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[Extract from "The New Jersey Mirror,"
Mount Holly, April 25th, 1883.]

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We give hereunder the text of Justice Parker's charge to the jury in the case of Fitzgerald *vs.* Faunce, in the Gloucester Court, in which a verdict for the defendant was rendered in accordance with the charge :

The previous history of the contest for the possession of the Faunce fishery, which was tried in our Circuit Court last week, may be shortly stated as follows : The Faunce family, who are of French Huguenot descent, their original name being Faus, became owners of the Upper fishery between Little Mantua creek and the Wilkins farm, by deed from Samuel Whitall, in 1818, to Christian Faunce. Whitall at that time was the owner of both the Fitzgerald farm and also of the Upper and Lower Faunce fishery. Christian Faunce used and fished the Upper fishery from 1818 to 1834, and then, with three of his sons, bought from William F. Newbold the Lower fishery, extending from Little Mantua creek to Great Mantua creek. The Faunces then, and ever since 1834, fished the two fisheries as one. They had paid in all $12,000 for the two fisheries, and during their occupancy no question was ever raised as to their ownership until 1877.

The Whitall farm had meanwhile passed from Whitall to the Newbolds, from them to R. K. Matlock, Esq., who, in 1876, sold it to Wilson Fitzgerald. This farm lies on the upland side of the fishery along its whole length. Mr. Fitzgerald applied to the Riparian Commission for a lease of the lands lying in front of his farm between high and low water

marks on the Delaware river. In the application no mention was made of the fact that the fishery was located there, nor was any notice given to the Faunces that a lease or grant had been applied for. The Riparian Commission gave a lease for these lands under water to Mr. Fitzgerald, by a description which included the whole of the Faunce fishery, for an annual rent of $140, or a purchasing price of $2,000.

When this grant was delivered to Mr. Fitzgerald he claimed to be the owner of the Faunce fisheries and notified the Faunces to keep off the premises, as trespassers, and when they insisted on their rights and kept on fishing, suit was brought against them as trespassers. A suit was brought each year that the Faunces or their tennants ished, but until the trial last week, the merits of the case never came before a jury, the previous cases being in the nature of preliminary skirmishes.

The Faunces defended by setting up their user and occupancy as undisputed owners for nearly seventy years, and their deeds from Whitall and Newbold.

Ex-Judge Pancoast and P. L. Voorhees, Esq., of Camden, appeared for Mr. Fitzgerald, and M. P. Grey, of Salem, and S. H. Grey, of Camden, for the Faunces. The trial occupied a week and was concluded on Tuesday by a verdict for the Faunces on the questions raised. The charge of Judge Parker declared that although the common law of England made the King the owner of all lands between high and low water marks, and in this country the State the owner of those lands, yet the local common law of the State, established by the many statutes taxing and recognizing private ownership of the fisheries on the Delaware, had changed the common law rule, and that the shore fisheries on the Delaware were capable of private ownership against the State's title.

## CHARGE OF JOEL PARKER, JUDGE.

"*Gentlemen of the Jury:* This suit is in the form of trespass. The plaintiff in his declaration complains that on the first day of April, 1881, and on other days afterwards, up to the time of the commencement of this suit, the defendant, with his workmen, broke and entered the close of the plaintiff, situated in the township of West Deptford, in



this county, and committed various acts of trespass thereon, as set forth in the declaration, by means of which the plaintiff suffered damages.

"The suit is brought to recover damages for a series of alleged trespasses occuring in the months of April and May in the year 1881. The premises on which the trespasses are charged to have been committed are described in the declaration as part upland and part land under the tide-waters of the river Delaware, and lie contiguous.

"To prove title to the upland, several deeds are put in evidence. It appears that a little before the beginning of the present century, the farm of plaintiff was part of a larger tract owned by Trent Francis, and that after his death it was conveyed by his widow and executrix to one Samuel Whitall, who subsequently conveyed to one William Newbold. After the death of William Newbold his devisees quit-claimed to his son William F. Newbold; he conveyed to Robert K. Matlock, from whom the plaintiff received his deed on the 27th of January, A. D. 1876.

"Although the description in these deeds calls for low water mark, in law, they conveyed only to high water, for a reason which will hereafter appear.

"The other part of the premises, adjoining the upland along high water mark and running out in the river in front of his farm the plaintiff claims, under what is called perpetual lease, with the privilege of obtaining an absolute grant at a fixed price. This lease was given to plaintiff by the Riparian Commissioners on the part of the State of New Jersey, or rather, by the State through the commissioners and Governor for the time being, on the 10th of March, 1877. The description in the lease includes the land flowed by the tide waters of Delaware river and Great Mantau creek, beginning at a point in high water mark of the river in the center of the road leading from the crown point road to the river, thence north 28 degrees 20 minutes west, 1200 feet to the exterior wharf line established in the river by the Riparian Commissioners, and thence down the river, following the exterior wharf line as far as plaintiff's farm extends, and being all the land under the tide waters of the river in front of plaintiff's farm from high water mark to said exte-

rior line, excepting only land under water in front of the small upper cabin lot of the Faunces, because plaintiff was not riparian owner of that lot. This lease was made by the State to the plaintiff as riparian proprietor, under and by virtue of the statutes of the State on that subject. The papers in the cause show that at the time of the lease he was riparian owner. The deeds before mentioned and this lease include the *locus in quo* as described in the declaration, and embrace all the premises both above and below high water mark, on which the several trespasses were alleged to have been committed.

"That the defendant and his workmen did the acts which the plaintiff charges as trespasses, at the times and places alleged within the description of these conveyances and lease, is not denied. The defendant admits that he took down the fence, or directed it to be done, that he led the horses through on the land inside the bank, and on the bank whenever it was necessary for the purposes of a fishery to take them, to and from the windlasses; that the windlasses were placed permanently in the soil, part on outside and part inside or on the bank, and were kept there year after year, and used by him in 1881; that he and his men used the bank in the prosecution of their business of fishing throughout the season of 1881; that at high water they made hauls and took out the fish near the foot of the bank, and at low water just outside the flats, and occupied the flats included in the plaintiff's lease so far as was necessary.

"Now, if the defendant had no legal right to do the acts complained of, if neither he nor the persons under whom he was acting had a right of several fishery there, these acts were traspasses for which the true owner of the land should recover damages.

"My instructions to you, gentlemen, are, that upon the evidence produced by the paintiff, and thus far stated by me, the plaintiff was the owner of the *locus in quo*, whether above or below high water mark, and you will so find unless the defendant has proved a better title or has made out a legal justification of his acts by virtue of a right in himself or in those under whom he acted to a several fishery there.



"The defendant claims that he had such right and that he has shown it, and is therefore justified in what he did. If this be so, if he has shown such right, he is entitled to your verdict.

"If the defendant, in the fishing season of 1881 had the legal right to fish there, with as many men as was necessary to operate the fishery to advantage, he was not a trespasser, unless in the prosecution of the work he or those under him with his command or knowledge did unnecessary damage or transcended any privileges given them by conveyances from the owner of the upland from whom the alleged fishery came.

"Is there proof that defendant or his employés did anything more on the lands of plaintiff than was actually necessary to carry on the business of fishing at the place, or anything more than was authorized by the rights and privileges in conducting the business of fishing there, contained and granted in the deeds from the former owners of the farm? If in the prosecution of the work there, defendant, either negligently or carelessly or intentionally damaged the plaintiff unnecessarily and beyond the privileges alleged to have been granted by Whitall on the upland, the jury should find for plaintiff the amount of such damages, whatever may be the law as to the right of the defendant within the bounds of the lease from the State.

"Of course, if defendant had no right of several fishery at all, he is liable for all his acts of trespass. If he had a right of several fishery he is only responsible for unnecessary damage or damages committed in excess of the rights granted to Christian Faunce by Whitall on the upland. This is a question for the jury.

"The real question in this cause is, had the defendant or those under whom he was operating a fishery there in 1881 a right of several fishery in that pool? If they had not, defendant is liable for all damages proved; if they had such right of several fishery, he would be liable only for damages from unnecessary acts, if any such are proved; and, if none such appear, then defendant is entitled to a verdict.

"The defendant claims that the persons under whom he operated the fishery had a legal right thereto through deeds

from prior owners of the farm, claiming also to be owners of the fishery.

"Two conveyances are produced which purport to convey the fishery. The first is dated December 4, 1818, from Samuel Whitall (who at the time was the owner of plaintiff's farm,) to Christian Faunce. This conveyance, after granting the cabin lot, purported to convey whatever right, privilege, use and enjoyment Whitall had for purposes of fishing and no other purposes, of premises along on middle of the bank in part lying between Little Mantua creek and the cabin lot, then out in the river to low water mark and down the river at low water mark with the right and privilege of laying off the nets used on said ground at the flood fishing, and also of laying nets on certain meadow land of Whitall. I may not give the precise language of the deed, but its substance. This deed purported to convey a right of several fishery on that shore from the then shore owner, which subsequently was sought to be perfected by a conveyance from William F. Newbold, a subsequent owner in 1834, to the Faunces, of the next lower fishery and a certain right of fishing in this which Whitall had reserved in his deed to Christian Faunce.

"To make these deeds from Whitall and from Newbold of any avail to defendant, it should appear that, at the time of the execution of the papers these grantors, or one of them, owned a several fishery at the place in question. They could not give title unless they were themselves owners of the right, and the deeds offered by defendant for the fishing right will not justify him unless it shall appear that such right existed in them or one of them.

"By the common law, the land owner had no right beyond high water mark, and therefore could not, under such law, derive title to a several fishery by deed from the proprietors. It has been decided in this State by the court of last resort, that at common law the State of New Jersey is the absolute owner of land in all navigable waters where the tide ebbs and flows within the territorial limits of the State, and that the State can grant such land to any one to be for his exclusive use. Where, then, did Whitall or Newbold get a right of several fishery, if they had it?



"Did the right of several fishery come by prescription to them?

"My charge to you is, gentleman, that neither the Faunces or their grantors had title to this alleged several fishery by prescription, use, or adverse possession, adverse to the State. It could not be adverse if, as defendant claims, the right has been continually protected by the State.

"But defendant interposes another ground of defence, which may be thus briefly stated: Admitting that, by the common law, the riparian owner holds only to high water mark, and that by the same law the State is the owner absolutely of all lands under tide waters, below high water mark, and may sell her right to whom she pleases; yet that there is a local custom, or local common law in New Jersey, applicable to shore fisheries along the River Delaware, which recognizes the right of property in several fishery, and that this right has been acknowledged and maintained by the Legislature and the courts. Consequently, it is argued that whatever right the State passed to plaintiff must be subject to this right of several fishery, if there was a fishery there before the giving of the lease. Now this is the important question of this case, in the presence of which all others must sink into insignificance. Very valuable interests depend upon the solution of this question. Tne shore fisheries on the Jersey side of the Delaware river below the falls at Trenton are of immense value.

"There is no question that the Legislature of the State has, by repeated acts, intended for the protection of shore fisheries, recognized them as property.

"These acts began at a very early day and continued at least in each decade, by new acts or supplements, almost from the time of the acknowledged independence of the State in 1783 to the present time. In and by these acts the claimants of these several fisheries are called owners, and penalties are fixed for invading the pools which they claim in front of their shores, provided they filed descriptions thereof, with a bond, in the clerk's office of the county. These fisheries were thought of such importance that in 1783 they entered largely into a treaty between New Jersey and a sister State on the other shore in respect to jurisdic-

tion over the Delaware river, and the right of guarding the fisheries on the river annexed to the respective shores was thereby guaranteed. In 1799 an act was passed subjecting persons having command of ships and other vessels and crafts, anchoring on fishing grounds, to a penalty, unless they were removed immediately upon request of the *owner* or occupier of such fishery, the penalty to be recovered by the *owner* or occupier.

"Acts have been passed almost annually for the last hundred years, providing for the taxing of fisheries. At first the designation in the act was "accustomed fisheries, the property of private persons," and afterwards the word "fisheries" alone was used. Under these acts shore fisheries in the tide waters of the Delaware have been taxed. This very Faunce fishery, we are told by a witness, has paid tax for over sixty years. Shore fisheries on the Delaware have been conveyed and devised as real estate, and been the subject of partition in our courts from a very early period. Sometimes they passed with the shore, at other times they were detached, but whether united or severed from the shore, they were regarded and treated as real property.

"The evidence shows this to have been the case from the early part of the 18th century.

"Having very hastily noticed the current of legislation on the subject of fisheries in the Delawar', and called attention as briefly as possible to the common understanding, not only of the owners but to the public and the courts, granting partition or sale of such property upon which the idea of local custom or local common law seems to have been drawn, I will inquire if local common law in New Jersey, in regard to rights of riparian owners on tide waters, differing from the common law of England, has been recognized and affirmed by the courts in this State.

"The celebrated case of *Gough* vs. *Bell* decided that there was such a such a thing as local common law in New Jersey. It is true the controversy there was not in reference to fisheries, but in reference to the right to dock out and improve by riparian owner in front of his lands between high and low water. The common law of England gave the land to the State below high water, but the court held



that a local common law authorized the riparian owner to improve in front of his lands below high water, and he could hold them after the improvement, if made before the State or her grantees asserted her rights.

"In the discussion of counsel, and in the opinions of the judges in that case, it was taken for granted that a local custom or local common law existed in respect to the rights of several fishery on the River Delaware, which was used by some of the judges as an evidence that there were changes in this State in some respects of the common law, as to rights of riparian owners.

"In order to make this subject plainer, it will be well to quote some extracts from the opinions of the Judges in the case of *Gough* vs. *Bell*.

"Chief Justice Green presided in the Supreme Court when that case was argued, and read an elaborate and carefully prepared opinion. He was one of the ablest jurists this State or the country has produced, and, coming from him, the extracts I quote have great significance. He says: 'Notwithstanding the acknowledged title of the State in her sovereign capacity to the soil of navigable rivers below high water mark, there has undoubtedly existed, from a very early period, rights of the riparian proprietors which have been recognized by the Legislature, inconsistent with the idea of that exclusive property in the State, sanctioned by the rule of the common law.' Then the Chief Justice mentions several acts of the Legislature to which I have alluded, which recognize the right of property in shore fisheries on the Delaware river, and he then adds: 'Such repeated and unequivocal legislative recognition of a right furnishes proof of its existence which cannot be disregarded.' Chief Justice Green quotes Mr. Griffith (a very able lawyer of the last century, residing at Burlington, familiar with the titles in West Jersey), as saying: 'This species of property [referring to fisheries] from the earliest times, has been the subject of exclusive enjoyment and alienation like any other.' The Chief Justice then further adds: 'This claim, it is clear, is totally irreconcilable with the rules of the ancient common law, touching property in the soil on shores of navigable rivers, and if the claim rested only on the principle

of the common law in England, it cannot be sustained. The right of the riparian proprietors to an exclusive right of fishery in the tide waters, in front of their lands, must rest, it is apprehended, on custom or local usage variant from the common law. There is then, I conceive, unquestionably a local common law affecting the title of riparian proprietors upon tide waters, and conferring upon them rights and privileges unknown to the common law of England.' In the Court of Errors and Appeals the decision of the Supreme Court in *Gough* vs. *Bell* was affirmed, and the opinion of Chief Justice Green approved. In the opinion of Judge Ogden, who was known in East Jersey as a sound lawyer, the following occurs: 'By the common law of England, the proprietors of lands bordering on navigable tide waters had title to ordinary high water mark, and the soil beyond that line was vested exclusively in the Crown. Proprietors of such lands in New Jersey, from a very early period in her history, have enjoyed, for their individual benefit and in private ownership, privileges upon the shore, adverse to the exercise of the sovereignty of the supreme power, excepting when employed for the protection of the rights of navigation and eminent domain. The origin of such infringement upon the rules of the common law of England has not been satisfactorily traced, but its existence has been repeatedly recognized in legislative enactments, and its enjoyment has been uninterruptedly claimed. One exercise of such right, not supported by the doctrines of the common law of England, regards exclusive fishery in front of his land.'

"I come now to give some extracts from the opinion of Judge Elmer, a most remarkable man, and an extremely able Judge, whose ripe experience, great learning and excellent judgment, have been of much value to New Jersey, in shaping the jurisprudence of the State, on many vital questions. He was a resident of West Jersey during the whole of his long and honorable career, and he knew what he was writing about when he wrote his opinion in the case of *Gough* vs. *Bell*, in the court of Errors and Appeals. He said: 'The question is not what was the common law of England, but what is the common law of this State. That some of



the doctrines of the common law have never been considered applicable to our circumstances and never have been adopted here, and that others have been materially changed by our local usages, is not disputed. We are now to consider whether the rules of the common law, in regard to the ownership of property adjoining the sea or our navigable waters, have been adopted in this State, or whether there is evidence that they never have been in force here, or have been materially changed. An excellency of the system of common law, derived originally from the general custom of the country, is that it is not inflexible as a statute, but may be modified from time to time, as circumstances require.' 'It is conceded,' he says, 'as well by those who contend for the application of the strict rule of the English common law to the shores of navigable waters in this State, as by those who think we have a local common law, on the subject different from that of England, that the owners of the adjoining land in this State have the exclusive right of fishery on such shore.' It was the opinion of Judge Elmer that the right of several fishery in the shore owner had its origin in the uniform practice of the holder of the upland to extend his exclusive right to the soil beyond high water mark. But it matters not how the right originated. The question which concerns us is whether the right of several fishery in the shore owner on the Delaware river existed and does exist. In the Circuit Court of the United States, Judge Baldwin, a man of acknowledged ability, held the same view and said, in *Bennett* vs. *Boggs:* 'It is admitted that from a very early period of the history of the States shore fisheries have been considered private property, capable of being devised and alienated with or separate from the land to which they are annexed, subject to taxation and taxed as other real estate.' This doctrine, so ably set forth by Chief Justice Green in *Gough* vs. *Bell*, has as late as 1870 been approved by the acute and logical mind of the present Chief Justice of this State, so that it may be and must be now considered as established law that there is a right of property in fisheries in the shore owners, and their assigns, on the Delaware river on the Jersey side, and that such right of property has been recognized by the

courts. Had Whitall such property in the fishery in question in 1818 when he made the deed thereof to Christian Faunce? or had Newbold a property in the rights and privileges of fishing he granted to the Faunces in 1834? Was this fishery one that has been recognized as private property? Was it of the class referred to by those learned Judges? It is an ancient fishery, going back of the year 1800, how far back of that time is not proved. The description of the pool of this fishery and accompanying bond have been filed in the Clerk's Office almost every year for over 60 years, commencing almost immediately after the law on that subject was passed, and for over 60 years taxes have been annually paid by the owners on this fishery. It has been operated as a fishery every year. Guided by the opinions of the eminent jurists I have named, and adopting their views, I charge you, as matter of law, that under the evidence the defendant, in the Spring of 1881, when the trespasses are alleged to have been committed by him, had a right, or those under whom he claimed had a right, of fishery there; that plaintiff held his lease subject to such right of fishery, and the defendant is entitled to your verdict, unless, as I before said, you find he did acts which did damage to the plaintiff that were not necessary to his operating the fishery, or which were outside of and beyond the rights and privileges of fishing granted to Christian Faunce in 1818 and 1834 by the then land owners. And if he did commit acts in excess of these rights and privileges, your verdict should be for plaintiff in such amount of damages as you find resulted therefrom.