Mr Henry Talbot

REPORT

OF THE

COMMISSIONERS

ON THE

CONTROVERSY,

WITH THE

STATE OF NEW-YORK,

RESPECTING THE

EASTERN BOUNDARY

OF THE

State of New-Jersey.

PUBLISHED BY ORDER OF COUNCIL.

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1807.

REPORT

OF THE

COMMISSIONERS, &c.

To the Honorable the Legislature of the state of New-Jersey.

THE commissioners appointed on the part of New-Jersey, to settle with commissioners appointed on the part of New-York, the jurisdictional boundary line between the two states; beg leave to

REPORT,

THAT the said commissioners under their respective authorities, met at Newark in New-Jersey, for the accomplishment of the end for which they were appointed, and that after long discussions, all attempts to procure an amicable adjustment proved entirely abortive.

Your commissioners hope that the honorable the legislature, will not disapprove of the breaking up of further conference, after it had fully appeared that the commissioners on the part of New-York, had resolved not to depart from their claim *over the whole waters lying between the respective states, including shores, roads and harbors, within the natural territorial limits of New-Jersey.*

Your commissioners further beg leave to state, that they could not assent to the conclusion drawn from the fact asserted by New-York, that possession both *before* and *since* the revolution, was in conformity to their present claim,

1st.—Because notorious acts of possessions, existed on the part of New-Jersey, and were evident to the senses of every man along the whole of the shores, opposite to New-York, and the adjoining waters, that were fully equivalent to those asserted on the foundation of the senses of the commissioners of New-York.

And 2nd.—Because the right of jurisdiction over these shores and waters, and which is the subject of the present controversy, was unquestionably, a *jus regium*, or royal prerogative right, actually possessed by, and vested in the crown of Great-Britain, and exclusively exercised by its board of

trade and navigation, without the intervention of either of the colonial governments, at the time of the declaration of independence ; and consequently, that this right had never be en possessed or exercised by the government of the colony of New-York, at that time ; and in respect to the time, since that period, no acts of jurisdiction have appeared on the part of New-York, or of *acquiescence* on the part of New-Jersey, which in the opinion of your commissioners, could give to New-York any claim from *possession*, (without pretence of any charter or grant) to a preferable right of jurisdiction over the shores and waters in question, after that of the crown of Great-Britain had ceased ; when such jurisdiction *naturally*, must belong to the sovereignty of the adjoining country.

Neither could your commissioners perceive, from the arguments adduced on the part of New-York, or from their own reflections, how they could justify themselves in compromitting the essential interests of the state, by admitting

1st.—That New-Jersey, when she acquired her independence, did not acquire the rights of employing commerce from, and creating a defence on, her own shores—seeing that such rights are necessary for revenue and security, and are incident to freedom and sovereignty, and that without them, these justly valued attributes, could not long be maintained, should these United States, now happily connected in a federal bond, ever become unconnected and conflicting powers.

2nd.—By admitting that the grants from the duke of York to lord Berkeley and sir George Carteret, & their successors, for the colony of New-Jersey, altho' *not* from the *king*, but from a *subject*, were to be construed, *not* according to the known general rule of the common law, which would carry the grantees to the middle of the river or channel, agreeably to the express intent of the grantor, but according to an exception to the general rule, which has been called the *prerogative rule*, (and which applies only to grants made by a *king*, and is never applicable to grants made by a *subject*,) and which would restrict the grantees to the high-water mark.

It will be perceived that the commissioners on the part of New-York, would not agree to any general jurisdictional line, inconsistent with the principles set up by them, altho' they consented to receive proposals for extending accommodations, in some particular cases, which might be shewn to be beneficial to citizens of New-Jersey, and not injurious to New-York.

To treat *afterwards* for any such benefits, appeared to your commissioners, an admission of each and every of the principles, contended for by New-York, and combated by New-Jersey, as contained in the following sheets.

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

October 30, 1807.

NO. I.

GENTLEMEN,

In addition to the general fact, 'that New-York has always, and without any claim by New-Jersey, exercised jurisdiction over the whole of the waters between the shores of the two states ;' we have judged it proper to state particularly the following matters in writing, previous to any verbal conferences between us.

King Charles the second, claiming the country, comprehending the shores and waters in question, then held by the Dutch, and to which they had given the name of *New Netherland*, granted *inter alia*, a part of it to his brother the Duke of York, on the 12th March, 1663-4, by the description of 'All that island or islands commonly called by 'the several name or names of Matowack's or Long-Island, 'situate and being towards the west of Cape Cod, and the 'Narrow Higansetts, abutting upon the main land, between 'the two rivers, there called or known by the several names 'of Connecticut and Hudson's river, together also with the 'said river called Hudson's river, and all the land from the 'west side of Connecticut river to the east side of Delaware 'bay,' with certain powers of government or sovereignty.

The duke by lease and release, of the 23d and 24th June, in the same year, conveyed a part of the above lands to lord

Berkeley, and sir George Carteret, by the description of 'All that tract of Land adjacent to New-England, and lying 'and being to the westward of Long-Island and Manhattan's 'Island, and bounded on the east part by the main sea, and 'part by Hudson's river, and hath upon the west, Delaware 'bay or river, and extendeth southward to the main ocean 'as far Cape-May at the mouth of Delaware bay, and to the 'northward as far as the northernmost branch of the said 'bay or river of Delaware, which is forty-one degrees and 'forty minutes of latitude, and crosseth over thence in a 'straight line to Hudson's river in forty one degrees of lati-'tude; which said tract of land was thereafter to be called by 'the name or names of New-Cæsaria or New-Jersey.'

This conveyance is the foundation of the claim of New-Jersey, and the questions arising on it, between the two states, and which we conceive to be the subject of the present reference, are,

First.—Whether that portion of the boundary expresssed, *part by the main sea and part by Hudson's river*, is a line commencing at the intersection of the forty-first degree of latitude, with the western shore of Hudson's river, and extending thence along the shore to the mouth of the river, assumed to be at the southern extremity of Manhattan Island on the east, and *Constable's Hook*, or whatever other may be considered as the corresponding or opposite point on the western shore, on the west, or a line commencing in and extending through the channel of the river?—Or, in other words, whether the *littus*, the high water mark, or the *filum aquæ*, the channel, is to be adjudged the boundary?

Secondly.—Whether the line, after it leaves the river, be it either high-water mark or the channel, is to pass on the eastern or western side of Staten-Island?

The last question may be viewed as resolving itself into another, namely: whether the water, which, in the phraseology of the grant hereafter cited, *parts Staten-Island and the main*, commonly known as the *Sound*, is not a portion of the main *sea* intended in the conveyance?

Van Der Donck, a Dutch writer, was in New-Netherland some years, and published his description of it in 1656—after having noticed Delaware bay, he proceeds,—'Now

'to pass over to the bay, in which the East and North rivers 'fall in together, and *in which Staten*-Island lies—and be-'cause it is the most frequented and most populous, and in 'and through it the most trade and traffick is carried on, and 'also because it lies in the middle of New-Netherland, so it 'is *quasi per excellentiam* called *the Bay*—it is the more 'famous, for there the East and North Rivers fall in togeth-'er, being two very fine rivers to be hereafter more particu-'larly described; together with several kills, guts and creeks, 'and some of them to be likened to small rivers, and also na-'vigable; as the Raritan kill, the kill of the Cul, Neversink, '&c.—besides that in this bay, more than a thousand ships 'of burthen may, and all within the land, make an harbour, 'and may lay handsomely, safe from dangerous winds.—'The entrance into the bay is wide enough, and to be found 'without much danger, readily, by those who have once been 'there, or have been well directed respecting it, and one can 'often with ease, if so minded, and the wind serves, imme-'diately sail up, with one and the same running tide, from 'the sea to before the city of New-Amsterdam, which is five 'miles from the open sea, with full lading, however large 'or burthensome the ships may be; and in like manner re-'turn again to sea; but in going out it is usual to come too 'under Staten-Island, at the watering place, to lay in a stock 'of water and wood, of both of which there is a sufficiency to 'be had.'—'One may come so far in the bay, behind Sandy-'Hook, to take advantage of the wind and tide, and wait for 'the last messengers with letters.'

New-Netherland, was conquered from the Dutch, by the English, on the 27th August 1664, and Nicolls, who commanded the armament, immediately on the conquest, and in consequence of a commission from the duke of the 2d of April preceding, entered on the exercise of civil government, throughout the whole of the territory comprised in the grant to the duke, under the style of his *Deputy Governor*.

The letter from the duke to Nicolls, notifying him of the conveyance to Lord Berkeley and Sir George Carteret, or as they, and their assigns have been usually denominated, the *proprietors*, is dated on the 28th Nov. 1664; but when in the intermediate time, before the arrival of Philip Carteret,

the first governor under the *proprietors*, in the ensuing summer it came to his hands, it does not appear.

On the 1st December in the same year, he granted to Baker and his associates, a tract of land described as follows: 'A parcel of land bounded on the south by a river, com-'monly called the Raritan's river, on the east by the sea 'which parts Staten-Island and the main, and to run north-'ward up after Cull bay, till you come to the first river, 'which sets westward out of the said bay, and to run west 'into the country, twice the length of the breadth thereof, 'from the north to the south of the aforementioned bounds.'

The *water*, parting Staten-Island and the main, in the grant denominated *sea*, had, in the Indian deed procured by the grantees, in consequence of a previous licence from Nicolls, and on which the grant was founded, been denominated *a river*.—This grant, as it regards a large portion of the land granted by it, has been usually distinguished as the *Elizabeth-Town grant*, and the claimants under it as the *Elizabeth-Town people*.

The *proprietors*, as soon as this grant came to their knowledge, objected to it, that the duke having already sold and conveyed away the lands to them, there was no title in him at the time, and consequently the grant a nullity. The *Elizabeth-Town people*, however, persisting to maintain it, on the ground that they had purchased the Indian title, and that the grant had thereupon regularly passed to them; before any notice either to Nicolls, or them, of the prior alienation by the duke; a litigation between these parties respecting it took place, and which still subsisted at the commencement of the American revolution; and if it is now to be considered as having ceased, it is to be attributed either to that event, or to a length of possession under the grant, or other circumstances the effect of a lapse of time; and in a very early stage of it, both the king and the duke gave their aid to the *proprietors*, by formal printed declarations, in opposition to the claims of the *Elizabeth-Town people*.—Governor Lovelace of New-York, in order to extinguish the claims of the Indians to Staten-Island, made a formal purchase of it from them in behalf of the duke on the 13th April, 1670. A partition of the entire tract conveyed by the duke to lord Berkeley, and sir George Carteret, having taken place, and

the eastern moiety, or East New-Jersey, having thereupon become the purpart of Sir George, the duke to the intent of *further assurance*, executed three successive releases for it, one to sir George himself, on the 29th July 1674, with the following description of its eastern boundary, "bounded on the east 'part by the main sea and part by Hudson's river;' another to his grandson and heir on the 10th September, 1680, and the third to the earl of Perth, and others the then *proprietors*, on the 14th March 1682, with the following description of boundary in each: 'Extending eastward and north-'ward along the sea coasts, and the said river called Hud-'son's river from the east side of a certain place or harbour, 'lying on the southern part of the same tract of land—(the entire tract conveyed by the original conveyance from the duke to lord Berkely and sir George Carteret) 'and com-'monly called or known in a map of the said tract of land, 'by the name of Little Egg-Harbor, to that part of the said 'river called Hudson's river, which is in forty-one degrees 'of latitude.'

Nicolls by grant of 23d December, 1667, after a recital in 'these words, "Whereas there is a certain island, within this 'government, lying and being in Hudson's river to the west 'of Long-Island, between Nutten Island and the main, and 'south south west from this fort, commonly called and 'known by the name of the Great Oyster Island, it being 'the biggest of the three small islands, which lie there, 'near or adjacent one to another, to which said island there 'appears not to be any particular lawful owner, either na-'tives or others, who have just title, or do lay claim to the same'—grants it to Robert Needham—this grantee the day after it conveys it to Isaac Bedlow, whose name it has borne from that time hitherto.

Governor Andross granted Little Oyster Island, being the second in size of the three Oyster Islands, known also as Bucking Island, to William Dyre.—The date of the grant in this instance, is, as it respects the month and the unit of the year, left blank in the record of it.

In 1683, a body exercising legislative authority in the colony of New-York, under the style of the *Governor, Council, and Representatives*, passed sundry acts, and among

them, one entitled 'An act to divide this province and de-'pendencies into shires and counties,' with the following descriptions of the boundaries of the city and county of New-York, and the county of Richmond. 'The city and county 'of New-York to contain all the island commonly called 'Manhattan island, Manning's island, and the two Barn 'islands, the city to be called as it is New-York, and the 'islands above specified the county thereof.'—'The county 'of Richmond to contain all Staten-Island, Shooter's 'Island, and the islands of meadow, on the west side there-'of.'——These acts were re-enacted in 1691, and as it respects Richmond county in the same terms, but as it respects the city and county of New-York, with the following variance:—'The city and county of New-York, to 'contain all the island commonly called Manhattan's Island, 'Manning Island, and the two Barn Islands, and the three 'Oyster Islands—Manhattan's island to be called the city 'of New-York and the rest of the islands the county.'

The charter to the city of New-York 1686, contains the following description of its bounndaries—'The city of New-'York, and the compass, precincts, and limits thereof, shall 'extend and reach itself, as well in length and in breadth, as 'in circuit, to the furthest extent of and in, and throughout, 'all that the said island Manhattans, and in upon all the 'rivers, rivulets, coves, creeks, waters, and water-courses, 'belonging to the same island, as far as low water mark'—and grants to the corporation 'all the waste, unpatented and 'unappropriated lands, lying and being within the said city, 'and on Manhattan's Island, extending and reaching to the 'low water mark, in, by and through, all parts of the same 'city and Manhattan's Island aforesaid.'

The charter of 1708 grants to them, 'all the vacant and 'unappropriated ground lying and being on Nassau island; 'alias Long-Island, from high-water mark to low water 'mark, contiguous and fronting the said city, from a place 'called the Wallabout, to the Red-Hook, over against 'Nutten Island, that is to say, from the east side of the 'Wallabout, opposite the then dwelling-house of James Ro-'bine, to the west side of the Red-Hook, commonly called 'the fishing place.' And notwithstanding, both as it respects

Manhattan's island, and between the Wallabout and Red-Hook, on Long-Island, the whole of the upland, or lands immediately bordering on, or expressed to be bounded by the adjacent waters, or respective rivers, had been priorly granted to private persons; the *title* of the corporation, as under these grants, to the land between high and low water mark has never been questioned.

The charter of 1730, contains the following description of the boundaries of the city:—'To begin at the river, creek 'or run of water called *Spit Den Duyvel*, over which kings 'bridge is built, where the said river or creek empties into 'the North river, on the West-Chester side thereof, at low-'water mark, and so to run along the said river, creek 'or run, on West-Chester side, at low water mark, 'into the East river or Sound, and from thence to 'cross over to Nassau Island, to low water mark there, 'including great Barn Island, Little Barn Island, and Man-'nings Island, and from thence all along Nassau Island 'shore at low water mark, unto the south side of the Red-'Hook, and from thence to run a line across the North river, 'so as to include Nutten Island, Bedlow's Island, Bucking 'Island, and the Oyster Island to low water mark, on the 'west side of the North river, or so far as the limits of the 'province extend there, and so to run up along the west side 'of the said river or low water mark, or along the limits of 'the province, until it comes directly opposite to the first 'mentioned river or creek, and thence to the place where 'the said boundaries first begun.'—This charter also grants that the mayor of the city for the time being, 'shall be '*bailiff and conservator of the waters of the North and East* '*rivers*,' and accordingly all arrests on these rivers, were made by the mayor as water bailiff, and the process for the purpose, was directed to him.—Of late, and probably within twenty years, the practice has by some means gone into disuse; and in place thereof the process is directed to the sheriff, and served by him.—The three Oyster Islands and Shooter's Island, are respectively as relative to Manhattan Island, and Staten-Island, beyond or westward of the channel.

There are records of more than one hundred and thirty grants, made at various times, by the successive governors

of New-York, during the first thirty-five years from the conquest, to different persons, for lands on Staten-Island; some of them *original grants*, and others in the nature of *confirmations*, and the greater proportion of them subsequent to the release from the duke to the proprietors of East-Jersey, in 1682.

There was soon a controversy between New-York and New-Jersey, concerning the northern boundary of the latter, or the points or stations, the western and eastern terminations of it, on the Delaware and Hudson respectively—when it began, cannot now, perhaps, as to any precise period be ascertained, but as early as the year 1700, the assembly of New-York, in an address to the governor, lord Bellamont, mention, 'that differences has arisen between the county of 'Orange in this province, and the province of East New-'Jersey, and they therefore pray him to take into his con-'sideration the settling the bounds between the two provinces. 'It was at last, in consequence of mutual acts by the respec-'tive legislatures, submitted to commissioners to be appointed 'by the crown.—'The appointment took place accordingly, 'and the commissioners having assembled and heard the 'parties, they on the 7th October, 1769, decreed that the 'boundary or partition line between the colonies of New-'York and New-Jersey should be a direct line from the 'fork or branch formed by the junction of the stream or wa-'ters called the Mahackamack, with the river called the 'Delaware or Fishkill, in the latitude of forty-one degrees, 'twenty one minutes and thirty-seven seconds, as found by 'the surveyors appointed by the said commissioners, to a 'rock on the west side of Hudson's river, marked by the said 'surveyors, in the latitude of forty-one degrees, being seven-'ty-nine chains and twenty-seven links to the southward, on 'a meridian from Sheyden's house, formerly Corbett's.'—— Both parties being dissatisfied with the decree, as it related to the point or station on the Delaware, appealed to the king in council, pursuant to a right reserved in the acts of submission; but in the course of two years thereafter, they concluded to relinquish their appeals, and by like mutual acts to 'adopt and confirm the line so decreed by the commission-'ers and declaring that it was and should be the boundary 'or partition line between the two colonies, and providing

'for the appointment of commissioners on the part of ea-'to join in ascertaining and marking it so that it might be 'sufficiently known and distinguished, and the commission-'ers were directed and required to mark the before men-'tioned rock, on the west side of Hudson's river, with a 'straight line throughout its surface, passing through the 'place marked by the surveyors with the following words 'and figures:—to wit. 'latitude 41° north', and on the south side thereof, the words *New-Jersey*, and on the north side thereof the words *New-York*, and to mark every tree that might stand in the said line with five notches and a blaze on the north, west, and south-east sides thereof, and to put up stone monuments at one mile distance from each other, along the said line, and to number the said monuments with the number of miles the same should be from the before mentioned rock, on the west side of Hudson's river, and mark the words New-Jersey on the south side, and the words New-York on the north side of every the said monuments.

On the 20th of April 1795, the common council of New-York, passed the following ordinance, or bye-law and order:

'It being represented to the board that certain persons 'had set up fuyck fences in the river, below low water 'mark, on the south side of Paulus-Hook on the Jersey shore, 'to the obstruction of drawing seines for the taking of fish, 'whereupon the following ordinance was passed by the 'board:

'A law to prevent the setting of fences or other obstruc-'tions in the rivers within the limits and jurisdiction of the 'city of New-York.

'Be it ordained by the mayor, alderman and commonalty 'of the city of New-York, in common council convened, 'and it is hereby ordained by the authority of the same, that 'no person shall set or place any fence or stake or any other 'thing whatsoever, in any parts of the rivers or bays within 'the limits and jurisdiction of the said city, by which the 'navigation of the said rivers or bays, or the casting or 'drawing of seines or nets for the taking of fish, may be in-'terrupted or obstructed, and if any person shall or do set 'or place any fence or stake, or any other thing whatsoever,

'in any part of the said rivers or bays, contrary to this law, 'such person shall on conviction, forfeit and pay as a fine for 'each offence the sum of eight pounds.'

'And further that it shall be lawful for any person to take 'up and remove any such fence or stake, or other thing which 'may at any time be found set or placed contrary to this law 'as aforesaid.'

'Ordered, that William Sloo, who is employed by this 'board to take fish for the use of the Alms-House and 'Bridewell, do cause to be taken up and removed, all such 'fences or stakes, or other things, as may or shall be set in 'the river in the manner aforesaid, and which may or shall 'obstruct or interrupt him in casting or drawing his seine 'as aforesaid.'

We have been informed, so as to be fully satisfied of the fact, that the fences and stakes were instantaneously removed by the persons by whom they were placed, and who at the same time disavowed any intention to obstruct the fishery.

We are, with due respect,
your obedient servants,
EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, James Parker, Lewis Condict, and Alexander C. M'Whorter, esquires, Commissioners, &c.

28th September, 1807.

NO. II.

Observations upon the question whether by the grant of the duke of York, of the 24th June, 1664, to Berkeley and Carteret, the right of the grantees was limited to high water mark on the Hudson river, or extended to the center of that river, usually termed the filum aquæ.—Charles the second, by his deed dated the 12th March, 1663-4, granted to the duke of York the Hudson river in terms by these words, 'together also with the said river called Hudson's river.'—The duke afterwards by his deed of release dated 24th

June, 1664, granted to Berkeley and Carteret, 'all that 'tract of land adjacent to New-England, and lying and being 'to the westward of Long-Island and Manhattan's Island, 'and bounded on the east part by the main sea, and part by 'Hudson's river, and hath upon the west, Delaware bay or 'river;' 'and also all rivers, mines, minerals, woods, fishings, 'hawking, hunting, and fowling, and all other royalties, 'profits, commodities, and hereditaments whatsoever, to the 'said lands and premises belonging, or in any wise apper-'taining with their, and every of their appurtenances, in as 'full and ample a manner as the same is granted to the said 'duke of York.'—The idea that the right of the duke's grantees is limited to high water mark upon the Hudson, arises from considering the river as a public one, in which the tide ebbs and flows; and of course at the time of the duke's grant, the soil and the water over it below high water mark, at the common law belonged to the king, and has not at any time subsequent passed out of him to any individual, and of course the state or public body that acquired the king's right became entitled to the whole of this river; or else that the river passed to the duke by the king's grant, but did not pass by the duke's grant to Berkley and Carteret, it not being granted to them in terms—and was carried of course by him to the crown upon his acquiring it.—If the king had power to grant the river, it is presumed no person will doubt but that it passed by the grant to the duke. —That he had such power at the common law, satisfactorily appears from Mr Hargrave's law tracts, 1d 17.—The Hudson then ceased to be a royal river, on the 12th March, 1764, and became the private property of a subject. By this transition it is supposed it became subject to the law that regulates inland or private rivers, and lost the prerogatives which regulated the right to it, when it was the property of the crown.

* By the feudal law all navigable rivers were computed among the regalia; from this source and from certain political considerations, the same principle passed into the common law, and it being once established, that a navigable river

1 Black. com. 274.—2 do. 262.

belonged to the king, all his grants respecting such River were subject of course, to the construction peculiar to royal grants. If therefore, the king owned the soil adjacent to a navigable river, and granted it to a subject, binding him upon the river, the grantee would be limited by high water mark—the grant being construed most favorable to the king, and nothing by intendment being taken against him.—The owners of the soil adjacent to navigable rivers, are therefore prima facie, not owners of any part of the river; and if they claim title to the river, it must be strictly shewn by a grant from the king in express terms, or by prescription.—* It is well known that the law in respect to fresh rivers or private rivers, as they are frequently termed, is directly otherwise, and that such rivers of common right belong to the owners of the soil adjacent; and that this ownership, prima facie in all cases extends usque filum aquæ, which arises from the construction of the grant of the adjacent soil, binding the grantees upon the river, all such grants by construction, carrying the right of the grantees to the filum aquæ.† This construction of law so favorable to royal property, is one of the prerogatives of the crown, and never adheres to any description of property, (except in some special cases of tenure by knight service) when such property ceases to be royal‡.—It follows then conclusively that if the soil adjacent to a navigable river together with the river itself, become vested in a subject, and such subject make a grant of the adjacent soil, binding the grantee upon the river, generally without restriction, that such grant must receive the same construction as is incident to every grant of soil adjacent to a private river; otherwise that quality of the property which springs from prerogative only, would adhere to it after it passed into the hands of the subject, which according to all the cases can never be. The true doctrine then is, that at the common law, when a navigable river becomes vested in a subject, it ipso facto, becomes a private river, and all the law regulating the rights to private rivers necessarily attaches to it—subject however to the right of government, and to the jus

* 4 Bur. 2164.—Harg. law tracts, page 5.
† 1 Black. com. 248-9.
‡ 17 Vin. ab. 96.—1 Pur. Wm. 253.—5 Co. Rep. 56.—Prin. law, 85.

publicum, hereafter spoken of.*—In the great case of the river Severn—the lords Barclay prescribed for the river, *usquæ filum aquæ* as parcel of the manor of Barclay, and proved his prescription; suppose he had granted the manor binding upon the river in the usual form; it is presumed no one could doubt but the whole manor would have passed on idea, that the section of the manor between high water mark and the filum aquæ, remained in the grantor, could only be entertained for a moment, upon the supposition, that the binding by the river in terms limited the grant to the margin—but when it be considered that if the boundary be carried to the filum aquæ, the binding is equally by the river, the whole resolves into a question of construction, which in the case of all private grants, being most unfavorable to the grantor, at once extinguishes the idea of the aforesaid section of the manor remaining in him after such grant.

Every navigable river, thus made private by the grant of the king, like the river Severn, is still subject, as is said of that river, to two distinct rights.†——1st. The right of government over it, which the supreme power of the nation necessarily retains, in reference to the safety of the nation, and to the customs.——2nd. The jus publicum, as it is termed by Lord Hale, or the public interest, that the people have of passage and repassage with their goods by water.—For as that great judge says, speaking of a navigable river granted to a subject, 'The people must not be obstructed 'by nuisances or impeached by exactions.' 'For the jus pri-'vatum of the owner or proprietor is charged with and sub-'jected to, that jus publicum, which belongs to the king's 'subjects, as the soil of an highway is, which though in point 'of property it may be a private man's freehold, yet, it is 'charged with a public interest of the people, which may not 'be prejudiced or damnified.'

It may not be amiss to remark further, that if Judge Tucker's opinion, as expressed in his Blackstone,‡ be true, 'that all prerogative rights in this country ceased at the revolution;' it seems necessarily to follow, that the law appli-

* Har. law tracts, page 85.
† Harg. law tracts, page 36.
‡ Page 237.

cable to the rights of private rivers, became common to public or navigable waters also,* and that peculiar right by prerogative inherent in the crown, which occasioned the distinction in law, in respect to these two kinds of rivers being extinguished, no distinction in the law, as to such description of waters remained.——It is presumed therefore, at this day, that the rights of individuals, as relative to public and private rivers are precisely the same—all, however, subject to the two description of rights before particularized—viz. The superintending right of the government for the purposes of public safety and revenue, and the jus publicum.

This statement and consideration of the law, accords with the practice and usage, and with the common understanding, it is believed of the people of the United States.† It was no doubt, under this view of the subject, that the enlightened commentator of the laws of Connecticut, lays down the law to be—that 'all rivers that are navigable, all navigable arms 'of the sea, and the ocean itself, on our coast, may in a cer-'tain sense be considered as common; for all citizens have 'a common right to their navigation, but all adjoining pro-'prietors on navigable rivers, and the ocean, have a right to 'the soil covered with water, as far as they can occupy it, 'that is to the channel, and have the exclusive privilege of 'wharfing and erecting piers on the front of their lands—'Any person therefore, has a right to sail through the water 'that covers the land of another, without being liable for a 'trespass, in the same manner as one may pass through the 'air, that is above the land of another, but no man has a 'right to do any act in the navigable waters in front of a-'nother's land, which can affect the soil, as wharfing or e-'recting piers, for in this there is an exclusive property—'though there is not in the water—nor may adjoining pro-'prietors erect wharves, bridges or dams, across navigable 'rivers so as to obstruct their navigation.'

It is presumed, Mr Swift meant to be understood, that such was the understanding of the common law in Connecticut, and it is believed that such is necessarily the understanding of the common law in every state in the Union since the revolution.

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2 Black. Com. 262. † Swift 341.

The result of the whole of this doctrine, then is, that upon the strictest principles of the common law, the grant of the duke to Berkeley and Carteret, binding them on the east by the Hudson carried their right of soil to the filum aquæ of that river—that no restriction in that grant was intended by the grantor, every one who reads it will readily admit.—It conveys in terms, all the land lying to the westward of Manhattan Island. If an adherence to express terms of grant, is to be so much attended to, as is contended, a more plausible argument arises from considering the land under the Hudson, as expressly included in these words, and carrying the right of Berkeley and Carteret to the eastern margin of the river, than limiting them to the western; and when it is observed, that the grant contains 'all rivers,' it is presumed that instead of any restriction of the property, that was the subject of the grant being intended. The intent was that it should embrace all property, that by the most liberal construction of the law could be brought within it.—There being then no intent on the part of the grantor to limit the grant within the extent the construction of law would otherwise give it.—If the statement of the law herein contained be correct, the conclusion on the question is inevitable,

That the grant to Berkeley and Carteret at the time it was made, carried their boundary on the east, to the filum aquæ of the Hudson river.

We are gentlemen, respectfully yours,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT,

To Ezra L'Hommedieu, Egbert Benson, Samuel Jones, Joseph C. Yates, Commissioners.

September 29th, 1807.

NO. III.

GENTLEMEN,

BEFORE a verbal conference, we beg leave further to submit for your consideration,

1st.—Certain extracts, and an affidavit, marked A. B. C. D. E.

2nd.—That a port has been established at Perth-Amboy, ever since the settlement of New-Jersey; and that the inhabitants of New-Jersey have been always in the constant practice of building wharves, erecting piers, establishing ferries, and taking fish and oysters in the waters adjoining, without any material interruption or question till of very late years.

3d.—A clause in Smith's history of New-Jersey, describing Manhattan's Island as in Hudson's river.

4th.—The duke of York's grant to Berkeley and Carteret, of New-Jersey, in June 1664, binds the territory therein conveyed, 'on the east, part by the main sea, and part by Hudson's river,' and hath upon the west, Delaware bay or river.

5th.—Whether to take Staten-Island out of the duke's grant, it must not be shewn that it lies east of the main sea?

6th.—Whether this can be shewn in any other way, than by proving that the Sound, which separates it from the Continent and makes it an island, is the *Main Sea?*

7th.—Whether the word *main* as connected with *sea*, must not be presumed in legal construction, to have been introduced into the grant for some purpose, and whether any purpose can be imagined but the obvious one of giving a definite meaning to the word *sea;* and to do away all uncertainty in the eastern boundary, which might arise from confounding sounds, straits or arms of the sea, with the sea itself?

8th.—Whether the term *main sea* has not a precise legal signification, which corresponds with the vulgar or common signification of it, and synonimous with *ocean*; and whether this be not chief justice Hale's idea in his description of it, when he says—'The part of the sea which lies not within 'the body of a country, is called the *main sea* or ocean.'

9th.—The duke by his subsequent confirmatory grants of East-New-Jersey, of 1680 and 1682, declares the eastern boundary to extend, 'eastward and northward along the sea coasts, and the said river called Hudson's river,' &c.—Whether the salt meadows, which chiefly constitute the western margin of the sound, and which is thirty miles from the ocean, can be considered the sea coast, which is called for by the grant; and more especially when the confirmatory grants add, 'and all and every isle, islands, &c.? Could the duke, or any other person conceive, that the legal title to Staten-Island, still remained in him?

10th.—Whether the grants of the duke are to be circumscribed within the litus, there could have been any islands meant to be conveyed thereby?

11th.—Whether the duke must not be presumed to have granted under legal advisement? And whether, according to the most approved rules of construction, his words ought not to be taken in the strongest and largest sense against him? so as not only to import as much as they do in common use, but also to include that signification which is known and received among lawyers—see Puffendorf, lib. 5, ch. 12. sect. 13.—And whether the words *main sea*, under the above idea, do not mean more than the word *sea*, mentioned in the grant of Nicolls to the Elizabeth-Town people, as lying between Staten-Island and the main land?

12th.—That the Proprietors of East-New-Jersey, had great controversy with their first settlers, and on that account could have had no wish to have the weight of the crown thrown into the scale against them, by having a controversy with the royal governor respecting Staten-Island; especially with the arbitrary and tyrannical governor Andross, who shewed at the same time, his power and his want of justice, by actually imprisoning governor Carteret, of New-Jersey, for the bare assertion of his lawful authority, in parts of New-Jersey not in controversy.——The above is submitted as a reason, why the proprietors of New-Jersey, did not assert their jurisdiction over Staten-Island, further than is referred to in the extracts submitted.

13th.—That an Indian title has never been considered *in New-Jersey*, any objection against one regularly deduced from the crown.——Besides the purchase of governor Love-

lace from the indians, for the Duke, was in 1670, and anterior to his several grants of 1674, 1680 and 1682, by which all the rights he had at those times, must have severally passed.

14th.—That if a grant be restricted by actual length of chain, or a natural land mark, on the margin of a river, nothing can be presumed to have been conveyed further—and as far as we have had opportunity to inspect the several grants and patents, which have been shewn to us, they all appear to be capable of being reconciled on this principle, to the common law construction of deeds, that we have heretofore submitted; except perhaps, in the grants to some towns, which seem to be grants of jurisdiction, as to corporations, over lands which had been previously, or might be thereafter purchased by the settlers.

15th.—That the commissioners who determined the northern boundary of New-Jersey, were excluded from settling the eastern boundary—hence it was, that the commissioners marked the rock on the west side of Hudson's river, with a straight line throughout the surface of the rock, passing *through* the place marked on the rock by the surveyors, with lat. 41 north; and on the *south* side of the rock, the words New-Jersey; and on the north side with the words New-York; and hence it is also, that they did not mark the east side of the said rock with the words New-York, if they had decided that to be the eastern boundary.

16th.—Further observations on the construction of the several grants from the duke, independent of the common law construction, heretofore submitted; which paper is marked No. 2.

We are with due respect, your obedient servants,

AARON OGDEN,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.
ALEXANDER C. M'WHORTER.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, Joseph C. Yates, esquires, Commissioners, &c. &c. &c.

30th September, 1807.

NO. IV.

GENTLEMEN,

IN answer to your observations on the question, 'Whether by the grant of the duke of York, of the 24th June, 1664, to Berkeley and Carteret, the right of the grantees was limited to high water mark, on the Hudson river, or extended to the center of that river, usually termed the *filum aquæ*.' It is requisite for us to attend to one principle, stated by you, in its application to the grant from the king to the duke, and the grants from the duke; namely: that at the common law, when 'a navigable river becomes vested 'in a subject, it *ipso facto* becomes a private river, and all 'the law regulating the rights to private rivers, necessarily 'attaches to it'.——Although, as will be perceived, we forbear from the examination of this principle, still to guard against presumptions from our silence, we think proper to declare, that we do not admit, because we do not discern, the law to be as we conceive you advance it; that when the soil adjacent to a navigable river on both sides of it, together with the river itself, becomes vested in a subject, and such subject makes a grant of a parcel of the adjacent soil, on one side of the river, bounding the grantees upon the river generally without restriction, that the right of the grantor to the river, comprehending the water and the land covered with it, and the right of jurisdiction, (if he shall also happen to have such right) to extend between certain lines from where it is so bound to the river, on the channel, will pass to the grantee.

Supposing however, that when the case was a *res integra*, or allowing a convenient time to Berkeley and Carteret, after the grant to them, to inform themselves of their rights; it might then have been made a question as to the rules by which the grants of the duke were to be construed, we say, that these having been a cotemporaneous exposition, and a usage or practice in conformity with it, for a period little short of a century and a half, such question must now be precluded.

The grant from the king to the duke, besides passing an estase in the territory, further grants certain rights of jurisdiction, or government, and which as to be discriminated or

abstracted from his estate or interest in the territory, comprehending the rivers within it we shall denominate his right of *jurisdiction*; and although the duke, as between him and the king, was certainly to be considered as a subject; yet in consequence of his *right of jurisdiction*, his grant were to receive the like construction as if they had been immediately from the sovereign, without the intervening grants to him; and in that sense, and in reference to that construction of his grants, he was, as between him and his grantees, to be considered as sovercign, and so the law has always been received in New-York; and accordingly every grantee has been declared to have sued out his grant at his peril; and as a consequence, if he deceived the duke in his suggestions for it, the grant was void. And further, the grants of the corporation of New-York, for the land between high and low water mark, mentioned in the *statement* we have delivered to you; and the grants which are still constantly made by the commissioners of the land office, under the authority of the state, for the soil below high water mark, where it had not prior to the American revolution, been expressly granted; either by the duke before or after his accession, or by his successors, to the crown, after his abdication, all rest on the ground, that where the grant for the adjacent land was bounded generally by the river, nothing passed below high water mark; or in fine, that the grants by the duke, as it regarded the rules by which they were to be construed, were to be deemed *royal grants*.

Whether the law of New-Jersey has been held, that where the *proprietors*, prior to the mode afterwards observed, of appropriating lands, by warrants from *council* of proprietors to the surveyor general, made a grant of land adjacent to a navigable river, so within the *fauces terræ* of the territory granted to them, as unquestionably to pass with it, and binding the land generally on the river; the grantee, as between him and the proprietors, was in virtue of the grant for the land, also entitled to the river as far as the channel, we are not informed; but supposing the law so to have been held; and consequently that as stated by us, it is to be deemed the mere *lex loci* of New-York, and as such not affecting the rights of New-Jersey—still we trust you will be sensible,

that it having now become as it were, a fundamental in our state, it would be highly unadvisable in us to depart from it—not only so, but we have a perfectly satisfactory conviction, there was sufficient warrant, and founded in the law of England, as to be applied to the case or *colony state*, to assume and adopt it in the first instance, and that it has been wise to persist in it.

We remain with due respect,
Your most obedient servants,

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, Alexander C. M'Whorter, William S. Pennington, Lewis Condict, and James Parker, esquires, Commissioners, &c.

30th September. 1807.

NO. V.

GENTLEMEN,

WE have hitherto considered this question in the light of a grant from one subject to another, of land lying in navigable waters.—Supposing we are wrong in the conclusion which we have drawn from this view of the subject; yet the real situation in which we stand, presents to the mind a different view of the question.

The duke of York received, from his brother, Charles 2nd, a grant of a large tract of land in America, at that time little better than a wilderness, for the purpose of settlement and improvement, with ample powers of government. The duke, finding this territory too large for one colonial government, before the country was even taken possession of in his name, granted a large district of this country, of near two hundred miles extent, separated from the rest on the eastern boundary, by large navigable waters, with like powers of government, to two of his friends, at that time high

in the confidence of the king.—This grant being made for the sole purpose of enabling the grantees to plant a colony, and improve the country; thereby to benefit, extend and protect the empire.—We apprehend that this grant, from the general principles of law arising therefrom, without any thing more, being the grant of an independent colony, carries with it a right to the use of the sea and navigable waters adjoining the same. Lest it should be said, that we take for granted what is yet to be proved, we will in the first place, shew upon what ground we say, that the grant carried with it the powers of government. The state of New-York, we apprehend, will not deny that the powers of government were granted to, and vested in the duke of York, throughout the whole territory conveyed to him; in his grant to Carteret and Berkeley, the territory is conveyed to them in as full and ample a manner, as the same is granted to him—on taking possession of which, the grantees assumed the powers of government, under the immediate auspices of the duke and the crown; and in sixteen hundred and eighty-two, after a partition had been made between East and West Jersey proprietors, the duke in order to confirm the title of the East-Jersey proprietors, made a new grant, in which he in express terms, conveys an authority to the proprietors, 'to exercise all necessary government there, with the same 'powers, authorities, jurisdiction, government, and other 'matters and things,' which he himself derived from the grant to him. Should it be said that a grant of the powers of government from the crown to a subject is not alienable; yet we apprehend, that the assent of the crown would cure that defect; that this assent was given, appears by a proclamation of Charles 2nd, dated the thirteenth day of June, sixteen hundred and seventy-four; wherein he says that, 'Whereas our right trusty, and well beloved councellor, sir 'George Carteret, by grant derived under us, is seized of 'the province of New-Jersey, in America, and of the juris-'diction thereof as proprietor of the same; we do strictly 'charge and command all persons inhabiting in such pro-'vince, forthwith to yield obedience to the laws and govern-'ment, which are, or shall be there established by the said 'sir George Carteret.'—A similar recognizance of the right

of government, is contained in his majesty's letter to the deputy governor of New-Jersey, dated the ninth day of December, sixteen hundred and seventy-two.——This right of government thus granted and confirmed by the duke, and recognized by the crown; was in fact exercised by the proprietors, upwards of thirty years, till it was voluntarily surrendered by them to, and accepted by the crown, in the beginning of the reign of queen Ann, on which it became a royal government, and remained a separate and distinct colony until the revolution, when it became an independent state; we therefore think that we are correct, when we say—at least for the purpose for which we use it, that the right of government passed with the soil to the New-Jersey proprietors. That it could be the intention of the parties concerned, that so extensive a district of country should be seperated from the remainder of the territory, erected into a distinct colony with ample powers of government, the territorial lines of which, nine tenths of its whole distance, binding on navigable waters, should be confined within its own shores, and so shut out from navigation, the free use of which being essentially requisite to its existence and prosperity; cannot as we apprehend, be easily conceived of, nor for a moment gain credit with any impartial man, acquainted with the history and geography of the country. When however, we look into the grants themselves, we find this right abundantly recognized; and in one of them in express terms provided for. In the original grant from the duke of York to Berkeley and Carteret, we find this strong and impressive language:—'And also all *rivers*, mines, 'minerals, woods, *fishing*, hawking, hunting and fowling—'and also all other *royalties*, profits and commodities, and 'hereditaments, whatsoever, to the said land and premises 'belonging, or in any wise appertaining, with their and every 'of their appurtenances, in as full and ample a manner as 'the same was granted to the said duke of York.'

Can it be said with legal propriety, that the free use of all navigable waters, washing the shores of an independent colony, is not appertaining to the territory, and among the regalia of the crown expressly granted?——The settlement of New-Jersey was fostered and encouraged by the duke of

York and the crown, for the extension, protection and benefit of the empire.——Can it reasonably be supposed, that it was intended to beguile the first settlers there, and then shut them out from the navigable waters adjoining their shores; that if they took an oyster in front of their lands, they were made liable to be dragged before the tribunal of a neighboring colony as trespassers?—We think this circumstance alone, sufficient to shew that it could not be the understanding of the parties at the time of the contract. But, what puts this question beyond all doubt, is the words in the confirmatory grant by the duke of York, to the East-Jersey proprietors, in sixteen hundred and eighty-two, before mentioned; this being made to explain former grants, and confirm the title, hath the following additional clause:—'As also 'the free use of all bays, rivers and waters, leading into, or 'lying between the said premises or any of them, in the 'said part of East-Jersey, for navigation, free trade, fishing, 'or otherwise.' Here is a complete recognition of the right of the New-Jersey proprietors, to the free use of the waters leading into any part of the colony, for fishing, trade, &c.—In consequence of this grant thus made and explained, the lords proprietors, grantees under the duke, acting under his auspices, protected, countenanced and encouraged by the crown, held out to the adventurers into the colony, in a set of articles of agreement made with them, in the nature of an original constitution of colonial government called the grants and concessions of the lords proprietors, and dated sixteen hundred and sixty-four, among other things—'that the as-'sembly should have power to create and appoint such and 'so many ports, harbors, creeks, and other places, for the 'convenient loading and unloading of goods and merchan-'dize, ships, boats, and other vessels, as shall be expedient, 'with such jurisdiction, privileges and franchises, to such 'ports, &c. belonging, as they shall judge most conducive to 'the general good of the said plantation or province.' It was also agreed, 'that the inhabitants of the said province 'have free passage through, or by any seas, bounds, creeks, 'rivers or rivulets, &c. in the said province, through, or by 'which they must necessarily pass, to come from the main 'ocean *to any part of the said province*;' and to induce ad-

venturers, the lords proprietors published in England, an account of the situation of the colony, shewing its advantages; and among other things say, 'that for navigation it 'hath these advantages, not only being situated along the '*navigable parts of the Hudson river* but lies fifty miles 'on the main sea,' &c.; and again, 'it being considerably 'peopled and situate on the coasts, with convenient harbors, 'proper for such as incline to fishhery, the whole coast and 'every harbor's mouth being fit for it.' We are aware that the acts of the lords proprietors, and the encouragement held out by them to the first settlers, are not legally binding on any others than themselves and representatives; but we apprehend that all this being done under the eye of the duke, and within the hearing of the king, by the friends and favorites of each, is strong evidence of the understanding of the parties at the time of the contract; and we apprehend that cotemporaneous expositions are weighty in law. On this head we will further observe, that at the the time that the proprietors were about to surrender to the crown, in the reign of King William, they stipulated among other things, that they should be entitled to wrecks and royal fish, that should be forfeited, found or taken within East-Jersey, or by the inhabitants thereof within the seas adjacent, to remain to the proprietors with all other privileges and advantages as amply as in the grant and confirmation to them of the fourteenth of March, sixteen hundred and eighty-two, (that is the confirmatory grant of the duke of York, before mentioned)—to which the lords commissioners of trade and plantations, made answer, 'that the right accruing to the proprietors 'from the seas adjacent, cannot be well circumscribed; and 'that the grant of sixteen hundred and eighty two, ought to 'be well considered, and such particulars therein as are 'proper, may be allowed of;' that is, as we apprehend, such things as did not concern the rights of government, which were about to be surrendered. All this added to the reasonableness and propriety of the thing, must we think, force irresistibly on the mind, a conviction that the king, the duke of York, and all parties concerned in the transaction, understood, that the inhabitants of New-Jersey as a separate independent colony, was to have the free use of the Hudson

river and all navigable waters washing their shores, with convenient access to the sea, comprehending in which, the right of erecting and establishing docks, wharves, piers and ports, any where on or adjacent to their own shores.—— When we speak of a separate independent colony, we would be understood to mean, separate and independent of any other colony, but not of the crown. This therefore being the intention of the grant, the nature of the transaction, and understanding of all parties concerned in interest; and as we apprehend, according to the general principles of law arising on the subject, the practice hath been correspondent thereto ever since.

For we think we may with perfect correctness state, that as far back as the memory of man extends, or any other evidence can be adduced, to the present hour, the inhabitants of New-Jersey have used, and uninterruptedly exercised the right of erecting and establishing docks, wharves, piers, ferries and fishing weirs, in front of their lands adjoining Hudson river and all other navigable waters, and have uninterruptedly used the waters of the Hudson river, and the sea adjoining and contiguous to their shores, for the purposes of navigation, trade, fishing, &c. in the same manner as any other American colony did use, occupy and enjoy their own shores, and the navigable waters adjoining and contiguous to them. Independent of any grant, act, stipulation or agreement, we are from the nature of the transaction led to consider that in settling and colonizing the wilderness of America, every district of country erected into a separate and distinct colony, with the powers of government either royal or proprietary, became entitled to the use of the navigable waters by which they are bounded, as part of the territory and domains of the colony; subject however to the general jurisdiction of the crown, made for the purposes of trade, revenue and defence; that the several colonies in respect to each other, were wholly independent, and placed in respect to their relative rights in the situation of independent territories. Being then in possession of these rights, as we apprehend, by express grant, by the understanding of all parties concerned at the time of the grant, and the general principles of law in respect to the same, and having ever since actually exercised and

uninterruptedly enjoyed them—we were at a loss to conjecture on what ground or foundation the state of New-York could build up a claim adverse to them. We apprehended that there existed some grant with a date anterior to the settlement of the country, and transcending all our rights—but on the most diligent enquiry we have not been able to discover a syllable in writing or print on the subject, unless the charter of governor Montgomery in 1730, sixty-six years after the settlement of the country; and the vesting of our rights, can be considered as such. The charter of governor Dungan to the city of New-York, in 1688, and in the reign of James 2d, who was formerly Duke of York and proprietor of the province, expressly limits the jurisdiction of the city corporation to low water mark, on their own shore, and thus circumsribed, it remained until the year 1730, in the reign of George 2nd; when governor Montgomery, desirous of encouraging the commercial city of New-York by endowing it with large extensive territory and jurisdiction, renewed the ancient charters, and extended the jurisdiction of the city corporation in the first place to Long-Island, and from thence across the river taking in the small islands in the same, when with cautious circumspection he approaches the Jersey shore in the language following: 'To low-water mark on the west side of the North river, or 'so far as the limits of our said province extend there, and 'so to run up along the west side of said river at low water 'mark, or along the limits of our said province, until,' &c.

Whether it is intended to set up this charter of Montgomery, as an evidence of the line of the province of New-York extending to the Jersey shore, we know not; we think that it evidences the contrary—for, if the line of the colony at that time extended to low water mark on the Jersey shore, governor Montgomery would never have set it afloat by the equivocal language made use of in his charter. The utmost that can be said of this charter is, that it extends the jurisdiction of the corporation of the city of New-York as far as the limits of the colony west. The province of New-York was not enlarged by this charter, nor is it any evidence of the colonial line; it says no more than this—if the line of the province extend to low water mark on the Jersey shore,

then and in that case, the jurisdiction of the corporation shall extend there also; and if not, then to the line wherever it may be. If instead of low water mark, it had said to Arthur Kull Bay, and Hackensack river, it would have been precisely the same thing; the question where is the line of the province, would have been wholly untouched and undetermined by it.——The charter of Montgomery we think, proves conclusively that in 1730, 66 years after the grant of the duke and the settlement of New-Jersey, that there had been no grant, deed, charter, or other instrument of writing made to the province of New-York, designating the low water mark on the western shore of Hudson river as the western line of the province.——We understand that the state of New-York entertains an idea, that the colonial government of New-York was placed in the shoes of the duke of York, and became his representative when this notion took its rise, or on what evidence its legal existence is grounded, is wholly inconceivable to us.

In an opinion delivered by Mr Richard Harrison, at the request of the corporation of the city of New-York, in May 1804, Mr Harrison says—'that it is well known that so 'much of the land between Connecticut river and Delaware 'bay as passed by the grant of the duke of York, and was 'not conveyed to the propietors of New-Jersey, reverted 'to the crown upon the accession of James 2nd.' The colony of New-York must then not only have been the representative of the duke, but also of the crown. We look upon all this as imaginary—but supposing it was real, and we were contending with the representatives of the duke of York, and the crown; the representatives must surely be bound by the acts of their principles. In the grants of the duke, afterward confirmed and explained by the crown, the facts are simple, and capable of being drawn in a small compass. The right of soil and government being in the duke of York, he formed a tract of land lying westward of Long-Island and Manhattan's Island, into a colony, and another tract of land lying on the east of the Hudson river, and including a northern district of country, into another colony; the two colonies build docks, wharves, piers, erect ferries, fishing weirs, on or contiguousto each of their own shores

at pleasure, and occupy and enjoy the river in common. The only difference between the two colonies in this respect is, that New-Jersey has a written authority for what they do, and New-York has none—that New-Jersey should be placed in a worse situation with a written, than New-York without a written title, is to us a matter of surprize.

We should think that a claim so derogatory to the rights of an independent state and humiliating to the feelings of a free people, should have for its basis a more solid foundation than any thing which has yet appeared to us.—We can perceive nothing either in the original formation or progress of the colonial governments, that should give one colony a superiority over the other, in respect to their respective shores, and the use of the navigable waters adjoining the same, or to the jurisdiction over them. If the colony of New-York derived any advantages from being a royal government, which is a matter we cannot easily conceive of, yet the colony of New-Jersey in the commencement of the last century became a royal government also, and continued so until the revolution and in that respect was on equal ground with the colony of New-York.

We are with due respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER.
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, Joseph C. Yates.

Sept. 30th, 1807.

NO. VI.

GENTLEMEN,

We yesterday delivered to you a written answer to your observations on the question relative to the construction of the grant from the duke of York to lord Berkley and sir George Carteret, and you also delivered to us a number of papers which we have perused and considered and thereupon find ourselves under the necessity of making a further statement in writing previous to the intended verbal conferences between us.

We have already stated in effect that we conceive the subject of the present reference to be a question of boundary and resolving itself into three questions.

Whether New-Jersey is to be restricted to high water mark? Or whether she is to extend to low water mark? Or whether she is to extend to the channel? All depending on the above grant, construed as if it had been *immediately* from the *King*: hence it will be perceived that we do not consider the right of New-Jersey to *use* the waters in question, separated from her claim to boundary or jurisdiction as in controversy; on the contrary we do not suppose ourselves authorized, much less held, to contend for a right in New-York to appropriate the *use* of those waters to her own inhabitants, or as it is usually expressed *citizens*, to the exclusion or in any manner to the prejudice of the citizens of any other state.

In answer to the suggestion that by the grant the right of government, or, as we have expressed it, the *right of jurisdiction* passed with the soil to the New-Jersey *proprietors* and the difference thereby occasioned as to the presumed interest of the parties, or in other words as to the construction of the grant, we would state that the grant is wholly incompetent in terms to create or convey a *right of jurisdiction*.—It contains no *words of grant* more operative than are to be found in every other grant from the duke, and to refer particularly to the grants for the township of Haerlem on Manhattan island and the township of Brooklyn on Long-Island, the former being bounded for at least ten miles on the Hudson, Spit den Duyvel, Haarlem, and East Rivers, and the latter for at least three miles on the last River; and yet as to both the land between high and low water mark, was afterwards granted to the corporation of New-York—as usual it contains many words altogether inoperative, and such as that a perfect estate in the soil or territory, comprehending the rivers within it, would have passed without them, and certainly none of sufficient *legal* import to pass a right of *jurisdiction*.——But admitting the grant competent in terms to pass an independent *right of jurisdiction*, another question still remains. Was it competent for him to pass it as to a *parcel* of the territory? He doubtless might *alien* he territory, granted to him, in *parcels* to others; but it will

not thence follow that as to the *right of jurisdiction* granted to him there was not always to be *unity*, if we may so express ourselves—even should it at times happen to be vested in a plurality of *natural* persons not unanalagous in this respect, as if it had been granted to a *corporation*, so that neither he nor his heirs or assigns could pass all INDEPENDENT OR DISTINCT *right of jurisdiction* to another, over any particular *parcel* and the GENERAL *right of jurisdiction* originally over the *whole* territory, thenceforth, as to such *parcel* to cease, and for this obvious reason, that if a distinct right of *jurisdiction* could be passed as to *one* parcel it might as to *more*, and there being nothing in the original grant from the king to limit the *number*, and the territory or *space* granted by it being infinitely divisible, the several and distinct jurisdictions, or governments, or sovereignties, however they may be most aptly termed, might be numberless; but further, there not being any thing in the original grant restraining a grantee to whom a *right of jurisdiction* over a *parcel* of the territory had passed, to pass to his alience of a parcel of such parcels, and such second alience again on an alienation of a parcel of the parcels aliened to him; also to pass a *right of jurisdiction* to his alience, and so on, whatever may be the number of the several successive alienations of the respective *lesser* parcels *ad infinitum*, so that one alienation of the *right of jurisdiction* as to a *parcel* would defeat the grant altogether as to the *right of jurisdiction* intended to be created and granted by it. The partition between the proprietors it is true, assumes it that the *right of jurisdiction* equally with the territory was partible, the government over each moiety becoming thereby *distinct* and *independent* of the government over the other moiety, and the grant or *further assurance* from the duke to sir George Carteret, the grandson, of the 10th September 1680, and under which it would seem his executrix, the year thereafter, set up a claim to Staten-Island—also assumes it that in the partition the proprietors had ceased to *hold together* as well the *right of jurisdiction* as the territory or *land*, and the duke accordingly grants to sir George the grandson, and in full and in express terms the *right of jurisdiction* over his purpart, what was agreed between the parties to the partition, should thereafter be called *East-New-Jersey*.—We are however

willing to wave all these questions, and are ready to admit, that as soon as the conquest of the country from the Dutch came to the knowledge of the *proprietors* they actually established and exercised a government over the territory granted to them, and as under a right or power contained in the grant from the duke, that the government so established and exercised by them, was recognized by the inhabitants and the government of New-York, by the duke, and by the king; and so far it was a government *de juse* or legitimate, but that in another and equally just sense, it was a government *de facto*, only as founded in mere *practice* under the grant; and in as much as such *recognition* was of a government certainly not including the oyster islands and Shuter's Island, and there being no matter, either of *fact* or of *law* by which a boundary could be assigned to it, intermediate between those islands and the western shore, the recognition was *virtually* of government whose eastern boundary or limit was high water mark.

With respect to the general fact that New-York has always exercised over the waters between the shores of the two states, and the fact that the mouth of the river Hudson was at or near Bedlow's Island, as far as they may be supposed to be in the knowledge of any persons now in life, are so within the knowledge of two of us, as that in course of the discussion, we shall assume them as proved; namely, that from their earliest recollection there has always been a reputation or understanding, that the whole of the waters of the river Hudson, and of the bay between Staten Island and Long-Island, were within the actual *jurisdiction* of New-York; that there was not however, any precise reputation or understanding either way, whether such jurisdiction extended to high water mark, or was confined to low water mark on the shore of New-Jersey—that as to the waters between Staten-Island and the main, there was no reputation or understandingas to a boundary or line of jurisdiction; that the citizens of New-York and New-Jersey had a free and common use equally of the waters in question, to take fish within the same, and for every other purpose; and that according to the common conception when a vessel was below Bedlow's

island, she was said to be in the *Bay* and when above it in the *North-River*.

We remain with due respect,
Your obedient servants,

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, Alexander C. M'Whorter, William S. Pennington, Lewis Condict, and James Parker, esquires, Commissioners, &c.

1st. October, 1807.

NO. VII.

GENTLEMEN,

Permit us further to submit—

I. Whether it must not be intended that the duke considered the Hudson's river ending at the point where the main sea commenced, or otherwise can it be intended that he meant to leave a chasm in the line of the eastern boundary of New-Jersey.

II. Whether the duke intended the Kill of Kull as part of the main sea under the following considerations:

1st. That the word *Kill* means *river*, and cannot therefore be considered as part of the *main sea*.

2nd. The Hudsons river does not empty itself into the Kill of Kull.

3d. The course of the Kill is east and west and not north and south, and consequently would form a southern and not an eastern boundary.

4th. That the waters of Raritan bay extending westward from Sandy Hook would form a northern and not an eastern boundary.

III. Whether the common law construction of grants that we have submitted will not be sufficiently reconciled with the rule of construction as understood in New-York in ori-

ginal grants there by a recollection that the duke came to the crown in 1684, *after which* all such grants might be considered as royal grants—and whether by this consideration we may not avoid the dilemma of putting aside the Lex Loci of New-York or the common law of the realm as understood when the grants of the duke were made.

We remain with respect, your obedient servants,

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, & Joseph C. Yates, esquires, Commissioners, &c. &c. &c.

5th October, 1807.

NO. VIII.

GENTLEMEN,

In answer to the two first questions, you submitted to us yesterday, we say that as the grant from the duke expresses the southern boundary by the main *ocean* and the eastern by the main *sea*, it is to be presumed that the terms though they frequently have the *same* yet as used in the grant, were intended to have *different* significations, and which accords with the fact, the bay between Sandy Hook and the Narrows may be denominated *sea*, but to denominate it *ocean* would be a forcible mode of expression which the occasion only might perhaps tolerate.—The water between New-Jersey and the western shore of Staten Island, is certainly neither *river* nor *creek*, in the strict and most correct use of the terms but is, what its present name properly imports, a *sound*, which is an *arm* of the *sea* being a *passage*, and in that sense may be considered as *sea*, and it appears that the instant the question occurred, whether the appellation of *river* or *sea* was to be applied to it? the latter was preferred as the more proper, and the error in the previous Indian deed corrected in the subsequent formal grant by the government accordingly.—Kill van Kull, considered as a *continuation of the passage* by the sound to the bay, may also be denominated *sea*, and at the same time when considered as the passage between the bay and the *Achten* Kul, or *Back* Kul, or bay now Newark bay, it may be also denominated the Kill, and so the *Kill of the Kull*.—The Dutch word Kill has been used in this country without any precise or definite meaning, as will be perceived when it is mentioned, that the Mohawk river was called the Maquaar *Kill*, the passage between the Hudson and Haarlem rivers, round the northern point of Manhattan Island was called Spyt den Duyvel *Kill*, and New Town creek an arm of the East river dividing the counties of Kings and Queens on Long Island for some miles, and no stream issuing into it, or passage from it, was called Mispat *Kill*, so that the sense in which it is to be understood must always be according to the *subject matter*.

It will however be perceived that Kill van Kull is wholly without the question; for if the boundary is to pass thro' the *Sound* and not thro' the *Narrows*, then it of course must pass down through Kill van Kull to reach the mouth of the Hudson, and if the line is to pass through the *Narrows*, then Kill van Kull and it can have no possible relation to each other; so that either way the enquiry whether, Kill van Kull is to be declared an arm of the *sea* or a *river* or a *creek* is useless.

That the mouth of the Hudson is at its confluence with the East river, we might merely refer to *Van Der Donck*, and to the statement we have delivered that such has been the common conception in regard to it hitherto; but in addition thereto we conceive ourselves warranted in asserting that so it exists in nature, though we at the same time admit that for legal or artificial purposes, and such as right and justice would require; the river itself, might constructively be considered as commencing not only at the Narrows but even at Sandy Hook, the entrance into it from the ocean. As to the objection that the course of Kill van Kull is east and west and that the waters of Raritan bay extend west from Sandy Hook, so that the Kill would form a southern, and the bay a northern boundary.—We answer, That supposing the ocean to be the southern boundary, then a line from Sandy Hook along the shore of Raritan bay through

the sound and Kill van Kul and up the Hudson to the degree of latitude; we conceive may with propriety be denominated the *eastern* boundary.—Notwithstanding the deviations of some of the curvatures or courses and distances in it, from its general northerly and southerly direction.

In answer to the third question, we would mention that we do not know, neither have we any reason to believe the distinction you surmise between the grants of the duke before, and those by him after he came to the crown has ever obtained: referring therefore again to the subsequent special grants which have been and still continue to be made for the soil below *high water mark*, as proof or example—we will only further state they have all taken place without discrimination as it respects the Prince or person from whom the grants for the adjacent upland were obtained, and proceeded on one uniform simple assumed principle, that the grants for the upland are within the *prerogative* rule of construction.

We are, with due respect, gentlemen, yours, &c.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, Alexander C. M'Whorter, James Parker, and Lewis Condict, esquires, Commissioners, &c.

October 2nd, 1807.

NO. IX.

GENTLEMEN,

Upon reading your first note handed us this day it has occurred to us as proper to submit to you the following considerations.

1st.—Whether the general question of boundary between the two states does not involve in it the consideration whether the high water mark or the litus on the eastern side of the Hudson river, be the true and legal line of division, equally with the lines of division stated by you.

As you will recollect, in our first communication we urge, that the duke having granted to us all the land lying and being to the westward of Long-Island and Manhattan's

Island, gave us ground to contend, that the true intent of the grant was to invest us with the soil or land under the water of that river—and the grant conveying also *all rivers* fortifies the idea. And although it may be said that the subsequent part of the grant binds us by the river—it is still to be recollected that if the soil under the water passed by a just construction of the deed—no subsequent words in the same deed could defeat this right.

2nd.—We are by no means satisfied with the opinion entertained in New-York, that the grants of the duke of York are to be considered as acts of the king, or, in other words royal grants.

3d.—We wish not to be understood that we are contending for the use of the waters lying between the two states merely as a common highway, which every alien friend would possess equally with us; but that we consider them at least to the *filum aquæ*, as within our jurisdiction, and the land lying under them as part of the territory and domains of the state.

4th.—We apprehend it must have escaped your notice, that the powers of government are conveyed to the East Jersey proprietors in the confirmatory grant of 1682, in direct and unequivocal terms, as fully as they are granted to the duke, for which we refer you to an extract of that grant accompanying this paper and marked No. 1.

5th.—As to the competency of the duke to grant an independent right of jurisdiction, we apprehend that the proclamation of Charles 2nd, bearing date the 13th June 1674, and also his letter of the 23d November, 1683, must have escaped your notice, in which this right is not merely implied but expressly recognized—Extracts from which we herewith deliver you, marked No. 2 and 3.——It may be a question whether at the common law the power of creating an independent government could be conveyed even from the king to a subject, much less from one subject in divided parts to other subjects; yet it was done and subsequently acquiesced in by all parties concerned in interest—viz. the duke and the king; and New-Jersey therefore became an independent colony *de juse*, as you candidly admit a recognition by the inhabitants and government of New-York, was in no

wise necessary to make the right legitimate. It was not in this point of view alone, that we mentioned the grant of the powers of government, but to shew that it was the intention of the duke at the time of the grant, to erect all the territory lying westward of Long-Island and Manhattan's Island to the forty-first degree of north latitude, into a colony, with the accustomed powers of government, and that therefore the grant was entitled to a different construction, and consideration as to the navigable waters adjoining the territories contained in it, than if it had been a grant of a small tract of land unaccompanied with such intentions.

6th.—We do not admit it to be a fact as advanced, that New-York has ever exercised the exclusive jurisdiction of Hudson river—nor do we think that reputation or common understanding will be sufficient authority to assume that fact. We think we are correct when we say that the reputation and common understanding in New-Jersey, was contrary and repugnant to the reputation and common understanding in this respect in New-York.——Besides West-Chester county, we understand was, previous to the revolution, (and we presume is so still) actually bounded on Hudson river, and as we apprehend, could not in any view of the subject have jurisdiction beyond the *filum aquæ*.

It may be true, that New-Jersey while a colony and since it has become an independent state, has had but little cause to exercise jurisdiction on Hudson river; but we apprehend that the *quantum* or degree of the exercise of a right does not affect the right itself. Whenever New-Jersey hath had cause to exercise jurisdiction over the wharves, docks, feries, fishing weirs, &c. beyond low water mark on Hudson river, it hath done it. And it is a fact of public notoriety, that a man has been indicted and tried for murder committed on Hudson's river as within the body of the county of Bergen.

We are with respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
LEWIS CONDICT,
JAMES PARKER,

To Ezra L'Hommedieu, Egbert Benson, Samuel Jones, Joseph C. Yates, Commissioners, &c. } October 2nd, 1807.

NO. X.

GENTLEMEN,

If the commissioners on the part of New-York and New-Jersey should unfortunately disagree upon the construction of the several grants of the duke of York, still it is hoped that the following considerations which are wholly distinct from those heretofore submitted may prove sufficient to produce an agreement in another particular, to wit.

That the jurisdiction of New-Jersey must be coextensive with its NATURAL *territories as understood by the laws of nature and nations.*—The following may serve to illustrate and prove the foregoing propositions.

I. That New-Jersey possessed all the rights of a free, sovereign and independent state, as fully and completely as any nation on the globe, except so far as she may have delegated rights to the general government of the United States; that in virtue of her sovereignty or empire (unles some limitation be shewn) she has jurisdiction over all the territories which by natural law belongs to it, and a perfect right to all powers within such territories that are necessary for her safety and preservation.*

II. That where two nations border each on a navigable river that (unles some reason of preference can be shewn) the jurisdiction of each extends to the middle of the river.†

III. That the coast of the sea, the shores, the bays, and harbours belong to the jurisdiction of the adjoining country; they are as it were the gates and inlets to such country and necessary for its safety and commerce‡ and consequently a part of the country and manifestly within its territories and under the empire § of the government established therein.

IV. That the empire of a country and the property in its soil are not inseparable in their nature even in regard to sovereign states—and nothing prevents the possibility of property belonging to a nation in places not under its obedience in which case they possess them in manner of individuals.¶

V. That if the foregoing positions be true, it will *not* follow that the jurisdiction of our shores and harbors belong

* Vatel 6. †. Vatel 108. ‡ 1. Black. Com. 264. § Vatel 116. Puffendorff 383 L. 4. C. 4. & 8. ‖ Vatel 118. ¶ Vatel 258.

to the state of New-York, although the property should belong to any individual or corporation within that state, or even to that state itself.*

VI. That the king of Great-Britain possessed, not only the *property* in all navigable rivers, but by his prerogative, claimed and exercised (among his regalia†) jurisdiction over them, and over all shores below high water mark, and over all ports and harbors whatsoever within his American colonies. It is therefore evident that if the grant to the first settlers of New-Jersey had contained an express limitation to high water mark, it would only follow that the property as well as the jurisdiction over the subject matter now in controversy was retained by the duke and again resulted to the crown when he became king of England, and would be no more than if the crown had retained originally the property & jurisdiction of a large lake in the centre of New-Jersey.

VII. It is believed that the crown of Great-Britain, by the lords commissioners for trade and plantations, exercised the actual jurisdiction in and over all harbors and rivers within her colonies, independent of any colonial assemblies; in which case when the independence of New-Jersey was acknowledged the kingof Great-Britain impliedly yielded to her all the jurisdiction generally, which he had before exercised in over and within the natural territories belonging to the *country* called *New-Jersey*.

VIII. That New-Jersey having as before mentioned on her various sides many valuable bays, harbors and ports, naturally forming a part of her territory, and essentially necessary for her safety and the establishment of her commerce, we do not perceive how any principle can be admitted which may *abridge her sovereignty over her shores and the adjoining waters.*

We remain yours, with due respect.

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson and Joseph C. Yates, Esquires.—Commissioners, &c. &c. } Oct. 2, 1807.

* 118—258. † 1. Black. Com. 164.

NO. XI.

GENTLEMEN,

A recurrence to the grants from the duke, does not enable us to find where he expresses the southern boundary to be the *main sea.* In his release of 1664 to Berkeley and Carteret, his description of the boundaries of New-Jersey, is as follows:—viz. 'Bounded on the east *part by the main* '*sea and part by Hudson's river*, and hath upon the west 'Delaware bay or river, and extendeth southward to the 'main ocean as far as Cape-May at the mouth of Delaware 'bay, and to the northward as far as the northernmost branch 'of the said bay or river Delaware, which is in forty-one 'degrees of latitude, and crosseth over thence in a straight 'line to Hudson's river, in forty-one degrees of latitude.'—In this deed of confirmation to the twenty-four proprietors of East-New-Jersey, of the 14th March 1682, is the following description—'All those *easterly* parts or shares and 'portions of the said whole and entire tract of land and 'premises before mentioned, extending *eastward* and *north-* '*ward* along the sea coasts and the said river called Hud- 'son's river, from the east side of a certain place or har- 'bour lying on the southerly part of the same tract of land, 'and commonly called or known in a map of the said tract 'of land by the name of Little Egg-Harbor, to that part of 'the said river called Hudson, &c.'

Besides the map of New-Jersey, manifestly shews the ocean to be the longest part of its eastern boundary line, and that the course of the *sea coast*, is almost north and south from Little Egg-Harbour, and is as directly so as the Hudson's river itself.

Whence it seems to be manifest that the duke of York did not intend to use the term *main sea* in a different sense from the synonimous term *ocean*—But, according to the real fact of the case, that is to say, the ocean lying on the eastern boundary agreeably to the common and legal acceptation of the term *main sea.*

That we are ready to admit, that the Raritan bay, the Sound, and the kill of Kull, may be well denominated *arms of the sea*, which may be said to extend from the *fauces terra*, as far as the tide ebbs and flows. But we do not perceive any

necessity to depart from the express terms of the grant, and leave a *direct northerly course* through the *narrows*, which is equally an *arm* of the sea, in order to deviate to a westward course from Sandy-Hook, round Staten-Island; which instead of effecting any manifest intention of the duke, seems directly contrary to it, if any meaning is to be collected from the description of the course as being *north*, and the situation of the land as lying westward of Manhattan Island and Long-Island, and not as lying westward of Manhattan Island and Staten-Island, which otherwise would have been his mode of expression.

We cannot yet perceive, why the common law construction of the duke's grant, which is manifestly according to his real interest, should (in a discussion like the present) be given up, in order to let in a narrow prerogative construction, which is defined to be '*Law in case of a king, which is not law in case of a subject.*'

Which construction, if carried to the extent under the arguments which have been delivered to us, ousts New-Jersey from all jurisdiction on her shores lying adjacent to Delaware river, Delaware bay, the Main sea, the Raritan bay, the Sound, and the Kills, and from thence to the forty-first degree of latitude on the Hudson river.

We are, gentlemen, yours, &c.

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, Joseph C. Yates, esquires—Commissioners, &c. &c.

October 3d, 1807.

NO. XII.

GENTLEMEN,

We have attended to the *propositions* contained in one, and to the *questions* contained in the other of your communications of the 2nd inst.

The propositions when considered as in the *abstract*, and with some explanations or modifications, and which we are

persuaded you would admit as requisite to render them more definite, probably would not be disputed by us; but we do not perceive how they, or the authorities you cite, can serve as a rule of the law whereby to decide the the question between the two states, which is a question of *right* or *title* to *territory*, comprehending not only land but also of water, and the land covered with it—and of right or title both to the *jurisdiction* and the *property*, and arising on a grant or transfer of jurisdiction and property made as under the law of the *land*; the *same* law by which a former question of boundary, arising on the *same* grant, and between the *same* parties, was decided. We cannot therefore consent to resort to the law of nature and of nations as a rule of decision. But, the case would from necessity be remanded to its proper *forum*; for the law of nature and of nations, being as you have stated it, 'that when two nations border each 'on a navigable river, unless some reason of preference can 'be shewn, the jurisdiction of each extends to the middle of 'that river.'

The *reason of preference* alledged by New-York, is a better right or title by positive law.——But, if we were to consent to leave the question to be decided according to the law of nature and nations, and assuming the fact that New-York and New-Jersey began to exist as distinct independent governments or sovereignties at the same instant, and that coeval therewith, and for the period we have stated, New-York has uninterruptedly, and without any claim by New-Jersey, actually exercised or *possessed* the jurisdiction over the waters in question, surely the law of nature or nations would pronounce that such *possession* or prescription, is of itself, decisive against New-Jersey, and that the peace of civilized nations require, that New-York should be declared to be at peace as to that portion of her territory.—— And here we take occasion to repeat, that the *fact* as to the *possession* of the jurisdiction, is so in our own knowledge, that it would not be possible for us to surrender a belief of it, no more than it would be, (if we may be tolerated in the expression) to surrender a belief arising from the evidence of our own senses, whoever might be the witnesses, and whatever the number of them, testifying differently; and

pecially if they were weak and immediately interested, and although upright, yet perhaps, not sufficiently guarded or capable to distinguish between their wishes and their thoughts.

The individual act of Mr Kennedy, in 1746, in purchasing a proprietary right, and having Bedlow's island, which he then held under a New-York title, surveyed on it, is certainly not only no proof of an interruption of the *possession* of New-York, but we suspect the transaction may be explained when it is recollected that he was at the time owner of the farm at Ahasimus, bordering on the river, and it was not unnatural for him to reason, as it appears the proprietors of New-Jersey did, on the application of Palmer, for their title to cover his estate on Staten-Island; and 'that it 'would be of no ill consequence, but rather of service, to 'any claim' which he might thereafter be minded to make to the water, or the soil under it, in front of his farm.

The fact you state as of '*public notoriety*, that a man had 'been indicted for a murder committed ou Hudson river, 'as within the body of the county of Bergen,' has never before come to our knowledge.—On enquiring we find, that the question, whether the *place* was within the jurisdiction of New-Jersey? was raised, and was expressly reserved; that the trial proceeded, and the prisoner was acquitted, the proof not being sufficient; that it was so *recent* as within two years last; and the proceedings wholly unauthorized, even by the law of New-Jersey, for supposing the state to have the jurisdiction below high water mark, and to any distance which may be contended for, no part of such distance or space is within the county of Bergen—its eastern boundary being thus described in the statute for *dividing and ascertaining the boundaries of the counties*, and passed as early as 1709,-10—'To begin at Constable's hook, and so to run up *along* the *bay* and *Hudson's* river, to the partition point between New-Jersey and the province of New-York."—— In a former communication we mentioned that Kill van Kull was to be considered as a *continuation* of the *Sound*, and from the above statute we have since discovered, it has always been considered the bounds of the county of Bergen, from where it comes to Pequanack river, being thus described in it—'And so to run down the said Pequanack and 'Passaick rivers to the *Sound*, and to follow the Sound to 'Constable's Hook where it began.'

As to the intimation that the duke having granted to lord Berkeley and sir George Carteret, '*All the tract of land* '*lying and being to the westward of Long-Island, and Man-* 'hattan's *Island*, that therefore the high-water or *litus* on 'the eastern side of the Hudson river might be considered 'as the true and legal line of divison,' and which if intended in your first communication to us, escaped our notice; we briefly answer, that the grant is expressed in terms, in our view, materially different from them as cited by you. It does not grant *all* the land westward of Long Island and Manhattan's Island, but, 'all that tract of land *adjacent* to *New-England*, 'and lying and being to the *westward* of Long-Island and 'Manhattan's *Island*, and bounded,' &c.——The tract intended to be granted is designated in *general* terms, as being *adjacent to New-England*, and *westward of Long-Island, and Manhattan's Island*, and finally described by *special* or *definite* boundaries.

If the *designation* had finished with the first member of it, *adjacent* to *New-England*, then perhaps the whole of the territory which the duke held except the *eastern* territory expressed in the grant to him to be a *part* of the main land of *New-England* would have passed. If it had finished with the second member of it, westward of *Long-Island and Manhattans-Island*, and if the grant itself would not then have been void for uncertainty, we can suppose the western shores of Long-Island and Manhattans Island would have been its eastern, and the eastern shore of the Delaware its western boundary—but we cannot imagine the rule or principle by which north and south boundaries would have been to be assigned to it. When the *description* however assigns boundaries to it by *special* or *definite* terms, as to be distinguished from, or contrasted with the preceding *general* terms, they are to restrain the *general* terms and confine them to their functions, which was only and *ex abundanti*, to mention the tract in relation generally to its *proximity* to New-England, and its *bearings* from Long-Island and Manhattans-Island, so that we conceive that the ques-

, what is the eastern boundary intended in the grant? As as it may depend on the *terms* of the description, must epend wholly on the *latter* or *special* or *definite* terms, al-luded to without any reference to the *preceding* or *general* terms.

The consideration that New-Jersey is an independent sovereign state does not in our view vary the case. She was always so as against New-York, both *defacto* and *de jure*, and in the principles of the American revolution she was always so *de jure* as against Great-Britain, with this exception, that the prince, possessing the British crown for the time being, was her sovereign, entitled and exercising the like powers and prerogatives as in Great-Britain, and if consequences in whom the supreme executive power was vested, and to whom as possessing especially the *ficial* powers, as they are termed, the powers of *peace* and *war*, the duty of *allegiance* was due, with whose concurrent agency, as a branch of her *legislature*, she could provide for raising armies and maintaining navies, and in every other respect provide for her safety and defence; regulate commerce and navigation, lay and collect duties on exports and imports, and tonnage on vessels, naturalize foreigners, coin monies, and assert and vindicate her rights as to boundary, and which she actually did as to her northern boundary, except the last; however, all the rights and powers here enumerated, the *indicia* of sovereignty, she has, equally with New-York and every other state in the union, delegated or ceded to the general sovereignty of the United States, and is now perhaps to be more likened to a corporation with certain powers, none more *plenary* than that of life and death for breaches of her own internal peace, and she is no otherwise independent than as she holds these powers independent of the general sovereignty; but still at *the will* of the legislatures or conventions of three fourths of the several states—neither will any supposed change in her condition by the revolution affect the case. The parliament or legislature of the mother country claimed a right to pass laws binding on the colonies. The colonists claimed to be entitled to like rights with their fellow subjects in Britain, and so not bound by any law to which they did not assent, or in effect to be sovereign or independent of the parliament.

Attempts were made to define the nature or extent of the sovereignty to be enjoyed or retained by the colonies, or to establish a *fundamental* between the parliament and them, and they to remain members of the empire, thereby to preserve the *unity* of it—all of which failed, inasmuch as they would only have terminated in the incongruous and futile mode of government an *imperium in imperio*, and there being no alternative between an absolute submission to the will of the parliament and the empire remain *intire*, and an absolute independence of such will, and of course a *severance* of the empire—the colonists resolved on the latter. Such is the simple principle of the American revolution. The question was limited as to the *parties*, it being between the parliament and the colonists, and not between the colonists themselves —and also as to its *subject* it being a mere *legal* question arising on the British constitution. We therefore conclude with stating that the doctrine that any one of the states acquired as against any other of them, in consequence of the revolution, any territorial rights or an enlargement or extension of territory is inadmissible.

We remain with due respect, your obedient servants.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, Wm. S. Pennington, James Parker, Lewis Condict, & Alexander C. M'Whorter, esquires, Commissioners, &c. &c.

3d, October 1807.

NO. XIII.

GENTLEMEN,

Although it probably was understood that those interchanged on the 3d instant were to close the written communications between us—you will still permit us in answer to yours, briefly to state that we have been misconceived, if it is supposed that we considered the expression *main sea*, in the grant from the duke as denoting its *southern boundary*—on the contrary we contend that *sea* and *ocean* as they stand

in the grant, are to receive different significations, and that the *ocean* is its *southern*, and that the *sea* forms a *part* of its *eastern* boundary, and this interpretation is confirmed by the partition-deed between the *proprietors* in 1676, and the two subsequent grants or *confirmations* from the duke of the 10th September, 1680, and the 14th March 1682, in which the boundary of East New-Jersey from Little-Egg-Harbor to the degree of latitude on the Hudson, is described "as ex-"tending eastward and northward along the sea *coast*, and "Hudson's river," and which by the familiar process of *redendo singula singulis*, and to that end transposing the words may be made to read "*extending eastward along the sea coast and northward along the Hudson river*,' and then as it respects the *eastern* boundary a case of the nature we have in a former communication suggested, would arise, in which the Hudson ought constructively to be considered as commencing at *Sandy Hook*.—One thing is assuredly evident, that the partition-deed and the two subsequent grants suppose the *course* of the *coast* from Little Egg-Harbor towards Sandy Hook to be, for a distance *easterly* and if for *any* it must be the *whole* distance, there no where existing a *natural* boundary for *such* a distance less deviating from a right line than that reach or portion of the coast.

We will only add that the subsequent use of the term *coast* as a *synonimæ* of *ocean* is scarcely to be conceived applicable to a *bay* or *other arm* of the sea, is decisive that our interpretation as to the different senses in which the terms *ocean* and *sea* as used in the grant, are to be received is correct.

We remain with due respect, your obedient servants,

EZRA L'HOMMEDIEU.
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To William S. Pennington, Aaron Ogden, Alexander C. M'Whorter, James Parker, & Lewis Condict, esquires.

October 5th, 1807.

NO. XIV.

GENTLEMEN,

Arms of the sea and navigable rivers are subject to a *jus publium*, a *jus privatum* and a *jus regium*. To this last right singly we meant to apply the propositions arising from the sovreignty of New-Jersey as distinct from all the other considerations we had therefore laid before you.

We mean explicitly to exclude under this head all questions of right or title to territory or property, as arising from the duke's grants and to confine ourselves merely to this jus regium; under this explanation we beg you to consider our communication of the second instant, in reference to this particular right.

If it be true as heretofore stated that the crown exclusively exercised this jus regium (being one of the regalia) in virtue of its prerogative through the agency of the lords commissioners of trade and plantations, independent of Parliament or any colonial assembly—it seems then to follow, that the rights exercised by New-York, of which you speak of your own knowledge before the revolution must have partaken of the nature of the *jus publium* and *jus privatum* only, and can have no reference to the *jus regium*, which we presume was never out of the crown of Great Britain while its king was our sovereign.

Suffer us *here* to refer to the many instances of the *jus publicum* and *jus privatum* by New-Jersey which we have before enumerated, most of which have been within our actual knowledge and observation.

The king as stated by you was the sovereign and a component part of the government of New-Jersey as well as of New-York and Great-Britain at the time of the revolution, whence the conclusion appears to be necessary that the *jus regium* theretofore exercised by the king over the shores and adjacent waters, of that part of the realm called New-Jersey, must have naturally devolved upon the sovereignty established in New-Jersey and not upon the sovereignty established in New-York.

It is submitted to the gentlemen of New-York under this view of the subject whether the evidence to which they have referred of the jurisdiction *de facto* since the revolution is of such remarkable facts, or can in any way amount to that im-

memorial usage or prescription right spoken of in public law, and which would oust New-Jersey from all kind of sovereignty and empire in and over its shores and adjoining waters, provided she had acquired such sovereignty by the assertion and vindication of her independence.

We remain with respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER.
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, & Joseph C. Yates, esquires, Commissioners, &c. &c. &c.

5th October, 1807.

NO. XV.

GENTLEMEN,

After mature deliberation and due attention to the written communications that have passed between us in our late discussion—we are of opinion, that according to the terms and manifest intention of the duke of York, in his several grants to lord Berkeley and sir George Carteret and their assigns—that the eastern boundary line passes through the narrows, and not through the Sound and Kill of Kull—& further, that in virtue of these grants, as also of sovereignty of the state of New-Jersey, this boundary line extends usque ad filum aquæ, or the midway of the river Hudson, or other waters lying between the shores of the two respective states.

We have to request from you an equally explicit opinion.

Should our respective opinions be found unfortunately to differ, then we beg leave further to request from you generally, your sentiments, as to the probability of accommodating our differences, by establishing a boundary line more convenient to New-York and New-Jersey, respectively; at the same time leaving to New-Jersey all her free navigation, than

to run the line according to the opinions of right, they may be entertained by the respective boards of commissioners.

Yours with due respect,

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER.
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, Joseph C. Yates.

Oct. 6th, 1807.

NO. XVI.

GENTLEMEN,

In answer to your note of this day, we can only say, that such are the facts, and such to our minds have appeared the reasonings from them, that we have not been able to persuade ourselves otherwise than that New-Jersey cannot rightfully claim Staten-Island, or below the western high water mark, of the waters between the shores of the two states.

The citizens of all the states in the Union, have the benefit and use of the navigable waters within the jurisdiction of New-York, in common and equally free with her own citizens, and the citizens of New-Jersey may avail themselves of her existing provisions for gratuitous grants to owners of the adjacent lands, for land below high water mark.

Still any proposition from you on the ground of consulting the mutual and due convenience of both the states, specifying or defining a line within which New-Jersey is to have the jurisdiction, free in future from the claims of New-York, to the end that her citizens may then have the benefit or use, without unreasonable detriment to others, or apprehensions of evils of a public or general nature, and which they cannot have if the jurisdiction of New-York is to extend over the whole of the waters in question, it certainly will receive our deliberate, and we trust, unprejudiced consideration; and the same time it is submitted, whether, in as much, as already with respect to the laws of quarantine,

and the period is approaching, when in every other respect a strict, and of course an expensive police will be requisite over the waters in the vicinity of the city of New-York; and that in order to its being effectual it must be extensive with the waters themselves; it will not behove both parties to proceed with caution in a measure of such magnitude, and not to be foreseen in all its consequences.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, Alexander C. M'Whorter, James Parker, and Lewis Condict, esquires, Commissioners, &c.

October 6th, 1807.

NO. XVII.

GENTLEMEN,

Being so unfortunate as to differ on the question of right, and you having cast back on us the necessity of making proposals for accommodation, we would ask whether it would accord with your views (should the state of New-Jersey relinquish its claim to Staten-Island,) to run the line from the middle of the Hudson river, in the forty-first degree of north latitude, and so down the middle of said river through the bay, the *Kill of Kull* and the sound, but in such manner as to leave the jurisdiction of the Oyster or small Islands in New-York?

We remain with due respect, your obedient servants,

AARON OGDEN,
WILLIAM S. PENNINGTON,
ALEXANDER C. M'WHORTER,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Egbert Benson, Samuel Jones, Joseph C. Yates, esquires, Comrs. &c. October 6th, 1807.

NO. XVIII.

GENTLEMEN,

We took it for granted, that having declared ourselves definitively against the admission of the claim of New-Jersey as founded in right, that their propositions of *accommodation*, if any, were to originate on her part. We cannot accede to a proposition by which the middle of the river Hudson for any distance shall be the line dividing the jurisdiction.

We are, gentlemen, with due respect, yours, &c.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, William S. Pennington, James Parker, Lewis Condict, and Alexander C. M'Whorter, esquires, Commissioners, &c.

October 6th, 1807.

NO. XIX.

GENTLEMEN,

Understanding that no line will be agreed upon by you on the principle of an accommodation of differences, respecting the eastern boundary line of New-Jersey—and further that you cannot consent to make any propositions to us upon the subject—permit us to say that we do not perceive any further utility in continuing the present discussion unless you have some further communications to make us.

We are, respectfully yours.

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT.

To Ezra L'Hommedieu, Samuel Jones, Egbert Benson, Joseph C. Yates, esquires—Commissioners, &c. &c.

October 6th, 1807.

GENTLEMEN,

NO. XX.

We can only repeat that a proposition of a line having for its object the convenience of the citizens of New-Jersey will be received by us, and in deliberating on it, we shall only regard the considerations we have suggested of benefit and use to accrue to them, of detriment which others may suffer, and of evils to be apprehened to the whole community, and consequently we decline an accommodation on any other grounds. We are gentlemen, yours respectfully.

EZRA L'HOMMEDIEU,
SAMUEL JONES,
EGBERT BENSON,
JOSEPH C. YATES.

To Aaron Ogden, Wm. S. Pennington, James Parker, Alexr. C. M'Whorter Lewis Condict, esquires, Comrs. &c.

NO. XXI.

GENTLEMEN.—It is not for the state of New-Jersey to ask and receive *benefits* from the state of New-York—we have not been commissioned for any such purpose.

As the claim of New-Jersey as stated by us has unfortunately failed to produce in you a disposition to settle a jurisdictional line upon principles of mutual concession—which principles and not any conviction of right in New-York constituted the *basis* on which we made our enquiry in the note of yesterday—and as you will not treat on this basis all other attempts towards accommodation are at an end.

We are at a loss to conjecture where it is you have imbibed an idea so wholly unworthy of us as that we would treat for the convenience of individual citizens at the expence of the just rights of the state.

We remain with due respect, your obedient servants,

AARON OGDEN,
ALEXANDER C. M'WHORTER,
WILLIAM S. PENNINGTON,
JAMES PARKER,
LEWIS CONDICT,

To Egbert Benson, Ezra L'Hommedieu, Samuel Jones and Joseph C. Yates Esquires.—Commissioners, &c. &c. Oct. 7, 1807.

APPENDIX.

BY the honorable Philip Carteret, esq. governor of the province of East-New-Jersey, under the right honorable Lady Elizabeth Carteret, sole executrix to the right honorable sir George Carteret, knight and baronet, deceased, late lord proprietor of this province, and his council.

To the honorable the governor or commander in chief of all his royal highness territories in America, at New-York, and his council there.

WHEREAS I have an order to lay claim to Staten-Island, as properly and justly belonging to the lord proprietor, his government and jurisdiction of this province, and doth appear by his royal highness's grant, under his hand and seal, bearing date the 10th day of September A. D. 1664.—— Wherefore these are in the lord proprietor's name, and by virtue of the said grant, to demand of you, the surrender of the said island unto me, with the quiet possession thereof, and that yourselves, or any other persons by your authority, do forbear the exercising any command, authority or jurisdiction within the said island; in which I do expect your speedy answer and compliance.

Given under my hand and seal the 22nd July 1681.

PH. CARTERET.

The letter to capt. Arthur Brackett, deputy governor, and commander in chief of New-York government, &c.

SIR,

According to my orders I have sent to Mr La Prarrie, and Mr Bollin, to demand the surrender of Staten-Island into my possession and government, as of right belonging unto sir George Carteret, lord proprietor of the province, as you may see by the copy of his royal highness's grant, sent you by them—concerning which pray let me have your speedy resolution and answer.

Your humble servant,

PH. CARTERET.

By the honorable Philip Carteret, esq. governor of the province of East-New-Jersey, under the right honorable the lady Elizabeth Carteret, sole executrix to the right honorable sir George Carteret, knight and baronet, deceased, late lord proprietor of this province, and his council.

WHEREAS Staten-Island doth of right belong to the province of East-New-Jersey, as doth appear by his royal highness the duke of York's deed of grant, under his hand and seal, bearing date the 10th September, 1680, but hath been detained by several of the governors under his royal highness, contrary to all law and equity; and having now a special order from the lord proprietor to demand the same, ——These are in his majesty's name, to will and require you, the magistrates, officers and, inhabitants of the said island, to forbear yielding any obedience to the government or jurisdiction of New-York, or to do or act any thing by their authority or command; but that you forthwith yield obedience to the jurisdiction and government of this province, and receive your commissions, orders and instructions from me, your lawful governor—as you will answer the contrary at your perils.

Given under my hand and seal the 22nd July, A. D. 1681.

PH. CARTERET.

The foregoing are true copies from Lib. 3, page 171, in the office of the proprietors of East-New-Jersey, at Perth-Amboy.

JAMES PARKER, *Register*.

September 10, 1807.

Book A, page 2, March 28, 1681.—Directions and instruction to James Bollin, esq. secretary of our province of East-New-Jersey, from Lady Elizabeth Carteret.

'You are to lay claim to Staten-Island as belonging to 'us, according to his royal highness's grant; and also the 'farm at Horsemus, and to take it into possession for my use.'

Book 3, page 22, Feb. 15, 1668.—Articles by Philip Carteret, to John Ogden, sen. and others, undertaking a fishing trade; as also the taking and preserving of whales, and such like great fish, &c.

'Imprimis—I do give and grant unto the aforenamed 'John Ogden, Caleb Camitley, Jacob Molleins, William

'Johnson, and Jeffry Jones and company, and to all or any 'of them, free leave and liberty, to take or kill any whale or 'whales, or such like great fish, in any place or places where 'they may be found or taken, whether at sea, or in any creek 'or cove between Barnegat, and the easternmost parts of 'this province, without any exceptions of drifts or wrecks.'

2nd.—'That the said persons and company, shall have 'free liberty to bring on shore, at any convenient place or 'places within the bounds & limits before mentioned, all such 'whales, or great fish, as they shall find, kill or take,& to erect 'huts or cabins on any person's land by the water-side, upon 'occasion, for their better preservation of the said whales or 'great fish, and trying them for the making of oil, or curing 'of other fish they shall take—Provided they do not trespass 'upon corn-fields, nor damage to the stock or cattle of any 'such persons, upon whose grounds they shall come.'

3d.—'Extends the limits of the charter to three years.'

4th.—'That for the encouragement of the said persons 'and company in the prosecution of this design—I do 'promise and grant unto them, in case Staten-Island falls 'within this government, some convenient place or tract of 'land upon the said island, near unto the water side, fit for 'the settlement of a town, or society, to consist of twenty-'four families; and that they shall have a competent pro-'portion of land alloted to each family or lot, with meadow 'ground, as well as planting land, and free commonage upon 'the island—each family or lot to pay as a quit rent, to the 'lords proprietors, their heirs or assigns, one bushel of 'wheat yearly.'

Book 3, page 27, June 21, 1669.—Licence from Philip Carteret, governor, &c. to Peter Hetfelsen, 'to be the only 'and constant ferryman between Communepau and the 'city of New-York, for three years.'

Same book, page 52, January 18, 1671.—License to Job Simerson, ferryman between Bergen, Communepau and New-York, 'with rates and conditions as was formerly 'granted to Peter Hetfelsen.'

Same book, page 152, Feb. 14, 1678.—License to Joseph Hunt, and others, to take whales, &c. within the same bounds as above granted in page 22.

Minutes of board of proprietors, A B, page 13.—At a meeting and council of the proprietors and proxies—to proprietors of the province, 10th May, 1685.

Present the deputy governor, &c.—' Petition from John ' Palmer, esq. to have a patent for the lands he has had and ' taken up on Staten-Island, upon consideration thereof, ' and that it may be of no ill consequence, but rather of ser- ' vice in our claim to that island—It is agreed and ordered, ' that the governor and council may make a patent of the ' same to him.'

Book A, page 185, May 26, 1684.—Patent from the proprietors of East New-Jersey, to John Palmer of Staten-Island, within the said province, esquire, ' All that his capital ' messuage or dwelling house, with the appurtenances, situ- ' ate, lying and being on the north side of Staten-Island, a- ' foresaid, within Constable Hook, near the mill creek late- ' ly erected and built by the said John Palmer, and in the ' possession of the said John or his assigns; and all that ' other parcel or tract of land,' &c.

This patent is for seven tracts containing in all 4500 acres.

Book C, two commissions, page 1, Aug. 4, 1718.—Charter to the the city of Perth-Amboy, by governor Richard Hunter, describes the bounds as follows:—' Beginning upon ' the north side of the Raritan river, by the upper corner of ' that called Peter Sonman's land, and by the lower corner ' of that now in the possession of James Moore, of Wood- ' bridge; thence extending on a straight line as said Moore's ' land goes, to land now possessed by one John Veal; thence ' continuing along by the said Veal's land, to the north-east ' corner thereof; from thence extending upon a direct line; ' to the south-west corner of David Herriot's land, and so ' extending along by said Herriot's, to the south-east corner ' thereof; from thence extending on a straight line, to the ' south-westerly corner of the land lately in the tenure and ' occupation of John Carhart, formerly one Henry Lessembus, ' and so along the line thereof, easterly as it goes, to the ' meadow or marsh on the north side of a gully, where water ' generally runs; thence extending on a direct east line thro' ' the marsh and sound to low water mark, on the easterly ' side thereof; from thence running down in the sound

' southerly, as far as the southernmost point of Staten-Island; ' from thence on a direct line, to where George Willock's ' plantation, called Rudyard's, adjoins by a creek, to that ' plantation, of late belonging to Andrew Bowne, deceased, ' thence extending along the lines of said Bowne's land, (ex- ' cluding the same) to Matewan creek; thence up the creek ' to a bridge thereon, where the highway from Amboy ferry ' to Freehold and Middletown, crosseth the same; thence ' extending along the partition line betwixt the counties of ' Middlesex and Monmouth, to Millstone brook; thence ' down the said brook to the post road; thence along the ' same to South-River as it goes to Raritan river, and so ' down Raritan river, (including the said river) to high wa- ' ter mark on the north side thereof, to where the limits of ' the said town are said to begin.'

Book C. 3, page 224, January 7, 1733.—Licence from governor Basby to Archibald Kennedy of New-York to settle a ferry in the county of Bergen, in the province of East New-Jersey, to carry passengers from thence to New-York, and from New-York thither.

Elisha Parker's warrant for 199 47-100 acres, W. 2. 16. Archibald Kennedy's 10 9-100 acres, A. B. 2 for 226—10 9-100 acres in full—to Archibald Kennedy.—These do certify that Elisha Parker by me duly deputed and sworn to the intent herein after mentioned, did survey for Archilald Kennedy, esq. a certain island situate in Hudsons river in the county of Bergen, and eastern division of New-Jersey called and known by the name of Bedlow's Island: beginning at a stake standing one chain and sixteen links distant upon a south thirty-two degrees and a half east course from a small cedar tree growing out of the side of the bank on the southeasterly side of the said island and from the said stake running west four chains and five links, thence north forty-eight degrees and a half west five chains and five links—thence north twenty six degrees west three chains and five links, thence north three degrees and a half west seven chains and three links, thence north four degrees east one chain and seven links, thence south eighty-two degrees east six chains and sixty seven links thence and south forty-seven degrees and a half, east four chains and fifty five links, then

south fifteen degrees and a half east four chains and five links, then south fourteen degrees west six chains and forty links to the beginning, (at one chain and ten links of the last course the house bore north seventy degrees west at one chain and twenty one links distant,) containing eleven acres and forty-two hundredths of an acre strict measure, which after allowance is to remain for ten acres and nine tenths of an acre to which Archibald Kennedy is entitled by virtue of a deed to him from Elisha Parker for the said quantity of ten acres and nine tenths of an acre of land unappropriated, dated the 18th day of February 1746—7, and recorded in lib. A. B. 2. fol. 26, to grant which the said Elisha had right in part of his warrant from the council of proprietors of the eastern division of New-Jersey aforesaid for 199 47-100 acres of land dated the 21st May 1744, and recorded in lib. W. 2. fol. 16.

Witness my hand, this nineteenth day of February, 1746.

JAMES ALEXANDER, Sen.

The foregoing is a true copy from book S. 2. page 169 in the office of the proprietors of East New-Jersey at Perth-Amboy, September 10, 1807.

Book B. 2. page 251, Nov 14, 1719.—Patent from governor Morris to George Wilcocks to keep a ferry from Amboy to Staten-Island.

Book F. page 742, Sept. 15, 1697.—Patent to George Wilcocks for sundry water lots in Amboy, extending into the Sound to low water mark.

Book C. page 70, August 26, 1698.—Patent to the same for other water lots extending to low water mark in the Sound.

Book G. page 61, May 1, 1699.—Patent to Thomas Gordon for two lots extending to low water mark in the Sound.

Bergen county, ss.—

Cornelius Van Vorst of Aharsimus in the county of Bergen, being duly sworn, deposeth and saith that he is now in the seventy-ninth year of his age—that he was born where he now lives, and has resided at Aharsimus ever since his birth—that this deponent has been acquainted with the shore on the west side of the Hudson river and what is now

called New-York bay ever since he was a boy—that this deponent has known that the inhabitants of the town of Bergen have uniformly exercised the right of oystering and fishing in the Hudson river and bay aforesaid ever since his recollection, and that the said inhabitants of Bergen have also exercised the right of setting fikes upon the flats and of continuing their extension from the shore into the river or bay from year to year—and that this deponent has also set fike fences, oystered and fished in the said river and bay and upon the flats—and this deponent further saith that he never knew any of the people of New-York exercise the right of setting fike fences upon the flats or on the west side of the Hudsons river or bay aforesaid within the limits aforesaid, excepting one person about two years ago, who this deponent understood had set a fike fence between the two islands; but of this this deponent has no certain knowledge—and this deponent further saith that when a boy he understood from the old inhabitants of Bergen that it had been the practice at the town meetings of the corporation of Bergen they appointed certain officers who they called water-bailiffs, whose particular duty it was to apprehend offenders upon the waters within the said township, which were considered to include those from the western shore of Hudson river and west of the bay aforesaid, to the deep waters in said river and bay—that this deponent understood that Jacob Vanhorn and Minard Garebrants were two of the persons who held the said office of water-bailiffs and that said bailiffs did frequently apprehend persons belonging to the city of New-York oystering upon the flats, and bring them before the authority then in Bergen— and this deponent further saith that he never understood that any legal measures were taken by the persons from New-York thus apprehended in defence of the right—but this deponent was informed that after some time a number of the people of New-York came over armed with muskets and drove off the said bailiffs—and this deponent further saith the records of the annual proceedings of the corporation of Bergen of the year of which this deponent now speaks have been lost or destroyed. And this deponent further saith that he established the present ferry at Jersey (then Powles Hook) about

forty years ago, that he built a dock and ferry stairs for the accommodation thereof, into Hudsons river beyond low water mark. and that no objection was made by the people or corporation of New-York for his so doing—that since the first establishment of the ferry aforesaid he has extended the ferry stairs and dock still further into the Hudson river and no objection was then made by the people or corporation of New-York for his so doing—and this deponent saith that the said ferry, has been established ever since the memory of this deponent, and that the ferry at Hobcken has been established nearly as long as the ferry at Powles Hook, that the ferry stairs and dock as well at Weekauk as Hoboken have for many years been extended beyond low water mark in the Hudson river, and that this deponent never heard any objection made thereto by the people or corporation of New-York, or any difficulty suggested on account thereof. And this deponent further saith, that a few years since, how many this deponent cannot now recollect, but since Mr Vanedyne Elsworth, first came to live at Powles-Hook, a certain William Slow, as this deponent understood, came over from New-York by the directions of the corporation, and cut the nets of some of the people of Bergen, and set them and went to fishing himself; that the said William Slow was prosecuted before Daniel Van Ryper, esq. of Bergen, by the person injured, and judgment obtained for the damages, and execution issued thereon, and the net taken by virtue thereof, and carried into Bergen, where it remained a few days, when this deponent understood the said Stow came over by order of the corporation, and paid the damages and costs, and took the net away. And this deponent further saith, the next season after the before mentioned transaction took place, one alderman and two assistants of the corporation of New-York, came over to this deponent, and asked permission to fish for the use of the alms-house, whicht his deponent permitted them to do; since which this deponent does not recollect any interference has been made by the corporation or people of New-York, with the right of fishing of the people of Bergen, nor have they since requested permission to fish, this deponent's knowledge, but

this deponent believes, that the people of New-York, as well as from some parts of Jersey, have practiced oystering upon the flats, and in Hudson river and New-York Bay.—And further this deponent saith not.

CORNELIUS VAN VORST.

Sworn before me this 26th September, 1807.

(SEAL) PHILIP WILLIAMS, Not. Pub.

And whereof an act being required, I have granted the same under my notarial form and seal, at the town of Jersey the day and year above written.

PHILIP WILLIAMS, *Notary Public.*