindabury.

Q What is your age?

A 52.

Q You are an attorney at law of the state of New Jersey, are you not?

A Yes, sir, attorney at law.

Q You are connected with the Central Railroad Co. of N. J.?

A Yes, sir.

Q And have been for how many years?

A Over 20.

Q Has your service with that company made you familiar with the handwriting of Jacob M. Clark?

A It has.

Q Have you inspected the map that was shown to the last witness, that he said was in the handwriting of Mr. Bacot, and that Mr. Bergen thought was in the handwriting of Mr. Clark?

A I have; those maps have been in my possession for the most part of twenty years.

Q Can you tell me whether or not that is the handwriting of Mr. Clark?

A In my opinion it is not the handwriting of Mr. Clark.

Q Where did you get it?

A Those papers were put in my possession when I first went with the company in January, 1881, in connection with all the other contracts, important papers and deeds of the company, and remained in my possession for at least seven or eight years; then a change in the system was made and it was transferred to the real estate agent, in whose possession they have been since.

Q Where did they come from to you originally?

A They were in a large safe which was put into my charge when I first went with the company.

Q Will you find the map of the Elizabethport tract?

A Yes, Exhibit 37 in the other case.

Q That, you say, is not in Mr. Clark's handwriting?

A That is not in my opinion Mr. Clark's handwriting.

Q Are you acquainted enough with the handwriting of Mr. Bacot to testify whether or not it is in his handwriting?

A I believe that to be in Mr. Bacot's handwriting. I have seen a good deal of Mr. Bacot's work; I suppose I have as many as 25 or 30 maps prepared by Mr. Bacot of different portions of the company's property.

Cross examination by Mr. Bergen.

Q Is Mr. Clark's handwriting on this revolutionary map on the wall; do you know whose handwriting that is on that map?

A The original and the copy of that paper, or the copy purports to be a copy of a map prepared by somebody else; there is a notation on it by Mr. Clark.

Q Now, referring to these maps on the easel A and B—

By the Court.

Q In that notation you recognize it to be Mr. Clark's handwriting?

A Yes, sir; it is in Mr. Clark's handwriting, "from a tracing in the possession of Ernest L. Meyer, C. E., August, 1889, Jacob M. Clark, C. E."

Q Now, look at these maps on the easel, marked A, B, E, J and others, and tell us whether the handwriting on those maps is not the handwriting of Mr. Clark?

A All those maps are the work of Mr. Clark.

CASE CLOSED.

OPINION.

Mr. C. Addison Swift and Mr. Frank Bergen, for informant and complainant.

Mr. J. L. Conover and Mr. R. V. Lindabury, for defendants.

EMERY, *V. C.* A grant made by the Riparian Commissioners to the Central Railroad Company of New Jersey, for a tract of land under and along the waters of Staten Island Sound, within the limits of the city of Elizabeth, is brought in question, by this information and bill, the general object of which is to have the grant declared void as to a portion of the tract, which is alleged to be within the lines of a public highway.

On November 12, 1874, the riparian commissioners, together with the governor of the state, granted and conveyed to the defendant, The Railroad Company, twelve tracts of land, seven of which were situated in Hudson County (four in the waters of New York Bay and two in the Kill von Kull and one in Newark Bay) three in Union County (in the waters of New York Bay and Arthur's Kill), and two in Middlesex County, one in Arthur's Kill, and one in the Raritan river. For ten of the tracts, being all except the first and the ninth, the inner boundaries of the respective tracts were fixed by the grant at "high water mark." In the case of two of the tracts, the first and the ninth, the tracts conveyed are described as being formerly under tide water, but now partly above tide water and for the first tract the shore line is fixed as "the ordinary high water mark of the Bay of New York or Communipaw Cove as the same existed in 1804." The ninth tract, which is the only one now in question, lies in the Arthur's Kill or Staten Island Sound on the north side of the Elizabeth river, and is described as a tract "part of which was formerly under, but is now above the tide waters of the Arthur Kill or Staten Island Sound." The shore line is described as "the original high water mark on the westerly shore of said Sound," and "the original high water mark on the northerly shore of the

Elizabeth river," and the grant conveys, by metes and bounds, a tract beyond these original shore lines of the sound and river, to the exterior wharf line fixed by the commissioners under the riparian acts. The grant expressly conveyed "all the rights of the state in said lands."

The attorney-general, as informant and the city of Elizabeth allege that from time immemorial a common highway has existed across the state from the Delaware river, at Trenton, and across this ninth tract, to a point on Staten Island Sound in the city of Elizabeth, connecting with the navigable waters of the Sound, at the original high water mark of the Sound, which highway is now known as Elizabeth avenue; that at the time of this grant the highway extended across this ninth tract to the shore line as it then existed, over land which had been filled in beyond the original high water mark; that the grant of the ninth tract extended along the shore line of the Sound (measured on the exterior wharf line) for about 500 feet, and included the lands under water in front of the highway, and also the lands included within the lines of the highway lying below the original high water mark of the Sound. The highway is alleged to be 94 feet wide. They now apply to set aside this grant of the ninth tract so far as it conveys or purports to convey any portion of the lands included within the lines of this highway below the original high water mark, and for two reasons: The first is that the grant was made to the Central Railroad Company, not as riparian owners, but with the consent and at the request in writing of the Elizabethport and New York Ferry Company, and that neither the railroad nor the ferry company were riparian owners of the lands included within the lines of common highway. It is therefor claimed that under the riparian acts the grant was *ultra vires* and void as to lands under water in front of the highway. The second reason is that in making application in writing to the commissioners for a grant of this land, as required by the riparian acts,

the railroad company gave a description of the ninth tract in their application, and that annexed to the part of the application containing the description was a map or diagram purporting to display the tract and the location of the highway in question in relation thereto, according to which Elizabeth avenue terminated at a point about 300 feet inland from the shore, and at the intersection of the avenue with South Front street, a street running in the same general direction as the original shore line referred to in the map and about 300 feet distant from the shore line on that point. The information and bill allege that no other or further information was submitted to the governor and commissioners as to the boundaries of the tract, or the location and termination of this common highway than that contained in the application, being the description and map, and that the governor and commissioners relying on these statements and information made the grant. It is then alleged that the statements of the application, together with the representation of the highway on the map, were intended to mislead and did mislead the commissioners and governor and that at the time of the application, the highway Elizabeth avenue extended to the Sound, the lines thereof being continued across and beyond South Front street to the Sound. It is therefore claimed that the grant as to so much of it as included lands within the lines of or in front of the highway was obtained by false suggestion and untrue statements and is void. The city of Elizabeth claims that it has the right to the possession of the lands included within the limits of Elizabeth avenue extended from First street to the exterior wharf lines. For what portion of these lands thus included in the highway which are in the possession of the railroad, being the portion beginning about 168 feet from the southerly side of Front street and extending to the exterior wharf line, the city in 1888 brought an action of ejectment against the railroad company in the Union Circuit Court. It appears by the record and proceedings in that suit, which have

been put in evidence on this hearing, that at the trial of this action in September, 1889, certain questions of fact were left to the jury. These were, first: whether the old highway now known as Elizabeth avenue ran to the waters of the Sound, or terminated as the railroad company claimed, at a point some distance therefrom, and near what is now South Front street; and, if the avenue ran to the shore, then, Second: whether it ran over the *locus in quo*, that is, between the lines of the avenue extended from Front street in straight lines to the shore, or, whether from about Front street it curved and ran to the shore northerly and outside of these lines, and outside of the tract claimed in the suit. It appeared on this trial, and by evidence, which, as the judge charged the jury, could not be doubted, that from the year 1849, the railroad company and those from whom it derived title, had possession of this disputed piece of land included in the ejectment suit as part of a dock or wharf, and that during all that time they had been in full possession, excluding the public. He further charged the jury that if the highway existed, the public right could not be taken away by adverse possession or user, and as to the effect of the grant now in question upon the public right in the highway, directed the jury that under the decision of the Court of Errors and Appeals (in 1873) in *Hoboken L. & Imp. Co.* v. *Hoboken*, 7 Vroom 540, made before the grant, the public right of highway was not affected by the riparian grant and that the lands conveyed were still subject to the public right of highway. Upon a rule to show cause the case was certified to the Supreme Court for its advisory opinion, which was reported in *Elizabeth* v. *Central R. R. Co.* 24 Vroom 491, (1891). The question whether the highway extended to the waters of the Sound or terminated at or near a place called The Point House, several hundred feet inland, depended mainly upon the construction of a colonial statute relating to the highway, passed June 20, 1765, and the Supreme Court, construing

this act, held that the highway extended to the waters of the Sound, and did not, after the act or by reason thereof, terminate at the Point House, as the railroad company claimed. On the question whether the highway thus extended to the shore was continued in a straight line so located as to include the *locus in quo,* the court held that the case was properly submitted to the jury upon the evidence, and that there was no just ground to complain of their verdict in favor of the plaintiff, that it did so continue. The principal legal question raised related to the effect of the riparian grant upon the public right to a highway over the lands included within the grant. As to this the Supreme Court, construing the riparian acts, under which the grant was made, held (1) that the grant was made to the railroad company under the authority of the original riparian act, and the supplements to March 27, 1874, including an act of April 6, 1871, relative to the riparian commission, and that the grant made under these supplements conveyed all the right of the state in the lands described in the grant, and had the same effect as if made directly under the act of March 31, 1869. As to the effect of a grant under this latter act, the court held (2) that the effect of such grant was to convey the lands described to the grantees for their exclusive use for the purposes expressed in the grant, and to exclude every right of use or occupancy on the part of the public, and that in face of such grants, highways running to the original water line would not be continued to the water line formed by filling in the granted area. (*Ibid.* 494). In relation to such highways, the rights of grantees under the riparian grants were considered to be different from the rights given by legislative acts of the character considered in the Hoboken case, 7 Vroom *supra.* It was held that under the acts construed in the Hoboken case, a mere license to fill in or reclaim undefined land under water, was granted to a riparian owner, and that, under such license, the licensee could acquire

against the state no greater rights in the land reclaimed than he had in the ripa; (24 Vroom 495). As to the applicability of the previous decision in the Hoboken case, the court took the same view as had been taken by the Supreme Court of the United States in *Hoboken* v. *Penna. R. R. Co.* 124 U. S. 656, 691, (1887) that the decision did not control the case, and considered itself free to determine the effect of the grants under the riparian acts. In deciding the question of the effect of these grants, the court, however, felt constrained to follow the Federal decision on the same point, out of regard for uniformity of decision on a question affecting so many important titles in the hands of citizens of other states, as well as our own; (24 Vroom, p. 495, 599). Reaching thus the conclusion that the railroad company had title under the grant to so much of the *locus in quo* as was located below the original high water line, it advised the Circuit Court that the verdict be set aside and that a new trial be granted. Upon the argument of the rule, it had been insisted upon the part of the city, that neither the railroad company nor the ferry company, with whose consent the grant was made, were riparian owners, and that the grant was therefore ineffective, but upon this point the court decided (see pp. 495 and 496) that under the act of April 6, 1871, (Gen'l St. 2,796) the commissioners were authorized to make to any applicant grants of lands lying between original high water line and the exterior lines on the same conditions for the protection of riparian owners, as the act of 1869 prescribed, (six months notice of the application, and failure to apply), and that under the supplement of March 27, 1874, (Gen'l St. 2,791) the commissioners were authorized to fix the purchase money to be paid by any applicant for lands below high water mark or formerly under tide water, and to grant the lands to such applicant whether riparian owner or not. They therefore held that the grant now in question was authorized under the riparian laws. Whether this conclusion was reached upon the ground

that the grant could be made under the act of March 27, 1874, to any applicant whether riparian owner or not, or upon the ground that the consent of the ferry company, the riparian owner, was sufficient under the act of April 6, 1871, does not seem to be expressly stated in the opinion. Chief Justice Depue in *Ocean City Ass'n* v. *Shriver,* 35 Vroom, 550, 565, (Err. & App., 1900), said, that the act of March 27, 1874, seemed to empower the riparian commissioners to make grants of lands under water to any applicant, but neither the act of April 6, 1871, nor of March 27, 1874, seemed were involved in the grant in that case, which was made under the act of March 21, 1871, (Gen'l St. 2,790), authorizing grants to riparian owners only. Upon the argument of the rule it was also urged in behalf of the city that on the application for the grant the railroad company submitted to the commissioners a map exhibiting an erroneous view of the road in dispute, and that the commissioners were thereby deceived in making the grant, and that the grant being obtained by false suggestion, was void. The court said that without mentioning other considerations which might prevent the application of the principle, yet, inasmuch as the false suggestion did not appear on the face of the grant, it could not be deemed void in collateral proceedings, (p. 496). The information and bill set out the proceedings in this suit at law, and allege that in pursuance of the advisory opinion of the Supreme Court the verdict has been set aside and a new trial ordered, and that it is the intention of the railroad company on the coming trial of the cause to offer the grant in evidence and rely on it as a defense to the action, and to claim title to and right of possession of the common highway included in the *locus in quo* by reason thereof. They therefore pray that the grant may be declared void, so far as it purports to convey the lands within the highway or under water in front thereof; that a declaration be made that the company have no estate or title or right of possession to the

highway, by virtue of the grant, that the grant may be corrected and reformed, and that the company may be enjoined from offering the grant in evidence in the ejectment suit, or making a defence thereto by means thereof. This statement of some of the points raised and decided in the Supreme Court in the action brought by the complainant is necessary, because on the hearing before me these same questions are presented by the informant and complainant as now before this court for decision in this suit. Other questions of a purely legal character and being questions which, as between the city of Elizabeth and the defendants, could be decided in the action at law, are also presented on this hearing, and a decision thereon by this court is now sought by the attorney general and complainant. On the part of the defendants, it is claimed that the decision of the Supreme Court in the action of the city upon the questions there decided, cannot be reviewed or questioned in this proceeding, and also, that as to any additional questions now raised, which are of a legal rather than an equitable character, the defendants are entitled to the judgment of a court of law in the ejectment suit and this court should not undertake to decide these legal questions in these proceedings, either upon the information or the bill. The attorney general was not a party to the ejcetment suit and could not have been, and the preliminary question in this cause is how far the attorney general as representing the state on this information, is bound by the decision of the Supreme Court in the city suit as settling the law of the case or otherwise, and whether a decree on the information in this cause, as well as upon the bill, must be merely auxiliary to the pending action at law and limited to questions which could not have been tried in the ejectment suit or cannot be hereafter tried there. As to separate decrees on an information and bill, it is settled that the dismissal of a bill filed in connection with an information does not necessarily carry the information with it, and that the

attorney general, if the information shows a right to relief, may have a decree. 1 *Dan. Ch. Pr.* 6th ed. 11, Citing *Atty Gen'l* v. *Cockermouth Local Board*, L. R. 18 Eq. 172; *Grey, Atty Gen'l* v. *Greenvilee & Hudson R. R. Co.*, 14 Dick. Ch. 372, and cases cited p. 379, (1900). In this latter case an information and bill was filed, the bill was dismissed on demurrer to both information and bill, but the information was retained and a preliminary injunction was ordered thereon. On appeal from this order it was held that the injunction was properly ordered. 17 Dick. 768, 772, (1900); but the point now under inquiry was not specially referred to. The Greenville & Hudson R. R. Co. case was one where the defendants were building their railroad over a public highway, and the attorney general in right of the public claimed that the construction of the road on this location was in excess of the corporate powers of the company, and it was held by the court below and expressly affirmed on appeal, that without regard to the question of the extent of the interference and independent of the question of nuisance, the attorney general was entitled to restrain in equity the excessive use of corporate powers, if the company had no right to build the road across the highway. 14 Dick. 373, 386, &c. On appeal 17 Dick. 772. There was not, as in the present case, an issue as to whether the highway in fact existed, but an issue of the excessive use of corporate powers to the impairment, in any degree, of the public right of highway. In *Atty Gen'l* v. *Cockermouth Local Board, supra,* the information was also retained and decree granted on the jurisdiction to restrain excessive use of powers by the corporation in discharging sewage into a stream, while the bill which was filed by the relator, alleging a nuisance from the sewage, was dismissed because the nuisance was not proved. Informations of this class filed by the attorney general to restrain excessive use of powers, in connection with bills filed for relief against the same acts as infringing private

rights for other reasons, are not strictly analagous to cases like the present, where the public right which the attorney general as well as the complainant seeks ultimately to protect, and the public injury is the same. The attorney general is, of course, the only officer on whose application a grant of the state affecting or claimed to affect the right of highway, could be questioned or restrained in its operation, but the grant in this case is questioned solely because it affects the right of highway claimed and the operation of it is sought to be restrained only so far as it affects the public right of highway. That the informant and the complainant can be joined, has been already decided on a demurrer to the information and bill, which was overuled by the Chancellor. *Attorney General* v. *Central R. R. Co.*, 16 Dick. 259.

In a case of this kind, where a suit at law is pending between complainant and the defendant, for the final settlement of the question of the existence of the public highway, the general rule to be applied is that the relief on the information, as well as on the bill, should only be auxiliary to the suit at law, and that the attorney general should not here question or review the rulings of the court of law, upon the legal question already decided in the action at law, or upon questions of a legal character, which may be thereafter decided there. In other words the information should not be used by the attorney general in this case, as a method of reviewing in this court the decision of the law court in the case of the city. In deciding the issues in this case, I shall therefore consider the information as well as the bill as merely auxiliary to the action at law pending. The issues of fact and law made by the pleadings in this cause are these:

(1). The existence or non existence of a public highway over the *locus in quo,* prior to the riparian grant.

(2). Whether the grant was *ultra vires,* on the

ground that neither the railroad company nor the ferry company were riparian owners of the lands included within the lines of the highway.

(3). Whether under the riparian acts the grant operated to prevent the existence of the highway over all of the lands included in the grant below the former ordinary high water mark.

(4). Whether the grant was obtained by fraud or false suggestion.

(5). Whether the right to any equitable relief is barred by delay in bringing suit.

As between the city and the railroad company, the first of these questions, highway or no highway, having been once decided in favor of the city, is now in the course of final adjudication in the action at law. It is a question properly triable in the action at law, and so long as the action at law for the trial of that issue is pending, this court should not either on the information or on the bill, decide this issue, but should confine itself to such equitable relief as the informant or complainant may be entitled to, in order to have the issue tried at law. On that view of the scope of relief, and for the purposes of this suit, it must be now assumed, as to this issue, that in the action at law, the existence of the highway over the *locus in quo* prior to the grant, may be satisfactorily made out, and that the highway existed as claimed in the information and bill.

The second question, whether the grant was *ultra vires* on the ground that neither the railroad company nor the ferry company were riparian owners of the lands included within the lines of the highway as claimed, was also an issue in the action at law, and is now as between the city and the defendant, an issue to be finally determined there. The decision of the question involves the determination, *first,* of the question of fact as to the record or paper title of the ferry company to the ripa, and reclaimed lands and *second,* of the question of law as to the power of the commis-

sioners under the riparian acts to make the grant to the railroad company with the consent of the ferry company. On the rule to show cause both these questions were resolved in favor of the grant. On the new trial, the same issue will remain to be again decided, and this court should not now on the application of the city undertake to decide this question, but should for the purposes of this suit, and on the information as well as on the bill, assume that this issue, so far as it involves a matter of fact, may be decided in favor of the defendant, and so far as it involves a question of law, that it must on the new trial be decided in their favor as being the law of the case, established between the parties for the purpose of the new trial.

The third issue, whether under the riparian acts the grant operated to prevent or terminate the existence of the highway over the lands included in the grant, below the line of the original high water mark, was purely a question of law as to the construction of the riparian acts, applied to the facts proved in reference to the situation of the lands at the time of the grant. In the action at law it was decided in favor of the railroad company, and so far as the city is concerned, this decision upon a matter of law, settles the law of the case for the purpose of the new trial, and also in this suit, brought to aid the future trial of the action. As to the attorney-general the decision must be considered as one made by the court of law, upon a question purely legal, and should be followed in this court, leaving the review of the decision to the appellate court. But, while following the decision, and as to the informant as well as the complainant, it is proper that I should call attention to an aspect of the case as now presented on this third issue, which does not seem to me to have been specially presented to or decided by the Supreme Court, but which is presented on the whole record. In deciding upon the effect of the riparian grant, the Supreme Court, as I read the opinion, gave it operation as conveying all the lands between the original high water mark and the exterior

wharf line fixed by the commissioners, as being then lands of the state, conveyed by the grant. The *ratio decidendi* of the decision (see 24 Vroom 495) was "that the claimant (under a riparian act grant) was the grantee of all the rights of the state in specified lands under water, founding its title upon express words of conveyance, the reasonable force of which excluded the reservation implied against a licensee under a license to fill in and enjoy undefined land. Such license is subject to the implied limitation that the licensee should acquire against the state no greater rights in the land reclaimed than he had in the ripa in front of which the reclamation is made, and a public right of access to the water is not extinguished by filling up under the license." The decision throughout seems to proceed on the basis that at the time of the grant the state was the owner of all the lands included in the grant below original high water mark, and no reference was specially made in the opinion to a fact which appears in the evidence, and which may materially change the aspect of the case, and the effect of the grant as to so much of the land within the lines of the highway as was located between original high water mark, and original low water mark. It appears by the uncontradicted evidence, and it was the opinion of the Supreme Court (24 Vroom 495) that the ferry company or its predecessors in title, were the owners of the original ripa and it appears by undisputed evidence that the riparian owners had filled up the lands below original high water mark and at least as far as original low water mark, and had built wharves and a dock on this original shore. This reclamation was made before the passage of the wharf act of 1851, the first section of which provides: "That it shall be lawful for the owners 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." *Gen'l St.*, p.

3752. By the 11th section of this act, "shore" was defined to be the lands between the limits of ordinary high and low water. By force of our local common law and these provisions of the wharf act of 1851, the land between high and low water mark reclaimed by the shore owner, became vested in the shore owner as his lands. *Stevens* v. *Paterson & Newark R. R. Co.*, 5 Vroom 532, 549, (Err. & App., 1870;) *Am. Dock & Imp. Co.* v. *Trustees Public School*, 12 Stew. 409, (1885). In the latter case, Mr. Justice Depue, charging the jury at law on an issue sent from this court, said that the title of the riparian owners to lands above low water, reclaimed under the wharf act, was indefeasible, and he directed the jury that this title was good against a subsequent grant of the state to another person covering lands above low water thus reclaimed; (p. 424, 437). Chancellor Runyon in the same cause, on application for new trial, also said, p. 445, that a riparian owner who had reclaimed the shore in front of his lands under the wharf act, 1851, and before its repeal, had legal title to the land reclaimed against a subsequent grantee of the state. This legal title of the shore owner to the lands between high and low water mark reclaimed either before or after the act of 1851, was subject, however, to the easement of a public highway reaching to high water mark before the reclamation. *Newark Lime & Cement Co.* v. *Newark*, 2 Mc C. 64, 69, (Green, Ch.) (1862), approved in *Hoboken L. & Imp. Co.* v. *Hoboken*, 7 Vroom 540, 547, (Err. & App., 1873). At the time of the application for the grant now in question, November, 1874, it would seem, therefore, that the state had no title whatever to so much of the lands in question included in the grant, as were above original low water mark and had been reclaimed, and that the public right of highway (assuming as I now must that the highway ran in the lines claimed to the original high water mark) existed over the reclaimed land, as far at least as the low water line, and that the only power or authority

which the state had over these reclaimed lands belonging to other owners, was by virtue of its sovereign right over highways. The question then is, whether under the riparian acts, the commissioners had the power of releasing the public right of highway over the private owners lands by a grant under the riparian acts, conveying these reclaimed lands of the owner to himself or to his nominee, as lands of the state, or by conveying to the grantee all the rights of the state in the reclaimed lands above low water belonging to another than the grantee. Upon examination, the riparian acts do not seem to warrant this construction of the grants. The act under which this grant of the ninth tract was made, was the supplement of March 27, 1874, by virtue of which the riparian commissioners, (four in number), or any three of them, together with the governor, were authorized to fix the price or rental, and to make grants or leases. Under the previous acts, grants were required to be made by the commissioners (or any two of them) with the concurrence of the governor and the attorney-general. Act March 31, 1869, Sec. 4. The attorney-general did not join in this grant and it can have effect only under the act of March 27, 1874. This supplement of March 27, 1874, P. L. 103, Gen'l St. 2,791, par. 26, authorized "The riparian commissioners or any three of them therein concurring, together with the governor of the state, to fix and determine, within the limits prescribed by law, the price or purchase money, or annual rental to be paid by any applicant for so much of lands below high water mark, or lands formerly under tidewater belonging to this state as may be described in any application therefor, duly made according to law; and the said commissioners, or any three of them therein acting and concurring, with the approval of the governor, shall in the name and under the great seal of the state, grant or lease said lands to such applicant accordingly." The Supreme Court in the Elizabeth case, (24 Vroom 497) held, that this act authorized a grant of lands to any

applicant whether riparian owner or not, but it will be observed that this act in its terms authorized a grant only of lands belonging to the state, then or formerly under tide water, and extended to no other lands than those owned by the state. In all the previous riparian acts, up to the act of April 6, 1871, the same limitation is made either expressly or by clear implication. Previous to the act of April 6, 1871, P. L. 113, entitled "An act relative to the riparian commission," the right of the riparian commissioners to make any grants or leases of lands of the state, not under tidewater, seems to have been doubted, and by that act, for the purpose, as recited in the preamble, "of quieting the possession of those who apply to the commission for grants or leases of lands which were heretofore but are not now under tidewater," the commissioners (among other things) on applications for leases or grants of lands not under tidewater, were authorized "to grant or lease such lands, or any part thereof lying between what was, at any time heretofore, the original high water line, and the exterior lines to be established." The grants of lands below original tide water under this act, may have been intended to quiet the possession and complete the title of lands which had been reclaimed without authority of the state, and as to which the state had or might claim to have proprietary rights, and as between the state and the riparian owner who had reclaimed as his successor in title, and grant (if made to them) would perfect the title and quiet possession as to the state's proprietary or sovereign rights. But a grant by the state to an applicant, not the riparian owner, under this act, of lands to which the riparian owner had undisputed title by reclamation previously made by the authority of the state would seem to be under the cases above cited inoperative as a grant of lands, and the question is whether it operated as a vacation by necessary implication of an existing public right of highway over the lands of the riparian owner. The general rule on this subject is stated by Chief Justice Whelpley in

Warren Co. v. *State,* 5 Dutch., 353, (Supt. Ct. 1872). "Public highways ought not to be destroyed, even in part, under pretence of legislative authority, unless it be conferred either in express terms or by necessary implication. If the words are ambiguous, the construction ought to be in force of the common highway and not against it." Other cases applying the principle of strict construction to legislative grants, under which authority to interfere with highways was claimed, and denying the right claimed, are *Jersey City* v. *Central R. R. Co.* 13 Stew., 417, (Van Fleet, *V. C.,* 1885); *Lehigh V. R. R. Co.* v. *Orange Water Co.,* 15 Stew., 202, (Van Fleet, *V. C.,* 1886); *Township of Raritan* v. *Port Reading R. R. Co.,* 4 Dick., 11, 13, (McGill, *Ch.,* 1890). If this question were now open for me to decide, as one not within the decision of the Supreme Court, I should be inclined to hold that the grant of the ninth tract must be held to be ineffective, so far as it purported to convey any public right of highway on land of the riparian owner between the original high and low watermark which had been reclaimed before the passage of the riparian acts, or to convey or release any public right of highway on such reclaimed land. It was operative as to the highway on lands below the original low water mark, even if reclaimed, because no authority for such reclamation has been shown, and in the absence of any authority from the state, the lands below low water belonged to the state, although reclaimed, and therefore all rights of the state passed by the grant. But this question as to the effect of the grant is altogether a legal question, arising on applying the terms of the grant to the subject matter, under the proofs in the case, and as between the city and the defendants, the validity of the grant as excluding any public right of highway on all of the lands below original high water mark has been decided in favor of the railroad company. The city is bound, by that decision as the law of this case, for the purposes of the new trial, and its remedy against such construction, if it has any, must solely be by review in

the law courts. I think also that as to the attorney-general, this must be the procedure for review of the decision of the Supreme Court. In a case decided by Vice-Chancellor Pitney, before the submission of this case, but not then officially reported, and not referred to by counsel, this same question as to the applicability of the decision in the city of Elizabeth case, to the highway over lands reclaimed at the time of the grant, was expressly raised. *Morris & Essex R. R. Co.* v. *Jersey City*, 18 Dick., 45, (April 23, 1902). Vice-Chancellor Pitney differs from me in reference to the scope of the decision of the Supreme Court, and thinks the court did expressly have in view this grant of the sovereign rights, over the reclaimed lands, upon which highways existed. (*Ibid.* p. 51). The portion of the Supreme Court's opinion which he considered as expressly deciding on the point, is the clause at the conclusion of the opinion, (24 Vroom 497), in which the learned justice says, that "the grant is made in absolute terms, independent of any riparian title, and without reference to any particular statute, &c." Vice-Chancellor Pitney reads this reference to riparian title, as meaning, "independent of any riparian title of the state," and as referring to its rights of sovereignty over the lands specified. The opinion shows that the point then under consideration and upon which this view was expressed, the objection that a riparian title in the grantee, was necessary to the validity of a grant by the state, and I take it, that the phrase meant that the grant was valid, independent of any riparian rights in the grantee, not independent of any proprietary rights of the state. But Vice-Chancellor Pitney's view may be the correct one. In the case before him, Vice-Chancellor Pitney decided that upon the evidence in the case, there was no highway over the reclaimed lands at the time of the riparian grant, and also that under the decision of the Supreme Court, and according to his own view also, of the decision of the United States Supreme Court, the grant operated to release the right of public highway on the reclaimed lands,

if it existed at the time of the grant. His decree was formally affirmed by a vote of the Court of Errors & Appeals, but no opinion has been filed nor remittitur entered. An application for rehearing is now pending before that court. The whole question, therefore, of the scope of the decision of the Supreme Court in the city of Elizabeth case, may now be under review in the appellate tribunal, but for the purposes of this hearing, the decision of the Supreme Court, that the grant operated to extinguish the public right of highway over all the lands specified in the grant, is conclusive as to the complainant, and controlling as to the attorney-general.

Treating the grant then as vacating the highway over all the lands described in the grant of the ninth tract, the remaining issue is whether the grant of this tract or of the rights of the state in it, or in the part claimed to be covered by the highway was obtained by fraud or false suggestion. Under the riparian acts in force at the time of the grant in question, grants of land were made upon application of the riparian owner or applicant to the commissioners, upon which application the commissioners designated the lands and fixed the price or rental. They were required to make a certificate of the boundaries, the price, compensation and rentals under their hands to be filed with the secretary of state. On payment to the state treasurer of the compensation fixed, the commissioners, in the name of the state and under the great seal of the state, granted the lands. (Act March 31, 1869, Sec. 8. Gen'l St. p. 2,788, par. 15). The act of April 6, 1871, entitled "An act relative to riparian commissioner," Gen'l St. p. 2,796, which expressly authorized applications for grants or leases of lands "which were not at the time of the application under tide water, and authorized the grant of such lands or any part thereof lying between what was, at any time heretofore the original high water line and the exterior lines established or to be established," provided "that the commissioners should grant or lease in all cases in which in their

discretion they shall think such grant or lease should be made," such rights, privileges and franchises as they are authorized to grant in cases coming directly within the fourth section (of the act of 1869) with the covenants provided by that act, and should insert such other covenants, clauses and conditions in said grants or leases as they shall think proper to require from the grantee or lessee, or ought to be made by the state." And it was further provided that the applications and certificates, in the cases thus provided for, might vary from the provisions of the supplement (of 1869) so as to conform to the act. The supplement of March 27, 1874, (P. L. p. 103, Gen'l St. p. 2,791, par. 26) provided for grants "to any applicant for so much of lands below high water mark, or lands formerly under tide water belonging to this state as may be described in any application therefor, duly made according to law." And the commissioners were authorized in the name and under the great seal of the state, to "grant or lease such lands to such applicant accordingly." The written application in this case made by the Central Railroad Co. of New Jersey to the commissioners, dated November 6, 1874, set out, "that the applicants are the owners of lands in the counties of Hudson, Union, Essex and Middlesex, in the state of New Jersey, fronting on water where the tide ebbs and flows and so are riparian owners in the tide waters of this state, and are also by the written consent and contracts in writing of other riparian owners, invested with the rights of riparian owners as to their lands under tide water, and while claiming the ownership, are nevertheless desirous of obtaining a grant from the said state, of the lands under water, which lie in front of said lands hereinafter described, to wit": Then follows description of the several tracts, the one in question being as follows:

"Ninth tract: being in the city of Elizabeth in the county of Union and state of New Jersey. Beginning at a point where the southeasterly extension of the centre line of Marshall street in the city of Elizabeth

intersects the former ordinary high water mark in the northerly shore of Staten Island Sound; thence southerly and southwestly in said high water mark along the Sound and up Elizabeth creek to South Front street; thence northerly and easterly along the boundary lines of the Elizabethport and New York Ferry Company to the place of beginning." The commissioners were requested to designate what lands under water lie in front of said lands owned by and vested as to riparian rights in said applicants within the exterior wharf lines, "and to fix the price and reasonable compensation for the grant of so much of said land under water as lie below high water mark and may properly be included in the grant," and to certify the boundaries and the price and compensation to be paid. Annexed to the original application (which by consent of the parties I have examined in the office of the secretary of state) were maps of all the tracts. This map of the ninth tract was identical with the map annexed to the information and bill as Schedule A, except that it does not show any exterior wharf lines, or any lines outside of the line intended apparently to indicate a shore line of some kind.

On this map no lines were designated or marked as being the line of either existing or original high water mark, or as property lines of the ferry company, neither were any points fixed on the map, inasmuch as the only two points which were referred to in the description were said to be in the original high water mark. The map, although in fact annexed to the application, was not referred to in the application as so annexed. Upon this application the commissioners made a certificate of boundaries, which was annexed to the application and maps, and after formally reciting that it was made "in compliance with the above application," designated as the ninth tract:

"All that tract of land in the city of Elizabeth, in the county of Union and state of New Jersey, part of which was formerly under, but is now above the tide waters of the Arthur Kill or Staten Island Sound, and

part of which is still under the tide waters of said Sound, described as follows: Beginning at the original high water mark on the westerly shore of said Sound, at a point in line with the centre line of Marshall street, extended southeasterly and from thence running south twenty-eight degrees and twenty-five minutes east to the exterior wharf line established by the commissioners appointed under the authority of the riparian act of 1864 and the supplements (said exterior wharf line being at a distance of 222 feet and three tenths of a foot from the southeasterly line of Front street, measured in the centre line of Marshall street); thence along said exterior wharf line—(six courses specified by courses and distances—the 'last two courses above mentioned lying along the Elizabeth river') to the original high water mark on the northerly shore of the Elizabeth river, and northeasterly along the original high water mark of the Arthur Kill or Staten Island Sound to the place of beginning, and likewise any and all lands lying in front of that above described to any point or points, to which the said exterior wharf line may hereafter be legally extended."

The commissioners certified the boundaries of all the twelve tracts and fixed the price of $300,000 as the entire price or compensation, upon paying which a conveyance for said lands should be made. Attached to the certificate of boundaries were maps of the several tracts, the map of the ninth tract being one which was identical with the map annexed to the information and bill as Schedules A. In addition to the lines marked on the map accompanying the original application, this map attached to the certificate of boundaries contained, marked in red, the exterior wharf lines and also in red a line about 75 feet in length on the northern boundary of the tract, and being an extension of center line of Marshall street, beyond the line marked as a shore line out to the exterior wharf line.

The formal grant by the governor and commissioners which was dated November 12, 1874, recited the appli-

cation as above, the payment of the price fixed, and conveyed all of the tracts including the ninth tract by the same description as in the certificate of boundaries, "together with all and singular, the hereditaments and appurtenances hereunto belonging, and all the rights of the said state in said lands." No maps were referred to in the grant nor apparently were any maps annexed to the grant. The riparian act authorizing the insertion of this clause conveying all the rights of the state, was the supplement of March 21, 1871, Gen'l St. p. 2,790, which directed that a grant or lease to a riparian owner of lands under water in front of his lands "shall vest all the rights of the state in said lands in said lessee or grantee." The grants under the act of April 7, 1871, (Gen'l St. p. 2,796) authorized the grant of such rights as were authorized under the 4th section of the act of 1869 (Gen'l St. 2,787, par. 11) which was that the grant or lease should pass "not merely the title to the lands therein described, but the right to fill up to the exterior bulkhead lines and appropriate the land to exclusive private uses." The supplement of March 27, 1874, (Gen'l St. 2,791, par. 26) authorized the grant or lease of lands under tide water or formerly under tide water belonging to the state, but did not declare in terms the effect of the grant, and did not expressly authorize the conveyance of all the rights of the state.

The information and bill charge that the map or diagram annexed to the application purported to display the ninth tract and the location of the highway in relation thereto; that no other or further information was submitted to the governor and commissioners as to the boundaries of said tract or the location and terminus of the highway, than the information contained in the application, being the description and map, and that on November 12, 1874, the governor and commissioners, in pursuance of and relying on the statements and information contained in the application, executed the grant of the ninth tract by the description above set out. It is charged that the state-

ments in the application, together with the representation on the map, that the railroad company was the riparian owner of so much of "the ninth tract as lay between the lines of the highway, were false and intended to mislead and deceive the commissioners and governor; that at the time of the application grant the highway extended to the Sound, and ran between two tracts owned by the ferry company, and that so much of said grant as purported to convey to the railroad company the lands or any interest in the lands between the lines of the highway and below original high water mark thereon, was obtained by means of said false suggestion and untrue statements in the application and is illegal and void." The governor and all the commissioners who signed the grant are deceased, and the only evidence outside of the papers themselves relating to representations to the commissioners relating to the lands or highway upon which the claim of false suggestion is based, is the evidence of a Mr. Jacob M. Clark, a civil engineer or surveyor. He said in the ejectment suit (p. 185 &c.) that acting for the Central Railroad Company, he prepared a map showing the wharf lines as he surveyed them as they then stood, for the commissioners for their information; that this map was with the grant and he identified a map shown him on the trial (and marked either D. 37 or D. 38) as the map referred to. On cross examination in reference to this map, he says (p. 234) that this was one of two original diagrams he made for the benefit of the commissioners; that he thinks he made two just alike; that the one shown him on the trial came back with the grant among the papers; that these were made in connection with the application and for the purpose of informing the riparian commissioners what they needed, the general situation of "our" property, so they could make the grant, and informing them also what the shape of the wharf land was as it then existed. In answer to questions as to the map being a correct representation of the foot of Elizabeth avenue, and whether that avenue did not as

he then (at the time of the trial, 1889) understood, go down 168 feet east of Front street, and whether the map was not therefore erroneous, he says that it was not erroneous, for the purpose of the diagram; that the information to the commissioners was the location and situation of "our" property, its shape, etc., and that it was not his business to locate the streets, and that if Elizabeth avenue did in fact run 168 feet southeast of Front street, the avenue was not correctly shown on the map. On the hearing before me, a map marked Exhibit D. 37 and supposed to be the map identified by Mr. Clark on the trial, as made by him, was produced. Mr. Clark was then deceased, and two witnesses familiar with the handwriting of Mr. Bacot, the secretary of the riparian commissioners at the time, say that the map produced before me at the hearing was in Mr. Bacot's handwriting. This map has been mislaid since the hearing, and was not sent in with the exhibits, but my recollection is that it was a map identical with the map attached to the certificate of boundaries, and with the map schedule A attached to the information, i. e. a map which in addition to a shore line showed the exterior wharf line boundaries. In other respects, and as to location and termination of Elizabeth avenue at South Front street, it was the same as the map annexed to the original application on file. Except for the purpose of making this survey of the property, Mr. Clark does not appear to have been in the employ of the railroad company, or to have had any knowledge of the property or highway except as they actually existed on the ground. He does not appear to have prepared the description in the original application, or in the certificate of boundaries. The application was the act of the company, and the purpose of this application on the face of it, was to describe or designate the tract of land in front of which a riparian grant was desired, and the application as to this ninth tract says in terms, that the company being invested with the consent of the riparian owner, (the ferry company) as to its lands under

tide water, is desirous of obtaining a grant from the state of the lands under water which lie in front of the lands described. This was a tract which was included between the line (toward the shore) of the former ordinary high water mark of Staten Island Sound and Elizabeth creek, (extending between the centre line of Marshall street and South Front street) and the line (toward the upland) of the boundary lines of the ferry company, running northerly and easterly between these two points in former ordinary high water mark. This described a tract in front of which the grant is desired, but it does not designate on the map, or by the description or map, where the high water mark is. The commissioners, by the original riparian act of April 11, 1864, Gen'l St. 2,785, sec. 1, were directed to make and submit maps "showing the original shore line as far as the same can be ascertained," and by the 12th section of the act of 1869, Gen'l St. p. 2,789, par. 19, were authorized to proceed by ejectment or otherwise against persons and corporations trespassing upon or occupying the lands of the state under water, or which were heretofore under water. No map seems ever to have been filed by the commissioners, locating original high water mark at the place in question, and the only evidence in this case as to the location of original high water mark is the evidence of Mr. Clark, who in 1889, before the trial of the ejectment suit, located or attempted to locate this line by borings through the filled reclaimed land down to the salt meadows, and the salt mud beyond it. According to the map constructed by him from the information supplied by the shore borings, the original high water mark at its intersection with the centre line of Marshall street extended, (the beginning point of the riparian grant) was about 75 feet from the exterior wharf line, as described in the grant. Opposite Elizabeth avenue, if extended in straight lines to the Sound, the distance from original high water mark as fixed by this map to the exterior wharf lines, was for the northern half of the avenue, about 75 feet, and from

the centre of the avenue the line of original high water marked curved inland, so that at the southerly side of the avenue, it was about 125 feet from the exterior wharf line. No line of original low water mark was located either on this map, or by the evidence, but at the time of the grant, the land beyond this line assigned as original high water mark, and within the lines of Elizabeth avenue extended, had been filled or built on to within 25 or 30 feet of the exterior wharf lines, and was occupied by the railroad company by its railroad tracks running across it and other structures. Elizabeth avenue then extended beyond South Front street toward the shore for about 168 feet and for a distance of about 100 feet from Front street, it was a paved street.

The representation of the railroad company that the ferry company were the riparian owners of the land in front of which the grant was applied for, including the land claimed to be covered by the highway, must for the purposes of this hearing, be considered as true. The riparian ownership of the ferry company was one of the points contested in the action at law, and considered, and the claim that the state was the riparian owner was also presented and considered. The conclusion of the Supreme Court upon the proofs (which are the same now submitted) was that the ferry company was the riparian owner (24 Vroom, 493). This decision cannot be reviewed here. The claim of false suggestion therefore rests solely on the effect of the representation of Elizabeth avenue on the map as terminating in South Front street. It is claimed that the map should have delineated the avenue as extended to the Sound, and over the land covered by the grant applied for, and that inasmuch as the avenue did in fact extend 168 feet further and did lawfully extend to the Sound at the time of the application, this delineation of it as terminating at South Front street was a material false representation or suggestion. This view as to the effect of the map was very forcibly argued by coun-

sel, but I do not think it is sound or correct. My view would be that so far as related to the highway, the map, if it showed the lines at all, must be taken as intended to show the existing condition of the lands for which the grant was asked, as to a highway on these lands, or reaching to them. There was in point of fact, and upon the ground, no highway existing beyond the line of original high water mark, or reaching to this line as now fixed by the evidence; nor had a highway over these lands been used for 25 years. The ferry company and railroad company now claim, apparently in entire good faith, that the highway did not extend to the shore, and since 1849 at least, they had acted on that claim and excluded the public from any use of a highway for some distance inland from this original high water mark. Their representation by the map of the tract for which a grant was desired, as not crossed or reached by a highway, cannot therefore be imputed to them as a false representation of an existing fact, and it would be altogether exaggerating and misconstruing its effect, to hold that the map was intended as a representation that no highway legally existed or could be claimed to exist beyond original high water mark on the reclaimed lands, or reached to them. Grants of the state should not be avoided for alleged false suggestion unless both the suggestion or representation, and its falsity are made out. In this case, the question as to the effect of the map and as to what representation was in fact made by the delineating of the highway on the map and annexing it to the application, is clearly open to fair dispute, and if the representation is construed as defendants now claim, that is, as the delineation of the claim of the defendants and of the existing condition as to the highway over the lands applied for, it cannot be said to be false. On the assumption, however, that the map in question must be considered as a false representation of the location of the highway, it should further appear satisfactorily, that the grant in question, so far as it affected the highway, was made by the governor

and commissioners in reliance on the false suggestion. The commissioners were authorized and directed by the riparian acts as part of their duty to locate the lines of original high water mark and to fix the prices of lands of the state beyond this line, which they granted or leased. It cannot be assumed that the lands for which the grants were sought were not examined by them or their agents for them, before certifying the boundaries and executing the grants, and, if, for the purposes of the application and certificate of boundaries and grant, they acted in point of fact on the basis of the highway as actually existing, and as not extending to original high water mark, such action on existing conditions was clearly within their power.

The governor and all of the commissioners were trusted officers of the state, and all men of the highest character and reputation, and during their lives the grant remained unchallenged. When it has now become impossible to produce evidence as to the effect actually given to the map on the point now in question, it would not be either safe or reasonable to assume that the grant was made solely upon information as to the location of the highway supplied by the map and without making such further examination and inquiry as the interests of the state and of the public required. And as to the grant having been made by reason of the information received from the defendants and supposed to be conveyed by the map, as to the termination of the highway, I should rather be inclined to the view that even if the map had shown the highway extending to the shore, or if the commissioners on examination of the property, had ascertained that the highway as then actually used extended to the original high water line, or beyond it, and that there was a claim of highway to the shore, it may have been the judgment of the commissioners and their counsel, that the riparian grant, would not affect any public right of highway, over the lands beyond original high water mark and that the location of the terminus of the highway upon the map was not material. In view of the decision of

the Court of Errors & Appeals in the Hoboken case, (7 Vroom, 1873), rendered before the application, it cannot be said that it was either improbable or unreasonable that this view of the effect of the grant should have been taken. It is still the view of the grant taken by the counsel for the attorney-general and complainant, notwithstanding the decision in the city of Elizabeth case, and the correctness of this view is now awaiting the ultimate decision of the Court of Errors and Appeals. So far as relates to the lands between original high water and low water mark, it is the view I would be inclined to take were the question before me an open one. Whether this was in fact the view of the commissioners and their counsel, it is now impossible to ascertain, but it would not be just or right to set aside this grant of the state, on the assumption that this view of the effect of the grant could not and should not have been taken. If this was the opinion of the commissioners and their counsel in making the grant, then although it may have been made under a view as to the effect of the law on existing highways, subsequently held to be mistaken, the grant could not be said to have been made by reason of false suggestion. And as to any exclusive reliance on the applicants representations by the map or otherwise, it further appears in the case, and must be considered, that for several years previous to the grant, the riparian commissioners had grave disputes with the railroad company over their occupation of lands claimed to belong to the state, and that for the recovery of some of the lands included in the grant by the commissioners, suits were pending, or had been directed, under the authority given by the riparian acts. The grant in question was made on a general settlement between the railroad company and the commissioners, who were throughout the whole dispute and proceedings for the grant, represented by counsel, now also deceased. Under all the circumstances attending the grant, I think it would be going altogether too far to assume conclusively that the map, and the map an-

nexed to the application or certificate alone, induced the grant, so far as it affected the highway, and to set it aside or reform it, or control it as to the highway for that reason.

The cases relied on by complainant's counsel as holding that where false representations have been made with a view to a particular purpose, which has been attained, the burden of proving the immateriality of the representation, and that the end was not attained by the deception, rests upon the grantee, were all cases in which the transactions were questioned between those who were the original parties to it, and while it was still practicable to procure the proofs, by calling the grantors. Smith vs. Ely, 7 H. of L., 750, the leading case, was on this point a decision as to the facts admitted by a demurrer.

One of the grounds upon which the denial of purely equitable relief, on the ground of laches, is often based is, that by reason of the lapse of time and delay in seeking relief, the party against whom it is asked has been put in a situation as to his proofs or otherwise, in which it would not be reasonable to place him, if the right is to be asserted. Lutgen vs. Lutgen, 19 Dick., 773, 780, 781, (Err. & App., 1902); Rochenfoncald vs. Bonstead, (1897) 1 Ch., 196, 210.

The equitable rules relating to the effect of laches and acquiesence are enforced against the state when it is a suitor for equitable relief as well as against private suitors. (Att'y Gen'l vs. Del. & B. B. R. R. Co., 12 C. E. Green 1, & cases cited p. 27.) And it is insisted in this case that the information should be dismissed on the ground of laches and acquiesence. While the delay in filing the information until all the officers who executed it on the part of the state, are dead, may not be sufficient of itself to deprive the state of equitable relief, it is certainly sufficient to prevent it from insisting upon the application of a mere rule of evidence relating to the burden of proof, as the basis for deciding that in the absence of proof to the contrary, it must be conclusively presumed that

the grant in question (so far as it affects the highway) was in fact induced by the representation on the map as to the termination of the highway.

These riparian grants, as was justly said by Vice-Chancellor Pitney in M. & E. R. R. Co. vs. Jersey City, 18 Dick., 54, are made with great care and caution by trusted public servants, after full moneyed consideration paid to the state, and under safeguards designed to protect the state against imposition and fraud. The courts have therefore always given the grants great value, and they should not be set aside, reformed or controlled in their operation, upon the ground that they were induced by false suggestion or fraud, in the absence of clear and cogent proofs.

Upon the whole evidence I conclude that the informant and complainant have failed to establish that the grant was procured by false suggestion as alleged, and the information and bill must therefore be dismissed.

FINAL DECREE.

This cause coming on to be heard in the presence of C. Addison Swift, Esq., and Frank Bergen, Esq., of counsel for the informant and complainant, and John L. Conover, Esq., and Richard V. Lindabury, Esq., of counsel for the defendants; and the pleadings having been read and proofs having been taken in open court, and the arguments of the respective counsel having been heard, and the court having duly considered said pleadings, proofs and arguments, and it appearing to the court that the informant and complainant are not nor is either of them entitled to the relief sought and prayed for by them in their bill of complaint, or any other relief in the premises: It is, on this fifth day of December, one thousand nine hundred and four,

Ordered, adjudged and decreed that the said information and bill be and the same is hereby dismissed with costs against the said complainant, the city of Elizabeth.

W. J. MAGIE,
C.

Respectfully advised,
JOHN R. EMERY,
Vice-Chancellor.

Formal notice of appeal filed.

New Jersey Court of Errors and Appeals.

Between
THE ATTORNEY-GENERAL, IN BEHALF OF THE STATE, *ex rel.*, THE CITY OF ELIZABETH, INFORMANT, AND THE CITY OF ELIZABETH,
Complainant,
and
THE CENTRAL RAILROAD COMPANY, *et als.*,
Defendants.

On Appeal.

PETITION OF APPEAL.

To the Honorable, The Court of Errors and Appeals in the last resort in all causes.

The petition of the Attorney-General in behalf of the State, *ex rel.*, the City of Elizabeth, informant, and the City of Elizabeth, complainant, in the above stated cause, respectively show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date the Fifth day of December, Nineteen hundred and four, wherein the said the Attorney General in behalf of the State, *ex rel.*, the City of Elizabeth, was informant, and the City of Elizabeth was complainant, and The Central Railroad Company of New Jersey, the American Dock and Improvement Company, and the Eliza-

bethport and New York Ferry Company, were defendants, in this respect, to wit:—that the said decree adjudges that the said information and bill be dismissed with costs against the complainant, the City of Elizabeth.

And your petitioners humbly appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said information and bill should not have been dismissed with costs against the said City of Elizabeth.

Your petitioners, therefore, pray that the said decree of the said Chancellor may be reversed, set aside, and for nothing holden.

And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

FRANK BERGEN,
Solicitor for Appellant.

FRANK BERGEN,
Of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

The answer of the above named respondents to the petition of appeal of the above named appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that a decree was, on the fifth day of December A. D., nineteen hundred and four, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised, and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

GEO. HOLMES,
Sol'r and of Counsel with Respondents.