

New Jersey Court of Errors and Appeals.

ALBERT N. BROWN, plaintiff in error,

v.

THE MORRIS CANAL AND BANKING
COMPANY, prosecutors in certiorari, de-
fendants in error,

} *Writ of error to the Supreme
Court.—Returnable 2d Tues-
day of March, 1858.*

Albert N. Brown, being the owner of lands situated in the township of Bergen, in the county of Hudson, and state of New Jersey, and along New York bay, as herein after in the state of the case described, petitioned the board of freeholders of the county of Hudson to grant him a license to build a dock, wharf, or pier.

The petition was granted, and the board of freeholders authorized a license, which license is dated January 17th, 1855. Thereupon the Morris Canal and Banking Company removed the license, and all the proceedings touching the same, to the Supreme Court, by a writ of *certiorari*, which writ of *certiorari* was directed 10 to the board of chosen freeholders of the county of Hudson, and was made returnable on the first Tuesday of June, 1855.

The cause was argued at the Supreme Court, on the 24th day of February, 1857, before Mr. Henry W. Green, Chief Justice, and Mr. Justice Potts, Mr. Justice Ogden, and Mr. Justice Vredenburg.

At the February term, 1858, the Supreme Court pronounced their judgment, that the license granted by the board of chosen freeholders of the county of Hudson to Albert N. Brown should be set aside. The Chief Justice and Mr. Justice Ogden and Mr. 20 Justice Vredenburg being of opinion that the license should be set aside, and Mr. Justice Potts being of opinion that the license was lawfully granted, and that the *certiorari* should be dismissed,

The following is the state of the case,

New Jersey Supreme Court.

THE STATE, THE MORRIS CANAL AND
BANKING COMPANY, PROSECUTORS,

v.

ALBERT N. BROWN,

*On certiorari to remove a
license granted to Al-
bert N. Brown.*

The following statement shows the substance of the return, and which has been agreed upon as a state of the case.

Albert N. Brown presented his petition under the act entitled, "An act to authorize the owners of lands upon tide waters to build wharves in front of the same."

A notice, dated November 11, 1854, was given by Albert N. Brown, that he would apply for a license, on the twenty-fifth day of December, 1854, to the board of chosen freeholders of the county of Hudson, of which the following is a copy :

"Public notice is hereby given, that the subscriber, being owner 10
in fee of certain lands and premises, situate in the township of
Bergen, in the county of Hudson, and state of New Jersey, being
a tract of land containing about forty-five acres and twenty-two
hundredths of an acre, which is in width, at right angles, eleven
chains and eighteen links, and bounded as follows : southeast, by
New York bay ; southwest, by lot numbered three, in partition
map of property between Jacob Merseles and the heirs of Merseles
J. Merseles ; northwest, by the road which leads from Jersey City
to Bergen Point ; and northeast, by the lands of Tunis J. Van Pelt
and George Vreeland, will apply to the board of chosen freehold- 20
ers of the county of Hudson, on Monday, the twenty-fifth day of
December, eighteen hundred and fifty-four, at the court house at
North Bergen, in said county, at ten o'clock in the forenoon of
that day, for a license to build a dock, wharf, or pier, in front of
the said lands, as the said lands front on New York bay, to extend
beyond the limits of ordinary low water mark into New York bay
aforesaid, which said dock, wharf, or pier shall commence at a
point on the most northeasterly part of the said tract, where the

division line between the lands of George Vreeland and the said tract terminates at high water mark; from thence, running south, twenty-six and a half degrees east, along the continuation of the said line, to a point two hundred feet beyond ordinary low water mark; thence southwesterly, seven hundred and seventy feet, more or less, to a point where the same would intersect the line between the lands of the subscriber and Stephen Vreeland and Mary his wife, extended in the course of the said line into New York bay; thence, along the line between the lands of the subscriber and
 10 Stephen Vreeland and Mary his wife, north, twenty-six and one half degrees west, to high water mark, which dock, wharf, or pier will be seven hundred and seventy feet in length, more or less, and extend as much as two hundred feet beyond low water mark.

ALBERT N. BROWN.

November 11, 1854."

This notice was advertised and published in the manner required by the act.

On the 25th day of December, 1854, Albert N. Brown appeared before the board of chosen freeholders of the county of Hudson,
 20 and presented his petition, of which the following is a copy:

"To the board of chosen freeholders of the county of Hudson.

The petition of Albert N. Brown respectfully sheweth, that your petitioner is the owner in fee of a certain tract of land, containing about forty-five acres and twenty-two hundredths of an acre, situate in the township of Bergen, in the county of Hudson, and state of New Jersey. Said tract is in width, at right angles, eleven chains and eighteen links, and is bounded as follows: southeast by New York bay, southwest by lot number three on partition map of property partitioned between Jacob Merseles and the heirs of Merseles
 30 J. Merseles, northwest by the road leading from Jersey City to Bergen Point, and northeast by land of Tunis J. Van Pelt and George Vreeland.

That your petitioner is, by virtue of his title in such lands, the owner of lands situate on tide waters, and is desirous of building a dock, wharf, or pier in front of the same, to extend beyond the limits of ordinary low water.

That your petitioner has caused a notice of an application for a license to build such dock, wharf, or pier to be given by advertisement inserted for six week in the Jersey City Daily Sentinel and
 40 Advertiser, a newspaper printed and published at Jersey City, in

this state, and to be put up the same space of time in five of the most public places in the neighborhood of said lands, which notice did specify the time and place of such application and the dimensions of the dock, wharf, or pier intended to be built, a copy of which notice is hereunto annexed.

Your petitioner would therefore respectfully ask your honorable body to grant to your petitioner a license to build a dock, wharf, or pier in front of the said lands, as the said lands front on New York bay, to extend beyond the limits of ordinary low water mark into New York bay aforesaid, which said dock, wharf, or pier shall 10 commence at a point on the most northeasterly part of the said tract where the division line between the lands of George Vreeland and the said tract terminates at high water mark; from thence running south, twenty-six and one half degrees east, along the continuation of the said line, to a point two hundred feet beyond ordinary low water mark; thence southwesterly seven hundred and seventy feet, more or less, to a point where the same would intersect the line between the lands of the subscriber and Stephen Vreeland and Mary his wife, extended in the course of the said line into New York bay; thence, along the line between the lands 20 of the subscriber and Stephen Vreeland and Mary his wife, north, twenty-six and one half degrees west, to high water mark, which dock, wharf, or pier will be seven hundred and seventy feet in length, more or less, and extended as much as two hundred feet beyond low water mark.

Dated December 25, 1854.

A. N. BROWN."

The following proceedings then took place before the board:

On the 25th day of December, 1854, the board of chosen freeholders of the county of Hudson met at the court house at North 30 Bergen, in and for the said county. The following named freeholders appeared: Minot C. Morgan, Edmund T. Carpenter, David Smith, Abraham W. Duryea, Samuel A. French, Benjamin S. Taylor, Nehemiah Knapp, William C. Arthur, Harvey M. Soule, Cornelius Shepherd, Mindert Van Horne, William S. Ogden, and George Vreeland.

Albert N. Brown, the applicant, appeared, attended by his counsel.

Ephraim Marsh, esq., president of the Morris Canal and Banking Company, appeared on behalf of the company. One of the 40 notices had been previously served on the said company, that the

said application would be made. Asa Whitehead, esq., appeared as counsel on behalf of Mary, wife of Stephen Vreeland, and Catharine, wife of Garret Vreeland. On the said 25th day of December, 1854, the further consideration of the said application was publicly adjourned to Wednesday, the 17th day of January, 1855, at ten o'clock in the forenoon of that day, at the court house. At the time and place to which the said application was adjourned, the following named freeholders were present, sufficient to constitute a quorum: Minot C. Morgan, Edmund T. Carpenter, David Smith, 10 Abraham W. Duryea, Jacob J. Banta, Benjamin S. Taylor, Samuel A. French, William C. Arthur, Nehemiah Knapp, Cornelius Shepherd, Harvey M. Soule, William S. Ogden, Mindert Van Horne, and George Vreeland.

Joseph P. Bradley, esq., appeared as counsel for the Morris Canal and Banking Company. Mr. Potter, of New York, counsellor at law, appeared for Mary, wife of Stephen Vreeland, and Catharine, wife of Garret Vreeland. Abraham O. Zabriskie and I. W. Scudder appeared as counsel for Albert N. Brown, the applicant; whereupon the applicant, by his counsel, laid before the 20 board of chosen freeholders the following deeds, papers, writings, documents, and exhibits:

Will of Jacob Van Wagenen, dated 19th day of December, 1782, admitted to probate. The following is the material clause in the will: "*Item*, all the rest, residue, and remainder of my estate, real and personal, after my said loving wife's decease, I will and direct be sold by my executors, herein after named, either at public or private sale, as they shall think fit," &c.

Effie Van Wagenen was named executrix, Garret Vreeland, Jacob Van Wagenen, and Guillaume Outwater executors.

30 Jacob Van Wagenen, surviving executor of the last will and testament of Jacob Van Wagenen, to Jacob Merseles, the father, and Merseles Merseles, the son.—Deed dated 22d day of June, 1824. Acknowledged 23d day of June, 1824.—Recorded, in the clerk's office of the county of Bergen, January 11, 1826.

This deed recites the will and the powers conferred, and conveys, for the consideration of seven thousand three hundred dollars, the following described property:

"All that piece or parcel of land situate, lying, and being in the township of Bergen, in the county and state aforesaid. Beginning 40 at a stake on the east corner of said land by York bay, on the line of Samuel Gautier, running from said stake north, twenty-eight degrees thirty minutes west, eighty-one chains and fifty-four links, to

Newark bay; thence returning to said stake, the place of beginning, running from thence along York bay, the several courses, to a stake standing in the cove on the line of Robert Thomson; thence running from said stake along said line north, twenty-eight degrees thirty minutes west, sixty-nine chains thirty links, to Newark bay; thence along said bay until it intersects the first mentioned line, containing one hundred and sixty-five acres. Bounded southwest by land of Robert Thomson, northwest by Newark bay, northeast by lands of Samuel Gautier, southeast by York bay."

Jacob Merseles and wife and Merseles J. Merseles and wife then made the following deed to the Morris Canal and Banking Company :

This indenture, made this second day of February, in the year of our Lord one thousand eight hundred and thirty-five, between Jacob Merseles and Letty his wife and Merseles J. Merseles and Susan his wife, of the township of Bergen, in the county of Bergen, and state of New Jersey, of the first part, and the Morris Canal and Banking Company, of the township of Bergen, in the county of Bergen, and state of New Jersey, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of two hundred and thirty-one dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented, and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey, and confirm, to the said party of the second part, and to their successors and assigns, all that lot, tract, or parcel of land and premises herein after particularly described, situate, lying, and being in the township of Bergen, in the county of Bergen, and state of New Jersey, beginning on the line of land of Robert Thomson, where the same is intersected by the route of the Morris canal, and running northwardly, as said canal runs, according to the course and distance marked on the said map, survey, and field book of said canal, filed in the clerk's office of the county of Bergen, to land of George Vreeland, the same being lot No. 38 on said survey, and is estimated to contain two acres and thirty-one hundredths of an acre, strict measure; the said lot lies in the vicinity of and on the margin of New York bay, between lands of Robert Thomson and George Vreeland, as by reference to said map, survey, and field book will

- more fully appear—together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining; also all the estate, right, title, interest, property, claim, and demand whatsoever of the said party of the first part of, in, and to the same, and of, in, and to every part and parcel thereof—to have and to hold all and singular the above described tract or parcel of land and premises, with the appurtenances, unto the said party of the second part, their successors and assigns, to the only proper use, benefit, and be-
- 10 hoof of the said party of the second part, their successors and assigns, as long as used for said canal. And the said Jacob Merseles and Merseles J. Merseles do, for themselves, their heirs, executors, and administrators, covenant and grant, to and with the said party of the second part, their successors and assigns, that they, the said Jacob Merseles and Merseles J. Merseles, are the true, lawful, and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging, and that the said land and premises, or any part thereof, at the time of sealing and delivery of these presents, are not en-
- 20 cumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever; and also, that the said party of the first part now have good right, full power, and lawful authority to grant, bargain, sell, and convey the said land and premises in manner aforesaid, and also, that they, the said Jacob Merseles and Merseles J. Merseles, will warrant, secure, and for ever defend the said land and premises unto the said party of the second
- 30 part, their successors and assigns, for ever against the lawful claims and demands of all and every person and persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

In witness whereof, the said Jacob Merseles and Letty his wife and Merseles J. Merseles and Susan his wife have hereunto set their hands and seals, the day and year first above written.

JACOB MERSELES,	[L. S.]
her	
LETTY $\bowtie$ MERSELES,	[L. S.]
mark	
MERSELES J. MERSELES,	[L. S.]
SUSANNA MERSELES,	[L. S.]

The words "heirs" erased, and "successors" substituted, when applied to the party of the second part, and the word "forever" erased in the *habendum* clause, before execution.

Signed, sealed, and delivered in the presence of

GARRET SIP.

Merseles J. Merseles died 21st March, 1837. Jacob Merseles died 14th March, 1846.

Merseles J. Merseles, the person named as Merseles Merseles in the deed from Jacob Van Wagenen, executor, &c., made his will, dated 20th March, 1837, which was admitted to probate 13th July, 10 1837.

The farm in question passed under the residuary clause in this will, *viz*: "All the rest of my real estate, including a tract of cedar swamp adjoining the property of George De Mott, I give and bequeath to be equally divided between my children."

This devise passed the undivided half of the farm.

The children of Merseles J. Merseles were—

1. Jacob M. Merseles.
2. Susan, married to Thomas Anderson.
3. Catharine, who married Garret Vreeland.
4. Mary, who married Stephen Vreeland.

20

They are all alive, and all now residing in the county of Hudson.

Jacob Merseles, one of the grantees of Jacob Van Wagenen, executor, &c., and who survived Merseles J. Merseles, presented his petition to the Orphans Court of the county of Bergen for partition, he being tenant in common with his son's children, the son being called Merseles Merseles.

This petition was presented January 29, 1838. By these proceedings in partition, the farm in question was awarded to Jacob Merseles, the grandfather and petitioner, and called lots one and 30 two.

Lots three and four were awarded to Merseles J. Merseles, he being deceased, and went to his children.

The partition sets forth, that lots numbered one and two are one share, and balloted to Jacob Merseles, and the lots Nos. three and four is the second share, and balloted to Merseles J. Merseles. First lot, No. one, is the northeast side of the tract, and on the southeast side of the main road leading from the town of Bergen to Bergen Point, and begins at a stake standing in the division line of said tract, and on the west side of the Morris canal; then along 40 said canal, north, forty-two degrees east, six chains and thirty-seven links; then north, forty-nine degrees three-quarters east, five chains

and forty-three links, to the line of land of George Vreeland; then along his line, north, twenty-seven degrees thirty minutes west, forty-one chains and forty-six links, to the centre of said main road; then along said road, south, thirty-nine degrees thirty minutes west, two chains and twenty-seven links; then south, thirty and one-quarter degrees west, ten chains and seventy-two links, to a stake standing in the division line; then south, twenty-seven degrees thirty minutes east, to the place of beginning, containing about forty-five acres and twenty-two hundredths of an acre; said
 10 lot is in width, at right angles, eleven chains and eighteen links; is bounded as follows, to wit, southeast, by New York bay; southwest, by lot No. three, allotted by ballot to Merseles J. Merseles; northwest, by the aforesaid road, and northeast by land of Tunis J. Van Pelt and George Vreeland."

This and the other tracts are shown by the map annexed to the partition.

Jacob Merseles, the grandfather, agreed with Jacob M. Merseles, that he, the grandfather, Jacob Merseles, would convey to the grandson, Jacob M. Merseles, lots numbered one and two in
 20 the partition set forth, provided Jacob M. Merseles would convey lots three and four to his brothers and sisters, which was accordingly done.

The grandfather's deed was as follows :

"This indenture, made the twenty-first day of June, A. D. in the year one thousand eight hundred and thirty-eight, between Jacob Merseles, of the township and county of Bergen, and state of New Jersey, of the first part, and Jacob M. Merseles, of the same place, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of one thousand dol-
 30 lars lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, and for natural love and affection, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns for ever, all those two certain pieces, parcels, or tracts of land and premises, situate, lying, and being in the township of Bergen, and county of Bergen, and state
 40 of New Jersey, and which are hereafter more particularly set forth and described, *viz* : The first lot or parcel is adjoining the Morris canal on the east, and starting at a stake near the centre of

the farm formerly owned by the said party of the first part and Merseles J. Merseles in his lifetime, as tenants in common, and running thence a northerly course along said canal, north, forty-two degrees east, six chains and thirty-seven links; thence north, forty-nine degrees and forty-five minutes east, five chains and forty-three links; thence north, twenty-seven degrees and thirty minutes west, forty-one chains and forty-six links, to the centre of the road; thence south, thirty-nine degrees and thirty minutes west, two chains and twenty-seven links; thence south, thirty degrees and fifteen minutes west, ten chains and seventy-two links, along said 10 road to the centre of the said farm; thence south, twenty-seven degrees and thirty minutes west, thirty-nine chains and thirty links, to the said canal, the place of starting, containing forty-two acres and eighty-five hundredths of an acre. The second lot, or parcel of land, is situate on the northerly side of the said road leading to Bergen Point and part of the said farm, and starting twenty-five links northerly of the line of the lands of John Waters, and running thence, southerly, to said Waters' line along said road; thence north, twenty-seven degrees and a half west, five chains and thirty-eight links; thence south, sixty-two and half degrees west, six 20 chains and eighty-five links, to the lands of Stephen Vreeland; thence along said Vreeland's land, north, twenty-seven degrees and a half west, twenty-five chains and fifty-five links, to the Morris canal, near the Newark bay; thence along said canal, north, forty-one degrees and fifteen minutes east, one chain and eighty-two links; thence north, thirty-one degrees and ten minutes west, one chain and sixty-five links; thence north, twenty-one degrees and thirty-five minutes east, five chains and fifty links; thence south, twenty-seven degrees and thirty minutes east, thirty-five chains and eighty-five links, to the place of beginning, containing twenty-acres 30 and two-hundredths of an acre; also all my right, title, and interest of, in, and to all and singular the said farm aforesaid, containing about one hundred and thirty-one acres and forty-one hundredths of an acre, be the same more or less, to the said Jacob M. Merseles, his heirs and assigns for ever, in fee simple, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, dower, and right of dower, property, possession, claim, and demand whatso- 40 ever, as well in law as in equity, of the said parties of the first part of, in, and to the above described premises, and every part

and parcel thereof, with the appurtenances, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns for ever. And the said Jacob Merseles and his heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs, and assigns, and against the said parties of the first part, his heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant, and by these presents for
 10 ever defend. In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JACOB MERSELES, [L. S.]
 [L. S.]

The words "for natural love and affection" were interlined, before executing, between 9th and 10th lines, and four words in the 4th line were erased before executing.

Sealed and delivered in the presence of

PETER BENTLEY.

20 To carry out the agreement, as above stated, between Jacob M. Merselis and his grandfather, the following deed was made:

Jacob M. Merselis and wife to Susan Anderson, wife of Thomas Anderson, Catharine Vreeland, wife of Garret Vreeland, and Mary Merselis. Deed dated March 27, 1841. Recorded August 20, 1853, Book 32 of Deeds for Hudson county, pages 562, &c.

This conveyed lots 3 and 4, in partition described and shown on the partition map; not deemed material to set forth at length, but, if necessary, can be referred to.

Jacob M. Merselis then conveyed to Albert N. Brown, the ap-
 30 plicant for the license.

Jacob M. Merselis and Sarah his wife to Albert N. Brown. Deed dated August 1, 1854. Acknowledged August 2, 1854. Recorded the same day.

This indenture, made the first day of August, in the year one thousand eight hundred and fifty-four, between Jacob M. Merselis and Sarah his wife, of the township of Bergen, in the county of Hudson, and state of New Jersey, party of the first part, and Albert N. Brown, of the city, county, and state of New York, party of the second part, witnesseth, that the said party of the first part,

for and in consideration of the sum of forty thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part for ever released and discharged from the same by these presents, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and, by these presents, do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns for ever, all that tract or parcel of land and 10 premises herein after particularly described, situate, lying, and being in the township of Bergen, in the county of Hudson, and state of New Jersey, commencing on the northeast corner of said tract where the eastern boundary line which divides said tract from lands of George Vreeland, running northwesterly, intersects the Jersey City and Bergen Point plank road; thence along said plank road, south, sixty-three and one half degrees west, seven hundred and thirty-nine feet, more or less, to the centre of the lane on the west side of said tract; thence, running along the centre of the lane, south, twenty-six degrees east, eighteen hundred and eighty-five 20 feet, more or less, to the waters of New York bay; thence along the New York bay seven hundred and seventy-five feet, more or less, to where the line which separates the said tract from the lands of George Vreeland comes down to and enters the waters of the New York bay; thence north, twenty-six and one half degrees west, seventeen hundred and two feet, more or less, to the place of beginning, containing in all twenty-nine acres and eighty-two rods, more or less, excepting out of the said tract certain lands mentioned and described in a deed, made by Jacob Merseles and Letty his wife and Merseles J. Merseles and Susanna his wife, to 30 the Morris Canal and Banking Company, which deed bears date the second day of February, eighteen hundred and thirty-five, and was recorded in the clerk's office of the county of Bergen the twenty-ninth day of July, eighteen hundred and thirty-seven, in Book W 3 of Deeds, pages 314, 315, and 316, to which deed, or the record thereof, for greater certainty reference is made, which said tract of land hereby conveyed is bounded as follows: on the north by the said plank road, on the west by lands of Stephen Vreeland and Mary his wife, on the south by New York bay, on the east by lands of George Vreeland; together with the right and 40 estate of the party of the first part to the middle of the plank road, for the distance that the said plank road runs on the northerly side

of the said land, subject to any easement thereon, and also together with the right of the party of the first part to the lands under water on the southerly side of the said tract, and south of the Morris canal, to the middle of New York bay, or as far as the right of the party of the first part extends; the tract of land hereby conveyed being a portion of lot number one, as described and set forth in certain proceedings for partition had in the Orphans Court of the county of Bergen, in the year eighteen hundred and thirty-eight, between Jacob Merseles and others, and being also a portion of the

10 property described in the deed from Jacob Merseles to Jacob M. Merseles, dated the twenty-first day of June, eighteen hundred and thirty-eight, and recorded June 5th, 1839, in Book A 4 of Deeds for Bergen county, pages 72, 73, 74: together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the same, and every part

20 and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof for ever. And the said Jacob M. Merseles, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree, to and with the said party of the second part, his heirs and assigns, that the said Jacob M. Merseles, at the time of the sealing and delivery of these presents, is lawfully seized in his own right of a good, absolute, and indefeasible estate of inheritance in fee simple of and

30 in all and singular the above granted, bargained, and described premises, with the appurtenances, except as stated in description, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid. And that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, their heirs or assigns, or of any other per-

40 son or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments,

taxes, assessments, and encumbrances, of what nature or kind soever, except as conveyed to said canal company; and also, that the said party of the first part, and their heirs, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest of, in, or to the herein before granted premises, by, from, under, or in trust for him or them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every 10 such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns for ever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably devised, advised, or required; and the said Jacob M. Merseles; his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against 20 the said party of the first part, and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant, and by these presents for ever defend. In witness whereof, the party of the first part have hereunto set their hands and seals the day and year first above written.

JACOB M. MERSELES, [L. S.]

SARAH MERSELES, [L. S.]

Signed, sealed, and delivered in the presence of

ROBERT GILCHRIST, Jr.

Albert N. Brown, the applicant, then rested.

30

Thereupon the Morris Canal and Banking Company, on their part, to sustain their objections, presented the following papers:

1. *Proceedings upon arbitration between the company and certain landholders.*

Whereas, the Morris Canal and Banking Company, under and by virtue of the provisions of the act entitled, "An act to incorporate a company to form an artificial navigation between the Passaic and Delaware rivers, and the act entitled, "An act to authorize the Morris Canal and Banking Company to extend the Morris

canal to the waters of the Hudson, have caused the route of the said canal to be located, and a map, survey, and field book of the route of the extension of the said canal to be made, and duly deposited and filed in the clerk's office of the county of Bergen, pursuant to the requirements of the said act; and whereas the Morris Canal and Banking Company have, pursuant to the provisions of their charter, made an application to the chief justice of the Supreme Court, who has appointed Isaac Southard, Charles Parker, and John T. McDowell, esquires, appraisers, to discharge the
 10 duties required of them under the said act, and the acts supplemental and additional thereto, and are now convened and prepared to enter upon the duties of their appointment:

And whereas it is suggested that the owners, proprietors, and parties interested in the lands and premises required to be taken for the uses of the said company, for the purposes of the extension of the said canal as aforesaid, are desirous, and the Morris Canal and Banking Company are also desirous to ascertain and settle, by amicable arrangement by arbitrators, the value of the lands so required to be taken for the uses of the company, and the
 20 damages incidental to and which may be sustained by the said several owners, proprietors, and parties interested therein, by reason of the construction of the said extension of the canal, and for that purpose they have severally agreed to submit the said matter to a friendly arbitration, consisting of the said three appraisers above named, and two resident citizens of the county of Bergen.

Now be it known, that the Morris Canal and Banking Company do hereby agree to and with the several owners, proprietors, and parties, severally interested in and claiming the lands through which the said extended canal is located, and the said several own-
 30 ers, proprietors, and parties interested in and owning, occupying, and possessing the said several lots or tracts of land, and who have made themselves parties hereto, by signing and sealing this instrument, do hereby severally agree, to and with the Morris Canal and Banking Company, to submit to the award and determination of Isaac Southard, John T. McDowell, Charles Parker, John A. Berry, and Peter M. Ryerson, esquires, or of any three or more of them, to ascertain and determine the compensation and damages which each of the landholders and owners and proprietors of the said lands shall receive for the said lands occupied by the said
 40 canal, and the damages incidental to and caused and to be caused by the location and construction of the said canal; and for the purpose of making a final settlement of all questions connected there-

with, it is hereby agreed between the said several parties as follows, to wit :

First. The said arbitrators, or a majority of them, shall forthwith proceed to view the several lots or tracts of land intersected or taken and occupied by the said canal between the eastern shore of the Passaic river and the bay of New York, and from their own view and inspection, and from the statements and evidence adduced before them, shall make an award, assessment, and appraisal of the value of the land taken from each of the said several lots, and of the damages which shall be done to the same, 10 and which shall be paid to the owners of the said lots by reason of the construction of the said canal and its various works, and the award, assessment, and appraisal made by the said arbitrators, or a majority of them, shall be final and conclusive.

Second. The Morris Canal and Banking Company shall pay or tender to the said several owners, if resident and to be found in this state, the sum awarded for the land and damages aforesaid before they enter upon the said lands, or to proceed to construct their said canal.

Third. Upon payment, or tender of payment, of the sum 20 awarded for the land taken and occupied, and damages done to each particular lot, the Morris Canal and Banking Company, by their engineers, contractors, workmen, agents, and servants, shall have full right and authority to enter upon the same, and to construct their said canal in the manner authorized by the aforesaid acts, doing no unnecessary damage or injury to the adjacent lands.

Fourth. The Morris Canal and Banking Company shall have the right to deposit any surplus earth or stone, or other matter produced by the excavation and construction of the canal, upon the adjacent lands, occupying no more of the adjacent lands than may 30 be reasonably necessary for that purpose; and the said Morris Canal and Banking Company shall pay or tender to the said several owners, at such rate per acre for the lands thus used as shall be fixed in and by the award of the aforesaid arbitrators, the said company having the right to the occupancy of the adjacent lands for the aforesaid purpose of depositing thereon the surplus earth, but the title thereto to remain in the landholders; and it is further agreed, that the said company do give to the said landholders, respectively, on the making of this award, satisfactory personal security, to be determined on, in case of disagreement by the parties, 40 by the aforesaid arbitrators, that they will make payment to the landholders, severally, for the lands so occupied within five days af-

ter the completion of the canal through or across the lands of each owner or proprietor adjacent to the lands so occupied as aforesaid; and the earth and materials so placed on the adjacent lands are to remain as placed by the company, and are not to be removed or disturbed by the landholders, and the said company shall have the right to preserve and maintain the same.

Fifth. No action of trespass or other action shall be brought against the said company, or their agents or servants, for any act done by them fairly and lawfully within the spirit and meaning of
 10 this submission and the aforesaid acts; and if any such action be brought or instituted, the said company, or their agents, workmen, or servants, may plead this submission and agreement by way of release to such action, or give the same in evidence in any other proper manner, as a bar to such action.

Sixth. Upon the appraisement of the damages for the said lands, and for all the incidental damages to the adjacent lands caused by the construction of the said canal and its works, and upon the award made, and payment or tender of payment of the sums awarded in each case, the said several owners do hereby engage
 20 and agree thereupon to convey to the said company the land taken as aforesaid, to be held by the company as long as the same shall be used for the purposes of the canal, and do consent and agree that the said company shall also thereupon take immediate possession thereof, and hold the same for the uses and purposes of the canal, not including in such conveyance, however, the adjacent lands to be occupied as aforesaid in depositing the surplus earth, stone, or other matter produced by the excavation and construction of the canal as afore mentioned.

Seventh. Nothing in this agreement and submission contained
 30 shall extend to any damages which may arise under the seventh section of the act to incorporate a company to form an artificial navigation between the Passaic and Delaware rivers, nor shall the same affect the rights which the parties hereto enjoy under the third section of the act entitled, "An act to authorize the Morris Canal and Banking Company to extend the Morris canal to the waters of the Hudson, except as to the portion of the canal between the Hackensack river and Droyers Point, where the number and location of the bridges to be made across the canal shall be conclusively and definitely fixed by the aforesaid arbitrators, and
 40 designated by them in their award; and no other bridges than those thus designated shall be required within the portion of the canal above mentioned.

In testimony whereof, the parties hereto have interchangeably

set their hands and seals, the Morris Canal and Banking Company, by affixing their corporate seal and the signatures of their president and secretary, and the owners and proprietors of the lands, by placing their respective hands and seals to this instrument, this fifteenth day of August, in the year of our Lord one thousand eight hundred and thirty-four.

JAS. B. MURRAY, *Pres't.*

[*Morris Canal and Bank'g Co's seal.*]

ROBT. GILCHRIST,

Cash. and Sec'y of the Morris Canal and Banking Co. 10

Sealed and delivered in the presence of

EPHM. BEACH.

JASPER CADMUS,	[L. S.]	GEORGE VREELAND,	[L. S.]
DAVID VAN BUSKIRK,	[L. S.]	MERSELES J. MERSELES,	[L. S.]
DANIEL CRANE,	[L. S.]	MINDERT VAN HORNE,	[L. S.]
CORNELIUS GARRABRANTS,	[L. S.]	JOHN C. VAN HORNE,	[L. S.]
GEORGE NEWKIRK,	[L. S.]	GARRET VREELAND,	[L. S.]
MINDERT GARRABRANTS, jr.	[L. S.]	JACOB VREELAND,	[L. S.]
DANIEL VREELAND,	[L. S.]	STEPHEN VREELAND,	[L. S.] 20
JOHN OUTWATER,	[L. S.]	JOHN E. POST,	[L. S.]
NICHOLAS VREELAND,	[L. S.]	MICHAEL M. VREELAND,	[L. S.]
BENJAMIN F. WELSH,	[L. S.]	WALTER WOOD,	[L. S.]
JOHN M. VREELAND,	[L. S.]	GARRET WANTERS,	[L. S.]
HENRY C. VAN RIPER,	[L. S.]	his	
JOHN KELLY,	[L. S.]	NATHANIEL X EARLE,	[L. S.]
JACOB ACKERMAN,	[L. S.]	mark	
HENRY H. BRINKERHOFF,	[L. S.]	MINDERT VREELAND,	[L. S.]
NICHOLAS J. PRIOR,	[L. S.]	THOMAS RICHARDS,	[L. S.]
WILLIAM ANDERSON,	[L. S.]	RICHARD VREELAND,	[L. S.] 30
his		JACOB MERSELES,	[L. S.]
THOMAS X JACKSON,	[L. S.]	VALENTINE MOTT,	[L. S.]
mark		by Samuel Cassedy, his att'y in fact.	
his			
JOHN X JACKSON,			
mark			

The above signatures, amounting to thirty-six landholders, was signed, sealed, and delivered in my presence.

EPHM. BEACH.

It is further agreed between the undersigned to submit to the award and determination of the above named Isaac Southard, 40

John T. McDowell, Charles Parker, John A. Berry, and Peter M. Ryerson, as to the damage sustained by Merseles J. Merseles to his water privileges and mill seat, in consequence of the construction of the canal above alluded to, and by which award the undersigned do hereby covenant with each other mutually to be bound.

In testimony whereof, the Morris Canal and Banking Company has caused their seal and the signatures of the president and secretary to be attached, and Merseles J. Merseles has hereunto set his hand and seal, this 15th day of September, 1834.

10

MERSELES J. MERSELES, [L. S.]

JAS. B. MURRAY,

President Morris Canal and Banking Co.

[L. S.]

R. GILCHRIST,

Sec'y Morris Canal and Banking Company.

Signed, sealed, and delivered in the presence of

EPHM. BEACH.

It is hereby further agreed, to, by, and between the parties to the within agreement, that Peter M. Ryerson shall be no longer one of the said arbitrators, in consequence of his having become
20 one of the directors of the Morris Canal and Banking Company since the said agreement was executed. And it is likewise further agreed to, as aforesaid, that John K. Goodman be substituted in his place, with equal powers and duties to the other arbitrators in the said agreement named; and that an award, when made, shall be as final and conclusive on both parties as though the said John K. Goodman had originally been made an arbitrator with the said Isaac Southard, John T. McDowell, Charles Parker, and John A. Berry.

Witness our hands and seals, this 16th day of September, 1835.

30

MERSELES J. MERSELES, [L. S.]

R. GILCHRIST, [L. S.]

Cashier of the Morris Canal and Banking Co.

Sealed and delivered in the presence of

H. V. WAGENEN.

To all persons to whom these presents shall come or concern, we, Isaac Southard, John T. McDowell, Charles Parker, John A. Berry, and Peter M. Ryerson send greeting:

Be it known, that in pursuance of a certain agreement and submission, hereunto annexed, and bearing date the fifteenth day of

August, eighteen hundred and thirty-four, and executed by the Morris Canal and Banking Company, of the one part, and the several owners, proprietors, and parties interested in and occupying and possessing the several tracts or lots of land taken and occupied by the said canal, in the extension thereof to the waters of the Hudson, the said extended canal lying between the eastern shore of the Passaic river and the bay of New York, as by the said agreement and submission will fully appear, we, the said Isaac Southard, John T. McDowell, Charles Parker, John A. Berry, and Peter M. Ryerson, the arbitrators in the said submission named, 10 having met, in the presence of the parties, at Jersey City, in the county of Bergen, and first severally been duly sworn according to law in each of the several cases and claims submitted to us by the several persons and parties to the said submission, and which are herein after awarded upon and decided by us, and being attended by the counsel of the several parties, or the parties themselves, and having duly taken upon ourselves the burthen of the said arbitration, did proceed to view the several lots or tracts of land intersected or taken and occupied by the said canal, between the eastern shore of the Passaic river and the bay of New York, 20 and from our own view and inspection; and from the statements and evidence adduced before us, and having duly considered the premises, we do make this our award, assessment, and appraisement of the value of the land taken from each of the said several lots, and of the damages which shall be done to the same, and which shall be paid to the owners of the said several lots by reason of the construction of the said extended canal and its various works, as follows: We do award, adjudge, and determine, that the Morris Canal and Banking Company shall pay to the landholders, severally, for the value of the land taken from each of the 30 several lots for the said canal and for the damages to the said land, and also for the land which the said Morris Canal and Banking Company shall occupy for the purpose of depositing any surplus earth or stone, or other material, produced by the excavation and construction of the said canal, as follows:

Lot No. 17. To Merseles J. Merseles, for fourteen hundredths of an acre, fourteen dollars; for incidental damages, nothing; for all land covered by any material of excavation on lot No. 17, other than what is included in the survey of the canal, at the rate of one hundred dollars by the acre.

No. 26. To Merseles J. Merseles, two acres and ten hundredths of an acre, two hundred and ten dollars,

For incidental damages, three hundred dollars,	\$300
Total, five hundred and ten dollars,	\$510
No. 38. To Merseles J. Merseles, for two acres and thirty-one hundredths of land, two hundred and thirty-one dollars,	231
For incidental damages, seventeen hundred and sixty-nine dollars,	1769
10 Total, two thousand dollars,	\$2000

The submission in relation to the tide mill and privileges of Merseles J. Merseles, appended to the general submission, having been subsequently made, and the hearing not being completed, no award is now made thereon, and the consideration of this matter is postponed until the first day of April next, after which time we, the arbitrators, will meet at Jersey City, on such day as we shall be notified thereto by ten days' previous notice from either party, the said party having given the like notice to the opposite party; this arrangement having been made by agreement of parties interested.

We do further award, adjudge, and determine, that the canal company erect three bridges across the canal, of the description required by their charter, between the Hackensack river and Drover's point, and that the location of said bridges be as follows: one at the outlet into the Hackensack river, on the lands of Jasper Cadmus, marked on the map and field book as lot No. 1; one on the land of Jane Van Riper, marked on the said map and field book as lot No. 10; and the third and last on the land of Valentine Mott, marked on said map and field book as lot No. 18.

30 And the parties to the said submission, having disagreed upon the personal security to be given by the said canal company to the said landholders for the payment to the landholders, severally, for the lands to be occupied by the said canal company for the purpose of depositing any surplus earth or stone, or other matter produced by the excavation and construction of the canal, upon the adjacent lands, in the manner required by the aforesaid submission, we do award, adjudge, and determine, that the personal security which the said canal company shall give to the said landholders for the purposes aforesaid, be Archibald McIntyre, esquire, of the city
40 of New York, which security is to be given to the landholders, respectively, as required by the aforesaid submission.

In witness whereof, we, the said Isaac Southard, John T. Mc-

Dowell, Charles Parker, John A. Berry, and Peter M. Ryerson, arbitrators as aforesaid, have hereunto set our hands and affixed our seals, this nineteenth day of September, in the year of our Lord one thousand eight hundred and thirty-four.

ISAAC SOUTHARD, [L. S.]

JOHN T. McDOWELL, [L. S.]

CHARLES PARKER, [L. S.]

JOHN A. BERRY, [L. S.]

PETER M. RYERSON, [L. S.]

Signed, sealed, and delivered in the presence of

10

EPHM. BEACH,

JOHN P. JACKSON.

Whereas the Morris Canal and Banking Company, by Robert Gilchrist, their cashier, did, on the fifteenth day of August, in the year of our Lord one thousand eight hundred and thirty-four, enter into bonds and submission with certain individuals, proprietors and landholders, for the adjustment of the value of the land and damages to be taken and occupied by the extended canal, located between the eastern shore of the Passaic river and the bay of New York, by which it was agreed that Isaac Southard, John T. 20 McDowell, Charles Parker, John A. Berry, and Peter M. Ryerson should be the arbitrators, with authority to decide upon the same, and to award the amount of damage and value of the land of each individual. And whereas, by a supplemental agreement, entered into by the said company, by Robert Gilchrist, their cashier, with Merseles J. Merseles, on the fifteenth day of September, one thousand eight hundred and thirty-four, it was further agreed, that the award and determination of the said arbitrators or appraisers should determine and settle the damages sustained by the said Merseles J. Merseles to his water privileges and mill site, in con- 30 sequence of the location and construction of the said extended canal above alluded to, by which award they agreed each to be bound to abide; and whereas the said arbitrators as aforesaid did decide and determine in all the cases submitted to them by the first submission, as will fully appear by the submission and award hereunto previously annexed, the award bearing date the nineteenth day of September, one thousand eight hundred and thirty-four, after which award and determination the arbitrators did adjourn from time to time until the fourteenth day of September, one thousand eight hundred and thirty-five, when they met, in pur- 40

suance of such adjournments, at the house of Freeman Anderson, at Jersey City, at which time and place the parties attended, Merseles J. Merseles for himself, and Robert Gilchrist for the said company, at which time and place the parties did enter into a further agreement (in consequence of Peter M. Ryerson, one of the arbitrators, having since his appointment become a stockholder and director in the said company, and thereby rendered himself incompetent to sit as an arbitrator,) it was therefore further agreed, by and between the said company, by Mr. Robert Gilchrist, their
 10 cashier, for the company, and Merseles J. Merseles for himself, that John K. Goodman should be substituted, as an arbitrator, in the place and stead of the said Peter M. Ryerson, which further agreement was executed on the sixteenth day of September, one thousand eight hundred and thirty-five, by the said parties, and is annexed to and made a part of the agreement before entered into between the present parties. And whereas, in consequence of the power and authority given by the aforesaid agreements and submission, the arbitrators were severally sworn according to law, and then organized and proceeded to the discharge of the duties en-
 20 joined upon them, the parties, respectively, appeared before them, Robert Gilchrist, for the company, and Merseles J. Merseles, for himself, and after examining the witnesses produced under oath, and hearing the allegations of the parties, the arbitrators then came to the following determination, that is to say: We do award and order, that the damage done to the water privileges and mill site of Merseles J. Merseles we assess and appraise at two thousand dollars, and do order and direct that that sum be paid by the Morris Canal and Banking Company to the said Merseles J. Merseles, in full discharge for the injuries sustained by him in consequence of
 30 the location and construction of the said extended canal, &c., in conformity with the submission.

In testimony whereof, the said Isaac Southard, John T. McDowell, Charles Parker, John A. Berry, and John K. Goodman, arbitrators as aforesaid, have hereunto set our hands and affixed our seals, this seventeenth day of September, in the year of our Lord one thousand eight hundred and thirty-five.

ISAAC SOUTHARD,	[L. s.]
JOHN T. McDOWELL,	[L. s.]
CHARLES PARKER,	[L. s.]

40 Signed, sealed, and delivered in the presence of

GEORGE W. HENDERSON.

Received from the Morris Canal and Banking Company, this eighteenth day of October, 1834, the sums set opposite to our respective names, in full for the amount awarded by the arbitrators, under the submission hereunto annexed, for lands and incidental damages by reason of the canal passing through our land, respectively, as appears by the preceding award of the said arbitrators:

Number.	Amount.	Signatures.
No. 17 and 26.	Five hundred and forty dollars, \$540.	MERSELES J. MERSELES, JACOB MERSELES.

Received from the Morris Canal and Banking Company two 10 thousand dollars, being in full for the amount awarded to us by the arbitrators, under the submission hereto annexed, for land and incidental damages, by reason of the Morris canal passing through our land, as appears by the preceding award of the arbitrators,

No. 38.—Jersey City, February 17th, 1835.

—————
\$2000.
—————

JACOB MERSELES,
MERSELES J. MERSELES.

Name of landholder.	No. lot.	Quantity of land.	Price per acre.	Amount.
Merseles J. Merseles.	17	0.22	\$100	\$22.00 (paid)

Robert Gilchrist was then called, but not sworn, and was examined. He was formerly the cashier of the Morris Canal and Banking Company. A paper was shown him, purporting to be the minutes of the meeting of landholders. This paper was in his handwriting. [The admission of this paper in evidence was objected to on the part of the applicant.] By this paper it appeared, that if the outside route was adopted, Merseles Merseles would claim \$2700.

Upon being cross-examined, he says—He does not remember anything about the meeting. There were two routes in contemplation, the inside route, which went west of the house, and a front or 30 outside route, which went along the bay. He supposes that Merseles would claim more damages for going in front of his house than back of his house; the matter about the mill site and the water right was separate from the property here, the mill property being at a distance from the point now in controversy.

Papers referred to by Robert Gilchrist.

"The following is the result of the meeting with landholders, between the Passaic river and Jersey City, June 18th, 1834:

Myndert Garraabrants asks \$150 for 1 acre and .91, or about \$75 per acre, for his salt marsh.

Myndert and John G. Van Horne want \$600 per acre for upland, \$200 per acre for salt marsh east of Bergen ridge, and \$100 for marsh west of said ridge, and \$200 for stream of water near their house.

Myndert Vreeland asks \$900 per acre for upland, and \$150 for marsh, \$200 per acre all round, if the canal is located in Cat-tail hollow; \$100 per acre wood land on Newark bay, he to take off 10 the wood; \$300 damages for using the creek himself and brothers.

Garret Vreeland, \$200 per acre for marsh below his house, and \$100 per acre for marsh near old ferry, if barrack is not destroyed; \$100 per acre for upland near Tin's falls; this is part upland and part the beach, the wood to be taken off by him.

Nicholas Vreeland asks \$200 per acre for salt marsh below his house, and near Van Horne's.

Michael Vreeland asks \$125 per acre for marsh near his house.

John M. Vreeland, \$100 per acre, and \$50 per acre for strip outside.

20 Richard Vreeland, \$200 per acre for marsh, and \$150 per acre, if the creek is kept open as good as it now is.

Stephen Vreeland, \$150 per acre for marsh east of Bergen ridge, and \$100 per acre for that on Newark bay.

Jacob Vreeland will give all his lands, if the company will allow him to use the water from the canal for milling purposes, sufficient for one pair of stones for grinding, and one pair for cracking, and do all fencing besides; if the water privilege is not granted to him, he must have \$500 per acre for his upland, and \$200 per acre for marsh, and all fencing and damages.

30 George Vreeland asks \$500 per acre for his upland, and \$30 per acre for lot of marsh between the rivers, if the whole ten acres is taken, and \$50 per acre if only part is taken; \$50 for marsh west Bergen ridge.

Daniel Vreeland, \$200 per acre for salt marsh; we take .11 of an acre.

Jasper Cadmus will take no less than \$400 for the quantity we want, 1.70 acres.

Merseles Merseles asks \$400 per acre for land, if the inside route is adopted, and \$150 for a spring, which will be destroyed.

40 If the front route is adopted, he will claim double as much, or \$2700; this is for land covered by water.

Jacob Merseles, \$200 per acre for his meadow on the Newark bay.

Henry Van Riper, \$350 for land and damages, .34 of an acre.

William Anderson, colored man, \$300 per acre, marsh.

George Newkirk asks \$200 for what is wanted, .37 of an acre, or he will take \$300 for all he owns—between six and seven acres.

Garret Waters, \$200 per acre for marsh on Newark bay, or \$150 for the lot—about $1\frac{3}{4}$ acres.

Benjamin F. Welsh, \$200 per acre for what we want, or \$100 per acre, if we take his 4 acres.

10

Walter Wood, \$200 per acre, marsh, Newark bay.

John Outwater, \$200 per acre, same place.

John E. Post, \$250 per acre, same place.

Earl and Wood, \$200 per acre, marsh, same place.

Cornelius Garrabrants, \$75 per acre for his marsh, east and west of Bergen ridge.

Robert Thompson, James Conck, Brinkerhoff, did not attend the meeting, June 21st.

Robert Thompson, who asks \$15,000 for his land, wanted for the use of the company 4 acres upland, and 2.23 acres of marsh, all 20 necessary bridges and damages besides. This is his charge, provided the inside route is adopted; should the front route be adopted he would ask double that sum, but says we shan't come there at all.

June 21st, I called upon Daniel Crane, who asks \$2000 for so much of his land and land covered by water as is wanted for the canal, and the consequent damage to him by reason of the canal being located through his property."

The maps will show that the larger portion of the outer or sea wall of the canal is below high water mark.

For a small distance, the sea wall is above high water mark, and 30 marshy land intervenes between the sea wall of the canal and high water mark.

The freeholders ordered a license, which has been signed according to the statute, and recorded in the clerk's office of the county of Hudson.

The following is the substance of the license, leaving out the recitals:

Now, therefore, we, the board of chosen freeholders of the county of Hudson, do, by virtue of the power and authority in us vested by the acts of the legislature in such case made and provided, hereby grant a license to the said Albert N. Brown to build

- a dock, wharf, or pier, of the following dimensions, to extend beyond the limits of ordinary low water mark into New York bay aforesaid, which said dock, wharf, or pier shall commence at a point on the most northeasterly part of the said tract, where the division line between the lands of George Vreeland and the said tract terminates at high water mark; from thence running south, twenty-six and half degrees east, along the continuation of the said line, to a point two hundred feet beyond ordinary low water mark; from thence, by a line to be drawn in a southwesterly direction,
- 10 seven hundred and seventy feet, more or less, and at right angles with the last mentioned line, as continued till the same would intersect the line between the lands of said Brown and Stephen Vreeland and Mary his wife, extended, in the course of the same, into New York bay; thence, along the line between the lands of Albert N. Brown and Stephen Vreeland and Mary his wife, as extended, north, twenty-six and one half degrees west, to high water mark, &c.

F. T. FRELINGHUYSEN,
Attorney for plaintiff in certiorari.

J. W. SCUDDER,
Attorney for defendant in certiorari.

Phillips & Boswell, printers, Trenton.

New Jersey Supreme Court.

THE STATE, THE MORRIS CANAL
AND BANKING CO., prosecutors,

v.

ALBERT N. BROWN,

*Writ of certiorari to the Board
of Chosen Freeholders of the
County of Hudson to remove
a license granted by them to
Albert N. Brown.*

The above *certiorari* having been directed to the board of chosen freeholders of the county of Hudson, returnable to the first Tuesday of June, 1855, and return having been made thereto by the said board, and the cause having been argued at the February term of the Supreme Court, 1857, upon a case made and agreed upon by the attorneys of the respective parties, and the said court having taken time to advise thereupon—

Now therefore, at the February term of the said court, 1858, the court do order and adjudge, that the said license in the said record and return set forth, granted by the said the board of chosen freeholders of the county of Hudson, be reversed and set aside.

On motion of F. T. Frelinghuysen, attorney for the prosecutors in *certiorari*.

ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the second Tuesday of March, eighteen hundred and fifty-eight, before the Court of Errors and Appeals in the last resort in all causes, comes the said Albert N. Brown, by Isaac W. Scudder, his attorney, and says: that in the record and proceedings aforesaid and in the giving the judgment aforesaid there is manifest error, in this, to wit: that the judgment aforesaid, by the record aforesaid, appears to have been given for the Morris Canal and Banking Company, prosecutors in the said *certiorari*, and against Albert N. Brown, the defendant in the said
 10 *certiorari*; whereas, by the law of the land, the said judgment ought to have been given for the said Albert N. Brown, and against the Morris Canal and Banking Company.

There is also error in this, that the said Supreme Court did adjudge that the said Albert N. Brown was not the owner of lands situated upon tide waters, and was not entitled to the said license granted by the board of chosen freeholders of the county of Hudson; whereas, in truth and in fact, the said Albert N. Brown was the owner of lands situated upon tide waters, and was entitled to the said license granted by the board of chosen freeholders
 20 of the county of Hudson.

There is also error in this, that the said Supreme Court adjudged that the said license granted to the said Albert N. Brown by the board of chosen freeholders of the county of Hudson was not lawfully granted; whereas the said license was lawfully granted to the said Albert N. Brown.

There is also error in this, that the said Supreme Court adjudged that the said the Morris Canal and Banking Company could lawfully bring and prosecute the said writ of *certiorari*; whereas, by the law of the land, the said company could not law-
 30 fully bring and prosecute the said writ of *certiorari*.

There is also error in this, that upon the law and facts and merits of the case, the said Supreme Court should have adjudged that the said license was lawfully granted to the said Albert N.

Brown; and inasmuch as they did adjudge that the said Albert N. Brown was not lawfully entitled to the said license, in that there is manifest error.

And the said Albert N. Brown prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings, may be reversed, annulled, and altogether holden for nought, and that he may be restored to all things which he has lost by occasion of the said judgment.

I. W. SCUDDER,
Att'y for the plaintiff in error. 10

The following opinions were delivered in the Supreme Court in the above stated case.

THE CHIEF JUSTICE. The board of chosen freeholders of the county of Hudson granted to Albert N. Brown a license to build a dock, wharf, or pier, in front of a tract of land claimed by said Brown, to extend into New York bay, from high water mark to a point two hundred feet beyond ordinary low water mark. The object of this *certiorari* is to test the validity of the license so granted. The proceedings were instituted, and the license granted, under the provisions of the act entitled, "An act to authorize the 20 owners of lands upon tide waters to build wharves in front of the same." *Nixon's Dig.* 871.

By the second section of the act, it is enacted, that it shall be lawful for the owners of lands situate along or upon tide waters to build docks, wharves, and piers in front of their lands beyond the limits of ordinary low water, in such manner as not to hinder, interfere with, or impair the public right of navigation, upon license obtained for that purpose, as herein after provided.

The third and fourth sections of the act prescribe the mode of proceedings to obtain the license. The fifth section provides for 30 the recording of the license, and enacts that, when so recorded and delivered, it shall authorize and empower the applicant to erect the dock, wharf, or pier at any time within five years from the date thereof; and the said dock, wharf, or pier, or so much thereof as shall be erected within said five years, shall be vested in said shore owner, in the same manner, for the same estate, and with the same limitations over in remainder, or otherwise, as the

lands along said tide waters in front of which the same were made may be; and such license shall not be assignable, except with and as appurtenant to said lands, and shall pass by sale of said lands, as appurtenant thereto.

The only question presented for the consideration of the court is, whether Albert N. Brown, to whom the license is granted, is a shore owner, and, as such, authorized to receive the license under the provisions of the act.

The legislature have left no room for doubt as to the precise meaning of the terms employed in the act. By the eleventh section, it is declared that the term shore, in the act, shall be construed to mean the land between the limits of ordinary high and low water; the term shore line to mean the edge of the water at ordinary high water, and the term shore owner to mean the owner of the lands above and adjoining the shore line. The owner of lands, therefore, to whom alone such license can be granted, must be the owner of lands above and adjoining the edge of the water at ordinary high water. Is Albert N. Brown such owner? Is that fact proved?

20 In support of his claim, he exhibits a deed from Jacob M. Merseles and wife to himself, bearing date on the first of August, 1854, for a tract of twenty-nine acres and eighty-two rods, more or less, bounding on the waters of New York bay.

The boundaries of the tract are in part described as running "to the waters of New York bay 775 feet, more or less." The deed excepts out of the tract, as described, "certain lands mentioned and described in a deed, made by Jacob Merseles and Letty his wife, and Merseles J. Merseles and Susannah his wife, to the Morris Canal and Banking Company, bearing date on the second 30 day of February, 1835. The deed also purports to convey to the grantee, Albert N. Brown, all the right of the grantors to the lands under water on the southerly side of the said tract and south of the Morris canal to the middle of New York bay, or as far as the right of the grantors extends. This clause obviously cannot affect the question now under consideration.

Whether this deed vests in the grantee the ownership of land upon tide waters, and constitutes him a shore owner within the contemplation of the act, will depend, it is obvious, entirely upon the description of the land previously conveyed to the Morris 40 Canal and Banking Company, which is excepted out of the grant. By reference to that deed, it appears that the land granted to the Morris Canal and Banking Company is described as follows, viz :

"beginning on the line of Robert Thompson, where the same is intersected by the route of the Morris canal, and running northwardly, as said canal runs, according to the course and distance marked on the said map, survey, and field book of said canal, filed in the clerk's office of the county of Bergen, to land of George Vreeland, the same being lot No. 38 on said survey, and is estimated to contain two acres and thirty-one hundredths of an acre strict measure; the said lot lies in the vicinity of and on the margin of New York bay, between lands of Robert Thompson and George Vreeland, as by reference to said map, survey, and field book will 10 more fully appear." The land thus conveyed to the canal company, and which is excepted out of the grant to Brown, is described as lying in the vicinity of and on the margin of New York bay, terms clearly importing that it bounded on the bay. It extends across the entire front of Brown's tract. An inspection of the copies of the map and field book exhibited to the court confine the general description in the deed to the canal company. The canal is there represented and described as bounding on New York bay throughout nearly its entire course over the land of Merseles.

The case admits that the maps will show that the larger por- 20 tion of the outer or sea wall of the canal is below high water mark. For a small distance, the sea wall is above high water mark, and marshy lands intervene between the sea wall of the canal and high water mark. By one of the exhibits in the cause, it appears that the canal, as actually located, does not precisely correspond with the description in the field book on file in the clerk's office, but there is no evidence that these variations will at all affect the material description in the deed, that the land conveyed was on the margin of New York bay. That such was the understanding of the parties, and the contemporaneous construction given to this 30 deed, is manifest from the description of the tract now owned by Brown contained in the deed to his grantor. This deed bears date on the twenty-first of June, 1838, within three years after the deed to the canal company, and described the tract as adjoining the Morris canal on the east, as starting at a stake, and running thence a northerly course along the canal, and after running the several boundary lines of the tract, thence to the said canal, the place of starting. This description makes the canal, not the New York bay, the eastern boundary of the farm. It includes no land east of the canal, and corresponds with the description in the deed to the 40 canal company, that the land thereby conveyed was on the margin of the bay. In the absence of all conflicting testimony, the docu-

mentary evidence establishes the fact, that the land conveyed to the canal company was upon the bay, and adjoined the shore line; that the canal, as located and constructed for nearly the whole distance across Brown's farm, is upon that line; that the sea wall of the canal now is and always since its construction has been, washed by ordinary high tide, and that, consequently, the land conveyed to and owned by the canal company lies between the shore line and the lands of Brown; that Brown's deed carried him not to the bay shore, but to the canal, leaving the width of the canal, with
 10 its banks, between him and the shore line. It is not incumbent on the plaintiff in *certiorari* to show negatively that Brown is not the shore owner. The fact of his ownership is to be shown affirmatively. It is the ground upon which alone the license, and the right to grant the license, rests, and if his right of property in the shore be not proved to exist co-extensive with the extent of the license to erect the wharf the license is invalid. If this be so, it seems clear that Brown is not a shore owner within the meaning of the act, and not entitled to a license.

But the material question before the court, and upon which this
 40 controversy mainly depends, is whether, admitting that the canal is between the land of the plaintiff and the shore line, the canal company have such title in the land as deprives the land owners of the right to build a wharf in front on his farm.

By the deed to the canal company, the land is conveyed to them, their successors and assigns, together with all and singular the waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in any wise appertaining; also all the estate, right, title, interest, claim, and demand whatsoever of the party of the first part of, in, and to the same, and to every part
 30 and parcel thereof. To have and to hold all and singular the above described tract or parcel of land and premises, with the appurtenances, unto the said party of the second part, their successors and assigns, to the only proper use, benefit, and behoof of the said party of the second part, their successors and assigns, as *long as used for a canal*. There is no reservation in the deed. It conveys all the right, title, and interest of the grantors in the land and its appurtenances for the term specified in the grant, to wit, *as long as used for said canal*.

By the terms of the conveyance, the grantees take a qualified
 40 fee, liable to be defeated whenever they cease to use the land for the purpose specified in the grant. 1 *Just.* 1 b. 27 a; 1 *Cruise* 79, Tit. 1, § 82; 2 *Bla. Com.* 110.

Yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple. *Plowden* 857; 1 *Craisc* 52, *Tit.* 1; § 86.

The corporation, as such, have an undoubted right to take a conveyance in fee.

The charter contains no limitation on this point; the sixth section empowers them to acquire land by deed or gift, without limitation in point of estate. The twenty-sixth section provides for the operations and privileges of the company for one hundred and fifty years, and that then the canal and its appurtenances shall become the property of the state. However the corporation may be restricted in the use of their estate, they are nevertheless owners in fee of the land while their estate continues. At the time of the license granted to Brown, the estate in this land continued in the canal company. It was then used for the purposes of a canal, and may continue to be so used for ever. It is not necessary to the enjoyment of the right of the shore owner to erect a wharf in front of his land, that he should be the owner of an unqualified estate in fee. On the contrary, the statute provides that the docks, 20 wharves, or piers erected in pursuance of the act shall be vested in the shore owner, in the same manner, for the same estate, and with the same limitations over in remainder, or otherwise, as the lands along said tide waters in front of which the same were made may be. How, then, can the applicant for license, being himself within the provisions of the statute, claim to be a shore owner, when in fact the canal company own a strip of land between him and the shore line? This seems to me decisive against the authority of the freeholders to grant the license to Brown, inasmuch, as by the terms of the statute, their authority is limited to a grant of 30 license to the shore owner. But it is objected that the company, by their charter, could only acquire title to land necessary to construct their canal and to carry out the purposes of their incorporation, and that they could neither by purchase nor condemnation acquire title to the rights of the land holders under water.

The rights of the land holders under water, whatever they may have been, were mere incidents of the ownership of the adjoining shore, held by permission of and subject to the control of the state. They passed, with the grant of the land, as incidents of ownership. The restriction of the power of the company to use their rights, 40 admitting such limitation to exist, is no limitation of the power of the company to take the rights, nor, because the company cannot use

them, does it follow that they exist elsewhere. In *Barnet v. Johnson*, it was held that there were uses to which the company could not apply lands acquired for the use of their canal; but it was not held that their ownership was limited, or that the adjacent owners possessed the rights which the company themselves could not exercise.

It is further objected, that if the company cannot exercise these rights themselves, they have no interest in contesting the claims of another, and cannot be heard upon the application. If these rights are incidents of the ownership of the shore, if the title to them is
 10 in the corporation, they surely have an interest in defending them. If this company cannot erect dwellings upon their canal, they may exclude others from doing so. If they may not, as a corporation, carry on the business of mining upon the lands, they may exclude others from doing it. They have an interest in protecting all the incidents of their rights of property. They have moreover a direct and immediate interest in having free access to the sea, and in excluding all others from obstructing it.

Without intending to intimate the least expression of opinion upon the question, whether the canal company may exercise the
 20 right of building wharves in front of this land, I am clearly of opinion that the grant of license for this purpose by the board of freeholders to another person was unauthorized by the statute, and must be set aside.

POTTS, J. This *certiorari* is brought to review the proceedings of the board of chosen freeholders of the county of Hudson in granting a license to Albert N. Brown to build a dock, wharf, and pier, to extend beyond the limits of ordinary low water mark into New York bay, commencing at a point on the most northeasterly part of a tract of about 45.22 acres in the township of Bergen, in
 30 said county, of which said Brown claims to be the owner in fee, where the division line between the land of George Vreeland and said tract terminates at high water mark, and from thence running south, $26\frac{1}{2}$ degrees east, along the continuation of said line, to a point 200 feet beyond ordinary low water mark; thence southeasterly 770 feet, more or less, to a point where the same would intersect the line between the lands of said Brown and Stephen Vreeland and wife, extended in the course of the said line into New York bay; and thence along the line between the lands of said

Brown and said Stephen Vreeland and wife north, $26\frac{1}{2}$ degrees west, to high water mark, which dock, wharf, or pier will be 770 feet in length, more or less, and extended as much as 200 feet beyond low water mark.

This license was granted under and by virtue of the provisions of an act to authorize the owners of land upon tide waters to build wharves in front of the same, approved March 18, 1851, *Nixon's Dig.* 871. This act provides that it shall be lawful for the owners of lands situate along and upon tide waters to build docks or wharves upon the shore in front of their lands, and in any other way to improve the same, and when so built upon or improved, to appropriate the same to his own exclusive use; that such docks, wharves, and piers may be extended beyond the limits of ordinary low water in such manner as not to hinder or impair the public right of navigation, upon licenses obtained as directed by the act. The act provides further, that neither the act nor any license granted by virtue thereof shall authorize any shore owner to extend any wharf or other improvement over lands on the shore or under water beyond low water mark, the title to which or any easement therein, by grant from this state or otherwise, may be 20 vested in any other person than such shore owner; and the board of chosen freeholders of the county wherein the same may be may require any wharf so built beyond low water mark, or any part thereof, to be kept as a public wharf, open to all persons whatever, under such regulations and at such reasonable rates of wharfage as they may direct; and the act declares, that the term shore shall be construed to mean the land between the limits of ordinary high and low water; the term shore line, to mean the edge of the water at ordinary high water; and the term shore owner, to mean the owner of the land above and adjoining the shore line. 30

The Morris Canal and Banking Company, who prosecute this *certiorari*, assign, as reasons why the license granted to Brown should be revoked and set aside—1, that they, the said Canal Banking Company, are the shore owners; and 2, that Brown has no legal title to the shore, and therefore has no right to the license. These are the questions to be examined.

1. Then has the company the title to the shore? do they own the land above and adjoining the shore? are they the shore owners within the true meaning and construction of the statute? If they are, then it follows, of course, that the board of chosen freeholders 40 erred in granting the license in question to Brown, the defendant in *certiorari*.

The Morris Canal and Banking Company claim title in this wise. They were authorized by their acts of incorporation to construct a canal from the waters of the Delaware to the waters of the Hudson, with the usual powers to take land for the purpose by purchase or appraisalment, and proceeded accordingly, in 1834, to survey and locate their route from the Passaic to the Hudson, and had three commissioners appointed to appraise the value of the lands required and assess the damages to the land owners. The route of the canal was located, partly along the margin of New York bay, through the land in question, then owned by Jacob Merseles and Merseles J. Merseles and their wives, to its terminus at Jersey City. On the 15th August, 1834, the company and these parties, together with certain other land owners, entered into an agreement under seal, whereby it was agreed to ascertain and settle, by amicable arrangement by arbitrators, the *value of the lands required to be taken for the use of the company*, and the damages, &c.; and they agreed to submit the matter to the three appraisers already appointed and two resident citizens of the county, who were agreed upon. They were "to ascertain and determine the compensation and damages which each of the land holders and owners and proprietors of the said land shall receive *for the land occupied by the said canal*, and the damages *incidental to and caused and to be caused by the location and construction of the said canal*." The said arbitrators, or a majority of them, were forthwith to proceed "to view the several lots or tracts of land intersected or taken and occupied by the said canal between the eastern shore of the Passaic river and the bay of New York," and from their view, &c., to "make an award, assessment, and appraisalment of the value of the land taken from each of the said several lots, and of the damages which shall be done to the same, and which shall be paid to the owners of the said lots by reason of the construction of the said canal and its various works," &c., which award was to be conclusive. The canal company were to have the right to deposit any surplus earth, &c., *upon the adjacent lands*, occupying no more of the adjacent lands than might be reasonably necessary for that purpose, but *the title thereto to remain in the landholders*; and upon performance, by the company, the land owners agreed "to convey to the said company *the land taken as aforesaid*, to be held by the company as long as the same shall be used for the purpose of the canal," and that the company should thereupon "take immediate possession thereof, and hold the same *for the uses and purposes of the canal, not including in such conveyance, however, the adjacent lands to be occupied as aforesaid in depositing the surplus earth*, &c.

On the 19th September, 1834, the arbitrators made their award under the above submission, giving for the land taken from the lot in question, 2.31 acres, \$231, and for incidental damages \$1769. The money so awarded was paid, and for which Jacob and Merseles J. Merseles gave the following receipt: "Received from the Morris Canal and Banking Company \$2000, being in full for the amount awarded to us by the arbitrators, under the submission hereto annexed, for land and incidental damages by reason of the Morris canal *passing through our land*, as appears by the preceding award of the arbitrators."

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On the 2d February, 1835, the said Jacob and Merseles J. Merseles and their wives made, executed, and delivered to the Morris Canal Company their deed of conveyance, for the consideration of \$231, of the land so awarded by the arbitrators. The deed is in the ordinary form of a deed of bargain and sale, to the company their successors, and assigns, *as long as used for said canal*, and describes the land conveyed as "situate, lying, and being in the township of Bergen, in the county of Bergen, and state of New Jersey, beginning on the line of land of Robert Thompson, where the same is intersected by the route of the Morris canal, and running north-20 wardly as said canal runs, according to the course and distance marked on the said map, survey, and field book of said canal, filed in the clerk's office of the county of Bergen, to land of George Vreeland, the same being lot No. 38 on said survey, and is estimated to contain 2.31 acres *strict measure*; the said lot lies in *the vicinity of and on the margin of New York bay*, between lands of Robert Thompson and George Vreeland," &c.

The canal company entered into possession of the land so conveyed, and have constructed their canal over it, and it is conceded that "the larger portion of the *outer or sea wall of the canal is be-* 30 *low high water mark*;" and that, "for a small distance, the sea wall is above high water mark, and marshy land intervenes between the sea wall of the canal and high water mark."

In examining the character and extent of the title which passed by this deed to the Morris Canal and Banking Company, we are not restricted to the words of the deed alone. The deed is to be construed in reference to the charter powers of the company, the proceedings to take the land by condemnation, the agreement of submission, and the award, of which the deed was but the execution. These are of the *res gestæ*. They are parts of the same 40 transaction—the acquisition of the land. The transaction originated in the power of the company to take the land, progressed by

the exercise of that power, and the deed was but the form in which the power was consummated. These, therefore, legitimately belong to the consideration of the question, as to what was the intention of the parties, and what are the legal effect and incidents of the grant.

The state, in the exercise of the right of eminent domain, which gives to the legislature the control of private property for public uses, and for public uses only, had delegated to this company, in consideration of the great public benefits the work it proposed to
 10 construct would secure, the power to take the lands of private citizens by condemnation. The purpose was the construction of a canal, or artificial navigation, which was to be and remain for ever a public highway. The lands authorized to be taken were such, and such only, as were *necessary* for the purpose of the canal and its appendages. This was the extent of the constitutional power; and the legislative delegation of authority to take private property for public uses is always to be construed accordingly. The charter of the company, in terms, thus limits the right. It requires, first, a
 20 survey and specific location of the works; then an offer of compensation; and if the parties cannot agree, then a particular survey and map is to be made of such lands, waters, and streams as, in the estimation of the president and directors of the company, are requisite to be taken for the uses of the canal; and these are to be exhibited to a justice of the Supreme Court, accompanied by the oath or affirmation of one of the engineers employed by said company, that *the premises therein described* are required to be occupied by the company, for the purpose of carrying into effect the object set forth by the act, and are *not more than is requisite for the said uses*, before commissioners can be appointed to appraise the
 30 value and damages. And it is the premises so *appropriated, described, and appraised*, alone, that vests in the company. The 27th section of the charter is very specific. It declares that every part of the act shall be so construed, as that the said corporation shall not be authorized to take or appropriate to the use of said canal, or under color or pretence that the same are necessary therefor, any lands, waters, or streams of water, but such only as are actually necessary for the erection and use of said canal for the purposes of navigation only, and its necessary towing paths and works, as specified in the fifth section. It is very clear, therefore, that
 40 whether we look to the constitutional powers of the legislature to grant, or to the express terms of the grant itself, the company were only authorized to take by condemnation such land as by specific

designation and proof were ascertained to be necessary for the use of constructing the canal and its necessary appendages.

The constitutional power to take private property for public use, implies the limitation, that nothing more can be taken than is strictly required for the use. The private interests of the individual are never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance. This is now held to be the rule in England. *Angell on Highways* 57, § 80. And the same author, speaking of the practice in the United States, p. 60, § 83, says—"It is very obvious that in taking private property, 10 under the express authority of government, for public use, no more should be taken than is demandable by the exigencies of the community; and the least possible private injury in so doing should be committed. If the charter of a navigation company authorize the entering upon lands adjoining the works to be constructed, and taking materials therefrom, no more can be taken than as are *incident* to the promotion of what is intended by the charter. So the presumption is, in laying out a common highway over the soil owned by an individual, that such individual *retains every right except the public easement*; and see 2 *Kent's Com.* 339. And so, too, 20 in the case of *Varick v. Smith, on appeal*, 9 *Paige Ch. R.* 561, it was said, by the court, that "the government has the power, under the constitution, to appropriate the private property of the citizen, just so far, and no farther than is necessary for the purpose and object of the appropriation." And "when such purpose is accomplished, the right of the state is exhausted, and the *whole of the residue* of the property, whatever it may be, *belongs to the citizen*."

Such, I apprehend, is the correct exposition of the doctrine we are considering. The public necessity is the foundation of the right, and with that necessity it begins and ends. To hold that an 30 incorporated company, authorized to construct a work of public utility, may go beyond this limit, and appropriate not only such such private property as is necessary to enable them to construct their work, but such as would be merely useful and advantageous in a pecuniary point of view to the stockholders, would be an unwarrantable and dangerous perversion of the doctrine. It would be using it as a pretext for appropriating the private property of one citizen to the purpose of increasing the emoluments of other citizens, irrespective of the strict public necessity.

That it was the intention of the parties to convey and acquire 40 precisely what the company were proceeding to take by condemnation, is manifest. The recitals in the agreement and submission

show that the company had surveyed and located the route of their canal over the premises; had specifically designated the lands necessary for their use by description; filed the field book, maps, and surveys in the clerk's office, and had applied for and obtained the appointment of commissioners to appraise the value of the land and damages, having made, as we must presume, the necessary proof, by the oath of one of their engineers, that the premises described were required by the company for the purpose of the construction of the canal. The agreement and submission further re-

10 cites, that the appraisers so appointed were convened, and proposed to enter on their duties; that at this juncture of time it was suggested that the land owners and the company were desirous to settle by arbitration, not *what* lands or rights were to be conveyed, but the *value of the lands so required to be taken* for the uses of the company, and the damages, &c. The property rights to be surrendered to the company had been already ascertained and fixed under the provisions of the charter. The compensation, alone, remained to be ascertained, and this was to be referred to arbitration.

20 The parties, in preparing this agreement and submission, appear to have been extremely careful to designate the precise subject matter with which they were dealing, the property rights to be parted with by one party, and acquired by the other, and for which compensation was to be awarded. They describe it as "the lands through which the said extended canal is *located*;" "the lands occupied by the said canal, and the damages incidental to, and to be caused by the location and construction of the said canal." The appraisers are to view "the several lots or tracts of land intersected or taken and occupied by the said canal;" and to appraise "the

30 value of the *land taken* from each of the said several lots, and of the damages which shall be done to the same." When the sum awarded for "the land taken and occupied, and damages done to each particular lot," are paid, the company are to have authority to enter and construct their canal, "doing no unnecessary damage or injury to the adjacent lands;" and to occupy the adjacent lands for the purpose of depositing the surplus earth, "but the title thereto to remain in the landholders." And by the sixth article of the submission it is agreed, that when the amount awarded is paid or tendered, the land owners will convey to the company the *land*

0 *taken as aforesaid*, to be held by the company so long as the same shall be used for the purposes of the canal, not including in said conveyance, however, the adjacent lands to be occupied as aforesaid in depositing the surplus earth, &c.

Then the award is made in pursuance of the agreement and submission. It awards \$231 to Merseles for precisely two acres and thirty-one hundredths of land, being the land actually occupied by the canal, and \$1769 for incidental damages. The arbitrators say, in their award, that they proceeded "to view the several lots or tracts of land intersected or taken and *occupied* by the said canal," and upon this view appraised the value of the land taken, &c., and the damages which shall be done to the same, and which shall be paid to the owners, &c., by reason of the construction of the said extended canal, &c., and the receipt given to the company, and 10 produced by them, says: the amount is that awarded them, under the submission, "for land and incidental damages by reason of the Morris canal *passing through* our land."

From this view of the proceedings had, and which were consummated by the deed in question conveying the two acres and thirty-one hundredths, strict measure, for as long as the same should be used by the canal, it is entirely clear that it never entered into the contemplation of the parties that they were dealing with any other property rights than those which the company were proceeding to acquire by condemnation under the provisions of their charter. But as the title by condemnation could only be acquired by a 20 strict pursuance of the delegated power, the substitution of the agreement, submission, and award, as the mode of ascertaining the value of the land and damages, instead of the commission and appraisal provided for by the charter, rendered it necessary to adopt the form of passing the title by deed. Yet it was but the more formal mode, adopted by the parties, of giving effect, by their own act, to the charter power of condemnation, the operation of which had been intercepted by the agreement.

Then what the company acquired by force of this deed of conveyance was, strictly, such an estate or interest in the land as they would have acquired by condemnation, had they pursued the mode prescribed by their charter to that end. They took neither more nor less than this. Their title was limited, therefore, to the narrow strip of land specifically described and actually used in the construction of the canal and its towing paths. They took it, too, limited to a particular and specific use, that of constructing and maintaining their canal on and over it for purposes of navigation, and their estate in it was to terminate with the use. In one sense, it is true, they became shore owners. The strip occupied by them, 40 embracing the two acres and thirty-one hundredths, it is admitted, lies along the shore of the bay of New York, and the larger por-

tion of the outer or sea wall of their canal is below high water mark. But the species of limited estate they acquired amounted, practically, to nothing more than *an easement or right of way*. Such was the opinion of the Chancellor in *Willink v. The same Co.*, 3 *Green's Ch. R.* 403; and such an interest in lands cannot possibly be construed to carry with it the legal right of riparian owners, the right to wharf out and otherwise reclaim and improve the adjoining shore, the use of the shore for fisheries and all other lawful purposes not obstructing the public right of navigation. These
 10 remain as appurtenances to the estate out of which the limited grant to the company was carved. They constitute part of the intrinsic value of that estate; they have never been divested from the owners of the upland; the owners of the original estate still have the right of fishery and ferry, and every other right which at common law attached as appurtenances to the land consistent with the enjoyment of the estate granted to the company. These were never sought to be condemned to the use of the canal company; they were not within the contemplation of the parties or the terms of the agreement and submission, the award, or the deed which
 20 executed the award.

The statute of 1851 must be construed as declaratory of the common law, for it is not within the constitutional powers of the legislature to give or take away the vested property right of the citizen or the public for purposes of mere private emolument. Its object was to define and settle the extent of the rights of which it treated, and which had become the subject of doubt and litigation, and to prescribe the mode of their exercise and enjoyment, for in many instances these riparian rights had become very valuable, more valuable, indeed, than the upland to which they were appur-
 30 tenant. Considering this, therefore, as a mere declaratory act, it in no wise affects the rights of these parties, so far as they are involved in this controversy.

Taking it to be established, that the deed of conveyance passed only such title as the company would have acquired by condemnation, the case seems very free from difficulty. The Morris Canal and Banking Company have undoubtedly the power in their charter to take not only the land necessary for the erection and construction of their canal and towing paths, but land for all the necessary appendages to their work, by condemnation; but it can
 40 only be taken by a strict pursuance of the forms prescribed by their charter, and one of these requires that they specify particularly the land required, and show by proper proofs that it is so ne

cessary, and the object for which it is to be used. Without this they cannot proceed to acquire the title. There is nothing in the case to show, nor is it pretended, that the company, in the case before us, designated any land of Merseles, or sought to appropriate any of his rights outside of the strip in question, except only the privilege of depositing their surplus earth on the adjoining land without interfering with the title. The proceedings are silent on the subject of docks, wharves, and piers, for which it is now argued the shore rights are important to them. If the company had required, as they now insist they do, these shore rights for the purpose of erecting wharves, docks, and piers, as auxiliary and necessary to the purposes of their legitimate business, they should have taken the proper steps to acquire them by condemnation. They should have described specifically the quantity and location of the land below high water mark which they required, and the uses for which it was required, or they should have embraced it in their agreement and submission, had the value appraised, and stipulated for and obtained a conveyance or release.

There is no foundation in fact for the argument, that the \$1769, awarded as damages, were given as the value of the riparian rights of the land owner, on the contrary, it is manifest that the damages were awarded, not for the rights themselves, but for the inconvenience of having the canal interposed between the upland and the shore, and the consequent difficulty presented to the enjoyment of the riparian rights by the land owner. This was the extent of the power the commissioners would have had under the charter. *Van Schoick v. Delaware and Raritan Canal Co., Spencer* 254. And the agreement and submission did not enlarge the power.

The cases that have been cited from the state of New York rest upon their peculiar legislation, and cannot be considered as of authority upon the question now before the court.

The only remaining question is as to the title of the defendant, Albert N. Brown, to the shore in question. But I apprehend it is not necessary to consider that question here. The Morris Canal and Banking Company cannot raise that question in this case. If they have no title or right, they are not in a situation to complain. That controversy, if there be one, it will be time enough to examine when the proper parties bring it in form before the court. A third party cannot be permitted to come into court and litigate questions of title in dispute among other parties.

If the canal company can show that the license granted interferes with any rights they have acquired, or in the progress of the

contemplated improvements to be made under the license, they are injured, the law will furnish a remedy.

In my opinion, the *certiorari* should be dismissed.

OGDEN J. I concur in the conclusion, that the license granted by the freeholders is illegal, and should be vacated.

It is manifest, by the case furnished to the court, that Brown is not the shore owner of lands in front of which the license is to be exercised. His grantor's title was bounded on the east upon the canal, and by the deed to Brown he could not convey more than
10 he then held. The Morris canal is constructed between the land covered by Brown's title and the New York bay, and it cuts Brown off from the tide waters of the bay.

Whether the canal company, as riparian owners, would be entitled to a license from the freeholders or not, remains unaffected by the decision of this case. If they ever make an application for a license, their rights will then be fairly up for examination.

It was objected that if the company cannot lawfully claim a license, they should not be permitted to question the license granted to Brown; and hence it was argued, that there is no proper party
20 before the court in opposition to Brown, and that his license should be affirmed. It appears, by the case, that notice of the application to the freeholders was given by Brown to the canal company, and that they appeared from time to time as the matter progressed before the board.

It also appears, from the evidence laid before the board, that Brown was shown to them not to be the shore owner. That fact being in the case, it is manifest that they exceeded their powers, and granted a license to a petitioner who was not entitled by the law under which they were acting to receive it.

30 Such being the case, as made before this court, which by the act is required, on review upon *certiorari*, to examine the law and facts and merits of the case, we must determine that the result reached by the freeholders is unsupported by the law and the facts.

The license should be vacated and for nothing holden.

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