

New Jersey Court of Errors and Appeals

ZEBULON POLHAMUS

Plaintiff in Error

vs.

REBECCA R. BATEMAN, Executrix,
&c., and LUTHER BATEMAN, Jr.,

Defendants in Error.

On Error

to the

Supreme Court.

Brief of CLEMENT H. SINNICKSON, of counsel with the defendants in error, and plaintiffs below.

Statement of the Case

This action was brought by Luther Bateman and Luther Bateman, Jr. against the plaintiff in error to recover damages for the breaking and entering the close of the said Batemans, covered with the waters of Delaware Bay, in the County of Cumberland. The said Luther Bateman afterwards died and his Executrix, Rebecca R. Bateman, by the order of the Supreme Court was substituted as one of the plaintiffs of record. The plaintiffs claim title under a deed made by the State of New Jersey,

through and by the Riparian Commissioners of New Jersey, the Governor of the State concurring—to the said Luther Bateman—which deed was offered in evidence by the plaintiffs below and marked Ex. P. A copy of which deed is here set forth.

COPY OF COMMISSION DEED TO LUTHER
BATEMAN :

THE STATE OF NEW JERSEY, TO ALL WHOM THESE
PRESENTS SHALL COME OR MAY CONCERN, GREETING :

10 WHEREAS, Pursuant to an Act of the Legislature of
said State, approved March 21st, 1871, entitled "A further
Supplement to an act entitled an act to ascertain the rights
of the State and of riparian owners in the lands lying
under the waters of the bay of New York and elsewhere in
this State," approved April eleventh, one thousand eight
hundred and sixty-four, and other statutes and Joint
Resolutions of said State—Luther Bateman, of ————,
in the County of Cumberland, State of New Jersey, being
the owner of lands fronting on the Delaware Bay where
20 the tide ebbs and flows therein, and so is riparian owner
on tide waters in this State, and desirous of obtaining a
grant from the said State of the lands under water hereinafter
mentioned which lie in front of said lands, did apply
to the Commissioners to-wit: BENNINGTON F. RANDOLPH,
AMZI DODD, MILES ROSS and JOHN CARPENTER, Jr., for a
grant of the lands hereinafter conveyed. And Whereas,
the said Commissioners, having due regard to the interest
of navigation, have agreed to grant the lands hereinafter
mentioned, and determined that two hundred and fifteen
30 dollars and thirty-four cents (\$215.34) is a proper compensation
to be paid to the State for the lands hereinafter conveyed.
Now therefor, the said State of New Jersey, by
the said Bennington F. Randolph. Amzi Dodd, Miles Ross

and John Carpenter, Jr., Commissioners aforesaid, the Governor of said State concurring, in consideration of the premises aforesaid and of the said sum of two hundred and fifteen dollars and thirty-four cents (\$215.34) duly paid by the said Luther Bateman to the said State the receipt whereof is hereby acknowledged, Doth hereby grant, bargain, sell and convey unto the said Luther Bateman and to his heirs and assigns forever, all that parcel of land flowed by tide water lying at Beadons Cove, in the Township of Downe, in the County of Cumberland and State of New Jersey, described as follows. 10

Beginning at a point in the high water mark of the easterly shore of Delaware Bay where the same is intersected by the division line between lands of the estate of Seth Page and lands of the said Luther Bateman and from thence running south fifty-two degrees and forty-three minutes west, three thousand five hundred and seventy-five and ninety-six one hundredths ($3575\frac{96}{100}$) feet to the exterior line established by the Commissioners appointed under the authority of the act entitled, "An Act to ascertain the rights of the State and of Riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this State" approved April 11th, A. D., 1864, and the supplement thereto, thence along said exterior line north thirty-three degrees and forty-three minutes west, eight hundred and sixty-one and thirty-seven one hundredths ($861\frac{37}{100}$) feet; thence north fifty-five degrees and seven minutes east two thousand five hundred and eighty-six and forty-one one hundredths ($2586\frac{41}{100}$) feet to a point; thence north two degrees and forty-two minutes east, nine hundred and seventy and one-tenth ($970\frac{1}{10}$) feet to the high water mark of the easterly shore of Delaware Bay, where the same is intersected by the northerly boundary line of lands of the said Luther Bateman; thence northerly along said high water mark to the place of beginning. 20 30

With the right, liberty, privilege and franchise to exclude the tide water from so much of the lands above described, as lies under tide water, by filling in, or otherwise improving the same, and to appropriate the lands above described to his exclusive private uses.

And if when said exterior lines shall be fixed at any other points or places further out into said Bay, also any and all lands under water lying between the present exterior lines above described and the new exterior line or
 10 lines that may be hereafter fixed the same to be used agreeably to the terms of such extension.

Provided, however, that if the said Luther Bateman is not the owner of the land adjoining the land under water hereby conveyed, then, and in that case, this conveyance, so far as the same binds the State, and all the covenants herein on the part of the State, shall be void as affecting any part or parts of said land joining land now owned by the Luther Bateman. And also provided, That if the
 20 extension line for solid filling and the extension line for piers or either-of said lines, now established or lines that may be hereafter established by the Riparian Commissioners of the State of New Jersey, shall hereafter be changed by the action of the authorities of the United States Government, and the grantee herein suffers damages, that the claim or claims therefor must be made against the authorities of the United States Government and not against the State of New Jersey.

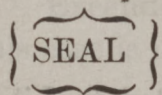
And the said State also covenants to and with the said Luther Bateman, his heirs and assigns, that the said State
 30 will not make or give any license, power or authority to any other person or corporation affecting lands under water in front of the said lands hereby granted, but this covenant shall not preclude the State from leasing or disposing of its lands under water which lie in front of the extension line or lines hereinbefore described. Should said State

hereafter enact any law or laws for leasing or disposing of its lands under water for the cultivation of oysters or other fish, provided that in such case a water space of suitable width for free and uninterrupted navigation and access to and from the lands hereinbefore described shall at all times be left and remain open and unobstructed between the extension line of solid filling (or between the extension line for piers when the same has been or shall be established) and the lands which may be appropriated by the State for such cultivation of oysters or other fish, the proper width of said open and intervening space to be determined by the Riparian Commissioners of this State. 10

Together with all and singular the hereditaments and appurtenances thereunto belonging and all the rights of the State in said lands.

To have and to hold all and singular the above granted and described lands covered with water and premises unto the said Luther Bateman and to his heirs and assigns forever.

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IN WITNESS WHEREOF the said State has caused these presents to be sealed with the Great Seal of the said State and to be subscribed by Leon Abbett, the Governor of said State, and the said Commissioners, and attested by Henry C. Kelsey, the Secretary of State thereof, this twenty-sixth day of June, in the year one thousand eight hundred and eighty-six (1886).

LEON ABBETT, GOVERNOR,

BENNINGTON F. RANDOLPH, 30

AMZI DODD,

MILES ROSS,

JOHN CARPENTER, JR.

WITNESS—R. C. BACOT.

ATTEST—HENRY C. KELSEY, SECRETARY OF STATE.

STATE OF NEW JERSEY,)
 COUNTY OF HUDSON,) ss.

BE IT REMEMBERED, That on this second day of July, eighteen hundred and eighty-six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Robert C. Bacot, of full age, who being by me duly sworn, on his oath, saith that he saw BENNINGTON F. RANDOLPH, AMZI DODD, MILES ROSS and
 10 JOHN CARPENTER, JR., the within named Commissioners, sign and deliver the within deed as their voluntary act, and that he, the said Robert C. Bacot, thereupon subscribed his name as an attesting witness thereto.

R. C. BACOT.

Sworn and subscribed before me at Jersey City the day and year aforesaid.

JOHN V. BACOT,

MASTER AS AFORESAID.

20 ENDORSED

Riparian Commission of N. J.. Recorded in Liber. I, Folio 746, &c. The State of New Jersey to Luther Bateman, Grant Dated June 26, 1886. Received and recorded in the Clerk's Office of Cumberland County Dec. 10, 1886, at 12 o'clock m. in Book of Deeds No. 183, page 413, &c.

F. L. GODFREY,

CLERK.

After the receipt of this deed the said Luther Bateman invited his son Luther Bateman, Jr., the above de-
 30 fendant in error, to take possession of the said lands with him, and they proceeded to prepare the same for the cultivation of oysters. They staked off the ground so that it

might be known. They planted the first year about four thousand bushels of young or seed oysters, they also spread upon the ground a large number of oyster shells in 1887, and in same year, 1887, they planted about 16,000 bushels of young oysters, and from time to time they continued to plant young oysters and to spread shells upon the grounds up to 1893. They planted upon said grounds over 50,000 bushels of young oysters and over 5,000 bushels of oyster shells.

In April, 1894, the plaintiff in error entered upon these grounds with his boat and dug up and carried off a boat load of oysters, the property of the said Bateman's, this he repeated a number of times, and the said Luther Bateman and Luther Bateman, Jr., brought suit against him in the New Jersey Supreme Court, in tort, to recover damages for these trespasses. The case was tried at Cumberland County. Rebecca Bateman, Executrix of Luther Bateman, who had died, being substituted as one of the plaintiffs, and verdict was rendered for the plaintiffs below—the defendants in error. 10 20

Exceptions were taken, a writ of error sued out, and this case is now to be heard on the Assignments of Error.

The first assignment was to alleged error in the drawing of the general panel of jurors, which I shall pass for the present.

The second alleged error was that the trial court against the defendant's objection, admitted in evidence on the part of the plaintiff, the above deed of conveyance.

The grounds of objection were that power to make the deeds was not vested in the Riparian Commissioners "That the State holds all the public waters of this great Bay as trustees for the whole people, and that it has no right to grant any portion of it to a single individual for his own private use.

See printed case p 16.

Riparian Deed Considered

The deed conveys these lands absolutely in fee simple and in direct words gives to the grantee the right to appropriate the same to his exclusive private uses.

See deed directly after description.

It is in proper form and is competent evidence without proof that previous steps leading to the vesting of titles have been taken.

Brown vs. Galloway, 1 Pet. CC, 291.

American Dock and Improvement Co. vs. Trustees 12 10
Stew. 418.

The deed is a solemn grant by the State of New Jersey conveying in fee simple to the grantee the lands upon which this trespass was committed. The plaintiffs in error deny that it was competent for the State to make this grant, and the first question to be decided is, had the State the right to make this grant?

The lands belonged to the State of New Jersey.

This has been clearly established by a long line of decisions in this State and in the United States Supreme Court.

Arnold and Mundi settled the question that the title of the proprietors stopped at high water mark, but some of the dicta in that case have been since rejected.

10 Martin vs. Waddell decided that the lands under the navigable waters belonged to the State and that the State could grant to an individual an exclusive right to take oysters in part of them—Martin vs. Waddell, 16 Pet. 367.

20 “In Gough vs. Bell it was held ‘That at common law the right of the owner of lands along the shore of the sea or of navigable waters, in which the tide ebbs and flows, extends only to the shore or ordinary high water mark, the shore which is the land between ordinary high water mark and ordinary low water mark and the lands under water belong to the State and are part of the Sovereignty.’”

Gough vs. Bell 2 Zab. p 441

so in State vs. Jersey City 1 Dut. 528

Stevens vs. Paterson & Newark R. R., 5 Vr. 552

Hoboken vs. Penna. R. R. Co., 124 U. S., 656

This is not only the law in New Jersey, but it is the law in all the other States in the Union.

An exhaustive list of cases on this subject is to be found in Shirely vs. Bowlby, 152 U. S. p1.

The State had the power to make a grant of these lands in fee simple—to grant to one individual the exclusive use of them.

The grant embraces about 60 acres. It is not claimed that the interest of navigation is affected by it and the deed recites that due regard has been had to such interest. The contention of the defendants below is that the State does not hold the land in fee as its own property, but holds it in trust for the benefit of the whole people and has no right to grant any portion of it to a single individual for his own private use. 10

This is in direct opposition to the declared law of this State.

Chief Justice Green in *Bell vs. Gough* says .

“ The objection to an alienation of the public domain by the King is that he is but a trustee for the community. But the Legislature are not mere trustees of common rights for the people. These rights are vested in the people themselves ; The Legislature 20 in disposing of them act as their representatives in their name and stead. The act of the Legislature is the act of the people, not that of a mere trustee holding the legal title for the public good.

Bell vs. Gough, 2 Zab. p 457.

In *State vs. Jersey City* it was held :

“That the State owns the land below high water mark while it remains under water. It may be granted by the State to a stranger at any time before it is actually reclaimed and annexed to the upland.”

State vs. Jersey City, 1 Dut. 528.

10 “The State owns all the land under navigable waters within its jurisdiction and may grant the exclusive right to use them to any individual the same as if they were dry arable land so long as the rights of navigation are not interfered with.”

McCready vs. Virginia, 94 U. S. 391.

In Hoboken vs. Penna. R. R. Co. the Supreme Court of the United States held

20 “The title under the New Jersey grants is not only a new estate but it is a new subject divided from the upland or riparian property by a fixed and permanent boundary. Such grants are not a mere franchise or incorporeal hereditament. Under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey whether proprietary or sovereign is transferred or extinguished, except such sovereign rights as the State may lawfully exercise over all other private property.”

Hoboken vs. Penna. R. R. Co., 124 U. S. 656.

This case was followed and accepted as the law in this State in Elizabeth vs. Central R. R. Co., 24, Vr. 491.

But if any doubts existed on this subject they were settled by this Court in *Stevens vs. Paterson & Newark R. R. Co.* and not by the dictum of the Judge writing the opinion but by a direct vote on the subject, It was then established by this Court that

“All navigable waters within the territorial limits of the State and the soil under such waters belong in actual propriety to the public. The dominion of the Legislature over the *Jura Publica* appears to be unlimited; by this power they can be regulated 10
abridged or vacated.

“The principle seems to be universally conceded that unless in certain particulars protected by the Federal Constitution the public rights in navigable waters can to any extent be modified or absolutely destroyed by statute.”

Stevens vs. Paterson & Newark R. R. Co., 5 *Vroom*, 544,
550, 555.

In that case it is distinctly established that

“The State is the absolute owner of the land in all 20
navigable waters within its territorial limits and such land can be granted to any one, either public or private without making compensation to the owner of the shore.”

Since the above decision the principle there laid down has been accepted as the law of this State and universally followed.

In *Wooley vs. Campbell* it was held that

10 “The right of fishing and taking oysters in the tidal waters of this State is prima facie common to all the people of the State. But the Legislature may grant a right of enjoyment in lands under tide waters to private individuals for the purpose of fishing and planting oysters to the exclusion of public rights therein.”

Wooley vs. Campbell, 8 Vroom 163.

“Trespass will be for the invasion of such right.”

Paul vs. Hazleton, 8 Vroom, 106.

20 “The title to the bed of navigable streams being absolute in the State it was competent for the Legislature (prior to the recent amendment of the Constitution) to grant the State’s lands to any one upon such terms as it deemed expedient.”

State vs. Post, 26 Vroom, 269.

American Dock & Improvement Co. vs. Trustees, 12 Stew. 418.

Elizabeth vs. Central R. R. Co., 24 Vroom, 491.

The disposition of these lands belonging to the State has been carefully guarded by the riparian acts, the public have been protected from the evils of special legislation, the matter has been settled by general legislation over twenty years ago, and the people have had ample opportunity to

correct any wrong that may exist in the system. That this system has been permitted to remain unchanged for over twenty-five years is, I think, evidence that it is the will of the people.

See Riparian Act of April 11, 1864, and supplements thereto of March 31, 1869, March 21, 1871, March 27, 1874, and other supplements. Gen. Statutes of N. J. pages 2785, 2786, 2790 and 2791.

Chicago Lake Front Discussion

But it is claimed by the defendants below that this well and long established law has been annulled by the decision of the United States Supreme Court in the case of Illinois vs. Illinois Central R. R. Co., commonly known as the Chicago Lake Front Decision.

Can a decision of the U. S. Supreme Court change the law of this State? As applied by the Courts of this State.

In *Burgess vs. Seligman* the U. S. Supreme Court
10 speaking on this subject said :

The Federal Courts have an independent jurisdiction in the administration of State laws co-ordinate with that of the State courts.

Burgess vs. Seligman, 107 U. S. 33.

While the United States Courts claim co-ordinate jurisdiction they do not claim supreme jurisdiction.

Nor does it follow as a matter of course that the United States Court would follow the Chicago Lake Front Decision or the rule there laid down in interpreting the law of New
20 Jersey as to this matter.

“The United States Courts follow the decisions of the State Courts in matters relating to land or in the construction of the statutes of such States.”

Foster vs. Joice, 3 Wash. C. C. 498.

Harrison vs. Rowan, 3 Wash. C. C. 580.

“Since the ordinary administration of the law is carried on by the State Courts it necessarily happens that by the course of their decisions certain rules are estab-

lished which become rules of property and action in the State and have all the effect of law which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of the State Constitution and Statutes. Such established rules are always regarded by the Federal Courts no less than the State Courts themselves as authoratative declarations of what the law is."

Burgess vs. Seligman, 107 U. S. 33.

Such has been the practice of the U. S. Supreme Court 10
in regard to this matter of tide lands.

In Virginia they interpreted the law as it was laid down in the Virginia Courts and decided that the State might grant these lands to the exclusive use of any individual the same as if they were dry arable lands.

McCready vs. Virginia, 94 U. S. 391.

In New Jersey they declared the law to be, as the State Courts had established it, that under these grants the lands conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute 20
titles.

Hoboken vs. Penna. R. R. Co., 124 U. S. 656.

In the Illinois case they found no interpretation of the law by the State Courts and they declared the law as applicable to that particular case.

But does the Illinois decision substantially conflict with the New Jersey decision?

The circumstances of that case were widely different from the New Jersey cases. There the Legislature of Illinois, in a manner that was suspicious, granted to one corporation what was practically the whole harbor of Chicago. That harbor was then being improved by the United States Government, and this grant interfered with the navigation and made it possible for the grantee to indefinitely postpone that improvement. Four years afterwards the Legislature of Illinois repealed the law which made the grant, and the State filed a bill in the United States Courts to ascertain its rights.

What the Court actually decided was that the grant gave a mere license to the Company which the State could revoke and which it had revoked by the repealing act.

Even this decision was made by a divided Court four judges voting in the affirmative and three in the negative.

There is much said in the opinion filed which is mere obiter dictum, and would in no case be binding upon this Court under the circumstances. But even in that case the Court held that such parcels of said lands under water as were to be used for the improvement of the public interest or which when occupied do not substantially impair the public interest in the lands and waters remaining, could be granted by the State. It nowhere held by dicta or otherwise, that the State had no power to grant absolutely to any individual a part of such lands. The dictum was that it could not grant the whole.

But these defendants in error claim that this grant and the other kindred grants made in that vicinity tend to promote and not impair the public welfare.

At the vicinity of this grant, the bay is from 15 to 20 miles wide, the channel is near the middle, and along the Jersey shore are large stretches of salt marsh rising just

above high tide, in front of this marsh the waters are shallow for a long distance out, and are of no use for navigation, the bottom is mud or shifting sand, and unimproved, no oysters will grow thereon, for the oyster spat perishes when it rests upon mud or shifting sand. Unimproved, these shallows are absolutely valueless, but they are capable of being converted into oyster farms, by from time to time spreading stones or oyster shells thereon, and planting mother oysters, by such cultivation millions of oysters can be produced where absolutely none would otherwise obtain. In Europe it is estimated that 90 per cent. of the oysters that are marketed came from these cultivated oyster farms. 10

In the State of Connecticut where especial attention has been paid to this matter, 2,500,000 bushels of oysters per year are raised and marketed on such cultivated beds. See bulletin of U. S. Fish Commission for 1893 page 273.

The object of these grants is the development of a similar oyster culture.

The Riparian Commission have established an exterior line, being careful not to interfere with navigation and carefully excluding all natural oyster beds, and have in compliance with the riparian laws granted to a number of persons, shore owners, the tide lands in front of their respective lands, and much money and labor has been expended by such purchasers upon these lands, and if protected in their property as other property is protected by 20

the law of the State, this valuable food product will be enormously increased. Surely these grants tend to promote and not impair the public interest.

But the right of a State to make such grants as this, has been settled so far as the United States Courts are concerned by a decision of the U. S. Supreme Court made unanimously, one year after the Illinois decision, in a case closely analagous to this.

10 The State of Oregon has a law very similar to the Riparian law of New Jersey.

It provides that the owners of land fronting on the Pacific ocean or any of the bays or rivers in which the tide ebbs and flows within the State, shall have the right to purchase all the tide land belonging to the State in front of the land so owned. A board of officers, of whom the Governor is one, is authorized to sell such tide lands upon proper application therefor. The shore owner has the first right to purchase, and if he does not make application within a prescribed time the grant may be made to a
20 stranger, upon notice.

A dispute arose between two persons claiming such tide lands, one claimed under a patent for a donative land claim bounded by the Columbia River, under the act of Congress. The other claimed under a grant made by the State of Oregon, under the above law. The matter was finally decided by the United States Supreme Court,

and a very elaborate opinion was filed by Justice Gray, in which he collected almost all the cases that have ever been, touching on this subject. The matter came up on appeal from the Supreme Court of Oregon, which had decided in favor of the Oregon law.

The United States Court affirmed the decision of the Oregon Court and held that

“By the law of the State of Oregon as enacted by its Legislature and declared by its highest Court, the title to the land in question is in the defendants in error and upon the principles recognized and affirmed by a uniform series of recent decisions of this Court above referred to the law, of Oregon governs the case.” 10

“The statutes of Oregon under which the defendant in error holds are a constitutional and legal exercise by the State of Oregon of its dominion over the lands under navigable waters.”

Shively vs. Bowlby 152 U. S. p. 1.

In speaking of these various decisions as to this matter of the States and the public rights to these lands the Court in the above case said 20

“Whether as a rule of property it would be safe to change these doctrines where they have been applied, is for the Courts of the several States to determine. If they choose to resign to the riparian proprietor, rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. The correct principle is laid down in Martin vs. Waddell, 16 Pet. 367; Pollard vs. Ha. 30 gen, 3 How. 212; Gomtillo vs. Kibbi, 9 How. 411;

— i d.

But even if this Court should be constrained to change the interpretation of these riparian statutes, and the law applicable to these grants, as declared by this Court in *Stevens vs. Paterson & Newark R. R. Co.*, it could not apply to this grant. At the time this grant was made, under the decision of this Court which had then been previously made, the State had the right to grant this land absolutely to the grantee in fee simple, to convey to him all the rights of the public therein, the construction of the act by this Court became a part of the statute, and a part of the States contract with the grantee, and a reversal of this decision can not deprive the grantee of his contract rights under said grant.

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20 “After a statute has been settled by judicial construction the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a Legislative enactment.”

Douglass vs. County of Pike, 101 U. S. 687.

Elizabeth vs. Central R. R. Co., 24 Vroom 496.

Burgess vs. Seligman, 107 U. S. 20.

Therefore this Court should not reverse this judgment for anything contained in the 2d, 15th and 18th reasons set forth by the plaintiffs in error in their assignment of errors.

Question as to the Ownership of the Ripa

The plaintiffs in error alleged that Luther Bateman was not the owner of the ripa at the time of the grant, but that Luther Bateman, Jr. was such owner, and the evidence offered to prove this being overruled by the Court, exceptions were taken upon which are based the 3d, 4th, 11th, 12th and 13th reasons for reversal. The defendants in error, while they deny the truth of the said allegation, insist that it was not competent for the plaintiff in error to go into that question on the trial below, and that the said 10 evidence was properly ruled out.

This is the old action of trespass *quare clarum fregit*, the defendant below pleaded the general issue. He does not claim to be owner of the close or to justify by entering under such owner, nor does he claim any estate or interest in the ripa.

This grant under which the plaintiffs below claimed the exclusive right to use said close is in the nature of a patent for public lands, and comes within the rules which govern such patents. 20

The grant is regular in form, contains no false suggestions on its face, and is competent evidence, without proof, that the previous steps leading to the vesting of the title had been taken.

Brown vs. Galloway, 1 Pet. C. C. 291.

Elizabeth vs. Central R. R. Co, 24 Vr. 496.

Bell vs Gough, 2 Zab. 411.

nature of a demurrer to evidence on the ground of its not conducing to prove the matter in issue. If admitted, the Court, jury or Chancellor, must receive it as evidence, both of the facts it recites and discloses, leading to the foundation of the grant and all other facts legally inferable by either, from what is so apparent on its face. It is a settled principle that a public grant is to be taken as evidence that it is issued by lawful authority.

United States vs. Arrendondo 6 Pet. 728. 10

“A private grant of the State obtained by false suggestion is not deemed void in collateral proceedings if the false suggestion does not appear on the face of the grant.”

Elizabeth vs. Central R. R. Co. 24 Vr 491.

“When the plaintiff claims by virtue of the location of a land certificate defendants who are mere trespassers, without color of title cannot defend on ground of Stale demand.”

Grant vs. Hill, 30 S. W. R. 952. 20

“A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.”

Hoofengale vs Andrews, 7 Wheaton 21.

Boardman vs. Lesse of Reed 6 Pet. 328.

“A mere intruder cannot question the validity of a patent under which the plaintiff claims.”

Lessee of Hoyt vs. Hemphill Ohio Cond. R 551.

Under the well-established rule in action of trespass the defendants below should not be permitted to raise this question.

The plaintiffs below were in possession of the premises, they had staked it out, planted there oysters on it and the bounds of their close were clearly defended. The defendants below were naked trespassers without color of title.

“The defendant under the general issue can not prove title in a stranger under whom he does not justify.

Todd vs Jackson, 2 Dut. 536.

“A mere trespasser or intruder cannot protect himself by setting up an outstanding title in a stranger.”

Jackson vs Harden. 2 John 202.

“When plaintiff claims by virtue of a levy and execution and the defendant is stranger to the title and does not claim under the execution debtor he will not be permitted to question the correctness of the judgment and execution by virtue of which the plaintiff claims title.”

Phelps vs. Parks, 4 Verm Rep. 488.

see Dollop vs. Hardy, 26 Maine 545.

Curtis vs. Hoyt, 19 Conn. 154.

In the case of *Brown vs. Morris Canal*, which was a contest for the right to wharf out between two parties each claiming to be shore owner—the Court held

“If a person acting under the license of the Freeholders under the wharf act, should build the improvement authorized—neither the State or any person claiming under the public right of navigation could interfere to stop him or claim the benefit of the completed improvement but it would be no protection against the legal shore owner.” 10

Brown vs. Morris Canal 3 Dut. 654.

But the case of *American Dock Improvement Co. vs. Trustees* is almost exactly in point.

The charter of the West Line Improvement Company authorized the Company to extend its railroad from its prior terminus to some point in line with the exterior line established in the Hudson River by the Riparian Commissioners and enacted that any lands of the State under tide waters which came within the location of its route should be paid for by the Company to the trustees of the school fund, the boundaries and price therefor to be fixed by the Riparian Commissioners on application for that purpose, a deed therefor to be made by said Commissioner in the name and under seal of the State. Upon the foreclosure of the mortgage given to the Trustees a question arose as to such tide water lands granted to the Company and an issue at law growing out of said proceedings was tried before Justice Depue. The deed to the Company was objected to because the plaintiff had not proved all the conditions of the grant, that is that the land was within the location of the Company's route as required by the charter, and evidence was offered to show that the Company's location was such as not to justify the grant. The Justice admitted the deed without any further proof, and excluded the evidence offered to attack the validity of the grant. 20 30

Amer. Dock Imp. Co. vs. Trustees, 12 Stew. 415.

In same case the defendents claimed that the grant was in violation of the rights of the riparian owners the Court permitted only such defendants as were riparian owners to contest said grant.

i. d. 420

All these rulings were sustained by the Chancellor on appeal.

Nor is there anything to sustain the position of the plaintiffs in error in the proviso in said deed in regard to
10 said Luther Bateman not being owner of the ripa.

This is merely a covenant for the protection of the State, it is not a condition precedent.

"A condition is a qualification or restriction annexed to a conveyance of lands whereby it is provided that in case a particular event does or does not happen or in case the grantee does or omits to do a particular act an estate shall commence be enlarged or defeated. 2 Cruise on Real Prop. p 2.

It is a rule of common law that no one can take ad-
20 vantage of the breach of a condition expressed, but parties and privies in right, and representation, as heirs, executors and administrators of natural persons, and the successor of bodies politic.

i. d. p 51, sec. 50.

Fitzgerald vs. Faunce, upon which the defendant below relied—does not apply to this case.

That was a direct issue between two parties, each claiming the close and each claiming the ripa. Faunce claimed the ripa from the same source as Fitzgerald, and by an older
30 deed. He claimed under a grant of a right of fishery, which carried with it a portion of the shore or ripa in front of the tide lands. And claimed a fee in said shore line. He put in a plea of justification under this grant. The Court held that this deed conveyed a fee to the

grantee—and that as the deed to Newbold, who was Fitzgerald's grantor, contained an exception and reservation of the rights of Faunce by express reference to the Faunce deed Newbold and those claiming under him were bound by this exception and reservation.

The defendants in error also claim that under the 14 and 15 sections of the General act concerning sales, the truth of the recitals in this deed cannot be questioned in this case.

The 14th section provides that an officer's deed duly acknowledged or proved shall be good and sufficient prima facie evidence of the recital contained in such deed, and the 15th section makes this apply to all deeds, declarations of sale and conveyances duly acknowledged or proved, heretofore or hereafter made by or by authority of any public or municipal authority, authorized or empowered by any law of the State to make and execute or to direct or procure the making and execution of any deed, declaration of sale or conveyance; and the proceedings upon which such deeds, declarations of sale and conveyances are found shall not be subject to be questioned collaterally.

General Statutes of N. J. p. 2982 Sec 14 and 15

“If the deed declaration of sale or conveyance is in proper form and purports to have been made pursuant to a public or municipal authority competent to order or make a sale of lands for that purpose generally and the deed declaration of sale or conveyance has been executed with proper formalities, it is conclusive evidence in such action of the title it purports to convey.

Woodbridge vs. Allen 14 Vroom 266.

Therefore judgment should not be reversed for anything contained in the 3d, 4th, 11th, 12th and 13th reasons.

Effect of Law of April 3, 1893.

The defendants below claimed that by reason of the 2d section of the Act of April 3, 1893, the oysters planted by the plaintiffs below on the lands in question became forfeited to the public, and the refusal of the Court to admit testimony as to the location of the line mentioned in said Act is the ground of the 16th reason in said assignment of errors. This reason ought not to prevail.

I.

10 Because the said Act is not intended to apply to any lands not belonging to the State.

The Act contains two sections—the first makes it unlawful for any person to catch or take oysters from any of the natural oyster beds or natural oyster grounds in Delaware Bay north of a line running from the mouth of Straight creek to Cross Ledge Lighthouse, from June 15th until April 1st, of each year, from June 15th to September 1st of each year no natural growth or planted oysters shall be caught or taken from any of the grounds in Delaware
20 Bay, Delaware River and Maurice River Cove for any purpose whatever, and the offence against said Act is made a misdemeanor.

Section 2—Enacts that it shall be unlawful for any person or corporation to stake up grounds or plant oysters north of a line running from the mouth of Straight creek

to Cross Ledge Lighthouse, and that any and all grounds staked up contrary to the provisions of this Act, and all oysters planted thereon shall be deemed public property, and shall be prosecuted according to the provisions of certain other Acts therein mentioned.

See General Statutes, N. J., p. 830, Paragraphs 131, 132.

It is the second section that is sought to be applied to the case—

This section is absolutely incoherent and is perhaps void on that account. 10

It is not limited to the Delaware Bay or the Delaware River, in terms it only stops at the north pole, it forbids any person to stake up grounds or plant any oysters north of a certain line therein mentioned. In this State of New Jersey, this forbidden ground would embrace a large part of the counties of Cumberland, Salem and Gloucester, and under it, if the Act is to be taken literally, any farmer within such strip, if he staked up any of his grounds or planted any oysters in any pond on his grounds, would forfeit the same to the public—and further this Act provides for the prosecution not of the persons, but of the grounds and the oysters. 20

This Act being highly penal cannot admit of a liberal construction, and the defendants in error insist that the second section is void because of its ambiguity and uncertainty.

But if the Act means anything it can only be intended to apply to such lands of the State as by previous Acts were permitted to be staked up and used for oyster planting. Such lands as are embraced within the provisions of paragraph 11 of the Act of April 14, 1846. See General Statute p. 807 paragraph 11 and the Act of June 19, 1890, General Statute p. 813 and the Act of April 16, 1891. i. d. 30

These acts make it lawful for certain Riparian owners, to take possession of, plant oysters on the tide lands in front of their lands without purchasing them from the State, and the Acts provide for the staking up of such lands so used, but this Act can not be construed as intended to apply to any lands which the State has sold and conveyed.

II.

10 The Act of April 3, 1893, is unconstitutional 1st because it embraces more than one object. The act is a supplement to the Act of 1882 which is a supplement to the Act of 1871, which is entitled an Act for the better enforcement in Maurice River Cove and Delaware Bay of the Act for the preservation of clams and oysters, approved April 14, 1846.

20 This Act of 1893 has two separate and distinct objects; one is the preservation of oysters, which is expressed in the first section—the other is the prevention of the using of the public grounds for the planting of oysters, in certain localities; or if a literal interpretation of the Statute is to be taken, the prevention of anyone from using his private grounds within the forbidden locality for the purpose of planting oysters. These objects are as separate and distinct as is possible; nor is the latter expressed in the title; and therefore under paragraph 4 of section 7 of the Constitution of New Jersey this Act of 1893 is unconstitutional.

2nd.

30 If this law applies to these lands conveyed to Luther Bateman, it is unconstitutional because it impairs the obligation of a contract.

The deed from the State to Luther Bateman was a contract in which the State contracted that Luther should

have the right to appropriate the said lands to his own exclusive use, and that he should have all the hereditaments and appurtenances thereto belonging and all the rights of the States therein. It conveyed to him, under the decisions above cited, the absolute estate and ownership in said lands in fee simple, and he had the right to do what he wished with it; and the State cannot after taking his money and making this contract, deprive him of any of these rights, especially of the very use to which it was well-known the said lands were intended to be put at the 10
time of the grant.

3rd.

If it applies to the Bateman lands it is unconstitutional because it takes private property without compensation. The right to stake up the said grounds and plant oysters therein is the very essence of their value; and if the owner is deprived of such rights a thing of value is taken from him by the public without compensation. The Constitution of New Jersey forbids this. In *Ten Eyck vs. Dela. & Raritan Canal Company*, the Supreme Court of this State held.

“The Government cannot, even for public purposes, 20
take away the rights of individuals to the advantages of streams of water in their ordinary and natural flow without making compensation to the owner.”

Ten Eyck vs. Del. & Rar. Canal Co. 3 Harr. 200.

Rejection of Evidence.

The 5th, 6th, 7th and 8th reasons assigned for reversal, are all because of the refusal of the Court to permit the defendant below to ask certain questions of witnesses of plaintiff's below on cross-examinations. These questions were all for the purpose of introducing matters of defence, they were on matters upon which the witnesses were not examined in chief—and they were properly ruled out.

- 10 "Witness can not be examined on cross-examination as to matters upon which he was not examined in chief.

Donnelly vs. State 2 Dut. 463.

Matters of defence should not be proved on cross-examination."

Dennis et. al. vs. Van Voy 2 Vroom 39.

"Questions not directly relevant to the issue, on cross-examination are within the discretion of the

judge, to prevent an undue expansion of the case by collateral facts."

Jones vs. Mechs. Fire Ins. Co. 7 Vroom 29.

West vs. State 2 Zab. 212.

"The admission of evidence of extraneous circumstances which bear remotely on the issues involved in the cause, is within the discretion of the Court; and its admission or rejection is no ground for reversal.

Schinck vs. Griffin 9 Vroom 462. 10

There is no ground for reversal for these reasons.

Opinion as to Value.

The 9th and 10th reasons, are because the Court permitted the plaintiffs below to ask their witness his opinion in regard to the value of the oysters per bushel on the Bateman ground, in spring of 1894. Which is the time of their taking by defendant below. These questions were proper; the witness was first shown to have been in the business of planting and catching oysters in Delaware bay for thirty-five years, was a member of the Committee
 10 of the Maurice River and Delaware Bay Oyster Association and was acquainted with this Bateman ground. He was an expert, and was competent to give his opinion as to the value of such oysters.

An expert is one instructed by experience.

1 Bouv. L. Dic. 301.

But whether an expert or not he was a practical man acquainted with the subject and was competent to give an opinion on it.

In Read vs. Barker the Court permitted millers to give
 20 their opinion as to the quantity of grain the mill could grind and the value of the water for milling purposes holding that

“The extent of their knowledge was shown and whether they be called experts or practical men acquainted with the subject, their judgments and opinions as expressed were competent.”

Read vs. Barker 1 Vrom 378.

Witnesses familiar with the article in question are per-

mitted to state their opinion as to its value, and that in its actual, or in an assumed and hypothetical state.

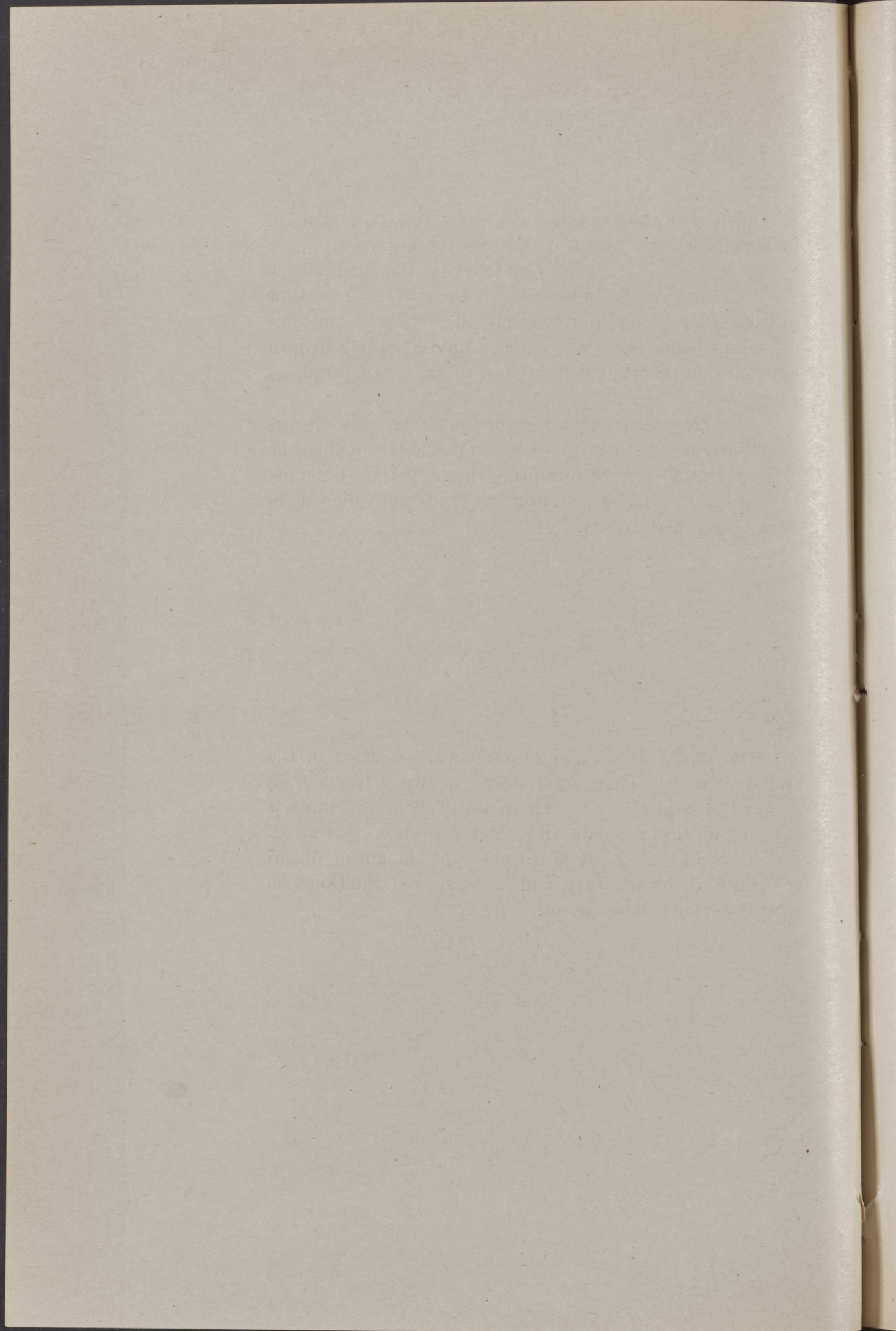
Sidwick on Damages 592.

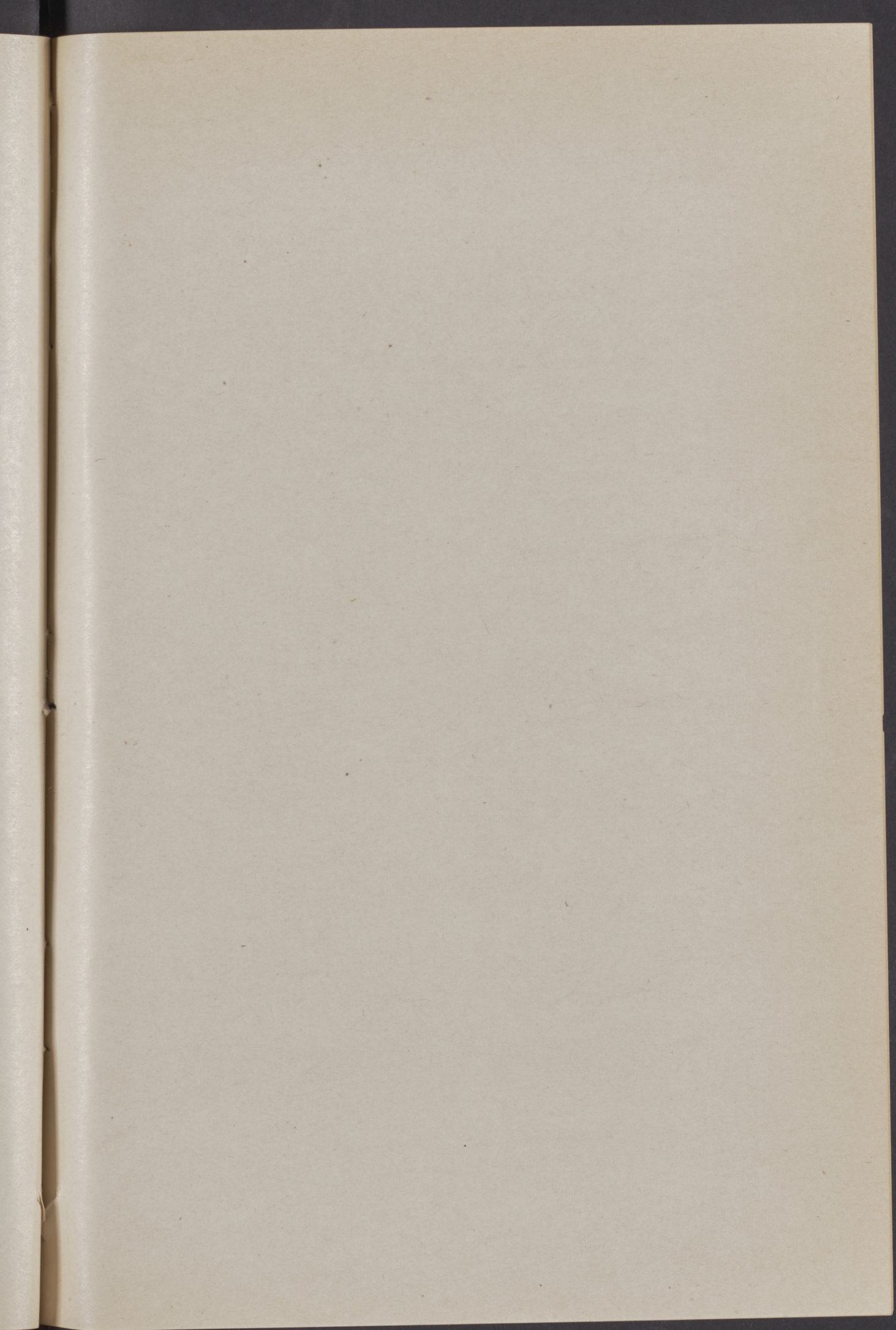
The 14th reason is because the Court refused to allow the defendant below to prove that the oysters taken by defendant below were taken from a natural oyster bed, in existence on the locus in quo prior to the grant of plaintiffs below.

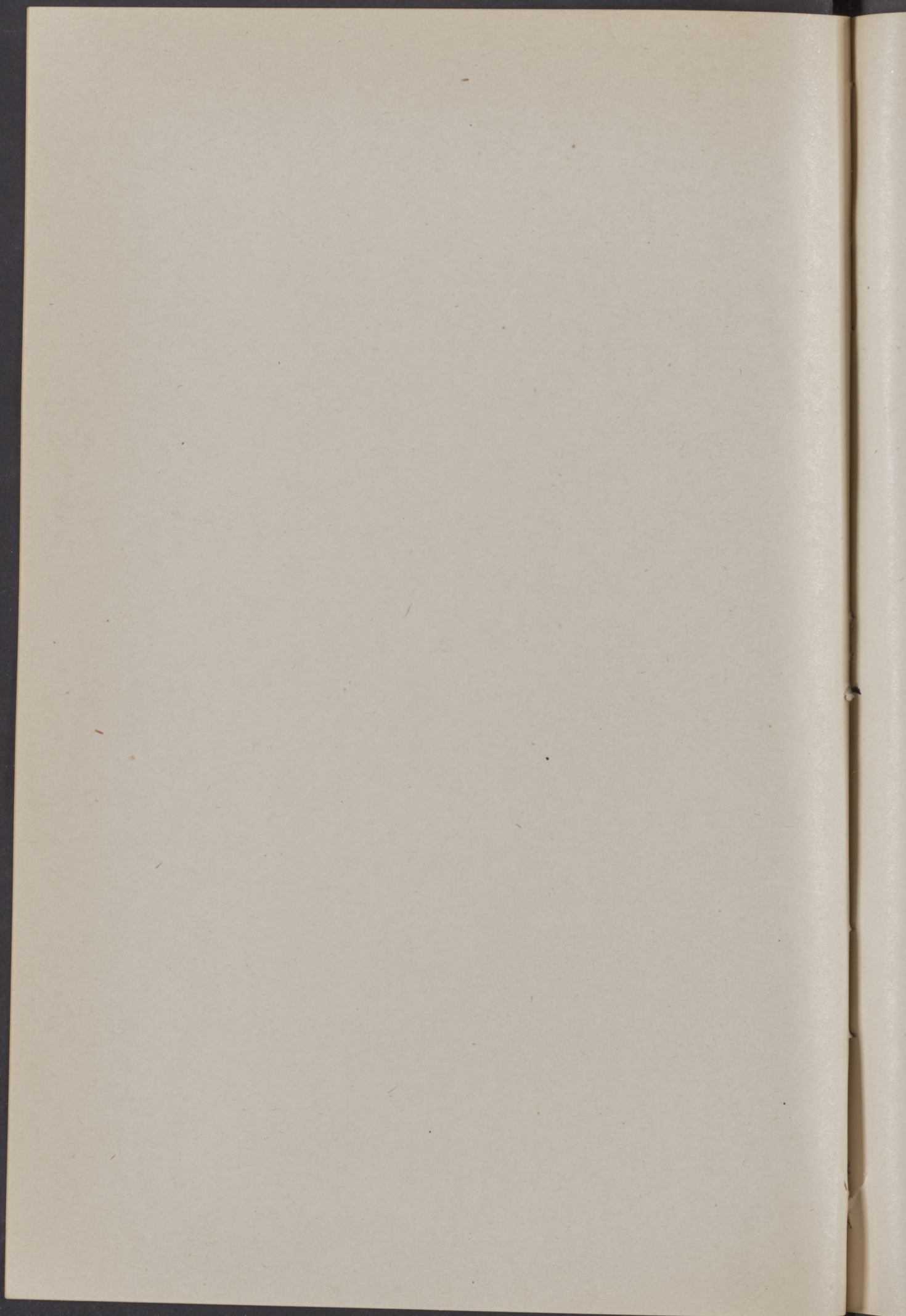
The defendant had no right to prove this, it was clearly irrelevant, there was nothing in the law at the time of the plaintiff's grant prohibiting the Riparian Commission or the State from granting any lands on which there were oyster beds, chart.

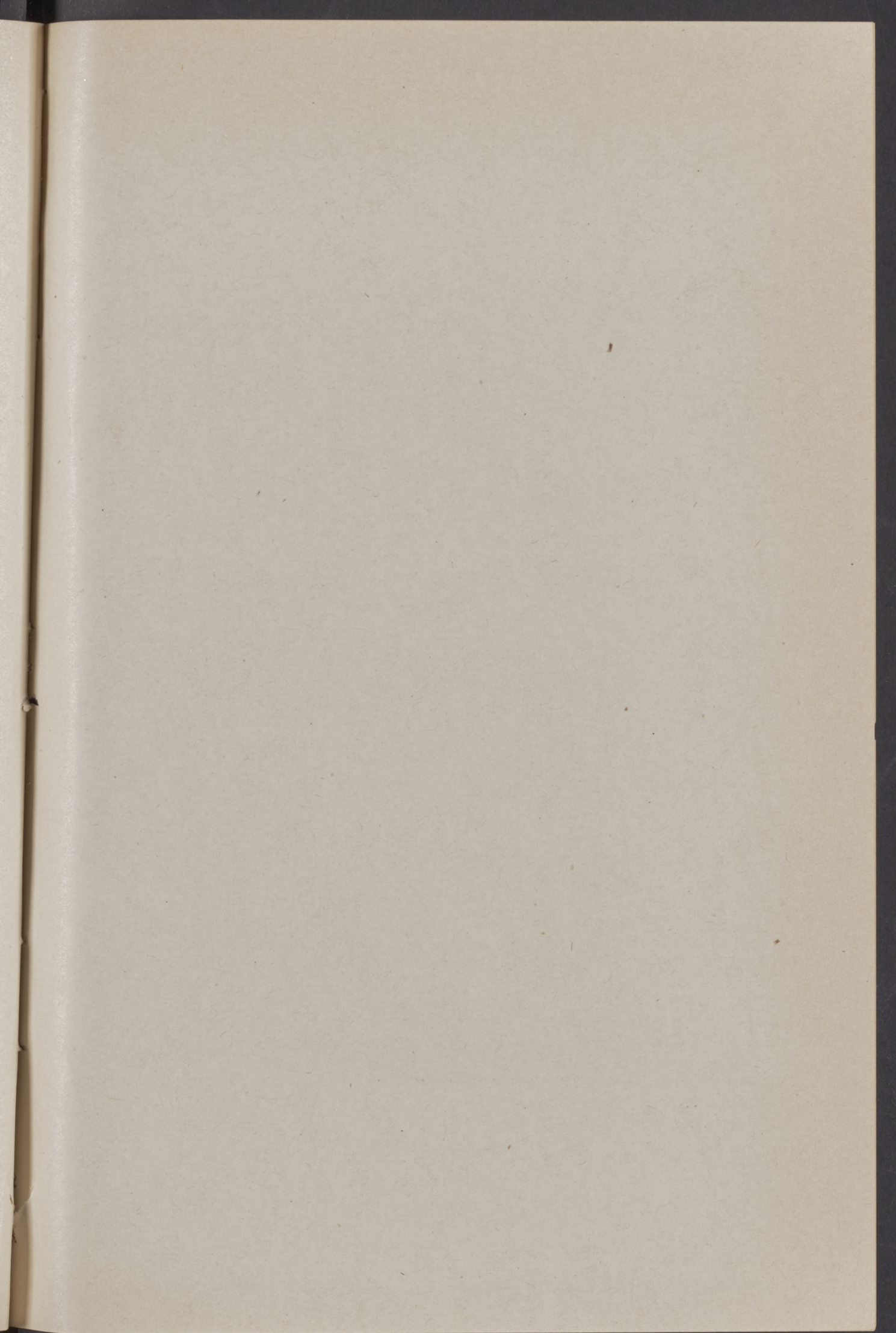
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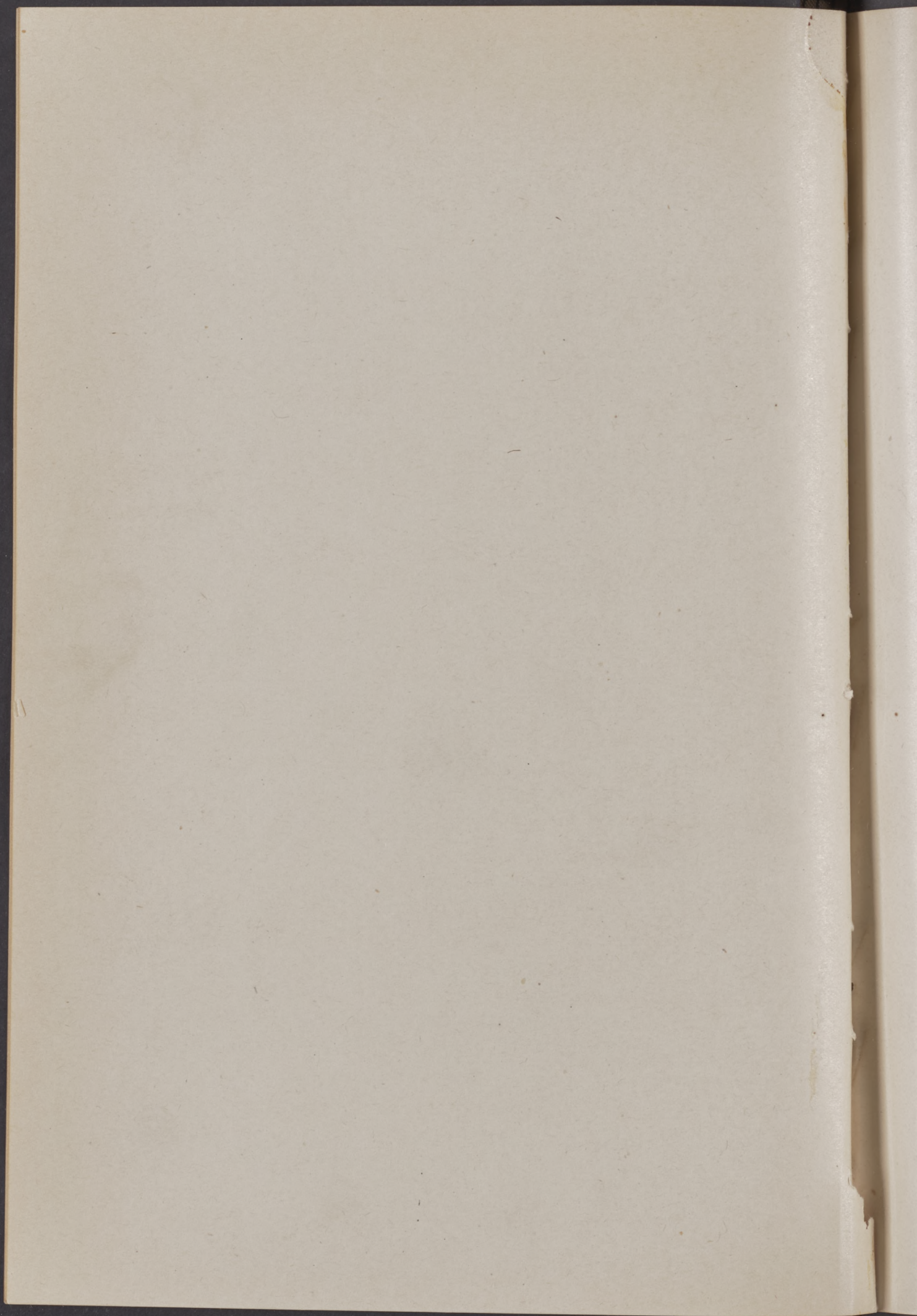
The 19, 20, 21, 22 and 23 reasons allege error in the Judge's charge. There was no error in any of the matters set forth in said reasons. The plaintiff in error admitted entering on said grounds and taking oysters therefrom, and therefore was guilty of trespass, the amount of damages was fixed by the Jury, and the charge of the Court as to said damages was correct.











NEW JERSEY COURT OF ERRORS.

ZEBULON POLHAMUS,

Plaintiff in Error.

vs.

REBECCA R. BATEMAN,

Executrix, &c., et. al.,

Defendants in Error.

On Error.

POINTS OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiffs below brought suit, in tort, in the Supreme Court, against the defendant, to recover damages arising from an alleged trespass to certain oyster grounds, under the waters of Delaware Bay in this state, claimed by them. See Narr, p 3. At the trial the plaintiffs rested their right to the *locus in quo*, consisting of a strip of land under water eight hundred and sixty-one feet in width, along the shore front, by three thousand, five hundred and seventy-five feet in depth, out into the Bay, containing a fraction over seventy acres, under and upon a certain riparian deed or grant, made by the Riparian Commissioners of this state to Luther Bateman, Sr., dated the twenty-sixth day of June, A. D., eighteen hundred and eighty-six, for a consideration of two hundred and fifteen dollars and thirty-four cents, which deed contains a provision to the effect, that it should be void if the title

of the grantee to the adjacent shore land should prove to be invalid. The defendant, at the trial, offered to prove that at the time Luther Bateman, Sr., made his application for the said riparian grant, and at the time of receiving the same, he was not the owner of the shore land upon which it was based. The trial court overruled this offer and held that the grant could not be attacked by the defendant, p 113.

The defendant also offered to prove that the oyster ground in question had been a natural oyster bed for a long time anterior to the date of the said riparian grant; and this defense was also overruled on the ground that the riparian deed vested in the grantee the absolute right to all natural oyster ground within its boundaries or limits, p 103.

Other material legal questions are presented in and by the record.

The result of the trial was a verdict and judgment in favor of the plaintiffs for nine hundred and fifty-four dollars and thirty-four cents damages. See judgment pp 10, 11.

Charge of the court, p 114.

Exceptions to the charge, p 119.

Other exceptions, pp 18, 37, 46, 47, 48, 58, 60, 61, 77, 86, 93, 98, 99, 103, 104 and 113.

Assignment of Errors, p 121.

I.

The Court below improperly held that the riparian grant to Luther Bateman, Sr., under and by virtue of which the plaintiffs claimed title to the *locus in quo* upon which the alleged trespass was committed, could not be attacked or proven to be invalid, by the defendant in this action.

The ownership of the adjacent shore land by the riparian grantee, Luther Bateman, Sr., was a condition precedent to his right to the grant in question; and without such owner-

ship the Commissioners had no right or authority to make the grant. The holding of the court below to the contrary, was directly against the doctrine on the same point, laid down by the Court of Errors in *Fitzgerald vs. Faunce*, 17 Vr. 536, in a suit upon a riparian grant, by the owner, for an alleged trespass, in which it was decided that the grant was void because the grantee did not own the shore land in fee simple, to the river side of the bank, adjoining the land under water conveyed thereby. Further; the deed in question, Plaintiff's Exhibit P 1, contains the following provision, "Provided, however, that if the said Luther Bateman is not the owner of the lands adjoining the lands under water hereby conveyed, then and in that case this conveyance, so far as the same binds the State and all the covenants herein on the part of the State shall be void as affecting any part or parts of said land joining land not owned by the said Luther Bateman."

All other official deeds are open to attack, for want of proper compliance with the law, when they are made the foundation of a claim and suit against another. It is so in the case of a Sheriff's deed, *Henderson vs. Hayes*, 12 Vr. 387; and in the case of a deed made by Commissioners to one who was not the purchaser at the sale, contrary to the order of the Court, *Den vs. Lambert*, 1 Green, 182.

The legal rule in such cases is, that a conveyance by a public officer which is not in compliance with the statute authorizing it does not operate to pass any title. It is simply inoperative. In *Woodbridge vs. Allen*, 14 Vr p 270, Justice Depew speaking for the Court of Errors in regard to the exercise of the statutory power of sale for taxes said: "The power to sell land for taxes is a naked power, and the validity of the title derived from such a sale, depends upon a strict compliance with the directions of the statute. The officer entrusted with the power of sale exercises a naked statutory and

special authority, depending upon the letter of the law for its support. He must act in conformity with the law from which his power is derived ; and a purchaser at such a sale is bound to inquire whether he has so acted ; it is, therefore, a condition precedent to the passing of titles at such sales that all the proceedings of the officers who have anything to do with the assessment and collection of taxes or with the advertisement and sale of the property, shall be in compliance with the statute authorizing the sale." X

As the plaintiffs' right to recover was put by the Judge below wholly upon the force and effect which he gave to the State's grant to Luther Bateman, Sr., which grant he held to be unassailable by the defendant, it follows that if such ruling was erroneous, as is contended on the part of the defendant, the judgment is illegal and must be set aside.

II.

The Commissioners had no power or authority to make the grant in question because the State holds the title to the land under the waters in Delaware Bay as trustee for the benefit of all the people of the State, and not as it holds the State House and other similar property ; and a grant of such a large body of the land under the public waters of that bay was in violation of the trust upon which it was so held by the State. The power of the State through the Commissioners to make the grant in question implies the power to make a single conveyance of the whole Bay. Such a right was expressly denied by the Supreme Court of the United States in the case of *The State of Ill. vs. The Ill. Central R. R. Co. and others*, 146 U. S. pp 455, 456 and 457, &c.

X And it has been held that a license granted under the Wharf Act to one who was not the riparian owner was void.
U. S. v. C. & O. R. Co. vs. C. & O. R. Co.

III.

But if the Riparian grant in question is valid it does not operate to take away the public right of fishing, either for floating or shell fish in the waters of the bay, not actually reclaimed by the grantee; such was not the intention of the grantors. The grant must be strictly construed as against the grantee who was chargeable with notice of the trust upon which the land was held by the State. The right of the Commissioners to sell and convey to the owner of the ripa absolutely, in fee simple, so much of the land under water as may be necessary for the purpose of reclamation and improvement is not denied; but it is insisted that the sale and conveyance of such a large body of land under water, wholly unnecessary for shore purposes, cannot be held to carry the right to fence in the same, and exclude all others from the enjoyment of the privilege of fishing therein, and that the land covered by water is held by the grantee, if at all, subject to the original trust in favor of the public, and that the right of fishing on natural oyster beds thereon remains in the public, and this contention is supported by the Riparian Act which predicates the right of appropriation by the riparian grantee, of such lands under water upon his previous reclamation and improvement thereof, (*Gen. Stat. of N. J. pg. 2788, Sec. 8*).

The claim on the part of the riparian grantees in Delaware Bay and elsewhere is, that, under these grants, made prior to the act of March 6th, 1888, Laws 1888, p 190, which expressly forbids the granting of lands under tide water whereon there are natural oyster beds, they hold the lands under water in fee simple, without restriction or limit; that the public have no rights therein, and that the general laws relating to floating and shell fish in Delaware Bay, do not affect them in the use of their lands under water. The ques-

tion presented is one of great interest and public importance, and needs to be put at rest by the deliverance of this Court of last resort. The rights of fishing by the people at large in public navigable waters was one of the subject matters dealt with in the Magna Charta, and ought not to be taken away except by the clearest warrant of the law.

IV.

The trial Court, following the theory that the grant in question conveyed the land under water to the grantee in fee simple absolute, and freed and discharged the same from the operation of the general public law relating to such oyster grounds in Delaware Bay, also over-ruled the defendant's offer to show, that the *locus in quo* is north of the southwest line as the same was established by Section 12 of the act of March 8th, 1882, Laws of 1882, p 55, and that the plaintiffs staked up the ground in question and planted oysters thereon contrary to the provision of the statute of April 3d, 1893, Laws of 1893, p 501, which forbids the planting and staking up of oyster ground in that vicinity. The Second Section of that Act is in terms as follows :

“2 That it shall be unlawful for any person, persons or corporation to stake up grounds or plant oysters north of a line running from the mouth of Straight Creek to Cross Ledge Light House, and that any and all grounds staked up contrary to the provisions of this act, and all oysters planted thereon shall be deemed public property.”

It also overruled the defendant's offer to prove that the oysters alleged to have been taken by the defendant from the plaintiffs were planted by the plaintiffs upon a natural oyster bed in Delaware Bay, and that such planted oysters were therefore forfeited to the public under the provisions of the

second section of the act of March 17, 1882, (P. L. 1882, Pg. 107), which provides as follows :

“2. That any person or persons who shall hereafter plant oysters upon any of the natural oyster beds in Delaware Bay, Maurice River Cove or any other cove or arm of said Delaware Bay or adjacent thereto, shall be deemed a trespasser, and such planted oysters shall be forfeited to the public, and all citizens of this State shall have the right and privilege of going upon said natural beds and taking said planted oysters and converting the same to their own use.”

But without this provision no one could by the act of staking up and planting additional oysters on a natural oyster bed deprive the public of the right of taking oysters therefrom, otherwise no natural public oyster bed could exist in any of the public waters of this State for a single day.

In Brown vs. DeGroff, 21 Vr. 410, Justice VanSyckel speaking for the Court said: “The right to take shell fish below high water mark, from natural oyster beds in the tide waters of this State, is a part of the public right of fishery, which has been fully recognized and cannot now be controverted. *It is a right common to all the citizens of the State, which may be exercised by them at will, except so far as it is restrained by positive law, or by grants from the State to individuals.*”

See also *Grace vs. Willets, Id 415*.

These rulings complained of were in accordance with the contention of the riparian grantees, that they hold these lands under water by a title which exempts them from the operation of the public laws of the State for the regulation of oyster fishing in the waters of Delaware Bay, p 103.

V.

No witness testified to any injury to the oyster bed or

ground claimed by the plaintiffs nor to any fact from which substantial damage to the bed could be legally inferred. All the plaintiffs' testimony related to the amount and value of the oysters taken therefrom, and the court was requested to instruct the jury that there was no proof upon which they could give the plaintiffs substantial damages for the alleged injury to the oyster bed stated in the declaration, but the Judge disregarded this just and legal request, and told the jury "It was a fair case for them to give fair and liberal damages," pp 114, 119. The refusal and the charge were both wrong. In the first place, there is no evidence at all, not even a scintilla, to prove substantial injury or damage to the oyster bed; and in the second place, if there had been such evidence, the court had no right to instruct the jury to give "liberal" damages in respect to the same.

It was a case for compensatory damages, only, such damages cannot be measured by the uncertain, fanciful and capricious standard of liberality. They must be such, and such only, as are proved by the evidence, to have occurred. To sanction this charge would open a new source of danger to every defendant in a damage suit; it would establish a rule whereby evidence would be very largely superceded by the introduction of the factor of liberality, heretofore an unknown quantity in the impartial administration of public justice between private parties. How much damage the jury found from the evidence and how much they added to make the same liberal, is a question unnecessary to discuss. It is enough to know that they were allowed to make such addition.

VI.

The trial court, against the defendant's objection, erroneously allowed the plaintiffs' counsel to put to one of his witnesses the following question: "What in your opinion would

ordinary bay plants, as they are usually caught and planted upon this ground claimed by the Messrs. Bateman, in 1886, some of them, and then several years running up several years to 1893 and having made a very successful growth, be worth in April 1894?" p 77. This was a hypothetical question, not based on established facts involved in the case, and not calculated to shed light on the issue on this point, which related only to the value of the particular oysters taken by the defendant from the ground in question in April 1894.

VII.

The court was requested to instruct the jury, "that the measure of damages for taking the oysters in question was their fair market value in the water at the time they were taken by the defendant." p 116. This the court refused to do and instructed the jury that the plaintiffs were entitled "to fair value, marketable value, of those oysters, as they came out from the water in eighteen hundred and ninety-four, that is, the time on the day when they were taken, April, eighteen hundred and ninety-four." This left the jury at liberty to give the plaintiffs the market value of the oysters after they had been removed from the water, which was materially different from their value in the water before such value had been increased by the labor of catching and culling them.

VIII.

Orange Moore, a witness for the plaintiffs, testified in chief that he had been oystering in Delaware Bay about twenty-five years, and that in the spring of eighteen hundred and ninety-four, he helped the Batemans work on their ground, about the location of which he had little knowledge, and saw the defendant take oysters from there. On cross-examination defendant's counsel, to test the witness' recollec-

tion, information and credibility, put to him the following question : p 60, "Did you ever take any oysters from that ground before that time to which you refer?" which question was over-ruled by the Court at the suggestion of the plaintiffs' counsel. This was a practical denial to the defendant of the right of cross-examination. The witness when examined, in chief, had said he knew where the ground in dispute was "pretty nearly." The purpose of the cross-examination was to show that he had no knowledge at all on the subject. This same witness testified in chief that the ground in question was staked up in the spring of 1894, and the court improperly refused to allow the defendant's counsel to ask him when he first knew it to be staked, p 61, a material inquiry if the staking up had any force or effect on plaintiffs' case.

It is insisted on the part of the defendant that the rulings above complained of constituted an unlawful infringement upon the material legal rights of the defendant and that the judgment should be set aside accordingly.

Respectfully submitted,

WALTER H. BACON, Att'y.

DAVID J. PANCOAST, Counsel.

Nov. term, 1896.



"PIONEER" PRINT, BRIDGETON, N. J.

NEW JERSEY COURT OF ERRORS AND
APPEALS

ZEBULON POLHAMUS,

Plaintiff in Error,

vs.

REBECCA R. BATEMAN, Executrix,
&c., and LUTHER BATEMAN, Jr.,

Defendants in Error.

}
On Error
to the
Supreme Court.

WRIT AND RETURN.

NEW JERSEY, SS.

(SEAL)

The State of New Jersey to
the Chief Justice and other
Justices of our Supreme Court
of Judicature. GREETING :

For as much as in the record and proceedings, and also
in the giving of judgment in a certain cause which was in our
Supreme Court of Judicature, before you, between Luther
Bateman, Jr., and Rebecca R. Bateman, Executrix, under the 10

last will and testament of Luther Bateman, Sr., plaintiffs, and Zebulon Polhamus, defendant, in an action of tort, manifest error hath intervened to the great damage of the said defendant, Zebulon Polhamus, as it is said; and we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, 10 with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort, in all causes, at Trenton, on the twenty-seventh day of June instant, together with this writ, that the record and proceedings aforesaid being inspected, he may further cause to be done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the 8th day of June, A. D., eighteen hundred and ninety-six.

20

HENRY C. KELSEY, Clerk.

WALTER H. BACON, Att'y.

The answer of Mercer Beasley, Chief Justice within named.

The record and proceedings of the plea whereof mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

M. BEASLEY,

C. J.

COPY OF JUDGMENT.

NEW JERSEY SUPREME COURT.

Rebecca R. Bateman, Executrix, &c., of Luther Bateman, deceased, and Luther Bateman, Jr., vs. Zebulon Polhamus	}	In Tort. On Postea, &c., WILLIAM E. POTTER, Attorney.
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As yet of the eleventh
 day of January, A. D.,
 eighteen hundred and
 ninety-five.

Witness, Mercer Beasley, Esq.,
 Chief Justice.

BENJ. F. LEE, 10
 Clerk.

CUMBERLAND COUNTY, SS.

Zebulon Polhamus was summoned to answer unto Luther Bateman and Luther Bateman, Jr., in a plea of tort, and thereupon the said Luther Bateman and Luther Bateman, Jr., by William E. Potter, their attorney complain;

For that the said Zebulon Polhamus on the first day of April, eighteen hundred and ninety-four, and on divers other days and times between that day and the day of the commencement of this suit, with force and arms, &c., broke and entered the close of the said Luther Bateman and Luther Bateman, Jr., covered with the waters of Delaware Bay, situate and being in the Township of Downe, in the County of Cumberland, and bounded and described as follows;

All that parcel of land flowed by tide water lying at Beadons Cove, in the Township of Downe, in the County of Cumberland, and State of New Jersey, beginning at a point in the high water mark of the easterly shore of Delaware Bay, where the same is intersected by the division line between lands

of the estate of Seth Page and lands of the said Luther Bateman and from thence running south fifty-two degrees and forty-three minutes west, three thousand five hundred and seventy-five and ninety-six hundredths (3,575.96) feet to the exterior line established by the commissioners appointed under the authority of the Act entitled "An Act to ascertain the rights of the State and of Riparian owners in the lands lying under the waters of the Bay of New York, and elsewhere in this State," approved April 11, A. D., 1864, and the supplements thereto ; thence, along said exterior line, north thirty-three degrees and forty-three minutes west eight hundred and sixty-one and thirty-seven one hundredths (861.37) feet ; thence north fifty-five degrees and seven minutes east two thousand five hundred and eighty-six, and forty-one one hundredths (2,586.41) feet to a point ; thence north two degrees and forty-two minutes east nine hundred and seventy and one-tenth (970.1) feet to the high water mark of the easterly shore of Delaware Bay, where the same is intersected by the northerly boundary line of lands of the said Luther Bateman ; thence northerly along said high water mark to the place of beginning.

Whereon there was then and there situate, growing and being a certain oyster bed of the said Luther Bateman and Luther Bateman, Jr., (who are citizens and residents of this State, and have been during the entire lives of them and each of them,) containing oysters of the said Luther Bateman and Luther Bateman, Jr., theretofore planted by them, and then and there growing, being and situate, to wit, six thousand bushels of oysters, of great value, to wit, of the value of three thousand dollars, which said oyster bed and the oysters then and there upon, situate and growing and being as aforesaid, had been theretofore and were then and there well and sufficiently

defined, marked out and designated as the oyster bed and oysters of the said Luther Bateman and Luther Bateman, Jr., by stakes and posts, and other devices placed in and upon the boundaries of the said bed and oysters and of the said close in such manner as sufficiently to apprise the public and the said Zebulon Polhamus, that the bed and oysters aforesaid had not been abandoned to the public, and that the said Luther Bateman and Luther Bateman, Jr., still retained the exclusive possession of the same ; and by means of a certain schooner or other vessel, then and there in the possession and 10 use of the said Zebulon Polhamus, and with and by means of a certain instrument known as an oyster dredge then and there connected by suitable appliances with the schooner or vessel aforesaid, tore up and subverted the soil of the close aforesaid, and damaged and destroyed the oyster bed aforesaid, and the oysters then and there growing, situate and being as aforesaid, and then and there took and carried off and disposed of to his own use the planted oysters of the said Luther Bateman and Luther Bateman, Jr., then and there situate, growing and being, and sufficiently defined, marked and desig- 20 nated as aforesaid, to wit, six thousand bushels of oysters of great value, to wit, of the value of three thousand dollars ; whereby the said Luther Bateman and Luther Bateman, Jr., not only were injured to the value of their oysters so taken by the said Zebulon Polhamus as aforesaid, but by reason of the premises, they lost the profits which might and would have accrued to them if their oyster bed and oysters had been permitted by the said Zebulon Polhamus to remain as situate and the oysters aforesaid, had been by him permitted to grow and to be caught, marketed and sold by the said Luther Bate- 30 man and Luther Bateman, Jr., to wit, profits to the amount of three thousand dollars.

And also for that the said Zebulon Polhamus, on the first day of April, eighteen hundred and ninety-four, and on divers other days and times between that day and the day of the commencement of this suit, with force and arms, &c., to wit, at the Township of Downe, in the County and State aforesaid, by means of a certain other schooner or other vessel, then and there in the possession and use of the said Zebulon Polhamus, and with and by means of a certain instrument known as an oyster dredge, then and there connected by suitable ap-
10 pliances with the schooner or vessel aforesaid, caught, seized, took and carried away, divers, to wit, other oysters of the said Luther Bateman and Luther Bateman, Jr., (who are citizens and residents of this State, and have been during the entire lives of them and each of them), to wit, six thousand bushels of oysters, of great value, to wit, of the value of three thousand dollars which said oysters and the oyster bed upon which the same were then and there situate, growing and being had been theretofore, and were then and there well and sufficiently defined, marked out and designated as the oysters
20 and oyster bed of the said Luther Bateman and Luther Bateman, Jr., by stakes and posts and other devices placed in and upon the boundaries of the said oysters and oyster bed in such manner as sufficiently to apprise the public and the said Zebulon Polhamus that the bed and oysters aforesaid had not been abandoned to the public, and that the said Luther Bateman and Luther Bateman, Jr., still retained the exclusive possession of the same, and converted and disposed thereof to his own use. And also for that the said Zebulon Polhamus,
30 aforesaid, and on divers other days and times between that day and the day of the commencement of this suit, with force and arms, &c., to wit, at the Township of Downe, in the

County and State aforesaid, caught, took and carried away other the oysters of the said Luther Bateman and Luther Bateman, Jr., (who are citizens and residents of this State; and have been during the entire lives of them and each of them), then and there found and being, to wit, six thousand bushels of oysters of great value to wit, of the value of three thousand dollars, and converted and disposed thereof to his own use, to wit, at &c., aforesaid.

And also for that whereas the said Luther Bateman and Luther Bateman, Jr., (who are citizens and residents of this 10 State and have been during the entire lives of them and of each of them) to wit, on the first day of April, eighteen hundred and ninety-four, in the Township of Downe, in the County and State aforesaid, were lawfully possessed as of their own property, of certain other oysters, to wit, of six thousand bushels of oysters of great value, to wit, of the value of three thousand dollars, and being so possessed thereof, they, the said Luther Bateman and Luther Bateman, Jr., afterwards to wit, on the day and year first above mentioned, and on 20 divers other days and times between that day and the day of the commencement of this suit, casually lost the said last mentioned oysters out of their possession, and the same afterwards, to wit, on the day and year first above mentioned, and on divers other days and times between that day and the commencement of this suit, at &c., aforesaid came to the possession of the said Zebulon Polhamus by finding.

Yet the said Zebulon Polhamus, well knowing the said last mentioned oysters to be the property of the said Luther Bateman and Luther Bateman, Jr., and of right to belong and appertain to them, but contriving and fraudulently intending 30 craftily and subtly to deceive and defraud the said Luther Bateman and Luther Bateman, Jr., hath not as yet delivered

the said last mentioned oysters or any or either of them or any part thereof, to the said Luther Bateman and Luther Bateman, Jr., although often requested so to do, and hath hitherto wholly refused so to do, and afterwards, to wit, on &c., aforesaid, converted and disposed of the said last mentioned oysters to his own use.

And other wrongs and injuries to the said Luther Bateman and Luther Bateman, Jr., then and there did, and to the damage of them the said Luther Bateman and Luther Bateman, Jr., of three thousand dollars and therefore they bring their suit &c.

And the said defendant Zebulon Polhamus, by Walter H. Bacon, his attorney, comes and defends the force and injury, when &c., and as to all the supposed trespasses in the first, second, third and fourth counts of the said declaration mentioned, says that he is not guilty thereof in manner and form as the said plaintiffs have above thereof complained against him; and of this, he, the said defendant, Zebulon Polhamus, puts himself upon the country, &c., and the said plaintiffs do
20 the like. And as to the supposed grievances in the fifth count of the said declaration mentioned, the said defendant by Walter H. Bacon, his attorney, comes and defends the wrong and injury, when &c., and says that he is not guilty of the said supposed grievances above laid to his charge or any or either of them or any part thereof, in manner and form as the said plaintiffs have above thereof complained against him. And of this, he, the said defendant, Zebulon Polhamus, puts himself upon the country, &c., and the said plaintiffs do the like.

NEW JERSEY SUPREME COURT.

June Term, 1895.

Luther Bateman, et. al.	}	Tort.
vs.		
Zebulon Polhamus.		

It appearing by affidavit on file that Luther Bateman, one of the plaintiffs in the above stated suit departed this life on or about the 12th day of August, A. D. 1895, having previously executed his last will and testament, in and by which he named and appointed his wife, Rebecca R. Bateman, as ¹⁰ Executrix thereof, and that the said instrument has been duly admitted to probate by the Surrogate of the County of Cumberland, and that letters testamentary have been duly issued to the executrix aforesaid, and that she has entered upon the duties of her office, aforesaid;

It is, on this 10th day of September, A. D. 1895, on motion of W. E. Potter, ordered, that the said Rebecca R. Bateman, Executrix of the last will and testament of Luther Bateman, aforesaid, deceased, be and she hereby is, substituted as one of the plaintiffs of record in the above stated ²⁰ cause in the place and stead of the said Luther Bateman, deceased.

Entered September 10, 1895.

On motion of

WM. E. POTTER,

Att'y.

Let the above order be entered.

G. C. LUDLOW,

Justice of Sup. Ct.

Therefore let a jury thereupon come before the Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court holden at Bridgeton, in and for the County of Cumberland, on the first Tuesday of ³⁰

May, in the year of our Lord, one thousand eight hundred and ninety-six, by whom &c.

And now at this day, to wit, the second day of June, in the year of our Lord, one thousand eight hundred and ninety-six, before the Supreme Court of the State of New Jersey comes the said plaintiffs by their attorneys aforesaid and the justice before whom &c., having sent hither his record had before him in these words to wit:

Afterwards, to wit, on the sixth day of May, eighteen
10 hundred and ninety-six, at Bridgeton, New Jersey, before the Hon. Geo. C. Ludlow, one of the Justices of the Supreme Court of Judicature of the State of New Jersey according to the form of the statute in such case made and provided come as well the within named Rebecca R. Bateman, Executrix of Luther Bateman, deceased, and Luther Bateman as the within named Zebulon Polhamus, by their respective attorneys within mentioned and the jurors of the jury, whereof mention is within contained being chosen, tried and sworn say upon their
20 torts and trespasses within laid to his charge in manner and form as the said Rebecca R. Bateman, Exec. &c., and the said Luther Bateman, within complained against him, and they assess the damages of the said Rebecca R. Bateman, Exec., &c., and the said Luther Bateman by reason thereof over and above their costs and charges by them about their suit in this behalf expended to nine hundred and fifty-four dollars and thirty-four cents, and for those costs and charges to six cents.

Therefore it is considered that the said Rebecca R. Bateman, Executrix &c., of Luther Bateman, deceased, and Luther
30 Bateman do recover against the said defendant their said damages by the jurors of the jury in form aforesaid found to the sum of nine hundred and fifty-four dollars and thirty-four

cents and also the sum of one hundred and seventeen dollars and eighty-nine cents for their costs and charges aforesaid by the Court now here adjudged to the said Rebecca R. Bateman, Executrix, &c., of Luther Bateman, deceased, and Luther Bateman, and with their assent which said damages, costs and charges in the whole amount to one thousand and seventy-two dollars and twenty-three cents.

Judgment signed this second day of June, A. D., eighteen hundred and ninety-six.

M. BEASLEY,
C. J.

10

I, Benjamin F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

(SEAL)

In testimony whereof I have here-
to set my hand and the seal of said
Court, at Trenton, this eleventh
day of June, A. D. eighteen
hundred and ninety-six.

BENJ. F. LEE. 20

BILLS OF EXCEPTIONS, &C.

NEW JERSEY SUPREME COURT.
CUMBERLAND CIRCUIT.

Rebecca R. Bateman, Ex'rx,
et. als., Plaintiffs,
vs.
Zebulon Polhamus,
Defendant.

In Tort.
Bills of Exceptions
and the testimony upon
which the same are
founded.

BRIDGETON, N. J., May 6, 1896.

This cause being called for trial and moved by the plaintiff, the defendant presented, read and filed his challenge to the array in terms as follows :

NEW JERSEY SUPREME COURT.

CUMBERLAND CIRCUIT.

<p>Rebecca R. Bateman, Executrix, et. als., Plaintiffs, 10 vs. Zebulon Polhamus, Defendant.</p>	}	<p>In Tort. Challenge to the Array by Defendant. ant.</p>
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This cause being called for trial on this sixth day of May, A. D., eighteen hundred and ninety-six, the defendant by his attorney, Walter H. Bacon, says that he excepts to the legality of and challenges the array and general panel of jurors summoned by the Sheriff for the trial of causes at this term, on the ground and for the reason, that the same was not drawn in the presence of the Court of Common Pleas of 20 said County of Cumberland according to law ; but was drawn in the presence of a single member of said court, namely, the Honorable James R. Hoagland, who excluded the other judges of said court, namely, Honorable Mulford Ludlam and Honorable Eli B. Hendee, from all participation in the said act of selecting the said jurors, and acted alone in the matter

of selecting and certifying the said panel of jurors, claiming that the act entitled "An act to reduce the number of judges of the inferior courts of common pleas, courts of oyer and terminer and general jail delivery, orphans' courts, courts of general quarter sessions of the peace and special sessions in the several counties of this state, and to fix the salaries and provide for the appointment of judges of said courts," approved March 26, 1896, made him the sole judge of the said court, and this, the said defendant is ready to verify.

Wherefore he prays judgment that the said panel may be 10 quashed.

WALTER H. BACON,
Attorney of defendant.

Endorsed with the title of the cause.

Filed May 6, 1896.

MR. BACON :—The defendant offers to prove the facts therein stated.

MR. POTTER :—Now I will ask Judge Hoagland if the facts therein stated are true.

JUDGE HOAGLAND :—They substantially are. 20

THE COURT :—I understand that the judges of the common pleas consist of Judge Hoagland and myself.

MR. BACON :—I want to prove this by the record of the Court of Common Pleas, on page 495, and by the minute of the court that appears on that page as of the date of April 7, 1896.

MR. POTTER :—What appears?

MR. BACON :—An order of the court as follows :

Cumberland Common Pleas Court met at the Court House, Bridgeton, April 7, A. D., eighteen hundred and 30 ninety-six, at ten o'clock in the forenoon.

Present, James R. Hoagland, Presiding Judge.

Present, Eli B. Hendee, Associate Judge.

Present, Mulford Ludlam, Associate Judge.

Court called by John B. Clevestine, Crier.

ORDER OF THE COURT.

Cumberland Common Pleas, at a session of said court held at the Court House on the seventh day of April, A. D., eighteen hundred and ninety-six, Lay Judges Eli B. Hendee and Mulford Ludlam appeared and took their seats upon the
10 bench. The Presiding Judge informed said judges that under the law they were not qualified to take part in the proceedings of the court. They therefore retired, after requesting their action to be entered upon the minutes of the court, which was accordingly done.

In the presence of James R. Hoagland, Judge; Allen R. Shinn, Sheriff, the following named persons were drawn to serve as petit jurors for the ensuing May term of Court.

Here follow the names of fifty-four jurors.

(Signed) W. B. TRENCHARD, Clerk.

20 We offer to prove it by the Clerk.

WILLIAM B. TRENCHARD, SWORN.

By MR. BACON.

Q. I show you the book of minutes of the Common Pleas.

THE COURT:—Do you have to prove a record of the court?

MR. POTTER:—I think it would be well in this case to have it.

MR. BACON:—I show you the book of minutes of the
30 Common Pleas and refer you to page 495 thereof, and ask

you whether you, as Clerk of the Court, entered this minute upon the record of the Court.

A. I did.

Q. The minute that has been read here?

A. Yes, sir.

Q. And you were present when this minute was made, and were directed by the Court to enter this minute on the minutes, and you entered the minute that you were directed to make?

A. I did.

10

By MR. PANCOAST.

Q. And you have a personal knowledge that the facts transpired in court as therein stated?

THE COURT :—The record speaks for that ; that shows for itself.

MR. POTTER :—Counsel for the plaintiff in the cause at issue having argued that the law referred to in the challenge was constitutional in its effect, and that the said judges were excluded from acting as the judges of the court of common pleas under and by virtue of that law, the court thereupon 20 ruled as follows upon the challenge to the array heretofore filed by the defendant. I think that is the only way to get at it, your Honor, to get to trial to-day.

THE COURT :—Well, the effect of that I suppose is to commit the court to the constitutionality of the act, isn't it?

MR. POTTER :—I should think it did.

THE COURT :—Well, I will stand by the act. I will rule that way. The challenge to the array is overruled and an exception is asked for by the defendant and is hereby allowed and sealed accordingly.

30

G. C. LUDLOW,

J. [L.S.]

MR. POTTER :—I first offer in evidence a deed of conveyance with map annexed from the Riparian Commissioners of the State of New Jersey, including the Governor, Leon Abbott, to Luther Bateman, dated June 26th, 1886, acknowledged before R. E. Beecher, Master in Chancery, July 2d, 1886, and recorded in the Clerk's Office of Cumberland County, December 10th, 1886, in Book of Deeds 183, page 413, &c.

MR. PANCOAST :—I object to the offer of this deed on the 10 ground that the Commissioners had no authority to make it.

THE COURT :—Well, why ?

MR. PANCOAST :—Because no such power is vested in them.

THE COURT :—Well, why and how ?

MR. PANCOAST :—Because the Riparian acts do not authorize the State through these Commissioners to convey this large tract of public water in Delaware Bay to any one individual.

THE COURT :—Do you propose to argue it ?

20 MR. PANCOAST :—That the State did not hold this land absolutely in fee so as to authorize these Commissioners to convey it for the sum of about \$215 to this grantee.

THE COURT :—The State no right to convey ?

MR. PANCOAST :—No right to convey this public tract of land and water in Delaware Bay because the State held it not in fee, as its own property, but held the waters of this Bay, the land covered by it, in trust for the benefit of the whole people. I insist that this attempt to convey this portion of this great navigable bay to this private individual for this 30 nominal sum was in breach of that trust, illegal and void, and not binding on any of the inhabitants of this State ; that the State holds all the public waters of this great bay as trustee

for the whole of the people, and that it has no right to grant any portion of it to a single individual for his own private use,

MR. POTTER :—I want to say in reply to it this: That there are over five hundred vessels engaged in planting and catching oysters in Delaware Bay, and probably twenty-five hundred men, and that the annual value of the oysters caught is very large, and there is not a single man of them, not one, who does not defend the bed that he has planted with his utmost energy, and there is not one of them that does not get 10 title from the State of New Jersey. There is not a man there catching an oyster except by the authority of the State, express or implied. He drives everybody off that he catches there, and has people indicted every term for stealing oysters. The doctrine of my friend would destroy the whole of the business which has been going on for at least fifty years in Maurice River Cove and Bay.

MR. PANCOAST :—According to the contention of my friend, and according to the view heretofore obtaining in our courts in this State very largely, the State of New Jersey by 20 one grant could convey to one corporation or one individual the whole of Delaware Bay. My contention is that it cannot do that, and it cannot do less. It cannot grant any considerable portion of that great bay to any private one individual. It may convey a certain portion of land adjacent to the shore of New Jersey for the purpose of navigation and for the purpose of wharfing out. Beyond that, according to my contention, supported by the views of the Supreme Court of the United States, it cannot convey to any one man or corporation any considerable portion of the waters of this bay. It 30 was so distinctly held by the Supreme Court of the United States in relation to the lake front of Chicago, that the State

of Illinois held that great water there in trust for the people and could not give it to a corporation, or any considerable portion of it; it could only give or grant such portion of it as was necessary for the purposes of shipping and to establish wharves. It is upon that doctrine that we, who represent the oyster interest in Delaware Bay, plant ourselves before this court.

THE COURT:—You object to the introduction of this deed now?

10 MR. PANCOAST:—Yes, sir.

THE COURT:—I will overrule the objection.

(Whereupon the defendant, by his counsel, prays a bill of exceptions which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

(Deed received in evidence and marked "Exhibit P 1.")

MR. POTTER:—I offer next in evidence, if your Honor please, a certified copy of the last will and testament of Luther Bateman, deceased, with a copy of the letters of ad-
20 ministration granted to Rebecca R. Bateman.

MR. PANCOAST:—We will admit that Rebecca R. Bateman is the executrix of Luther Bateman, for the purpose of saving time.

MR. POTTER:—I would rather make the offer. It was probated on the 22d day of August, 1895. (Reads will. Marked "Exhibit P 2.")

ISAAC O. ACTON, sworn.

Direct Examination.

30 By MR. POTTER.

Q. Mr. Acton, where do you live?

A. Salem, New Jersey.

Q. What is your present profession?

A. I am a civil engineer and lawyer, a member of the bar

Q. Have you received the degree of Civil Engineer?

A. I have.

Q. From what institution?

A. From Lafayette College, Easton, 1876.

A. Did you by request go down near Beadon's Cove, in Downe Township, in this County, to make a survey of the lands described in the deed of the Commissioners to Luther 10 Bateman in 1886, which I have just read?

A. I did.

Q. Did you have the deed with you or a copy of the survey?

A. I am not certain that I did. I had some deeds with me. I made quite a number of surveys that trip, but am no certain that deed was with me. I think it was.

Q. Did you prepare a map of this survey?

A. Yes, sir.

Q. Is that the map? (Indicating map.)

20

A. Yes, sir.

MR. PANCOAST :—Unless he knows from what paper he made the survey—

A. I made the survey from the bounds, the stakes in the bay. I think the deed was with me.

MR. PANCOAST :—I object to that, because unless we know what he is delineating on the map his testimony would be of no value at all.

MR. POTTER :—Well, he does know. He says he had the deed.

30

MR. PANCOAST :—Well, just examine him and see.

Q. Just examine that deed and see?

A. I believe that deed was with me at the time.

By MR. PANCOAST.

Q. Well, do you know whether it was or not?

A. No, I do not.

Q. Have you any notes that would be able to tell you what the courses and distances in the deed were?

A. I have no notes taken from the deed.

Q. What means have you of saying surely?

MR. POTTER :—Just wait till I get through, Judge.
I am not through examining.

By MR. POTTER.

Do you know that you had this deed with you for some time?

A. I had the deed some time, yes. I believe I had it for the survey. The survey was made from stakes set in the bay on the ground.

Q. Made by angles, wasn't it?

A. Made by angles, yes, sir.

By MR. PANCOAST.

20 Q. Then you didn't survey from a deed? You surveyed from stakes or monuments on the ground, is that so?

A. Yes, sir, that is so.

MR. POTTER :—Well, if we show that those angles cover the property in the deed—

(To the witness :)

Q. Now just read, if you please, the survey that you made from that deed; how it runs.

30 A. I commenced at Bateman's Creek, this point, about high water mark. I ran the first line to the point shown at the end of the creek, nearly directly in line with a staked

line shown as the most northerly line on the map. There is a stake on the shore there. That course was taken and tests were taken at various other points, quite a number of them shown here. That point was designated, pointed out to me and the angles taken. The line was run from this point to a point where it was necessary to make a small offset. There an offset of a right angle was made and another course run to that point. (Indicating.) That was directly in line with a number of stakes, a staked line. From the last mentioned point the tests were taken to bushes and trees driven along in there. 10 In that manner all this whole survey was made all along the shore and a considerable distance beyond this point, by running the shore line and taking tests of outside stakes and interior stakes located on the grounds, and from that survey that map was made, together with the map and courses and distances in the deed.

Q. Just examine the description in the conveyance made there in that deed, which is Exhibit P. 1, and state whether or not the tract of land covered by water marked by you there "Luther Bateman," contains the whole or the greater 20 part of the tract of land described in that deed?

A. It does.

Q. No doubt about it at all?

A. No doubt about it at all.

Q. Was this tract marked "Luther Bateman," also well staked up with oyster stakes?

A. Yes, sir; well staked up, well defined.

Cross-Examination.

By MR. PANCOAST.

Q. There are two tracts here delineated on this map, 30 both with the name Luther Bateman?

A. Yes, sir.

Q. You have been speaking of the most northerly one, or the large one?

A. I have.

Q. And you made that survey from stakes on the ground?

A. Stakes on the ground.

Q. And you say your map of that tract corresponds with the map to the riparian deed shown here?

10 A. Yes, sir.

Q. That is Exhibit P 1?

A. Yes, sir.

Q. Now what is the length of the southerly line of this tract?

A. I have never measured it.

Q. Isn't it shown here?

A. It is shown in red, yes, sir. It is taken from the riparian deed, 3,575.96 feet.

Q. Then these courses and distances on your map in red
20 are taken from the riparian deed?

A. They are.

Q. What fraction of a mile, approximately, is the most southerly line of this tract?

A. About 36-52 of a mile. There are 5280 feet in a mile.

Q. It is the largest fraction of a mile then?

A. Yes, sir; over one-half, nearly three-quarters.

Q. From the shore out to the exterior line?

A. Yes, sir.

Q. Where the stakes ended?

30 A. Yes, sir.

Q. About three-quarters of a mile?

A. Yes, sir.

Q. About what was the width of it, put in the fraction of a mile?

A. Well, it is 861 feet; there are 5280 feet in a mile; that is about 8-52 of a mile.

Q. And roughly and approximately stated, about how many square acres are there in that plot?

A. Well, I couldn't say; a great many acres in it, of course.

Q. Well, just about how many?

A. Well, there are fifty or sixty acres certain there. 10

Q. And all this embraces the waters of the bay?

A. Yes, sir.

Q. None of it shore land?

A. No, sir; none of it shore land.

LUTHER BATEMAN, JR., SWORN.

Direct Examination.

By MR. POTTER.

Q. Mr. Bateman, are you the son of Mr. Luther Bateman, and one of the two plaintiffs in this suit?

A. Yes, sir. 20

Q. About when did your father die?

A. He died August 11th.

Q. What year?

A. 1895.

Q. Do you remember the fact of his first purchase of lands under water in Delaware Bay, near Beadon's Creek or Beadong's Creek in Downe Township?

A. Yes, sir.

Q. Was the deed that I have just given in evidence the deed from the Riparian Commissioners which conveyed to him the land he first purchased there? 30

A. Yes, sir.

Q. That deed is dated June 26th, 1886, and recorded in the following fall, or rather, winter?

A. Yes, sir.

Q. After he purchased this property did he invite you to take possession of it with him and prepare and plant a bed of oysters on it?

A. Yes, sir.

Q. Who had charge of the principal work of planting the oysters and shells upon it that you did plant?

10 A. Well, I had charge of planting them. As I knew nothing about taking the boat at that time, I was aboard the boat and helped plant them.

Q. You were aboard the boats and helped plant them?

A. Yes, sir.

Q. Your father at that time was in rather feeble health, that finally killed him?

A. Yes, sir. He didn't do much work; sat around home.

Q. Finally died of heart disease, did he?

20 A. Yes, sir.

Q. When did you first plant oysters on this property?

A. Planted the first fall; took it up in the summer, got our grant, and planted in the fall.

Q. The fall of 1886.

A. Yes, sir.

Q. What vessel did you use in planting in the fall of 1886?

A. Lena Bateman, Captain Husted.

Q. Was it a schooner or sloop?

30 A. Sloop.

Q. How many deck loads of oysters did you plant in the fall of 1886 or the beginning of 1887?

A. About five or six.

Q. Five or six deck loads?

A. Yes, sir.

Q. About how many bushels of oysters did that schooner average to the deck load?

A. That sloop?

Q. Yes.

A. Well, this fall I was down in her buying—we were not deck loading—we carried pretty nearly five hundred bushels, buying them.

10

Q. Then she would carry five hundred bushels?

A. Yes, sir.

Q. Is she the same size and build now as in 1886?

A. Yes, sir.

Q. What were these six deck loads of oysters that you planted in 1885 or 1887 worth on the ground?

A. I don't know. I know they were bragging on it. That was the first time I went oystering. I know they said—
(Objected to.)

Q. What size of oysters were they that you planted? 20

A. Well, they were creeks.

Q. Natural creek oysters, were they?

A. Yes, sir.

Q. Where did you get them from?

A. Got them out of Tuxent Creek.

Q. How many days were you engaged in the business at that time? Confine yourself to December, 1886, and January, 1887.

A. Well, I couldn't say how many days we were down; I guess about two weeks, off and on.

30

Q. Did you hire the boat and men?

A. Yes, sir. Well, my father owns the boat, owned her at that time ; paid the men.

Q. How many men did he employ and hire besides you ?

A. Four, I think ; three or four.

Q. What did he pay them by the month or week or however they were paid ?

A. He paid them by the week, but I couldn't say how much. Six or seven or eight dollars a week, I suppose, on
10 account of wages.

Q. You assisted in unloading and loading ?

A. Yes, sir ; helped catch them.

Q. What do you think your labor was worth a week ?

MR. PANCOAST :—I object to this as an element to prove the value of these oysters alleged to have been taken contrary to law. If I take a man's horse, or cow, or chattel, it is not ordinarily proved how much labor was put on it ; it is to prove how much it was worth in the condition in which it was taken. Here was an oyster bed containing oysters, of a
20 certain value in April, 1894, which, it is alleged, we took and are responsible for. The antecedent history may be interesting, but it is not proper.

THE COURT :—I think you had better find out what they were worth in April, 1894.

Q. In 1887 did you plant any oysters upon this property .

A. Yes, sir.

Q. You had charge of the planting of them ?

A. I was aboard the boat.

30 Q. Who was the captain of the vessel in 1887 ?

A. Well, we had two.

Q. Who were the captains ?

A. James Turner and Theophilus Husted.

Q. What was Husted's vessel?

A. The Lena Bateman.

Q. What was Turner's vessel?

A. May Bateman.

Q. How many deck loads did you plant by the vessel of Theophilus Husted, in 1887?

A. Why, somewhere around about ten or twelve deck loads, somewheres around there; I don't know exactly.

Q. The Lena Bateman is the same sloop as you said recently carried five hundred bushels?

A. Well, that is what we bought with her last summer, not quite five hundred bushels.

Adjourned till May 7th, 1896, 10 a. m.

Bridgeton, N. J., May 7th, 1896.

LUTHER BATEMAN, JR., continued.

By MR. POTTER.

Q. I believe I was asking you when we adjourned, Captain, about the planting of oysters in 1887. Did you plant any oysters on this ground in 1887? 20

A. Yes, sir; planted there in two boats.

Q. What two boats?

A. Lena Bateman and May Bateman.

Q. Who was the captain of the Lena Bateman?

A. Theophilus Husted.

Q. Who of the May?

A. James Turner.

Q. What were they, schooners or sloops?

A. Sloops. 30

Q. In 1887, how many deck loads did you plant from the Lena Bateman under Captain Husted?

A. About ten or twelve.

Q. And how many from the May Bateman?

A. About the same. Both planted together, planted about the same deck loads. Both went in together at the same time.

Q. Did you plant any in 1887 under James Turner?

A. Yes, sir; planted ten or twelve deck loads.

Q. What were these, different kinds of plants?

A. Got them right out of the bay from the natural beds.

10 Q. Well, in 1888, what did you plant?

A. Well, planted both boats there in 1888 in the spring, two or three weeks.

Q. How many deck loads did you plant from the Lena Bateman?

A. The captain said when they came ashore, six or seven deck loads.

Q. Is that captain here?

A. Yes, sir.

Q. In 1888 how many did you plant from the May
20 Bateman?

A. The same amount of deck loads.

Q. Now, in 1887 did you plant any from the vessel commanded by Captain James Turner?

A. Yes, sir; in 1887 we planted from Captain James Turner.

Q. What was the name of his vessel?

A. May Bateman.

Q. How much did you plant from her in 1887?

A. Ten or twelve deck loads.

30 Q. Were they shells?

A. We planted them off the beds.

Q. Off what beds, the natural beds?

A. The natural beds in the bay.

Q. Did you plant a load of shells from Captain James Turner's vessel in 1887?

A. No; we bought a load of shells of Lewis Bradford in 1887.

Q. Who paid for those shells?

A. Well, my father and me together.

Q. What did you pay for that deck load of shells?

A. There was a deck load and a load in the hold. We paid \$75 for the load. 10

Q. Now, in 1890, did you do any planting on this ground?

A. Yes, sir; from the J. P. Pifold.

Q. Was it a schooner or a sloop?

A. Schooner.

Q. Who was her captain?

A. I was captain, but had a sailing master.

Q. Who was the sailing master?

A. Henry Lore.

Q. Henry C. Lore? 20

A. Yes, sir.

Q. What did you plant from the Pifold in 1890?

A. About thirty odd deck loads, and two big deck loads I think we planted in the cove.

Q. These were bay oysters?

A. Yes, sir; off the natural beds and around.

Q. Did you plant any creek oysters in 1890 from the same vessel?

A. Yes, sir; bought between nine hundred and a thousand bushels the following summer. 30

Q. Well, in 1891, did you plant any from the Pifold?

A. Yes, sir ; we planted there I think about eight or ten deck loads, somewheres around there.

Q. In 1892 did you plant any from the schooner Luther Bateman ?

A. Yes, sir ; one deck load in 1892.

Q. Bay plants ?

A. Yes, sir.

Q. In 1893 did you plant a load of shells ?

A. Yes, sir ; we planted a load of shells, 3,600 bushels.

10 Q. From what vessel did you plant these ?

A. John L. Shaw.

Q. Who was the sailing master or captain ?

A. John L. Shaw was the captain of the vessel.

Q. Did you plant any deck loads from the schooner Luther Bateman in 1893 ?

A. Yes, sir ; ten deck loads the first of the season.

Q. Who was the sailing master of the schooner ?

A. William Weldon.

Q. Now, in all these years, beginning in 1886 and 1887,
20 including 1888 and 1890 and 1891, did this defendant come upon your grounds and take any of your oysters or otherwise disturb you ?

A. No, sir ; not until 1894.

Q. Did you see the defendant upon your ground, this ground that is spoken of ?

A. Yes, sir.

Q. In 1894 ?

A. Yes, sir.

Q. When in 1894 did you first see him ?

30 A. I first seen him the second week in April, on Tuesday.

Q. Did you have an interview with him that day ?

A. Yes, sir ; I told him he was dredging on my grounds. He says, "Show me where the line is and I won't dredge there any more." After he found out where the lines were he dredged there altogether then.

Q. At that time was your ground staked up as an oyster ground in the usual way, marked?

A. Yes, sir ; staked up good.

Q. And you had kept it so from the time that you purchased it in 1886?

A. Yes, sir ; always kept the grounds staked up in 1886. 10

Q. This was the second Tuesday in April was it, that you had this conversation?

A. Yes, sir.

Q. Did he go off of it?

A. No, sir.

Q. Went right on dredging, did he?

A. Went right on dredging.

Q. You were present on the ground?

A. I was present on the ground, yes, sir ; on board of our vessel. I was there. 20

Q. Did he catch any oysters on that day?

A. Yes, sir ; caught a deck load.

Q. A good sized deck load?

A. Yes, sir ; a good sized deck load.

Q. Had you previous to that day recently examined your ground as to the growth of oysters on it?

A. Yes, sir.

Q. What was the condition of the ground as showing oysters?

A. In good condition. 30

Q. Were there many oysters on it?

A. Yes, sir.

Q. Practically full of oysters?

A. Practically full of oysters.

Q. Who were present with you on the second Tuesday of April, when you saw this defendant taking oysters there?

A. William Weldon and Orange Moore.

Q. Well, now, after the second Tuesday of April, 1894, how many more times did you see the defendant upon this ground?

A. Well, he dredged there that whole week up till Friday.

Q. How many days?

A. That was four days, and he came back the next week. I guess he didn't catch many the next week. I didn't see him aboard. His boat was there.

Q. His boat was there?

A. Yes, sir; but she didn't dredge long, went off. We had a tug boat there that morning.

Q. You had a tug boat there to guard it?

A. Yes, sir; we went to Philadelphia and got a tug boat.

Q. During these times did you see any foreign boats on your ground; that is, not belonging to you, dredging?

A. Yes, sir; a big fleet.

Q. What boat was the defendant on when you saw him?

A. The Mary A. Rogers.

Q. Was she a sloop or schooner?

A. Schooner.

Q. How many men did she have aboard of her assisting the defendant in catching your oysters?

30 A. I couldn't say; he was either six or seven handed. I didn't particularly notice. Six or seven handed they usually go in those boats.

Q. Not less than five men ?

A. No, sir.

Q. Did you see the dredge hauled on these dates ?

A. Yes, sir.

Q. You have already testified that on Tuesday he got a deck load that you saw ?

A. Yes, sir.

Q. Did he carry them off the ground ?

A. Yes, sir.

Q. How many deck loads did you see him get on your 10 ground and carry off on Wednesday ?

A. He got a deck load on Wednesday.

Q. And Thursday ?

A. He got a deck load on Thursday.

Q. And Friday ?

A. Yes, sir ; on Friday. We went out there in the tug boat and chased him off.

Q. On Friday ?

A. Yes, sir ; he went out in the channel.

Q. Then you saw him get how many deck loads your- 20 self ?

A. Four deck loads.

Q. These oysters that he took had been growing there what years ? From the years you mentioned ?

A. Yes, sir ; from the years I mentioned.

Q. What were the general sizes of the oyster, culls, and a good many primes, some smaller ?

A. They ran good size.

Q. In which direction from your ground did he take these oysters, towards the mouth of Maurice River ?

A. Towards Maurice River, about a south course down.

Q. Were any other vessels, besides his, during this time catching oysters upon your ground?

A. Yes, sir; there were several vessels there.

Q. How long after this defendant stopped catching oysters upon your grounds before you examined your grounds?

A. Why, it was the next week; we went out there in a boat.

Q. Did you throw your dredge?

10 A. Yes, sir; we went out in a boat called the Dalway, a Philadelphia boat. When he seen us coming he trimmed in and ran. Captain George Berg had our boat. We didn't get any oysters. We only caught one shell.

Q. Did you make a good draw?

A. We only made one haul.

Q. Have you ever examined your ground since?

A. No; I ain't fooled around it much since there has been such a time over it. I just hauled over it once. I just looked there last Spring.

20 Q. There wasn't anything there?

A. Nothing there worth catching.

Q. And this ground that you spent so much money on and planted so many oysters on, was entirely denuded of these oysters by this defendant and others?

A. Yes, sir.

Q. How many foreign boats did you see on your ground at this time?

A. I think there was about fifteen, or as high as twenty, at work there at one time that week.

30 Q. Now, the dates in April. You said the first Tuesday in April; what were the dates? Do you know whether it was the 10th, 11th, 12th, 13th and 16th?

A. The 10th, 11th, 12th and 13th, the first week in April.

Q. You didn't see him there on the 16th?

A. Yes, sir; but I don't think he was there. I think his son had her on the 16th.

Q. But his boat was there?

A. Yes, sir. I don't know whether he was there or not. He didn't make but one haul.

Q. When he hauled on the 16th the bed had been pretty well stripped of oysters then? 10

A. Pretty well stripped then.

Cross-Examination.

By MR. PANCOAST.

Q. What was your father's name?

A. Luther Bateman.

Q. What is your name?

A. Luther Bateman.

Q. Any other Luther Batemans in this vicinity?

A. Not that I know of.

Q. During the lifetime of your father then, you were 20 known as Luther Bateman, Junior?

A. Luther Bateman, Junior; yes, sir.

(Witness being shown paper purporting to be the riparian application of Luther Bateman for a grant in fee simple for land under water in Delaware Bay, dated May 9th, 1883, he is asked :)

Q. Is the name Luther Bateman in that application in the handwriting of your father?

MR. POTTER :—Wait a moment. I don't understand that that is cross-examination. 30

MR. PANCOAST :—I am not confined to the limits of cross-

examination where the person is a party. This person is a party.

MR. POTTER :—Yes, your Honor, that is true, that he is not limited to the precise questions put to the party ; but he comes here now as an expert witness to testify to the handwriting of his father.

THE COURT :—What has this to do with the case ?

MR. PANCOAST :—It has considerable, if the Court please, Luther Bateman was one of the plaintiffs in the former suit. Luther Bateman is the applicant for the riparian deed.

THE COURT :—The application on which this grant is founded ?

MR. PANCOAST :—Yes, sir ; and it is cross-examination properly, since your Honor has referred to that application because it is the application for that grant in this suit—

MR. POTTER :—He can prove the handwriting if he chooses, but you will have to call another witness. You can't call my witness and call him to testify to a matter which is entirely extraneous to the matter I examined him on.

THE COURT :—I don't think, Judge, that that examination would be correct as the case stands now. This man has testified to nothing except the acts. There is a deed introduced here of the Riparian Commission, and that deed, of course, will have to stand upon its own merits. If you attack that deed you will have to do it upon direct testimony. I don't see how you can on cross-examination.

MR. PANCOAST :—That deed refers to the application. Here is a party in the witness box. I ask that witness if that application is signed by his father, one of the parties to this suit. I think that question is clearly competent.

MR. POTTER :—I don't think it is at all competent. I

have examined him as to specific acts of planting oysters upon this ground.

MR. PANCOAST :—He has asked him further in respect to this ground, too; asked him if that was not his father's grant under which he held this land. He has suggested that I am precluded from asking him any questions at all about this grant. That grant refers to his father's application. I ask him if that is his father's signature to his application.

MR. POTTER :—That paper belongs to the proper officer of the State. We will prove that in proper time. 10

THE COURT :—I will overrule it.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

(Witness being shown a paper purporting to be a bill filed in the Court of Chancery in this State wherein Luther Bateman is complainant and Harrison Hollinger and others are defendants, he is asked :)

Q. Is this name Luther Bateman in the affidavit annexed to the bill, in the handwriting of your father? 20

MR. POTTER :—I object to the question. It is not cross-examination nor is it admissible.

THE COURT :—I will overrule it.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

Q. You said, I think, that your father claimed this oyster ground under this riparian deed here shown to you, Exhibit P. 1? 30

A. Yes, sir.

Q. Do you have any claim yourself in your own right to this riparian ground named in this riparian deed which your father staked up?

MR. POTTER :—The claim of this defendant and the reason that he was joined was the fact that he was in possession of this ground with his father under a license from his father for the purpose of planting oysters, and it seems to me that that being a question of law, it is hardly premissible to ask the defendant further than that, what his claim is. I
10 asked the witness whether he didn't go into possession with his father for the purpose of planting oysters?

MR. PANCOAST :—Having asked him what his interest is, he proposes to prevent me from cross-examining him.

THE COURT :—I think the question is competent. I don't want to get the two suits mixed. He has testified here that he had an interest.

Q. (Question repeated.)

A. In the oysters, I had a share of the oysters, but the ground belonged to my father.

20 By MR. POTTER.

Q. You mean the title to the ground was in your father?

MR. PANCOAST :—Wait, wait, Colonel. Don't get to interfering. Let's examine in the regular way. The witness is in my hands and I don't want him to be meddled with.

By MR. PANCOAST.

Q. Then, as I understand you, your father claimed this ground to be his ground under this riparian deed?

A. Yes, sir.

30 Q. And you had an arrangement with him, a business arrangement with him, by which you were to use it for the growth of oysters together jointly?

- A. Yes, sir ; use it jointly.
- Q. When was this ground in question first staked up to your knowledge?
- A. Staked up in 1886.
- Q. Was it staked up before 1886?
- A. No, sir ; the summer of 1886.
- Q. After your father got this riparian grant?
- A. After he got the grant.
- Q. Was the whole of it staked up then?
- A. Whole of what? 10
- Q. This ground.
- A. Yes, sir ; the whole of it was took up.
- Q. Now, what was the size of these oysters that you planted there in 1886?
- A. Size of them? Well, they were cullentines and smaller.
- Q. How long would it take these oysters to mature for market?
- A. Well, it is according to what kind of ground you put them on. 20
- Q. On that ground.
- A. On that ground? Well, about two or three years.
- Q. What kind of oysters did you plant there in 1887; the same kind?
- A. Off the beds in the bay.
- Q. The same kind of oysters?
- A. No ; they were creeks.
- Q. How long would they take to mature?
- A. I suppose about the same time.
- Q. In 1888? 30
- A. They were planted out of the Bay, off the beds.
- Q. They would mature in the same time?

A. I suppose so.

Q. When did you commence taking oysters from this bed before this alleged raid in 1894?

A. The summer of 1890 is the first oysters we ever dredged off the ground, to my knowledge.

Q. The summer of 1890?

A. Yes, sir.

Q. Well, had you allowed these oysters that you planted there in 1886, that you say would mature in two or three 10 years, to lie there until 1890 undisturbed?

A. Yes, sir; they got a growth on them and we let them lie.

Q. When did you commence to take up in 1890?

A. Took up about two weeks in the summer time and then we went to buying.

Q. Took them up in the summer time?

A. Yes, sir.

Q. How many did you take up in the summer of 1890?

A. Well, I don't know exactly the number of baskets.

20 Q. Well, did you keep any account?

A. I did at the time, but I never keep any account of my oysters, only just take the number of baskets when I put them on the float.

Q. Well, did you take oysters such as were fit for market in 1890?

A. Yes, sir; ran two weeks.

Q. You took oysters such as were fit for market, did you, in 1891?

A. Yes, sir.

30 Q. In 1892?

A. I think we ran some in 1892.

Q. In 1893?

A. I don't think we ran any in 1893.

Q. Why didn't you run any in 1893? Were there none there to run?

A. Yes, there were some there to run.

Q. You planted these oysters there with the intention of taking them up as fast as they were fit for market?

A. Yes, sir. I didn't want to tear my ground all to pieces.

Q. You did that, didn't you, took the marketable oysters away as fast as they were ready, didn't you? 10

A. No, sir.

Q. You commenced in 1890?

A. Yes, sir; I wanted to save a little expense.

Q. You continued to take them up till 1894?

A. Yes, sir; to take a little expense off, to pay my expenses as I went along. I wanted to save my ground.

Q. You are sure that the oysters you commenced to plant there in 1886 and 1887 would mature in two or three years?

A. Yes, sir; we could run them. 20

Re-Direct Examination.

By MR. POTTER.

Q. I will ask you one more question. I am not sure but I have asked it, but I will ask it again. Before this raid of the defendant and others began, had you been over your ground to ascertain whether there was a good thick growth of oysters there?

A. Yes, sir.

Q. Well, did you find such a growth?

A. Yes, sir; plenty of oysters there on the ground before the raid, and had plenty there on the morning 30

the boats went to work. I was there before they went to work and tried the ground before they went to work.

THEOPHILUS HUSTED, sworn.

Direct Examination.

By MR. POTTER.

Q. Mr. Husted, where do you live?

A. Newport.

Q. Have you been in the oyster planting and catching business more or less?

10 A. Yes, sir.

Q. How long have you pursued it?

A. Thirteen years.

Q. Are you familiar, have you become so in the course of your business, with the value of oysters caught upon the natural beds for the purpose of planting, situated in the Delaware Bay, and also oysters caught in the various creeks running into it?

A. Well, you can get some idea of it.

Q. Well, you are able to form a judgment of their value,
20 aren't you?

A. Yes, sir.

Q. Were you engaged in the latter part of 1886 or the early part of 1887, in planting oysters in the sloop Lena Bateman for the late Luther Bateman and son?

A. Yes, sir.

Q. Are you familiar with the ground of Luther Bateman just below Beadon's Creek, in Delaware Bay?

A. Yes, sir.

Q. Now, at the end of 1886, in December 1886, or Jan-
30 uary 1887, did you plant any oysters on this ground for Luther Bateman and son?

A. Planted five or six deck loads in 1886.

Q. In 1887 did you plant any ?

A. Twelve deck loads.

Q. Now, in 1888, did you plant any ?

A. Six deck loads.

Q. Did you also plant twelve deck loads in 1887 ?

A. Yes, sir.

Q. Then you planted eighteen deck loads altogether in 1887, did you ?

A. 1886.

10

Q. 1886 was it ?

A. In 1886 there were five or six deck loads.

Q. In 1887 you planted first twelve deck loads, didn't you ?

A. Yes, sir.

Q. And also another time in 1886 you planted six deck loads ?

A. Yes, sir.

Q. Making eighteen deck loads you planted in 1888 ?

A. No, sir ; not in 1888.

20

Q. Well, you planted twenty-four deck loads didn't you, in 1887 and 1888 ; six deck loads in 1887 and twelve deck loads, that is eighteen, and in 1888 you planted six deck loads, didn't you ?

A. In 1886 I planted five or six deck loads, in 1887 twelve deck loads, in 1888 six deck loads.

Q. That is twenty-four deck loads altogether, isn't it, in the two years ?

A. Yes, sir.

Q. Were you at work on this ground for Mr. Luther Bateman and son in April, 1894.

A. Yes, sir.

30

Q. While you were at work there did you see Mr. Polhamus, the defendant, come on the ground with a vessel?

A. Yes, sir.

Q. Did that vessel have a dredge upon it?

A. Yes, sir.

Q. Did you see him throw his dredge and catch any oysters on the grounds?

A. Yes, sir.

Q. What did he do with the oysters that he caught?

10 Did he go off the ground with them?

A. He took them in the cove and planted them.

Q. Maurice River Cove?

A. Yes, sir.

Q. The defendant was a planter on ground of his own in the cove, was he?

A. I think he was.

Q. How many times in 1894 did you see the defendant upon this ground with his schooner and dredge?

A. Three times I think I saw him there.

20 Q. Did he catch any oysters each time?

A. Two deck loads while he was working there.

Q. You saw him catch and carry off from this ground two deck loads, did you?

A. Yes, sir.

Q. What was about the size of his schooner?

A. Well, I should judge she was about twice as big as the Lena Bateman, would carry twice as many on deck.

Q. Carry twice as many on deck as the Lena Bateman?

A. I should think so.

30 Q. How many oysters on deck could the Lena Bateman carry?

A. To dredge a deck load on her would be from two

hundred to two hundred and fifty bushels, dredged on.

Q. Polhamus' schooner you would estimate double the capacity?

A. I should think she would carry as many more as the Lena.

Q. That would be five hundred bushels?

A. Between four and five hundred bushels, I should think.

Q. To the deck load?

A. Yes, sir. 10

Q. And you saw him carry off two deck loads?

A. Yes, sir.

Q. Were you present when Mr. Bateman, the gentleman here present, had a conversation with Polhamus and told him that those were his grounds, and he must get off?

A. No sir; I didn't hear that.

Q. Were you catching Bateman's oysters at the time Polhamus was for Bateman?

A. Yes, sir.

Q. What was the character of the oysters that you 20 caught? Were they in good shape?

A. Yes, sir; good shape; culls and primes and cullentines, nice oysters.

Q. What, in your opinion, were the oysters caught there at that time, in April, 1894, worth on the ground per bushel? I don't want you to include the cost of catching them, but as they lay on the ground.

A. I should judge they were worth about fifty cents.

Q. About fifty cents per bushel?

A. Yes, sir; maybe worth more or less; I couldn't say. 30

Cross-Examination.

By MR. PANCOAST :—

Q. Did you ever buy or sell any oysters on the ground ?

A. No sir ; I never did.

Q. Did you help Bateman take these oysters off this ground after you helped plant it ?

A. Yes, sir.

Q. You helped plant in 1886 ?

A. Yes, sir.

10 Q. When did you begin to help Bateman take those oysters off ?

A. In the spring of 1894, in April.

Q. You never helped them before that ?

A. No, sir.

MR. PANCOAST :—I would like to ask that last witness one question.

Q. Did you ever catch any oysters on that ground before 1894 ?

MR. POTTER :—I object. He is trying to interject by
20 cross-examination a matter which I didn't go into.

THE COURT :—He said he didn't begin catching for this gentleman until 1894.

(Question overruled.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

JAMES TURNER, SWORN.

Direct Examination.

30 By MR. POTTER.

Q. Captain, where do you live ?

A. Newport.

Q. Have you been engaged more or less in the business of planting and catching oysters in Delaware Bay?

A. Yes, sir.

Q. How many years?

A. About nineteen years, I think.

Q. Do you know this ground of Luther Bateman's lying adjacent to Beadon's Creek, in Downe Township?

A. Yes, sir.

Q. Were you employed in 1887 by Mr. Luther Bateman and his son to plant some oysters for them on that ground?

MR. PANCOAST:—I object to the question. My friend is getting to be technical—I don't want to be—and has asked for strict rulings and has gotten them. I object to this question on the ground that it is leading.

THE COURT:—You had better change the question, Mr. Potter, change the form of it.

MR. POTTER:—Well, I don't see any objection.

Q. Were you employed by Messrs. Luther Bateman and son to plant any oysters for them in Delaware Bay in 1887? 20
(Objected to as leading).

MR. PANCOAST:—He should ask him when he was employed?

THE COURT:—I will let the question stand.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

A. I was employed in 1887.

Q. To plant on that ground? 30

A. On this ground?

Q. Yes; first time. Did you plant any oysters for

them on this ground in 1887?

A. Yes, sir.

Q. Did you plant by the deck load?

(Objected to as leading).

THE COURT :—I think you had better put your questions a little less leading.

MR. POTTER :—The question of leading questions has been practically obliterated, as I understand, in the practice of law.

10 Q. Well, how many oysters did you plant in 1887?

A. In 1887 I planted twelve full deck loads and part of another.

MR. PANCOAST :—I have this to say, if it is agreeable, that if one rule is adopted, and that leading questions may be asked on both sides, I will agree.

MR. POTTER :—You said yesterday that no agreements were to be made.

MR. PANCOAST :—Very well, that settles it.

Q. You planted twelve deck loads in 1887?

20 THE COURT :—That is merely a repetition of what he said.

Q. Did you plant on this ground in 1888?

MR. PANCOAST :—I object to the question as leading. Every question suggests the answer.

THE COURT :—Well, I don't think that question is objectionable.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

30

J. [L.S.]

Q. Did you plant on this ground in 1888 for Messrs. Bateman?

A. Yes, sir.

Q. How many oysters, about, did you plant?

A. Six full deck loads.

Q. What vessel did you use in planting these oysters?

A. May Bateman.

Q. Did you also plant any shells upon this ground in 1887?

A. Well, I had charge of a boat to unload a load of shells.

Q. Then you did deliver the shell there, did you? 10

A. Mr. Bateman hired me to go down and take the boat and throw off a load of shells. That is all I had to do with that.

Q. What boat was that?

A. Well, her name was Bradford. I don't know as I know her name, only the Bradford.

Q. A sloop or schooner?

A. A schooner, Captain Lewis Bradford.

Q. You have already said that you got oysters for Messrs. Bateman off this ground in 1894, I believe. 20

A. I have not said so.

Q. Did you catch any oysters for the Messrs. Bateman in 1894?

(Objected to as leading.)

THE COURT:—I think, Colonel, that as the objection will be continuously made, you had better change your form of question.

MR. POTTER:—Would your Honor suggest a question?

THE COURT:—You may ask when he caught them next, or when he did catch them. 30

Q. When was the first time that you caught oysters off this ground?

A. The first time I don't remember. I went there one time and ran a few and they were too small. We caught sixty some baskets, I don't remember. They were so small we left them. Then I was employed in 1894 again.

Q. How did they run, good shape?

A. They were nice then, good shape.

Q. That was the time the defendant and others were on this ground catching oysters?

(Objected to.)

10 THE COURT :—Well, Colonel, just get out of that habit, won't you?

MR. POTTER :—I will be pleased to follow up any method of examination your Honor suggests.

THE COURT :—Well, I think that is a very leading question.

MR. POTTER :—Well, I will go around the barn then. It will prolong the case a good bit.

THE COURT :—Well, the Judge insists upon it.

Q. Did you catch any oysters for the Messrs. Bateman
20 in 1894?

(Objected to.)

THE COURT :—He has just said that he did.

Q. What was the condition of those oysters?

A. They were nice.

THE COURT :—He has just said that too. He just said they were nice and in good condition.

Cross-Examination.

By MR. PANCOAST.

Q. You are connected with the Bateman family, aren't
30 you?

A. Yes, sir ; married Mr. Bateman's daughter.

LEWIS BRADFORD, SWORN.

Direct Examination.

By MR. POTTER.

Q. Mr. Bradford, where do you live?

A. I can hardly tell you. I make my home aboard the vessel, and am in Virginia and Maryland most of the time.

Q. Haven't you any residence in this State?

A. No, sir.

Q. Did you know Luther Bateman, senior, in his lifetime? 10

A. Yes, sir.

Q. Do you remember selling him a load of shells at one time?

(Objected to.)

A. Yes, sir.

THE COURT:—I don't think there is anything wrong about that, Judge. That is only preparatory to calling his mind to the circumstances; that is all.

A. Yes, sir.

Q. About what time did you sell him this load of shells? 20

A. About 1887 or 1888; in the latter part of July as near as I can tell.

Q. What sort of shells were they? That is, what waters were the shells bred in?

A. They were from the Chesapeake, bought in Annapolis.

Q. To whom did you deliver these shells?

A. Well, I bargained with Captain Bateman, but Mr. Turner threwed them off.

Q. Were you paid for the load of shells by Messrs. 30
Bateman?

A. Yes, sir.

Q. How much did they pay you for them ?

A. I couldn't tell, it has been so long. It has gone from my mind.

Q. About how many bushels did you calculate to load on ?

A. I suppose there was 2,500 or 2,600 bushels, or 2,700, somewheres along there.

No cross-examination.

HENRY C. LORE, sworn.

Direct Examination.

10.

By MR. POTTER.

Q. Mr. Lore, where do you live ?

A. Newport.

Q. Have you been engaged in the oyster business more or less ?

A. Yes, sir ; somewheres about close to fifty years.

Q. What is your present age ?

A. Sixty-nine the third day of July.

Q. Were you employed as sailing master in the Spring
20 of 1890 ?

A. Yes, sir.

Q. Of the J. P. Pifold ?

A. Yes, sir.

Q. What is she, a sloop or schooner ?

A. Schooner.

Q. About how many bushels of oysters would she carry to a deck load ?

A. Well, we had four hundred of bought oysters on her at one time, and forty-two bushels, I think it was ; 442 bushels on her decks, bought oysters, one time, creeks.

30 Q. Were you employed by anybody to plant oysters off of her at any time ?

A. I was employed to plant out of the bay in her ; worked hard for them.

Q. For whom ?

A. For young Luther, there. It was his first start and I went with him. He was captain and I sailed with him.

Q. You acted as sailing master, did you ?

A. Yes, sir.

Q. Did you plant any oysters for him at that time ?

A. Planted between 33 and 36 deck loads on this ground.

Q. On the ground adjacent to Beadon's Creek in 10 question ?

A. Yes, sir.

Q. What sort of oysters were these 33 to 36 deck loads ?

A. They were planted off the Hog Shoal bed. They were what is known as bay plants, and off Benny's and off the new beds at Egg Island.

Q. They were the natural beds in Delaware Bay ?

A. Yes, sir.

Q. Did you that year plant any creek oysters for them ?

A. Bought oysters? 20

Q. Creek oysters, yes.

A. After we were done there, I went with them and they bought them by the bushel.

Q. You bought them ?

A. Yes, sir.

Q. Did you plant them on the ground ?

A. Yes, sir ; planted between eight and nine hundred bushels while I was with them.

Q. Now, in the Spring of 1891, the next Spring, did you plant any oysters on this ground for the Messrs. Bate-
man ? 30

A. Yes, sir.

Q. What were they, bay plants?

A. Yes, sir.

Q. How many oysters, about, did you plant?

A. Well, I suppose we put about ten or twelve deck loads there. We carried the balance that we planted into the cove.

Cross-Examination.

By MR. PANCOAST.

Q. You are a member of the Bateman family, are you?

10 A. Brother-in-law to him.

WILLIAM WELDON, SWORN.

Direct Examination.

By MR. POTTER.

Q. Where do you live, Mr. Weldon?

A. Newport.

Q. Did you know Luther Bateman, Senior, in his lifetime?

A. Yes, sir.

Q. Were you in the employ of the Messrs. Bateman
20 aboard of a boat at any time?

A. Yes, sir.

Q. What boat?

A. The schooner, Luther Bateman.

Q. While you were in that employ did you use to help plant any oysters off of her.

A. Yes, sir.

Q. Do you know the situation of his grounds adjacent to Beadon's Creek?

A. Yes, sir.

30 Q. How many oysters did you see planted on this ground while you were in their employ?

A. We put ten deck loads there.

Q. About how many would she carry, the Luther Bateman, per deck load?

A. Well, if you were to deck load her heavy, I suppose six or seven hundred bushels.

Q. Well, as she was deck loaded, about what?

A. Well, they were of different sizes. I suppose from five to six hundred, probably, on her. It is a hard matter to tell.

Q. Now, in the Spring of 1894 were you upon this 10⁰ ground of the Messrs. Bateman?

A. Yes, sir.

Q. In their employ?

A. Yes, sir.

Q. In April, 1894?

A. Yes, sir.

Q. While you were there in their employ did you know Zebulon Polhamus, the defendant?

A. Yes, sir.

Q. Did you see him at any time during that month go 20 upon this ground with his schooner?

A. Yes, sir.

Q. Had he a dredge aboard of his schooner?

A. Yes, sir.

Q. Did you see him throw that dredge and catch any oysters?

(Objected to as leading.)

THE COURT :--Yes; I think it is.

Q. Well, what did he do when he came there on the ground?

A. He dredged there with us the same as we did.

Q. Did you see him catch any oysters?

A. Yes, sir.

(Objected to.)

Q. While you were there did you hear a conversation between him and Luther Bateman, Jr.?

A. Yes, sir.

Q. State that conversation.

A. Captain Luther Bateman told him to go off his ground. He said, "Where is your ground?" Captain Luther Bateman pointed where he came up and says, "That is my
10 line there."

Q. Pointing to what?

A. To his ground.

Q. Pointing to his stakes?

A. Yes, sir; he had a row of stakes and says, "That is my line there."

Q. What did Polhamus say?

A. I didn't understand what he said.

Q. He made some reply?

A. He said something but I didn't understand it.

20 Q. How many times did you see Polhamus on the ground with his schooner or himself during that month?

A. He was there on Tuesday, and there was one day, I can't tell whether it was Wednesday or Thursday or Friday. I can't tell whether he was on the ground that day or not; but there was one or the other of those days that I don't remember whether he was there or not.

Q. He was there either Wednesday or Thursday, and there Friday?

A. Yes, sir.

30 Q. Was he there the next week?

A. He came up Monday morning. I don't know whether he was on the boat or not. He hove to on the line.

I couldn't see whether he was on the inside of the stakes or not. We were pretty well in shore.

Q. Did you see him carry off any oysters from the ground in his vessel?

A. Yes, sir.

Q. How many deck loads did you see him carry?

A. He went away with two pretty fair deck loads.

Q. What was the size of his schooner as compared with the Luther Bateman?

A. She was not as large.

10

Q. Not as large as the Luther Bateman?

A. No, sir.

Q. Well, about how many, in your judgment, would she carry to a deck load?

A. Well, I should judge that he had on somewheres between four and five hundred bushels.

Q. To each deck load?

A. Yes, sir, when he was deck loaded.

Q. How was the oyster fishing there at that time, good, bad or indifferent?

20

A. Well, it was right good when we first went to work.

Q. Were any other vessels taking oysters there on the ground besides you and him?

A. Yes, sir.

Q. How many did you see all told?

A. Well, there was twenty-one all told, I think, with the three Bateman boats, Luther, May and Lena.

Q. All catching oysters?

A. All catching oysters, yes, sir.

Q. After that raid was done did you examine the ground?

30

A. Yes, sir; I worked there till Saturday. I went

down Monday and they stopped us from working there.

Q. At the last of your work how did you find the grounds as to oysters?

A. There wasn't much there.

Q. How did your dredges come up, filled with what?

A. They wasn't filled with anything much at the last.

Q. What was your inference from that fact?

A. Sir?

Q. What was the inference that you drew in your own
10 mind from the fact that you couldn't catch anything, that they were gone?

(Objected to.)

THE COURT:—He says they brought up nothing. We can draw our own inference.

Cross-Examination.

By MR. PANCOAST.

Q. When did you first in your lifetime catch oysters on that ground?

(Objected to. Objection sustained.)

20 (Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

ORANGE MOORE, SWORN.

Direct Examination.

By MR. POTTER.

Q. Mr. Moore, where do you live?

A. Newport.

Q. Have you been engaged in oystering in Delaware
30 Bay?

A. Yes, sir.

Q. How many years, about?

A. About twenty-five, between that and thirty.

Q. Were you in the employ of Luther Bateman and his son at any time on one of their vessels?

A. Yes, sir.

Q. What time?

A. Spring of 1894.

Q. Do you know the location of their ground adjacent to Beadon's Creek?

A. Not very well. I know where it is pretty nearly. 10

Q. Well, were you on that ground in their employ in the Spring of 1894?

A. Yes, sir.

Q. Do you know Zebulon Polhamus?

A. By sight, yes, sir.

Q. Do you know the schooner Rogers that he employs?

A. Yes, sir.

Q. Did you see him and his schooner at work upon this ground stated, in the Spring of 1894?

A. Yes, sir. 20

Q. How many days did you see him at work there?

A. I think about three.

Q. What was he doing?

A. In the act of dredging.

Q. For oysters?

A. Yes, sir.

Q. Did you see him catch on this ground any oysters?

A. I saw him catch oysters or something.

Q. What did he do after he caught this, whatever he did catch?

A. I couldn't tell you. He took them off the ground. 30

Q. Took them off the ground, did he?

A. Yes ; took them off the ground.

Q. About how many deck loads of oysters did you see him take off the ground ?

A. Well, I couldn't say over two deck loads.

Cross Examination.

By MR. PANCOAST.

Q. How many days were you there ?

A. I was there four days, five days. Four days he was there.

10 Q. Did you ever take any oysters from that ground before that time to which you refer ?

(Objected to.) (Objection sustained.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S]

Re-Direct Examination.

By MR. POTTER.

Q. I will ask Captain Moore one other question. Was
20 this ground spoken of fully staked up by stakes, posts or other devises to show that it was an oyster bed, in the Spring of 1894 ?

MR. PANCOAST :—I object to the question as improper. The question involves a conclusion.

THE COURT :—He can say whether he saw stakes on this ground.

Q. Were there any stakes on this ground ?

A. Yes, sir.

Q. Was it staked in the same manner as other grounds ?

30 THE COURT :—Does he know ? Did he notice it ?

Q. How was it staked ?

A. It was staked by oak stakes.

THE COURT :—How does it compare with the usual way ?

Q. Staked in the usual way ?

A. About the usual way of staking up ground.

Re-Cross Examination.

By MR. PANCOAST.

Q. When did you first know that ground to be staked up ?

(Objected to.)

10

MR. POTTER :—I confined my questions to the spring of 1894.

(Question overruled.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

RICHARD COSIER, SWORN.

Direct Examination.

By MR. POTTER.

20

Q. Did you know Mr. Luther Bateman in his lifetime ?

A. Yes, sir.

Q. Were you employed by him at any time ?

A. Yes, sir.

Q. To do what ?

A. To watch the ground.

Q. To watch his ground ?

A. Yes, sir.

Q. What ground ?

A. The ground below Beadon's Point ?

30

Q. The one adjacent to Beadon's Creek ?

A. Yes, sir.

Q. Below the Point?

A. Yes, sir.

Q. How did you proceed to do this watching? Did you walk out into the water or did you take a boat?

A. Took a boat, of course.

Q. What sort of a boat was it that you took?

A. Well, sometimes a bateau and sometimes a sloop.

Q. Employed and commanded by yourself?

10 A. Me and another man, yes, sir.

Q. Well, were you watching this ground in the Spring of 1894?

A. Yes, sir.

Q. Do you know Zebulon Polhamus?

A. Yes, sir.

Q. Do you know his schooner, the Rogers?

A. Yes, sir.

Q. Well, in April, 1894, did you see him come on this ground with his schooner?

A. Yes, sir.

20 Q. How many different days did you see him there with his schooner?

A. Three.

Q. Did he have a dredge aboard of his schooner?

A. Yes, sir.

Q. What did he do with that dredge?

A. Well, he dredged with it.

Q. Did you see him catch any oysters with it?

30 A. Yes, I suppose they were oysters, he dredged on that ground where the oysters were.

Q. Well, did you see him throw his dredge and pour out whatever he had upon his deck?

A. Yes, sir.

Q. Well, didn't you see the oysters upon his deck?

A. Yes, sir.

Q. What did he do with the oysters after he was done oystering?

A. I couldn't say, but he went off the ground with them.

Q. How many deck loads during this time did you see him catch and take off the ground?

A. Two, and he went down one day while I was ashore, 10 the third time.

Q. You merely heard that?

A. Yes, sir.

Q. Well, we don't want that.

A. Well, I saw him go off the ground, but I don't know how many oysters he had.

Q. You saw him go off the third day?

A. Yes, sir, that was after I got ashore.

(No cross-examination.)

JOHN L. SHAW, sworn.

20

Direct Examination.

By MR. POTTER.

Q. Mr. Shaw, where do you live?

A. Newport.

Q. Have you been engaged in planting and catching oysters in Delaware Bay for some years?

A. Yes, sir.

Q. How long?

A. Thirty-five years.

Q. Do you know the ground planted by the Messrs. 30 Bateman adjacent to Beadon's Creek, Downe Township?

A. Yes, sir ; I know something about it, where it is.

Q. Did you ever plant any shells upon that ground for the Messrs. Bateman ? If so, when, and how many bushels, about, did you plant for their benefit ?

A. I planted 3,600 bushels in the summer of 1892 or 1893.

Q. You have had a good deal of experience in buying and planting oysters, haven't you ?

A. Yes, sir ; quite a good bit.

10 Q. What, in your opinion, is the value of an ordinary deck load, say 500 bushels of oysters, of bay oysters, of the usual size for planting ?

A. Well, off the natural beds as we catch them, with the shells together with the oysters, we value a deck load at about \$1.00.

ZACCHEUS JOSLIN, sworn.

Direct Examination.

By MR. POTTER.

Q. Mr. Joslin, where do you live ?

20 A. Newport.

Q. Have you been engaged in the business of planting and catching oysters in Delaware Bay ?

A. Yes, sir.

Q. How many years ?

A. About twenty-five.

Q. Do you know a certain ground claimed by Luther Bateman in his lifetime and by Luther Bateman, Jr., situate below Beadon's Creek, in Downe Township ?

A. Yes, sir.

30 Q. Were you on the ground in the spring of 1894 ?

A. Yes, sir.

Q. Do you know Zebulon Polhamus, the defendant?

A. Yes, sir; by sight.

Q. What schooner does he command?

A. Mary Rogers.

Q. What is her size about?

A. Somewhere about fifty feet long, maybe a little less or a little over.

Q. Did you see Zebulon Polhamus with his schooner upon this ground of the Messrs. Bateman at any time?

A. Yes, sir.

10

Q. When was it?

A. I think the 11th and 13th, 1894.

Q. Of April?

A. Yes, sir.

Q. 1894?

A. Yes; in April.

Q. Was his schooner at that time equipped as a schooner for catching oysters?

A. Yes, sir.

Q. Did she have a dredge aboard of her?

20

A. Yes, sir.

Q. Did you see him throw his dredge and catch any oysters upon the grounds of these Messrs. Bateman in the Spring of 1894?

A. Yes, sir.

Q. How many deck loads did you see him carry off the ground?

A. Two.

Q. Did you see any other vessels on the ground at that time?

30

A. Yes, sir.

Q. How many vessels were there besides the Bateman vessel that you saw?

A. Fifteen or twenty.

Q. Is that enough vessels, in your judgment, to make quick work of dredging a ground of say fifty acres?

A. Yes, sir; it wouldn't take long.

Q. About how many bushels of oysters will an ordinary dredge hold?

A. Two bushels, easy enough.

10

Cross-Examination.

By MR. PANCOAST.

Q. What were you doing there?

A. Sailing around there. I was not on his ground dredging.

Q. Were you in the oyster bed?

A. Yes, sir.

Q. I understood you to say that you were dredging around there?

A. No, sir; sailing around.

20 Q. Were you in the oyster bed?

A. Yes, sir.

Q. Were you dredging?

A. Not on that ground; no sir.

Q. Were you dredging off that ground?

(Objected to.)

THE COURT :-I don't see what that has to do with the case at all. He says he was not dredging there on that ground. I will overrule it.

BENJAMIN JOSLIN, sworn.

Direct Examination.

30 By MR. POTTER.

Q. Where do you live?

A. Newport.

Q. Have you been engaged more or less in planting and catching oysters in Delaware Bay?

A. Yes, sir.

Q. How many years?

A. I think about seventeen.

Q. Do you know Zebulon Polhamus?

A. Yes, sir.

Q. Do you know the schooner that he commands and sails?

10

A. Yes, sir.

Q. What is her name?

A. Mary Rogers.

Q. Did you know her to be equipped in a manner suitable for catching oysters?

A. Yes, sir.

Q. Did she carry a dredge aboard of her?

A. Yes, sir.

Q. Were you down to the ground claimed by the Messrs. Bateman adjacent to Beadon's Creek in April, 1894?

20

A. Yes, sir.

Q. Did you see Zebulon Polhamus go upon that ground?

A. Yes, sir.

Q. Was the ground staked up in the ordinary way as an oyster ground?

A. It was.

Q. Did you see him throw his dredge and catch any oysters?

A. I saw him go through the motion of dredging, yes, sir.

30

Q. How many days did you see him on the grounds?

A. I was there only one day. I was there one day and

a little while Saturday morning. Thursday I was there.

Q. Was he apparently catching oysters?

A. Yes, sir ; when I was there.

Q. What did he do when he got through catching oysters with his vessel, take her off the ground?

A. He was there when I came, and when I left he was still there.

Q. Was he working apparently all this time catching oysters?

10 A. Yes, sir ; going backwards and forwards.

Cross-Examination.

By MR. PANCOAST.

Q. What were you doing there?

A. I was there to work.

Q. On that same ground?

A. No, sir.

Q. To work at what?

A. Catching oysters.

Q. How many persons were there at work on that
20 ground with yourself?

A. I think I have the names of eleven?

THE COURT :—What ground are you speaking of?

MR. PANCOAST :—This ground in question.

By THE COURT.

Q. How many were there on that ground of Mr. Bate-
man's?

A. Well, they came and went on my ground and on
his. I think I have the names of eleven.

By MR. PANCOAST.

30 Q. You claim to have adjoining grounds, do you?

A. Yes, sir.

Q. Have you a riparian grant?

A. I have an interest in one.

Q. That is the ground you refer to, is it?

A. That is the one that I refer to that I was working on.

By THE COURT.

Q. The ground that Polhamus was working on was on the riparian grant, as you understood, to Bateman?

A. Bateman's, yes, sir. 10

Q. Do you know the lines of that grant?

A. I know the line that separates him and I.

Q. You know where his riparian ground is, and he is adjoining you, you say?

A. Yes, sir.

Q. And the lines of that grant you know?

A. Yes, sir; I know the stake that separates us.

Q. The stake, you say, separates him from you?

A. Yes, sir.

Q. And the stakes that make the lines around it? 20

A. Yes, sir; established on the out shore and the upper lines.

Q. Polhamus was on the Bateman tract?

A. Yes, sir.

Q. How long would it take an oyster to mature? I will just ask this. I lost my memorandum.

MR. POTTER:—Two or three years, he said; but we will show that by expert testimony.

By MR. PANCOAST.

Q. Did you ever see Bateman's riparian deed? 30

A. Did I ever see it?

Q. That's the question.

A. I don't know that I ever did.

Q. Then how do you know the bounds of his riparian grant?

A. I said the stakes that separated between him and I.

Q. Then you know nothing about the riparian grant?

A. Only the stakes that separates him and I.

Q. Then leaving out the stakes, you know nothing about it?

10 A. No ; I don't know the courses.

Q. Do you know the distances?

A. Well, I don't know as I do.

CAPTAIN EPHRAIM MULFORD, sworn.

Direct Examination.

By MR. POTTER.

Q. Captain Mulford, where do you live?

A. Bridgeton.

Q. Where did you formerly live?

A. Cedarville.

20 Q. Have you been engaged in the business of planting and catching oysters in Delaware Bay, and if so, for how many years?

A. Thirty years or more.

Q. What is your present age, about?

A. About fifty-eight.

Q. How long, in your opinion, does it take for bay plant, such as are ordinarily caught in the bay, when planted on proper ground, to mature and become marketable?

A. Well, we think four years.

30 Q. About four years?

A. Yes, sir.

Q. Do you know as a fact that bare shells planted upon proper ground in Delaware Bay will catch the oyster spawn so that in a few years there will be a large growth of oysters upon these bare shells?

A. Yes, sir.

Q. How long does it take, according to your experience, to make this growth upon shells?

A. Well, it might do it in three years on good ground; four would be my experience.

Q. About what do you consider a deck load of ordinary 10 Delaware Bay creek oysters, as they are caught for the purpose of planting, worth before they are planted?

A. I don't understand whether you mean creeks or bays.

Q. Well, I will ask you first bays?

A. Well, it is owing to the size of the boat.

Q. I said per bushel. You don't understand me.

A. I suppose thirty cents.

Q. Before they are planted at all?

A. Yes, sir.

20

Q. Now, taking the ordinary growth of oysters, what would these same bay plants be worth if they are planted on good ground, at the expiration of four years, say, or even of three years; say three years first?

A. Well, I should think fifty cents.

Q. As they lie on the bottom?

A. Yes; after lying four years, I should think they ought to be worth fifty cents.

Q. What, in your opinion and judgment, according to your thirty years experience, would be the effect of going 30 upon a bed which had been in existence for eight years, upon which several thousand bushels of oysters had been planted

for eight years, and absolutely denuding the bed of oysters? Would not there have to be additional expense put on that bed to create another bed?

A. Yes, sir; I should judge there would have to be a bottom made for it.

Q. Do you know Captain Zebulon Polhamus?

A. Yes, sir.

Q. Do you know his schooner?

A. Yes, sir.

10 Q. The Rogers?

A. Yes, sir.

Q. In your judgment, taking the fact that it would be loaded as ordinary vessels used in the business are loaded, about how many bushels would she carry to a deck load?

A. I should say five hundred.

Cross-Examination.

By MR. PANCOAST.

Q. Do you think the spat or spawn of the oyster which collects on old shells can grow to be good oysters in three or
20 four years?

A. Yes, sir; I think so.

Q. Sure of that, are you?

A. I have seen it in four years.

Q. Then how long would it take oysters that are planted on a good oyster bottom, that is, small oysters, to get fit for market?

A. I should think they would be in three years.

Q. They would be in less time, wouldn't they? Young oysters planted on good bottom would come to maturity
30 sooner than the spawn?

A. Not much difference. The young oyster grows faster.

Q. Certainly; it would come to maturity sooner, wouldn't it?

A. I don't think so.

Q. Then what advantage is there in getting young oysters and planting them, if they won't come to maturity sooner than old shells?

A. Well, we have the control of them.

Q. Then shells are pretty nearly as good as young 10 oysters to plant?

A. Well, I have had a pretty good growth on old shells.

Re-Direct Examination.

By MR. POTTER.

Q. Hasn't it been the custom within the last few years to plant—

(Objected to. Question overruled.)

DANIEL BRADFORD, sworn.

Direct Examination.

20

By MR. POTTER.

Q. Where do you live?

A. Newport.

Q. What is your age, about?

A. Fifty-two.

Q. Have you been engaged more or less in planting and catching oysters in Delaware Bay?

A. All my life.

Q. How many years, about?

A. Thirty-five years or more.

30

Q. Do you know the defendant, Zebulon Polhamus?

A. Know him by sight, yes, sir.

Q. Do you know his schooner?

A. Yes, sir.

Q. About how many bushels of oysters, as they are ordinarily caught, in your opinion, would his schooner carry to a deck load?

A. 500 to 550 bushels.

Q. What, in your opinion and judgment, is a deck load of bay plants worth per bushel before they are planted?

10 A. Well, we generally pay about thirty-five or forty cents for them. That is what we have to pay for them.

Q. Thirty-five or forty cents per bushel?

A. Yes, sir.

Q. What, in your opinion, would that deck load be worth, being planted on good ground and growing successfully for the period of four years?

A. \$150 or \$200.

Q. I meant to ask you per bushel. You say when they are ready to plant they are worth thirty-five cents; how much
20 would they be worth per bushel on the ground at the end of four years' successful growth?

A. Sixty or seventy cents, I should judge.

Cross Examination.

By MR. PANCOAST.

Q. How much could you get for such oysters in the market at wholesale, in the Spring of 1894?

A. I don't know what they did bring then.

Q. What were they worth in the water that Spring?

A. About fifty cents. They stand us at fifty cents from
30 the Chesapeake by the time we get them here.

Re-Direct Examination.

By MR. POTTER.

Q. I meant to ask you what would the bay oysters that had been planted four years and had a successful growth, be worth in the market at Port Norris.

A. Well, we don't sell them by the bushel. Why, the way we sell them they are worth about two or three dollars a bushel. We sell them by the hundred.

Q. They are worth several times what they are on the grounds.

10

(Objected to.)

By MR. PANCOAST.

Q. You said you didn't know the price in 1894?

A. No, sir; I didn't buy any in 1894.

Q. You can't recall what the price is?

By THE COURT.

Q. What did he mean by saying in the Spring of 1894 he put them at about fifty cents?

MR. POTTER:—Why, they had grown from the value of thirty cents when they were planted, to the value of sixty or 20 seventy cents.

THE COURT:—You asked the wholesale price in the Spring of 1894, to which he said fifty cents. I don't understand.

MR. BACON:—He said fifty cents for Chesapeake.

MR. PANCOAST:—It is of no consequence. He says he don't know the price in the Spring of 1894, when these oysters were taken.

Direct Examination.

RICHARD D. SHEPPARD, sworn.

30

By MR. POTTER.

Q. Where do you live Captain?

A. Newport.

Q. Have you been engaged in the business of planting and catching oysters in Delaware Bay?

A. Yes, sir.

Q. How many years?

A. Thirty-five, at least.

Q. You are a member of the present Committee of the Maurice River Cove and Delaware Bay Oyster Association, aren't you?

10 A. Yes, sir.

Q. Do you know the defendant, Zebulon Polhamus?

A. Yes, sir.

Q. Are you acquainted with his schooner, the Rogers?

A. I know her very well, yes, sir.

Q. About how many bushels of oysters, in your opinion, would she carry to a deck load?

A. Five hundred.

Q. Captain, are you acquainted with the ground claimed by the Messrs. Bateman, adjacent to Beadon's Point?

20 A. I know about where they are, yes, sir.

Q. In your opinion, Captain, what would oysters planted upon that ground, beginning in 1886 and running up to the year 1891, be worth per bushel upon the ground as they lay, in the Spring of 1894; that is, ordinary bay plants?

MR. PANCOAST:—I object. The question is, what were these particular oysters that were on the ground in 1894 worth.

THE COURT:—That is what I presume he is trying to prove.

30 MR. PANCOAST:—But there are so many uncertain factors that would enter into such a question.

Q. I will add—and having made a very successful

growth between the years 1886—part of them were planted in 1886—and running up to the year 1893—in the year 1894?

MR. PANCOAST :—Objected to on the ground that it does not properly tend to prove what the value of these oysters, alleged to have been taken by the defendant, was in April, 1894.

THE COURT :—I will let the question stand, because I don't see how you can get at the value of these oysters unless you take the opinion of experts.

(Whereupon the defendant, by his counsel, prays a bill 10 of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,
J. [L.S.]

Q. What, in your opinion, would ordinary bay plants, as they are usually caught and planted, planted upon this ground claimed by the Messrs. Bateman in 1886, some of them, and then several years, running up several years to 1893, and having made a very successful growth, be worth in April, 1894?

MR. PANCOAST :—I object, on the ground that it is not a 20 proper method of proving the value of these oysters in April, 1894, alleged to have been taken by this defendant.

(Objection overruled.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,
J. [L.S.]

A. I should think sixty cents at least per bushel.

Q. I know you don't sell them generally by the bushel.

A. No, sir.

30

Cross-Examination.

By MR. PANCOAST.

Q. That is, sixty cents in the water or in the market?

Is that valuation of sixty cents a bushel put upon oysters assumed to be in the water or on the ground ?

A. Well, the idea I intended to convey was after they were caught again.

Q. Their marketable value you gave ?

A. Yes, sir ; on the ground.

Re-Direct Examination.

By MR. POTTER.

Q. My question was on the ground.

10 A. Well, that would make some difference, I suppose ; ten cents a bushel in my opinion.

Q. How have you been accustomed at Port Norris to selling oysters to the shippers ?

(Objected to.)

THE COURT :—I don't think we want anything to do with that. Let's get at the value of the oysters, that is what we want. I will overrule that question.

HARRY GANDY, sworn.

Direct Examination.

20 By MR. POTTER.

Q. Mr. Gandy, where do you live ?

A. Newport.

Q. Do you know the defendant, Zebulon Polhamus ?

A. Yes, sir

Q. And also his schooner, the Rogers ?

A. Yes, sir.

Q. Do you know the general size of the schooner ?

A. Well, I should judge she was about a fifty-foot schooner.

30 Q. About how many bushels of oysters would she carry at an ordinary deck load ?

A. Well, I should think she would carry upwards of five hundred bushels.

Q. Do you know Zebulon Polhamus?

A. Yes, sir.

Q. Do you know the location of the ground of Bateman adjacent to Beadon's Creek?

A. Yes, sir.

Q. Did you at any time in April, 1894, see Polhamus, with his schooner, the Rogers, on this ground?

A. Yes, sir. 10

Q. How many times did you see him there?

A. I saw him on Tuesday, Wednesday and Friday. He was there on Thursday, but I am not sure whether he was working or not.

Q. Was he catching oysters these three days with a dredge?

A. Yes, sir.

Q. Have you had any conversation with Polhamus to ascertain how many deck loads he got off of this ground?

A. Yes, sir. 20

Q. How many did he admit to you?

A. He said he caught four as pretty deck loads as I ever saw.

Cross Examination.

By MR. PANCOAST.

Q. You are a claimant under riparian grant of oyster ground in Delaware Bay, aren't you?

A. No, sir; I own no grant directly.

Q. Don't you claim any ground under a grant, under a riparian grant? 30

A. No, sir.

LEWIS DUNHAM, sworn.

Direct Examination.

By MR. POTTER.

Q. Mr. Dunham, where do you live?

A. Newport.

Q. Are you acquainted with the location of the oyster ground claimed by Messrs. Bateman adjacent to Beadon's Creek, in Downe Township?

A. Yes, sir.

10 Q. Were you on or near this ground in April, 1894?

A. Yes, sir.

Q. Do you know Zebulon Polhamus, the defendant in this case, and his schooner?

A. When I see him.

Q. Did you see him working with his schooner on this ground catching oysters in April, 1894?

A. Yes, sir.

Q. How many times did you see him?

A. I didn't keep any record or account.

20 Q. You saw him more than once?

A. Oh, he was there all the time, I thought, pretty much, I was there. I couldn't tell you how many days, because I didn't keep any account.

No cross-examination.

LUCIUS BRADFORD, sworn.

Direct Examination.

By MR. POTTER.

Q. Mr. Bradford, where do you live?

A. Newport.

30 Q. Are you acquainted with the location of the oyster ground, claimed by the plaintiff, adjacent to Beadon's Cove, in Downe Township?

A. Yes, sir.

Q. Were you down there in April, 1894?

A. Yes, sir.

Q. Do you know Zebulon Polhamus and his schooner, the Rogers?

A. By sight; yes, sir.

Q. Do you remember going down to this ground in April, 1894?

A. Yes, sir.

Q. What vessel did you go in?

10

A. Well, I was out there in my own boat, the Lucy Hopkins, and out there in the Luther Bateman.

Q. Did you see Zebulon Polhamus, the defendant, with his boat, upon the ground of the Messrs. Bateman?

A. Yes, sir.

Q. That was the time you were aboard the Luther Bateman?

A. Yes, sir.

Q. Did you endeavor to approach his boat so as to make a capture of her or him?

20

A. Yes, sir.

Q. What did he do when he saw you approaching his boat?

A. Well, he was reefed when we approached him, and he shook out sail and started off shore, set his topsail.

Q. And sailed away from you, did he?

A. Yes, sir.

Q. Left the grounds?

A. Yes, sir; left the grounds.

Cross-Examination.

30

By MR. PANCOAST.

Q. How many others were there taking the oysters?

A. Other boats?

Q. Yes.

A. Well, three or four other boats.

Q. Did they leave too?

A. Yes, sir.

Q. All taking oysters at the same time, were they?

A. Yes, sir.

MR. POTTER:—I want to offer, so the Court will have that before its mind, the riparian act and its various supplements.

MR. PANCOAST:—They are public acts; they don't have to be offered.

MR. POTTER:—I know they don't have to be formally offered. I also want to offer the laws of 1856—pamphlet laws of 1856—especially the act of March 14th, 1856, page 204; pamphlet laws of 1825, especially the act of December 9th, 1825, page 74.

PLAINTIFFS REST.

Recess till 2 P. M.

20

AFTERNOON SESSION.

MR. POTTER:—If the Court please, I rested a little prematurely this morning. I want to re-call a witness or two.

LUTHER BATEMAN, JR., recalled.

Q. Captain, do you remember at what time Mr. Oakford Acton prepared the survey from which he made this map?

A. Not exactly; it was in the summer of 1894.

Q. Soon after the trespass upon your property by the defendant?

A. Yes, sir.

Q. Now, had there been any change made in the stakes surrounding the out boundaries of the map between the time the oysters were taken from your ground and the time he made that survey?

A. No, sir ; there hadn't been nary stick changed.

Cross-Examination.

By MR. PANCOAST.

Q. It was staked up more or less every year after 1886, wasn't it? 10

A. Yes, sir ; we staked it up every year, sometimes twice a year, spring and fall.

Q. Did the ice take all the stakes away in the winter?

A. No, sir ; it never took all the stakes away. It cut them down, cut the tops off of them.

Q. It had to be re-staked every year?

A. Yes, sir ; mostly twice a year, spring and fall.

PETER C. COSIER, SWORN.

Direct Examination.

By MR. POTTER. 20

Q. Captain, where do you live?

A. Newport.

Q. Do you know Mr. Oakford Acton, the surveyor that testified here?

A. I do.

Q. Were you down with him on the ground at the time he made the survey from which he prepared his map?

A. Yes, sir.

Q. Just examine the riparian grant, Exhibit P 1 ; do you recognize that instrument as an instrument that you had 30 in your hands before?

A. Yes, sir ; I had it in my hands that day. I held on to it several times when he was setting his compass.

Q. Do you know that Mr. Acton used that instrument in making the survey?

A. Yes, sir ; I suppose so. He asked for it when he was running out the lines.

Q. He would ask for it and run the lines?

A. Yes, sir.

Cross-Examination.

¹⁰ By MR. PANCOAST.

Q. He said he made his survey from the stakes on the ground ; is that your recollection, that he made a survey from the stakes on the ground?

A. My recollection is that he took this, if you will allow me—

Q. No ; answer my question.

A. They had a few stakes.

Q. I haven't asked you that.

A. Well, ask it again.

²⁰ Q. I asked you whether or not your recollection is that Mr. Acton, the surveyor, made the survey from the stakes on the grounds.

A. Yes, sir ; they ran out—

Q. That is all.

Re-Direct Examination.

By MR. POTTER.

Q. Did he have that deed in his hands?

MR. PANCOAST :—I haven't asked a single word about this deed, and both counsel and witness are trying to rope it 30 in. You asked about the deed in the first place, and I

haven't asked about it. You have no business to renew your questions about it.

THE COURT :—He has already answered that he had the deed in his hands.

PLAINTIFFS REST.

TESTIMONY FOR THE DEFENCE.

GABRIEL B. DUNNING, SWORN.

Direct Examination.

By MR. BACON.

Q. Where do you reside? 10

A. Trenton.

Q. Are you in the office of the Secretary of State?

A. Yes, sir.

Q. In what capacity?

A. Acting clerk of the Court of Errors and Appeals.

Q. Has the Secretary of State the custody of a portion of the records of the Riparian Commissioners, including the applications for riparian grants?

A. Some of them.

Q. Have you brought here at my request the applica- 20
tion filed by Luther Bateman with the Riparian Commission-
ers in May, 1883?

A. Yes, sir.

Q. Will you be good enough to produce it?

A. Yes, sir. (Witness produces paper.)

Q. Is that the original application?

A. Yes, sir.

Q. As taken by you from the files in the office of the
Secretary of State?

MR. POTTER :—I object to the admission of this applica- 30

tion on the ground that its admission in this suit for the purpose named is illegal and incompetent. I know of no law that makes the Secretary of State the custodian of these applications before the Riparian Commissioners. That may be true or may not. I am not sure.

MR. PANCOAST :—There is a law requiring that.

MR. POTTER :—I insist, on the ground just stated, that the issue as to whether the man is the riparian owner or not cannot be tried in an issue brought up in another case.

10 THE COURT :—I will overrule your objection now. That will be brought up later in the case.

(Whereupon the plaintiffs, by their counsel, pray a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

MR. PANCOAST :—We ask leave to show a certified copy in order that the original may be taken.

Q. I show you a paper purporting to be a certified copy of the application of Luther Bateman for a grant of lands
20 under water in Delaware Bay, and map thereto annexed. Is that paper and certified copy certified by the Secretary of State?

A. Yes, sir.

MR. POTTER :—I don't consent to the admission of any certified copy.

Q. Is that a true copy of the original?

A. I believe it to be.

MR. BACON :—We will offer the original then. I offer in evidence the original application of Luther Bateman to the
30 Riparian Commissioners, of the State of New Jersey, for a

grant in fee simple of land under water in Delaware Bay,
dated May 9th, 1883.

(Marked "Exhibit D 1.")

No cross examination.

JOHN C. PAYNE, sworn.

Direct Examination.

By MR. BACON.

Q. Where do you reside?

A. In Jersey City.

Q. Are you an officer of the Riparian Commission? 10

A. Yes, sir; I am Secretary and assistant engineer.

Q. Mr. Payne, I show you Exhibit D 1. Is that the original application filed by Luther Bateman in the office of the Riparian Commission as an application for the grant subsequently made to him?

A. Yes, sir; it is.

Q. Accompanying that application was there an abstract of title filed?

A. Yes, sir; there was.

Q. Have you such abstract of title with you? 20

A. Yes, sir; I have.

Q. Will you produce it if you have it?

(Witness produces paper.)

Q. Do the rules of the Riparian Commissioners require that applications for riparian grants shall be accompanied by abstracts of title?

A. Yes, sir.

Q. And was this abstract filed in pursuance of that rule, and has been on the files since?

MR. POTTER :—I object to the admission of that abstract 30 of title. I would like to ask the witness first how long he has been secretary of the Riparian Commission?

A. I have been secretary of the Riparian Commission for about a year, and assistant engineer of the Commission for about seventeen years.

By MR. POTTER.

Q. Were you present when this abstract was filed, this abstract and application, in the office of the Commissioners? Were you actually present and saw it filed?

A. No, sir.

MR. POTTER:—It has no mark on it, if your Honor
10 please, that it was ever filed anywhere.

THE COURT:—I won't admit that. That is not certainly competent evidence in a matter of this kind.

MR. POTTER:—It is only the certificate of the attorney as to the title anyway, and it certifies that the title was in Luther Bateman, Jr. at the time.

MR. BACON:—We offer in evidence an abstract of title dated May 3d, 1883, made by Benjamin T. Powell, and filed with the application made by Luther Bateman for this grant.

THE COURT:—Is it marked filed?

20 MR. BACON:—It is not marked filed, but the witness testifies that he took it off the files.

MR. POTTER:—He don't know anything about it.

By MR. BACON.

Q. Mr. Payne, did you take this personally from the files in the office of the Riparian Commissioners?

A. Yes, sir; it is indicated on the paper where it is filed. It is marked here No. 95, Shelf , Closet ,
Room .

Q. Does that indicate where it was filed?

30 A. Yes, sir.

Q. What paper was it filed with?

A. With a number of papers.

Q. No; but I mean when it was filed in the office of the Commission, what was it filed with?

A. It was filed with the application of Mr. Bateman.

Q. Have you here the minutes of the Riparian Commission at that time?

A. Yes, sir.

Q. The original minute books?

A. Yes, sir; the minute where that was sent to the attorney of the board in September, 1883.

Q. You have the minutes showing that this abstract of title was presented to the Riparian Commission with this application?

A. I have an abstract from the minutes showing that the abstract was sent to the attorney.

(Objected to.)

Q. Have you the minutes here?

A. Yes, sir.

Q. Mr. Payne, do the rules of the Riparian Commission require that the abstract of title shall, in every case, be filed with the application or be filed before the grant is made?

A. Yes, sir.

By THE COURT.

Q. You say that the rules are that they should file it before the application is made?

A. No, sir; before the grant is made. The record that I spoke of showing that the abstract of title was sent to the attorney of the board, is in letter book D, page 453, of the records of the Riparian Commission. The letter book I have in my hand.

A JUROR :—I want to get the date on which this line was placed by the Legislature from that point to this point. (Indicating on map.)

THE COURT :—That is the Southwest Line?

A. JUROR :—Yes, sir.

MR. BACON :—March 18th, 1882. It was first established there and then moved.

MR. BACON :—We are now trying to show that this abstract of title was a necessary part of the preliminaries to his
10 grant, and that the abstract was sent on a certain day to the attorney of the board.

By THE COURT.

Q. What is that, a book of letters?

A. Yes, sir.

Q. Is that the original book?

A. Yes, sir.

Q. Isn't that the copy of letters?

A. Yes, sir; that is a letter book.

Q. Where is the minute book of the records of the
20 board?

A. I have the minute book here, but it does not show when the abstract was sent to the attorney; but I don't think the minute book would show that. That is shown by the letters. That is a detail that the minute book would not show. When an application is acted upon and passed upon by the board, the secretary, as a matter of office routine, sends the abstract to the attorney, and that is the only record.

By MR. BACON.

Q. That is the only record that there would be under any
30 circumstances of the sending of this abstract to the attorney?

A. Yes, sir.

By THE COURT.

Q. They might have half a dozen abstracts on hand before they grant it?

By MR. BACON.

Q. Is there any other abstract on file in this case except the one you have produced here?

THE COURT :—He is not able to speak upon that subject at all, is he? Let's get the thing right.

(To the witness.)

Q. You are talking about title, but you speak about the 10 record of the Riparian Commission. That is a different thing from the record book. Where is the entry of this transaction at its close? Have you got the book? Does the book of minutes show that?

A. Yes, sir. I don't know what your Honor refers to as the close of it. The minute book will show when the grant was executed.

Q. Have you got that?

A. Yes, sir; minute book No. 4, page 146.

MR. POTTER :—I don't think this ought to go down on 20 the stenographer's notes as yet.

THE COURT :—All right; don't read it.

MR. BACON :—I desire him to read it.

MR. POTTER :—That copy of that letter is inadmissible on any point.

THE COURT :—I have refused to let that in. Now, then, he offers the book of minutes of the Riparian Commission of 1886, when the grant was delivered.

By MR. POTTER.

Q. Who kept your books, Mr. Payne?

30

A. The secretary, Mr. Bacot.

By MR. BACON.

Q. That is the original book, is it?

A. Yes, sir.

Q. Will you read the minute on the page you refer to?

A. "Grants for lands under water were acknowledged by the Commissioners as follows: To Frederick Hemsley, to Luther Bateman, to James B. Gandy," and a number of others following.

By THE COURT.

10 Q. What is the date of that?

A. The meeting of June 26th, 1886.

MR. BACON:—Now, if your Honor please, we are in this situation. This witness has testified that it is the invariable rule of the Commission that they make no grants except upon the filing of the abstract of title. He identified the original application and shows by the minute book that the grant was made. Now, we are in a position to offer in evidence the documents, without which the grant would not have been made.

20 THE COURT:—Because you are offering an abstract of title which they found among their papers, it may have no relation to this case at all. The grant was made in 1886. It very often happens that they have a change of the names, and a change of the application, and then they get their grant. Nobody knows anything about the business of that office. You might have a half dozen of these abstracts from different lawyers; and they finally get hold of one which goes to the bottom of it, and then they issue the grant. It would never
30 do in the world to find an abstract floating around the office and claim that was the abstract upon which this grant was made. It would not do to do that way. I certainly won't

allow that abstract in and I won't allow that minute in. You could take my property away in a very few minutes that way.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

MR. BACON :—If your Honor please, I will ask to have this marked for identification.

THE COURT :—Then you withdraw it as an offer of a paper?

10

MR. BACON :—We don't offer it in evidence, but ask to have it marked for identification.

THE COURT :—It is not in for an offer, only to have it marked for identification?

MR. BACON :—Yes, sir.

(Marked "Exhibit A for Identification.")

By MR. BACON.

Q. Now, Mr. Payne, I show you Exhibit 1 on the part of the plaintiffs, the grant to Luther Bateman. Is that the grant that was made by the Riparian Commission pursuant to 20 the application which has been proved here?

A. Yes, sir.

THE COURT :—I don't think you have any right to ask that question. The grant speaks for itself. I overrule that question.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

Q. Have you any personal knowledge as to the map 30 annexed to that deed?

A. Yes, sir ; I made the map and drew the description which enters into the grant.

Q. Have you computed the area of the land under water embraced in that grant ?

A. Yes, sir.

Q. What is the acreage ?

A. A fraction over seventy acres.

By THE COURT.

Q. Seventy acres in the whole thing ?

10 A. Yes, sir.

Q. And the map was made by you ?

A. Yes, sir.

By MR. BACON.

Q. Now Mr. Payne, I show you these two maps on vellum. Were these two maps also made by you ?

A. Yes, sir.

Q. What do they show ?

A. They are copies from the office records of the Riparian Commission.

20 MR. POTTER :—I object to the introduction of any other grants made by the commission than the one in question, or any map referring to any other grants.

MR. BACON :—We are simply showing the locality of this grant. For the purpose of our defence it is very important.

THE COURT :—It seems to me that you are showing now a condition of things in that neighborhood under the charge of the Riparian Commission in the way of grants that they have made there, including the grant in question. Is that a copy of the original map on file in the office of the Riparian
30 Commission ?

A. Yes, sir.

By THE COURT.

Q. Of that section of Delaware Bay ?

A. Yes, sir.

THE COURT :—What is the objection, Colonel ?

MR. POTTER :—Well, I don't know what they are trying to get at, but I object to going into any other grants.

THE COURT :—I don't suppose they intend to go into any other tract, only showing this particular locality.

MR. BACON :—Certainly.

THE COURT :—That is all right ; I will let that in. 10

MR. BACON :—I offer these two maps in evidence. This is a copy of working maps of the grants below Beadon's Cove. (Marked "Exhibit D 3.")

By MR. BACON.

Q. What is the other map ?

A. It is a copy of a general office map showing the grants on the Delaware Bay in that locality.

Q. Showing all the grants made between the mouth of Straight Creek and Stow Creek ?

A. Yes, sir. 20

MR. BACON :—I offer this in evidence.

(Marked "Exhibit D 4.")

We offer sheet No. 14 of Prof. Cook's series.

MR. POTTER :—I object, on the ground that maps are not evidence. They are used for illustration.

MR. PANCOAST :—We offer that for that purpose, the purpose of illustrating to the witnesses as to the locality.

THE COURT :—I will admit that for that purpose.

MR. BACON :—It is Atlas sheet No. 14 of the Geological survey of New Jersey. 30
(Marked "Exhibit D 5.")

I offer Coast Chart No. 125, Delaware River, Cross Ledge to Penn's Neck, for the purpose of illustrating the testimony of the witnesses in relation to this locality.

MR. POTTER :—That is a United States Survey ?

MR. BACON :—Yes, sir.

MR. POTTER :—It can only be admitted for the purpose of reference and illustration.

THE COURT :—I understand they are not offered for any other purpose, not to prove any given fact at all, but simply
10 to be referred to as a matter of illustration.

(Marked "Exhibit D 6.")

Cross Examination.

By MR. POTTER.

Q. How long did you say you have been in the employ of the Riparian Commissioners ?

A. About seventeen years.

Q. Chiefly as engineer ?

A. Yes, sir

Q. And for the last year as secretary, I believe you
20 said ?

A. Yes, sir ; and engineer.

Q. They have conveyed lands of the State of New Jersey which have produced a large revenue, haven't they, during the last seventeen years ?

(Objected to.)

THE COURT :—That is a notorious fact. Everybody knows that.

(Question withdrawn.)

Q. Have they conveyed lands really belonging to
30 Luther Bateman, jr., to Luther Bateman, as claimed ? Is it not probable that Luther Bateman produced some proof that

he was at that time the owner in fee simple of the ripa or shore.

(Objected to. Question overruled.)

MR. BACON:—I offer in evidence Deed Book No. 169, Page 385 and the record there contained.

MR. POTTER:—Recorded when?

MR. BACON:—I will give you that when I get down to it; of a deed bearing date March 30th, 1883, made by Cornelia Lore, of Newport, to Luther Bateman, Jr., of Newport, for all that certain lot of land situate in the township of 10 Downe.

THE COURT:—When was that recorded?

MR. BACON:—April 2d, 1883, nine o'clock in the forenoon.

THE COURT:—What is the object of that?

MR. BACON:—To show that on the 30th day of March, 1883, the title to the marsh and upland lying between Beadon's Creek and Daniel's Creek in Delaware Bay, was in Luther Bateman, Jr.

MR. POTTER:—I object to that offer, your Honor. How 20 does it follow by any process of reasoning that there might not have been a deed—

MR. PANCOAST:—We will show that.

THE COURT:—I will overrule that until you complete it.

MR. PANCOAST:—How can we withhold it?

THE COURT:—I won't let it go in until the whole title is shown.

MR. PANCOAST:—We offer this as one link in the chain of proving that the title was in Luther Bateman, Jr., instead of Luther Bateman.

THE COURT:—Well, suppose you do prove that, how are you any better off? We have a Riparian Grant in 1886. We 30

don't care what was done in 1883.

MR. PANCOAST :—Don't we care what was done in 1883 if Luther Bateman bought this land and held it until 1886? Your Honor cannot but take notice of it ; if we show the conveyance to him in 1883, it is presumably in him down to date.

THE COURT :—I don't think the deed can go in now.

MR. PANCOAST :—We take an exception to the refusal of the offer of this deed, which was intended to show that at the time of this application the shore land belonged to Luther
10 Bateman, Jr.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

MR. PANCOAST :—I will make another offer for the same purpose of a deed from Ethan Lore to Cornelia Lore, dated February 16th, 1882, and recorded in the Clerk's Office, in Book No. 168, page 451, conveying the same shore land.

THE COURT :—What is the date of record?

20 MR. PANCOAST :—I haven't the date of record. Does your Honor rule that in or out?

THE COURT :—I will rule that in.

MR. PANCOAST :—I offer another deed for the same purpose, to show the title—

THE COURT :—Have you read the description that is in that deed?

MR. PANCOAST :—I think we have.

THE COURT :—Well, I would like to know what the description is. It covers, you say, the shore land?

30 MR. PANCOAST :—That is what we offer it for.

THE COURT :—Have you seen it, Colonel?

MR. POTTER :—No. Sir.

THE COURT :—I will withdraw my proposition to let that in and will withdraw that for the present.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

MR. PANCOAST :—Then I offer for the same purpose a deed by Noah Johnson and Sarah his wife to George Crossley, dated April 1st, 1801, recorded in Book of Deeds No. 3, on page 189, in the Clerk's Office of this county. Of course 10 all these deeds I have referred to are recorded in the Clerk's Office of this county.

THE COURT :—That is the same property ?

MR. PANCOAST :—Yes, sir ; the shore land.

THE COURT :—I will withhold it for the present. I want to see those deeds.

MR. PANCOAST :—I offer a devise by last will and testament of Ethan Lore to Ethan Lore, proved April 21st, 1847, recorded in the Surrogate's Office of this county in Book D of Wills, page 205. 20

THE COURT :—I take the same course with that. I would like to withhold my approval of them until I can see and learn more about the descriptions.

ZEBULON POLHAMUS, sworn.

Direct Examination.

By MR. BACON.

Q. Captain Polhamus, where do you reside ?

A. Leesburg.

Q. This county ?

A. Yes, sir. 30

Q. How long have you resided there ?

A. I have resided in Leesburg about forty-three years.

By THE COURT.

Q. Where is Leesburg, in this county?

A. Yes, sir; in this county.

Q. How far from here?

A. Ten miles below Millville, twenty miles from here.

By MR. BACON.

Q. How long have you been in the oyster business?

A. I have been in the oyster business forty years.

10 Q. Do you own any oyster beds?

A. Yes, sir.

Q. Have you any oyster grounds in Delaware Bay and Maurice River Cove?

A. I have in Maurice River Cove.

Q. Do you know the locality in Delaware Bay known as Beadon's Cove?

A. Yes, sir.

Q. Did you ever catch any oysters in Beadon's Cove?

A. Yes, sir.

20 Q. When did you first commence catching oysters there?

MR. POTTER:—I object. That is a question leading up undoubtedly to a proffer of proof as to the fact whether or not this ground of the plaintiffs was a natural oyster bed. I submit that under no circumstances should such testimony be allowed in this case. The defendants claim that that question is settled by a law passed and approved on the 17th of March, 1882, found in Pamphlet Laws of 1882, page 107 and 108. The title of that law is, "A further supplement to the act
30 entitled 'An act for the better enforcement in Maurice River Cove and Delaware Bay of the act entitled 'An act for the

preservation of clams and oysters,' approved April fourteenth, one thousand eight hundred and forty-six, and of the supplements thereto ' ' ' .

The first section enacts as follows : (Reads.)

Now, that evidently cannot apply to the locality where the plaintiffs' bed is situated, because that is neither on any of the well known beds mentioned, nor does the water there fall bare as bars will, and does not in point of fact fall bare at low tide ; but they claim that the second section is the section which authorized this defendant to go on and 10 catch planted oysters of the defendant. Now, I contend that the contention of the defendants on that point is entirely at fault, for three reasons. The act, being a supplement to an original act, as to Maurice River Cove, is evidently unconstitutional ; and I do not know that I can do any better at this point than to present a portion of the very able brief of my friend which he presented before the Supreme Court to quash the indictment against this defendant. He argued that the whole scheme of the Maurice River Cove, prior to the organization of the Maurice River Cove Association, that 20 was made prior to the amendment to our constitution—the whole framing, he argued, of this series of acts is unconstitutional and void, and he argued it with great force, and his argument could not be answered. I tried to. My information is from one of the court that they came to the conclusion that this series of acts was unconstitutional, but they thought it public policy to find some other means to quash the indictment, and they found it. My friend omitted to state the reason. It was all printed.

THE COURT :—Did the Supreme Court hold those laws 30 unconstitutional ?

MR. POTTER :—No ; they expressed that opinion , pri-

vately, but they thought it public policy to quash the indictment, and found some other reason.

THE COURT :—I would like to know just exactly what that question has to do with the case now.

MR. POTTER :—I don't know, but I have been told that a large number of witnesses have been subpoenaed here to prove that this locality was a natural oyster bed.

THE COURT :—They won't certainly be able to prove that as against that riparian grant. They have got to defeat
10 that riparian grant before they can get it in.

MR. POTTER :—Then my objection holds good?

THE COURT :—If it is done for the purpose of proving it a natural oyster bed I will overrule it.

MR. PANCOAST :—The Court mistakes our position, I think. First, we hold that this grant is void, and second, we say if it is not void, if the Riparian Commissioners had the right to make the grant, they had not the right under any view of the law to make a grant of a natural oyster bed.

THE COURT :—That comes in the other question with
20 the fact of the riparian grant.

MR. PANCOAST :—The riparian grant may be good for another purpose ; it may be bad for the purpose of granting a natural oyster bed. We say whether it is good or bad, whether made with authority or without authority, it does not cover this natural oyster bed which we propose to show was there.

THE COURT :—I don't think the evidence is a matter of very much consequence. If it was, one witness could say that there was a natural oyster bed there. There is no need
30 of our going into that question. I suppose you propose to prove by this witness that there was a natural oyster bed there.

MR. PANCOAST :—Yes, sir.

THE COURT :—Then I will overrule it. Then if you have got just as far as you want to go, you can take that question up ; but if that riparian grant stands, that question, I say, cannot go into the case. I will overrule it altogether so as to let the whole question go to the Supreme Court, so as to settle that question whether there is such a thing as a state right to convey, whether there are natural oyster beds there or any other thing. It seems to me it can all be put in a very short compass. 10

MR. PANCOAST :—The offer of the defendant is to prove by this and other witnesses that the oysters alleged to have been taken from the plaintiff were taken from a natural oyster bed in existence at the locus in quo prior to plaintiff's riparian application and up to the date of the plaintiff's riparian grant which has been offered in evidence.

THE COURT :—The Court overrules this offer, holding that the plaintiff has a fee simple title to the lands in question under the Riparian Commissioners' deed in evidence, Exhibit No. 1. 20

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S.]

THE COURT :—I don't see what objection there is to that. If that riparian grant covers it, whether it was a natural oyster bed or not makes no difference.

MR. PANCOAST :—The defendant offers to prove by this witness on the stand, the defendant, and others, that the locus in quo is north of southwest line as the same was established 30 by Section 12 of the act of March 8th, 1882, (Laws of 1882, page 55) and as the same has been altered and established by

the act of April 3d, 1893, (Laws of 1893, page 101,) and that the plaintiff staked up the said locus in quo and planted thereon the oysters in question, contrary to the provisions of the said act and thereby forfeited the same to the public.

MR. POTTER :—That offer is illegal upon two grounds : first, that the act of 1882 is the very act which was argued so forcibly as being unconstitutional by my friend upon the motion to quash this indictment ; and secondly, that act is also a supplement to an act entitled “A further supplement
10 to an act for the better enforcement in Maurice River Cove and Delaware Bay of the act entitled “An act for the preservation of clams and oysters, etc.,” and it only applies to those persons who are planting under the patronage of the Maurice River Cove Association, under the general permission of the State to stake out and occupy ground for the purpose of planting and growing oysters in Maurice River Cove, and it does not apply to persons planting upon their own ground and not the ground of the State in Delaware Bay. The act, as I say, applies only to those persons who were planting
20 under the grants of the State under the general custom ; that is, by staking up grounds and planting thereon. It does not apply, nor was it intended to apply, to anyone planting upon their own ground.

THE COURT :—I overrule that offer, Judge, because, as I held before, the title of the State, as shown by the Commissioners’ deed, overrides all these questions.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.)

G. C. LUDLOW,

J. [L.S]

30 By MR. BACON.

Q. Captain, did you go on this Riparian ground of Bate-

man, claimed by Bateman, in April, 1894?

A. Yes, sir.

Q. For the purpose of catching oysters?

A. Yes, sir.

Q. How many oysters did you take in April, 1894, from the Bateman ground as referred to in this case?

A. To the best of my knowledge, from Captain Bateman's grounds, I took about seventy-five bushels. After they had been culled from the shells, I don't think there would have been any over. There might have been a few over 10 seventy-five bushels. When I got to Captain Bateman's ground, they had it pretty well rooted up. He told me on the 1st of April that if I would not go on his ground, he said he would not come in before the May term of Court. I says I would give in to his conditions. I says, "If I see you there I will go likewise." I went up the bay and I seen sixteen or eighteen boats in there. Says I, "Boys, they ain't sticking to their word. They are carrying their oysters away before Court." When I came up I seen twenty-five or thirty boats 20 in there with them. I went to work outside of Beadon's Point Bar. I caught part of a deck load. I says, "I am going to be a man of my word." I says, "If they go in there before May Court, I would go also." I went in there and they were rooting and gouging. There was twenty odd boats in there, and it was only now and then that you could get a haul. Bateman said they had boats in there a week before that, so he had his oysters pretty well drug off, and it was pretty much half shells that I got off those ground.

Q. How long had Bateman been taking the oysters off the grounds?

A. The oystermen told me they seen his boat in there 30 the Saturday before that.

(Objected to.)

THE COURT :—That won't do.

Q. I mean, how many years had he been taking oysters ?

A. I guess he had been taking them every year. That is what they told me. I guess he had.

Q. We don't want that. You don't know ?

A. No, sir.

Q. The day you went in there, did you have any oysters on the deck of your boat before you went in ?

10 A. Yes, sir.

Q. And what you got from the Bateman ground, did you put on deck with the others ?

A. Yes, sir.

Q. How many times were you there ?

A. I was in there three different times on Captain Bateman's ground.

Q. How many oysters did you catch on all three occasions put together ?

A. All three occasions I didn't get over seventy-five
20 bushels altogether.

Q. Not over seventy-five bushels ?

A. No, sir ; to the best of my knowledge if they had been culled, they would not have been only seventy-five bushels. It was only now and then that I got a haul, now and then.

Q. Why was that ?

A. He had a lot of boats there, replanting for him.

Q. It was because there was a large number of other boats there ?

30 A. Yes, sir.

Q. Captain, how much were these oysters worth a bushel that you got on Bateman's ground.

A. I could have got the same oysters out of the bay for thirty-five cents put on my decks. Thirty-five to forty cents was the highest.

Q. Wasn't there boats that worked there with you besides Bateman's boats?

A. Yes, sir.

Q. How many boats do you suppose you saw on Bateman's ground the days you were there?

A. I could safely say that I saw over twenty sail.

Q. Besides Bateman's boats? 10

A. Yes, sir; in the three days, I mean, at different times.

Cross Examination.

By MR. POTTER.

Q. Captain, what schooner were you sailing when you were taking oysters from Mr. Bateman's ground?

A. The same one you have been naming all the time.

Q. The Rogers?

A. Yes, sir.

Q. What is a full and fair estimate in ordinary work of 20 her deck load capacity in bushels?

A. I never had five hundred bushels on her deck but once, and that was in the Chesapeake. We buried her winders all out of sight.

Q. Do you know Captain Harry B. Gandy?

A. Yes, sir.

Q. Did you hear his testimony this morning, that you had told him soon after you took those oysters that you got four as pretty deck loads as you ever saw?

A. Yes, sir; but I deny the charge. 30

Q. Did you have any conversation with him?

A. I don't remember ever having any conversation with him.

MR. PANCOAST :—I beg leave to say to your honor that if your Honor does not intend to receive the deeds and will offered by the defendant to show the title to the shore land was not in Luther Bateman at the time of his said application and grant, then we have no further evidence to offer.

THE COURT :—Well, I tell you, Judge, I wanted to see and understand the nature of that line of the case. I haven't
10 seen these deeds and Colonel Potter says he has not seen them. I would like to know before I reject them ; if you have a document or proof or anything, show me just what this point is you make against this grant. I would like to see it.

MR. PANCOAST :—If the Court would adjourn at this point we could have this all in proper shape.

Adjourned till May 8th, 1896, 10 a. m.

BRIDGETON, N. J., May 8, 1896.

BENJAMIN T. POWELL, sworn.

20

Direct Examination.

By MR. BACON.

Q. Mr. Powell, are you an attorney at law of this State?

A. I am.

Q. Practising your profession in this county?

A. I am.

Q. At Cedarville?

A. Yes, sir.

Q. Did you know Luther Bateman in his life time?

A. I did.

30

Q. Were you employed by Luther Bateman in May,

1883, to make an application to the Riparian Commissioners for a grant of land under the tide-waters of Delaware Bay at Beadon's Cove?

A. I was.

Q. I show you Exhibit 1 for the defendant, being the riparian application, and ask you whether that is in your handwriting?

A. It is.

Q. The witness to that paper is James Powell; he was your father?

10

A. Yes, sir.

Q. He is now deceased?

A. Yes, sir.

Q. That is his handwriting as witness?

A. Yes, sir.

Q. Do you know whose signature that is to the application?

A. All I know is what the writing says.

Q. What it purports to be?

A. Yes, sir.

20

MR. POTTER :—What signature did you last inquire of him about?

MR. BACON :—The signature of the applicant.

MR. POTTER :—Luther Bateman's signature?

MR. BACON :—Yes, sir.

MR. POTTER :—Well, his reply was, all he knew about it was what the writing said. That does not make him competent to prove his signature.

By MR. PANCOAST.

Q. Did you ever see Luther Bateman write?

30

A. Not that I ever know of at present.

MR. POTTER :—I raise the point that he is not the proper person to prove the signature.

MR. BACON :—We haven't made any attempt to prove it, Colonel.

By MR. BACON.

Q. Now, Mr. Powell, I show you Exhibit A marked for Identification, being the paper endorsed "Search showing Luther Bateman's title," and ask you if that is in your handwriting?

10 A. Yes, sir.

Q. Is that an abstract of the title to the property described in the application made by Luther Bateman for the riparian grant by the previous paper which you have identified?

THE COURT :—Is that a search you have there?

MR. BACON :—It is an abstract of title.

MR. POTTER :—Who is it prepared by?

MR. BACON :—By Mr. Powell himself.

MR. POTTER :—Is it in his handwriting?

20 MR. BACON :—He says so.

MR. POTTER :—What is the date of it?

MR. BACON :—It is the paper marked "Exhibit A for Identification" yesterday.

MR. POTTER :—Will you let me look at it?

MR. BACON :—You looked at it yesterday.

MR. POTTER :—Well, I want to look at it now if you are going to offer it in evidence.

MR. BACON :—I have not got that far yet. I am going to if I get that far.

30 Q. (Question repeated.) Is that an abstract of the title to the property described in the application made by Luther

Bateman for the riparian grant, by the previous paper which you have identified?

THE COURT :—What is the object of that?

MR. PANCOAST :—The object of this proof and the other proofs that we have got to offer, as I suppose is well known to the Court, is to show that Luther Bateman was not the owner of the shore land adjoining the land under water described in his grant.

MR. POTTER :—I object, your honor, to any testimony whatever on that point. The grant has this provision in it, 10 and it is a mere proviso: "Provided, however, that if the said Luther Bateman is not the owner of the ground adjoining the land under water hereby conveyed, then and in that case, this conveyance, so far as it binds the State, and all covenants herein contained, are void."

The object of this testimony is to show in this suit that a solemn grant of this State made under its seal and by its Riparian Commissioners, including the Governor, was made without authority and is void. Now, I insist, and desire to insist strongly, because this case seems to have gotten down 20 to a very narrow point on the part of the defendant, that that cannot be done in this suit. That proviso is a proviso inserted by the State for its own protection, so that if it makes any grant it can recall it at any time, by proper legal proceedings for the purpose. Now, my friend said this question was raised and adjudicated in the case of Fitzgerald vs. Faunce in the Gloucester circuit, and afterwards taken up and reversed; that there, upon the proof of a mere easement in Faunce the Court of Errors for the first time brought forward a question which had not been raised in any of the courts below, 30 although there were several counsel on both sides, Grey & Grey for the plaintiff and my friend for the defendant; that

upon mere oral proof of an easement between the grant to the plaintiff and the tide water ; that they held that even if a man held an easement, namely, a right to fish, between the applicant for the riparian grant and the water, that would bar the grant.

Now, you see, your Honor, that case stood in this position. There was a suit brought by Fitzgerald against Faunce, as I remember, and various deeds were introduced upon both sides to show title in Fitzgerald, or in Faunce, whoever
10 brought the suit. That was the object of the introduction of these deeds. Now, when they came up before the Court of Errors, the court, in construing these deeds, held that the plaintiff did not have a title which reached to the water's edge, but that the title which would have justified the grant was in the defendant, not by virtue of any easement or right to fish, but by virtue of a positive deed in fee simple. You recollect the force with which my friend dwelt on the Court's ruling that he had a mere title to fish, and the Court's suggesting to the counsel that the Court merely
20 construing the deed, that that deed conveyed to the defendant below a right in fee simple and not a mere easement. He says now that his recollection was positive about it that the defendant merely proved orally that he had an easement, a right to fish. Here is what the Court said. (Reads.)

Therefore, that question raised there which he claims was raised and adjudicated as to his right to take the State's deed here has no bearing whatever upon this case. Here is a covenant made by the State under the solemn seal, that "If Luther Bateman is not the owner of the lands adjoining the
30 land under water hereby conveyed, then and in that case, this conveyance, so far as it binds the State, and all covenants herein contained, are void, "as affecting any part or parts of

said land adjoining land not owned by Luther Bateman.”

Now, as I said in the beginning, it is plain that this was a covenant inserted by the State for its own protection only, and cannot be taken advantage of by anyone except the State or by the party owing the adjoining land, by suit brought for the express purpose of setting it aside; and therefore this whole line of testimony which counsel is undertaking to introduce here, although we can meet it if forced to, is illegal and incompetent. I ask the Court not only to overrule Mr. Powell’s testimony so far as it has gone, but to over- 10
rule all testimony offered in this direction on the part of the defendant.

MR. PANCOAST :—I insist that this testimony is perfectly legal and proper; that if we can show that Luther Bateman was not the owner of the shore land adjoining the land described in his grant at the time he received the grant, that the grant is utterly void and our offer is now formally made to prove by this and other witnesses and by deeds and other legal testimony, that Luther Bateman at the time he made his application for the grant to him in evidence in this case and 20
on the date of the grant itself, was not the owner of the shore land adjoining the land under water conveyed to him in and by the said grant.

THE COURT :—I am quite well satisfied, Judge, that this defendant in this case cannot attack the statements and the language and the effect of that deed, and I shall hold that the deed by the State to Luther Bateman and its statements cannot be questioned or attacked in this case by the defendant.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.) 30

G. C. LUDLOW,

J. [L.S.]

DEFENDANT RESTS.

MR. POTTER :—I made such a thorough opening at the beginning of this case, that I do not feel any opening on my part necessary.

MR. PANCOAST :—Then the Court will have to give the case to the jury. I don't know as we have anything to say.

THE COURT :—Well, gentlemen, if you don't wish to take advantage of the opportunity to say anything, I will have to give it to the jury.

MR. PANCOAST :—I have three points on which I desire
10 to have your Honor instruct the jury.

First.—I ask your Honor to instruct the jury that no substantial damages should be given for the injury to the oyster bed, because none has been proved.

Second.—I ask the Court to instruct this jury that the measure of damages for taking the oysters in question is their fair market value in the water at the time they were taken by the defendant.

Third.—I request the Court to instruct this jury that the amount of oysters taken by the defendant cannot be
20 guessed at, but must be ascertained by them wholly from the evidence, and that the burden of proof to show their value is upon the plaintiff.

CHARGE OF THE COURT.

Now, gentlemen, this case has reached a point where both parties desire it, because the question is a very important question, and can only be settled as to general questions of right as to State grants, by the highest Courts in the State. We have tried the case so as to carry these questions, which are legal questions, up to a higher Court.

30 The plaintiff in this case has the grant of the State dated June, 1886, and is in the possession and has all the rights of

the State and the people of the State, in the lands described in this deed. I don't suppose it is necessary to read the description, because there seems to be no question raised about the premises; and the deed is made by Bennington F. Randolph, Amzi Dodd, Miles Ross and John Carpenter, Jr., Riparian Commissioners, and is an absolute grant, the Governor signing it, under the seal of the State, for the lands which are therein described as lands under water in Delaware Bay. The conveyance is absolute as to Luther Bateman, his heirs and assigns forever.

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Now, the State is the absolute owner of the land under water in all its inland navigable waters within its territorial limits. The State land can be granted by the State to anyone, either public or private; there is no question about that. It has been so held by the courts, but that is a question that need be only incidentally referred to now.

The defendant went on these lands which were thus conveyed to Bateman and dug out and carried away oysters planted there by the plaintiffs—I think the date was sometime in 1894—and the defendant admits it; he says he did go there. So he was a trespasser. He went on the lands which were conveyed to the plaintiffs and in their possession under the grant from the State, which made them absolute owners in fee of the land of the State and of the people of the State, with everything that was on it, under water at that locality. So all that part of the case is a matter that you really have nothing to do with, except that your work is much simplified by the admission of the defendant that he was there and took the oysters away, which oysters were of course the property of the plaintiffs planted by them, and the defendant had no right to take them. The act, as I understand, was done with a view of testing the rights of the parties under the law and

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constitution of this State.

Therefore, there is no question about it, gentleman, in the case, that the verdict, whatever it may be, on your part, must be a verdict in favor of the plaintiffs; otherwise you defeat the whole proceedings.

The question is as to the amount. The plaintiff is entitled by your verdict to full compensation for the damages done him by the defendant, both for trespass upon the real estate and for the value of the oysters taken. What that ought
10 to be is a question entirely for you. The oyster bed, it appears by the evidence, was dug up, dredged. The soil was dug up, dredged, so that there was an injury; and you decide what you think under the circumstances such an injury to such a property is. That amount should be considered and awarded. The value of the oysters is another matter which you consider and estimate and find.

Now, on that subject, gentleman, you will be the judges. I have been requested by the defendant to say that no substantial damages can be given, none being proved. That is a
20 question, as I said, gentlemen, for you to say from the facts. If you think that, then your verdict would be for mere nominal damages; but you must consider the facts, and under these facts determine what is the injury and what is the amount of the injury which the plaintiff has sustained by the digging up of the soil, the injury to the oyster bed itself and the value of the oysters taken.

In estimating that value you have the right to make it what you consider to be fair and proper under all the circumstances, and in as much as the act seems to have been an act
30 of bold trespass, it is a fair case for you to give fair and liberal allowance for what you consider to be the injury. But in estimating the value of the oysters, which is a matter,

gentlemen, to be got at from the facts, (and it is rather difficult to get the exact amount, because there is some conflicting testimony as to how much Mr. Polhamus took,) we have it in evidence by the witnesses that he said that he got four handsome deck loads; and how much the Rogers would carry at a deck load you are to judge from the evidence, and what such oysters would be worth, if that was the quantity that he took, you are to judge. He himself says that he never got over seventy-five bushels in all, cullens and all thrown out, and that he had about seventy-five bushels of oysters which he 10 took off and planted in Maurice River Cove. You have that testimony to guide you and you are to conclude from all the facts what you think was the amount of oysters that he carried off; and whatever you think and judge fairly is the quantity, you will allow for that, what you think such oysters were worth in the market as dug up at the time. Some evidence of that value has been given, and you can take it into consideration; but you, probably, living in this section of the country, know a good deal about such matters, and you are able to judge better than I am. But he is entitled to 20 fair value, marketable value, of those oysters as they came out from the water in 1894. That is the time, on the day when they were taken, April, 1894.

Of course, gentlemen, you are not to guess at things and throw it off offhand, but you are to get at this question as nearly as you can from the evidence here, so as to make your verdict, a verdict which, as between man and man, you would consider to be a just and fair transaction.

I think those are the points, gentlemen, that you have submitted.

MR. POTTER :—There is one other point I would suggest 30 to your Honor, that I omitted in these requests, which is,

when the jury have ascertained the damage done to the plaintiff in April, 1894, he is entitled to interest on the damages so ascertained until the first Tuesday of June next, which is the meeting of the Supreme Court.

THE COURT :—That is true, gentlemen, you may add interest up to the first Tuesday of June, at six per cent.

Now, I don't think there is anything else to be said to you, because the case has come to a simple question to be estimated on the principles I have mentioned. I feel
10 confidence in you, gentlemen, that you will deal fairly and rightly, and then hereafter, when the Courts decide the ultimate final ruling as to questions between the State and the Riparian grantees, there will be nothing to be done except to close out this matter, which, as I understand, has been in controversy for some time, and I don't wonder at it at all. It is a question of a great deal of interest, and which ought to be settled by the highest courts of the State.

My attention is called by a juror to a matter, and I will mention it to you, and perhaps my charge may have misled
20 you—the injury done to the bed itself. Now, the evidence shows there were a number of other parties who were upon this ground, and this defendant, therefore, is not to be charged for the entire injury done to the entire bed. You will have to determine what you think would be fair and right for him to pay in getting up the oysters that he took off. I am glad you called my attention to it.

MR. PANCOAST :—I except to your Honor's refusal to charge on the three points as requested, in so far as the Court refuses to charge the same.

30 Which exception is hereby allowed and sealed accordingly.

G. C. LUDLOW,

J. [L.S.]

I except to that part of the charge of the Court which stated that under the Riparian deed in evidence, the grantees became seized of the sole right to the land under water described therein, with everything on it.

Which exception is hereby allowed and sealed accordingly.

G. C. LUDLOW,

J. [L.S.]

I except to that part of the charge of the court which instructed the jury, that they must render a verdict for the plaintiff.

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Which exception is hereby allowed and sealed accordingly.

G. C. LUDLOW,

J. [SEAL]

I except to that part of the charge of the Court, relating to damages for injury to the oyster bed itself; and the refusal to charge, that under the proofs, the plaintiff could not recover substantial damages for such alleged injury; and to that part of the charge wherein the court said: "It is a fair case for you (referring to the jury) to give fair and liberal damages."

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Which exception is hereby allowed and sealed accordingly.

G. C. LUDLOW,

J. [L.S.]

I except to that part of the charge relating to the damages to be given for the taking of the oysters wherein the Court said "Whatever you think and judge fairly is the quantity, you will allow for that; what you think such oysters were worth in the market as dug up at the time. Some evidence of that value has been given and you can take it into consideration; but you, probably, living in this section of the country, know a good deal about such matters, and you are able to judge better than I am. But he is entitled to fair

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value, marketable value, of those oysters as they came out from the water in eighteen hundred and ninety-four. "That is the time on the day when they were taken, April, eighteen hundred and ninety-four."

Which exception is hereby allowed and sealed accordingly.

J. C. LUDLOW.

J. [L.S.]

ASSIGNMENT OF ERRORS.

NEW JERSEY COURT OF
ERRORS AND APPEALS.

Zebulon Polhamus,	}	
Plaintiff in Error,		
and		On Error.
Rebecca R. Bateman, Executrix, &c.,		Assignment of Errors.
and Luther Bateman, Jr.,	}	
Defendants in Error.		

The said Zebulon Polhamus, by Walter H. Bacon, his 10 attorney, complains and says, that the said judgment is erroneous and ought to be reversed and set aside for the following reasons :

1. Because the trial Court held and adjudged, that the general panel of jurors, from which the jury was drawn to try the said case, was a legal panel, and overruled the defendant's challenge thereto.

2. Because the trial Court against the defendant's objection, admitted in evidence on the part of the plaintiff a deed of conveyance from the Riparian Commissioners to 20 Luther Bateman, dated June 26th, 1886.

3. Because the trial Court refused to allow the defendant's counsel, on cross-examination, to ask the plaintiff, Luther Bateman, whether the name to a certain paper, pur-

porting to be the Riparian application, upon which the Riparian deed in question was made to his father, was the signature of his father.

4. Because the trial Court refused to allow the defendant's counsel, on cross-examination, to ask one of the plaintiffs, Luther Bateman, whether the name, Luther Bateman, signed to an affidavit annexed to a bill filed in the Court of Chancery of this State, wherein Luther Bateman was complainant and Harrison Hollinger et als. were defendants, was
10 in the handwriting of his father, Luther Bateman, who was the other plaintiff in this suit when the same was instituted.

5. Because the trial Court refused to allow the defendant's counsel, on cross-examination, to ask Theophilus Husted, a witness for the plaintiff, the following question: "Did you ever catch any oysters on that ground before 1894?"

6. Because the trial Court refused to allow the defendant's counsel, on cross-examination, to ask William Weldon, a witness for the plaintiff, the following question: "When did you first in your lifetime catch oysters on that
20 ground?"

7. Because the trial Court refused to allow the defendant's counsel, on cross-examination, to ask Orange Moore, a witness for the plaintiff, the following question: "Did you ever take any oysters from that ground before that time to which you refer?"

8. Because the trial Court refused to allow the defendant's counsel, on cross-examination, to ask Orange Moore, a witness for the plaintiff, the following question: "When did you first know that ground to be staked up?"

9. Because the trial Court, against defendant's objection, allowed the plaintiff's counsel to ask Richard D. Sheppard, a witness for the plaintiff, the following question: "In your opinion, Captain, what would oysters planted upon that ground, beginning in 1886 and running up to the year 1891, be worth per bushel upon the ground as they lay in the Spring of 1894; that is, ordinary bay plants; and having made a very successful growth between the years 1886 part of them were planted in 1886 and running up to the year 1893 in the year 1894?" 10

10. Because the trial Court allowed plaintiff's counsel, against the defendant's objection, to ask the said Richard D. Sheppard, one of his witnesses, the following question: "What, in your opinion, would ordinary bay plants, as they are usually caught and planted, planted upon this ground claimed by the Messrs. Bateman in 1886, some of them, and then several years, running up several years to 1893, and having made a very successful growth, be worth in April, 1894?"

11. Because the trial Court refused to allow the defend- 20
ant's counsel to put in evidence an abstract of title of the shore land filed with the Riparian Commissioners by Luther Bateman as one of the preliminary steps to obtain the riparian deed which the Commissioners made to him on the 26th day of June, 1886, for the locus in quo.

12. Because the trial Court refused to allow the defend-
ant's counsel to ask Mr. Payne, the Secretary of the Board of Riparian Commissioners, if the grant to Luther Bateman in question, was made pursuant to the application filed by him with the said Riparian Commissioners. 30

13. Because the trial Court refused to allow the defendant to prove that Luther Bateman, at the time he made his application to the Riparian Commissioners for the Riparian grant in question, and at the time of receiving the same, was not the owner of the shore land adjoining the land under water described in the said grant.

14. Because the trial Court refused to allow the defendant to prove that the oysters alleged to have been taken by the defendant from the plaintiffs were taken from a natural
10 oyster bed in existence at the locus in quo prior to plaintiff's Riparian application and up to the date of the Riparian grant in question.

15. Because the trial Court, against the objection of the defendant, held that the plaintiffs have a fee simple title to the oyster grounds in question under and by virtue of the deed from the Riparian Commissioners to Luther Bateman, dated June 26th, 1886.

16. Because the trial Court refused to allow the defendant to prove that the locus in quo is north of the southwest
20 line as the same was established by Section 12 of the act of March 8th, 1882 (laws of 1882, p 55) and as the same has been altered and established by the act of April 3, 1893, (laws of 1893, p 101) and that the plaintiffs staked up the said locus in quo and planted thereon the oysters in question, contrary to the provisions of the said acts.

17. Because the trial Court held and adjudged that the legality of the deed from the Riparian Commissioners to Luther Bateman for the locus in quo could not be questioned, or attacked by the defendant in this case.

18. Because the trial Court charged and instructed the jury that Luther Bateman, under his Riparian grant, became seized of the sole right to the land under water described therein with everything on it.

19. Because the trial Court charged and instructed the jury that they must render a verdict for the plaintiff.

20. Because the trial Court refused to instruct the jury at the request of defendant's counsel, that under the proofs the plaintiff could not recover substantial damages to the oyster bed itself.

21. Because the trial Court charged and instructed the jury that they might give fair and liberal damages to the plaintiffs.

22. Because the trial Court refused to instruct the jury, at the request of the defendant's counsel, that the measure of damages for taking the oysters in question was their fair market value in the water at the time they were taken by the defendant.

23. Because the Court improperly instructed the jury as to the measure of damages, both in respect to the taking of the oysters and in respect to the injury to the oyster bed itself.

WALTER H. BACON, Att'y.

D. J. PANCOAST, Counsel.

