Is the legal title to land under water in East-Jersey, where the tide flows and re-flows, in arms of the sea, bays and rivers, vested in the State, or does the same belong to the Proprietors of East-Jersey; and in case of a controversy, in what Court ought the same to be decided?

OPINION.

From the statement of facts furnished with the foregoing question, it appears that Charles the second, in the year 1664, granted to his brother James, Duke of York, a tract of land comprehending the present State of New-Jersey, with all the islands, soils, *rivers*, *harbours*, marshes, waters, &c. thereto belonging and appertaining, with all the King's estate, right, title, interest, &c. in and to the same. The King also granted to the Duke the Government of the territory included in the grant.

The Dutch were at this time in possession of New Jersey, but surrendered it to an English force in August of the same year; and by the treaty of Breda in 1667, it was ceded to the King of England. In 1673 it was again conquered by the Dutch, and by the treaty of peace in 1674, it was restored to the King of England.

After the last mentioned treaty, in June 1674, by a new patent, the same territory and rights of government mentioned in the first patent, were re-granted and confirmed to the Duke, his heirs and assigns.

By sundry conveyances, all executed after the second patent to the Duke, his estate in East-Jersey, together with the powers of government, became vested in twenty-four persons, whose heirs and assigns are the present Proprietors of East-Jersey.

In 1702, the then Proprietors both of East and West-Jersey, surrendered the powers of government to Queen ANN, who accepted the surrender, and New-Jersey thereupon became a royal province.

All the lands in New-Jersey are held by titles derived from the Proprietors; and from the time of the last patent to the Duke of York, neither the King, nor the Colonial

Government, nor the State, has ever granted lands except such as had been acquired by purchase, forfeiture, or escheat.

The Proprietors have repeatedly granted land under navigable waters, and their right to do so has never been questioned until of late.

Such being the material facts in the case, the answer to the foregoing question must depend upon the operation of the patent to the Duke of York, and of the surrender of the powers of government by the Proprietors.

It is evident that by the patent the King intended to grant to his brother every thing which he had power to grant within the boundaries specified in that instrument, and that the words of it are as comprehensive as possible. If then the King had power to convey, and the Duke to take and hold land covered with the tide waters, the question must be answered in the affirmative. It has however been denied that King Charles the second had power to convey lands under water where the tide ebbs and flows.

In the cause of Arnold *vs.* Mundy, (I. Halsted's Report, 1.) an opinion was delivered, which has probably occasioned this question.

One of the Judges held that by the grant to the Duke of York, the King conveyed to him all things appurtenant to the sovereignty commonly called Royalties for the benefit of the colonists; but that he could not so grant them as to convert them into private property, and that on the surrender of the government they reverted to the Crown. That they are now vested in the people of New-Jersey, who have in themselves both the legal estate and usufruct, and may make such disposition of them as they may think fit. He seemed to think that the right to the soil under tide waters was one of these Royalties; and he founded this opinion on the law of nature, the civil law, the common law, and magna charta.

It is my duty to examine these positions, with the respect due to the learned Judge who has advanced them.

It is proper to distinguish between the fee simple of the soil, and a right to the exclusive use of it for all purposes. An individual may be seized in fee of the soil of a highway, yet the public have a right of passage over it; so the title to the soil of a fresh water river may be in one man, and the right of fishing in it in another. Almost all the argu-

ments in the opinion alluded to, tend to shew that the use of navigable rivers for various purposes is common to the public, but are inapplicable, (as it appears to me,) to the question in whom the fee simple of the soil is vested. If it should be asked what is the value of a title, subject to such a right in the public? it may be answered,

1st. That the existence, and not the value of the title, is the question to be determined.

2d. That the title is of value; for if the soil is private property, then no one can, without the consent of the owner, erect upon it wharves, mill-dams, or other edifices. Thus when a few years ago the legislature of this State passed an act authorizing Mr. Macomb to build a dam across the Haerlem River, (in which the tide ebbs and flows,) he was obliged before he could avail himself of this grant, to acquire from the Corporation of the city of New-York, the soil on which he intended to build it, of which they were seized in fee.

We are then to inquire whether by the law of nature, the soil of a navigable river is incapable of being private property. If it be, then doubtless the title of the Proprietors is invalid, and that of the people of New-Jersey equally so; for the law of nature is paramount to all human laws, and binds the citizens of New-Jersey collectively as well as individually.

No reason has been given why the grant to the Duke of York should be considered void by the law of nature; but I presume this opinion has been founded on the position that the sea is incapable of ownership, and that rivers in which the tide flows, are arms of the sea.

But this proposition is only true to a limited extent. "The open sea, (says Vattel, B. 1. Cap. 23 S. 280,) is in its "own nature not to be possessed, nobody being able to "settle there so as to hinder others from passing." But he afterwards adds in the same chapter, (S. 287,) "The various "uses of the sea near its coast render it very susceptible of "property;" and he shews by a variety of reasons and examples, that the sea itself along the coast, as far as a nation is able to protect its rights, may become the property of the nation.

Grotius asserts that none can have property either in the entire sea or its principal branches; but he adds, that

rivers are susceptible of property, because confined in banks. (Dejure, &c. B. 2, Cap. 2, S. 3.)

Puffendorf holds the same doctrine, and allows that the shores of the sea, the sea itself near them, and the right of fishing near the coast, may be property of the nation.

But upon this point it cannot be necessary to cite authorities. Can it be supposed that nature forbids wharves and tide mills? or that the Dutch have violated its precepts in reclaiming for the use of man thousands of acres formerly buried beneath the waves?

The property possessed by a nation may, by the law of nature, be enjoyed in the manner which the nation thinks most convenient. It may either remain in common, to be enjoyed by all the citizens, or the whole or any part of it may be divided among them as private property.

Whether a partition shall be made, and who shall be entrusted to make it, must be decided not by the law of nature, but by the constitution and laws of the nation itself.

The civil law was the code of the Roman Empire. By it, all running water, the sea and its shores, sea ports and rivers, are declared to be common—and the shore is defined to be all that tract over which the greatest winter flood extends. Institutes, Lib. 2, Tit. 1, S. 1.

But it is notwithstanding notorious that private persons were allowed to occupy the shores, and even to appropriate the soil beneath the sea. It was common for the wealthy and luxurious Romans to make fish-ponds and erect edifices in the sea, and the practice is noticed by Sallust, and by several of the poets. The ponds of Lucullus were sold by Cato, and according to Pliny, produced a sum more than equal to one hundred and forty thousand dollars of our money. It is true, that some of these ponds were dug in the shore, and water from the sea brought into them by canals. But (Columella, Chap. 17,) describes the usual method of constructing them, and directs that for certain kinds of fish, they should be made on that part of the shore which is never left destitute of water by the ebbing of the sea. Plutarch speaks of the edifices built by Lucullus in the sea itself. According to Pomponius, as quoted by Grotius, this could only be done by the Prætors leave. It seems, indeed, scarcely credible, that in a nation whose principal territory was a peninsula, washed for so many hundred miles by the sea, there should be no power lodged in any

part of the government to authorize the construction of a wharf in a seaport, or the reclaiming of marsh land.

Can it be that the Emperors, even when they had united in themselves all power, and become completely despotic, so that their will was law, had yet in this respect less authority than the Commissioners of the Land Office of the State of New-York? But without endeavouring to solve a difficulty which has caused no small embarrassment to commentators, it is sufficient to observe, that the civil law was never in force either in England or New-Jersey.

By the common law of England, all title to land is supposed to be derived from the King; and this, which is sometimes a legal fiction in England, was up to the time of the Revolution exact truth in New-Jersey. The King is the sole absolute proprietor of all the land in his realm; all others are his tenants. Nor is his title to the soil to be confounded with his sovereign authority. He is not only the first Magistrate of the nation, but is also the *owner* of the soil.

He has the sole right to grant the lands not already disposed of, to such persons and upon such terms as he thinks proper. It is true, that he is invested with this right, as with every other, for the public good. But the constitution has provided no means for controlling its exercise, other than the punishment of the ministers who have advised improper grants. It is the same with the still more important prerogative of declaring war. This right is not confined to lands which are not covered with water. On the contrary it is held that the soil beneath the sea itself and under navigable rivers, belongs to the King, and that he may grant it to individuals. It is plain that such a right must exist in some department of the government in every maritime nation. That the power of granting such lands is vested in the King of England, has never, to my knowledge, been denied in that country. Sir Matthew Hale says, "Although the King hath "prima facie this right in the arms or creeks of the sea "communi jure and in common presumption, yet a subject "may have such a right, and this he may have two ways: "1st. By the King's charter or grant, *and this is without ques-* "*tion.* The King may grant fishing within a creek of the "sea or in some known precinct which hath known bounds "though within the main sea. He may also grant that "very interest itself, viz. *a navigable river* that is an arm of

"the sea, the water and soil thereof." (Hargraves law tracts, 17.)

In the case of the Attorney-General *vs.* Richards, (2. Anst. 603,) an information was filed in the Exchequer against the defendants for erecting buildings between high and low water mark in Portsmouth harbour. The defendants claimed to hold the soil of the place in question under letters patent of the 4 *Charles* I. These letters patent granted to Mary Wandesford and William Wandesford certain mud banks and lands overflown with the sea—The counsel for the prosecution say, "The prima facie right of the Crown to all ports "and arms of the sea is clearly established. The nature of "that right is explained by Lord Hale in his treatises, "De "jure maris," and "De portubus maris." It is there shewn "that the King has the soil of the sea-coast and havens, and "is entitled to the profits thereof as a *jus privatum;* and so "far as it is considered in that light, he may grant it away."

The counsel for the defendants assert—"It is clear that "as far as the jus privatum of the Crown is concerned, a "grant of the soil of the sea-coast or of a harbour is good." The chief Baron in delivering the opinion of the court, says: "*It is clear* that the right to the soil between high and low "water mark is prima facie in the Crown. Then the onus "of proving an adverse title is thrown upon the defendants. "This they attempt to do under the letters patent; but "upon the whole evidence as far as we now can trace the "meaning of the grant, this spot does not seem to have been "included in it." Thus the counsel on both sides and the court, all unite in admitting the right of the King to grant land below high water mark; and it may be observed, that it never occurred to any of them that such grants were forbidden by Magna Charta.

Hale says, that there are thousands of instances of the King's licensing the building of new wharves.

It is well known, and appears from the statutes made in relation to the Marsh lands, that hundreds of thousands of acres have been reclaimed from the sea on the coast of England, and are at this day private property. It seems strange to say that such lands are incapable of becoming property, or that they have all been reclaimed before the reign of King John.

A grant of the King for land under the tide water conveys a right to the soil; but this right is nevertheless to be

enjoyed subject to the rights of the public, of which navigation is one. An obstruction to navigation is a nuisance, and cannot be justified by the King's license. A building upon land, granted by him cannot be purpresture, but it may be abated as a nuisance; and whether it be a nuisance, is a question of fact to be decided by a jury.

The practice has been in conformity to the law as I have stated it. The patent to the Duke of York is one instance in which the King has granted land under water. But it is said, that this was granted to the Duke as Governor in his political capacity. The same observation cannot be made in relation to the following.

James 2d. granted to the corporation of the city of New-York all the ungranted land on Manhattan Island extending to low water mark. Queen Ann granted to the same corporation certain land on Long-Island, between high and low water mark. George 2d. granted to the same corporation a large tract of land extending 400 feet below low water mark under the water of the Hudson river and of the Sound. A considerable part of the city of New-York stands on the lands thus granted; and no one has ever yet thought of calling the title in question. Since the revolution, the State has made similar grants to the city; and the commissioners of the Land-Office are in the constant habit of granting land under the tide waters of the Hudson river to the proprietors of the adjacent banks, when they desire it, almost as a matter of course.

The only other reason assigned for the invalidity of the patent from Charles 2d. is, that such grants are prohibited by the 16th chapter of Magna Charta. I am convinced that the object of this chapter has been mistaken, and that it has no reference to grants of fisheries, and still less to grants of land under water.

In this I differ from Lord Coke, and from several eminent judges and lawyers who have cited his commentary upon this chapter as good law. It is therefore becoming to state at large the reasons which induce me to dissent from such respectable authorities.

For a reason which will presently appear, I shall transcribe the 15th as well as the 16th chapter.

15. Nec villa nec liber homo distringatur *facere pontes ad riparias*, nisi qui ab antiqua et de jure facere debent.

16. Nulle reparie defendantur de cetero, nisi ille que

fuerunt in defenso tempore Henrici Regis avi nostri, per eadem loca, et eosdem terminos, sicut ipse consueverunt tempore suo.

To the 16th chapter Lord Coke (2 Instit. 30) adds the following comment: "That is, *no owner of the banks of rivers*, "shall so appropriate or keep the rivers several to him, to "defend or bar others to have passage or fish there, other-"wise than they were used in the reign of H. 2. This "statute, says the Mirror, is out of use, car plusors rivers "sont ore appropries et engarnies et mise in defense que "soilont etre commons a pisher et user in temps le Roy. "H. 2."

In the old translation published with the statutes at large, the 16th chapter is rendered as follows: "No banks shall "be defended from henceforth but such as were in defence "in the time of King Henry our grandfather, by the same "places and the same bounds as they were wont to be in his "time."

It appears that the word *ripariæ* in the charter, is both by Lord Coke and the author of the old translation, rendered *banks*.

When or by whom the old translation was made I do not know, but Mr. Ruffhead, in his preface to the statutes at large, speaks of it with little respect: "In the *early* statutes, "(says he,) the errors of the version are *exceedingly numer-*"*ous.*"

It is not therefore presumptuous to question its accuracy in this the *earliest* of all the printed statutes.

The word ripariæ, here translated *banks*, in truth means *rivers;* and so it is rendered in all the other translations of the statutes. It is a Monkish Latin word in use in the middle ages, and is the root of the French *riviere*, and of the English river. In Du Cange's Glossary, it is thus explained: "Rivaria—Riparia—Fluvius Gallice Riviere." So also in Spellman's Glossary:

"Riparia—riæ, pro fluvio."

And in the 15th chapter of the charter, *facere pontes ad reparias* must mean, to make bridges over rivers. Lord Coke, probably misled by the old translation, in order to make sense of the 15th chapter, reads "facere pontes *aut* riparias," which he supposes to mean to make bridges *or* banks; and in this error he may have been confirmed by a copy of the Magna Charta of the 2d Henry 3, preserved in the town-

clerk's office in the city of London, in which this reading is found.

It is therefore necessary to ascertain the true *text*, before we attempt to explain it. It is now easy to do this, and the evidence I shall produce will serve to throw light on the whole subject. Sir William Blackstone has published an edition of the ancient charters, and to that work, and the introduction to it, I am indebted for the following dates and extracts from the charters.

In the month of June 1215, King John and the discontented Barons encamped separately at Runningmede. Conferences were commenced between them, and after several days they agreed upon certain articles or heads of agreement.

These original articles are still in existence. They commence thus: "Ista sunt capitula quæ Barones petunt et "Dominus Rex concedit."

With some variations, they were put into the form of a charter, which bears Teste on the 15th June, 1215, and is the famous Magna Charta of King John. In the month of August, of the same year, the Pope issued a Bull annulling the charter, and the King refused to observe it. A war ensued, and Prince Louis of France invaded the Kingdom. King John died in October 1216, leaving his son Henry 3d. only nine years old. The Earl of Pembroke was made guardian or protector of the King and Kingdom, and to satisfy the nobility, he granted a renewal of the charter, though with considerable variations, in the name of the young King in November 1216. In 1217, after peace was concluded with Prince Louis, a third charter, with sundry additions, was granted, and now for the first time, the King granted a Charta de Foresta. In 1223 Pope Honorius 3d. issued a Bull and declared the King of age, although he was only 17 years old.

Apprehensions were hereupon entertained lest he should not think himself bound by the charters granted during his minority, and in the ensuing year, being the 9th of his reign, he was prevailed upon to grant a new one, which is that published in the statutes at large.

Thus there were four charters; one granted by John, and three by Henry 3d. It is well known that many copies of these were sealed and deposited in various places. Of each of them one or more remain at this day; and they, as well as the Capitula, have been published, with the most minute

and scrupulous accuracy by Sir William Blackstone—From these it appears, that the text of the 15th chapter, as printed in the statutes at large, is correct.

1st. Though the copy of the charter of 1217, in the Town clerk's office at London, is according to the reading followed by Lord Coke, yet the original of that charter is in existence, and the words of it are "*pontes ad riparias;*" and surely the copy ought to be corrected by the original—and not the original by the copy.

2d. There is no room to presume a mistake in the original, because, in this respect, it corresponds precisely with *all* the other charters without exception; and we cannot suppose that in four charters, executed at different periods, the writers should happen to make exactly the same mistake, and each time without detection.

3d. In the *Capitula* the article runs thus:

"Ne aliqua villa amercietur pro pontibus faciendis ad "riparias nisi ubi de jure antiquitus esse solebant," where it is impossible to read *aut* for *ad* without doing violence at once to grammar and good sense.

I think it is evident that the common reading is the right one, and that *riparia* means river. A literal translation of the 16th chapter will be as follows:

"No rivers shall be defended henceforth except those "which were in defence in the time of King Henry our "Grandfather, at the same places and within the same "limits as they used to *be in his time.*"

But what is meant by "defended?" The latin word *defendere*, as used by the monks and lawyers of the time of King John and Henry the third, is the theme from whence is derived the modern French *defender*, to forbid. It means to protect from encroachment; to place in a state of prohibition; or to forbid the use of the thing defended. Du Cange says,

"Defendere, conservare, sibi reservare. Forestæ & Sylvæ "dicuntur quod iis frui nulli liceat nisi quibus usagii aut "aliis ejusmodis competit aut in quibus venari nisi domino "non licet."

And he gives the following example:

"Memorandum quod boscus de Waffoke debet esse in "defenso dum durat pannagium videlicet de festo Michælis "usque ad festum S. Martini; ita quod aliena animalia

"cujuscumque generis domestica non debent teneri nec "pasci in eodem sine licentia."

Another illustration of the meaning of this word, still more to our purpose, may be found in the statute, 13 E. 1, Cap. 47.

"Provisum est quod aquæ de Humbre, Ouse &c. et omnes "aliæ aquæ quibus Salmones capiuntur in regno ponantur *in* "*defenso* quoad Salmones capiendos a die nativitatis beatæ "Mariæ virginis ad diem S. Martini." So in the Statute 13 R. 2, Cap. 19, S. 1, it is ordained: "Que les ewes de Lone "&c. et touts autres ewes el countee de Lancastre *soient mise* "*en defense* quant al prise des salmons del jour de S. Michael "tanque al jour de Purification de Notre Dame," &c.

It appears then, that to put a wood or river in defence, was to prohibit the use of it either wholly or in some particular respect. What was the kind of defence intended in the 16th Chapter of Magna Charta? Lord Coke, we have seen, supposes it to mean the appropriation of rivers by the *owners of the banks*, so as to prohibit others from passing and fishing. A lawyer should never speak of Lord Coke but with respect; but as an antiquary, he is far surpassed by Sir Matthew Hale, (whom I shall presently cite,) and who stands unrivalled among the English Judges for patient, industrious, and judicious research. Had Lord Coke bestowed on the 16th Chapter of Magna Charta the minute attention which he employed in many other instances, his interpretation would have been accurate, and his authority irresistible. But he evidently passes it over in a very cursory manner, nor does he add a word to those which are extracted above.

The chief object of Magna Charta was, to limit the prerogative of the King—not to diminish the value of property enjoyed or claimed by the Barons. It would seem singular that they should address their sovereign in substance as follows:—"We beseech your Majesty, nay we insist, that "you will annul the grants you have made to us, and that "you will take care in future that we do not exercise or "enjoy the franchises you have conferred upon us."

Is it not more probable that this Chapter was intended to restrain the exercise of some right claimed by the Monarch, the inconvenience of which had been previously felt?

The probability of this is greatly strengthened by the lan-

guage of the Capitula and of the first two Charters. The provision on this subject in the Capitula is in these words:—

"Et omnes forestae quae sunt afforestatae per Regem "tempore suo deafforestentur & *ita fiat* de ripariis quæ *per* "*ipsum regem* sunt in defenso."

In the Magna Charta of King John, it is as follows:—

"Omnes foreste que afforestate sunt tempore nostra statim "deafforestentur & ita fiat de ripariis que *per nos* tempore "nostro posite sunt in defenso."

And in the Magna Charta of the 1 H. 3, it is as follows:—

"Omnes forestæ quae afforestatæ sunt tempore regis Johan-"nis patris nostri statim deafforestantur & *ita fiat de* ripariis "quae per eundem Johannem tempore suo posite sunt in "defenso."

From these quotations it clearly appears, that the King himself, and not the owners of the banks, had put the rivers in defence. And it further appears that the grievance to be redressed in relation to rivers, had some resemblance to the grievance of the forests, and a similar remedy was to be applied to both.

The forests which King John had afforested in his own time were to be disafforested; and *so it was to be done* with the rivers, which by the *King himself* had been put in defence.

When the Charter of 1217 was granted by H. 3, a Charter of the forest was also granted; and on this occasion, all the provisions which related to the forests were removed from Magna Charta, and inserted in that of the forest. A change of phraseology therefore became necessary, and the Chapter under consideration, was altered to the form in which we now find it.

We are now prepared for the explanation given by Sir Matthew Hale, which he supports, as it appears to me, by indubitable evidence. He tells us that the Kings had been accustomed to treat the rivers as they did the forests, and to reserve them for their own amusement. The forests were in a state of perpetual defence, guarded by severe and sanguinary penalties. The rivers were put in defence occasionally, and during the pleasure of the Royal sportsman. "The King, (says Hale, Hargrave's Law Tracts, 6,) by an "ancient right of prerogative hath had a certain interest in "many *fresh* rivers, where the sea doth not flow or re-flow,

"*as well* as in salt or arms of the sea, and those are these "which follow:—

"1st. A right of franchise, or privilege that no man may "set up a common ferry, &c.

"2d. An interest, as I may call it, of *pleasure or recreation.* "Before the statute of Magna Charta, Cap. 16, it was *frequent* "for the King to put *as well fresh* as salt rivers *in defence* for "his recreation, *that is*, to bar fishing or fowling in a river "till the King had taken his pleasure or advantage of the "writ or precept de defensione ripariæ, which anciently was "directed to the sheriff to prohibit riviation in any rivers "in his bailiwick. But by that statute it is enacted, quod "nullæ ripariæ defendantur de cætero, nisi illæ quæ fuerunt "in defenso tempore Henrici Regis avi nostri, et per eadem "loca, & per eosdem terminos sicut esse consueverunt tem- "pore suo. After this statute, the (writs of) ripariorum "defensiones ran thus, as appears Claus. 20, H. 3, M. 3, "dorso:—Rex vice-comiti Wigorniæ salutem, Præcipimus "tibi quod sine dilatione clamari facias, et firmiter pro- "hiberi ex parte nostra ut nullus de cetero eat ad rivian- "dum in ripariis nostris in balliva tua quæ in defenso fue- "runt in tempore Henrici Regis avi nostri; et scire facias "omnibus de comitatu tuo qui ab antiquo facere debent "pontes, ad riparias illas, quod provideant sibi de pontibus "illis, ita quod prompti sint et parati in adventu nostro, "quando eis scire faciemus," and thus it was written to "most counties. But because this left the country in a "great uncertainty in the writs of 22 H. 3, so afterwards it "mentioned some one particular river, et in aliis ripariis "in balliva tua quæ in defenso esse consueverunt tempore "Henrici Regis avi nostri, as Avon in Worcestershire, "Bladen in Oxfordshire, Mules in Surry, &c. This hath "long been disused, for it created a great trouble to the "country, and little benefit or addition of pleasure to the "King."

I have copied the whole of this passage, because it appears to me conclusive of the question we are considering.

The writ of which Sir Matthew Hale gives a copy is extracted, as he tells us, from the records of 20 H. 3, only eleven years after the passing of the statute of Magna Charta, when its language and meaning must have been understood. It is made to conform to that statute, and uses its very words. Similar writs were to be found in the

Records of the 22 years of the same reign, and in many others—sæpius alibi.

The mode of putting rivers in defence, was to cause it to be proclaimed by the Sheriff, that no one should go ad riviandum upon them; that is, that no one should fowl or fish upon them till the King had taken his pleasure; and the same writ which directed the proclamation to be made, commanded the Sheriff to warn those whose duty it was to repair the bridges of the *same rivers*, ad riparias illas, against the King's arrival, doubtless for his own convenience in passing them.

To repair bridges was one of the duties of a feudal tenant, but the sheriffs had probably imposed this burden on those whose tenures did not oblige them to it. The 15th Chapter, therefore, declares that none shall be compelled to build or repair bridges except those who had been bound to do so, ab antiquo. And as to the principal grievance to which this was accessary, as it was of the same nature with the grievance of forests, so the Barons placed both on the same footing, and applied the same remedy to each. They did not abolish the King's prerogative with respect to either, but only limited its exercise. All forests, which were such in the time of Henry 2d, were preserved, and all others disafforested. And all rivers which were wont to be put in defence in the reign of Henry 2d, were left liable to the writ de defensione ripariae for the King's amusement; and all others were exempted from it.

I think it is now evident, that the right of putting rivers in defence, and that of granting the soil beneath them, are two things entirely distinct; and that the prohibition in Magna Charta, was levelled against an exercise of prerogative by the King for his own personal pleasure, and not against any claim of the *owners of the banks of rivers*, or other individuals.

It is still necessary to consider the paragraph from the Mirror, cited by Lord Coke. It is not very plainly expressed, nor am I sure that I understand the assertion, that *plusors rivers sont ore appropries & engarnies & mises en defence.* I do not perceive why the author may not allude to rivers put in defence by the King. But whatever may be intended by these words, the quotation is of no authority or weight. They are not the words of Horne, who was the author of the Mirror of Justice. He published this work in four

books in the reign of Edward the First. At a subsequent period, probably more than 120 years after the Magna Charta, some unknown person published a fifth book as a continuation, in which he enumerates what he supposes to be abuses of the common law, and defects in Magna Charta, and other statutes.

This fifth book has been bound with the former, and either from that circumstance, or the fraud of the author, it long passed for the work of Horne. It is now universally acknowledged to be surreptitious, and indeed it is manifest that it must be so,for it speaks of the statute giving process of outlawry in debt, which was not passed till above fifty years after the death of Edward the First. Besides, it is a contemptible performance, evidently written by an ignorant man.

That this character may not appear unjust, I will mention some of the abuses of which he complains. He thinks it an abuse that a man should be driven to be tried by the country when he offers to defend himself by battle. That trial by battle is not allowed in personal actions as well as in felonies. That proofs by miracle of God are not allowed where other proof fails. That any plaint is received without sureties present to *testify* that it is true. That a tortious distress is not punished as a felony. That rape should extend to other than virgins. That any one should answer or appear by attorney. How far he was competent to expound Magna Charta, may appear by his explanation of the 34th chapter. "The point that none shall be taken or "imprisoned upon the appeal of any women for the death "of any other than of her husband, is to be meant of such "women which the husband *last* held for his wife, if there "be many wives alive."—Is the obscure dictum of such a writer as this, to be put in opposition to the opinion of Lord Hale, supported by original records?

I will only add, that Hale, with this very chapter of Magna Charta in his eye, was so far from thinking that it prohibited the King from granting several fisheries in navigable rivers or the land beneath them, that he says expressly the reverse.—Had Sir M. Hales' treatise "De jure maris," been published in his life time, it would probably have prevented succeeding Judges from expressing themselves as they have done concerning this chapter of Magna Charta.

But he left it in manuscript, and it was first printed by Mr. Hargrave in 1787.

Upon the whole, I have no doubt that the patent to the Duke of York, conveyed to him in fee simple, all the land under water in New-Jersey. The surrender of the Proprietors was expressly confined to "the powers, authorities, "and privileges of or concerning the government of the "provinces aforesaid, or either of them, or the inhabitants "thereof, which were granted, or mentioned to be granted, "by the said letters patent." It would, I think, be an unauthorised construction of this instrument, to consider it as surrendering any right of property, and still more so to consider it as making a distinction between dry land and land under water, retaining the one and surrendering the other.

I think, therefore, that King Charles 2d. had authority to convey all lands under water in New-Jersey; that he did effectually convey them to the Duke of York, and that the title to them has not been surrendered to the Crown.

It follows, that, in my opinion, the legal title to land under water in East-Jersey where the tide ebbs and flows in arms of the sea, bays and rivers, is not vested in the State, but belongs to the Proprietors of East-Jersey.

A suit depending upon this question between parties, all of whom are citizens of New-Jersey, must be decided by the courts of that State; but if one of the parties is a citizen of another State, it may be commenced in the Circuit Court of the United States, or removed into it if commenced in a State court.

Should the Legislature undertake to grant the land in dispute, the validity of the grant must be contested, in the first instance, in the State courts; and should the decision of the Court of the last resort be in favour of the grant, an appeal or writ of error, will lie to the Supreme court of the United States.

I beg leave to add, that I should have stated this opinion, and my reasons for it, with much more brevity, but for the request of the gentlemen by whom I was consulted.

P. A. JAY.

November 20th, 1824.