
IN THE
Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

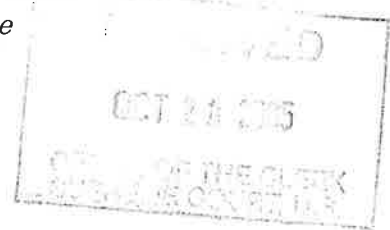
On Motion To Reopen and for a Supplemental Decree

LODGING FOR
BRIEF OF THE STATE OF DELAWARE IN OPPOSITION
TO THE STATE OF NEW JERSEY'S
MOTION TO REOPEN AND FOR SUPPLEMENTAL DECREE
OF THE STATE OF DELAWARE

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October 27, 2005

TABLE OF CONTENTS

Tab

- 1 Record, *New Jersey v. Delaware*, No. 1, Original (1877) (excerpt)
- 2 Delaware's Answer, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Oct. 15, 1901)
- 3 Letter from Herbert H. Ward, Attorney General of Delaware, to John Hunn, Governor of Delaware (Jan. 31, 1903)
- 4 Joint Resolution of the Delaware General Assembly (Feb. 3, 1905) (Plaintiff's Exhibit 162, *New Jersey v. Delaware*, No. 11, Original)
- 5 New Jersey General Assembly Resolution (Feb. 14, 1905) (excerpt from Plaintiff's Exhibit No. 161, *New Jersey v. Delaware*, No. 11, Original)
- 6 1905 N.J. Laws ch. 42, p. 67 (excerpt from Plaintiff's Exhibit No. 161, *New Jersey v. Delaware*, No. 11 Original); 23 Del. Laws ch. 5
- 7 Materials from *New Jersey v. Delaware*, No. 1, Original (Feb. 1906):
 - Interlocutory Report of Commissioner
 - Stipulation
 - Proposed Order
 - Statement of Reasons
- 8 New Jersey's Bill of Complaint, *New Jersey v. Delaware*, No. 19, Original (U.S. filed June 3, 1929)
- 9 Delaware's Answer to Complaint, *New Jersey v. Delaware*, No. 19, Original (U.S. filed Oct. 9, 1929)
- 10 Brief for Plaintiff, *New Jersey v. Delaware*, No. 13, Original (U.S. filed Dec. 18, 1932)

1

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 1. ORIGINAL DOCKET.

The State of New Jersey,
Complainant,
VS.

The State of Delaware.

RECORD.

TRENTON, N. J.:
THE JOHN L. MURPHY PUBLISHING COMPANY, PRINTERS.
1897.

INDEX.

	PAGE
Notice of motion for leave to file bill.....	3
Notice of motion for subpoenas.....	3
Notice of motion for preliminary injunction.....	3
Proof of notice of motion.....	4
Motion for leave to file bill.....	5
Minute order granting leave to file bill, awarding subpoenas, and assigning motion for preliminary injunction for argument.....	5
Bill of complaint.....	6
Subpoena.....	51
Proof of service of subpoena.....	51
Argument on motion for preliminary injunction.....	52
Order for preliminary injunction.....	52
Proof of service of preliminary injunction.....	54
Injunction and proof of service.....	55
Order to plead, answer or demur.....	57
Docket entries.....	58
Agreement of counsel May 2d, 1892.....	59
Notice to plead, &c., accepted July 13th, 1897.....	60
Notice of application for decree <i>pro confesso</i> , and to refer same to United States Commissioner September 8th, 1897.....	60
Substitution of counsel.....	61

Supreme Court of the United States
IN EQUITY.

THE STATE OF NEW JERSEY

v.

THE STATE OF DELAWARE.

On Bill, &c.

NOTICE OF MOTION FOR LEAVE TO FILE BILL,
SUBPŒNAS AND PRELIMINARY INJUNCTION.

*To the State of Delaware and to the Governor and Attorney-
General of said State:*

Notice is hereby given that on Friday, the second day of March, 1877, at ten o'clock in the forenoon of that day, or as soon thereafter as the court can attend to the same, in the Supreme Court room, in the capitol, in the city of Washington, District of Columbia, I will make motions before the Supreme Court of the United States, on behalf of the State of New Jersey, for leave to file in said court a bill in equity by the State of New Jersey against the State of Delaware, and also the affidavits annexed to said bill (copies of which bill and affidavits will be herewith delivered to you), that process of subpœna may issue from said court, to be directed to the State of Delaware to answer said bill, and also for a preliminary writ of injunction pursuant to the prayer in that behalf in said bill contained; and the statements of said bill and the affidavits and the extract from the last biannual message of the Governor of the State of Delaware, annexed to said bill, will be used and relied upon to

support the said motion for a preliminary writ of injunction.
Copies of said motion are herewith delivered to you.

I have the honor to be, very respectfully,

Your obedient servant,

JACOB VANATTA,

Atty.-Genl. and Sol. of Complainant.

Dated at Trenton, N. J.,

February 17th, 1877.

PROOF OF NOTICE OF MOTION.

UNITED STATES OF AMERICA, }
STATE OF NEW JERSEY, } ss.

Milo Yeomans, of full age, being duly sworn according to law, on his oath saith that he resides at Trenton, in the State of New Jersey, and that, at the request of Jacob Vanatta, the Attorney-General of the State of New Jersey, he did deliver on the twentieth day of February, 1877, to Hon. John P. Cochrane, Governor of the State of Delaware, at his residence near Middletown, in the State of Delaware, a notice of which the above notice is a true copy, and also a printed copy of the bill of complaint, and a printed copy of the motion mentioned in said notice; and on the same day deponent did deliver to Hon. John B. Pennington, Attorney-General of the State of Delaware, at the State House, at Dover, Delaware, a notice of which the above notice is a copy, and two printed copies of said bill in equity, and two printed copies of the said motion.

MILO YEOMANS.

Subscribed and sworn to before me, February 26th, 1877,
at Trenton, New Jersey.

W. S. BELVILLE,

U. S. Commr., Dist. of N. J.

Endorsed—Original. U. S. Supreme Court. In Equity.
The State of New Jersey v. The State of Delaware. Notice
of Motion. Filed 13th March, 1877.

MOTION FOR LEAVE TO FILE BILL.

The Supreme Court of the United States. The State of New Jersey v. The State of Delaware. Original No.

And now comes the above-named complainant and moves the court for leave to file in this court its bill in equity against the above-named defendant and for process to answer.

FREDERICK T. FRELINGHUYSEN,
Of Counsel for Complainant.

Suppose process had better issue to Hon. John P. Cochran, Governor of Delaware, and the writ can be enclosed to Hon. John B. Pennington, Attorney-General of Delaware, Dover. He will procure the Governor's acceptance of service.

T. F. BAYARD.

Endorsed—Sup. Court U. S., 1876. Oct. Term. Original No. The State of New Jersey, Complt., v. The State of Delaware. Motion for leave to file bill and for process. Filed 13th March, 1877.

MINUTE ORDER GRANTING LEAVE TO FILE BILL,
AWARDING SUBPŒNAS, AND ASSIGNING MO-
TION FOR PRELIMINARY INJUNCTION FOR
ARGUMENT.

On the 13th of March, A. D. 1877, the following entry appears of record, to wit :

Supreme Court of the United States. The State of New Jersey, Complainant, v. The State of Delaware.

"On motion of Mr. E. L. Stanton leave is hereby granted him to file bill in this cause, and it is ordered that subpœnas issue to the defendants, and that the motion for preliminary injunction be assigned for argument on Monday next, the 13th instant."

BILL OF COMPLAINT.

To the Justices of the Supreme Court of the United States.

The State of New Jersey, one of the States of the United States of America, brings this its bill against the State of Delaware, also one of the States of the United States of America, and thereupon your orator complains and says :

That your orator is the owner in fee-simple of a portion of the bed of the Delaware river, that is to say, from the southeasterly corner of the State of Pennsylvania, on said river, down said river to and into Delaware bay. That within the limits aforesaid, your orator's part of the bed of said river extends from the New Jersey shore thereof to the middle of said river. That within and beyond the limits aforesaid the tides of the ocean ebb and flow, and that, within the limits aforesaid, your orator has and is entitled to, in and on every part of the waters of said river, an equal interest and concurrent jurisdiction with the State of Delaware; and that your orator has title to the rights aforesaid, by the means hereinafter stated, namely :

A. Letters-patent from Charles the Second, King of England, to his brother James, the Duke of York, bearing date the twelfth of March, 1664, in and by which the said King did give and grant unto his said brother James, Duke of York, his heirs and assigns, all that part of the mainland of New England, beginning at a certain place called or known by the name of St. Croix, next adjoining to New Scotland, in America; and from thence extending along the seacoast unto a certain place called Petuaquine, or Pemaquid, and so up the river thereof to the farthest head of the same as it tendeth northward; and extending from thence to the river of Kenebeque, and so upwards by the shortest course to the river of Canada northward, and also all that island or islands commonly called by the several name or names of Matowacks or Long Island, situate, lying and being towards the west of Cape Codd, and the Narrow Higansetts abutting upon the mainland between the two rivers there, called

or known by the several names of Conecticut or Hudson's river, together also with the said river called Hudson's river, and all the lands from the west side of Conecticut to the east side of Delaware bay. And also, all those several islands called or known by the names of Martin's Vineyard and Nantuke's, or otherwise Nantukett; together with all the lands, islands soiles, rivers, harbours, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowling; and all other royaltys, profits, commodities and hereditaments to said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances.

And further by the said patent, did grant unto the said James, Duke of York, his heirs, deputies, agents, commissioners and assigns, full and absolute power and authority to correct, punish, pardon, govern and rule all such the subjects of such King, his heirs and successors, as should from time to time adventure themselves into any the parts or places aforesaid, or that should at any time thereafter inhabit within the same according to such laws, orders, ordinances, directions and instruments as by the said Duke or his assigns should be established; and in defect thereof, in case of necessity, according to the good discretions of his deputies, commissioners, officers or assigns respectively; as well in all causes and matters capital and criminal as civil, both marine and others; so always as the said statutes, ordinances and proceedings should not be contrary to, but as near as conveniently may be, agreeable to the laws, statutes and government of the realm of England.

Also to make, ordain and establish all manner of orders, laws, directions, instructions, forms and ceremonies of government and magistracy, fit and necessary for and concerning the government of the territories and islands aforesaid, so always that the same be not contrary to the laws and statutes of the realm of England, but as near as may be agreeable thereunto; and the same at all times thereafter to put in execution or abrogate, revoke or change, not only within precincts of the said territories or islands, but also upon the seas in going and coming to and from the

same, as he or they in their good discretion should think the fittest for the good of the adventurers and inhabitants there.

* * * * *

And further, that it should be lawful to and for the said James, Duke of York, his heirs and assigns, in his or their discretion, from time to time, to admit such and so many person or persons to trade and traffique unto and within the said territories and islands aforesaid, and unto every or any part and parcel thereof; and to have, possess and enjoy any lands or hereditaments in the parts and places aforesaid, as they should think fit, according to the laws, orders, constitutions and ordinances by the said Duke, his heirs, deputies, commissioners and assigns, should be made and established by virtue of and according to the true intent and meaning of the said letters-patent.

* * * * *

And further, did give and grant unto the said Duke, his heirs and assigns, and declare that it should be lawful to and for him, them or any of them at all and every time and times thereafter, out of any of the said King's realms or dominions whatsoever, take, lead, carry and transport in and to their voyages, and for and towards the plantations of said territories and islands, all such and so many of his subjects or any other strangers being not prohibited or under restraint, that would become the subjects of said King, and live under his allegiance, as should willingly accompany them on the said voyages, etc.

And also to all and every such governor or governors or other officers or ministers as by the said Duke, his heirs and assigns, should be appointed to have power and authority of government and command in or over the inhabitants of the said territories or islands that they and every of them should, and lawfully might, from time to time at all times thereafter, for their own defense and safety encounter, expulse, repel and resist, by force of arms, as well by sea as by land, and all ways and means whatsoever, all such person and persons as without the special license of the said Duke, his heirs or assigns, should attempt to inhabit within

the said precincts and limits of said territories and islands. And also all and every such person and persons whatsoever, as should enterprise or attempt at any time thereafter the destruction, invasion, detriment or annoyance to the parts, places or islands aforesaid, or any part thereof, as by reference to the said letters patent, leave of reference to which is hereby prayed, will more fully and at large appear.

B. That after the making of the said grant, and in or about the year 16 , the territory included in the said grant was conquered by the military power of the States of the United Provinces of the Netherlands, and afterwards in or about the the said territory by the said conqueror was surrendered to the King of England, and thereupon, in order to make good and affirm and establish the aforesaid grant, the said King of England, by his letters-patent bearing date on or about the twenty-ninth day of June, 1674, did grant and convey unto the said Duke of York all and every of the property and all and every of the rights, powers and privileges granted, conveyed, transferred and assured in and by the patent first hereinbefore mentioned, using in the last one of the said patents the same words which are used in the first of the said patents, and no others except those stating the date, as by reference to the last-mentioned of said patents, leave of reference to which is hereby prayed, will more fully and at large appear.

C. By lease and release, which lease was dated the 23d and the release the 24th day of June, 1664, made by the said James, Duke of York, etc., party of the first part, and Lord John Berkeley and Sir George Carteret, parties of the second part, the said James, after reciting the grant so as aforesaid made to him by the aforesaid letters-patent, dated 16th March, 1664, for a competent sum of good and lawful money to him paid by the said Berkeley and Carteret, did grant and bargain, sell, release and confirm to said Berkeley and Carteret, their heirs and assigns forever, all that tract of land adjacent to New England and lying and being to the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea and part by Hud-

son's river, and hath upon the west Delaware bay or river, and extendeth southward to the main ocean as far as Cape May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is forty-one degrees and forty minutes of latitude, and crosseth over thence in a straight line to Hudson's river in forty-one degrees of latitude, which said tract of land is hereafter to be called by the name or names New Cæsarea or New Jersey, and also all rivers, mines, minerals, woods, fishings, hawking, hunting and fowling, and all other royalties, profits, commodities and hereditaments whatsoever to the said lands and premises belonging or in anywise appertaining, with their and every of their appurtenances, in as full and ample a manner as the same is granted to the said Duke of York by the before-recited letters-patent, and all the estate, right, title, interest, benefit, advantage, claim and demand of the said James, Duke of York, of, in and to the said and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof.

* * * * *

To have and to hold, all and singular, the said tract of land and premises with their and every of their appurtenances, and every part and parcel thereof, unto the said Berkeley and Carteret, to their heirs and assigns forever, to the only use and behoof of the said Berkeley and Carteret, their heirs and assigns forever, yielding and rendering therefor yearly and every year the sum of twenty nobles, lawful money of England, if the same should be lawfully demanded, at or in the Inner Temple Hall, London, at the feast of St. Michael, the archangel, yearly. As by reference to the said release, leave of reference to which is prayed, will more fully and at large appear.

D. "The concession and agreement of the lords proprietors of the province of New Ceserea or New Jersey, to and with all and every the adventurers and all such as shall settle or plant there," made and published by the said John Berkeley and George Carteret, and bearing date the 10th

day of February, in the year of our Lord one thousand six hundred and sixty-four. These concessions and agreements were made for the purpose of inducing people to settle and dwell in the said province, and were pledges, guarantees and assurances to such settlers. Said concessions relate to the power and rights of the governor, and council, and secretary or register, surveyor-general, assemblymen and other officers in the said province; to the legislative power of the assembly, among which were in the said province to create and appoint such and so many ports, harbors, creeks and other places for the convenient loading and unloading of goods and merchandise out of ships, boats and other vessels, as should be expedient, with such jurisdictions, privileges and franchise to such ports, etc., belonging, as they should judge most conducing to the general good and welfare of the province.

And that the inhabitants of the said province should have free passage through or by any seas, bounds, creeks, rivers or rivulets, etc., in the said province, through or by which they must necessarily pass to come from the main ocean to any part of the province aforesaid, as by reference to the said concession and agreements, leave of reference to which is hereby prayed, will more fully and at large appear.

These grants and concessions bear even date with the appointment and commission of Sir Philip Carteret, the first Governor of New Jersey, who was appointed by the said proprietors, Lord John Berkeley and Sir George Carteret, and by his letter of instructions, bearing even date with his commission, Governor Carteret, by the said proprietors, was authorized and directed, for the said proprietors, and in their names, "to let, sell, convey and assure such land in our said province to such person and persons, and for such estate and estates, and with such provisions, conditions and limitations as we by our concessions and agreements, under our hand and seal, bearing date with these presents, to and with the adventurers are obliged to grant, and as you shall be directed by such other instructions and rules as from time to time you shall receive from us, and not otherwise; hereby ratifying and confirming whatsoever you shall lawfully do pur-

suant to such our concessions, and to such instructions, rules and directions as aforesaid, and also to make * * *

Provided, and it is hereby declared, that this present deed, or anything therein contained, doth not extend or shall be deemed or taken to extend to you our said Governor or Councillors, or either or any of them, any power or authority to make any manner of grant, conveyance or demise, or other like disposition of any lands lying within or being part of the said province, but according to our said concessions and instructions, as by reference, leave of which is prayed, will more fully appear. * * * *

E. An indenture, made the twenty-ninth day of July, 1674, between James, Duke of York, etc., of the one part, and said Sir George Carteret of the other part. This indenture recites the letters-patent made by the King to the Duke of York, bearing date the twenty-ninth of June, 1674, and then witnesses that the Duke, in consideration of a competent sum of money, "doth grant, bargain, sell, release and confirm unto the said George Carteret, his heirs and assigns, all that tract of land adjacent to New England, and lying and being to the westward of Long Island and Manhattan Island, and bounded on the east part by the main sea and part by Hudson's river, and extends southward as far as a certain creek called Barnegat, being about the middle between Sandy Point and Cape May, and bounded on the west in a straight line from the said creek called Barnegat to a certain creek in Delaware river, next adjoining to and below a certain creek in Delaware river called Renkokus Kill, and from thence up the said Delaware river to the northernmost branch thereof, which is in forty-one degrees and forty minutes of latitude, and on the north, crosseth thence in a straight line to Hudson's river in forty-one degrees of latitude, and also all rivers, mines, minerals, wood, fishing, hawking, hunting and fowling, and all royalties, profits, commodities and hereditaments whatsoever to the said lands belonging or appertaining; with their and every of their appurtenances in as full and ample a manner as the same is granted unto the said James, Duke of York,

by the before-recited letters-patent, and all the estate, right, title, interest, benefit, advantage, claim and demand of the said James, Duke of York, of, in and to the said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof," which grant was subject to a yearly rent of twenty nobles, lawful money of England, if the same should be lawfully demanded, at the Inner Temple Hall, London, as by reference to this last-mentioned grant, leave of reference to which is hereby prayed, will more fully and at large appear.

F. An indenture quintipartite, bearing date the first of July, Anno Domini 1676, between the said Sir George Carteret of the first part, William Penn of the second part, Gawn Lawry of the third part, Nicholas Lucas of the fourth part, and Edward Billinge of the fifth part. This deed recites the aforesaid letters patent from the King to the Duke of York, dated the 12th of March, 1664; the said lease and release from the Duke of York to Berkeley and Carteret, bearing date the 23d and 24th day of June, 1664; an indenture of bargain and sale dated the 18th of March, 1673, between the said John Lord Berkeley of the one part, and John Fenwick of the other part, by which said Berkeley granted to Fenwick all the moiety or half part of him, said Berkeley, of, in and to the said tract of land called New Ceserea or New Jersey; two other indentures, one being indenture of bargain and sale, dated the 9th of February, 1674, from the said John Fenwick and Edward Billinge of the one part, said William Penn, Gawn Lawry and Nicholas Lucas of the other part, and the other being an indenture tripartite of grant, release or confirmation, bearing date the tenth of February, 1674, between said John Fenwick of the first part, said Edward Billinge of the second part, and the said William Penn, Gawn Lawry and Nicholas Lucas of the third part, and that by several other good and sufficient assurances in the law duly executed, said moiety, or half part of said tract of land; the said moiety or half part of all and every other the said several and respective premises so conveyed unto the said John Fenwick

as aforesaid, were conveyed unto and then were vested in the said William Penn, Gawn Lawry and Nicholas Lucas and their heirs, to the use of them and their heirs and assigns forever (in which, nevertheless, the said Edward Billinge claimed to have equitable interest), so as the said William Penn, Gawn Lawry and Nicholas Lucas then actually stood seized of, and in one undivided moiety or half part of all and every the said premises so granted unto the said John Lord Berkeley and Sir George Carteret as aforesaid, as joint tenants between themselves; and did then hold the same to them and to their heirs, as tenants in common with the said Sir George Carteret, who was then actually seized of the other undivided moiety or half part of all and every the same premises, and did then hold the same to him and his heirs as tenant in common with the said William Penn, Gawn Lawry and Nicholas Lucas, and it was further recited in the said deed that said Sir George Carteret, William Penn, Gawn Lawry and Nicholas Lucas had agreed to make a partition of the said tract of land, and of the said several and respective premises, into two parts, then in and by the said indenture said Edward Billinge, and the said William Penn, Gawn Lawry and Nicholas Lucas, by and with the consent, direction and appointment of the said Edward Billinge, testified by his being a party to the said indenture, and by his sealing and executing the same, did bargain, sell, release, confirm and convey unto the said Sir George Carteret, his heirs and assigns forever, the easterly part of New Jersey, to have and hold in severalty; and by the same indenture, the said Sir George Carteret did bargain, sell, release, confirm and convey unto the said William Penn, Gawn Lawry and Nicholas Lucas, to their heirs and assigns forever, the westerly part of New Jersey, to have and to hold to them, their heirs and assigns in severalty. The division line between the said easterly and westerly parts of New Jersey, in the said indenture is described as follows: From the northernmost branch or part of the before-mentioned river, called Delaware river, and to the most northerly point or boundary of the said tract of land and premises so granted by his royal highness, James, Duke of

York, unto the said Lord Berkeley and Sir George Carteret, now by the consent and agreement of the parties to these presents, called, and agreed to be called The North Partition Point, and from thence, that is to say, from the said North Partition Point extending southward by a straight and direct line drawn from the said north partition southward, through the said tract of land, unto the most southerly point of the east side of Little Egg Harbor aforesaid; which said most southerly point of the east side of Little Egg Harbor is now by the consent and agreement of the parties to these presents called and agreed to be henceforth called the South Partition Point; and which said straight and direct line drawn from the said North Partition Point, thro' the said tract of land unto the said South Partition Point is now by the consent and agreement of the said parties to these presents called and agreed to be called the line of partition, and with the land in the westerly side of the said partition line said Sir George Carteret did convey unto the said William Penn, Gawn Lawry and Nicholas Lucas, all and every the isles, islands, rivers, mines, minerals, woods, fishings, hawkings, huntings and fowlings, and all other royalties, governments, powers, forts, franchises, harbors, profits, commodities and hereditaments whatsoever, unto the said westerly part, share and portion of the said tract of land and premises, as by reference to this indenture, leave of reference to which is hereby prayed, will more fully and at large appear.

G. An indenture made the sixth day of August, Anno Domini 1680, between James, Duke of York, etc., of one part, and Edward Billinge, William Penn, Gawn Lawry, Nicholas Lucas, John Eldridge and Edward Warner of the other part. This indenture recites the letters-patent from the King to the Duke of York, dated the 12th of March, 1664, the lease and release from the Duke of York to Berkeley and Carteret, dated the 23d and 24th of June, 1664, the conveyance from John Lord Berkeley to John Fenwick of Berkeley's moiety; that the conveyance to Fenwick was in trust for Edward Billinge, his heirs and

assigns ; that Fenwick and Billinge conveyed the said moiety to William Penn, Gawn Lawry, Nicholas Lucas, and their heirs, to certain use, that is to say, as to ten equal and undivided one-hundred parts thereof to the use of the said John Fenwick, and of his heirs and assigns forever, and as to the other moiety equal and undivided part of the said undivided moiety to the use of the said William Penn, Gawn Lawry and Nicholas Lucas, their heirs and assigns forever, in trust for the said Edward Billinge, his heirs and assigns forever, that after which the said John Fenwick conveyed all his said ten equal and undivided hundred parts of the said undivided moiety, unto John Eldridge and Edward Warner, their heirs and assigns forever ; that Eldridge and Warner conveyed the same ten equal undivided hundred parts unto the said William Penn, Gawn Lawry and Nicholas Lucas, their heirs and assigns forever, the better to enable them, the said Edward Billinge, William Penn, Gawn Lawry and Nicholas Lucas, to make a partition of the said entire premises with the said George Carteret. Then reciting the aforesaid partition by which the western part of New Jersey was conveyed in severalty to said Penn, Lawry and Lucas. That after the partition, pursuant to a trust for that purpose reposed in them, they conveyed ten full equal undivided one-hundred parts of the said westerly part of New Jersey unto the said John Eldridge and Edward Warner, and their heirs, for their own use forever. And further recites that the said William Penn and Gawn Lawry remain still seized of the other ninety equal and undivided one-hundred parts of West New Jersey, to them and their heirs in trust for the said Edward Billinge, his heirs and assigns forever, then reciting that after the conveyance from the Duke of York, that Berkeley and Carteret, as aforesaid, and in the times of the late war between the King of England and the States of the United Provinces of the Netherlands, the armies and subjects of the said States General gained possession, not only of the said premises so by his Royal Highness conveyed to Berkeley and Carteret, and also of other lands and hereditaments which were originally granted unto his said Royal Highness by his said Majesty's said letters-patent herein-

before recited—all which were afterwards regained from the said States, or by them delivered up unto his said Majesty ; then reciting the aforesaid letters-patent from the King to the Duke of York, dated the 27th of June, 1674, then after these recitals the said indenture declares for a consideration therein expressed, and for the better extinguishing of all such claims and demands as his said Royal Highness may anyways have of or in the premises aforesaid now called West New Jersey, or any part of them, and for the further and better settling, conveying, assuring and confirming of the same, and of every part thereof, according to the purport and meaning of these presents, his Royal Highness did grant, bargain, sell and confirm unto the said William Penn, Gawn Lawry, Nicholas Lucas, John Eldridge and Edward Warner, all that part, share and portion of all those parts, shares and portions of that entire tract of land and all these entire premises so granted by his said Royal Highness unto the said John Lord Berkeley and Sir George Carteret, and their heirs as aforesaid, as in and by and upon the said partition aforesaid was and were vested in the said William Penn, Gawn Lawry and Nicholas Lucas and their heirs, and then agreed to be called by the name of West New Jersey, together with all the islands, bays, rivers, waters, forts, mines, quarries, royalties, franchises and appurtenances whatsoever to the same belonging or in anywise appertaining, and all the estate, right, title, interest, reversion, remainder, claim and demand whatsoever, as well in law as in equity, of him the said James, Duke of York, of, into and out of the same, or any part or parcel of the same ; as also the free use of all bays, rivers and waters leading into or lying between the said premises or any of them in the said parts of America, for navigation, free trade, fishing or otherwise, to have and to hold to said Penn, Lawry, Lucas, Eldridge and Warner, their heirs and assigns forever to certain uses, namely, as to ten equal and undivided hundred parts thereof to the use of said John Eldridge and Edward Warner, and of their heirs and assigns forever, and as to the other ninety equal undivided hundred parts thereof to the use of the said William Penn,

Gawn Lawry and Nicholas Lucas, and of their heirs and assigns forever, in trust, nevertheless, for the said Edward Billinge his heirs and assigns forever.

And further, for the better enabling said Edward Billinge, his heirs and assigns, to improve and plant the said premises with people, and to exercise all necessary government there, whereby the said premises might be the better improved and made more useful to him, his heirs and assigns, and to the King's Majesty, said Duke of York did give, grant, assign and transfer unto the said Edward Billinge, all and every such the same powers, authorities, jurisdictions, governments and other matters and things whatsoever, which by the said respective recited letters-patent, or either of them, are and were granted or intended to be granted to be exercised by the said Duke of York, his heirs, assigns, deputies, officers or agents, in, upon or in relation unto the said premises thereby confirmed or intended to be confirmed, and every of them, in case the same were then in the actual seizure of the said Duke of York, to be held, enjoyed, exercised and executed by him, the said Edward Billinge, his heirs and assigns, and by his deputies, officers, agents and commissioners, as fully and amply to all intents, constructions and purposes as his said Royal Highness, or his heirs, might or could hold, enjoy, use, exercise or execute the same by virtue of the said letters-patent.

And your orator further shows that in this indenture West New Jersey is described as "All that westernly part, share and portion of the said whole and entire tract of land and premises as before mentioned which is extending southward and westward and northward along the seacoast and the before-mentioned bay or river, called Delaware bay and Delaware river, unto a certain point there now called the South Partition Point, being the most southerly point of the east side of a certain place or harbor lying on the southern part of the said tract of land and premises called or known in the map of the said premises by the name of Little Egg Harbor, unto a certain other point there now called the North Partition Point," etc., as by reference to the said last-mentioned indenture, leave of reference to which is prayed, will more fully and at large appear.

H. The concessions and agreements of the proprietors, freeholders and inhabitants of the province of West Jersey, in America, bearing date the third of March, 1676, which were agreed to and signed by the said Edward Billinge, Gawn Lawry, William Penn, Nicholas Lucas and others. The sixth chapter of this document grants and dedicates lands for highways and streets, and cities, towns and villages, and for wharfs, keys, harbors and for public houses, * * * as also that the inhabitants of the said province have free passage through or by any seas, bounds, creeks, rivers, rivulets, in the said province, through or by which they must necessarily pass to come from the main ocean to any part of the province aforesaid.

* * * * *

“That all the inhabitants within the said province of West Jersey, have the liberty of fishing in Delaware river, or on the seacoast;” as by reference to the said concessions and agreements, leave of reference to which is hereby prayed, will more fully and at large appear.

And your orator respectfully submits and charges that whatever rights the said Duke of York, or the said William Penn, may have acquired in or to the Delaware river from the King of England after the making of the concessions and agreements last hereinbefore referred to, in equity were subject and subordinate to the rights granted by the said concessions and agreements to the inhabitants and property-holders of West New Jersey, in or by virtue of the said concessions and agreements; and that said William Penn was, and all persons, associations, and every State claiming by, through, or under him were, are and should be estopped from asserting or maintaining that any rights or pretended rights acquired by the said Duke of York, or by said Penn, in or to any part of the Delaware river from the King of England, subsequent to the year 1676, do or can destroy, lessen or impair any of the rights in or to the Delaware river, or any part thereof, conferred upon the inhabitants of West New Jersey, by the said concessions and agreements.

I. A deed of surrender from the proprietors of East and West New Jersey of their right, or pretended right of government to Her Majesty Queen Anne, bearing date the fifteenth day of April, 1702, duly executed by the then proprietors of each of said divisions, in and by which the said proprietors for themselves and heirs did surrender and yield up unto their then sovereign, Anne, Queen of England, all powers of government as to New Jersey granted by King Charles II. to the Duke of York, and by the Duke of York to the said proprietors, as by reference to said surrender, leave of reference to which is prayed, will more fully appear.

The said surrender was accepted by the Queen in council on the seventeenth day of April, 1702, and ordered to be enrolled in her Majesty's High Court of Chancery.

J. By the American Revolution, which took place by the declaration of independence, bearing date the fourth day of July, 1776, the State of New Jersey became, and was, and from thenceforth has been a free and independent State, and as such became entitled to have and to hold all such rights as free and independent States may have or hold, to do all acts and things which independent States may of right do, and by force of the said revolution and said independence the said State of New Jersey became invested not only with all and every power of government in and over the territory of said State and the tide-waters adjacent thereto, but also became invested with all the property, and rights of property, within and appertaining to said State, which immediately before said revolution were vested in the crown of England; that at the time the said revolution took place the bed of the river Delaware in its whole width and length, from the falls in said river at or near Trenton, to the mouth of said river—that is, throughout the whole extent to which the tide ebbed and flowed in said river—belonged to and was vested in the crown of England in trust for the uses and purposes of the subjects of the King of Great Britain; that by means of the said revolution, the said independence of the State of New Jersey, and the treaty of peace between the King

of Great Britain and the United States of America, concluded at Paris, September 3d, 1783, that portion of the bed of the Delaware river, last hereinbefore mentioned, situate between the States of New Jersey and Delaware, to the middle of said river, became vested in fee-simple in the State of New Jersey; the remaining portion thereof, by the same means and at the time being vested in the State of Delaware; and so the title to the bed of said river, your orator respectfully submits, hath ever since continued and now is. As to the waters of said river between the State of New Jersey and the State of Delaware, your orator respectfully submits that ever since the fourth of July, 1776, your orator, and the State of Delaware, have each had and been entitled to an equal interest therein, and each has had a right to exercise equal and concurrent jurisdiction in and over the same, and an equal right for its citizens and inhabitants to fish in said waters.

Your orator is aware that it has at times been alleged and pretended on behalf of the State of Delaware that Charles II., King of England, by alleged letters-patent, said to bear date March 22d, 1683, did grant to his brother, the Duke of York, "the town of 'Newcastle,' otherwise called Delaware, and fort therein or thereunto belonging, situate, lying and being between Maryland and New Jersey, in America, and all that tract of land lying within the compass or circle of twelve miles above the said town, situate, lying and being upon the river Delaware, and all the islands in the said river of Delaware, and the said river and the soil thereof lying north of the southernmost part of said circle of twelve miles about said town," but your orator denies that the said alleged patent was ever legally made or ever legally delivered by the said King Charles II. to his said brother James, Duke of York, and that said patent never had any legal existence. And your orator further contends, and respectfully submits, that if it shall appear that said alleged patent had legal existence and validity, that then and in that case, by legal and just construction thereof, it cannot and should not be construed to include or control any part of the bed of said river lying northerly or

easterly of the middle of said river, and no rights of jurisdiction or fishery in said river except equal and concurrent rights with your orator.

K. To the bed of the river Delaware, and jurisdiction *ui* and over said river so as aforesaid claimed, your orator hath title and right by long, peaceable and undisputed possession, use and enjoyment—that is, possession, use and enjoyment which began with the earliest settlement of the State of New Jersey, and which hath continued ever since without interruption or dispute, excepting only the interruption and dispute hereinafter complained of.

During all that time the citizens and residents of New Jersey, under the authority of your orator, and with its leave and license, from time to time, have improved the easterly shore of said river, opposite to the State of Delaware, from a point opposite to the boundary line between Pennsylvania and Delaware, on the Delaware river, to and below a point on the easterly side of said river, twelve miles below New Castle, as their wants and convenience have required, by erecting dykes and embankments and building wharves, docks, piers and other structures and arrangements. The southwesterly limits of the counties of Salem, Cumberland and Cape May (which counties lie opposite to the State of Delaware, and bound on the said river) by usage and legislative enactment, have been the main ship channel of the river and bay of Delaware. The laws of your orator relative to fishing in the Delaware river, for over seventy years, have been recognized, obeyed and enforced on every part of that part of said river which lies between the State of New Jersey and the State of Delaware, and the citizens and inhabitants of the State of New Jersey, for more than two hundred years, have claimed, exercised and enjoyed, except as hereinafter stated, without molestation or interruption, the right of fishing in all parts of said river, equally and in common with the citizens and inhabitants of the State of Delaware, and during all that time the courts of New Jersey have exercised jurisdiction, in respect of wrongs

committed on said river, where it runs between said two States, and complained of in the courts of your orator.

2.

Your orator further shows that the Legislature of the State of Delaware passed an act March 28th, 1871, entitled "An act for the protection of fishermen," in and by the first section of which it is enacted "that it shall be unlawful for any person not being a citizen of the State to take or catch fish of any kind in Delaware bay or river or any of the creeks emptying into the same, within the limits of this State, without obtaining from the clerk of the peace of one of the counties a license therefor, which license shall be granted on paying to the clerk, for the use of the State, twenty dollars, and shall be in force for one year from its date, and shall be confined to one boat or vessel named therein; provided, that transient vessels may catch fish for their own immediate use. If any master of a boat or vessel, or other person, shall violate this section, he shall be deemed guilty of a misdemeanor, and shall pay to the State a fine of fifty dollars, and the boat or vessel used in such violation of the law, with all her tackle, apparel and furniture, and all her implements for fishing, gill net or seine, or any contrivance for taking fish, and anything so taken shall be forfeited, and may be seized and detained for trial by any officer or person. Such trial may be had before any justice of the peace, and if condemned the property seized shall be sold by his order, and the proceeds, deducting costs and charges, be equally divided among the captors; provided, that an appeal shall be allowed from the judgment of the justice, if applied for within ten days, to the Court of General Sessions of the Peace and Jail Delivery, on security being given by bond and sufficient surety in the full value of the property condemned, conditioned to be void if such judgment be reversed by said court," as by reference to this act, leave of reference to which is hereby prayed, will more fully and at large appear.

That by a supplement to said last-mentioned act passed by the Legislature of Delaware, March 29th, 1871, it was

enacted "that it shall be unlawful for any resident or citizen of this State to catch or take any shad, for the purpose of sale, in Delaware river or bay, or any of the creeks or rivers emptying into the same, within the limits of this State, without first obtaining from the clerk of the peace of one of the counties a license therefor, which license shall be granted on paying to the clerk of the peace aforesaid, for the use of the State, five dollars, and shall be in force one year from its date, and shall be confined to one boat or vessel named therein." By the second section of said act it is enacted "that all provisions of the act to which this is a supplement shall, with the exception of section one of said act, be applicable to citizens and residents of this State."

And your orator further shows that certain officers of the State of Delaware, whose names are unknown to your orator, construed the said act of the State of Delaware as requiring or authorizing them to arrest citizens of New Jersey while pursuing the occupation of fishing in the river Delaware, on easterly side of said river, and easterly of the middle and near to the easterly shore of said river, and under that construction, in the month of April and early part of the month of May, in the year 1872, officers of the State of Delaware, on the easterly side of the middle of the river Delaware, arrested twenty or more citizens and inhabitants of the State of New Jersey, who were then and there, in accordance with the laws of the State of New Jersey, engaged in the occupation of fishing in the said river on the easterly side of said river, and seized their vessels and fishing implements and carried the said citizens and residents into the State of Delaware, and there charged them with violation of the aforesaid act relative to fishing, in this, that said persons had not taken a license and paid the license fee of twenty dollars prescribed by the first section of the aforesaid act, and the courts and authorities of the State of Delaware did enforce the provisions of the said act against said citizens and residents of New Jersey, and did thereby assert an exclusive jurisdiction over the whole of said river from shore to shore in disregard and defiance of the rights of your orator, and thereupon the Governor of the State of New Jersey did

issue his proclamation, bearing date the eighth day of May, 1872, reciting and proclaiming as follows :

“A proclamation by the Governor of New Jersey.

“Whereas, citizens of New Jersey, while pursuing the occupation of fishing in the river Delaware, on the eastern side of said river, and within the jurisdiction of this State, have recently been arrested by persons claiming to act under the laws and authority of the State of Delaware and taken as prisoners out of this State ;

“And whereas, the business of those so arrested has been seriously interrupted, and the like business of many other citizens will be disturbed should similar aggression upon the authority and jurisdiction of this State be continued ;

“And whereas, disputes in relation to jurisdiction between States should be submitted to the legal tribunal created with especial reference to such disagreements, and should not be permitted to result in a collision of opposing local authorities, or in individual retaliation :

“Therefore, I hereby give notice and proclaim that the State of New Jersey claims jurisdiction over that part of the river Delaware, between the States of Delaware and New Jersey, which is easterly of the middle line of said river, and further claims that all persons who conform to the fishing laws of the State of New Jersey have the right to fish on the eastern side of said river, without permission or license of any other State.

“And I notify and warn all persons not to molest, disturb, arrest, or attempt to arrest, without lawful process, issued by some legal authority in this State, any citizen of New Jersey, at any place within her jurisdiction.

“And I exhort the people of this State, if any illegal arrest or interference be attempted, to refrain from acts of violence, assuring them that every effort will be made to have the questions involved determined by the proper tribunal.

“Given at the executive chamber, at Trenton, this
[L. S.] eighth day of May, A. D. one thousand eight
hundred and seventy-two.

“Attest, JOEL PARKER.

“JOS. A. HALL, Private Secretary.”

That on the thirtieth of January, 1873, the Legislature of the State of Delaware did adopt joint resolutions of which the following is a copy :

“Whereas, it appears by the message of his Excellency the Governor, and the documents accompanying the same, that the State of New Jersey makes claim for her citizens of the right to fish in that part of the waters of the Delaware within the limits of the ‘twelve-mile circle’ and eastward of the channel of said river, thus denying the exclusive jurisdiction of this State over the said waters within the said circle, a jurisdiction never doubted in Delaware, nor questioned elsewhere with confidence until now, so far as this General Assembly is informed ;

“And whereas, his Excellency the Governor of New Jersey, in his correspondence with the Governor of this State, has suggested that the question of exclusive jurisdiction, and of authority involved in the claim maintained by that State, be settled by resort to legal proceedings which this Legislature have respectfully declined to adopt, believing that the question can be more appropriately settled and justice done otherwise and as hereinafter provided for ;

“And whereas, it is of the utmost importance that no questions of sovereign title or rights should exist between States ;

“And whereas, in this case such do exist they should be settled as becomes the high parties ; therefore,

“Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met, That the whole subject of controversy be submitted to the decision of six commissioners, three to be appointed by the Legislature of each State, and that their decision shall be final.

“Resolved, That said decision be submitted in writing, upon parchment, under the hands of the said commissioners, to this Legislature, and to that of the State of New Jersey, and be entered upon the journal of each house of the General Assembly of each State as a perpetual memorial of the end of the aforesaid controversy ; and that similar certificates be made and delivered to the Governor of each

State, to be placed among the executive archives; and further, that each State, through its Governor, make proclamation for six months, in the newspapers printed within its borders, of the aforesaid decision, to the end that full public information thereof may be given.

“Resolved, That Joseph P. Comegys of Kent county, William G. Whiteley of New Castle county, and Edward L. Martin of Sussex county, be appointed commissioners on the part of this State for the purpose aforesaid; that they be at once notified by the Speaker of the Senate of such their appointment, and in case at the end of five days from such notice, either of them has not accepted said appointment, that another from the same county be appointed in his place.

“Resolved, That a copy of the foregoing preamble and resolutions, duly certified by the Governor to the Governor of New Jersey, with a request that they be laid before the Legislature, that the aforesaid controversy shall be settled during the present session of the Legislature of each State.

“Resolved, That each of the said commissioners shall each receive for his services hereunder the sum of five hundred dollars, to be paid by the State Treasurer, on the certificate of the Speaker of the Senate, that the said services have been performed.

“Adopted at Dover, January 30th, 1873.”

That on the fourteenth of February, 1873, the Legislature of the State of Delaware did adopt other joint resolutions of which the following are copies, namely:

“Joint resolutions supplementary to those passed on the 30th of January last, respecting the fishery question with New Jersey.

“To avoid all question or debate as to the extent of the powers conferred upon the commissioners appointed by this State, under the resolutions adopted on the 30th day of January last, and on those to be appointed by the State of New Jersey, according to the suggestions therein:

“Resolved, by the Senate and House of Representatives

of the State of Delaware in General Assembly met, That no question was intended to be submitted by the said resolutions respecting the title of this State to the river Delaware, and the soil thereof within the limits of the twelve-mile circle, but only whether, notwithstanding such title, the citizens of New Jersey have the right to fish in said river within that circle; and if so, the nature and extent of that right. And the said commissioners are to consider that no other question but that here mentioned is submitted to them, this State refusing to allow her aforesaid title to be drawn in question by said commissioners, or in any other manner.

“Resolved, That a copy of the foregoing, duly certified, be forwarded by the Governor to the Governor of New Jersey.

“Adopted at Dover, February 14th, 1873.”

“Joint resolution supplementary to the joint resolution with respect to the subject of difference between the State of New Jersey and this State.

“Resolved, by the Senate and House of Representatives of the State of Delaware in General Assembly met, That all of the preamble to the ‘Joint resolution with respect to the subject of difference between the State of New Jersey and this State,’ adopted on the 30th ultimo, after the words ‘so far as this General Assembly is informed,’ be and the same is hereby stricken out, and in lieu thereof these words shall be substituted: And the said preamble shall be read and construed and published according to the change made.

“And whereas, it is important that the said question should be at once settled, so that there shall be no conflict of claim hereafter.

“Adopted at Dover, February 19th, 1873.”

Your orator further shows that on the seventeenth of February, 1873, the Legislature of the State of Delaware passed another act entitled “A supplement to the act entitled an act for the protection of fishermen,” in and by which it is enacted as follows:

"A supplement to an act entitled 'An act for the protection of fishermen.'

"Section 1. That it shall be unlawful for any person, not being a citizen of this State, under this act, to use more than three hundred fathoms of gill-net or seine; and that any person who may violate this section shall be deemed guilty of a misdemeanor, and shall pay to the State a fine of twenty-five dollars for every such violation.

"Section 2. That the Governor be and he is hereby authorized to appoint five commissioners who shall be appointed in and for and shall reside in the county of New Castle, in the towns of Port Penn, Delaware City, New Castle, Wilmington and Claymont, one in each place; and the appointment shall be made and vacancies filled by the Governor for and during the period of two years. The said commissioners are hereby authorized and required to take cognizance of all violations of the act to which this is a supplement, to arrest any and every offender against the aforesaid law, to seize and detain the boat or boats of said offenders, and are hereby invested with all the powers, privileges and remunerations of the sheriff and constables enumerated in the act aforesaid."

* * * * *

Passed at Dover, February 19th, 1873.

That shortly thereafter the Legislature of the State of New Jersey did pass an act which was approved on the 26th of February, 1873, and is entitled "An act for the settlement of the territorial limits and jurisdiction of the State of New Jersey and the State of Delaware," which act reads as follows:

"1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That the Governor shall, by and with the advice and consent of the Senate, appoint three commissioners, who shall have full powers on the part of the State of New Jersey, to meet three commissioners appointed, or to be appointed under or by virtue of a law of the State of Delaware, to negotiate and agree respecting the

territorial limits and jurisdiction of the State of New Jersey and the State of Delaware; and if by death, resignation, or otherwise, a vacancy do happen among those appointed by the State of New Jersey, the Governor, or person administering the government of this State, is hereby authorized to supply the same.

"2. And be it enacted, That the said commissioners on the part of the State of New Jersey, or a major part of them, shall have full power and authority to agree upon, settle and determine the limits of territory and jurisdiction between the said States as to them may seem just; and their agreement in the premises in writing, signed and sealed by the said commissioners of both, or a majority of them, respectively, if made on or before the first day of January next, shall become binding on the State of New Jersey, when confirmed by the respective Legislatures of the State of Delaware and of the State of New Jersey, and the Congress of the United States shall consent thereto.

"3. And be it enacted, That the said commissioners shall meet at such time and place as they may agree upon, and that the expenses and disbursements of the said commissioners for surveys, if any shall be necessary, for maps and copies of maps, of documents of any kind that may be deemed useful, and for any other purpose which shall aid them in the discharge of their duties, and a reasonable compensation for their services, shall be ascertained and allowed by the Governor and paid by the Treasurer, on the Governor's warrant, out of any moneys in the treasury not otherwise appropriated.

"4. And be it enacted, That the Governor shall transmit to the Governor of the State of Delaware a copy of this act.

"5. And be it enacted, That this act shall take effect immediately.

"Approved February 26th, 1873."

And shortly thereafter the Governor of New Jersey, with the advice and consent of the Senate, did appoint three commissioners for the purposes named in said act, namely, Abraham Browning, of the county of Camden; Cortlandt

Parker, of the county of Essex, and Albert H. Slape, of the county of Salem, all of whom accepted said appointment.

Your orator further shows that, after receiving information of the passage of the said supplemental resolutions by the Legislature of the State of Delaware, of the 14th and 19th of February, 1873, the Legislature of the State of New Jersey did pass another act, which was approved on the eleventh of March, 1873, and is in the words following :

“A supplement to the act approved February twenty-sixth, one thousand eight hundred and seventy-three, entitled ‘An act for the settlement of the territorial limits and jurisdiction of the State of New Jersey and the State of Delaware.’

“Whereas, it appears that the State of Delaware has in some measure modified the original joint resolution passed by the Legislature of that State with respect to the subject of difference between the State of New Jersey and that State, and thereby declined to submit to commissioners any question as to the title claimed by said State to a part of the Delaware river, but has authorized the submission of the question whether the citizens of New Jersey have the right to fish in that part of the Delaware river claimed by the State of Delaware, and the nature and extent of that right ; and whereas, it is expedient to settle at this time so much of the difference between the said States as may be settled amicably ; therefore,

“1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That the commissioners already appointed under the act to which this is a supplement, and their successors, shall have power to settle so much of the difference between this State and said State of Delaware as the said State of Delaware has submitted, or may from time to time hereafter submit ; provided, however, that nothing in this act contained shall be construed to, or to authorize said commissioners by any act or agreement to affect any other claim or jurisdiction of New Jersey in or over the whole or any part of the Delaware river or the soil thereof, notwithstanding the settlement of said fishery question.

"2. And be it enacted, That if the said State of Delaware shall hereafter give more enlarged powers to its commissioners, the said commissioners of this State, and their successors, may act upon and exercise every of the powers given in this act, or the act to which this is a supplement, to the extent of the submission under such enlarged powers so to be given by said State of Delaware.

"3. And be it enacted, That the said commissioners and their successors shall remain charged with the matters mentioned in the said act to which this is a supplement, until the same shall be finally settled under the powers by said act given; and such as shall be given by said State of Delaware or otherwise, notwithstanding the agreement contemplated by said act to which this is a supplement, may not be made on or before the first day of January next; and that any agreement made under this act or the act to which this is a supplement shall be submitted to the Legislature of this State, and be ratified and confirmed by this State in the manner prescribed by the act to which this is a supplement, and be consented to by Congress before the same shall be finally binding on this State.

"4. And be it enacted, That a copy of this act shall be transmitted to the Governor of Delaware, and that the same shall take effect immediately.

"Approved March 11th, 1873."

Your orator further shows that on the eighth of April, 1873, the Legislature of the State of Delaware did adopt certain other joint resolutions, of which the following is a copy :

"Joint resolution in reference to the fishery question.

"Resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met :

"1st. That any and all laws of the State requiring a license to fish for shad within the waters of this State, be and the same are hereby suspended pending the negotiations between the commissioners appointed by this State and the State of New Jersey for the settlement of the fishery question.

"2d. That upon the determination of the questions submitted to the said commissioners favorable to the claim of this State, the commissioners appointed on the part of this State are hereby authorized to make such a compromise or settlement as will secure to the people of the State of Delaware and the people of the State of New Jersey, the mutual right of fishery in the Delaware bay, and in that part of the Delaware river lying between the two States.

"Adopted at Dover, April 8th, 1873."

Your orator further shows that after the date of the resolution last quoted, the aforesaid commissioners, appointed by the State of Delaware and by your orator, had various conferences and discussions; that after a considerable time the said commissioners on the part of Delaware submitted to the said commissioners appointed by your orator, a printed argument setting forth their views of the matters in dispute, and of the rights of the said parties respectively in and over the subject-matters thereof; that the commissioners on the part of your orator engaged in the discussion and consideration in dispute, in good faith, and with a sincere hope and wish of reaching an agreement and settlement that would be reasonable and just and satisfactory to both parties, and were engaged in preparing their argument in reply to the argument submitted by the commissioners on the part of Delaware, but before the commissioners on the part of your orator were able to complete and submit their reply, the Legislature of the State of Delaware, on the twenty-fourth of February, 1875, adopted a joint resolution, of which the following is a copy:

"Joint resolution directing the State Treasurer to pay Jos. P. Comegys, Wm. G. Whiteley and E. L. Martin each five hundred dollars.

"Whereas, by joint resolution, adopted at Dover Jan. 30th, 1873, Jos. P. Comegys, Wm. G. Whiteley and Edward L. Martin were appointed commissioners on the part of Delaware, to meet a like number of commissioners on the part of the State of New Jersey, with power to consider and

decide the right of the citizens of New Jersey to fish in that part of the water of the Delaware river within the limits of the 'twelve-mile circle,' and eastward of the channel of the said river; and whereas, it appears to this General Assembly that said Joseph P. Comegys, W. G. Whiteley and E. L. Martin have performed the duties enjoined upon them as far as possible; now, therefore,

"Resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met, That the State Treasurer be and he is hereby directed to pay to the said Jos. P. Comegys, Wm. G. Whiteley and Edward L. Martin, each, the sum of five hundred dollars, as provided in the aforesaid joint resolution.

"Adopted at Dover, February 24th, 1875."

And afterwards, and on the twenty-sixth day of March, 1875, the Legislature of the State of Delaware did pass another joint resolution, of which the following is a copy :

"The Hon. Joseph P. Comegys of Kent county, William G. Whiteley of New Castle county, and Edward L. Martin of Sussex county, as commissioners with respect to the subject of differences between the State of New Jersey and this State, the said commissioners having fully performed their duty, and reported the result of their labors to the General Assembly :

"Be it resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met, That the said Joseph P. Comegys, William G. Whiteley and Edward L. Martin are hereby relieved of further duties as commissioners of this State.

"Adopted at Dover, March 26th, 1875."

And your orator further shows that no copy of either one of the joint resolutions last quoted was transmitted to the Governor or Secretary of State, or any other executive officer of the State of New Jersey, nor to the Legislature thereof; your orator had no notice whatsoever of the adoption of either one of the resolutions last quoted, until after the first of January, 1876, but until that time, and until in

or about the month of March, 1876, your orator understood and believed that the said commission was still in full force, and was not aware that the State of Delaware had modified or withdrawn the power so as aforesaid conferred upon her said commissioners, or that they had been discharged from the said commission or withdrawn from the duties thereof; and your orator did not learn of that fact until on or about the 20th of March, 1876, when the attention of the Governor of New Jersey, by one of its citizens, was called to a notice published in the "Morning Herald," a newspaper published at Wilmington, in the State of Delaware, on the fifteenth of March, 1876, purporting to be signed by John Springer, a Clerk of the Peace, at New Castle, and is as follows:

"NOTICE TO FISHERMEN.

"The action of the General Assembly of the State of Delaware in 1873, also in 1875, did not repeal the law requiring a State license for catching shad or fish of any kind in the Delaware river. The same does remain in full force at this time. Therefore, all persons engaged in fishing in said Delaware bay or river, or creeks, must procure a State license.

"The licenses are issued at the office of the Clerk of the Peace at New Castle, and at number 309 West Second street, Wilmington.

"JOHN SPRINGER,

"Attest, Clerk of the Peace at New Castle.

"M. A. J. SPRINGER, Deputy,

"No. 309 West Second street, Wilmington."

Your orator further shows that after receiving the information last shown, communications were had between the Governor of Delaware and other officers of said State on the one side, and your orator's Governor and other officers on the other side, from which your orator learned that the State of Delaware claims and insists that the aforesaid joint resolutions of the State of Delaware, adopted April 8th, 1873, had been abrogated by the other joint resolutions of said

Legislature, adopted February 24th, 1875, and March 26th, 1875, and was no longer in force, and that the Governor and executive officers of the State of Delaware understood that it was their right and their duty to treat as belonging to and within the exclusive jurisdiction of the State of Delaware, the whole of the river Delaware from shore to shore, from a point twelve miles below the town of New Castle to the northerly boundary of said State on said river, and within that space to enforce the said fishing laws, and all other laws, of the State of Delaware, and enforce the penalties thereby prescribed upon all citizens and inhabitants of the State of New Jersey who should fish anywhere in that part of said river without having taken out the license and paid the license fee of twenty dollars prescribed against non-residents of Delaware, in and by her aforesaid fishing laws, and the said Governor and executive officers of the State of Delaware refused to make any agreement with your orator to stay the execution of said laws, or to refrain from enforcing them against the citizens or residents of New Jersey pending a suit in this honorable court for the settlement of the matters so as aforesaid in controversy between your orator and the said State of Delaware; and your orator is informed and believes, and charges the truth to be, that it is the intent and purpose of the State of Delaware, and the executive officers thereof, to enforce the said fishing laws of the State of Delaware, and other laws of said State, against any and all citizens and inhabitants of the State of New Jersey who may, without the twenty dollars license, fish in any part of said river, north of the point of said river twelve miles below the town of New Castle, and south of the northerly boundary line of the State of Delaware on the Delaware river, and to enforce all laws of the State of Delaware on and over that part of said river, as and if said last-named State had sole and exclusive jurisdiction over all that part of said river; that said enforcement of said fishing and other laws will not only be contrary to and violative of the rights and powers of your orator in the premises, and burdensome and injurious to the citizens and inhabitants of the State of New Jersey, but will also be likely to lead to

breaches of the peace and create disturbances and commotions and violent strifes between the people of the said two States, and lead to unfriendly relations between the said two States and the people thereof, injurious to the peace and prosperity of both.

And your orator further shows that thereupon the Legislature of New Jersey did pass, and the Governor did approve, a joint resolution of which the following is a copy :

“ Joint resolution relative to the rights of the State of New Jersey in that part of the Delaware river which runs between the States of Delaware and New Jersey.

“ Whereas, the State of Delaware now claims to own the bed and to have exclusive jurisdiction, from shore to shore, of a portion of the Delaware river, extending from the boundary line between the States of Pennsylvania and Delaware, for some distance below the town of New Castle, and has lately endeavored to exercise jurisdiction co-extensive with said claim; and whereas, this State hath always claimed and now doth claim to own the bed of said river to the middle thereof, so far as said river lies between this State and the State of Delaware, and to be entitled to exclusive jurisdiction (subject to the Constitution of the United States and the acts of Congress made in pursuance thereof) over its half of said river, and hath always, heretofore, exercised jurisdiction accordingly; and whereas, it is desirable and necessary that the rights of this State, as between it and the State of Delaware, in and to said river, shall be definitely, finally and conclusively settled; and whereas, the efforts heretofore made to settle said matters of difference by consultation and agreement between the said differing States have proved ineffectual; therefore,

“ 1. Be it resolved by the Senate and General Assembly of the State of New Jersey, That the Governor of this State be and he is hereby authorized to cause to be instituted and prosecuted in the Supreme Court of the United States a suit in equity, or an action at law, by the State of New Jersey against the State of Delaware, to ascertain, determine and settle the true territorial boundary line between said

States, and the extent of the jurisdiction of each of said States in and on said river, and for that purpose the Governor shall have power to employ, on behalf of this State, counsel to assist the Attorney-General in the commencement and prosecution of said suit or action, and the expenses necessarily and reasonably attending the commencement and prosecution of said suit or action, on bills certified by the Governor, shall be paid out of any moneys in the treasury not otherwise appropriated.

"2. And be it further resolved, That this resolution shall take effect immediately.

"Approved March 30th, 1876."

And your orator further shows that this bill, by the direction of the Governor of your orator, by authority of and pursuant to the joint resolutions last quoted, hath been prepared and is presented.

To the end, therefore, that the said the State of Delaware may full, true, direct and perfect answer make to all and singular the matters hereinbefore stated or charged, as fully and particularly as if the same were hereinafter repeated, and it thereunto interrogated paragraph by paragraph, and more especially that it may state whether it has not in and since the year 1872 claimed to own, in severalty and exclusively, the whole bed of the Delaware river from a point on said river twelve miles below the town of New Castle to the boundary line, on said river, between the State of Delaware and the State of Pennsylvania, and also whether it does not claim that its inhabitants are entitled to the sole and exclusive right of fishing in that portion of said river last hereinbefore mentioned, and also whether it has not denied, and does or not now deny, the right of the inhabitants of New Jersey to fish in any part of that portion of said river except under license from the State of Delaware, and whether its officers have not, in and since the year 1872, arrested/the inhabitants of New Jersey and imprisoned them, and seized their property and deprived them thereof for fishing in that portion of said river, as well for being and fishing, without license from the

State of Delaware, in said river, on the easterly side of the middle of said river, north of a point twelve miles below New Castle and south of the State of Pennsylvania, as for being and fishing on the other side of the middle of that portion of said river, without license from the State of Delaware, and whether it and its officers have not threatened and do not mean and intend to arrest and imprison the citizens and residents of New Jersey, and to imprison, fine and otherwise punish them, to seize and dispose of the property of any of the citizens or inhabitants of New Jersey who may be found fishing on or in any part of said river north of a point twelve miles below New Castle, and a point twelve miles above the same town, without a license from the State of Delaware, and whether it is not the intent and purpose of the executive and ministerial officers of the State of Delaware to require the citizens and residents of New Jersey to pay larger or greater fees for licenses to fish in that portion of the Delaware river last above described than can or will be charged to citizens or residents of the State of Delaware for licenses to fish on the same portion of said river.

Your orator therefore respectfully prays that the State of Delaware may fully answer this bill, but without oath or affirmation.

That the true boundary line between the State of New Jersey and the State of Delaware may be ascertained, declared, defined and perpetually established.

That the rights and estate of your orator in the bed of said river, and the territorial extent thereof, may be ascertained, declared and established.

That the jurisdiction of your orator and of its courts and officers in and over the Delaware river, so far as said river is between the State of New Jersey and the State of Delaware, may be ascertained, defined, declared and perpetually established.

That the rights of the citizens and inhabitants of New Jersey to fish in that part of the Delaware river which is between the State of New Jersey and the State of Delaware, may be ascertained, declared and perpetually established and secured to them.

That the State of Delaware, its officers, agents and servants, and every person acting or claiming to act under or by the power or authority of the State of Delaware, or any of its laws, may be perpetually enjoined from imposing any tax, assessment, or imposition whatsoever by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware. Or if said State may legally be permitted to require a license for fishing in any part of the said river, and to impose a tax for such license, or for fishing in said river, that it be enjoined perpetually from imposing any tax therefor, on citizens or residents of New Jersey, and from prescribing or requiring any license therefor for citizens or residents of New Jersey other or different from what is imposed upon and prescribed or required from citizens or residents of the State of Delaware; and, also, may be perpetually enjoined from arresting, imprisoning, trying, fining, or in any manner punishing, or seizing, holding or selling any property of any citizen or resident of New Jersey for fishing in any part of the Delaware river. And that your orator may have such other and further relief in the premises as the nature and circumstances of its case require, and as may be agreeable to equity.

May it please your Honors to grant unto your orator not only a writ or writs of injunction according to the prayers aforesaid, or to such extent and in such form as to your Honors shall seem proper, but also a writ of subpoena to be directed to the said the State of Delaware, requiring it to be and appear in the Supreme Court of the United States, at a time therein to be named, then and there to fully answer this bill, and to stand to, abide and perform such orders and decrees in the premises as to the said court shall seem meet and proper, and as may be agreeable to equity. And your orator will ever pray, &c.

JACOB VANATTA,
*Attorney-General of New Jersey,
 and Solicitor of the Complainant.*

UNITED STATES OF AMERICA, } ss.
 STATE OF NEW JERSEY, }

Samuel Callahan, being duly sworn according to law, on his oath deposes and says that he is sixty-six years of age and resides at Pennsville, in the township of Lower Penns Neck, in the county of Salem and State of New Jersey, and has resided in that place all his life; that since the year 1824 he has, every year, been engaged in the business of fishing for all kinds of fish on the Delaware river, with nets; that his fishing, during the time aforesaid, has extended from Marcus Hook to Reed's Island, which last-named place is about twelve miles below New Castle, and has been down on both sides of and in the middle and in all parts of said river, within the limits aforesaid, as deponent saw fit, and at his free will and pleasure; and at no time during the period aforesaid did deponent pay anything or take out any license for the privilege of fishing in said river from the State of Delaware, nor from any authority whatsoever; nor was deponent ever asked to pay or take license for fishing in said river; nor, prior to the year 1872, did deponent ever hear that any resident of the State of New Jersey had ever been required or asked to pay or take out license for the privilege of fishing in said river, but all Jerseymen who saw fit to do so fished in said river freely, at their own pleasure, without leave asked of anyone as a matter of right. In the year 1872 deponent heard that some Jerseymen had been arrested for fishing in said river without license from the State of Delaware, but no one ever arrested deponent, or offered to arrest him, for fishing in said river.

SAMUEL CALLAHAN, SR.

Sworn and subscribed before me, at Trenton, New Jersey,
 February 9th, 1877.

LEWIS W. SCOTT,
United States Commissioner, District of New Jersey.

UNITED STATES OF AMERICA, }
 STATE OF NEW JERSEY, } ss.

William Hawn; being duly sworn according to law, on his oath deposes and says that he is fifty-nine years old and resides in Pennsville, in the county of Salem, New Jersey; that Pennsville is about half a mile north of a point opposite to New Castle, Delaware; deponent has resided in Pennsville continually since the year 1834, and during all that time has been interested in, and most of the time actually engaged in fishing, for all kinds of fish, in the Delaware river, and deponent's fishing therein has been done in all parts of said river, from Penn's Grove, which is about seven miles north of Pennsville, to the mouth of Alloway's creek, which is about twelve miles below Pennsville, and during all the time aforesaid, prior to the year 1872, deponent never heard that any Jerseyman, or resident of New Jersey, was required or asked to pay anything, or to obtain a license from anyone for the privilege of fishing in said river, but all who chose to do so fished in any part of said river, at their will and pleasure, freely, as a matter of right. In the early part of May, 1872, deponent heard that some of his acquaintances had been arrested and carried into the State of Delaware, by officers of that State, for fishing in said river without license from the State of Delaware, and the word was that all who fished in said river, or any part thereof, north of Alloway's creek, without such license as aforesaid, would be arrested by officers from Delaware, and thereupon, under the advice of friends, deponent went to New Castle, in Delaware, to obtain license for deponent's sons, who were carrying on the fishing business in which deponent was then interested, and for that purpose went to the Clerk of the Peace in New Castle, and asked said clerk whether he required that license should be taken out for Jerseymen to fish on the easterly side of said river; and said clerk said Jerseymen must take out license from Delaware to fish in any part of said river. Deponent complained of the hardship or injustice of that requirement, but said clerk said that all who fished in said river without such license would be arrested, and thereupon deponent paid to said clerk a

license fee or tax of twenty dollars, and a fee of fifty cents for the issuance of the license, and thereupon deponent received from said clerk a license, of which the following is a copy :

"In the name and authority of the State of Delaware,

"STATE OF DELAWARE, ss. :

"James Ponder, Governor of the said State, to all persons to whom these presents may come. Greeting :

"This license is granted to Thomas Hawn & Brother, residents of the village of Pennville, in the county of Salem and State of New Jersey, to take or catch shad, for the purpose of sale, in Delaware river or bay, or any of the creeks or rivers emptying into the same, within the limits of this State, they having paid to the Clerk of the Peace of New Castle county, the sum of twenty dollars, for the use of the State, conformably to the provisions of an act of the General Assembly of this State, entitled A supplement to the act entitled 'An act for the protection of fishermen,' passed at Dover, March 29th, 1871.

"This license shall continue in force one year from the date hereof; and shall be confined to one boat or vessel named Charles Henry.

"Given under my hand, and countersigned by the Secretary of State, and sealed under the seal of his office, at Dover, the eighth day of May, in the year of our Lord one thousand eight hundred and seventy-two (1872).

"JAMES PONDER.

"JOHN H. PAYNTER, Secretary of State."

Deponent further saith that he paid the said twenty 50-100 dollars under protest, and it was so endorsed on said license. Deponent has taken no license for fishing since 1872, although he has been engaged in that business ever since. Last year there were reports that arrests would be made by the officers of Delaware for fishing in said river without license, but so far as deponent knows, no such arrests were made.

WILLIAM HAWN.

Sworn and subscribed before me, at Trenton, New Jersey,
February 9th, 1877.

JAMES WILSON,
U. S. Commissioner.

UNITED STATES OF AMERICA, }
STATE OF NEW JERSEY, } ss.

John Q. A. Denny, being duly sworn according to law, on his oath saith that his age is forty-six, and that he lives at Pennsgrove, Salem county, New Jersey, which is about eight and a half miles above a point opposite to New Castle, Delaware, and deponent has lived in that place all of his lifetime, and for 27 years last past deponent has every year been engaged in the business of fishing in the Delaware river, from Gloucester, which is 22 or 23 miles above Pennsgrove, to Cohansey, which is about 35 miles below Pennsgrove. During the time aforesaid deponent has used vessels and nets in said business of fishing, and has, at his free will and pleasure, fished on both sides of said river and in all parts thereof, and at no time did deponent ever take any license from or pay any money to the State of Delaware for the privilege of fishing in said river; and never, prior to the year 1872, did deponent ever hear from anyone that the State of Delaware, or anyone in its name or on its account, had ever claimed or pretended to claim, that said State had or claimed any right to impose any license fee or tax of any kind on any resident of New Jersey, for the right or privilege of fishing in any part of said river. In the year 1872, deponent was informed that some 22 Jersey-men were arrested by officers from Delaware, for fishing without license from the State of Delaware, for fishing in said river; and in the month of April, 1872, an attempt was made by the officers of said last-named State, to arrest deponent for fishing in said river near Port Penn, but deponent escaped without being arrested by them, and since then no attempt has been made to arrest deponent for fishing in said river.

J. Q. A. DENNY.

Sworn and subscribed before me, February 9th, 1877, at Trenton, New Jersey.

JAMES WILSON,
U. S. Commissioner.

UNITED STATES OF AMERICA, }
STATE OF NEW JERSEY, } ss.

George Stanton, of full age, being duly sworn, on his oath deposes and says that he is forty years old, that he lives at Pennsgrove, Salem county, New Jersey, and has resided at said Pennsgrove over 27 years last past continually, and for nineteen years last past has, every year been engaged in the business of fishing in the Delaware river, from a point twelve miles above New Castle, Delaware, to a point about twenty miles below New Castle, and during all that time, at his free will and pleasure, has fished in all parts of said river within the limits aforesaid, without paying anything, or having any license therefor, except that on the 2d of May, 1872, deponent, with twenty-one of his neighbors, all of whom were residents of the said county of Salem, while fishing in said river, about one-half of a mile easterly of the middle of the channel of said river, and about eleven miles above New Castle, were arrested by officers from the State of Delaware. Said officers came to deponent and his said neighbors, on a tugboat called the "Falcon," in command of Captain John Haycock, which boat came from Wilmington, Delaware. Deponent does not know the names of the officers who made said arrests, but they claimed to be acting in the name of and by the authority of the State of Delaware. Said officers seized the said twenty-two persons, one of whom was deponent, and eleven rowboats and eleven fishing nets, which were then and there in the possession and use of said twenty-two persons. All the persons arrested protested against the arrest, and one or two verbally refused to submit to said arrest, and thereupon one of said officers drew a pistol and pointed it at the person so refusing, and said if he, the person objecting, did not come on board of the "Falcon" he would make him, or words to that effect. All of said twenty-two persons, as soon as

arrested, with said rowboats and nets, by the "Falcon," were taken into Wilmington, Delaware, and there by said officers were taken to the office of the District or Prosecuting Attorney in Wilmington. Said attorney told said prisoners they had been violating the laws of the State of Delaware. The prisoners told the said attorney that they had been fishing, when arrested, on the easterly side of the middle of the river, but he replied that the State of Delaware claimed the whole river, from shore to shore, twelve miles above and twelve miles below New Castle, and then he stated what the punishment was for the offense with which the said prisoners were charged—that is, for fishing in the said river, within the limits aforesaid, without license from the State of Delaware, which punishments were forfeiture of the boats and nets, and fine and imprisonment. The said attorney further said that the said prisoners could take their choice, take out license and pay \$20 therefor, and the expenses of the arrest, doing which they could go their way, or else they could go to jail and wait for and have a trial. As all of said prisoners were poor persons, and could not afford to go to jail and incur the expenses of trial, they were compelled to accept licenses and pay therefor. They took out eleven licenses, one license for each boat, and paid for each license \$20.75, and for the costs of the arrests \$55.

Since in 1872, deponent has taken out no license or paid any tax to the State of Delaware for the right to fish in the Delaware river or in any part of it. Before 1872 deponent had never heard that anyone questioned or denied the right of deponent, or of any citizen of New Jersey, to fish freely in any part of the Delaware river between New Jersey and Delaware.

Since said arrests, deponent has frequently heard fishermen, resident in New Jersey, declaring that if persons or officers from Delaware should again arrest citizens of New Jersey, on the Delaware river, for fishing in said river without license from the State of Delaware, the arrests would not be submitted to, but would be resisted with all the force necessary to defeat such arrests; and deponent verily believes that if such arrests are again attempted they will be

resisted and that violence, bloodshed and loss of life will be the probable and almost certain result.

GEORGE STANTON.

Subscribed and sworn to before me, at Trenton, New Jersey, February 13th, 1877.

[L. S.]

J. D. HALL,
Notary Public.

UNITED STATES OF AMERICA, }
STATE OF NEW JERSEY, } ss.

Job Barber, of full age, being duly sworn, on his oath deposes and says that he is fifty-one years old, and resides in Pennsgrove, Salem county, New Jersey, and has lived in said county all of his life except the first eight years of his life, and that for twenty-two years last past he has been engaged in the business of fishing in the Delaware river, from a point about twelve miles above New Castle, Delaware, to a point about twenty miles below New Castle, in all parts of said portion of said river, and without paying anything for so doing, or having license therefor from the State of Delaware, no such pay or license ever having been asked for except in 1872. Deponent has heard the foregoing affidavit of George Stanton read and understands its contents. Deponent was one of the persons arrested at the time spoken of in said Stanton's affidavit, and with said Stanton and the others of said prisoners, was taken into Wilmington, Delaware, and deponent knows that the statements of the said affidavit of said Stanton, as to what occurred at and after said arrests, to be true, and that they are true. He further saith that he believes that if the State of Delaware should make any efforts hereafter to arrest Jersey men for fishing in said river, it will cause breaches of the peace, and very likely bloodshed, and probably worse consequences.

JOB BARBER.

Subscribed and sworn to before me, at Trenton, New Jersey, February 13th, 1877.

[L. S.]

J. D. HALL,
Notary Public.

Extract from the annual message of Hon. John P. Cochran, Governor of the State of Delaware, dated 2d January, 1877, addressed and delivered to the General Assembly of said State at its session held in January, 1877 :

“Since the last session of the General Assembly, the ‘fishery controversy’ has been renewed between this State and the State of New Jersey, involving the jurisdiction of the respective States over that portion of the Delaware river lying within ‘the compass or circle of twelve miles about the town of New Castle’ to low-water mark on the New Jersey shore.

“On the 28th day of March, 1871, the General Assembly passed an act declaring it unlawful for any person, not being a citizen of this State, to catch or take fish of any kind in Delaware bay or river, or any of the creeks emptying into the same, within the limits of this State, without first paying twenty dollars, for the use of the State, to the Clerk of the Peace for one of the counties, for an annual license therefor. A supplement to said act, passed at the same session, declared it also unlawful for any resident or citizen of this State to catch or take any shad, for the purpose of sale, in Delaware river or bay, or any of the creeks or rivers emptying into the same, within the limits of this State, without first paying five dollars for an annual license therefor for the use of the State.

“The enforcement of these provisions by the arrest of citizens of New Jersey engaged in fishing within that portion of the Delaware river lying within the twelve-mile circle, was promptly opposed by the authorities of that State with a claim of jurisdiction over said river east of the middle line, and of the legal right of her citizens to fish on the New Jersey side of the river without the license of Delaware, either within or without the said circle.

“The controversy arising over this question of disputed jurisdiction, led, during the year 1872, to a correspondence and subsequent conference between the late Executives of the two States, which finally resulted in their agreement to bring the subject to the attention of the Legislatures of their respective States, and recommend the appointment of com-

missioners on the part of each to settle the matter in dispute. Their recommendations were accordingly made, and a joint commission, consisting of three members from each State, and comprising lawyers of acknowledged learning and ability, was appointed by legislative authority. Shortly after their appointment a joint resolution of the General Assembly suspended all laws requiring a license to fish for shad within the waters of this State, pending the negotiations between the commissioners of the two States.

"But all efforts of the joint commissioners to reach a satisfactory basis of definite settlement of the matter in controversy having failed, it was finally agreed between them, as I am duly informed, that the commissioners from each State should prepare and present to the other a written or printed statement of the title and claim involved in the controversy of each State, with the grounds upon which the same were based, which might be reported by them to their respective States. I am also informed that as early as July, 1874, the commissioners from this State duly delivered the statement asserting and vindicating the claim and title of Delaware, but that the commissioners from New Jersey have as yet wholly failed to do likewise in behalf of their State. This omission on the part of the latter, having continued until March 26th, 1875, was construed to be an implied abandonment of their case and a tacit relinquishment of their alleged claim of title and jurisdiction. The General Assembly of this State accordingly, on that day, adopted a joint resolution declaring that the commissioners on the part of this State, having fully performed their duty and reported the result of their labors, were relieved of further duties as such commissioners.

"The effect of this resolution was to abrogate their authority and terminate their negotiations, and to revive the suspended license laws. It thereupon became my imperative duty, under my constitutional obligation to 'take care that the laws be faithfully executed,' to sign and cause to be issued the licenses prescribed by the acts I have referred to. Immediately upon his receiving information of this fact, I was solicited by His Excellency Governor Bedle, of New

Jersey, to meet him in Philadelphia for a conference upon the subject, with a view to some amicable arrangement for the temporary postponement of the execution of the law in question until the necessary proceedings could be had for the final settlement of the controversy by some competent authority. But desirable as it was to secure an amicable adjustment of our differences, and to avert any disturbance of the friendly relations which have so long existed between the citizens of New Jersey and Delaware, I was, nevertheless, unable to comply with his Excellency's desire, because I had no power, as the Executive of this State, to suspend for an instant, any law upon its statute-book. Therefore, after a complete review of the history of the controversy and a thorough interchange of views, it became apparent that the State of New Jersey must necessarily resort to the proper legal tribunal for an adjudication, if she is determined to insist upon her denial of our title and jurisdiction over the Delaware river to her low-water mark within the twelve-mile circle. In confirmation of this conclusion it has been communicated to me officially that the Attorney-General of New Jersey is now engaged in the completion of a bill in equity in support of the pretensions of that State, and that the same will shortly be filed in the Supreme Court of the United States for the purpose of having the true boundary line between the two States judicially determined and finally and definitely established. If this proceeding shall indeed be taken by New Jersey, it will be incumbent upon the General Assembly at its present session to make adequate provision for the proper vindication of that rightful claim of title and jurisdiction which, I believe, has never before been denied by New Jersey, but which, on the contrary, is based upon original and incontestable grants, and has been uninterruptedly asserted and maintained by the State of Delaware for the space of nigh two centuries, and I would respectfully recommend that such legislation be had as will meet all exigencies likely to arise, pending the litigation."

SUBPCENA.

THE UNITED STATES OF AMERICA, ss.

[SEAL.] The President of the United States of America
to the State of Delaware, Greeting :

For certain causes offered before the Supreme Court of the United States, having jurisdiction in equity, you are hereby commanded that, laying all other matters aside and notwithstanding any excuse, you be and appear before the said Supreme Court holding jurisdiction in equity, on the third Monday of May next, at the city of Washington, in the District of Columbia, being the seat of the National Government of the United States, to answer unto the bill of complaint of the State of New Jersey in the said court exhibited against you.

Hereof you are not to fail at your peril.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at the city of Washington, the fourteenth day of March, A. D. 1877.

D. W. MIDDLETON,
Clerk Supreme Court U. S.

1877, March 29th. Service of the within writ is this day accepted.

JOHN P. COCHRAN,
Governor of the State of Delaware.

JOHN B. PENNINGTON,
Attorney-General of the State of Delaware.

PROOF OF SERVICE OF SUBPCENA.

I, John G. Nicolay, Marshal of the Supreme Court of the United States, do hereby certify that I have served the within writ by receiving from John P. Cochran, Governor of the State of Delaware, and John B. Pennington,

Attorney-General of the State of Delaware, their written acceptance of service of this writ upon the State of Delaware, as appears in the foregoing endorsement.

Done at the city of Washington this fifth day of April, A. D. eighteen hundred and seventy-seven.

JOHN G. NICOLAY,
Marshal.

Endorsed—Supreme Court U. S. 1876. October Term No. The State of New Jersey, Complainant, vs. The State of Delaware. Subpœna and Service. Filed 5th April 1877.

ARGUMENT ON MOTION FOR PRELIMINARY INJUNCTION.

On the 19th day of March, A. D. 1877, the following entry appears of record, to wit:

“Supreme Court of the United States. The State of New Jersey, complainant, v. The State of Delaware.

“The argument of the motion for preliminary injunction in this cause was commenced by Mr. F. T. Frelinghuysen of counsel for the complainant, continued by Mr. T. Bayard, of counsel for the respondent, and concluded Mr. Jacob Vanatta, of counsel for the complainant.”

ORDER FOR PRELIMINARY INJUNCTION.

On the 26th day of March, A. D. 1877, the following entry appears of record, to wit:

“Supreme Court of the United States. No. 17. Original October Term, 1876. The State of New Jersey, Complainant, v. The State of Delaware. Bill in Equity

and being argued by Mr. Frelinghuysen and Mr. Vanatta for the complainant, and by Mr. Bayard for the defendant, and it appearing by the allegations of the bill, duly verified by affidavits and other evidence of public character, that for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same, where the said river runs between the said State and the State of Delaware, and that (except as hereinafter stated) the citizens and inhabitants of New Jersey have, during said period, exercised the right of freely fishing in said river, in common with the citizens and inhabitants of said State of Delaware, but that recently, to wit, from and since the year 1872, the State of Delaware has claimed exclusive jurisdiction of the whole of said river from the southerly line of Pennsylvania southwardly to the distance of twelve miles below the town of New Castle, and has interfered with and claimed to control the right of fishing thereon, and has exacted fines and other impositions from the said citizens and inhabitants of New Jersey for fishing as aforesaid, unless they would take out licenses for that purpose from the authorities of the State of Delaware, and pay certain fees and exactions for said licenses, and has caused to be arrested certain of said citizens and inhabitants for refusing to comply with such requirements; and that the State of Delaware still threatens and intends to enforce its said claims, which are resisted by the State of New Jersey; and that the public peace between the citizens and inhabitants of said States is liable to be endangered and interrupted by reason of the premises; and this suit being brought for the purpose of determining the true boundary line between the said States, and settling the controversies between them in reference to the matters aforesaid; therefore—

It is ordered by the court that an injunction do issue to enjoin and restrain the said State of Delaware, its officers, agents and servants, that they and each and every of them do henceforth desist and refrain from imposing any tax, assessment or imposition whatsoever, by way of license fee

or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware, as they have heretofore been accustomed to do, before the said interference; and from arresting, imprisoning, trying, fining, or in any manner punishing, or seizing, holding or selling any property of any citizen or resident of New Jersey for fishing in said river as aforesaid, until this court shall make other order to the contrary.

March 26th, 1877.

True copy.

Test:

D. W. MIDDLETON,
Clerk Supreme Court U. S.

[L. S.]

PROOF OF SERVICE OF PRELIMINARY
INJUNCTION.

Robert L. Hutchinson, United States Marshal in and for the District of New Jersey, being by me duly sworn according to law, upon his oath says that on the eleventh day of April, A. D. eighteen hundred and seventy-seven, he served a copy of the annexed "order for an injunction" upon His Excellency John P. Cochran, Governor of the State of Delaware, by showing to him the annexed copy of said order and the seal of the court thereon, and informing him of the contents therein, and delivering to him a true copy of said order; and upon the Honorable John B. Pennington, Attorney-General of the State of Delaware, on the twelfth day of April, A. D. eighteen hundred and seventy-seven, by showing to him the annexed copy of said order and the seal of the court thereon, and informing him of the contents therein, and delivering to him a true copy of said order.

R. L. HUTCHINSON,
U. S. Marshal for the District of New Jersey.

Sworn and subscribed before me, at Trenton, N. J., on this seventeenth day of April, A. D. 1877.

W. S. BELVILLE,
U. S. Commissioner, District of N. J.

INJUNCTION AND PROOF OF SERVICE.

THE UNITED STATES OF AMERICA, ss.

The President of the United States of America
[SEAL.] to the State of Delaware, its officers, agents and
servants, Greeting :

Whereas, the State of New Jersey, complainant, hath lately exhibited its bill before the Supreme Court of the United States, at Washington, against you, the said State of Delaware, defendant, praying relief touching the matters therein mentioned ;

And whereas, by an order of the said Supreme Court, made in the said cause on the 26th day of March, A. D. 1877, it was ordered that a preliminary injunction should issue, under the seal of the said Supreme Court, to restrain the said State of Delaware, its officers, agents, and servants, that they, and each and every of them, do henceforth desist and refrain from imposing any tax, assessment, or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware, as they have heretofore been accustomed to do before the interference of the said State of Delaware, as mentioned in said order, and from arresting, imprisoning, trying, fining, or in any manner punishing or seizing, holding, or selling any property of any citizen or resident of New Jersey for fishing in said river as aforesaid, until the said court shall make other order to the contrary :

You and each of you are therefore hereby commanded

and enjoined that you do desist and refrain from imposing any tax, assessment, or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware, as they have heretofore been accustomed to do before the interference of the said State of Delaware, as mentioned in said order; and from arresting, imprisoning, trying, fining, or in any manner punishing or seizing, holding, or selling any property of any citizen or resident of New Jersey for fishing in said river, as aforesaid, until the said court shall make other order to the contrary.

Hereof fail not at your peril.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 31st day of March, A. D. 1877.

D. W. MIDDLETON,
Clerk Supreme Court U. S.

Robert L. Hutchinson, United States Marshal in and for the District of New Jersey, being by me duly sworn according to law, upon his oath says that on the eleventh day of April, A. D. eighteen hundred and seventy-seven, he served the annexed writ of injunction upon His Excellency John P. Cochran, Governor of the State of Delaware, by showing to him the original writ and the seal of the court thereon and informing him of the contents therein, and delivering to him a true copy of said writ; and upon the Honorable John B. Pennington, Attorney-General of the State of Delaware, on the twelfth day of April, A. D. eighteen hundred and seventy-seven, by showing to him the original writ and the seal of the court thereon, and informing him of the contents therein, and delivering to him a true copy of said writ.

R. L. HUTCHINSON,
U. S. Marshal for the District of New Jersey.

Sworn and subscribed before me, at Trenton, N. J., on this seventeenth day of April, A. D. 1877.

W. S. BELVILLE,
U. S. Commissioner, Dist. of N. J.

Endorsed—Sup. Court U. S. 1876, Octo. Term. Original. No. 1. The State of New Jersey v. The State of Delaware. Injunction and service. Filed 20th April, 1877.

ORDER TO PLEAD, ANSWER OR DEMUR.

On the 23d day of April, A. D. 1877, the following entry appears of record, to wit:

“Supreme Court of the United States. The State of New Jersey, Complainant, v. The State of Delaware.

“On motion of Mr. Frelinghuysen, of counsel for the complainant, it is ordered that the State of Delaware plead, answer or demur to the bill of complaint filed in the above-stated case on or before the second Monday of October next; and that when an issue of fact is joined, each party be at liberty, on ten days’ notice, to take testimony before a Commissioner of the Circuit Court of the United States, in such manner as testimony is usually taken for the purpose of being used in the Circuit Courts of the United States.”

I, James H. McKenney Clerk of the Supreme Court of the United States, do hereby certify that the foregoing manuscript and printed pages, numbered from one to sixty, inclusive, contain a true copy of the record in the case of The State of New Jersey, Complainant, v. The State of Delaware, No. 1, original, October Term, 1884, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this first day of May, A. D. 1885.

[L. s.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

DOCKET ENTRIES.

Supreme Court of the United States. No. 1. Original.
October Term, 1897. The State of New Jersey, Com-
plainant, v. The State of Delaware. Bill in Equity.

1877, March 13th. Motion for leave to file bill and for
process filed.

1877, March 13th. Notice of motion and proof of service
filed.

1877, March 13th. Leave granted to file bill and sub-
pœna ordered to issue.

1877, March 13th. Bill filed.

1877, March 15th. Subpœna issued to the Marshal.

1877, March 19th. Motion for preliminary injunction
argued.

1877, March 26th. Ordered that preliminary injunction
issue.

1877, March 29th. Copy of order sent to Mr. Freling-
huysen.

1877, March 31st. Injunction issued to Mr. Freling-
huysen.

1877, April 5th. Proof of service of subpœna filed.

1877, April 20th. Proof of service of order and injunc-
tion filed.

1877, April 23d. Ordered that defendant plead, answer
or demur on or before second Monday of October next, and
when issue is joined, testimony to be taken in the usual
manner.

1892, May 16th. Leave granted to file stipulation extend-
ing time to plead, answer or demur.

1892, May 16th. Stipulation filed.

1897, May 24th. Ordered that the clerk notify counsel
that the court expects this cause to be disposed of at the next
term.

True copy.

Test :

[L. S.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

AGREEMENT OF COUNSEL, MAY 2d, 1892.

In the Supreme Court of the United States. The State of New Jersey, Complainant, v. The State of Delaware, Defendant. Original. In equity.

And now, to wit, this second day of May, A. D. 1892: Whereas, by an understanding between the counsel, the said cause has been permitted to stand until this time upon the rule to plead, answer or demur, with the agreement that the defendant should not be required to act upon such rule until counsel on either side should desire to press the case to a hearing: It is thereupon agreed by counsel on both sides that the said understanding is continued and that the time to plead, answer or demur is hereby extended without limit, provided that the defendant may be at any time required to plead, answer or demur, on sixty days' notice from the plaintiff, or the defendant may of its own motion, at any time, plead, answer or demur with the same effect as if the same were done under the original rule; and in either case, upon the filing of a plea, answer or demurrer, the case shall proceed as if the same had been done under the original rule; that nothing in this agreement shall be construed to affect in any manner or impair the obligations of the injunction heretofore issued in this cause, to wit, on the 31st day of March, 1877, but the same shall remain in full force and vigor until the further order of the court in the premises. Signed in triplicate.

JOHN P. STOCKTON,
Of Counsel for Plaintiff.

GEORGE GRAY,
GEO. H. BATES,
Of Counsel for Defendant.

NOTICE TO PLEAD, &c., ACCEPTED JULY
18th, 1897.

State of New Jersey, Complainant, v. State of Delaware,
Defendant. In Supreme Court. Original No. 1.

Now, to wit, this 18th day of July, A. D. 1897, notice to
plead, answer or demur as provided for in the agreement of
May 2d, 1892, is accepted by defendant, and further notice
waived.

GEO. GRAY,
Of Counsel for Defendant.

NOTICE OF APPLICATION FOR DECREE PRO CON-
FESSO AND TO REFER SAME TO UNITED
STATES COMMISSIONER, SEPTEMBER 8th, 1897.

United States Supreme Court. Between the State of New
Jersey, Complainant, and the State of Delaware, Defend-
ant. Original Number 1. On Bill for Injunction and
Relief.

SIR—Take notice that I shall apply to the Supreme Court
of the United States, at the Capitol in Washington, D. C.,
on Monday, the eleventh day of October next, at twelve
o'clock noon, or as soon thereafter as counsel can be heard,
for leave to enter a decree *pro confesso* in above-stated cause
and to refer the same to a United States Commissioner to
take the proofs which may be offered before him by com-
plainant in support of complainant's bill, of all which you
hereby have notice.

Your obedient servant,

S. H. GREY,
*Attorney-General for the State of New
Jersey, and Solicitor of Complainant.*

To the Hon. George Gray, Solicitor of Defendant.

Dated Trenton, N. J., September 8th, 1897.

Due and legal service of within notice is hereby acknowl-
edged.

GEO. GRAY,
Solicitor for Defendant.

SUBSTITUTION OF COUNSEL.

In the Supreme Court of the United States. Between the State of New Jersey, Complainant, and the State of Delaware, Defendant. Original number one. On Bill for Injunction and Relief.

It is hereby stipulated and agreed that Samuel H. Grey, Attorney-General of the State of New Jersey, may be substituted as solicitor for complainant in above-stated cause, and that a rule of the court making such substitution may be entered, pursuant to the practice of the court to that effect.

October 2d, 1897.

GEO. GRAY,
Solicitor for Defendant.

2

No. 1 Orig.

Answer of Defendant.

Office Supreme Court U. S.
FILED
OCT 15 1901
JAMES H. MCKENNEY,
Clerk.

Filed Oct. 15, 1901.

United States Supreme Court

No. 1 ORIGINAL. IN EQUITY.

THE STATE OF NEW JERSEY,
Complainant,

AND

THE STATE OF DELAWARE,
Defendant.

DEFENDANT'S ANSWER.

UNITED STATES SUPREME COURT.

THE STATE OF NEW JERSEY,
COMPLAINANT,

AND

THE STATE OF DELAWARE,
DEFENDANT.

IN EQUITY.

No. 1

ORIGINAL.

ANSWER.

The Answer of the STATE OF DELAWARE, one of the States of the UNITED STATES OF AMERICA, the defendant, to the Bill of Complaint of the STATE OF NEW JERSEY, also one of the States of the United States of America, the complainant.

This defendant, now and at all times hereafter, saving to itself all and all manner of benefit of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said Bill of Complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says :

I

That this defendant is the owner in severalty and in fee-simple of the whole bed of the Delaware River lying within the compass or circle of twelve miles about the town of New Castle in the State of Delaware, to wit, within the circumference of a circle of a radius of twelve miles described about the Court House in the said town of New Castle as a centre, and all islands in said River Delaware, within the compass of said

circle, and the said river and soil thereof lying North of the Southernmost part of the said circle of twelve miles about the said town, together with all the lands, islands, soil, rivers, harbors, mines, minerals, marshes, waters, fishings, huntings and fowlings, and all other royalties, privileges, profits, rents, services, franchises, duties, jurisdictions, liberties, privileges, commodities and hereditaments to the said premises, or any of them belonging or appertaining, with their and every of their appurtenances, and all the estates, rights, titles, interests, benefits, advantages, claims and demands whatsoever of, in, or to the said premises, and of every part and parcel thereof; and all government and all rights of government, all jurisdiction, whether legislative, judicial or executive, all fisheries and exclusive control and jurisdiction thereof in, on or over the said portion of said river and the waters thereof, subject, in all the particulars aforesaid, only to the limitations, if any there be, of the Constitution and Laws of the United States of America. That save as hereinbefore appears, this defendant is advised that said Bill of Complaint raises no question of government, jurisdiction, fishery, or control or jurisdiction thereof, right, title, interest, benefit, advantage, claim or demand between or by the parties to this cause; and this defendant denies that the complainant is the owner, in fee simple or otherwise, of any portion of the bed of the Delaware River within the compass of said circle of twelve miles about the said town of New Castle, so described as aforesaid, and hereinafter called the "twelve mile circle", or that within the limits aforesaid the complainant is the owner of the part of the bed of said river extending from the New Jersey shore thereof to the middle of said river, or that within the limits aforesaid the complainant has or is entitled to, in or on any part of the waters of said river, below low-water mark on the New Jersey shore thereof, an equal interest and concurrent jurisdiction with the de-

defendant, or that the complainant has any title to any of the rights claimed in its Bill of Complaint by the means in said Bill of Complaint stated.

This defendant admits that within and beyond the limits aforesaid the tides of the ocean ebb and flow.

And with respect to the title and jurisdiction alleged and claimed by and for the complainant, on its own behalf, in its said bill of complaint, this defendant, further answering, saith:—

1. This defendant believes that Charles the Second, King of England, by letters patent bearing date the twelfth day of March 1664, to his brother James, Duke of York, his heirs and assigns, did give and grant the lands and premises, royalties, rights, powers, authorities, liberties, hereditaments and appurtenances in the section or sections of said Bill of Complaint denominated by the letter A, by said complainant set forth and described, but for greater certainty as to said letters patent and all of the provisions thereof it craves leave to refer to the said letters patent when produced in this cause.

But this defendant claims, and respectfully submits, that if it shall appear by evidence in this cause that said alleged patent ever had legal existence and validity, that then and in that case, by legal and just construction thereof, it cannot and should not be so construed as to include, within the express description of the lands and premises therein contained, or as to control any part of the bed of said River Delaware within the compass of the said twelve mile circle, nor any right of jurisdiction or fishery in said portion of said river.

2. This defendant admits that, subsequent to the year 1664, and in or about the year 16 , a portion of the territory included in the said description of the said alleged grant, set

forth under section A in said Bill of Complaint, was conquered by the military power of the States of the United Provinces of the Netherlands, the seat of whose power in America was at New Amsterdam, and that afterwards, and in or about the said territory by the said conqueror was surrendered to the King of England. And this defendant believes that, in order to make good and affirm and establish the alleged grant aforesaid, or otherwise, the said King of England by his letters patent bearing date on or about the twenty-ninth day of June, 1674, did grant and convey unto the said Duke of York, all and every of the property and all and every of the rights, powers and privileges alleged to have been granted, conveyed, transferred and assured in and by the alleged patent first in said Bill of Complaint mentioned, using in the last one of the said alleged patents the same words which in said Bill of Complaint are alleged to have been used in the first of the said alleged patents, and no others, except those stating the date; but for greater certainty as to said letters patent and all of the provisions thereof it craves leave to refer to the said letters patent when produced in this cause. And this defendant further claims, and respectfully submits, that if it shall appear by evidence in this cause that said alleged confirmatory patent ever had legal existence and validity, that then and in that case, by legal and just construction thereof, it cannot and should not be so construed as to include, within the express description of the lands and premises therein contained, or to control any part of the bed of said River Delaware within the compass of the said twelve mile circle, nor any right of jurisdiction or fishery in said portion of said river.

3. This defendant doth not know and cannot set forth as to its belief or otherwise, whether or not it is the fact that the said James, Duke of York, etc., by lease and release bearing dates the twenty-third and twenty-fourth days of June, 1664,

respectively, after reciting the grant so as aforesaid alleged to have been made to him by the aforesaid alleged letters patent, dated 12th March, 1664, for a valuable consideration, to Lord John Berkeley and Sir George Carteret, their heirs and assigns forever, did grant and assign, sell, release and confirm, the lands and premises, royalties rights, hereditaments and appurtenances in the section or sections of said Bill of Complaint denominated by the letter C, by said complainant set forth and described; or whether or not the said alleged lease and release were ever legally made or ever legally delivered by the said James, Duke of York, to the said Berkeley and Carteret; or whether or not said lease and release ever had any legal existence. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said alleged lease and release ever had legal existence and validity, that then and in that case, by legal and just construction thereof, they cannot and should not be so construed as to include or control any part of the bed of said River Delaware within the compass of the said twelve mile circle, nor any right of jurisdiction or fishery in said portion of said river; and further that the said James, Duke of York, did not then and thereby convey to the said Berkeley and Carteret a more extensive title or other lands than the title and lands alleged to be so derived to or vested in him by the title to him, the said Duke of York, as invoked by said complainant in its said Bill of Complaint.

4. This defendant doth not know and cannot set forth as to its belief or otherwise, whether or not it is a fact that the said Lord John Berkeley and Sir George Carteret, as alleged Lords Proprietors of the province of New Ceserea or New Jersey, made or published the concessions and agreements, bearing date the tenth day of February in the year of our Lord one thousand six hundred and sixty-four, to

and with all and every the adventurers and all such as shall settle or plant there, in the first two paragraphs of the section of said Bill of Complaint denominated by the letter D by said complainant set forth and described; or whether or not said alleged grants and concessions bear even date with the appointment and commission of Sir Philip Carteret, alleged to be the first Governor of New Jersey, who was appointed by the said alleged proprietors, Lord John Berkeley and Sir George Carteret, as in the third paragraph of the said section of said bill of complaint denominated by the said letter D by said complainant mentioned; or whether the said alleged Governor Carteret, by his alleged letter of instructions, bearing even date with his alleged commission, was authorized or directed by or for the said alleged proprietors and in their names in manner, form or substance as by said complainant is set forth and mentioned in the third and fourth paragraphs of the section of said bill of complaint denominated by the said letter D; or whether or not the said alleged concessions and agreements, or the said alleged appointment and commission of Sir Philip Carteret as Governor aforesaid, or the said alleged letter of instructions to said alleged Governor, were ever legally made, executed, delivered, promulgated, issued, and received, respectively; or whether or not the said alleged concessions and agreements, appointment and commission, or letter of instructions ever had any legal existence. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said alleged concessions and agreements, appointment and commission, or letter of instructions, or either or any of them ever had legal existence and validity, that then and in that case, by legal and just construction thereof, neither the said concessions and agreements, nor the said appointment and commission, nor the said letter of instructions, can or should be so construed as to include, control, or refer to any part of the bed of said River Del-

aware within the compass of the said twelve mile circle, nor any right of jurisdiction or fishery in said portion of said river; and further that the said alleged Lords Proprietors could and did not then and by either the said alleged concessions and agreements, or appointment and commission or letter of instructions confer to and upon any person a more extensive title, or other lands, or more extensive, more liberal, or other powers, authorities, pledges, guarantees, assurances, rights, jurisdictions, privileges, franchises or concessions, than those titles, lands, powers, authorities, pledges, guarantees, assurances, rights, jurisdictions, privileges, franchises or concessions alleged to be so derived to or vested in them by the title to them the said Lords Proprietors as invoked by said complainant in its said Bill of Complaint.

5. This defendant doth not know and cannot set forth as to its belief or otherwise, whether or not it is the fact that James, Duke of York, etc., by indenture made the twenty-ninth day of July, 1674, to the said Sir George Carteret, his heirs and assigns, did grant, bargain, sell, release and confirm the lands and premises, royalties, rights, profits, commodities, hereditaments and appurtenances in the section of said Bill of Complaint denominated by the letter E by said complainant set forth and described; or whether or not the said alleged Indenture was ever legally made or ever legally delivered by the said James, Duke of York, to the said Sir George Carteret; or whether or not said indenture ever had legal existence. But this defendant claims and respectfully submits that if it shall appear, by evidence in this cause, that said alleged indenture ever had legal existence and validity, that then and in that case, by legal and just construction thereof it cannot and should not be so construed as to include or control any part of the bed of said River Delaware within the compass of the said twelve mile circle, or any right of jurisdiction or fishery

in said portion of said river; and further, that the said James, Duke of York, did not then and thereby convey to the said Sir George Carteret a more extensive title or other lands than the title and lands alleged to be so derived to or vested in him by the title to him the said Duke of York, as invoked by said complainant in its said Bill of Complaint.

6. This defendant doth not know and cannot set forth as to its belief or otherwise, whether or not it is the fact that Sir George Carteret of the first part, William Penn of the second part, Gawn Lawry of the third part, Nicholas Lucas of the fourth part, and Edward Billinge of the fifth part, entered into or made an indenture quintipartite, bearing date the first day of July, Anno Domini, 1676, reciting the aforesaid alleged letters patent from the King to the Duke of York, dated the twelfth of March 1664, and the said alleged lease and release from the Duke of York to Berkeley and Carteret bearing date the twenty-third and twenty-fourth days of June 1664, in and by which indenture quintipartite said Edward Billinge, and the said William Penn, Gawn Lawry, and Nicholas Lucas, by and with the consent, direction and appointment of the said Edward Billinge, testified by his being a party to the said indenture and by his sealing and executing the same, did bargain, sell, release, confirm and convey unto the said Sir George Carteret, his heirs and assigns forever, the easterly part of New Jersey, to have and hold in severalty; and whether or not, by the same indenture, the said Sir George Carteret did bargain, sell, release, confirm and convey unto the said William Penn, Gawn Lawry and Nicholas Lucas, to their heirs and assigns forever, the westerly part of New Jersey, to have and to hold to them, their heirs and assigns in severalty, according to a certain description of the division line between the said easterly and westerly part of New Jersey in the said alleged indenture and in the said Bill of Complaint described; and

whether or not in and by which alleged indenture, it is averred, that the said Sir George Carteret did convey, with the land on the westerly side of the said partition line, unto the said William Penn, Gawn Lawry and Nicholas Lucas all and every the isles, islands, rivers, mines, minerals, woods, fishings, hawkings, huntings and fowlings, and all other royalties, governments, powers, forts, franchises, harbors, profits, commodities and hereditaments whatsoever unto the said westerly part, share and portion of the said tract of land and premises, as in the section of said Bill of Complaint denominated by the letter F, by said complainant set forth and described; or whether or not the indenture of bargain and sale, dated the eighteenth of March 1673, between the said John, Lord Berkeley of the one part and John Fenwick of the other part, by which said Berkeley is said to have granted to Fenwick all the moiety or half part of him said Berkeley, of, in and to the said tract of land called New Ceserea or New Jersey, or the two other indentures, one being indenture of bargain and sale, dated the ninth of February, 1674, from the said John Fenwick and Edward Billinge of the one part, said William Penn, Gawn Lawry and Nicholas Lucas of the other part, and the other being an indenture tripartite of grant, release, or confirmation, bearing date the tenth day of February, 1674, between said John Fenwick of the first part, said Edward Billinge of the second part and the said William Penn, Gawn Lawry, and Nicholas Lucas of the third part, and the said several other alleged good and sufficient assurances in the law, duly executed, by which the said moiety or half part of said tract of land and all and every other the said several and respective premises so alleged to be conveyed unto the said John Fenwick were said to have been conveyed unto, and at the date of the said indenture quintipartite were said to be vested in, the said William Penn,

Gawn Lawry and Nicholas Lucas and their heirs, to the use of them and their heirs forever (in which nevertheless the said Edward Billinge claimed to have equitable interest) so as the said William Penn, Gawn Lawry and Nicholas Lucas are said to have then actually stood seised of and in one undivided moiety or half part of all and every the said premises so granted unto the said John Lord Berkeley and Sir George Carteret as aforesaid, as joint tenants between themselves, and did then, as it is alleged, hold the same to them and to their heirs as tenants in common with the said Sir George Carteret, who was then, as it is said, actually seised of the other undivided moiety or half part of all and every the same premises and did then, as it is alleged, hold the same to him and his heirs as tenants in common with the said William Penn, Gawn Lawry and Nicholas Lucas, all of which indentures and other good and sufficient assurances in the law are, in said section of said bill of complaint, denominated by the said letter F, by said complainant mentioned and described as recited in the said indenture quintipartite, were, or either of them was in fact, ever legally made or ever legally delivered in pursuance of their several tenors and intents; or whether or not, as, it is alleged, is further recited in said indenture quintipartite, the said Sir George Carteret, William Penn, Gawn Lawry and Nicholas Lucas had theretofore agreed to make partition of the said tract of land, and of the said several and respective premises into two parts, as in the section of said bill of complaint denominated by said letter F, by said complainant is further set forth and averred; or whether or not the said indenture quintipartite was ever legally made or ever legally delivered by the said Sir George Carteret to the said William Penn, Gawn Lawry and Nicholas Lucas; or whether or not the said indenture quintipartite or the said several indentures and other good and sufficient assurances in the

law in the said indenture quintipartite said to have been recited, or the alleged and recited agreement to make partition, between Sir George Carteret of the one part and William Penn, Gawn Lawry and Nicholas Lucas of the other part, or any of them, ever had any legal existence. But this defendant claims and respectfully submits, that if it shall appear by evidence in this cause that said alleged indenture quintipartite, or the said indentures and assurances therein recited, or the said agreement to make partition therein recited, ever had legal existence and validity; that then and in that case, by legal and just construction thereof, they or either of them cannot and should not be so construed as to include, refer to, or control any part of the bed of said River Delaware within the compass of the said twelve miles circle, nor any right of jurisdiction or fishery in said portion of said river; and further, that the said parties to the said indenture quintipartite, and to the said several indentures and other assurances in the law, and agreement for partition therein said to be recited, could not and did not then and thereby either convey or receive more extensive titles or other lands than the titles and lands alleged to be so derived to or vested in the several grantors therein or parties thereto, as invoked by said complainant in its said Bill of Complaint.

7. This defendant doth not know and cannot set forth as to its belief or otherwise, whether or not it is the fact that the said James, Duke of York, etc., by indenture made the sixth day of August, Anno Domini, 1680, wherein were certain recitals in said Bill of Complaint enumerated and set forth, and wherein Edward Billinge, William Penn, Gawn Lawry, Nicholas Lucas, John Eldridge and Edward Warner were parties of the other part, for a consideration in said indenture expressed, and for the better extinguishing of all such claims and demands as his said Royal Highness

might anyways have had of or in the premises aforesaid, then called West New Jersey, or any part of them, and for the further and better settling, conveying, assuring and confirming of the same and of every part thereof, according to the purport and meaning of said presents, did grant, bargain, sell and confirm unto the said William Penn, Gawn Lawry, Nicholas Lucas, John Eldridge and Edward Warner, their heirs and assigns, the lands and premises, royalties, rights, franchises, privileges, and appurtenances, for the respective interests, estates, intents, uses and trusts, in the section or sections of said Bill of Complaint denominated by the letter G, by said complainant set forth and described; or whether or not the said Duke of York by said indenture, for the reasons therein said to be recited and set forth in the said section or sections of the said Bill of Complaint, or otherwise, did give, grant, assign and transfer unto the said Edward Billinge the powers, authorities, jurisdictions, governments and other matters and things whatsoever, which by the aforesaid respective letters patent from the King to him the said Duke, or either of them, are or were granted or intended to be granted to be exercised by the said Duke of York, his heirs, assigns, deputies, officers or agents, in, upon, or in relation unto the said premises thereby said to be confirmed or intended to be confirmed, and every of them, in case the same were then in the actual seizure of the said Duke of York, to be held, enjoyed, exercised and executed by him the said Edward Billinge, his heirs and assigns, and by his deputies, officers, agents and commissioners as fully and amply to all intents, constructions and purposes as his said Royal Highness, or his heirs, might or could hold, enjoy, use, exercise or execute the same by virtue of the said letters patent, as in the second paragraph of the section of said Bill of Complaint denominated by the letter G, by said complainant set forth and described; or whether

or not the several patents and conveyances and the several declarations of trust, holdings in trust and trusts, the partitions, purposes and intents of the several parties to said conveyances said to be recited in the said indenture of the sixth day of August, 1680, and set forth and enumerated by said complainant in the first paragraph of the said section of its said Bill of Complaint denominated by the said letter G, where ever legally made, delivered, entered into, undertaken, expressed or agreed to by the several parties thereto; or whether the said indenture of the sixth day of August, A. D., 1680, or the said patents, conveyances, declarations of trust, holdings in trust, trusts and partitions therein alleged to be recited, ever had any legal existence. But this defendant claims and respectfully submits that, if it shall appear, by evidence in this cause, that said alleged indenture, or the said patents, conveyances, declarations of trust, holdings in trust, trusts and partitions therein said to be recited, ever had legal existence and validity, then and in that case, by legal and just construction thereof, they or either of them cannot and should not be so construed as to include, refer to or control any part of the bed of said River Delaware within the compass of the said twelve mile circle, nor any right of jurisdiction or fishery in said portion of said river; and further, that neither the said James, Duke of York, nor any of the granting parties in any of the said recited conveyances, declarations of trust, trusts or partitions, did then and thereby convey to the grantees in the said indenture of the sixth day of August, 1680, or in any of the said recited conveyances, declarations of trust, trusts or partitions, respectively, more extensive titles or other lands than the titles and lands alleged to be so derived to or vested in them, the said Duke and other said grantors respectively, by the title or titles to them respectively as invoked by said complainant in its said Bill of Complaint.

8. This defendant doth not know and cannot set forth as to its belief or otherwise, whether or not it is the fact that concessions and agreements of the proprietors, freeholders and inhabitants of the province of West Jersey, bearing date the third of March, 1676, were agreed to and signed by the said Edward Billinge, Gawn Lawry, William Penn, Nicholas Lucas and others, the sixth chapter of which document, as it is alleged, grants and dedicates lands for highways, and streets, and cities, towns and villages, and for wharves, keys, harbors, and for public houses, and further provides that the inhabitants of the said province have free passage through or by any seas, bounds, creeks, rivers, rivulets, in the said province, through or by which they must necessarily pass, to come from the main ocean to any part of the province aforesaid, and further, that all the inhabitants within the said province of West Jersey have the liberty of fishing in Delaware River, or on the sea coast, as by said complainant is set forth in the first paragraph of the section of said Bill of Complaint denominated by the letter H; or whether or not the said alleged concessions and agreements were ever legally made, or ever legally delivered by the said supposed proprietors to said freeholders and inhabitants; or whether or not the said concessions and agreements ever had any legal existence. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said alleged concessions and agreements ever had legal existence and validity for any purpose, that then and in that case, by legal and just construction, such document cannot and should not be construed so as to include, control or refer to any part of the bed of said River Delaware within the compass of the said twelve mile circle, nor any right of jurisdiction or fishery in said portion of said river; and further, that the said supposed proprietors could not and did not then and thereby give or convey to or confer upon

the said freeholders and inhabitants of West Jersey more extensive rights, titles, royalties or privileges or other lands than the rights, titles, royalties, privileges or lands alleged to be so derived to or vested in them by the title to them the said supposed proprietors as invoked by said complainant in its said Bill of Complaint; and further, that, as will more fully appear in this Answer, upon the setting-out of the title of this defendant to that portion of the said Delaware River and of the bed thereof, included within the compass of the said twelve mile circle, and upon the comparison thereof with the said pretended title of said complainant set forth in the said Bill of Complaint, subsequent to all of the patents, grants, indentures, conveyances, concessions, agreements, commissions, letters of instructions and partitions mentioned and described in said Bill of Complaint, in its sections denominated by the letters A, B, C, D, E, F, G and H, to wit on or about the twenty-second day of March, A. D. 1683, the said Charles the Second, King of England, by his letters patent bearing the date last aforesaid, granted to the said James, Duke of York, all of the said river and the soil and bed thereof included within the compass of the said twelve mile circle; that the said latter grant of the said King to the said Duke of York was about eighteen years subsequent to the first letters patent, and about eight years subsequent to the second letters patent, from the said King to the said Duke, cited and invoked by said complainant in its said Bill of Complaint as the source and fountain head of its said pretended title; that the said two letters patent, original and confirmatory, so cited and averred by said complainant, contain no express grant of that portion of the said River Delaware or of the bed thereof included within the compass of the said twelve mile circle, nor any words of implication that may be construed as an estoppel to prevent the due, operative, and legally effective grant of such portion of the said river and

of the bed thereof to the said Duke of York by the letters patent of the said King, of March the twenty-second, 1683, even had the said King been only a private person; and that inasmuch as the said Charles the Second was King of England at the times of the granting of said two letters patent so cited and averred in said Bill of Complaint as and for the title of said complainant to the premises in dispute, and no estoppel binds the crown, no impediment, either in fact or law, appears wherefore the said letters patent of the twenty-second of March, 1683, were not legally and equitably effective to then pass the title to the Duke of York of the said premises in question. And this defendant further claims and respectfully submits that, even if it shall appear by evidence in this cause that said alleged concessions and agreements of the third day of March, 1676, mentioned in the section denominated by the letter H in said Bill of Complaint, ever had legal existence and validity for any purpose, it is averred in said Bill of Complaint, in the section thereof denominated by the said letter G, that the powers and authority to make said concessions and agreements of March the third, 1676, were exclusively granted to and vested in the said Edward Billinge, the said supposed *cestui que trust* of the larger part of said West New Jersey, and the specially and solely named grantee of the said Duke of York of said powers and authorities; that the said William Penn, Gawn Lawry and Nicholas Lucas are averred in the last above mentioned section of said Bill of Complaint to have been, not the beneficial owners of said West New Jersey, or of any part thereof, but trustees thereof only for the said John Eldridge, Edward Warner and Edward Billinge; and that the said William Penn and his co-trustees joined, if it be a fact that they did join, in the execution of the said concessions and agreements of the third day of March, 1676, as formal parties only, by virtue of their said trus-

teeship. And this defendant denies that whatever rights the said Duke of York, or the said William Penn may have acquired in or to the Delaware River from the King of England after the making of the concessions and agreements last hereinbefore referred to, in equity were subject and subordinate to the rights alleged to be granted by the said concessions and agreements to the inhabitants and property holders of West New Jersey, in or by virtue of the said concessions and agreements. And this defendant further denies that the said William Penn was, or that all persons, associations or every State claiming by, through, or under him were, are or should be, estopped from asserting or maintaining that the rights acquired by the said Duke of York, or by said Penn, in or to the said part here in question in this cause of the Delaware River, from the King of England, subsequent to the year 1676, do and may destroy, lessen or impair all pretended rights to or in that portion of the Delaware River here in question in this cause and every part thereof, alleged in said Bill of Complaint to have been conferred upon the inhabitants of West New Jersey by means of the said concessions and agreements.

9. This defendant doth not know and cannot set forth, as to its belief or otherwise, whether or not it is the fact that the alleged then proprietors of East and West New Jersey by deed of surrender, bearing date the fifteenth day of April, 1702, and said to have been duly executed by the then alleged proprietors of each of said divisions, for themselves and heirs did surrender and yield up unto their then Sovereign Anne, Queen of England, all their right or pretended right and powers of government as to New Jersey, alleged to be granted by King Charles the Second to the Duke of York, and by the Duke of York to the said proprietors, or whether or not the said supposed surrender was

accepted by the Queen in Council on the seventeenth day of April, 1702, and ordered to be enrolled in her Majesty's High Court of Chancery, as in the section of said Bill of Complaint, denominated by the letter I, by said complainant set forth and described; or whether or not said alleged surrender was ever legally made, or ever legally delivered by the said proprietors to the said Anne, Queen of England; or whether or not said alleged surrender or said alleged acceptance thereof ever had any legal existence or validity. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said alleged deed of surrender and said alleged acceptance thereof ever had legal existence and validity, that then in that case, by just and legal construction thereof and of the said alleged evidences of the supposed title of the complainant to the premises in dispute in this cause, the said alleged surrender or the said alleged acceptance thereof cannot and should not be so construed as to include or control any part of the bed of said River Delaware within the compass of the said twelve mile circle, nor any right of jurisdiction or fishery in said portion of said river; and further, that the said alleged then proprietors of East and West New Jersey could not then and thereby surrender to the said Anne, Queen of England, a more extensive title, or other or more extended rights or powers of government or over other territory than the title, and the rights and powers of government and territory then actually vested in them.

10. This defendant admits that by the American Revolution, which took place by the Declaration of Independence, bearing date the fourth day of July, 1776, the State of New Jersey became and was, and from thenceforth hath been, subject to and under the Constitution of the United States since the adoption thereof, a free and Independent State; and as such became entitled, subject as aforesaid,

to have and to hold all such rights as free and independent States may have or hold, to do all acts and things which independent States may of right do; and by force of the said revolution and said independence, subject as aforesaid, the said State of New Jersey became invested not only with all and every power of government in and over the territory of said State, but also became invested with all the property, and rights of property, within and appertaining to said State, which immediately before said revolution were vested in the Crown of England; but this defendant denies that by virtue of any of the premises the said complainant became invested with any power of government in or over the tide waters adjacent to the territory of said State, so far as the said tide waters are included within the compass of the twelve mile circle aforesaid. This defendant denies that at the time the said revolution took place the bed of the River Delaware in its whole width and length, from the falls in said river at or near Trenton to the mouth of said river, that is, throughout the whole extent to which the tide ebbed and flowed in said river, belonged to or was vested in the crown of England in trust for the uses and purposes of the subjects of the King of Great Britain, or that by means of the said revolution, the said independence of the State of New Jersey, and the treaty of peace between the King of Great Britain and the United States of America, concluded at Paris, September the third 1783, that portion of the bed of the Delaware River, last hereinbefore mentioned, situate between the States of New Jersey and Delaware, to the middle of the said river, became vested in fee simple in the State of New Jersey, or that the remaining portion thereof, by the same means and at the same time was vested in the State of Delaware, or that so the title to the bed of said river hath ever since continued and now is. But, on the contrary, this defendant avers and respectfully submits that at and immediately be-

fore the time the said revolution took place, so much of the bed of the said River Delaware as then was and now is included within the compass of the said twelve mile circle belonged to and was vested in the proprietors of the land and the said river and soil thereof included within the compass of said twelve mile circle, by a title derived from the Crown of England, and hereinafter fully set forth; that by means of the said revolution, the said independence of the State of Delaware, and the treaty of peace between the King of Great Britain and the United States of America, concluded at Paris as aforesaid, all that portion of the bed of the Delaware River, situate between the States of New Jersey and Delaware, included within the compass of the said twelve mile circle, became vested in fee simple in the State of Delaware: and that so the title to the said portion of the bed of said river, this defendant respectfully submits, hath ever since continued and now is. This defendant further denies that ever since the fourth of July, 1776, or at any time, hath the said complainant and this defendant each had, or been entitled to, an equal interest in the waters of said river between the State of New Jersey and the State of Delaware, or that each has had a right to exercise equal or concurrent jurisdiction in and over the same, or an equal right for its citizens and inhabitants to fish in said waters. But, on the contrary, this defendant avers and respectfully submits, that ever since the fourth of July, 1776, this defendant hath had and been entitled to a sole and exclusive interest in so much of the waters, between the State of New Jersey and the State of Delaware, of said river as are included within the compass of the said twelve mile circle, subject only to the common rights of navigation thereof, and hath had the right to sole and exclusive jurisdiction in and over the same, and to the sole and

exclusive right for its citizens, inhabitants and licensees to fish in said waters:

This defendant avers that it hath at all times been alleged on behalf of this defendant that Charles the Second, King of England, by due and authentic letters patent, bearing date March 22, 1683, did grant to his brother, the Duke of York, "All that the town of New Castle, otherwise called Delaware, and fort therein, or thereunto belonging, situate, lying, and being between Maryland and New Jersey, in America; and all that tract of land lying within the compass of a circle of twelve miles about the said town, situate, lying, and being upon the River Delaware, and all islands in the said River Delaware; and the said river and soil thereof lying north of the southernmost part of said circle of twelve miles about the said town;" that said patent was duly and legally made and duly and legally delivered by the said King Charles the Second to the said Duke of York, and that the same has ever since the said making and delivery thereof continued to have legal existence; and that by legal and just construction thereof, said patent may and should be construed to include and control the part of the bed of said river lying northerly and easterly of the middle of said river, and all rights of jurisdiction and fishery in said river, so far and to such an extent as the said part of the bed of said river and the waters thereof are included within the compass of the said twelve mile circle.

11. This defendant denies that said complainant hath title or right to the bed of the River Delaware, within the compass of the said twelve mile circle, or jurisdiction in and over said portion of said river, by long peaceable and undisputed possession, or that said possession, use or enjoyment began with the earliest settlement of the State of New Jersey or hath continued ever since, without in-

terruption or dispute, excepting only the interruption and dispute in said Bill of Complaint alleged.

But on the contrary this defendant avers that such jurisdiction was not exercised and seldom if ever asserted by the complainant, and that the history of the government of the State of New Jersey witnesses the practical acknowledgement of the jurisdiction of the defendant as claimed by it now and heretofore, until and except as it was denied by this suit.

This defendant doth not know and cannot set forth as to its belief or otherwise, whether or not it is the fact that during all the time from the said earliest settlement of the State of New Jersey to the time of the filing of the said Bill of Complaint, the citizens and residents of New Jersey, under the authority of said complainant, and with its leave and license, from time to time have, or to what extent, improved the easterly shore of said river opposite to the State of Delaware, from a point opposite to the boundary line between Pennsylvania and Delaware, on the Delaware River, to a point on the easterly side of said river twelve miles below New Castle, as their wants and convenience have required, by erecting dykes and embankments or building wharves, docks, piers or other structures or arrangements; or whether or not the Southwesterly limits of the County of Salem, by usage or legislative enactment in the State of New Jersey, or elsewhere outside the State of Delaware, have been the main ship channel of the Delaware River. This defendant is informed and believes, and therefore avers, that the laws of said complainant, relative to fishing in the Delaware River, for over seventy years have not been recognized, obeyed or enforced on any part of said river which lies between the State of New Jersey and the State of Delaware, within the compass of the said twelve mile circle; and that the citizens and inhabitants of the State of New Jersey for

more than two hundred years, have not claimed, exercised or enjoyed, except as in said Bill of Complaint stated, without molestation or interruption, the right of fishing in all parts of said river, equally and in common with the citizens and inhabitants of the State of Delaware; and that during all that time the Courts of New Jersey have not exercised jurisdiction, in respect to wrongs committed on said river, within the compass of the said twelve mile circle, and complained of in the Courts of said complainant. And this defendant claims and respectfully submits that even if the citizens and residents of New Jersey, during the time, in the localities, and in the manner set forth in the said Bill of Complaint, have improved the easterly shore of said river, by erecting and building thereon, dykes, embankments, wharves, docks, piers or other structures or arrangements, the building and erecting, in manner aforesaid, of such structures or arrangements cannot and should not be held effectual in law or in equity in any event, to affect in any way or to any extent the title or right of this defendant to or its jurisdiction over, any portion of the soil or bed of the said river or of the waters thereof included within the compass of the said twelve mile circle, not actually and physically occupied by the said structures or arrangements; and that the State of New Jersey cannot, whether by such actual or physical occupation, if any such occupation there be, of any part of the original territory, jurisdiction, rights, privileges, franchises, powers, or estates, or any of them, of any and every nature and description or of any appendants or appurtenances to them or any of them appertaining, of the State of Delaware as they, or any of them, existed at the date of the adoption of the Constitution of the United States, or otherwise howsoever, acquire any part or portion of such territory, jurisdictions, rights, privileges, franchises, powers or estates, or any of them, of any and every nature

and description, or of any appendants or appurtenances to them or any of them appertaining, of the State of Delaware, unless and until it may and shall be shown that the Congress of the United States, and the several legislatures of the States of New Jersey and Delaware have expressly and formally consented thereto.

And this defendant further claims and respectfully submits that the said complainant, whether as a colony or State, cannot derive any title to, or any jurisdiction over, any of the premises in dispute in this cause, as against the defendant, whether as a colony or as a State, by prescription.

II

And this defendant, further answering, saith that the true title, jurisdiction, government and sovereignty of, over, in and to that portion of the River Delaware lying and being within the limits of the said twelve mile circle, as hereinbefore set forth and alleged, have been and now are vested in this defendant by the means hereinafter stated.

1. The title by discovery of the Atlantic Coast of North America, at least as far south as Virginia, is claimed and, as this defendant is informed and believes, generally admitted to have been acquired by England by force of the voyage, along said coast, of Sebastian Cabot in or about the years 1497-8. That part of the coast which now constitutes the State of Delaware was, as this defendant is informed and believes, visited in or about the year 1606 by Captain John Smith, an English Navigator, and in or about the year 1611 by Lord Delaware, the English Governor of Virginia; but neither of them landed, merely sailing into Delaware Bay and departing. After a similar visit to the Bay, in or about the year 1609, Henry

Hudson, then in the employment of a Dutch Company, and sailing under the flag of the Netherlands, went northward to the Bay of New York, and discovered and navigated the Hudson River, of which, in consequence of his report, in the following year (1610) the Dutch took possession, and established various trading posts, including one at the site of the City of New York and one at the site of the City of Albany, which were respectively known under the Dutch occupation as Fort Amsterdam (afterwards New Amsterdam) and Fort Orange.

2. And this defendant, further answering, saith that from and after the establishment of the Dutch settlements in New York on the Hudson River, then called the North River, as hereinbefore set forth, there were repeated and continuous efforts by the same people to establish settlements on the Delaware River, then called the South River, which they explored so far as the Schuylkill, and also to establish other settlements easterly from New York as far as the Connecticut River, both of which rivers and the lands contiguous thereto were settled and governed by and as part of the colony having its headquarters and central point of authority at and in the settlement on or near the City of New York, then designated as New Amsterdam. During the period of upwards of fifty years thereafter, all of said territory, including the territory composing the present State of Delaware, and the River Delaware, and the said twelve mile circle, was known as the New Netherlands, and was claimed and, except as herein stated, governed as and for a colony of the States General of the United Provinces of the Netherlands, or under the authority thereof. And this defendant is informed and believes that during the said period of Dutch supremacy, as early as the year 1622 or 1623, there were settlements by the Dutch from New Amsterdam on

the easterly side of the River Delaware. In the year 1630, lands along the Delaware Bay and River, extending from Cape Henlopen to Bombay Hook, were acquired by Samuel Godyn on behalf of a Dutch Company, one of whom, De Vries, a navigator, in or about the year 1631, near what is now the town of Lewis, then called Hoernkill, established a colony, which, on his return in the following year, he found had been exterminated by the Indians. And this defendant further avers that a patent for the lands so acquired by the said Godyn were issued directly from the government of the States General of the United Netherlands, by the Director and Council of the Colonial Government, whose seat was on the island of Manhattans, and that other patents for lands in Delaware were from time to time issued by said Colonial Government, all of which always have been and still are recognized in the State of Delaware as the valid inception of the legal title to the lands to which they respectively relate. And this defendant craves leave to refer to the said patents and prays that the same when proved at the hearing of this cause may be taken as a part of this answer.

And this defendant further answering saith that in or about the year 1638 a Swedish expedition under Peter Minuit, formerly Governor of the New Netherlands under the Dutch Sovereignty, arrived in the Delaware River and commenced to establish settlements on the West side thereof and built a fort named Fort Christina at or near the site of the present city of Wilmington. The settlement of the Country by the Swedes continued until about the year 1647; but immediately after the first arrival of Minuit, the Dutch authorities of the New Netherlands protested against the Swedish operations and did not cease, during all the years of their continuance, to assert the rights of government and of proprietary title of the United Provinces of the Netherlands to and in the Delaware River and the land now constituting

the State of Delaware, and of and over which the said state claims ownership, jurisdiction and government in this suit. These protests not having received the desired attention, and it being considered that the "intention" of the Swedes was "to dispossess and unseat the (Dutch) Company from the entire river," in or about the year 1651, as this defendant is informed and believes, the then Director at New Amsterdam, Stuyvesant, proceeded to the Delaware and personally disputed with Johan Printz, who after the departure of Minit had been the head of the Swedish settlements known as New Sweden, as to the right of the Swedes to interfere in a country claimed by the Dutch as an appendage or appurtenance of the colony which had its seat of government at New Amsterdam. Thereupon, Director Stuyvesant built Fort Casimer at or near New Castle, which action led to hostilities with the Swedes, who, under Johan Rysingh, who had then succeeded Printz, took the said fort in or about the year 1654; and, the hostilities continuing, on or about August thirty-first, 1655, Fort Casimer was retaken by the Dutch, to whom also a few days after Fort Christina also surrendered. As the result of these operations, the Swedish settlements formally acknowledged the sovereignty of the Dutch as established at New Amsterdam, and formal articles of the terms of the surrender were executed under date of September eleventh, 1655, as to Fort Casimer, and September 25-15 of the same year, as to Fort Christina. Provision was made therein for the protection of Swedes who chose to remain and for the return of those who wished to go back to Europe. All of which will appear from the documents referred to and a multitude of others relating to the government of the Delaware Country and River by the Dutch Colonial Government of the Netherlands, to which, when cited at the hearing of this cause, this defendant craves leave to refer and prays that they may be taken as part of this answer.

And this defendant further avers that the said land and river of Delaware became thereupon known by the general designation of the South River of the New Netherlands, and continued to be further settled by active immigration promoted and assisted by the Government of the United Provinces of the Netherlands and the City of Amsterdam, and further that such government continued undisturbed and unchallenged from any quarter until the conquest of the New Netherlands by the English forces under James, Duke of York, hereinafter mentioned and set forth.

3. Charles the Second, King of England, in assertion of the English title by discovery and partial occupation of the territories therein described, granted his letters patent to his brother, James, the Duke of York, bearing date the twelfth of March, 1664, which letters patent are those alleged, mentioned and described in the said section or sections of said Bill of Complaint denominated by the letter A; and this defendant hereby refers to the said letters patent as a whole and makes the same a part of this, its answer. That pursuant to the powers and authority in said letters patent contained, the said Duke of York did duly constitute and appoint, by his commission duly issued, dated on or about the second day of April, 1664, Colonel Richard Nichols to be his deputy Governor within the lands, islands and places in said letters patent mentioned and granted, to perform and execute all and every the powers which were by the said letters patent granted to the said Duke; as by reference to the said commission, when produced in this cause, will more fully appear, and which this defendant prays may be taken as a part of this its answer.

That thereafter, on or about the twenty-fifth day of the month of April, 1664, the said Charles the Second,

issued his commission to the said Colonel Richard Nichols, and Sir Robert Carre, George Cartwright and Samuel Maverick, to visit certain of the Colonies of England in America and determine complaints, accompanied by two letters of instructions, by one of which the said commissioners were directed to reduce to subjection and obedience to the English Crown the Dutch at Long Island and elsewhere within the Colonies and territories claimed by the King. And this defendant refers to the said commission and letters of instructions and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

4. After the date of said letters patent, and in or about the month of September in said year 1664, the portion of said territory described in said letters patent in the occupancy and actual government of the Dutch, dominated by, and surrounding, their then seat of government at New Amsterdam, otherwise and later called New York, was, under the commission aforesaid, to said Nichols and others, conquered by the military power of the King of England, said Charles the Second. That at the date of the said conquest, the said Bay and River Delaware and the territories lying upon the west side thereof, were and constituted a dependancy of the Dutch Government having its seat of Government at said New Amsterdam; which said Government, for many years as aforesaid, had had and exercised, and then did have and exercise, all the rights and powers of a proprietor in, of and over the soil and waters of the said river Delaware and said territories adjacent thereto, and all jurisdiction, whether legislative, judicial or executive, and all government and rights of government in, upon and over the said river Delaware, the soil and waters thereof and said territories adjacent thereto. That in or about the month of October in said

year, 1664, the said Bay and River Delaware and said territories adjacent thereto, including the premises here in dispute, so dependant upon, subject to and owned by the Dutch Government at New York, were, as such a dependency, also conquered by the military power of the said King of England, and the inhabitants thereof submitted without resistance to the authority of said King, and took oaths of allegiance to him and his Governor. That by the treaty of Breda, made on or about the thirty-first day of July, 1667, between the English and Dutch, all the territories conquered by the English as aforesaid, including the premises here in dispute, were confirmed to the English. That from the year 1664 until in the year 1673, the Bay and River Delaware and the said territories lying adjacent to and west thereof, including the premises here in dispute, constituted a dependancy of, and were governed in all particulars by the Government of the Duke of York at New York, and the said Duke of York and his said government during said period had and exercised all government and rights of government, all jurisdiction, whether legislative, judicial or executive, over said Bay, River and Territory, as such a dependancy as aforesaid, and over all of the inhabitants thereof, and all and every of the rights of a proprietor of, in and over the soil and waters of said River and Territory, including the premises here in dispute.

5. That in or about the month of July 1673, the territory, the seat of Government of which was at New York, was reconquered by the military power of the States General and the Prince of Orange, whereupon, without the direct exercise of military force, the Delaware dependancy, as above described, including the premises here in dispute, as the direct consequence of the conquest of the seat of said Government at New York, also fell into the

hands of and was occupied as the territory of the States of the United Provinces of the Netherlands; and the inhabitants of said dependancy, in the same year, in or about the month of September, declared their submission under obedience to the honorable lords States-General of New Netherlands. That upon said reconquest of New York and its said dependancy, and for the space of about seven months thereafter, the governors and government of the Dutch at New York had and exercised all government and rights of government, all jurisdictions, whether legislative, judicial or executive, and all and every of the rights of a proprietor, in and over the said River Delaware and said Territory adjacent thereto, as a dependancy of the said Government at New York, and in and over the soil and waters of said River and Territory, including the premises here in dispute.

6. By the Treaty of Peace, signed at Westminster, in or about the month of February, 1674, the Territory of which the seat of Government was at New York as aforesaid, including the said dependancy of the Bay and River Delaware and said Territories adjacent thereto, were restored to their former lord or proprietor; and by virtue of which treaty, the said River Delaware and the lands adjacent thereto upon the west, were restored as a dependancy to the said Government of the said Duke of York, who as lord proprietor thereof, thereafter governed the same and exercised jurisdiction in, and the rights of a proprietor over, the same, in manner and form as he had theretofore done before the said reconquest of the same by the said States General.

7. That thereupon, in order to make good and affirm and establish the aforesaid grant covered by the said letters patent of the said date of the twelfth of March, 1664,

the said Charles the Second, King of England, by his letters patent, bearing date on or about the twenty-ninth day of June, 1674, did grant and convey unto the said Duke of York, all and every of the property and all and every of the rights, powers and privileges, granted, conveyed, transferred and assured in and by the said patent first made as aforesaid, using in the last one of the said patents the same words which are used in the first of the said patents and no others, except those stating the date; to which last mentioned letters patent this defendant refers, as a whole, and makes the same a part of this, its answer.

8. That in the year 1680, William Penn petitioned King Charles the Second to grant him Letters Patent for a tract of land in America, lying north of Maryland, on the east bounded with the Delaware River, on the west limited as Maryland, and northward to extend as far as plantable. That said petition was referred by the said King to the Lords of the Committee of said King's most Honorable Privy Council for the affairs of Trade and the Plantations, who considered the same from about the month of June 1680 until about the month of March 1681. That among other persons consulted by said Lords of said Committee, as to said grant, was His Royal Highness the Duke of York, in consideration of his recognized possession of and title to the lands and premises involved in said petition and the proposed grant thereunder. That the southerly boundary of the proposed grant was fixed and determined by the said Lords of said Committee, and by Lord Chief Justice North, upon their reference of the same to him, only upon the consent and approval of the said Duke of York, who was by them conceded to have held and possessed ever since the conquest of New York by Colonel Nichols, as an appendix and part of the government of New York, all that Colony or Plantation known by the name of Dela-

ware Colony, or more particularly, New Castle Colony. And this defendant craves leave to refer to all and every of the minutes, acts and proceedings of the said Lords of the Committee of said King's Most Honorable Privy Council for the affairs of Trade and the Plantations, all correspondence with, and in behalf of said Lords of said Committee, and all acts, proceedings and correspondence by, with and in behalf of His Royal Highness, the said Duke, and of all other persons, relative to the said petition and the consequent Royal Grant of the territory and Province of Pennsylvania, and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

9. That King Charles the Second, by letters patent under the great seal of England, bearing date the fourth day of March, 1681, and published by royal proclamation on the Second day of April, 1681, granted unto William Penn, his heirs and assigns, upon his petition aforesaid, all that tract or part of land in America, with all the islands therein contained, as the same is bounded on the east by Delaware River, from twelve miles distance, northward of New Castle Town, unto the three and fortieth degree of northern latitude if the said river doth extend so far northward; but if the said river shall not extend so far northward, then by the said river so far as it doth extend, and from the head of the said river the eastern bounds are to be determined by a meridian line, to be drawn from the head of the said river unto the said three and fortieth degree, the said lands to extend westwards, five degrees in longitude, to be computed from the said eastern bounds, and the said lands to be bounded on the north, by the beginning of the three and fortieth degree of northern latitude, and on the south, by a circle drawn at twelve miles distance from New Castle northwards and westwards unto the beginning of the fortieth degree of northern lati-

tude, and then by a straight line westwards, to the limit of longitude above mentioned. That by the same charter, the territory of Pennsylvania was erected into a province, and appropriate powers of government thereof were conferred upon William Penn and his heirs. And this defendant prays leave to refer to said letters patent and charter, and that the same may be taken as a part of this, its answer.

10. That James, Duke of York, made and executed an indenture, dated the twenty-first day of August, 1682, to the said William Penn, wherein is recited that, his Royal Highness being willing and desirous that the tract or part of land called Pennsylvania should be granted and assured unto the said William Penn and his heirs, and for that purpose having signified and declared his assent thereto to the Right Honorable the Lords of the Committee of Plantations, his said Majesty by his letters patent under the great seal of England, bearing date the fourth day of March in the third and thirtieth year of his reign, for the considerations therein mentioned, did grant unto the said William Penn and his heirs, all that tract or part of land in America, with the islands therein contained and thereunto belonging, as the same was bounded and described in and by the said Letters Patent and therein called Pennsylvania, together with the several royalties, franchises, jurisdictions and privileges therein contained, and that his Royal Highness, for the consideration therein mentioned, was willing and pleased to confirm and make any farther assurance of the said tract of land and premises unto the said William Penn and his heirs; and thereupon, by said indenture, said Duke remised, released and forever quit claimed unto William Penn, his heirs and assigns, all the estate, right, title, interest, rents, services, duties, payments, property, claim and demand whatsoever, of his Royal Highness,

of, into or out of the said tract of land and all and singular other the lands, islands, tenements, hereditaments and other things comprised in the said recited letters patent and within the bounds and limits therein mentioned, to have and to hold the said tract of land, rents, services, hereditaments and premises unto the said William Penn, his heirs and assigns forever. And this defendant hereby refers to the said indenture and prays that the same may be taken and considered, when in evidence in this cause, as a part of this, its answer.

11. By deed signed and sealed but not witnessed, bearing date the twenty-first day of August, 1682, James, Duke of York, demised, granted, bargained and sold unto William Penn all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the River Delaware in America, and all islands in the said River Delaware and the said River and soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises and duties and all the estate, interests and powers whatsoever of his said Royal Highness in or to the same, to have and to hold all the same granted, or intended to be granted, town, circle, islands, to William Penn, his executors, administrators and assigns, for ten thousand years from the day before the date, without impeachment of waste, at a yearly rent of five shillings. And this defendant hereby refers to the said deed of lease and prays that the same, when in evidence in this cause, may be taken as part of this, its answer.

12. By a deed sealed and delivered in the presence of witnesses, bearing date the twenty-fourth day of August, 1682, the said James, Duke of York, demised, granted,

bargained and sold unto William Penn, upon due consideration, all that town of New Castle and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the River Delaware, and all islands in the same river, and the said river and soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town, to have and to hold to the said William Penn, his executors and administrators and assigns, for ten thousand years, at the yearly rent of five shillings. And this defendant refers to the said deed of lease and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

13. By a deed sealed and delivered in the presence of witnesses, bearing date the twenty-fourth day of August, 1682, the said James, Duke of York, upon due consideration, bargained, sold, let and to farm let unto the said William Penn all that tract of land upon Delaware River and Bay, beginning twelve miles south from the town of New Castle, and extending south to the Horerkilns, otherwise called Lopen, together with free and undisturbed use and passage into and out of all harbors, bays, waters, rivers, isles and inlets belonging to or leading to the same, together with the soils, fields, woods, underwoods, mountains, hills, fennes, isles, lakes, rivers, rivulets, bays and inlets situate in or belonging unto the limits and bounds aforesaid, with all the rights of the Duke to the same, to have and to hold for the space of ten thousand years; in which deed the said William Penn covenanted *inter alia* to yield one-half the profits of the office of Registry &c., to the said Duke, who also reserved a right of distress for his rents. And this defendant refers to the said deed of lease and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

14. By a deed of feoffment, bearing date the twenty-fourth day of August, 1682, the said James, Duke of York, for due consideration therein mentioned, did bargain, sell, enfeoff and confirm unto the said William Penn, his heirs and assigns forever, all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the River Delaware, in America, and all islands in the said River Delaware, and the said river and soil thereof, lying north of the southermost part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises, duties, jurisdictions, liberties and privileges thereunto belonging; and all the estate, right, title, interest, powers, property, claim, and demand whatsoever, of his said Royal Highness, of, ~~any~~ or to the same, or any part or parcel thereof; saving always and reserving to his Royal Highness, his agents and servants, free use of all ports, ways and passages into, through and out of the bargained premises, and every part and parcel thereof; to have and to hold the said town and circle of twelve miles of land about the same, islands, and all other the before mentioned or intended to be hereby bargained premises, with their appurtenances, unto the said William Penn, his heirs and assigns, to the only use and behoof of him the said William Penn, his heirs and assigns, forever, yielding and paying therefor yearly and every year unto his said Royal Highness, his heirs and assigns, the sum of five shillings of lawful money of England, at the feast of St. Michael the Archangel, only.

And in and by said indenture his said Royal Highness, for himself, his heirs and assigns, did covenant and grant to and with the said William Penn, his heirs and assigns, that his said Royal Highness, his heirs and assigns, would at any time or times thereafter, during the space of seven years next ensuing the date thereof, upon the request, and at the costs and charges in the law of the said William Penn, his

heirs and assigns, do, make and execute, or cause or procure to be made, done and executed, all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and assuring the said town and circle of twelve miles of land about the same, and islands, and all other premises, with the appurtenances, unto the said William Penn, his heirs and assigns, forever, as by the counsel learned in the law of the said William Penn, his heirs or assigns, shall be reasonably devised, advised, or required.

And his said Royal Highness further thereby made, constituted and appointed John Moll of New Castle aforesaid, esquire, and Ephraim Harman, of New Castle aforesaid, gentleman, jointly and either of them severally, his true and lawful attorneys, and by said presents, did give and grant unto the said John Moll and Ephraim Harman, his said attorneys, or either of them, full power and authority for him, and in his name and stead, into all and singular the premises thereinbefore mentioned, or intended to be thereby aliened, enfeoffed and confirmed, and into every or any part or parcel thereof, in the name of the whole, to enter, and quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to enter and receive; and after peaceable possession thereof had and taken as aforesaid, to deliver quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to the said William Penn, his heirs or assigns, or to his or their lawful attorney or attorneys, sufficiently authorized to receive and take the same, and him or them to leave in the quiet and peaceable possession thereof, according to the true intent and meaning of said presents. And his said Royal Highness did further thereby allow of, ratify and confirm whatsoever the said John Moll and Ephraim Harman, his said attorneys, should lawfully do or cause to be done, in and about the premises, by virtue of said presents, to be as

good and effectual in the law, to all intents and purposes whatsoever, as if his said Royal Highness had done the same in his own person, or had been present at the doing thereof.

And this defendant craves leave to refer to the whole of said last recited indenture of feoffment, when produced in evidence or proved, at the hearing of this cause, and prays that the same, when so produced or proved, may be taken as part of this, its answer.

15. By further deed or indenture of feoffment, bearing date the twenty-fourth day of August, 1682, the said James, Duke of York, for the due consideration therein mentioned, did bargain, sell, enfeoff, and confirm unto the said William Penn, his heirs and assigns forever, all that tract of land upon Delaware River and Bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware, and extending south to the Whorekills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbors, bays, waters, rivers, isles, and inlets, belonging to or leading to the same; together with the soil, fields, woods, underwoods, mountains, hills, fens, isles, lakes, rivers, rivulets, bays, and inlets, situate in or belonging unto the limits and bounds aforesaid; together with all sorts of minerals; and all the estate, interest, royalties, franchises, powers, privileges and immunities whatsoever, of his said Royal Highness therein, or in or into any part or parcel thereof: saving always and reserving to his said Royal Highness, his agents and servants, free use of all ports, ways and passages into, through and out of the said bargained premises, and every part and parcel thereof; to have and to hold the said tract of land, and all and singular other the premises, with the appurtenances, unto the said William Penn, his heirs and assigns, to the only use and behoof of him,

the said William Penn, his heirs and assigns forever, to be holden of his said Royal Highness and his heirs, as of their castle at New York, in free and common soccage, yielding and paying therefor yearly and every year, to his said Royal Highness, his heirs and assigns, one rose, at the feast of St. Michael the Archangel yearly, if demanded.

And in and by said indenture the said William Penn covenanted for himself, his heirs and assigns, within the space of one year next ensuing the date of said presents, to set up an office, or offices of Registry, wherein he should keep account of the rents and other profits arising out of said bargained premises, and annually to pay to his said Royal Highness one full moiety of all and all manner of rents, issues and profits, as well extraordinary as ordinary, as shall be made or raised upon, or by reason of the premises or any part thereof. And in said deed, his said Royal Highness reserved a right of distress for any unpaid arrears of said moiety of said profits.

And his said Royal Highness for himself, his heirs and assigns, did further covenant and grant to and with the said William Penn, his heirs and assigns, by said presents, that his said Royal Highness, his heirs and assigns, would, at any time or times thereafter, during the space of seven years next ensuing the date thereof, upon the request, and at the costs and charges in the law of the said William Penn, his heirs and assigns, do, make, and execute, or cause or procure to be made, done and executed, all and every such further act and acts, conveyances and assurances, in the law whatsoever, for the further conveying and assuring the said tract of land, and all and singular other the premises, with the appurtenances, under the said William Penn, his heirs and assigns, forever, as by the counsel learned in the law of the said William Penn, his heirs or assigns, should be reasonably devised, advised or required.

And his said Royal Highness further thereby made, constituted and appointed John Moll of New Castle aforesaid, esquire, and Ephraim Harman of New Castle aforesaid, gentleman, jointly, and either of them severally, his true and lawful attorneys, and thereby did give and grant unto the said John Moll and Ephraim Harman, his said attorneys, or either of them, full power and authority for him, and in his name and stead, into all and singular the premises thereinbefore mentioned, or intended to be thereby aliened, enfeoffed and confirmed, and into every, or any part or parcel thereof, in the name of the whole, to enter, and quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to take and receive; and after peaceable possession thereof had and taken as aforesaid, to deliver quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to the said William Penn, his heirs or assigns, or to his or their lawful attorney or attorneys, sufficiently authorized to receive and take the same, and him or them to leave in the quiet and peaceable possession thereof, according to the true intent and meaning of said presents. And his said Royal Highness did thereby allow of, ratify and confirm, whatsoever the said John Moll and Ephraim Harman, his said attorneys should lawfully do, or cause to be done, in and about the premises, by virtue of said presents, to be as good and effectual in the law, to all intents and purposes whatsoever, as if his Royal Highness had done the same in his own person, or had been present at the doing thereof.

And this defendant hereby refers to the said indenture of feoffment and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

16. That on or about the twenty-eighth day of Octo-

ber, 1682, the said William Penn, either in his proper person or by his attorney, did demand, and the said John Moll and Ephraim Harman, or one of them, being the said Duke's attorneys for such purpose, duly constituted as aforesaid, did with great form and solemnity, deliver and leave the said William Penn in the quiet and peaceable possession and seisin of the premises contained in both the said respective indentures of feoffment, pursuant to the power and authority given by the same respective indentures of feoffment, by delivery to the said William Penn, of the fort at New Castle, and of turf and twig, and of water and soil of the River Delaware; memorandums of the delivery of seisin were duly prepared and attested by several witnesses, which memorandums, or records thereof, remain to this day. And this defendant hereby refers to the records and memorandums of the said liveries of seisin, and prays that they may when produced in this cause, be taken as parts of this, its answer.

17. That on or about the said twenty-eighth day of October, 1682, the inhabitants of the town of New Castle, upon Delaware River, having heard the indenture read, made between his Royal Highness, James, Duke of York, &c., and said William Penn, wherein said Duke transferred his right and title to New Castle, and twelve mile circle about the same, with all powers and jurisdictions, and services thereunto belonging, unto the said William Penn, and having seen by the said Duke's appointed attorneys, John Moll and Ephraim Harman, both of New Castle, possession given, and by their governor, the said William Penn, possession taken, whereby they were made subjects, under the king, to the said William Penn, did in the presence of God, solemnly promise to yield to him, the said William Penn, all just obedience and to live quietly and peaceably under his government. That of the said oath of allegiance and submission to the said William

Penn, a memorandum was made and signed by said inhabitants of the town of New Castle, or by representatives thereof, which said memorandum, or a due record thereof, remains to this day. And this defendant hereby refers to the said memorandum of said oath of allegiance and submission, or to the record thereof, and prays that the same when produced in this cause, may be taken as a part of this, its answer.

18. That shortly after the delivery of such possession and seisin of said territory and River Delaware, included within said twelve mile circle, to the said William Penn, as aforesaid, and sometime in the month of November, 1682, the said Duke of York's Commander-in-Chief and Council established at New York, issued a proclamation, declaration, or order, addressed or directed to the several justices of the peace, magistrates, and other officers at New Castle, St. Jones, Deale, alias Whore Kill, at Delaware, or within any of the bounds and limits mentioned in the said recited indentures of feoffment to the said William Penn. Said order or proclamation recites that his Royal Highness had been graciously pleased by indenture under his hand and seal, bearing date the twenty-fourth day of August, then last past, for the consideration therein mentioned, to bargain, sell, enfeoff, and confirm unto William Penn, Esquire, his heirs and assigns forever, all that town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, with all islands, and the river and the soil thereof lying north of the southermost part of the said circle, and all rents and services, royalties, franchises, duties, jurisdiction, privileges and liberties thereunto belonging, and by another indenture of the same date, for the consideration therein likewise mentioned; had also bargained, sold, enfeoffed, and confirmed under the said William Penn, Esquire, his heirs and assigns forever, all

that tract of land upon Delaware River and Bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware and extending south to the Whore Kills, otherwise called Cape in Lopen, with all isles, rivers, rivulets, bays and inlets, royalties, franchises, powers, privileges, and immunities whatsoever, and in and by the said indentures, appointed and authorized John Moll, esquire, and Ephraim Harman, gentleman, to deliver to him, the said William Penn, free and actual possession of the premises, as by the said indentures, there produced and shown to said Commander-in-Chief and Council, and by them well approved of and entered in the public records of said Province, did and may more at large appear; and said proclamation further recited that the said Commander-in-Chief and Council being thereby fully satisfied of the said William Penn's right to the possession and enjoyment of the premises; whereupon the said order or proclamation proceeded, that the said Commander-in-Chief and Council theretofore thought fit and necessary to signify and declare the foregoing to the persons to whom said proclamation was addressed, to prevent any doubt or trouble that might arise or accrue, and to give them their thanks for their good services done in their several offices and stations during the time they remained under his Royal Highness' Government; which proclamation concluded as follows: "expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn in and by the said indentures in the performance and enjoyment of which we wish you all happiness." And this defendant refers to the said order or proclamation or the due record thereof, and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

19. That the Duke of York having, by each of his said indentures of feoffment of the twenty-fourth of August, 1682, covenanted with the said William Penn to make and procure further assurance of the premises contained within the said recited indentures of feoffment as aforesaid, he, the said Duke of York, did in pursuance and performance of his said covenants, very shortly after the date of the said feoffments, make his application to the said King, Charles the Second, for a more particular and express grant under the great seal of England, of the said lands and waters contained in the said feoffments, and since called the three lower counties, and did procure and obtain the same.

Pursuant to the said application of the said Duke of York, the said King, Charles the Second, by his letters patent, under the great seal of England, bearing date at Westminster on or about the twenty-second day of March, which was in the thirty-fifth year of his reign, Anno Domini 1683, (O. S. 1682), which date was not quite seven calendar months after the date of the said Duke's said feoffments, did give and grant unto said James, Duke of York, his heirs and assigns, all that, the town of New Castle, otherwise called Delaware, and fort therein or thereunto belonging, situate, lying and being between Maryland and New Jersey in America; and all that tract of land lying within the compass or circle of twelve miles about the said town, situate lying and being upon the River Delaware, and all the islands in the said River Delaware, and the said river and soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town; and all that tract of land upon Delaware River and Bay, beginning twelve miles south from the said town of New Castle, otherwise called Delaware, and extending south to Cape Lopen; together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods,

marshes, waters, lakes, fishings, hawkings, huntings and fowlings, and all other royalties, privileges, profits, commodities and hereditaments, to the said town, fort, tracts of land, islands and premises, or to any or either of them belonging or appertaining, with their and every of their appurtenances, situate lying and being in America, and all of the said King's estate, right, title and interest, benefit, advantage, claim and demand whatsoever, of, in or to the said town, fort, lands, or premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof, together with the yearly and other rents, revenues and profits of the premises, and of every part and parcel thereof; to have and to hold the said town of New Castle, otherwise called Delaware, and fort, all and singular the said lands and premises with their and every of their appurtenances, thereby given and granted, or thereinbefore mentioned to be given and granted, unto the said James, Duke of York, his heirs and assigns forever; to be holden of the said King, his heirs and successors, as of his manor of East Greenwich, in his County of Kent, in free and common soccage, and not in capite or by Knight service; yielding and rendering, and the said James, Duke of York, for himself, his heirs and assigns, did thereby covenant and promise to yield and render unto the said King, his heirs and successors, of and for the same, yearly, and every year, four beaver skins, when the same should be demanded, or within ninety days after such demand made.

And of the King's special grace, certain knowledge, and mere motion, for him, his heirs and successors, the said King did thereby give and grant unto the said James, Duke of York, his heirs, deputies, agents, commissioners and assigns, full and absolute power and authority to correct, punish, pardon, govern and rule, all such the subjects of said King, his heirs and successors, or any other person or persons as should from time to time adventure themselves into any

of the ports and places aforesaid, or that should or did at any time thereafter inhabit the same, according to such laws, orders, ordinances, directions and instructions, as by the said Duke of York, or his assigns, should be established; and in defect thereof, in cases of necessity, according to the good discretion of his deputies, commissioners, officers, or assigns respectively, as well in all cases and matters capital and criminal as civil, both marine and others, so always as the said statutes, ordinances and proceedings be not contrary, but (as near as may be) agreeable to the laws, statutes and government of the said King's realm of England; and saving and reserving to said King, his heirs and successors, the receiving, hearing and determining of the appeal and appeals of all, or any person or persons of, in, or belonging to the town, fort, lands and premises aforesaid, or touching any judgment or sentence to be there made or given.

And by said Letters Patent the said King further granted that it should and might be lawful to and for the said Duke of York, his heirs and assigns, from time to time, to nominate, make, constitute, ordain and confirm such laws as aforesaid, by such name or names, style or styles, as to him or they should seem good; and likewise to revoke, discharge, change and alter, as well as all and singular governors, officers and ministers, which should thereafter be by him, or them, thought fit and needful to be made or used within that aforesaid town, fort, lands and premises; and also to make, ordain and establish all manner of laws, orders, directions, instructions, forms and ceremonies of government and magistracy, fit and necessary for and concerning the government of the said town, fort, lands and premises, so always as the same be not contrary to the laws and statutes of said King's realm of England, but (as near as may be) agreeable thereunto, and the same at all times thereafter to put in execution, or abrogate, revoke or

change, not only within the precincts of the said town, fort, lands and premises, but also upon the seas, in going and coming to and from the same, as he, the said Duke of York, or his heirs and assigns, in their good discretion, shall think fittest for the good of the adventurers and inhabitants. And the said King did thereby further grant, ordain and declare that such governors, deputies, officers and ministers, as from time to time shall be authorized and appointed in manner and form aforesaid, shall and may have full power and authority within the said town, fort, lands and premises, to use and exercise martial law in case of rebellion, insurrection and mutiny, in as large and ample manner as the said King's Lieutenants, in his counties within his realm of England, had or ought to have, by force of their commission of Lieutenancy, or any law or statute of his said realm.

And the King by said Letters Patent did further for himself, his heirs and successors, grant unto the said Duke of York, his heirs or assigns, in his or their discretions, from time to time, to admit such and so many person and persons to trade and traffic unto and within the said town, fort, lands and premises, and into every and any part and parcel thereof, and to have, possess and enjoy any lands and hereditaments in the parts and places aforesaid, as they shall think fit, according to the laws, orders, constitutions, and ordinances, by the said Duke of York, his heirs, deputies, commissioners and assigns, from time to time, to be made and established by virtue of, and according to, the true intent and meaning of said presents, and under such conditions, reservations and agreements, as the said Duke of York, his heirs and assigns, should set down, order, direct and appoint, and not otherwise, as aforesaid.

And the said King, did further of his especial Grace, certain knowledge, and mere motion, for himself, his heirs,

and successors, give and grant unto the said Duke of York, his heirs and assigns, by said presents, that it should and might be lawful to and for him, them, or any of them, at all and every time and times thereafter, out of any of the said King's realms or dominions whatsoever, to take, load, carry and transport, in and into their voyages for and towards the plantation of the said town, fort, lands and premises, all such and so many of the said King's loving subjects, or any other strangers being not prohibited, or not restrained that would become the said King's loving subjects, and live under his allegiance, and should willingly accompany them on the said voyage, together with all such clothing, implements, furniture, or other things, usually transported, and not prohibited, as should be necessary for the inhabitants of the said town, fort, lands and premises, and for their use and defense thereof, and managing and carrying on the trade with the people there, and in passing and returning to and fro; yielding and paying unto the said King his heirs and successors, the customs and duties therefore due and payable, according to the laws and customs of the said King's realm.

And the said King by said letters patent did also for himself, his heirs and successors, grant to the said Duke of York, his heirs and assigns, and to all and every such Governor and Governors, Deputy or Deputies, or their officers or ministers, as by the said Duke, his heirs or assigns, should be appointed, to have power and authority of government, and command in and over the inhabitants of the said town, fort, lands and premises, that they and every one of them should, and lawfully might, from time to time, and at all times forever thereafter, for their several defences and safety, encounter, repulse and expel and resist by force of arms, as well by sea as by land, and by all ways and means whatsoever, all such person and persons as, without

the special license of the said Duke, his heirs or assigns, should attempt to settle and inhabit within the several precincts and limits of the said town, fort, lands and premises, and also all and every such person or persons whatsoever, as should enterprise and attempt at any time thereafter, the destruction, invasion, detriment or annoyance, to the parts, places, town, fort, lands and premises aforesaid or any part thereof.

And said King did, by his said Letters Patent, declare his will and pleasure to be, and did thereby declare and grant, that said Letters Patent, or the enrollments thereof, should be good and effectual in law, to all intents and purposes whatsoever, notwithstanding the not well or true reciting or mentioning of the premises, or any part thereof, or of any former or other Letters Patent or grants whatsoever, made or granted of the premises, or of any part thereof, by the said King, or any of ^{his} progenitors, unto any person or persons whatsoever, bodies politic or corporate, or any other law or other restraint, incertainty or imperfection whatsoever to the contrary in any wise notwithstanding, although express mention of the true yearly value or certainty of the premises, or any of them, or of any other gifts or grants by him, or by any of his progenitors, theretofore made to the said Duke of York, in said presents was not made, or any statute, act, ordinance, provision, proclamation or restriction theretofore had, made, enacted or provided, or any other matter, cause or thing whatsoever, to the contrary thereof in any wise notwithstanding.

As by reference to said Letters Patent will more fully and at large appear. To which Letters Patent this defendant hereby refers and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

That immediately after the said last mentioned Let-

ters Patent had passed the great seal, the said Duke of York, who was no other than a trustee for the said William Penn therein, and had obtained them in pursuance of his said covenant for further assurance, did deliver over the same original last mentioned letters patent under the great seal, to the said William Penn, into the custody and possession of whom, his heirs and assigns, the same did thereby pass and ever after remain.

20. And this defendant further avers that, upon the making of the feoffments from the Duke of York to the said William Penn, and of the said Royal Letters Patent to the Duke of York, for the benefit of the said William Penn as aforesaid, the said William Penn straightway entered into full seisin, possession and exercise of the lands, territories, rivers, waters, the royalties, government and rights of government, and jurisdiction, whether legislative, judicial or executive, conferred by the said feoffments and said Letters Patent; and particularly entered upon the possession and full exercise of all of the titles, powers, royalties, privileges, franchises, jurisdictions, governments and rights of government conferred by said two last mentioned feoffments and said letters patent, within, upon and over the territory, lands, soils, waters, and property included within the compass of said twelve mile circle, and had and exercised, within said last mentioned bounds, all and every the rights of a proprietor, under the terms of all of his muniments of title aforesaid. And further that in the improvement and settlement of said last mentioned territories, the said William Penn and his heirs expended large sums of money. That the said William Penn, and his heirs, continued in the possession, enjoyment and exercise of all the powers and privileges, rights and titles, jurisdiction and government of the said territories, lands and premises, with the full knowledge of, and with the full recognition of his governmental and

proprietary rights therein by the Crown of England, and without its let or hindrance, from the time of the taking possession and exercise of the same as aforesaid, until the time of the American Revolution, excepting that, for a short period during the reign of Queen Anne of England, he was removed from the government of his said Provinces, but shortly thereafter was most fully and completely restored thereto. All of which by reference to very numerous grants by William Penn and his heirs to sundry persons, and from numerous legislative, judicial and executive acts, laws, records, documents, provincial charters and acts of provincial settlement, will more fully and at large appear, to all of which this defendant prays leave to refer and to make the same, when produced in this cause, a part of this, its answer.

21. That on or about the month of December, 1682, the said William Penn under his hand and broad seal, as proprietor and governor of the Province of Pennsylvania, and of the said Three Lower Counties, issued and published an Act of Union for annexing and uniting of the counties of New Castle, Jones's, and Whorekills, alias New Dale, to the Province of Pennsylvania. The said Act of Union, after sundry recitals of the title of the said William Penn to the said Province of Pennsylvania and said Three Lower Counties, as by reference thereunto will fully appear, enacted that the county of New Castle, Jones's and Whorekills, alias New Dale, should be annexed, and by the authority of the said proprietor and governor, by and with the advice and consent of the deputies of the freemen of said Province, and counties aforesaid in assembly made, were thereby annexed unto the Province of Pennsylvania, as of the proper territory thereof; and that the people therein should be governed by the same laws, and enjoy the same privileges in all respects, as the inhabitants of Pennsylvania did or should enjoy from time to time therein,

anything in said law, or any other law, act or thing, in said Province, to the contrary thereof in any wise notwithstanding. And this defendant hereby refers to the said Act of Union and prays that the same when produced in this cause, may be taken as a part of this, its answer.

22. That the union of the said Three Lower Counties to the Province of Pennsylvania continued in full force, both legislative and otherwise, until about the year 1701; in which said year, the said William Penn granted and promulgated a charter of privileges to the inhabitants of the said Province of Pennsylvania and said Three Lower Counties, called the Territories thereof, whereby he granted full permission under said charter of privileges for the said Province and the said Territories, to have and maintain several legislatures. That subsequent to about the year 1702, no further joint legislative assemblies of representatives from the Three Lower Counties and from the said Province of Pennsylvania were ever held. And this defendant hereby refers to the said charter of Privileges, to the acts and proceedings of the legislative bodies of the Three Lower Counties, and of the said Province of Pennsylvania, so far as relating to the said legislative disunion between the Three Lower Counties and the said Province of Pennsylvania, and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

23. That from the year 1682 down to the year 1776, the said William Penn and his heirs, under various wills, deeds of settlement, and descents, continually had, held, possessed, retained, and exercised the rights of proprietor and proprietors of the territory, lands, waters, and premises, included within the compass of the said twelve mile circle, under the powers, titles, and authorities granted to the original proprietor, and so held and exercised by him as

aforesaid, and as modified by various charters of privileges granted by said proprietors to the Province of Pennsylvania, and the said Three Lower Counties. And this defendant prays leave to refer to the said wills, deeds of settlement, and descents, or to the due records thereof, and to the several charters of privileges, for further particulars in this behalf; and that the same may, when produced in this cause, be taken as parts of this, its answer.

24. That at the date of the American Revolution, which took place by the Declaration of Independence, bearing date the Fourth day of July, 1776, the territorial limits of the State of Delaware extended to and included, *inter alia*, all those lands and that portion of the Delaware River, its waters and the soil and bed thereof to low water mark on the New Jersey shore, included within the compass of said twelve mile circle; and such its limits and boundaries had continuously been and remained down to the date of said Revolution from about the year 1682. That by said American Revolution, the State of Delaware became and was, and from thenceforth has been, a free and independent state, and as such became entitled to have and to hold all such rights as free and independent states may have or hold, to do all acts and things which independent states may of right do; and by force of the said Revolution and said Independence the said State of Delaware became invested with all and every power of government in and over the territory of said State and the tide waters adjacent thereto, and particularly to the full extent of the limits and boundaries of said State as they existed at the time of said American Revolution as aforesaid, and also became invested, not only with all the property and rights of property, royalties, powers, and franchises, governmental powers and authority and jurisdictions within and appertaining to said State, which immediately before said Revolution were vested in the then and

former proprietor or proprietors of its territory within the limits and bounds aforesaid, but also with all the property, rights of property, privileges, franchises, powers, governmental power and jurisdictions, if any thereof yet then remained in the Crown of England, in manner and form as they were so vested in said Crown; that by means of said Revolution, the said independence of the State of Delaware, and the Treaty of Peace between the King of Great Britain and the United States of America, concluded at Paris, September third, 1783, all that portion of the bed, soil and waters of the Delaware River last hereinbefore mentioned, to low water mark on the New Jersey shore and included within the compass of said twelve mile circle, became vested in fee simple in the State of Delaware; and so the title to the bed of said portion of said river, this defendant respectfully submits, hath ever since continued and now is.

25. That to and in the said bed and soil of said portion of the Delaware River and to jurisdiction in and over said river, so as aforesaid claimed, this defendant hath title and right by long and peaceable possession, use and enjoyment, which use, possession and enjoyment began with the earliest determination of the said boundaries of said State as hereinbefore set forth and hath ever since continued, without interruption or dispute. That in, over and with reference to the portion of said Delaware River and the soil and the bed thereof, as a part of the recognized territory of said State of Delaware, the said State hath from time to time continuously passed and enforced legislative acts, its courts have continuously, both before and after the American Revolution, exercised jurisdiction and issued and enforced processes, writs, orders, judgments and decrees, and the courts of the United States within the district of said State, have enforced their processes, orders and writs.

That with reference to the rights of fishing and every regulation and control thereof in said river, within the limits of said twelve mile circle, the State of Delaware hath never relinquished or abandoned the proprietary rights which it hath always possessed, had and defended, from the inception of its title to the bed and soil and waters of said river, within the limits of said twelve mile circle, in the year 1682, to the present day, but on the contrary, this defendant saith that the said proprietary rights, and title to said fisheries and fishings in said portion of said river, and the regulation and control thereof, this defendant hath continuously from the said year 1682 to the present day claimed, exercised and defended.

That in the exercise, by this defendant, of proprietary right, jurisdiction and sovereignty, in and over the said twelve mile circle, its Legislature did, on May 27th, 1813, pass an Act entitled "An Act Ceding to the United States of America the Jurisdiction which this State has over the Pea Patch, on certain conditions therein mentioned" (being Digest of Delaware Laws of 1829, page 673), in and by which the State of Delaware ceded to the United States of America, for the purpose of erecting forts, batteries and fortifications thereon for the protection of the River Delaware and the adjacent country, a certain island in the River Delaware and within the twelve mile circle; which was thereupon, in pursuance of said cession, occupied by the Government of the United States of America, and fortifications were thereupon built thereon, and have ever since been maintained. That after said cession, and prior to the year 1847, the title of the United States of America under said cession, was questioned by James Humphrey who claimed through sundry means, conveyances, under grants from the State New Jersey or its proprietary; and that for the purpose of determining the right, title, sovereignty and jurisdiction of the State of Delaware in and

over the said island, at the time of said cession, as aforesaid, to the United States of America, an arbitration of and concerning the same was had, heard and determined by and before the Honorable John Sergeant of Pennsylvania, who was designated as an arbitrator for the express purpose of determining the said right, title, jurisdiction and sovereignty, under and pursuant to the authority of an Act of the Congress of the United States, approved August 8th, 1846, under which the said arbitrator was appointed, and, when so appointed, was constituted a special tribunal for determining the same. That the question of the right, title, jurisdiction and sovereignty of the State of Delaware of, in, to and over the River Delaware and the soil thereof, within the twelve mile circle, was the very question involved in said litigation and determined by the said special tribunal, so created for that purpose; and that to the said litigation and decision the parties to this suit, that is to say, the States of New Jersey and Delaware, were privies in ~~the~~ estate to and with the respective parties. That during the hearing and determination of said arbitration, full and accurate minutes of all proceedings were taken by the Secretary of the reference, who was then, theretofore and subsequently, the regular and only reporter of the decisions of the District and Circuit Courts of the United States in the District of Pennsylvania and the Third Circuit; and that said minutes, having been carefully written out, were transmitted to the proper department of the Government of the United States and were, pursuant to a resolution of the Senate of the United States, printed and published as Senate Executive Document No. 21 of the first session of the Thirtieth Congress. That the decision of the said arbitrator was, that the title and jurisdiction to and over said island and to the river and soil thereof, within the said twelve mile circle, was in the said State of Delaware. That the said decision was reached after the most thorough

examination of the facts, upon the original documents, the testimony of witnesses, the law applicable thereto, and the argument of able counsel representing both sides. And the defendant craves leave to refer to the said Senate Executive Document No. 21, and to the record and proceedings of the said arbitration and decision, when produced at the hearing of this cause.

III

1. And this defendant, further answering, saith that its Legislature did, on March 28th, 1871, pass an Act entitled "An Act for protection of Fishermen" (being Chap. 72, Vol. 14, Laws of Delaware), as is in said Bill of Complaint alleged, but that the said Act is not fully set forth in said Bill of Complaint, nor is that portion of the same from which the said Bill of Complaint purports to make a quotation set forth with entire accuracy; and this defendant therefore craves leave to refer to the said Act when produced at the hearing of this cause.

And this defendant, further answering, saith that its Legislature did also pass, March 29th 1871, a supplement to said last mentioned Act, entitled "A Supplement to the Act entitled 'An Act for the Protection of Fishermen'" (being Chap. 73, Vol. 14, Laws of Delaware), the terms and tenor of which said last mentioned Act are accurately set forth in said Bill of Complaint.

And this defendant, further answering, denies that any of its officers, at any time, construed the said acts of the Legislature of this defendant as requiring or authorizing them to arrest citizens of New Jersey, or any other persons, while lawfully pursuing the occupation of fishing in the River Delaware; and that it does not know and cannot set forth as to its belief or otherwise, whether it is a fact that officers of this defendant arrested citizens and inhabitants

of the State of New Jersey, and seized their vessels and fishing implements and carried the said citizens and residents into the State of Delaware and there charged them with violation of the aforesaid Act relative to fishing, by not taking out a license and paying the license fee of Twenty Dollars (\$20.00) prescribed by the first section of the aforesaid Act of March 28th, 1871.

And this defendant, further answering, does not admit that its courts and authorities did enforce the provisions of the said Act against citizens and residents of New Jersey; but this defendant avers that its courts and officers have at all times asserted the jurisdiction of the State of Delaware over the said twelve mile circle, and its right of control of fishing therein, and that if any arrests were made by the officers of this defendant, as set forth in said Bill of Complaint, such arrests were made only of persons who were found to be violating the laws of the State of Delaware, rightly made and enforced within its own lawful jurisdiction, and in execution of the laws of said State then in force. And this defendant further avers that the courts and authorities of the State of Delaware have always asserted, and still continue to assert and maintain, an exclusive jurisdiction over the whole of said river within the said twelve mile circle to low-water mark on the New Jersey shore thereof, as hereinbefore more particularly set forth. This defendant believes, and is willing to admit, that the Governor of the State of New Jersey did issue his proclamation bearing date the eighth day of May, 1872, as is in said Bill of Complaint set forth; but for greater certainty it craves leave to refer to the said proclamation when produced at the hearing of this cause.

2. And this defendant, further answering, admits that its Legislature did, January 30th, 1873, adopt certain joint resolutions, substantially as set forth in said Bill of Com-

plaint (being Chap. 583, Vol. 14, Laws of Delaware); and also that the said Legislature did, on the 14th day of February, 1873, adopt certain other joint resolutions set forth substantially in said Bill of Complaint (being Chap. 593, Vol. 14, Laws of Delaware); and that the said Legislature did, on February 19th, 1873, adopt a certain other joint resolution, amending the preamble of the joint resolution of January 30th, 1873 (being Chap. 594, Vol. 14, Laws of Delaware); which said resolutions are substantially as set forth in said Bill of Complaint; but for greater certainty this defendant craves leave to refer to all of said resolutions when produced at the hearing of this cause.

3. And this defendant, further answering, saith that it admits that on February 19th, 1873, its Legislature passed another Act entitled "A Supplement to the Act entitled 'An Act for the Protection of Fishermen'" (being Chap. 419, Vol. 14, Laws of Delaware), the terms and tenor of which said Act are substantially set forth in the said Bill of Complaint; but for greater certainty this defendant craves leave to refer to the said Act when produced at the hearing of this cause.

4. And this defendant, further answering, saith that it believes to be true, and therefore admits, that the Legislature of the State of New Jersey did pass an Act, approved February 26, 1873, entitled "An Act for the Settlement of the Territorial Limits and Jurisdiction of the State of New Jersey and the State of Delaware", as set forth in said Bill of Complaint; but for greater certainty this defendant craves leave to refer to said Act when produced at the hearing of this cause.

And this defendant admits that the Governor of New Jersey did appoint three commissioners for the purposes named in said last mentioned act, as set forth in said

Bill of Complaint, and that said commissioners accepted said appointment.

5. And this defendant, further answering, saith that it believes it to be true, and therefore admits, that the Legislature of the State of New Jersey did pass another Act, approved March 11th, 1873, as in said Bill of Complaint is set forth, but upon what information the said Legislature of the State of New Jersey acted in passing the said last mentioned Act, this defendant has no knowledge, except so far as the same is disclosed by the terms of the Act itself; but for greater certainty this defendant craves leave to refer to said Act when produced at the hearing of this cause.

6. And this defendant, further answering, admits that on the eighth day of April, 1873, its Legislature, acting in a spirit of inter-state comity, and with a desire to have the questions of difference between the two states, growing out of the legislation of the State of Delaware, hereinbefore set forth and referred to, settled amicably and without any friction resulting from the enforcement of the laws of this defendant which were complained of by the Legislature and other officers of New Jersey, and the validity of which was to be examined into and passed upon by the joint commissioners of the two States, passed certain joint resolutions (being Chap. 605, Vol. 14, Laws of Delaware), suspending the laws of the State of Delaware requiring a license to fish for shad within its waters pending the negotiations between the commissioners appointed by the two states for the settlement of the fishery question, and authorizing the said commissioners to consider and determine the mutual right of fishery in the Delaware Bay and in that part of the Delaware River lying between the two states, as is in said Bill of Complaint alleged; but for greater certainty

this defendant craves leave to refer to said resolutions when produced at the hearing of this cause.

7. And this defendant, further answering, saith that it believes that the commissioners of the two states had various conferences and discussions, and that the commissioners on the part of Delaware submitted to the commissioners on the part of New Jersey a printed argument setting forth their views of the matters in dispute and of the rights of the parties respectively in and over the subject matters thereof, and that the views of the said commissioners of this defendant, as embodied in the said printed argument, were afterwards reported to the Legislature of this defendant. And this defendant craves leave to refer to the said printed argument prepared by its commissioners as aforesaid and submitted to the commissioners of New Jersey, and craves leave to produce the same at the hearing of this cause. This defendant cannot say with certainty what was done by said commissioners, but it believes that the commissioners from both states did engage in a discussion and consideration of the subject in dispute in good faith and with the sincere hope and wish of reaching an agreement and settlement that would be reasonable, just and satisfactory to both parties; but this defendant is informed and believes that all efforts of the joint commissioners to reach a satisfactory basis of settlement failed, and that it was after the discussion and failure to agree that it was determined that the commissioners from each state should present a written or printed statement of their title and claim, with the grounds upon which the same were based. In pursuance of that agreement, the commissioners of this defendant did duly deliver the statement so agreed upon by them to be prepared and presented, asserting and vindicating the claim, title and jurisdiction of this defendant as it had always theretofore been maintained, the said statement being the printed argument hereintofore referred to. But

this defendant is also informed and believes that the commissioners of New Jersey wholly failed to prepare and deliver to the commissioners of this defendant their statement of the claims of the State of New Jersey, and that they continued so to do until March 26th, 1875; which failure on the part of the commissioners of the State of New Jersey to present their argument and statement of claims as agreed upon by the commissioners of the two states was construed and accepted by the Executive and the Legislature of this defendant as an abandonment of the case, and tacit relinquishment of the alleged claim of title and jurisdiction in the State of New Jersey, and a practical admission that the objections taken by the officers of the State of New Jersey to the legislation which had been passed by the General Assembly of this defendant, as hereinbefore referred to and set forth, were not well founded. And thereupon the Legislature of this defendant passed certain joint resolutions February 24th, 1875, (being Chap. 238, Vol. 15, Laws of Delaware), and certain other resolutions on March 26th, 1875, (being Chap. 249, Vol. 15, Laws of Delaware), under and by which the said commissioners were discharged from further consideration of the subject, and relieved of further duties as commissioners as aforesaid, both of which joint resolutions are not accurately set forth in the said Bill of Complaint; and for greater certainty this defendant craves leave to refer to the same when produced at the hearing of this cause.

And this defendant, further answering, saith that it hath no knowledge whether either of the joint resolutions last cited was transmitted to the Governor, or Secretary of State, or any other executive officer of the State of New Jersey, or to the Legislature thereof, or whether the complainant had any notice whatsoever of the adoption of either one. But this defendant is advised that the said

resolutions related entirely to its own commissioners, and neither of them contained any matter which, in the exercise of the comity due from one state to another, rendered it necessary to have formal notice thereof sent to the complainant, it having been assumed by the officers of this defendant that the failure of the commissioners of the complainant to prepare their statement and deliver the same to the commissioners of this defendant, as it was agreed by the two joint commissions should be done, was virtually and practically an abandonment of the controversy, on the part of the complainant, by those who were officially designated to represent it therein.

8. And this defendant, further answering, saith that it believes it to be true, and therefore admits that a notice was published by the Clerk of the Peace in and for New Castle County, giving notice to fishermen of the necessity, under the laws of the State of Delaware, to procure license for fishing in the Delaware Bay or River or creeks within the jurisdiction of this defendant, as in said Bill of Complaint is set forth; but for greater certainty this defendant craves leave to refer to the said notice when produced at the hearing of this cause.

And this defendant, further answering, saith that it believes it to be true that communications passed between the officers of the two states, and that the Governor and executive officers of this defendant understood that it was their right and their duty to treat as belonging to, and within the exclusive jurisdiction of, the State of Delaware, the whole of the River Delaware within the said twelve mile circle, and to enforce the said fishing laws and all other laws of this defendant and the penalties thereby prescribed, upon all persons who should violate the said laws.

And this defendant further believes it to be true that the Governor and executive officers of this State refused

to make any agreement with the officers of the complainant to stay the execution of any of the laws of the defendant, or to refrain from enforcing them against all persons who should violate them, for the reason that the executive officers of this defendant had no power or authority, under the Constitution of this defendant, to suspend or neglect the execution of its laws.

And this defendant, further answering, admits that it is its purpose to enforce all its laws on and over that part of the River Delaware lying within the said twelve mile circle, for the reason that this defendant claims, and has always hitherto claimed, that it has and hath sole and exclusive jurisdiction over all that part of said river, as hereinbefore is more particularly set forth.

9. And this defendant, further answering, saith that it believes to be true, and therefore admits, that the Legislature of New Jersey did pass, and the Governor did approve, the joint resolutions approved March 30th, 1876, as in said Bill of Complaint is set forth; but for greater certainty this defendant craves leave to refer to the same when produced at the hearing of this cause.

Lastly this defendant, further answering, doth say that it hath not only in and since the year 1872, but at all times theretofore, claimed to own in fee simple the bed and soil of the Delaware River from a point in said river, twelve miles below the town of New Castle to the boundary line between the State of Delaware and the State of Pennsylvania, that is to say, within the said twelve mile circle, and that this defendant claims to have the sole and exclusive jurisdiction and control of the right of fishing in that part of the said river last hereinbefore mentioned. This defendant doth not know, and therefore cannot admit, the arrest of the inhabitants of New Jersey or their

imprisonment, or the seizure of their property, but it avers that resistance to the State of Delaware, in the exercise of its lawful jurisdiction over the said twelve mile circle, was attempted by persons believed to be citizens of New Jersey, and that measures were taken by the officers of this defendant to enforce the laws relating to fishing therein, but that all proceedings relating to the enforcement of said laws were, in fact, suspended by the negotiations which thereupon immediately took place between the executive officers of the States of New Jersey and Delaware, and that, as this defendant believes, no further efforts were made to enforce the said laws, because, of the expectations entertained in both states, that the whole subject would be amicably settled and disposed of by the action of the commissioners appointed to represent the two states as hereinbefore set forth. That after the action by the Legislature of this defendant, which resulted in practically repealing the suspension of the laws relating to fisheries complained of in the said Bill of Complaint, the Executive and officers of this defendant, in pursuance of their constitutional obligations to take care that the laws be faithfully executed, did give notice, as hereinbefore set forth, that the Act of March 28th, 1871, would be enforced. That suggestions were made by the then Governor of New Jersey to the then Governor of this defendant, to endeavor to reach some amicable arrangement for the postponement of the execution of the law, but that the Governor of Delaware found himself unable to enter into such arrangement, because he had no power, as the Executive of the State, to suspend any law upon its statute books. That thereupon the proceedings were taken by the State of New Jersey, under which the injunction was issued in this cause, and that since that time no effort has been made and no action taken toward the enforcement of that law. But this defendant is advised and insists that but for the said

injunction, it claims the right of jurisdiction and control in the premises, as hereinbefore set forth.

Whereupon this defendant, having fully answered, confessed, traversed and avoided or denied all the matters in the said Bill of Complaint material to be answered, according to the best knowledge and belief of this defendant, hereby expressly denies all allegations of said Bill of Complaint which have not been herein expressly answered, if any there be, and humbly prays this Honorable Court to enter its decree that this defendant be hence dismissed with its reasonable costs, in this behalf, most wrongfully sustained.

HERBERT H. WARD,
Attorney General of the State of Delaware.

GEO. H. BATES,
Of Counsel.

Solicitors of the Defendant.

3

Wilmington, Delaware,

January 31st 1903.

To His Excellency,

John Hunn,

Governor of the State of Delaware.

Dear Sir:

It becomes my official duty again to direct your attention to the litigation which has long been pending in the Supreme Court of the United States, between the states of New Jersey and Delaware, concerning which I addressed you in February, 1901. This litigation, as I then stated, grew out of legislation in our State, prohibiting persons who were not citizens of Delaware from fishing within certain limits which were claimed to be within the exclusive jurisdiction of our State, and over which limits the jurisdiction of our State has, from time immemorial, been asserted and maintained.

The Act in question was passed on March 28th 1871, being Chapter 72 of Volume 14, Laws of Delaware, and such parts of which as are now in force can be found on page 467, &c., of the Revised Code as published in 1893. The jurisdiction in question is that claimed by the State of Delaware over the waters of the Delaware River to low water mark on the New Jersey shore, within the limits of the twelve miles circle having its center at the Court House at New Castle, and an arc of which circle constitutes the Northern boundary of this State.

The enforcement of the provisions of the Act of March 28th 1871, by the arrest of citizens of New Jersey engaged in fishing within that portion of the Dela-

ware River lying within the twelve mile circle, was promptly opposed by the authorities of that State, with a claim of jurisdiction over said river East of the middle line, and of the legal right of her citizens to fish on the New Jersey shore of the river without the license of Delaware, either within or without the said circle.

During the year 1872, the then Executives of the two States had certain correspondence and conferences over this controversy, the result of which was their recommendation to the legislatures of their respective states that commissioners should be appointed on the part of each to settle the matter in dispute. Upon such recommendation, a joint commission, consisting of three members from each state, was appointed by legislative authority, and the General Assembly of this State suspended the law of 1871, pending the negotiations between such commissioners.

These joint commissioners having failed to reach a satisfactory basis of settlement of the matter in controversy, the commissioners from this State reported to the Executive, in 1874, their failure to arrive at a satisfactory settlement of the matter in dispute, and delivered a statement asserting and vindicating the claim and title of Delaware. On March 26th 1875, the General Assembly of this State adopted a joint resolution, declaring that the commissioners on the part of this State having fully performed their duties and reported the results of their labors, were relieved of further duty as such commissioners. This joint resolution appears in Chapter 249, Volume 15, Laws of Delaware. The effect

of this resolution was to abrogate the authority of such commissioners, to terminate their negotiations, and to revive the suspended license laws. Such license laws were thereafter enforced by the authorities of this State and the original conditions resulting therefrom recurred. As the result of this state of affairs, New Jersey, in pursuance of leave granted, on March 13th 1877, filed a Bill in Equity in the Supreme Court of the United States to restrain the State of Delaware from the exercise of its jurisdiction.

Prior to the filing of said Bill in Equity, your predecessor, Honorable John P. Cochran, then Governor of the State of Delaware, on the second day of January, 1877, addressed and delivered to the General Assembly his Message, in the course of which he recited the foregoing historical facts and informed the General Assembly of the purpose, as communicated to him by the Governor of New Jersey, of said State to commence proceedings in the Supreme Court of the United States. In concluding his discussion of the subject, Governor Cochran said:

"If this proceeding shall be taken by New Jersey, it will be incumbent upon the General Assembly at its present session, to make adequate provision for the proper vindication of that rightful claim of title and jurisdiction which, I believe, has never before been denied by New Jersey, but which, on the contrary, is uninterruptedly asserted and maintained by the State of Delaware for the space of nigh two centuries, and I would respectfully recommend that such legislation be had as will meet all exigencies likely to arise, pending the litigation."

As a result of this Message of Governor Cochran, the General Assembly, on the twenty-sixth day of January, 1877, adopted joint resolutions, reciting the claim of

this State to the ownership and exclusive jurisdiction of that portion of the Delaware River which is included within a circle of twelve miles radius, taking the Court House in the City of New Castle as a central point, and delcaring,-

"That the Attorney General be, and he is hereby, authorized and directed to cause his appearance, in behalf of this State, to be promptly entered upon the Record of the said suit in the Supreme Court of the United States, whenever the same shall be commenced by the State of New Jersey. And be it further resolved, that the Governor be, and he is, hereby, authorized to employ, in behalf of the State, additional Counsel to assist the Attorney General in the defense of the said suit".

These resolutions are contained in Chapter 504, Volume 15, Laws of Delaware.

In pursuance of said resolutions and authority, the Governor subsequently, from time to time, appointed Messrs. Thomas F. Bayard, George Gray, and George H. Bates, as Counsel to represent the State in this cause. Subsequently, Mr. Bayard withdrew from his position as Counsel, upon his appointment as Secretary of State of the United States. Mr. George Gray has since been appointed United States Circuit Judge. Of the original Counsel in the cause, Mr. George H. Bates now remains.

In February 1901 I received communications from the Clerk of the Supreme Court of the United States, from the Honorable Samuel H. Grey, then Attorney General for the State of New Jersey, and from the Hon. George H. Bates, the special Counsel for the State of Delaware, calling my attention to the cause, and communicating to me the order of the Supreme Court that the cause before it should be forthwith proceeded with. Upon a conference with Messrs. Grey and Bates, and upon the examination of the record of the

cause, it appeared that the State of Delaware must take the next step in the action, by filing its Answer to the Bill of Complaint of New Jersey. Inasmuch as the State of New Jersey had not theretofore been pressing its suit against this State, under a written agreement of Counsel filed in the cause, no Answer for the State of Delaware had theretofore been filed.

On February 14th 1901 I addressed you, reciting the history of the controversy, and suggesting that you send to the General Assembly a Message, embodying the facts set forth in said report, and that you recommend the passage of a joint resolution by the General Assembly then in session, which should reiterate the authority of this State to defend said action to its termination, and renew its statement of confidence in the position heretofore assumed in said controversy by this State. Thereupon, you sent the following Message to the Senate and House of Representatives:-

"I have received and herewith transmit for your information a communication from the Attorney General relating to the suit now pending in the Supreme Court of the United States, between the States of New Jersey and Delaware. It is unnecessary for me to enlarge upon the importance of this report. The unanimity with which the people of this State, through various General Assemblies and Executives, have always defended the integrity of the jurisdiction, territory, and sovereignty of this State in this controversy, constitutes a just guide for present action. I cannot bring myself to believe that the present generation of Delawareans will, when properly advised on the subject, find themselves less sensitive and earnest in maintaining the rights of the State than the generations which have preceded us. It would seem that if the controversy is ever to be settled finally, it could not be placed in a position of greater advantage than to embrace the present opportunity to have it forever set at rest by the decision of that tribunal which, under the Federal Constitution, is competent to sit in judgment between sovereign states. From personal conference with the Attorney General and Counsel who have heretofore represented the State in

this litigation, and from such investigation of the case as I have been able to make, I believe that the interests of the State have been carefully guarded in the past, and that such interests will be fully protected in the future by such of the existing counsel for the State as are now living and as are now free to act in her behalf, together with the Attorney General of the State.

"I therefore recommend that the General Assembly renew its declaration of purpose, not to abandon the vindication of its sovereign right and title to the territory which immemorially has been conceded to be a part of its domain, and that it shall make such provision for the further defense thereof against what must be considered the unfounded pretensions of the State of New Jersey, as will comport with the honor, dignity and best interests of the State."

Acting upon the suggestion of this Message, the Senate and House of Representatives adopted the joint Resolution, which was approved February 26th 1901, and which appears at page 531, Volume 22, Laws of Delaware. This Resolution, after reciting that said General Assembly was desirous to maintain the claims of this State set forth in the joint Resolution passed January 28th 1877, to exclusive jurisdiction over that portion of the Delaware River which is included within the circle of twelve miles radius, taking the Court House in the City of New Castle as a central point, declared:-

"That the Attorney General and such of the special counsel heretofore appointed to assist him as are now free to act in said behalf, be and they are hereby instructed to maintain the defense of said suit, and they are hereby authorized to take such steps therefor as may be necessary."

In due course the Answer of the State of Delaware was prepared and duly filed in the Supreme Court of the United States, and a copy of which Answer I herewith send you. Issue has been joined upon the pleadings by the State of New Jersey. The case has, therefore, now arrived at the stage when proof may be produced. No testimony has been taken. The preparation and presentation of this testimony, both on the part of New Jersey and upon the part of the State of Delaware will entail the production of ancient original documents, which are distributed probably mainly between London, England, and Albany, N. Y.

There may be some few records in the archives of the various counties of this State - chiefly New Castle County. The proper production of this testimony will entail very considerable expense.

Owing somewhat to the expiration of the term of the Hon. Samuel H. Grey, late Attorney General for the State of New Jersey, and the succession of the Honorable Thomas N. McCarter, present Attorney General for said State, and the necessity which Mr. McCarter found himself under to familiarize himself with the case, the actual taking of testimony has not begun. There has recently come from the Supreme Court of the United States an intimation that the case must advance.

On the 27th inst. there was a conference between the Attorney Generals of New Jersey and Delaware, together with the Honorable George H. Bates, associate counsel for the State of Delaware, for the purpose of expediting the progress of the cause. Upon a full consideration at this conference of the difficulties and probable cost of the

production of proof upon each side of the controversy to sustain the allegations in the Bill and Answer, and upon a somewhat careful consideration of the history and bearing of the controversy upon the citizens of the two states interested in the cause, it was agreed between counsel for the two states to again make an attempt to equitably determine and settle the rights of Delaware and New Jersey to the disputed territory, and if possible to adjust all differences between the two states arising out of Delaware's territorial claim, in a manner satisfactory to both states.

In my former official communication to you, under date of February 14th 1901, certain reasons were set forth which justified confidence in the validity and strength of the claim of the State of Delaware to the territory in question. The very laborious and critical examination of ancient documents and reprints thereof, made by the Attorney General and Mr. Bates, Associate Counsel for Delaware, which preceded the preparation of the somewhat voluminous Answer of the State which was filed in the said cause, has greatly strengthened the belief and reliance of counsel for this state upon the justice of her claim. Notwithstanding this well grounded hope that the State of Delaware would be ultimately successful in the suit now depending in the Supreme Court of the United States, yet if the entire controversy between the two states can be settled out of court in a manner creditable and satisfactory to both states, it would seem the part of good reason to attempt to make such a settlement.

At the conference above mentioned, between counsel for the two states, it was agreed that the Attorneys General and associate counsel of the respective states should confer with the executive and legislative authorities of Delaware and New Jersey respectively, in order to ascertain the sentiment of the said authorities of the two states concerning the settlement of the cause upon lines to be hereafter determined.

In view of the foregoing, I would therefore advise you to send to the General Assembly a Message, recommending the appointment of a special joint committee of the Senate and House of Representatives to consider and advise with the Attorney General and special counsel for this State concerning the proper disposition of the said territorial controversy between this State and the State of New Jersey.

I remain,

Yours very truly,

Herbert A. Ward,
Attorney General

Revised,

COMMUNICATION FROM ATTORNEY
GENERAL TO THE GOVERNOR REL-
ATIVE TO THE CASE OF THE STATE
OF NEW JERSEY VS. THE STATE
OF DELAWARE, IN THE SUPREME
COURT OF THE UNITED STATES.

" " " " " " " " " " " "

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Plaintiff's Exhibit No. 162

Delaware Laws Relating to New Jersey-Delaware
Boundary Dispute.

Revised Statutes of Delaware, 1852, pp. 2-3.

CHAPTER 1.

OF SOVEREIGNTY; JURISDICTION AND LIMITS.

SEC. 1. The jurisdiction and sovereignty of the State extend to all places within the boundaries thereof, subject only to such rights of concurrent jurisdiction as have been, or may be, granted over any places ceded by the State to the United States.

SEC. 2. The limits of the State are declared to be the divisional lines between it and Maryland, run and marked by commissioners, and approved on the 11th of January, 1769; the circular line between it and Pennsylvania, surveyed and marked in 1701, under a warrant issued by William Penn in pursuance of the feoffment from the duke of York, dated August 24, 1682, as the same has been held, occupied and recognized by the said States respectively, ever since that time; low water mark on the eastern side of the river Delaware, within the twelve mile circle from New Castle; and the middle of the bay below said circle.

SEC. 3. The State shall be divided into three counties—New Castle, Kent and Sussex.

SEC. 4. The dividing line between New Castle and Kent counties shall be, as heretofore established, from the mouth of Duck Creek westwardly through the "Thoroughfare" north of Bombay Hook Island, and up said creek "to the mouth of a branch issuing from the main branch of Duck Creek, and opposite part of Enoch Jones' land on the Kent side, and Richard Nash's land on the New Castle side; and running from thence up the said

branch on the several courses thereof westwardly six hundred and two perches, to a white oak corner tree of Benjamin Hazle and Richard Hollet's lands at the head of said branch; from thence continued due west one thousand seven hundred and eight perches, till it intersects the tangent or divisional line between these counties and Maryland, where the same crosses the Cypress branch."

SEC. 5. The dividing line between Kent and Sussex counties shall be "up the Mispillion creek continued from a fork thereof at the junction of the Tan-trough branch and Beaver-dam branch, running up the Tan-trough branch with the several courses thereof, eight hundred and eight perches to the head thereof; thence south-westwardly to a small fork of a small branch of the river Nanticoke; thence down said branch to the southward end of a beaver-dam, on the west side of a beaver-pond, the original temporary division between Kent, Sussex and Maryland; and from thence due west two thousand eight hundred sixty and four perches to the north and south or tangent line between Delaware and Maryland."

SEC. 6. New Castle county shall be divided into ten hundreds, namely: Brandywine, Christiana, Wilmington, Mill Creek, White Clay Creek, Pencader, New Castle, Red Lion, Saint Georges, and Appoquinimink.

SEC. 7. Kent county shall be divided into six hundreds, namely: Duck Creek, Little Creek, Dover, Murderkill, Milford and Mispillion.

SEC. 8. Sussex county shall be divided into ten hundreds, namely: Cedar Creek, Broadkilm, Nanticoke, North West Fork, Broad Creek, Little Creek, Dagsborough, Baltimore, Indian River, and Lewes and Rehoboth.

PLAINTIFFS EXHIBIT NO. 162

3

Laws of Delaware, 1873, Vol. 14, Pt. 2, pp. 668-669, 674, 680.

RESOLUTIONS.

CHAPTER 583.

Joint Resolution with respect to the subject of difference between the State of New Jersey and this State.

WHEREAS it appears by the message of His Excellency the Governor, and the documents accompanying the same, that the State of New Jersey makes claim for her citizens of the right to fish in that part of the waters of the Delaware within the limits of the "twelve mile circle" and eastward of the channel of said river, thus denying the exclusive jurisdiction of this State over the said waters within the said circle, a jurisdiction never doubted in Delaware, nor questioned elsewhere with confidence until now, so far as this General Assembly is informed;

AND WHEREAS His Excellency the Governor of New Jersey, in his correspondence with the Governor of this State, has suggested that the question of exclusive jurisdiction, and of authority involved in the claim maintained by that State, be settled by resort to legal proceedings, which this Legislature have respectfully declined to adopt, believing that the question can be more appropriately settled and justice done otherwise, and as hereinafter provided for;

AND WHEREAS it is of the utmost importance that no questions of sovereign title or rights should exist between States;

AND WHEREAS in this case such do exist they should be set-settled as becomes the high parties; therefor,

Be it resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met, That the whole subject of controversy be submitted to the decision of six commissioners, three to be appointed by the legislature of each State, and that their decision shall be final.

Resolved, That said decision be submitted in writing, upon parchment, under the hands of the said commissioners, to this Legislature, and to that of the State of New Jersey, and be entered upon the Journal of each House of the General Assembly of each State as a perpetual memorial of the end of the aforesaid controversy; and that similar certificates be made and delivered to the Governor of each State, to be placed among the executive archives; and further, that each State, through its Governor, make proclamation for six months in the newspapers printed within its borders of the aforesaid decision, to the end that full public information thereof may be given.

Resolved, That Joseph P. Comegys, of Kent county, William G. Whitely, of New Castle county, and Edward L. Martin, of Sussex county, be appointed commissioners on the part of this State for the purpose aforesaid. That they be at once notified by the Speaker of the Senate of such their appointment, and in case at the end of five days from such notice either of them has not accepted said appointment, that another from the same county be appointed in his place.

Resolved, That a copy of the foregoing preamble and resolutions, duly certified, be forwarded by the Governor to the Governor of New Jersey, with a request that they be laid before the Legislature, that the aforesaid controversy shall be settled during the present session of the Legislature of each State.

Resolved, That the said commissioners shall each receive for his services hereunder the sum of five hundred dollars, to be paid by the State Treasurer, on the certificate of the Speaker of the Senate that the said services have been performed.

Adopted at Dover, January 30, 1873.

CHAPTER 593.

Joint Resolutions supplementary to those passed on the 30th of January last respecting the Fishery question with New Jersey.

To avoid all questions or debate as to the extent of the powers conferred upon the commissioners appointed by this State under the resolutions adopted on the 30th day of January last, and on those to be appointed by the State of New Jersey according to the suggestions therein,

Resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met, That no question was intended to be submitted by the said resolutions respecting the title of this State to the River Delaware and the soil thereof, within the limits of the "twelve miles circle," but only whether, notwithstanding such title, the citizens of New Jersey have the right to fish in said river within that circle, and if so the nature and extent of that right; and the said commissioners are to consider that no other question but that here mentioned is submitted to them, this State refusing to allow her aforesaid title to be drawn in question by said commissioners, or in any other manner.

Resolved, That a copy of the foregoing, duly certified, be forwarded by the Governor to the Governor of New Jersey.

Adopted at Dover, February 14, 1873.

CHAPTER 594.

Joint Resolution supplementary to the Joint Resolution with respect to the subject of difference between the State of New Jersey and this State.

Resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met, That all

of the preamble to the "Joint Resolution with respect to the subject of difference between the State of New Jersey and this State," adopted on the 30th ultimo, after the words "so far as this General Assembly is informed," be and the same is hereby stricken out, and in lieu thereof these words shall be substituted, and the said preamble shall be read and construed and published according to the change made:

"AND WHEREAS it is important that the said question should be at once settled, so that there shall be no conflict of claim hereafter."

Adopted at Dover, February 19, 1873.

CHAPTER 605.

Joint Resolution in Reference to the Fishery Question.

Resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met:

1st. That any and all laws of the State requiring a license to fish for shad within the waters of this State be and the same are hereby suspended pending the negotiations between the commissioners appointed by this State and the State of New Jersey for the settlement of the fishery question.

2d. That upon determination of the questions submitted to the said commissioners favorable to the claim of this State, the commissioners appointed on the part of this State are hereby authorized to make such a compromise or settlement as will secure to the people of the State of Delaware and the people of the State of New Jersey the mutual right of fishery in the Delaware Bay and in that part of the Delaware River lying between the two States.

Adopted at Dover, April 8, 1873.

Laws of Delaware 1877, Vol. 15, Part 2, pp. 641-642.

RESOLUTIONS.

CHAPTER 504.

Joint Resolutions relative to the rights of the State of Delaware, in a certain part of the Delaware river which runs between the States of Delaware and New Jersey.

WHEREAS, The State of Delaware claims to own the bed and to have exclusive jurisdiction (subject to the constitution of the United States and the acts of Congress made in pursuance thereof) over that portion of the Delaware river which is included within a circle of twelve miles radius, taking the court house in the city of New Castle as a central point—and

WHEREAS, The State of New Jersey disputes the validity of such claim, and asserts, upon her part, jurisdiction and ownership over that part of the same area on the east side of the channel of said river—and

WHEREAS, Legally authorized commissioners have heretofore held frequent conferences and consultations which have failed to result in any satisfactory determination of the points in dispute—and

WHEREAS, It has officially come to the knowledge of this General Assembly, through a properly certified copy of a joint resolution, adopted by "the Senate and General Assembly of the State of New Jersey," March 30th, 1876, that the Governor of said State is authorized to cause to be instituted and prosecuted, in the Supreme Court of the United States, a suit in equity or an action at law, by the State of New Jersey against the State of Delaware, to ascertain, determine, and settle the true territorial boundary line between said States, and the extent of the jurisdiction of each of said States in and on said river, and—

WHEREAS, As the State of Delaware was the first to give her assent to the Constitution of the United States which

provides the arbiter of the Supreme Court for the decision of controversies between States, so she will promptly accept the gage of contest in that august tribunal tendered her by her sister State; Therefore,

Be it resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met, That the Attorney General be, and he is, hereby, authorized and directed, to cause his appearance, in behalf of this State, to be promptly entered upon the record of the said suit in the Supreme Court of the United States, whenever the same shall be commenced by the State of New Jersey. And be it further resolved, that the Governor be, and he is, hereby, authorized to employ, in behalf of the State, additional counsel to assist the Attorney General in the defence of the said suit.

Resolved, That the Governor of this State be, and he is, hereby, requested to transmit to the Governor of New Jersey, a certified copy of the foregoing preamble and resolutions.

Adopted at Dover, January 26, 1877.

Revised Statutes of Delaware, 1852, pp. 3-4, as Amended to 1893, pp. 3-4.

SOVEREIGNTY, JURISDICTION AND LIMITS.

CHAP. 1. CHAP. 548, VOL. 19.

SEC. 1. The jurisdiction and sovereignty of the State extend to all places within the boundaries thereof, subject only to such rights of concurrent jurisdiction as have been, or may be, granted over any places ceded by the State to the United States.

SEC. 2. The limits of the State are declared to be the divisional lines between it and Maryland, run and marked by commissioners, and approved on the 11th of January,

1769; the circular line between it and Pennsylvania, surveyed and marked in 1701, under a warrant issued by William Penn in pursuance of the feoffment from the duke of York, dated August 24, 1682, as the same has been held, occupied and recognized by the said States respectively, ever since that time; low water mark on the eastern side of the river Delaware, within the twelve mile circle from New Castle; and the middle of the bay below said circle.

CHAPTER 548. VOL. 19. LAWS OF DELAWARE.

AN ACT TO PROTECT THE MARKS OF THE BOUNDARIES OF THIS STATE.

SECTION I. That if any person shall willfully deface, mutilate, damage, displace, or remove any stone or monument placed or fixed under authority of this State to mark any boundary line of this State, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit and pay to the State a sum not exceeding one thousand dollars, (one-half of which shall be for the use of and paid to the informer) and shall be imprisoned for a term not exceeding one year.

Passed at Dover, April 27, 1893.

SEC. 3. The State shall be divided into three counties—New Castle, Kent and Sussex.

SEC. 4. The dividing line between New Castle and Kent counties shall be, as heretofore established, from the mouth of Duck Creek westwardly through the "Thoroughfare" north of Bombay Hook Island, and up said creek "to the mouth of a branch issuing from the main branch of Duck Creek, and opposite part of Enoch Jones' land on the Kent side, and Richard Nash's land on the New Castle side; and running from thence up the said branch on the several courses thereof westwardly six hundred and two perches, to a white oak corner tree of Benjamin Hazle and Richard Hollet's lands at the head of said branch;

from thence continued due west one thousand seven hundred and eight perches, till it intersects the tangent or divisional line between these counties and Maryland, where the same crosses the Cypress branch.”

SEC. 5. The dividing line between Kent and Sussex counties shall be “up the Mispillion creek continued from a fork thereof at the junction of the Tan-trough branch and Beaver Dam branch, running up the Tan-trough branch with the several courses thereof, eight hundred and eight perches to the head thereof; thence southwardly to a small fork of a small branch of the river Nanticoke; thence down said branch to the southward end of a beaver-dam, on the west side of a beaver-pond, the original temporary division between Kent, Sussex and Maryland; and from thence due west two thousand eight hundred sixty and four perches to the north and south or tangent line between Delaware and Maryland.”

Joint Resolution relating to the controversy concerning the boundary line between the States of New Jersey and Delaware.

Whereas, the Governor has communicated to the General Assembly a report of the Attorney General respecting the present condition of the litigation pending in the Supreme Court of the United States between this State and the State of New Jersey, concerning the boundary between said States, and has thereon recommended action by this General Assembly in that behalf;

And Whereas, this General Assembly is desirous to maintain the claims of this State set forth in the Joint Resolution passed January 28, 1877, to exclusive jurisdiction over that portion of the Delaware river which is included within the circle of twelve miles radius, taking the Court House in the City of New Castle as a central point; Therefore,

PLAINTIFFS EXHIBIT NO. 162

11

Be it Resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met:

That the Attorney General and such of the special counsel heretofore appointed to assist him as are now free to act in said behalf, he and they are hereby instructed to maintain the defense of said suit, and they are hereby authorized to take such steps therefor as may be necessary.

JAS. V. McCOMMONS,
Speaker of the House of Representatives.

PHILIP L. CANNON,
President of the Senate.

Approved this the 26th day of February, A. D. 1901.

JOHN HUNN,
Governor.

STATE OF DELAWARE.

OFFICE OF SECRETARY OF STATE.

I, CALEB R. LAYTON, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of the Joint Resolution relating to the controversy concerning the boundary line between the States of New Jersey and Delaware, approved February 26th, A. D. 1901, as the same appears on file in this office.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State, at Dover, this twenty-sixth day of February, in the year of our Lord one thousand nine hundred and one.

CALEB R. LAYTON,
Secretary of State.

Laws of Delaware. 1901, p. 78.

CHAPTER 46.

Of the Revenues of the State.

AN ACT to appropriate money for payment of disbursements made or to be made in the defense of the action of the State of New Jersey against the State of Delaware, pending in the Supreme Court of the United States.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met, (three-fourths of all the members elected to each House concurring therein):

Section 1. That the sum of one thousand dollars is hereby appropriated to meet the necessary expenses and disbursements, made or to be made, in the defense of the suit pending in the Supreme Court of the United States, wherein the State of New Jersey is complainant and the State of Delaware is defendant. And the Governor is hereby authorized, from time to time, to draw his warrant or warrants upon the State Treasurer for the said sum or any part or parts thereof upon the certificate of the Attorney-General that such disbursements have been made or are proper to be made.

Approved March 9, A. D. 1901.

*Laws of Delaware, 1905, Vol. 23, Pt. 2, pp. 462, Appendix
pp. 2-6, pp. 12-20.*

RESOLUTIONS.

CHAPTER 216.

Joint Resolution relating to the Boundary controversy between
the States of New Jersey and Delaware.

*Be it resolved by the Senate and House of Representa-
tives of the State of Delaware in General Assembly met:*

That Preston Lea, Governor, Robert H. Richards, Attor-
ney General, Herbert H. Ward and George H. Bates,
special counsel, be and they hereby are appointed and
constituted Commissioners of the State of Delaware to
confer with like commissioners representing the State of
New Jersey, for the purpose of framing a compact or
agreement between the said states and legislation conse-
quent thereon, to be submitted to the legislatures of said
two states for action thereon, looking to the amicable
termination of the suit between said states now pending
in the Supreme Court of the United States and the final
adjustment of all controversies relating to the boundary
line between said states and to their respective rights in
the Delaware River and Bay.

Approved, February 13, A. D. 1905.

APPENDIX.

COMPACT BETWEEN THE STATE OF NEW JERSEY AND THE STATE OF DELAWARE, RELATING TO THE BOUNDARY CONTROVERSY BETWEEN SAID STATES.

(Here follows the compact as recited, including signatures, in Plaintiff's Exhibit No. 53; 34 U. S. Stat. L. Pt. 1, Ch. 394, p. 858.)

CHAPTER 5.

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

AN ACT to Ratify and Confirm a Compact or Agreement between the States of New Jersey and Delaware respecting the Delaware River and Bay and to authorize the execution thereof.

Whereas By joint resolution of the Legislature of the State of New Jersey, approved February 14th 1905, Edward C. Stokes, Governor, Robert H. McCarter, Attorney General, Franklin Murphy and Chauncey G. Parker, were appointed and constituted Commissioners of the State of New Jersey to confer with like Commissioners representing the State of Delaware for the purpose of framing a compact or agreement between the said States and legislation thereon, to be submitted to the legislatures of the said two States for action thereon, looking to the amicable termination of the suit between said two States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware River and Bay;

And Whereas By like joint resolution of the General Assembly of the State of Delaware approved February 13th 1905, Preston Lea, Governor, Robert H. Richards, Attorney General, Herbert H. Ward and George H. Bates were appointed to represent the said State as Commission-

ers to confer with the Commissioners of the State of New Jersey, for the purpose before recited;

And Whereas The Commissioners of the said two States having duly conferred as directed by said resolutions, have framed and submitted to this General Assembly a proposed compact or agreement between the said States;

And Whereas The compact or agreement so framed and submitted is in the words following, that is to say:

“Compact between the State of New Jersey and the State of Delaware relating to the boundary controversy between said States.

(Here follows the compact, without signatures, as recited in Plaintiff's Exhibit No. 53; 34 U. S. Stat. L. Pt. 1, Ch. 394, p. 858.)

Therefore, be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Section 1. The foregoing compact or agreement, and every clause, matter and thing therein contained, be, and the same is, hereby adopted, ratified and confirmed as and for the act and deed of the State of Delaware, and the Commissioners of the said State are hereby authorized and empowered, on its behalf, to execute the same in duplicate, and to deliver one copy thereof to the Commissioners of the State of New Jersey.

Section 2. It shall be the duty of the Governor, at or before the next session of Congress of the United States, to transmit a duly certified copy of this Act to the President of the United States, with the request that it be communicated to Congress for its action thereon.

Approved March 20, A. D. 1905.

CHAPTER 6.

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

AN ACT appointing Three Commissioners on the part of the State of Delaware, to confer with Three Commissioners to be appointed on the part of the State of New Jersey, in accordance with the provisions of the Compact between the States of New Jersey and Delaware respecting the Delaware River and Bay, defining their duties and powers and appropriating money to pay the necessary expenses thereof.

Whereas The Senate and House of Representatives of the State of Delaware in General Assembly met have passed an act entitled "An Act to Ratify and Confirm a Compact or Agreement between the States of New Jersey and Delaware respecting the Delaware River and Bay, and to authorize the execution thereof," which act hath received the approval of the Governor of the State of Delaware; and the Legislature of the State of New Jersey hath passed an act of the same title and of the same purport, which act hath received the approval of the Governor of the State of New Jersey;

And Whereas The said Compact or Agreement between said two states hath been duly signed and executed in duplicate originals by Edward C. Stokes, Robert H. McCarter, Franklin Murphey and Chauncey G. Parker, Commissioners on the part of the State of New Jersey, and by Preston Lea, Robert H. Richards, Herbert H. Ward and George H. Bates, Commissioners on the part of the State of Delaware, one of which duplicate originals hath been retained by said Commissioners of Delaware to be delivered to the Governor of that State and the other of which duplicate originals hath been retained by the Commissioners of New Jersey to be delivered to the Governor of that State;

And Whereas It is provided and agreed by said compact or agreement between said States, among other things, as follows:

"Article IV. Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three Commissioners to confer with three Commissioners to be immediately appointed by the General Assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said Commissioners for each State respectively shall, within two years from the date of their appointment, report to the Legislature of each of said States the proposed laws so framed and recommended by said joint commission. Upon the adoption and passage of said laws so recommended by the respective Legislatures of said two States said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended or repealed by concurrent legislation of the said two States. Said Commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States, where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

The faith of said contracting States is hereby pledged to the enactment of said laws so recommended by said commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective Legislatures thereof.

Each State shall have and exercise exclusive jurisdiction within said river to arrest, try and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for."

“Article V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned, shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided.”

Now Therefore, In pursuance of the terms of said Compact,

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Section 1. That Alexander B. Cooper, William S. Hillis and Walter H. Hayes be and they are hereby appointed Commissioners on the part of the State of Delaware, to confer with like Commissioners appointed or to be appointed by the Legislature of the State of New Jersey, to do and perform all the duties, acts, matters and things required and stipulated in the said Compact or Agreement hereinabove mentioned, to be by them done and performed. That in and upon said Commissioners are hereby vested and conferred all powers and authorities necessary and convenient for the full and complete performance of all the duties, acts, matters and things by this Act imposed upon them. Said Delaware Commissioners shall fill any vacancies occurring in the membership of said Delaware Commission by the selection of some other suitable citizen or citizens of the State of Delaware.

Section 2. Said Commissioners shall, on or before the first-day of June, A. D. 1905, organize by the election from their number of a president and a secretary. The president so elected shall be the presiding officer at all separate meetings of said Commissioners, and the general executive head of said commission. The Secretary so elected shall conduct the correspondence of said commission under its direction and keep a record of all the meetings, acts and proceedings of said Delaware Commissioners and of all meetings, acts and proceedings

of the joint commissioners in the performance of the duties, acts, matters and things stipulated for in the said compact.

Said Delaware Commissioners shall have power to cause the production of books, papers and other things, and to summon before themselves, or before the said joint Commission, witnesses, expert and otherwise, the testimony of which, in the opinion of said Commissioners, shall be material to enable them to justly and fully perform the duties on them hereby imposed. All witnesses may be summoned upon warrants therefor signed by the President of said Delaware Commission, and shall be paid, for attendance and mileage, the fees usually paid in the State of Delaware for the attendance of witnesses at the trial of civil causes in the Superior Court of said State. The attendance of witnesses before said Delaware Commission or before said joint commission may be compelled by attachments issued by said Delaware Commission to the Sheriff of any County in the State of Delaware; said attachments shall be signed by the President of said Delaware Commission and countersigned by the Secretary thereof, and shall be executed and returned by the Sheriff to whom the same shall be directed. Each of said Commissioners shall have power and authority to administer oaths or affirmations to witnesses appearing before them or before said joint commission.

Section 3. The sum of fifteen hundred dollars is hereby appropriated out of the monies in the Treasury of this State, not otherwise appropriated, to pay the necessary expenses attendant upon the execution of the duties of said Commissioners. Said monies shall be drawn from the said the Treasury, from time to time as occasion shall demand, upon the warrant of the Governor of this State drawn upon the State Treasurer, upon the certificate in writing to said Governor signed by the President and countersigned by the Secretary of said Delaware Com-

mission, giving the details of such expenditures made or to be made as aforesaid.

Approved, March 23, A. D. 1905.

Laws of Delaware 1927, Vol. 35, p. 644.

RESOLUTIONS.

CHAPTER 243.

HOUSE JOINT RESOLUTION

Be it resolved by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Sec. 1. That Robert H. Richards, William S. Hilles, Charles W. Cullen, William M. Short and William F. Cummins be and they hereby are appointed and constituted Commissioners of the State of Delaware to confer with like Commissioners representing the State of New Jersey, for the purpose of framing a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of said two States for action thereon, looking to the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware River and Bay. The said Commissioners shall report at the present or some subsequent Session of the Legislature.

Sec. 2. That there is hereby appropriated out of any moneys in the Treasury of the State not otherwise appropriated, the sum of Two Thousand Dollars (\$2,000.00), to defray the traveling and necessary expenses of the Commissioners while engaged on the matters herein referred to. Said appropriation shall be immediately available upon the approval of this Joint Resolution, and shall continue in force as long as the said Commissioners are engaged on said matter, and shall be paid by the State

Treasurer from time to time on vouchers submitted by the Commissioners and signed by at least three Commissioners.

Approved March 2, A. D. 1927.

Laws of Delaware 1927. Vol. XXXV, pp. 550, 556.

CHAPTER 261.

OF THE REVENUES OF THE STATE.

AN ACT MAKING APPROPRIATIONS FOR THE EXPENSES OF THE STATE GOVERNMENT OTHER THAN LEGISLATIVE EXPENSES FOR THE FISCAL YEAR ENDING ON MONDAY IMMEDIATELY PRECEDING THE SECOND TUESDAY OF JANUARY, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND FOUR.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met, (with the concurrence of three-fourths of all the members elected to each House of the General Assembly):

Section 1. That the several amounts named in this Act, or so much thereof as may be necessary, are hereby appropriated and authorized to be paid out of the Treasury of this State to the respective public officers and for the several purposes specified for the current fiscal year ending on Monday immediately preceding the second Tuesday of January in the year of our Lord one thousand and four; provided, however, that all parts or portions of the several sums appropriated by this Act which, on said Monday immediately preceding said second Tuesday of January, A. D. 1904, shall not have been paid out of the Treasury shall be converted back into the General Fund of the Treasury. The said several sums hereby appropriated are as follows, viz.:

(p. 556) For to provide for the defense of the suit of the State against the State of New Jersey in the matter of the boundary dispute between the two States, pending in the United States Supreme Court, ten thousand dollars, to be drawn by the warrant of the Governor on the State Treasurer, and to be placed at the disposal of the Attorney General.

Approved March 23, A. D. 1903.

5

(p. 653) JOINT RESOLUTIONS.

Joint Resolution No. 1.

Joint Resolution relating to the boundary controversy between the States of New Jersey and Delaware.

BE IT RESOLVED *by the Senate and General Assembly of the State of New Jersey:*

Edward C. Stokes, Governor, Robert H. McCarter, Attorney-General, Franklin Murphy and Chauncey G. Parker, be and they hereby are appointed and constituted commissioners of the State of New Jersey to confer with like commissioners representing the State of Delaware for the purpose of framing a compact or agreement between the said states and legislation consequent thereon to be submitted to the legislatures of said two states for action thereon, looking to the amicable termination of the suit between said states now pending in the Supreme Court of the United States and the final adjustment of all controversies relating to the boundary line between said states and to their respective rights in the Delaware river and bay.

This joint resolution shall take effect immediately.

Approved February 14, 1905.

PLAINTIFFS EXHIBIT NO.

161

33

Minutes of the Votes and Proceedings of the One Hundred and Twenty-Ninth General Assembly of the State of New Jersey, Trenton, 1905, pp. 456-461, (March 1, 1905)

A message was received from the Governor by the hands of his Secretary, as follows:

EXECUTIVE DEPARTMENT,
TRENTON, March 1st, 1905.

To the Speaker and Members of the House of Assembly:

I herewith transmit the report of the action of the Commissioners appointed under Joint Resolution of the State of New Jersey, approved February 14th, 1905, and the Commissioners representing the State of Delaware, for the purpose of framing a compact between the said States and legislative action thereon, looking to an amicable termination of the suit between the two States now pending in the Supreme Court of the United States and a final adjustment of all controversy relating to the boundary line between this State and Delaware, and to their respective rights in the Delaware river and bay.

This report, covering the compact agreed upon by the Commissioners of the States of New Jersey and Delaware, and a proposed bill to make the same effective, is respectfully submitted for your consideration and action.

E. C. STOKES.

AN ACT to ratify and confirm a compact or agreement between the states of New Jersey and Delaware respecting the Delaware river and bay and to authorize the execution thereof.

(Recites all of Chapter 243, N. J. Pamphlet Laws 1903, pp. 515-520. For text see that Act *supra* in this Exhibit, and also Plaintiff's Exhibit No. 53; 34 U. S. Stat. L. Pt. 1, Ch. 394, p. 585.)

Therefore, BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

Section 1. The foregoing compact or agreement, and every clause, matter and thing therein contained be, and the same is hereby adopted, ratified and confirmed as and for the act and deed of the state of New Jersey, and the commissioners of the said state are hereby authorized and empowered on its behalf to execute the same in duplicate, and to deliver one copy thereof to the commissioners of the state of Delaware.

Section 2. It shall be the duty of the governor at or before the next session of the congress of the United States, to transmit a duly certified copy of this act to the president of the United States, with the request that it be communicated to congress for its action thereon.

Section 3. This act shall take effect immediately.

The Governor's message was then taken up, which, together with the accompanying report, was, on motion of Mr. Duffield, referred to the Committee on Judiciary.

6

101
PLAINTIFFS EXHIBIT NO.

35

Laws of New Jersey 1905, Pages 563, 67, 462.

(Page 67)

CHAPTER 42.

An Act to ratify and confirm a compact or agreement between the States of New Jersey and Delaware respecting the Delaware river and bay, and to authorize the execution thereof.

WHEREAS, by joint resolution of the Legislature of the State of New Jersey, approved February fourteenth, one thousand nine hundred and five, Edward C. Stokes, Governor; Robert H. McCarter, Attorney-General; Franklin Murphy and Chauncey G. Parker were appointed and constituted commissioners of the State of New Jersey to confer with like commissioners representing the State of Delaware for the purpose of framing a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of the said two States for action thereon looking to the amicable termination of the suit between said two States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware river and bay; and

WHEREAS, by like joint resolution of the General Assembly of the State of Delaware, approved February thirteenth, one thousand nine hundred and five, Preston Lea, Governor; Robert H. Richards, Attorney-General; Herbert H. Ward and George H. Bates were appointed to represent the said State as commissioners to confer with the commissioners of the State of New Jersey for the purpose before recited; and

WHEREAS, the commissioners of the said two States, having duly conferred as directed by said resolutions, have framed and submitted to this Legislature a proposed compact or agreement between the said States; and

WHEREAS, the compact or agreement so framed and submitted is in the words following, that is to say:

COMPACT BETWEEN THE STATE OF NEW JERSEY AND THE
STATE OF DELAWARE RELATING TO THE BOUNDARY
CONTROVERSY BETWEEN SAID STATES.

(Here follows the compact as given in Plaintiff's Exhibit 53; 34 U. S. Stat. L. Pt. 1, Ch. 394, p. 858.)

Therefore,

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The foregoing contract or agreement, and every clause, matter and thing therein contained, be and the same is hereby adopted, ratified and confirmed as and for the act and deed of the State of New Jersey, and the commissioners of the said State are hereby authorized and empowered on its behalf to execute the same in duplicate, and to deliver one copy thereof to the commissioners of the State of Delaware.

2. It shall be the duty of the Governor, at or before the next session of the Congress of the United States, to transmit a duly certified copy of this act to the President of the United States, with the request that it be communicated to Congress for its action thereon.

3. This act shall take effect immediately.

Approved March 21, 1905.

PLAINTIFFS EXHIBIT NO.

37

(Page 462)

CHAPTER 239.

An Act appointing three commissioners on the part of the State of New Jersey to confer with three commissioners to be appointed on the part of the State of Delaware, in accordance with the provisions of the compact between the States of New Jersey and Delaware respecting the Delaware river and bay, defining their duties and powers and appropriating money to pay the necessary expenses thereof.

WHEREAS, The Legislature of the State of New Jersey has passed an act entitled "An act to ratify and confirm a compact or agreement between the States of New Jersey and Delaware respecting the Delaware river and bay and to authorize the execution thereof," which act has received the approval of the Governor of the State of New Jersey, and the Legislature of the State of Delaware has passed an act of the same title and of the same purport, which act has received the approval of the Governor of the State of Delaware; and

WHEREAS, Said compact or agreement between said two States has been duly signed and executed in duplicate originals by Edward C. Stokes, Robert H. McCarter, Franklin Murphy and Chauncey G. Parker, commissioners on the part of the State of New Jersey, and by Preston Lea, Robert H. Richards, Herbert H. Ward and George H. Bates, commissioners on the part of the State of Delaware, one of which duplicate originals has been retained by said commissioners of Delaware, to be delivered to the Governor of that State, and the other of which duplicate originals has been retained by the commissioners of New Jersey, to be delivered to the Governor of that State; and

WHEREAS, It is provided and agreed by said compact or agreement between said States, among other things, as follows:

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

CHAPTER 5.

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

AN ACT to Ratify and Confirm a Compact or Agreement between the States of New Jersey and Delaware respecting the Delaware River and Bay and to authorize the execution thereof.

Preamble.

Whereas By joint resolution of the Legislature of the State of New Jersey, approved February 14th 1905, Edward C. Stokes, Governor, Robert H. McCarter, Attorney General, Franklin Murphy and Chauncey G. Parker, were appointed and constituted Commissioners of the State of New Jersey to confer with like Commissioners representing the State of Delaware for the purpose of framing a compact or agreement between the said States and legislation thereon, to be submitted to the legislatures of the said two States for action thereon, looking to the amicable termination of the suit between said two States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware River and Bay;

Preamble.

And Whereas By like joint resolution of the General Assembly of the State of Delaware approved February 13th 1905, Preston Lea, Governor, Robert H. Richards, Attorney General, Herbert H. Ward and George H. Bates were appointed to represent the said State as Commissioners to confer with the Commissioners of the State of New Jersey, for the purpose before recited;

Preamble.

And Whereas The Commissioners of the said two States having duly conferred as directed by said resolutions, have framed and submitted to this General Assembly a proposed compact or agreement between the said States;

Preamble.

And Whereas The compact or agreement so framed and submitted is in the words following, that is to say:

"Compact between the State of New Jersey and the State of Delaware relating to the boundary controversy between said States.

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

Whereas A controversy hath heretofore existed between the States of New Jersey and Delaware, relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve mile radius an arc of which constitutes the Northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom;

Preamble of compact.

And Whereas There is now pending in the Supreme Court of the United States, a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued against the State of Delaware restraining the execution of certain statutes of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upwards;

Preamble of compact.

And Whereas For the purpose of adjusting the differences between the said two States arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker, have been appointed Commissioners on the part of the State of New Jersey by joint resolution of the Legislature of said State, and Preston Lea, Robert H. Richards, Herbert H. Ward and George H. Bates have been appointed Commissioners on the part of the State of Delaware by joint resolution of the General Assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of said two States for action thereon, looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay;

Preamble of compact.

Now Therefore, The said State of New Jersey, by its Commissioners above named, and the said State of Delaware, by its Commissioners above named, do hereby make and enter into a compact or agreement between said States as follows:

Article 1 of compact.

Article I. Criminal process issued under the authority of the State of New Jersey against any person accused of an

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

offence committed upon the soil of said State, or upon the Eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch Islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

Article 3 of
compact.

Article II. Criminal process issued under the authority of the State of Delaware against any person accused of an offence committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

Article 3 of
compact.

Article III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said river between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

Article IV. Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three Commissioners to confer with three Commissioners to be immediately appointed by the General Assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said Commissioners for each State respectively shall, within two years from the date of their appointment, report to the Legislature of each of said States the proposed laws so framed and recommended by said joint Commission. Upon the adoption and passage of said laws so recommended by the respective Legislatures of said two States said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended or repealed by concurrent legislation of the said two States. Said Commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States, where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

Article 4 of compact.

The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said Commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective Legislatures thereof.

Each State shall have and exercise exclusive jurisdiction within said river to arrest, try and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.

Article V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned, shall continue in force in said respective States until the enactment of said concurrent legislations as herein provided.

Article 5 of compact.

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

Article 6 of
compact.

Article VI. Nothing herein contained shall affect the planting, catching or taking of oysters, clams or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

✓ Article 7 of
compact.

Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States.

Article 8 of
compact.

Article VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

Article 9 of
compact.

Article IX. This agreement shall be executed by the said Commissioners, when authorized to do so by the Legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued, without costs to either party, and without prejudice. Pending the ratification hereof by Congress said suit shall remain in statu quo.

Done in two parts (one of which is retained by the Commissioners of Delaware, to be delivered to the Governor of that State, and the other one of which is retained by the Commissioners of New Jersey, to be delivered to the Governor of that State) this day of
in the Year of Our Lord, One Thousand Nine Hundred and Five."

Therefore, be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met:

Compact
ratified and
confirmed.

Section 1. The foregoing compact or agreement, and every clause, matter and thing therein contained, be, and the same is, hereby adopted, ratified and confirmed as and for the act and deed of the State of Delaware, and the Commissioners of the said State are hereby authorized and empowered, on

OF SOVEREIGNTY, JURISDICTION AND LIMITS.

its behalf, to execute the same in duplicate, and to deliver one copy thereof to the Commissioners of the State of New Jersey.

Commissioners of State authorized to execute compact in duplicate.

Section 2. It shall be the duty of the Governor, at or before the next session of Congress of the United States, to transmit a duly certified copy of this Act to the President of the United States, with the request that it be communicated to Congress for its action thereon.

Governor to transmit certified copy of act to President of United States to be communicated to Congress.

Approved March 20, A. D. 1905.

7

IN THE
Supreme Court of the United States.

THE STATE OF NEW JERSEY,
Complainant,

vs.

THE STATE OF DELAWARE,
Defendant.

No. 1. ORIGINAL.

*To the Honorable the Chief Justice and the Associate Justices
of the Supreme Court of the United States :*

The Commissioner appointed by the Court in the above case respectfully reports as follows :

By a supplemental Order of the Court, dated January 3, 1905, it was ordered that the defendant should close its evidence by the first day of March, 1905; that the rebuttal evidence should be taken by the first day of June, 1905, with a further allowance until the first day of July, 1905, for further evidence on behalf of the defendant, and that the Commissioner should file his report on or before the first day of March, 1906.

The taking of testimony was proceeded with until February 3, 1905; at this time the defendant's proofs had been substantially, though not entirely, completed. Subsequently counsel presented to the Commissioner evidence of certain

legislative action by the State of New Jersey and the State of Delaware, respectively, looking to the termination of the present litigation, though leaving the question of boundary unsettled:—

The Legislature of the State of Delaware by a Joint Resolution approved February 13, 1905, appointed four Commissioners to confer with like Commissioners appointed by the State of New Jersey “for the purpose of framing a compact or agreement between the said states and legislation consequent thereon, to be submitted to the legislatures of said two states for action thereon, looking to the amicable termination of the suit between said states now pending in the Supreme Court of the United States and the final adjustment of all controversies relating to the boundary line between said states and to their respective rights in the Delaware River and Bay.” (Delaware Laws, 1905, p. 462.)

On February 14, 1905, a Joint Resolution was passed by the legislature of the State of New Jersey in the same words, *mutatis mutandis*. (New Jersey Acts, 1905, p. 563.)

The Commissioners subsequently agreed upon the terms of a “Compact between the State of New Jersey and the State of Delaware relating to the boundary controversy between said States,” which is as follows:

Whereas A controversy hath heretofore existed between the States of New Jersey and Delaware, relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve miles radius an arc of which constitutes the Northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom;

And Whereas There is now pending in the Supreme Court of the United States, a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued

against the State of Delaware restraining the execution of certain statutes of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upwards;

And Whereas For the purpose of adjusting the differences between the said two States arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker, have been appointed Commissioners on the part of the State of New Jersey by joint resolution of the Legislature of said State, and Preston Lea, Robert H. Richards, Herbert H. Ward and George H. Bates have been appointed Commissioners on the part of the State of Delaware by joint resolution of the General Assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of said two States for action thereon, looking to the amicable termination of the said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay;

Now Therefore, The said State of New Jersey, by its Commissioners above named, and the said State of Delaware, by its Commissioners above named, do hereby make and enter into a compact or agreement between said States as follows:

Article I. Criminal process issued under the authority of the State of New Jersey against any person accused of an offence committed upon the soil of said State, or upon the Eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the New

Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch Islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

Article II. Criminal process issued under the authority of the State of Delaware against any person accused of an offence committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

Article III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of said river between the low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

Article IV. Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three Commissioners to confer with three Commissioners to be

immediately appointed by the General Assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said Commissioners for each State respectively shall, within two years from the date of their appointment, report to the Legislature of each of said States the proposed laws so framed and recommended by said joint Commission. Upon the adoption and passage of said laws so recommended by the respective Legislatures of said two States said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended or repealed by concurrent legislation of the said two States. Said Commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States, where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said Commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective Legislatures thereof.

Each State shall have and exercise exclusive jurisdiction within said river to arrest, try and punish its own inhabitants for violations of the concurrent legislation relating to fishery herein provided for.

Article V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned shall con-

tinue in force in said respective States until the enactment of said concurrent legislation as herein provided.

Article VI. Nothing herein contained shall affect the planting, catching or taking of oysters, clams or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States.

Article VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

Article IX. This agreement shall be executed by the said Commissioners, when authorized to do so by the Legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued, without costs to either party, and without prejudice. Pending the ratification hereof by Congress said suit shall remain *in statu quo*.

Done in two parts (one of which is retained by the Commissioners of Delaware, to be delivered to the Governor of that State, and the other one of which is retained by the Commissioners of New Jersey, to be delivered to the Governor of that State) this day of in the Year of Our Lord, One Thousand Nine Hundred and Five.

The Legislature of the State of Delaware, by an act approved March 20, 1905, adopted, ratified and confirmed this Compact. (Delaware Laws, 1905, p. 12.) This act, after

reciting the appointment of Commissioners by the respective States, and the terms of the Compact *in extenso*, provided as follows:

“Therefore, be it enacted, etc.

“SECTION 1. The foregoing compact or agreement, and every clause, matter and thing therein contained, be, and the same is, hereby adopted, ratified and confirmed as and for the act and deed of the State of Delaware, and the Commissioners of the said State are hereby authorized and empowered, on its behalf, to execute the same in duplicate, and to deliver one copy thereof to the Commissioners of the State of New Jersey.

“SECTION 2. It shall be the duty of the Governor, at or before the next session of Congress of the United States, to transmit a duly certified copy of this Act to the President of the United States, with the request that it be communicated to Congress for its action thereon.”

The Legislature of the State of New Jersey, by an act approved March 21, 1905, also adopted, ratified and confirmed the Compact. This act is in the same words as the Delaware act, *mutatis mutandis* (New Jersey Laws, 1905, p. 67).

In pursuance of this authority the Compact was signed by the Commissioners on March 21, 1905. (Delaware Laws, 1905, Appendix, p. 2.)

The Congress of the United States has not yet taken action in the premises.

Upon these facts, the Commissioner, at the request of Counsel, suspended further proceedings. As the time has almost expired within which the Commissioner was ordered to file his report, he deems it proper to place before the Court the present condition of the cause.

Respectfully submitted,

Francis Rawle

Commissioner.

Supreme Court of the United States

STATE OF NEW JERSEY }
 vs. } In Equity—No. 1, Original.
STATE OF DELAWARE. }

STIPULATION.

It is stipulated by counsel with reference to the report of the commissioner, filed February 19, 1906, that the Court be asked to approve the action of the commissioner as therein set forth and to enter an order authorizing the commissioner, pending the final result of the Legislative action reported by him, to suspend further proceedings in the cause until the further order of the Court ; provided, that counsel on either side may, at any time, on due notice to the counsel for the opposite party, make application to the Court for other or further instructions to the commissioner, as circumstances may require. Dated the twenty-third day of February, 1906.

ROBERT H. McCARTER,
Attorney-General,
for Complainant.

ROBERT H. RICHARDS,
Attorney-General,

GEO. H. BATES,
H. H. WARD,
for Defendant.

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY }
vs. } In Equity. No. 1, Original.
STATE OF DELAWARE. }

*On Motion for Approval of Interlocutory Report of
Special Commissioner.*

And now, this ——— day of February, 1906, on the interlocutory report of the Special Commissioner in this cause, made February 19, instant, and the stipulation of counsel filed this day:

It is ordered, That the action of said Commissioner in suspending the taking of testimony, pending certain legislative action set forth in said report be, and the same is approved.

It is further ordered, That the said Commissioner is hereby authorized to continue the suspension of proceedings before him in this cause until the further order of the Court.

Provided, That counsel on either side may at any time, on due notice to counsel for the opposite party, make application to the Court for other or further instructions to the Commissioner.

Supreme Court of the United States

STATE OF NEW JERSEY }
 vs. } In Equity—No. 1, Original.
STATE ON DELAWARE. }

Statement of reasons submitted orally for the joint application of Counsel on both sides for suspension of proceedings until the further order of the Court.

The compact which was passed by the Legislatures of the two States was, as will appear from its terms in the report of the Commissioner, not a settlement of the disputed boundary, but a truce or *modus vivendi*.

This answers the inquiry of the Court as to whether in case of non-action by Congress the compact might be made the basis of a consent decree.

Its main purpose is to provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware River and Bay.

It was submitted to Congress for its deliberate and not merely perfunctory action thereon. Under the terms of the compact and pursuant thereto, the two States appointed Commissioners to frame and submit to the Legislatures a code of joint fishing laws to govern both States. The Commissioners are now engaged in that work. Very soon after the compact had been communicated to Congress, the Commissioners of both States unanimously joined in a request that no action should be taken by Congress pending the action of the Commissioners.

Because of this situation it was agreed by Counsel to ask the Court to suspend proceedings without limit of time, leaving it open to the Court either of its own motion or on application of Counsel to make any further order in the premises.

A limited suspension can only operate by way of pressure

for hurried action by Congress in contravention of the request of the representatives of both States for delay; and a suspension of proceedings in the Court while the subject is pending in Congress will contribute to the orderly disposition of the matter in controversy.

With respect to the long time during which the case has been pending—it lay dormant for many years by consent of both Court and Counsel. Since it was actively taken in hand it has been pressed very expeditiously—quite as much so as was possible in view of the nature of the investigation required.

GEO. H. BATES,
Of Counsel for Deft.

8

Notice.

[1]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 19 Original.

STATE OF NEW JERSEY,

10

Plaintiff,

vs.

STATE OF DELAWARE,

Defendant.

NOTICE.

TO:

Hon. C. Douglas Buck, Governor, and

20

Hon. Reuben Satterthwaite, Jr., Attorney-General of the
State of Delaware.

SIRS:

Please be advised that on Monday, June 3, 1929, the
plaintiff will apply to the Court for leave to file its bill of
complaint, a copy of which is annexed hereto.

WILLIAM A. STEVENS,
Attorney-General.

30

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

Dated May 25, 1929.

40

Motion—Statement.

[2] **MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.**

Comes now the State of New Jersey, by its Attorney-General, and asks leave of the Court to file its bill of complaint herewith submitted.

10

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

May 27, 1929.

20 The purpose of this suit is to ascertain and establish the true boundary line between the plaintiff and the defendant.

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

30

40

Proof of Mailing Motion and Bill of Complaint.

**[B] PROOF OF MAILING COPIES OF MOTION
AND BILL OF COMPLAINT.**

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } SS.:

VERA E. CASTELLANO, of full age, being duly sworn according to law, on her oath deposes and says: 10

1. On May 28, 1929, in the Post Office in the City of Newark, New Jersey, I deposited in sealed envelopes with the postage thereon by registered mail prepaid, a true printed copy of the annexed motion, notice and bill of complaint addressed to each of the following persons:

Hon. C. Douglas Buck, Governor of the State of Delaware, Dover, Delaware.

Hon. Reuben Satterthwaite, Jr., Attorney-General of Delaware, Du Pont Building, Wilmington, Delaware. 20

VERA E. CASTELLANO.

Sworn and subscribed before me this 28th day of May, 1929.

JOHN J. GAFFEY,
Attorney at Law of N. J.

Bill of Complaint.[4] **BILL OF COMPLAINT.**

Filed June 3, 1929.

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

10 The plaintiff, State of New Jersey, by its Attorney-
General, brings its bill of complaint against the defendant,
State of Delaware, and alleges and shows:

I.

1. The plaintiff is a State of the Union having its
Capital and seat of government at the City of Trenton,
Mercer County, New Jersey, and exercises through its
Legislature the powers and duties of sovereignty within
its territorial limits under and by virtue of its constitution.
20 This suit is instituted by direction of the Legislature of
the plaintiff and with the approval of the Governor there-
of.

2. The defendant, State of Delaware, is a State of the
Union having its Capital and seat of government in the
City of Dover, Kent County, Delaware, and exercises
[5] through its Legislature the powers and duties of
sovereignty within its territorial limits under and by
virtue of its constitution.

30

II.

3. The jurisdiction of this Court depends upon the
ground that this is a suit in which a state is a party, with-
in the provisions of Article III, Section 2, of the Con-
stitution of the United States.

III.

40 4. From the southeasterly corner of the State of Penn-
sylvania in the Delaware River to the main sea at the

Bill of Complaint.

mouth of Delaware Bay, said river and bay are navigable waters wherein the tide ebbs and flows and form the boundary line between the plaintiff and the defendant.

5. The controversy involved in this suit is where, in said river and bay, the exact division of territory between the parties lies. The plaintiff claims the ownership in fee-simple of that portion of the subaqueous soil lying easterly of the thalweg thereof; the defendant claims ownership in fee-simple of the whole bed of said river to low water mark on the easterly shore, lying within the circumference of a circle of a radius of twelve miles described about the Court House in the town of New Castle in the State of Delaware as a centre and all the islands in said river within the compass of said circle, and of that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical centre thereof.

6. By letters-patent dated March 12, 1664, Charles II, King of England, granted and conveyed to James, Duke of York, his heirs and assigns, certain lands in America, including all the lands from the west side of Connecticut to the east side of Delaware bay, together with all the lands, islands, soils, rivers, harbours, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowling, and all other royalties, profits, commodities and hereditaments to said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances.

7. Said letters-patent also granted to said James, Duke of York, his heirs, deputies, agents, commissioners and assigns, full and absolute power and authority to correct, punish, pardon, govern and rule all such the subjects of said King, his heirs and successors, as should from time to time adventure themselves into any of the parts or places aforesaid, or that should at any time thereafter in-

Bill of Complaint.

habit within the same, according to such laws, orders, ordinances, directions and instructions as by said Duke or his assigns should be established; and in defect thereof, in case of necessity, according to the good discretions of his deputies, commissioners, officers or assigns respectively; as well in all causes and matters capital and criminal as civil, both marine and others; so also as the said statutes, ordinances and proceedings should not be contrary to, but as near as conveniently may be agreeable to the laws, statutes and government of the realm of England.

8. By lease dated June 23, 1664, and release dated June 24, 1664, said James, Duke of York, after reciting the grant aforesaid made to him by said letters-patent of March 12, 1664, conveyed to Lord John Berkeley and Sir George Carteret, their heirs and assigns forever, all that tract of land adjacent to New England and lying and being to the westward of Long Island and Manhitas Island and bounded on the east part by the main sea and part by Hudson's river, and having upon the west Delaware bay or river, and extending southward to the main ocean as far as Cape May at the mouth of Delaware bay and to the northward as far as the northern most branch of the said [7] bay or river of Delaware, which is forty-one degrees and forty minutes of latitude, and crossing over thence in a straight line to Hudson's river in forty-one degrees of latitude, which said tract of land was thereafter to be called by the name or names of New Caesarea or New Jersey.

9. Said lease and release also conveyed all rivers, mines, minerals, woods, fishings, hawking, hunting and fowling, and all other royalties, profits, commodities and hereditaments whatsoever to the said lands and premises belonging or in anywise appertaining, with their and every of their appurtenances, in as full and ample a manner as the same were granted to the said Duke by the aforementioned

Bill of Complaint.

letters-patent of March 12, 1664, and all the estate, right title and interest, benefit, advantage, claim and demand of the said Duke of, in and to said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof.

10. Meanwhile the Dutch, whose seat of government in America was in New Amsterdam, now New York, claimed occupancy and actual government, by conquest and settlement of a portion of the territory conveyed by said lease and release of June 23, and 24, 1664. In or about the month of September, 1664, the Dutch in and about New Amsterdam were conquered by the military power of Charles II, King of England, and by the Treaty of Breda, made on or about July 31, 1667, between the governments of said Charles II, and the United Provinces of the Netherlands, all of the territories conquered by the English of the Dutch, including the territory of New Jersey above described in said lease and release of June 23, and 24, 1664, were surrendered and confirmed to the English Crown. 10 20

11. A doubt having arisen whether the English Crown was not re-vested by said Treaty of Breda with the title [8] and government of the lands granted and conveyed to said James, Duke of York, in and by said letters-patent of March 12, 1664, said Charles II, King of England, by letters-patent dated June 29, 1674, re-granted and re-conveyed to said James, Duke of York, said lands and territory by the same description and by the same words as theretofore in said letters-patent of March 12, 1664. 30

12. By deed dated March 18, 1673, said Lord John Berkeley conveyed to one John Fenwick, in trust for one Edward Byllynge, all the moiety or undivided one-half part or interest in and to said tract of land called New Jersey.

13. By deed dated February 9, 1674 and by deed dated February 10, 1674, said John Fenwick and said Edward 40

Bill of Complaint.

Byllynge, conveyed to William Penn, Gawen Lawrie and Nicholas Lucas (subject to an equitable interest claimed by said Edward Byllynge), said moiety or undivided one-half part or interest formerly of the said Lord John Berkeley in said tract of land as aforesaid.

10 14. By deed dated July 29, 1674, said James, Duke of York, reciting said letters-patent of June 29, 1674, reconveyed unto said Sir George Carteret, his heirs and assigns, the northerly portion of the tract of land called New Jersey, described as all that tract of land adjacent to New England, and lying and being to the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea and part by Hudson's river, and extending southward as far as a certain creek called Barnegatt, being about the middle between Sandy Point
20 and Cape May, and bounded on the west by a straight line from said creek called Barnegatt to a certain creek in Delaware River, next adjoining to and below a certain creek in Delaware river called Renkokus Kill, and from thence up said Delaware river to the northernmost branch thereof, which is in forty-one degrees and forty minutes of latitude, [9] and on the north, crossing thence in a straight line to Hudson's river in forty-one degrees of latitude.

30 15. Said last mentioned deed also conveyed all rivers, mines, minerals, wood, fishing, hawking, hunting and fowling, and all royalties, profits, commodities and hereditaments whatsoever to the said lands belonging or appertaining; with their and every of their appurtenances in as full and ample a manner as the same was granted unto the said James, Duke of York, by said letters-patent of June 29, 1674, and all the estate, right, title, interest, benefit, advantage, claim and demand of the said James, Duke of York, of, in and to said lands and premises, or any part
40 or parcel thereof, and the reversion and reversions, remainder or remainders thereof.

Bill of Complaint.

16. By deed dated July 1, 1676, between said Sir George Carteret, William Penn, Gawen Lawrie, Nicholas Lucas and Edward Byllynge, reciting said letters-patent of March 12, 1664, said lease and release of June 23, and 24, 1664, and the deeds mentioned in the foregoing paragraphs 12 and 13 hereof, and reciting that the said Penn, Lawrie and Lucas (including the equitable interest of said Byllynge) stood seized of and in one undivided moiety or half part, of all and every of said premises so granted unto the said Lord John Berkeley and Sir George Carteret as aforesaid as joint tenants between themselves, and did then hold the same to them and to their heirs, as tenants in common with the said Sir George Carteret who was then seized of the other undivided moiety or half part thereof, and reciting that the parties had agreed upon a partition of said tract of land into two parts, said Byllynge, Penn, Lawrie and Lucas conveyed unto said Sir George Carteret, his heirs and assigns forever, the easterly part of New Jersey, to have and to hold the same in severalty, and the said Carteret conveyed unto said Penn, Lawrie and Lucas, to their heirs and assigns forever, the [10] westerly part of New Jersey, to have and to hold to them, their heirs and assigns in severalty, the line of division between said easterly and westerly parts being fully described in said deed. Said parts comprised the whole of the territory or tract originally conveyed by said James, Duke of York to said Berkeley and Carteret, and were conveyed with all the appurtenances and privileges heretofore described with respect to the conveyance of said whole tract by said James, Duke of York to said Berkeley and Carteret.

17. By deed dated August 6, 1680, containing certain recitals, including said letters-patent of March 12, 1664, said lease and release of June 23, and 24, 1664; said deed from said Lord John Berkeley to said John Fenwick; said

Bill of Complaint.

10 deed from Fenwick and Byllynge to said Penn, Lawrie and Lucas; the subsequent conveyance of interests to John Eldredge and Edward Warner; the claims to said territory by the Dutch and the reconquest thereof by the British; said letters-patent of June 27, 1674, and further reciting that for the better extinguishing of all such claims and demands as said Duke of York may anyways have of, or in the premises aforesaid called West New Jersey or any part thereof and for the further and better settling, conveying, assuring and confirming the same, said James, Duke of York, conveyed unto Edward Byllynge, William Penn, Gawen Lawrie, Nicholas Lucas, John Eldredge and Edward Warner all that part, share or portion of all those parts shares and portions of the entire premises so granted by said Duke of York unto said John Lord Berkeley and Sir George Carteret, and their heirs as aforesaid, as in and by and upon the said partition aforesaid was and were vested in said Penn, Lawrie and Lucas and their heirs, then agreed to be called by the name of West New Jersey, comprising all that part of New Jersey bordering [11] on said Delaware river and bay, except the portion thereof described in the deed recited in paragraph 14 hereof.

30. 18. Said last mentioned deed also conveyed all the islands, bays, rivers, waters, forts, mines, quarries, royalties, franchises and appurtenances whatsoever to the same belonging or in anywise appertaining, and all the estate, right, title, interest, reversion, remainder, claim and demand whatsoever, as well in law as in equity, of him the said James, Duke of York, of, into and out of the same, or any part or parcel of the same.

40 19. Said last mentioned deed also conveyed all and every such the same powers, authorities, jurisdictions, governments and other matters and things whatsoever,

Bill of Complaint.

which by the said respective recited letters-patent, or either of them, are and were granted or intended to be granted to or exercised by the said Duke of York, his heirs, assigns, deputies, officers or agents, in, upon or in relation unto the said premises thereby confirmed or intended to be confirmed, and every of them, in case the same were then in the actual seizure of the said Duke of York. 10

20. By deed of surrender dated April 15, 1702, and accepted April 17, 1702, the proprietors of East New Jersey and the proprietors of West New Jersey, for themselves, and their heirs, did surrender and yield up unto Anne, Queen of England, all sovereignty and powers of government as to New Jersey granted by Charles II, King of England, to James, Duke of York, and by said Duke of York to the said proprietors, or their predecessors, and thereafter until the war of the Revolution, the territory of New Jersey was governed by the English monarchs under governors appointed thereby. 20

21. As a result of the American Revolution, which followed the Declaration of Independence on July 4, 1776, [12] the State of New Jersey became and ever since has been a free and independent State possessed of all the rights thereof and vested with all and every power of government in and over the territory thereof and the tidal waters adjacent thereto, which immediately before the Revolution were vested in the Crown of England. 30

22. At the time of said Revolution, the bed of the Delaware River and Bay underneath the tidal waters thereof and between the highwater mark on either side, from Trenton to the main sea at the mouth of the Bay at Cape May, belonged to and was vested in the Crown of England in trust for the use and possession of the subjects of the King; that by virtue of said Revolution and the resulting 40

Bill of Complaint.

10 independence of the State of New Jersey and by virtue of the Treaty of Paris negotiated between the Kingdom of Great Britain and the United States of America and signed at Paris, September 3, 1783, that portion of the bed of the Delaware River and Bay which divides the States of New Jersey and Delaware, lying between the thalweg thereof and the highwater mark on the easterly shore be-
came and has ever since remained vested in fee simple in the State of New Jersey, and the remaining portion there-
of westerly of the thalweg thereof to the highwater mark on the westerly shore became and has ever since remained, vested in fee simple in the State of Delaware.

20 23. The Legislature of the plaintiff by joint resolution adopted February 14, 1905, appointed a commission to confer with a like commission appointed by the Legislature of the defendant for the purpose of framing a compact looking to the amicable termination of a dispute then
30 pending over the boundary line in question. On February 13, 1905, the Legislature of the defendant appointed a like commission for that purpose. After a number of conferences said commissions agreed upon concurrent jurisdiction by the plaintiff and the defendant over the [13] waters of the Delaware River and Bay but were unable to agree upon the question of boundary or upon the territorial rights of the parties therein. An agreement or
40 compact respecting jurisdiction over said waters was signed by the commissioners, and ratified by the Legislatures, of the plaintiff and defendant, respectively, and approved by act of Congress. Said agreement or compact expressly provided that nothing therein contained should affect the planting, catching or taking of oysters, clams or other shellfish or interfere with the oyster industry as then or thereafter carried on under the laws of either State, and that each State should on its own side of the river continue to exercise riparian jurisdiction of every kind and

Bill of Complaint.

nature and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States. And it was also expressly provided in said agreement or compact that nothing therein contained should affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware River, or the ownership of the sub-aqueous soil thereof, except as therein expressly set forth. 10

24. The dispute between the plaintiff and the defendant, and their officers and citizens, respectively, concerning the boundary line between the two States in the Delaware River and Bay and concerning the territorial ownership of the bed of said river and bay as between said States, has existed for many years and the question has arisen from time to time and negotiations have been conducted between the plaintiff and the defendant, and between commissions appointed by the Legislatures thereof, respectively, for the purpose of settling the dispute, and the plaintiff, by leave of this court, filed its bill of complaint against the defendant on March 13, 1877, praying that the true boundary line between the plaintiff and the [14] defendant might be ascertained, declared, defined and perpetually established, and that the rights of the parties in the bed of said river and the territorial extent thereof might be ascertained, declared, and established. An answer was filed therein on October 14, 1901 and a replication thereto was filed November 26, 1901, but said suit was discontinued by consent of the parties, under the provisions of an agreement or compact between the parties in 1905 and the questions of boundary and territorial ownership were left undetermined. 20 30

25. Ever since the year 1799 the Legislature of the plaintiff has enacted and had in force statutes regulating the oyster industry within its territorial limits, including 40

Bill of Complaint.

Delaware River and Bay, and since the year 1899 said industry has been regulated by the plaintiff through a commission which, since the year 1915, has been and is now known as the Board of Shell Fisheries. In the bed of said Delaware river and bay within the area involved in the dispute between the plaintiff and the defendant the plaintiff has developed and maintained and now maintains extensive oyster beds along the easterly side of the thalweg of said river and bay.

26. During all of this time the citizens and residents of the plaintiff under and by virtue of the authority conferred and licenses issued by the plaintiff have improved the easterly side of said river and bay throughout the entire extent thereof by erecting dikes and embankments and the construction of wharves, docks, piers and other structures which have remained in the continuous and uninterrupted use and possession of said citizens and residents.

27. The oyster industry of the plaintiff in Delaware river and bay is of great actual and potential value and now produces annually four million bushels of oysters of [15] the annual value of approximately seven million dollars. The plaintiff has appropriated and expended therein approximately one million dollars and the citizens of the plaintiff have invested therein and in the equipment and facilities necessary therefor and incident thereto upwards of fifteen million dollars.

28. During the month of May, 1925, citizens of the defendant under the claim of ownership by the defendant, came upon the waters of the easterly side of the thalweg of the bay and took seed oysters to the extent of many thousands of bushels from the bed of the bay claimed to be owned in fee simple by the plaintiff.

Bill of Complaint.

29. The portion of the Delaware river and bay from which citizens of the defendant claim the right to take oysters from lands claimed by the plaintiff comprises a large area which produces annually seed oysters of great value, being a substantial part of valuable seed oyster beds, which are the only natural oyster beds from which plaintiff and its citizens can obtain an annual supply of seed oysters for planting more than thirty thousand acres of land leased by the plaintiff to its citizens and now under cultivation by them in the Maurice River Cove on the easterly side of said bay. 10

30. By Joint Resolution No. 4 entitled "Joint Resolution relating to the boundary controversy between the State of New Jersey and the State of Delaware," approved March 28, 1927, the Legislature of the plaintiff appointed a commission to confer with a like commission of the defendant for the purpose of framing a compact or agreement between said States and legislation consequent thereon to be submitted to the Legislatures of said States, respectively, for action thereon looking to the final adjustment of all controversies relating to the boundary line between the plaintiff and the defendant, and to their respective rights in the Delaware River and Bay. A similar commission was appointed by the Legislature of the defendant and said commissions conducted negotiations for a period, but were unable to agree upon the questions submitted for their consideration. 20 30

31. By a report dated April 16, 1929, the commission appointed by the Legislature of the plaintiff reported that meetings had been held with the commission appointed by the defendant but without reaching an agreement, and recommended that the matter of the boundary line controversy between the two States be referred to the Attorney General to the end that appropriate action should be taken to fix and determine said boundary line. 40

Bill of Complaint.

32. On April 17, 1929, by a joint resolution entitled "Joint Resolution concerning the boundary line between the States of New Jersey and Delaware in the Delaware River and Bay," approved May 6, 1929, the Legislature of the plaintiff instructed its Attorney-General to institute such legal proceedings as may be necessary to ascertain and establish the boundary line between the plaintiff and the defendant.

33. The defendant and its citizens by persisting in their present claims of title to the subaqueous soil claimed by the plaintiff on the easterly side of the thalweg of said Delaware river and bay, have created a conflict between the parties and their respective citizens and between the public authorities and officers of the plaintiff and the defendant respectively charged with the duty of enforcing the laws of the respective states, which cannot be settled or determined by any legal means other than by resort to this Honorable Court.

34. The plaintiff claims title in fee simple to the bed of said Delaware river and bay which divides the States of [17] New Jersey and Delaware from the thalweg thereof to the highwater mark on the easterly shore under and by virtue of the sovereignty of the Crown of England existing prior to, and to which it succeeded as a result of the Declaration of Independence, the American Revolution and the Treaty of Paris, aforesaid, and under and by virtue of the common law of England as existing and applied at that time both in England and in the British colonies in America and which was adopted by the plaintiff and the defendant upon attaining their independence, and has ever since existed and been applied by the courts of the plaintiff and the defendant.

Bill of Complaint.

IV.

In consideration whereof, and for as much as the plaintiff is without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this nature are properly cognizable and relievable, plaintiff prays;

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That the said defendant, State of Delaware, may to the best and utmost of its knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived;

That this court grant unto the plaintiff the United States' writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, State of Delaware, perpetually restraining and enjoining it, its citizens, officers, agents and employees, and all other persons acting or claiming or assuming to act under its authority, from taking oysters or other property, and from claiming or exercising any territorial or ownership rights in, upon or over the subaqueous soil in [18] said Delaware river and bay easterly of the thalweg thereof or between said thalweg thereof and the highwater mark on the easterly side of said river and bay;

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That the true boundary line between the State of New Jersey and the State of Delaware, may by order of this court, be ascertained, declared, defined and perpetually established and that the rights and title of the plaintiff, and of its citizens and inhabitants, claimants thereunder, in the bed of said Delaware river and bay and the territorial extent thereof may be so ascertained, declared and established.

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That this court grant unto the plaintiff the United States' writ of subpoena, issuing out of and under the seal

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Motion for Leave to File Bill of Complaint.

of this Honorable Court, to be directed to the said defendant, State of Delaware, commanding it, by a certain day and under a certain penalty therein to be expressed, to be and appear before this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to
 10 your Honors shall seem meet, and shall be agreeable to equity and good conscience;

And that the plaintiff may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

And the plaintiff, as in duty bound, will ever pray, etc.

STATE OF NEW JERSEY,

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By WILLIAM A. STEVENS,
 Attorney-General.

DUANE E. MINARD,
 Assistant Attorney-General,
 Solicitors for Plaintiff.

WALTER H. BACON,
 Counsel.

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[1] **MOTION FOR LEAVE TO FILE
 BILL OF COMPLAINT.**

Mr. Duane E. Minard, for Complainant.

June 3, 1929. Granted, and process is ordered to issue returnable on Monday, July 1, next. (279 U. S. 825; 73 L. ed. 978.)

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Answer.

[1]

ANSWER.

Filed July 1, 1929.

The Answer of State of Delaware, Defendant, to the Bill of Complaint of State of New Jersey, Plaintiff.

I.

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1. This defendant admits that the plaintiff above named is a State of the Union, having its capital and seat of government at the City of Trenton, Mercer County, New Jersey, and exercises through its Legislature the powers and duties of sovereignty within its territorial limits, under and by virtue of its constitution. This defendant believes it to be true that this suit was instituted by direction of the Legislature of the plaintiff and with the approval of the Governor thereof.

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2. This defendant admits that State of Delaware, the defendant, is a State of the Union, having its capital and seat of government in the City of Dover, Kent County, Delaware, and exercises through its Legislature the powers and duties of sovereignty within its territorial limits, under and by virtue of its constitution.

[2]

II.

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3. This defendant admits that the jurisdiction of this Court depends upon the ground that this is a suit in which a State is a party within the provisions of Article III, Section 2, of the Constitution of the United States.

III.

4. This defendant admits that from the southeasterly corner of the State of Pennsylvania in the Delaware River to the main sea at the mouth of Delaware Bay, that said

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Answer.

river and bay are navigable waters wherein the tide ebbs and flows and form the boundary line between the plaintiff and the defendant.

10 5. This defendant admits that the controversy involved in this suit is where, in said river and bay, the exact division of territory between the said plaintiff and the said
20 defendant lies. This defendant admits that the plaintiff claims ownership in fee simple of that portion of the subaqueous soil lying easterly of the thalweg thereof; and that the defendant claims ownership in fee simple of the whole bed of said Delaware River to low water mark on the easterly shore thereof, lying within the circumference of a circle of a radius of twelve miles described about the courthouse in the Town of New Castle, in the State of Delaware, as a center, and all the islands in said river
30 within the compass of said circle, and all that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

30 6. This defendant believes that Charles II, King of England, by letters-patent dated March 12, 1664, did grant and convey to James, Duke of York, his heirs and assigns, certain lands in America, including all the lands from the west side of Connecticut to the east side of Delaware Bay, together with all the lands, islands, soils, rivers, harbours, mines, minerals, quarries, woods, marshes,
40 waters, lakes, fishings, hawkings, huntings and fowling, and all other royalties, profits, commodities and hereditaments to said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances, but for greater certainty as to [3] said letters-patent and all of the provisions thereof, it craves leave to refer to the said letters-patent when produced in this cause. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said alleged patent ever had legal existence and

Answer.

validity, that then and in that case, by legal and just construction thereof, it cannot and should not be construed so as to include within the express description of the lands and premises therein contained, or as to control any part of the bed of said Delaware River within the compass of said twelve mile circle or that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof. 10

7. This defendant believes that said letters-patent also granted to James, Duke of York, his heirs, deputies, agents, commissioners and assigns, full and absolute power and authority to correct, punish, pardon, govern and rule all such the subjects of said King, his heirs and successors, as adventure themselves into any of the parts or places aforesaid, or that should at any time thereafter inhabit within the same, according to such laws, orders, ordinances, directions and instructions as by said Duke or his assigns should be established; and in defect thereof, in case of necessity, according to the good discretions of his deputies, commissioners, officers or assigns respectively; as well in all causes and matters capital and criminal as civil, both marine and others; so also as the said statutes, ordinances and proceedings should not be contrary to, but as near as conveniently may be agreeable to the laws, statutes and government of the realm of England. But this defendant claims and respectively submits that if said patent ever had any legal existence and validity, that then and in that case, by legal and just construction thereof, it cannot and should not be construed to apply to any part of the bed of said Delaware River within the compass of the said twelve mile circle, or to that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof. 20 30

Answer.

8. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not the said James, [4] Duke of York, by lease dated June 23, 1664, and release dated June 24, 1664, after reciting the grant aforesaid made to him by said letters-patent dated March 12, 1664, conveyed to Lord John Berkeley and Sir George Carteret, their heirs and assigns forever, all that tract of land adjacent to New England and lying and being to the westward of Long Island and Manhitas Island and bounded on the east part by the main sea and part by Hudson's River, and having upon the west Delaware Bay or River, and extending southward to the main ocean as far as Cape May at the mouth of Delaware Bay, and to the northward as far as the northernmost branch of the said Delaware Bay or Delaware River, which is forty-one degrees, forty minutes of latitude and crossing over thence in a straight line to Hudson's River in forty-one degrees of latitude, which said tract of land was thereafter to be called by the name or names of New Caesarea or New Jersey. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said alleged lease and release ever had any legal existence and validity, that then and in that case, by legal and just construction thereof, they cannot and should not be so construed as to include or control any part of the bed of said River Delaware within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

9. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not said lease and release also conveyed all rivers, mines, minerals, woods, fishings, hawkings, hunting and fowling, and all other royalties, profits, commodities and hereditaments whatsoever to the said lands and premises belonging or in

Answer.

any way appertaining, with their and every of their appurtenances, in as full and ample a manner as the same were granted to the said Duke by the aforementioned letters-patent of March 12, 1664, and all the estate, right, title and interest, benefit, advantage, claim and demand of the said Duke of, in and to said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders thereof. But this [5] defendant claims and respectfully submits that if it shall appear by evidence in this cause, that said lease and release ever had any legal existence and validity, that then and in that case, by legal and just construction thereof, they cannot and should not be so construed as to include or control any part of the bed of said Delaware River within the compass of said twelve mile circle, nor any right of jurisdiction in said portion of said river, or that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

10. This defendant believes that the Dutch, whose seat of government in America was in New Amsterdam, now New York, claimed occupancy and actual government, by conquest and settlement of a portion of the territory conveyed by said lease and release of June 23rd and 24th, 1664, and in or about the month of September, 1664, the Dutch in and about New Amsterdam were conquered by the military power of Charles II, King of England, and by the Treaty of Breda, made on or about July 31st, 1667, between the governments of said Charles II and the United Provinces of the Netherlands, all of the territories conquered by the English from the Dutch, including the territory of New Jersey above described in said lease and release of June 23rd and 24th, 1664, were surrendered and confirmed to the English Crown. And this defendant further claims and respectfully submits that the territories so surrendered cannot and should not be so construed as

Answer.

to include any part of the said River Delaware within the compass of said twelve mile circle, or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

10 11. This defendant believes that a doubt did arise as to whether the English Crown was not revested by said Treaty of Breda with the title and government of the lands granted and conveyed to said James, Duke of York, in and by said letters-patent of March 12, 1664, that said Charles II, King of England, by letters-patent dated June 29, 1674, regranted and reconveyed to said James, Duke of York, said lands and territory by the same description and by the same words as [6] theretofore in said letters-patent of March 12, 1664. And this defendant further
20 claims and respectfully submits, that if it shall appear by evidence in this cause, that said alleged confirmatory patent ever had legal existence and validity, that then and in that case, by legal and just construction thereof, it cannot and should not be so construed as to include within the express description of the lands and premises therein contained, or to control any part of the bed of said Delaware River within the compass of said twelve mile circle, or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

30 12. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not by deed dated March 18, 1673, said Lord John Berkeley conveyed to one John Fenwick, in trust for one Edward Byllynge, all the moiety or undivided one-half part or interest in and to said tract of land called New Jersey. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said deed dated March 18, 1673, had any legal existence or validity, that then and in
40 that case, by legal and just construction thereof, it cannot

Answer.

and should not be so construed as to include or control any part of the bed of said Delaware River within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

13. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not by deed dated February 9, 1674, and by deed dated February 10, 1674, the said John Fenwick and said Sir Edward Byllynge conveyed to William Penn, Gawen Lawrie and Nicholas Lucas, (subject to an equitable interest claimed by said Edward Byllynge) said moiety or one-half undivided interest formerly of the said John Berkeley in said tract of land as aforesaid. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said deeds dated February 9, 1674, and February 10, 1674, had any legal existence or validity, that then and in that case, by legal and just construction thereof, they cannot and should not be so construed as to include or control any part of the bed of said Delaware River within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

14. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not by deed dated July 29, 1674, said James, Duke of York, reciting said letters patent of June 29, 1674, reconveyed unto the said George Carteret, his heirs and assigns, the northerly portion of the tract of land called New Jersey, described as all that tract of land adjacent to New England, and lying and being to the westward of Long Island and Manhitis Island, and bounded on the east part by the main sea and part of Hudson's River, and extending southward as far as a certain creek, called Barnegatt, being about the middle between Sandy Point and Cape May, and bounded

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Answer.

10 on the west by a straight line from said creek called
Barnegatt, to a certain creek in Delaware River next ad-
joining to and below a certain creek in Delaware River
called Renkokus Kill, and from thence up said Delaware
River to the northernmost branch thereof, which is in
20 the north, crossing thence in a straight line to Hudson's
River in forty-one degrees of latitude. But this defend-
ant claims and respectfully submits that if it shall appear
by evidence in this cause that said alleged indenture ever
had legal existence or validity, that then and in that case,
by legal and just construction thereof, it cannot and should
not be so construed as to include or control any part of
the bed of said Delaware River within the compass of
said twelve mile circle or any portion of the subaqueous
soil of the remainder of said river and bay westerly of
the geographical center thereof.

15. This defendant does not know and cannot set forth
as to its belief or otherwise, whether or not said last men-
tioned deed also conveyed all rivers, mines, minerals, wood,
fishings, hawking, hunting and fowling, and all royalties,
profits, commodities and hereditaments whatsoever to the
said land belonging or appertaining; with their and every
of their ap- [8] purtenances in as full and ample a manner
as the same were granted unto the said James, Duke of
30 York, by said letters-patent of June 29, 1674, and all the
estate, right, title, interest, benefit, advantage, claim and
demand of the said James, Duke of York, of, in and to
said lands and premises, or any part or parcel thereof, and
the reversion and reversions, remainder and remainders
thereof. But this defendant claims and respectfully sub-
mits that if it shall appear by evidence in this cause that
said alleged indenture ever had legal existence or validity,
that then and in that case, by legal and just construction
40 thereof, it cannot and should not be so construed as to

James,

include or control any part of the bed of said Delaware River within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

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 11 This defendant does not know and cannot set forth
 as to its belief or otherwise, whether or not by deed dated
 July 1, 1676, between said Sir George Carteret, William
 Penn, Gawen Lawrie, Nicholas Lucas and Edward Byllynge,
 reciting said letters-patent of March 12, 1664, said
 lease and release of June 23 and 24, 1664, and the deeds
 mentioned in the foregoing paragraphs 12 and 13 hereof,
 and reciting that the said Penn, Lawrie and Lucas (in-
 stalling the equitable interest of said Byllynge) stood
 seized of and in one undivided moiety or half part, of all
 and every of said premises so granted unto the said Lord
 20 John Berkeley and Sir George Carteret as aforesaid, as
 joint tenants between themselves, and did then hold the
 same to them and to their heirs, as tenants in common
 with the said George Carteret who was then seized of the
 other undivided moiety or half part thereof, and reciting
 that the parties had agreed upon a partition of said tract
 of land into two parts, said Byllynge, Penn, Lawrie and
 Lucas conveyed unto said Sir George Carteret, his heirs
 and assigns forever, the easterly part of New Jersey, to
 have and to hold the same in severalty, and the said Car-
 30 teret conveyed unto said Penn, Lawrie and Lucas, to their
 heirs and assigns forever, the westerly part of New Jersey,
 to have and to hold to them, their heirs and assigns in
 severalty, the line of divi- [9] sion between said easterly
 and westerly parts being fully described in said deed; or
 whether or not said parts comprised the whole of the
 territory or tract originally conveyed by said James, Duke
 of York, to said Berkeley and Carteret, and were conveyed
 with all the appurtenances and privileges heretofore de- 40

Answer.

scribed with respect to the conveyance of said whole tract by said James, Duke of York, to said Berkeley and Carteret. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause, that the said deed dated July 1, 1676, ever had legal existence or validity, that then and in that case, by lawful and just
 10 construction thereof, it cannot and should not be so construed as to include, refer to or control any part of the said Delaware River within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

17. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not by deed dated August 6, 1680, containing certain recitals, including said
 20 letters-patent of March 12, 1664, said lease and release of June 23 and 24, 1664; said deed from said Lord John Berkeley to said John Fenwick; said deed from Fenwick and Byllynge to said Penn, Lawrie and Lucas; the subsequent conveyance of interests to John Eldredge and Edward Warner; the claims to said territory by the Dutch and the reconquest thereof by the British; said letters-patent of June 27, 1674, and further reciting that for the better extinguishing of all such claims and demands as said Duke of York may anyways have of, or in the
 30 premises aforesaid called West New Jersey or any part thereof and for the further and better settling, conveying, assuring and confirming the same, said James, Duke of York, conveyed unto Edward Byllynge, William Penn, Gawen Lawrie, Nicholas Lucas, John Eldredge and Edward Warner all that part, share or portion of all those parts, shares and portions of the entire premises so granted by said Duke of York unto said John Lord Berkeley and Sir George Carteret, and their heirs as aforesaid, as in and by and upon the said partition aforesaid was and
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Answer.

were vested in [10] said Penn, Lawrie, and Lucas and their heirs, then agreed to be called by the name of West New Jersey, comprising all that part of New Jersey bordering on said Delaware River and Bay, except the portion thereof described in the deed recited in paragraph 14 hereof. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause, that the said indentures ever had legal existence or validity, that then and in that case, by lawful and just construction thereof, they cannot and should not be so construed as to include, refer to or control any part of the said Delaware River within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

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18. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not said last mentioned deed also conveyed all the islands, bays, rivers, waters, forts, mines, quarries, royalties, franchises and appurtenances whatsoever to the same belonging or in anywise appertaining, and all the estate, right title, interest, reversion, remainder, claim and demand whatsoever, as well in law as in equity, of him the said James, Duke of York, of, into and out of the same, or any part or parcel of the same. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause, that the said alleged indentures ever had legal existence or validity, that then and in that case, by lawful and just construction thereof, they cannot and should not be so construed as to include or control any part of the bed of said Delaware River within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

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Answer.

19. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not said last mentioned deed also conveyed all and every such the same powers, authorities, jurisdictions, governments and other matters and things whatsoever, which by the said respective recited letters-patent, or either of them, are and were granted or intended to be granted to or exercised by the said Duke of [11] York, his heirs, assigns, deputies, officers or agents, in, upon or in relation unto the said premises thereby confirmed or intended to be confirmed, and every of them, in case the same were then in the actual seizure of the said Duke of York. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause, that the said alleged indenture ever had legal existence or validity, that then and in that case, by lawful and just construction thereof, it cannot and should not be so construed as to include or control any part of the bed of said Delaware River within the compass of said twelve mile circle or any portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

20. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not by deed of surrender dated April 15, 1702, and accepted April 17, 1702, the proprietors of East New Jersey and the proprietors of West New Jersey, for themselves, and their heirs, did surrender and yield up unto Anne, Queen of England, all sovereignty and powers of government as to New Jersey granted by Charles II, King of England, to James, Duke of York, and by said Duke of York to the said proprietors, or their predecessors, and whether or not thereafter until the war of the Revolution, the territory of New Jersey was governed by the English monarchs under governors appointed thereby; or whether or not said alleged surrender was ever legally made or

Answer.

ever legally delivered unto Anne, Queen of England. But this defendant claims and respectfully submits that if it shall appear by evidence in this cause that said alleged deed of surrender ever had legal existence or validity, that then and in that case, by just and lawful construction thereof, and of the alleged evidences of the supposed title of the complainant to the premises in dispute in this cause, the said alleged surrender cannot and should not be so construed as to include or control any part of the bed of the Delaware River within the compass of the said twelve mile circle, or that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof; and further that the [12] said alleged then proprietors of East and West New Jersey could not then and thereby surrender to the said Anne, Queen of England, a more extensive title or other, or more extended rights or powers of government, or over other territory than the title, and the rights and powers of governments and territory then actually invested in them.

21. This defendant admits that as a result of the American Revolution which followed the Declaration of Independence on July 4, 1776, the State of New Jersey became and ever since has been a free and independent state, possessed of all the rights thereof and vested with all and every power of government in and over the territory thereof and the tidal waters adjacent thereto, which immediately before the Revolution were vested in the Crown of England. But this defendant expressly denies that by virtue of any of the premises that said complainant became vested with any power of government in or over the tidal waters adjacent to the territory of said State of New Jersey, so far as the said tidal waters are included within the compass of the twelve mile circle as aforesaid, or westerly of the geographical center of the remainder of said river and bay.

Answer.

22. This defendant denies at the time of said Revolution the bed of the Delaware River and Bay underneath the tidal waters thereof and between the highwater mark on either side, from Trenton to the main sea at the mouth of the Bay at Cape May, belonged to and was vested in the Crown of England, in trust for the use and possession of the subjects of the King; and that
10 by virtue of said Revolution and the resulting independence of the State of New Jersey, and by virtue of the Treaty of Paris, negotiated between the King of Great Britain and the United States of America, and signed at Paris September 3, 1783, that portion of the bed of the Delaware River and Bay which divides the States of New Jersey and Delaware, lying between the thalweg thereof and the high water mark on the easterly shore became and has ever since remained vested, in fee
20 simple, in the state of New Jersey, and that the remaining portion thereof westerly of the thalweg thereof to the high water mark on the westerly [13] shore became and has ever since remained vested, in fee simple, in the State of Delaware.

But on the contrary, this defendant avers and respectfully submits that at and immediately before the time the said Revolution took place, so much of the bed of the said Delaware River as then was and now is included within
30 the compass of the said twelve mile circle and all that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof belonged to and was vested in the proprietors of the land and the said river and soil thereof included within the compass of said twelve mile circle and westerly of the geographical center of said river and bay south of said twelve mile circle, by a title derived from the Crown of England, and hereinafter fully set forth; that by means of the said Revolution, the said independence of the State
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Answer.

of Delaware, and the Treaty of Peace between the King of Great Britain and the United States of America, concluded at Paris as aforesaid, all that portion of the bed of the Delaware River, situate between the States of New Jersey and Delaware, included within the compass of the said twelve mile circle, and all that portion of the said river and bay south of said twelve mile circle westerly of the geographical center thereof, became vested, in fee simple, in the State of Delaware; and that so the title to the said portion of the said river and bay, this defendant respectfully submits, has ever since continued and now is. This defendant avers and respectfully submits, that ever since July 4, 1776, this defendant has had and been entitled to the sole and exclusive interest in so much of the waters, between the State of New Jersey and the State of Delaware, of such river as are included within the compass of said twelve mile circle, and in the waters of said river and bay south of said twelve mile circle, westerly of the geographical center thereof, subject only to the common rights of navigation thereof, and hath had the sole and exclusive jurisdiction in and over the same. This defendant avers that it hath at all times been alleged on behalf of this defendant that Charles II, King of England, by due and authentic letters-patent bearing date March 22, 1683, [14] did grant to his brother, the Duke of York, "All that the Town of New Castle, otherwise called Delaware, and fort therein, or thereto belonging, situate lying and being between Maryland and New Jersey, in America; and all that tract of land lying within the compass of a circle of twelve miles about the said town, situate lying and being upon the Delaware River, and all islands in the said Delaware River; and the said river and soil thereof lying north of the southernmost part of said circle of twelve miles about the said town"; that said patent was duly and legally made and duly and legally delivered by the said

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Answer.

10 King Charles II to the said Duke of York, and that the same has ever since the said making and delivering thereof continued to have legal existence; and that by legal and just construction thereof said patent may and should be construed to include and control the part of the bed of said river lying northerly and easterly of the middle
20 of said river, and all rights of jurisdiction of said river, so far and to such an extent as the said part of the bed of said river and the waters thereof are included within the compass of the said twelve mile circle.

23. This defendant believes that the Legislature of the plaintiff by joint resolution adopted February 14, 1905, appointed a commission to confer with a like commission appointed by the Legislature of the defendant for the purpose of framing a compact looking to the amicable termination of a dispute then pending over the
20 boundary line in question. And that on February 13, 1905, the Legislature of the defendant appointed a like commission for that purpose. And that after a number of conferences said commissions agreed upon concurrent jurisdiction by the plaintiff and the defendant over the waters of the Delaware River and Bay but were unable to agree upon the question of boundary or upon the territorial rights of the parties therein. And that an agreement or compact respecting jurisdiction over said waters
30 was signed by the commissioners, and ratified by the Legislatures, of the plaintiff and defendant, respectively, and approved by an act of Congress. And that said agreement or compact expressly provided that nothing therein contained should affect [15] the planting, catching or taking of oysters, clams or other shellfish or interfere with the oyster industry as then or thereafter carried on under the laws of either State, and that each State should on its own side of the river continue to exercise
40 riparian jurisdiction of every kind and nature and to

Answer.

make grants, leases and conveyances of riparian lands and rights under the laws of the respective States. And that it was also expressly provided in said agreement or compact that nothing therein contained should affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as therein expressly set forth. But this defendant expressly denies that said commissions settled or attempted to settle or fix the boundary line between the State of New Jersey and the State of Delaware.

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24. This defendant admits that the dispute between the plaintiff and the defendant, and their officers and citizens, respectively, concerning the boundary line between the two States in the Delaware River and Bay and concerning the territorial ownership of the bed of said river and bay as between said States, has existed for many years and the question has arisen from time to time and negotiations have been conducted between the plaintiff and the defendant, and between commissions appointed by the Legislatures thereof, respectively, for the purpose of settling the dispute, and the plaintiff, by leave of this court, filed its bill of complaint against the defendant on March 13, 1877, praying that the true boundary line between the plaintiff and the defendant might be ascertained, declared, defined and perpetually established, and that the rights of the parties in the bed of said river and the territorial extent thereof might be ascertained, declared and established. And that an answer was filed therein on October 14, 1901, and a replication thereto was filed November 26, 1901, but said suit was discontinued by consent of the parties, under the provisions of an agreement or compact between the parties in 1905 and the question of boundary and territorial ownership were left undetermined.

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Answer.

[16] 25. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not ever since the year 1799 the Legislature of the plaintiff has enacted and had in force statutes regulating the oyster industry within its territorial limits, including Delaware River and Bay, and whether or not since the year 1899 said industry
10 has been regulated by the plaintiff through a commission which, since the year 1915, has been and is now known as the Board of Shell Fisheries. And whether or not in the bed of said Delaware River and Bay within the area involved in the dispute between the plaintiff and the defendant the plaintiff has developed and maintained and now maintains extensive oyster beds along the easterly side of the thalweg of said river and bay. But this defendant expressly denies that the said complainant by
20 virtue of any of the premises of the said complainant became seized of that part of the Delaware River within the compass of said twelve mile circle, or that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical center thereof.

26. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not during all of this time the citizens and residents of the plaintiff under and by virtue of the authority conferred and licenses issued by the plaintiff have improved the easterly side
30 of said river and bay throughout the entire extent thereof by erecting dikes and embankments and the construction of wharves, docks, piers and other structures which have remained in the continuous and uninterrupted use and possession of said citizens and residents. But this defendant claims and respectfully submits that even if the citizens and residents of the State of New Jersey in the localities and in the manner set forth in the said Bill of Complaint have improved the easterly side of said river
40 and bay throughout the entire extent thereof by erecting

Answer.

dykes and embankments and the construction of wharves, docks, piers, and other structures which have remained in continuous and uninterrupted use and possession of said citizens and residents, it cannot and should not be held effectual in law or in equity in any event to affect in any [17] way or to any extent the title or right of this defendant to, or its jurisdiction over, any portion of the soil or bed of the said river, or of the waters thereof included within the compass of said twelve mile circle and that portion of said bay or river west of the geographical center thereof; and that the State of New Jersey cannot whether by such actual or physical occupation, if any such occupation there be, of any part of the original territorial, jurisdiction, rights, privileges, franchises, powers, or estates, or any of them, of any and every nature and description, or of any appendants or appurtenances to them or any of them appertaining, of the State of Delaware as they, or any of them existed at the date of the adoption of the Constitution of the United States, or otherwise howsoever, acquire any part or portion of such territory, jurisdiction, rights, privileges, franchises, powers of estates, or any of them, of any and every nature and description, or of any appendants or appurtenances in them or any of them appertaining, of the State of Delaware, unless and until it may be and shall be shown that the Congress of the United States and the several Legislatures of the States of New Jersey and Delaware have expressly and formally consented thereto. And this defendant further claims and respectfully submits that the said complainant cannot derive any title to, or any jurisdiction over any of the premises in dispute in this cause as against the defendant by prescription.

11. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not the oyster industry of the plaintiff in Delaware River and Bay is of

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Answer.

great actual and potential value and now produces annually four million bushels of oysters of the annual value of approximately seven million dollars. And that the plaintiff has appropriated and expended therein approximately one million dollars and the citizens of the plaintiff have invested therein and in the equipment and facilities necessary therefor and incident thereto upwards of fifteen million dollars.

28. This defendant does not know and cannot set forth as to its belief or otherwise, whether or not during the month of May, 1925, citizens of the defendant under the claim of [18] ownership by the defendant, came upon the waters of the easterly side of the thalweg of the bay and took seed oysters to the extent of many thousands of bushels from the bed of the bay claimed to be owned in fee simple by the plaintiff. But this defendant avers that during the month of May, 1925, it was the owner of the said Delaware Bay to the geographical center thereof and had a right to take seed oysters from said bay west of the geographical center thereof.

28. This defendant believes that the portion of the Delaware River and Bay from which citizens of the defendant claim the right to take oysters from lands claimed by the plaintiff comprises a large area which produces annually seed oysters of great value, being a substantial part of valuable seed oyster beds, which are the only natural oyster beds from which plaintiff and its citizens can obtain an annual supply of seed oysters for planting more than thirty thousand acres of land leased by the plaintiff to its citizens and now under cultivation by them in the Maurice River Cove on the easterly side of said bay.

30. This defendant believes that by Joint Resolution No. 4 entitled "Joint Resolution relating to the boundary controversy between the State of New Jersey and the

State of Delaware," approved March 28, 1927, the Legislature of the plaintiff appointed a commission to confer with a like commission of the defendant for the purpose of forming a compact or agreement between said States and legislation consequent thereto to be submitted to the Legislatures of said States, respectively, for action thereon leading to the final adjustment of all controversies relating to the boundary line between the plaintiff and the defendant, and to their respective rights in the Delaware River and Bay. And that a similar commission was appointed by the Legislature of the defendant and said commissions conducted negotiations for a period, but were unable to agree upon the questions submitted for their consideration.

21. This defendant believes that by a report dated April 18, 1929, the commission appointed by the Legislature (191) of the plaintiff reported that meetings had been had with the commission appointed by the defendant but without reaching an agreement, and recommended that the matter of the boundary line controversy between the two States be referred to the Attorney-General to the end that appropriate action should be taken to fix and determine said boundary line.

22. This defendant believes that on April 17, 1929, by a joint resolution entitled "Joint Resolution concerning the boundary line between the States of New Jersey and Delaware in the Delaware River and Bay," approved May 11, 1929, the Legislature of the plaintiff instructed its Attorney General to institute such legal proceedings as may be necessary to ascertain and establish the boundary line between the plaintiff and the defendant.

23. This defendant believes that the defendant and its assigns by persisting in the present claims of title to the submerged soil claimed by the plaintiff on the easterly

Answer.

side of the thalweg of said Delaware River and Bay, have created a conflict between the parties and their respective citizens and between the public authorities and officers of the plaintiff and the defendant respectively charged with the duty of enforcing the laws of the respective states, which cannot be settled or determined by any legal means
10 other than by resort to this Honorable Court.

34. This defendant admits that the plaintiff claims title in fee simple to the bed of said Delaware River and Bay which divides the States of New Jersey and Delaware from the thalweg thereof to the high water mark on the easterly shore. And this defendant does not know and cannot set forth as to its belief or otherwise, whether or not the said plaintiff claims said title under and by virtue of the sovereignty of the Crown of England existing
20 prior to, and to which it succeeded as a result of the Declaration of Independence, the American Revolution and the Treaty of Paris, aforesaid, and under and by virtue of the common law of England as existing and applied at that time both in England and in the British colonies in America and which was adopted by the plaintiff and the [20] defendant upon attaining their independence, and has ever since existed and been applied by the courts of the plaintiff and the defendant.

30 And this defendant, further answering, saith that the true title, jurisdiction, government and sovereignty of, over, in and to that portion of the River Delaware lying and being within the limits of the said twelve mile circle, as hereinbefore set forth and alleged, have been and now are vested in this defendant by the means hereinafter stated.

40 1.—The title by discovery of the Atlantic Coast of North America, at least as far south as Virginia, is claimed and, as this defendant is informed and believes, generally

Answer.

admitted to have been acquired by England by force of the voyage, along said coast, of Sebastian Cabot in or about the years 1497-8. That part of the coast which now constitutes the State of Delaware was, as this defendant is informed and believes, visited in or about the year 1606 by Captain John Smith, an English Navigator, and in or about the year 1611 by Lord Delaware, the English Governor of Virginia; but neither of them landed, merely sailing into Delaware Bay and departing. After a similar visit to the Bay, in or about the year 1609, Henry Hudson, then in the employment of a Dutch Company, and sailing under the flag of the Netherlands, went northward to the Bay of New York, and discovered and navigated the Hudson River, of which, in consequence of his report, in the following year (1610) the Dutch took possession, and established various trading posts, including one at the site of the City of New York and one at the site of the City of Albany, which were respectively known under the Dutch occupation as Fort Amsterdam (afterwards New Amsterdam) and Fort Orange.

Q.—And this defendant, further answering, saith that from and after the establishment of the Dutch settlements in New York on the Hudson River, then called the North River, as hereinbefore set forth, there were repeated and continuous efforts by the same people to establish settlements on the Delaware River, then called the South River, which they explored so far as the Schuylkill, and also to establish other settlements easterly from New York as far as the Connecticut River, both of which rivers and the lands contiguous thereto were settled and governed by and as part of the colony having its headquarters and central point of authority at and in the settlement on or near the City of New York, then designated as New Amsterdam. During the period of upwards of fifty years thereafter, all of said territory, including the territory

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Answer.

10 composing the present State of Delaware, and the River Delaware, and the said twelve mile circle, was known as the New Netherlands, and was claimed and, except as herein stated, governed as and for a colony of the States General of the United Provinces of the Netherlands, or under the authority thereof. And this defendant is in-
20 formed and believes that during the said period of Dutch supremacy, as early as the year 1622 or 1623, there were settlements by the Dutch from New Amsterdam on the easterly side of the River Delaware. In the year 1630, lands along the Delaware Bay and river, extending from Cape Henlopen to Bombay Hook, were acquired by Samuel Godyn on behalf of a Dutch Company, one of whom, De Vries, a navigator, in or about the year 1631, near what is now the Town of Lewis, then called Hoernkill, estab-
20 lished a colony, which on his return in the following year, he found had been exterminated by the Indians. And this defendant further avers that a patent for the lands so acquired by the said Godyn were issued directly from the government of the States General of the United Nether- lands, by the Director and Council of the Colonial Gov- ernment, whose seat was on the island of Manhattans, and that other patents for lands in Delaware were from time to time issued by said Colonial Government, all of which
30 always have been and still are recognized in the State of Delaware as the valid inception of the legal title to the lands to which they respectively relate. And this de- fendant craves leave to refer to the said patents and prays that the same when proved at the hearing of this cause may be taken as a part of this answer.

40 And this defendant further answering saith that in or about the year 1638 a Swedish expedition under Peter Minuit, [22] formerly Governor of the New Nether- lands under the Dutch Sovereignty, arrived in the Dela- ware River and commenced to establish settlements on

the West side thereof and built a fort named Fort Christina at or near the site of the present city of Wilmington. The settlement of the Country by the Swedes continued until about the year 1647; but immediately after the first arrival of Minuit, the Dutch authorities of the New Netherlands protested against the Swedish operations and did not cease, during all the years of their continuance, to assert the rights of government and of proprietary title of the United Provinces of the Netherlands to and in the Delaware River and the land now constituting the State of Delaware, and of and over which the said state claims ownership, jurisdiction and government in this suit. These protests not having received the desired attention, and it being considered that the "intention" of the Swedes was "to dispossess and unseat the (Dutch) Company from the entire river," in or about the year 1651, as this defendant is informed and believes, the then Director at New Amsterdam, Stuyvesant proceeded to the Delaware and personally disputed with Johan Printz, who after the departure of Minuit had been the head of the Swedish settlements known as New Sweden, as to the right of the Swedes to interfere in a country claimed by the Dutch as an appendage or appurtenance of the colony which had its seat of government at New Amsterdam. Thereupon, Director Stuyvesant built Fort Casimer, at or near New Castle, which action led to hostilities with the Swedes, who under Johan Bjornh, who had then succeeded Printz, took said fort in or about the year 1654; and, the hostilities continuing, in or about August thirty-first, 1655, Fort Casimer was retaken by the Dutch, to whom also a few days after Fort Christina also surrendered. As the result of these operations, the Swedish settlements formally acknowledged the sovereignty of the Dutch as established at New Amsterdam, and formal articles of the terms of the surrender were executed under date of September eleventh,

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Answer.

1655, as to Fort Casimer, and September twenty-fifth of the same year, as to Fort Christina. Provision was made therein for the protection of Swedes who chose to remain and for the return of [23] those who wished to go back to Europe. All of which will appear from the documents referred to and a multitude of others relating to the government of the Delaware Country and River by the Dutch Colonial Government of the Netherlands, to which, when cited at the hearing of this cause, this defendant craves leave to refer and prays that they may be taken as part of this answer.

And this defendant further avers that the said land and river of Delaware became thereupon known by the general designation of the South River of the New Netherlands, and continued to be further settled by active immigration promoted and assisted by the Government of the United Provinces of the Netherlands and the City of Amsterdam, and further that such government continued undisturbed and unchallenged from any quarter until the conquest of the New Netherlands by the English forces under James, the Duke of York, hereinafter mentioned and set forth.

3.—Charles the Second, King of England, in assertion of the English title by discovery and partial occupation of the territories therein described, granted his letters patent to his brother, James, the Duke of York, bearing date the twelfth of March, 1664, which letters patent are those alleged, mentioned and described in the said Bill of Complaint; and this defendant hereby refers to the said letters patent as a whole and makes the same a part of this, its answer. That pursuant to the powers and authority in said letters patent contained, the said Duke of York did duly constitute and appoint, by his commission duly issued, dated on or about the second day of April, 1664, Colonel Richards Nichols to be his deputy

Answer.

Governor within the lands, islands and places in said letters patent mentioned and granted, to perform and execute all and every the powers which were by the said letters patent granted to the said Duke; as by reference to the said commission, when produced in this case, will more fully appear, and which this defendant prays may be taken as a part of this its answer.

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That thereafter on or about the twenty-fifth day of the month of April, 1664, the said Charles the Second, issued his [24] commission to the said Colonel Richard Nichols, and Sir Robert Carre, George Cartwright and Manuel Maverick, to visit certain of the Colonies of England in America and determine complaints, accompanied by two letters of instructions, by one of which the said commissioners were directed to reduce to subjection and obedience to the English Crown the Dutch at Long Island and elsewhere within the Colonies and territories claimed by the King. And this defendant refers to the said commission and letters of instructions and prays that the same may, when produced in this case, be taken as a part of this, its answer.

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After the date of said letters patent, and in or about the month of September in said year 1664, the portion of said territory described in said letters patent in the occupancy and actual government of the Dutch, situated by, and surrounding their then seat of government at New Amsterdam, otherwise and later called New York, was, under the commission aforesaid, to said Nichols and others, conquered by the military power of the King of England, said Charles the Second. That at the date of the said conquest, the said Bay and River Delaware and the territories lying upon the west side thereof, were and constituted a dependency of the Dutch Government having its seat of Government at said New Amsterdam; which said Government, for many years as

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Answer.

10 aforesaid, had had and exercised, and then did have and exercise, all the rights and powers of a proprietor in, of and over the soil and waters of the said river Delaware and said territories adjacent thereto, and all jurisdiction, whether legislative, judicial or executive, and all government and rights of government in, upon and
20 over the said river Delaware, the soil and waters thereof and said territories adjacent thereto. That in or about the month of October in said year 1664, the said Bay and River Delaware and said territories adjacent thereto, including the premises herein in dispute, so dependant upon, subject to and owned by the Dutch Government at New York, were, as such a dependency, also conquered by the military power of the said King of England, and the inhabitants thereof submitted without resistance to the authority of said King, and took oaths of [25]
30 allegiance to him and his Governor. That by the treaty of Breda, made on or about the thirty-first day of July, 1667, between the English and Dutch, all the territories conquered by the English as aforesaid, including the premises here in dispute, were confirmed to the English. That from the year 1664 until the year 1673, the Bay and River Delaware and the said territories lying adjacent to and west thereof, including the premises here in dispute, constituted a dependency of, and were governed in all particulars by the Government of the Duke of York at New York, and the said Duke of York and his said government during said period had and exercised all government and rights of government, all jurisdiction, whether legislative, judicial or executive, over said Bay, River and Territory, as such a dependency as aforesaid, and over all of the inhabitants thereof, and all and every of the rights of a proprietor of, in and over the soil and waters of said River and Territory, including the premises here in dispute.

That in or about the month of July 1673, the territory, the seat of Government of which was at New York, was reconquered by the military power of the States-General and the Prince of Orange, whereupon without the direct exercise of military force, the Delaware dependency, as above described, including the premises here in dispute, as the direct consequence of the conquest of the seat of said Government at New York, also fell into the hands of and was occupied as the territory of the States of the United Provinces of the Netherlands; and the inhabitants of said dependency, in the same year, in or about the month of September, declared their submission and obedience to the States-General of New Netherlands. That upon said reconquest of New York and the said dependency, and for the space of about seven months thereafter, the governors and government of the said New York had and exercised all government and jurisdiction of government all jurisdictions, whether legislative, judicial or executive, and all and every of the rights of a proprietor, in and over the said River Delaware and the Territory adjacent thereto, as a dependency of the said Government at New York, and in and over the soil and waters of said River and Territory, including the premises here in dispute.

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By the Treaty of Peace, signed at Westminster, in or about the month of February, 1674, the territory of which the seat of Government was at New York as aforesaid, including the said dependency of the Bay and River Delaware and said Territories adjacent thereto, were restored to their former proprietor; and by virtue of which treaty, the said River Delaware and the lands adjacent thereto upon the west, were restored as a dependency to the said Government of the said Duke of York, who as proprietor thereof, thereafter governed the same and exercised jurisdiction in, and the rights of a proprietor over,

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Answer.

the same, in manner and form as he had theretofore done before the said reconquest of the same by the said States General.

10 7.—That thereupon, in order to make good and affirm and establish the aforesaid grant covered by the said letters patent of the said date of the twelfth of March, 1664, the said Charles the Second, King of England, by his
20 letters patent, bearing date on or about the twenty-ninth day of June, 1674, did grant and convey unto the said Duke of York, all and every of the property and all and every of the rights, powers and privileges, granted, conveyed, transferred and assured in and by the said patent first made as aforesaid, using in the last one of the said patents the same words which are used in the first of the said patents and no others, except those stating the date; to which last mentioned letters patent this defendant refers, as a whole, and makes the same a part of this, its answer.

30 8.—That in the year 1680, William Penn petitioned King Charles the Second to grant him Letters Patent for a tract of land in America, lying north of Maryland, on the east bounded with the Delaware River, on the west limited as Maryland, and northward to extend as far as plantable. That said petition was referred by the said King to the
40 Lords of the Committee of said King's most Honorable Privy Council for the affairs of Trade and the Plantations, who considered the same from about the month of June 1680 until about the month of March 1681. That among other persons consulted by said Lords of said Committee, as to said grant, was [27] his Royal Highness the Duke of York, in consideration of his recognized possession of and title to the lands and premises involved in said petition and the proposed grant thereunder. That the southerly boundary of the proposed grant was fixed and determined by the said Lords of said Committee, and by

Answer.

Lord Chief Justice North, upon their reference of the same to him, only upon the consent and approval of the said Duke of York, who was by them conceded to have held and possessed ever since the conquest of New York by Colonel Nichols, as an appendix and part of the government of New York, all that Colony or Plantation known by the name of Delaware Colony, or more particularly, New Castle Colony. And this defendant craves leave to refer to all and every of the minutes, acts and proceedings of the said Lords of the Committee of said King's Most Honorable Privy Council for the affairs of Trade and the Plantations, all correspondence with, and in behalf of said Lords of said Committee, and all acts, proceedings and correspondence by, with and in behalf of his Royal Highness, the said Duke, and of all other persons, relative to the said petition and the consequent Royal Grant of the territory and Province of Pennsylvania, and prays that the same may, when produced in this cause, be taken as a part of this its answer.

That King Charles the Second, by letters patent under the great seal of England, bearing date the fourth day of March, 1681, and published by royal proclamation on the Second day of April 1681, granted unto William Penn, his heirs and assigns, upon his petition aforesaid, all that tract or part of land in America, with all the islands therein contained, as the same is bounded on the east by Delaware River, from twelve miles distance, northward of New Castle Town, unto the three and fortieth degree of northern latitude if the said river doth extend so far northward; then by the said river so far as it doth extend, and from the head of said river the eastern bounds are to be determined by a meridian line, to be drawn from the head of the said river unto the said three and fortieth degree, the said lands to extend westwards, five degrees in longitude, to be computed from

Answer.

the said east- [28] ern bounds, and the said lands to be bounded on the north, by the beginning of the three and fortieth degree of northern latitude, and on the south, by a circle drawn at twelve miles distance from New Castle northwards and westwards unto the beginning of the fortieth degree of northern latitude, and then by a
 10 straight line westwards, to the limit of longitude above mentioned. That by the same charter, the territory of Pennsylvania was erected into a province, and appropriate powers of government thereof were conferred upon William Penn and his heirs. And this defendant prays leave to refer to said letters patent and charter and that the same may be taken as a part of this, its answer.

10. That James, Duke of York, made and executed an indenture, dated the twenty-first day of August, 1682, to
 20 the said William Penn, wherein is recited that, his Royal Highness being willing and desirous that the tract or part of land called Pennsylvania should be granted and assured unto the said William Penn and his heirs, and for that purpose having signified and declared his assent thereto to the Right Honorable the Lords of the Committee of Plantations, his said Majesty by his letters patent under the great seal of England, bearing date the fourth day of March in the third and thirtieth year of his reign, for the considerations therein mentioned, did grant
 30 unto the said William Penn and his heirs, all that tract or part of land in America, with the islands therein contained and thereunto belonging, as the same was bounded and described in and by the said Letters Patent and therein called Pennsylvania, together with the several royalties, franchises, jurisdictions and privileges therein contained, and that his Royal Highness, for the consideration therein mentioned, was willing and pleased to confirm and make any further assurance of the said tract of land and premises unto the said William Penn and his

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Answer.

heirs; and thereupon, by said indenture, said Duke released, released and forever quit claimed unto William Penn, his heirs and assigns, all the estate, right, title, interest, rents, services, duties, payments, property, claim and demand whatsoever, of his Royal Highness, of, into or out of the said tract of land and all and singular [29] other lands, islands, tenements, hereditaments and other things comprised in the said recited letters patent and within the bounds and limits therein mentioned, to have and to hold the said tract of land, rents, services, hereditaments and premises unto the said William Penn, his heirs and assigns forever. And this defendant hereby refers to the said indenture and prays that the same may be taken and considered, when in evidence in this cause, as a part of this, its answer. 10

11. By deed signed and sealed but not witnessed, bearing date the twenty-first day of August, 1682, James, Duke of York, demised, granted, bargained and sold unto William Penn all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the River Delaware in America, and all islands in the said River Delaware and the said River and soil thereof lying north of the southermost part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises and duties and all the estate, interests and powers whatsoever of his Royal Highness in or to the same, to have and to hold all the same granted, or intended to be granted, town, lands, islands to William Penn, his executors, administrators and assigns, for ten thousand years from the day before the date, without impeachment of waste, at a yearly rent of five shillings. And this defendant hereby refers to the said deed of lease and prays that the same, when in evidence in this cause, may be taken as part of this, its answer. 20 30 40

Answer.

12.—By a deed sealed and delivered in the presence of witnesses, bearing date the twenty-fourth day of August, 1682, the said James, Duke of York, demised, granted, bargained and sold unto William Penn, upon due consideration, all that town of New Castle and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the River Delaware, and all islands in the said river, and the said river and soil thereof lying north of the southernmost part of the said circle of [30] twelve miles about the said town, to have and to hold to the said William Penn, his executors and administrators and assigns, for ten thousand years, at the yearly rent of five shillings. And this defendant refers to the said deed of lease and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

13.—By a deed sealed and delivered in the presence of witnesses, bearing date the twenty-fourth day of August, 1682, the said James, Duke of York, upon due consideration, bargained, sold, let and to farm let unto the said William Penn all that tract of land upon Delaware River and Bay, beginning twelve miles South from the Town of New Castle, and extending South to the Horerkilns, otherwise called Lopen, together with free and undisturbed use and passage into and out of all harbors, bays, waters, rivers, isles and inlets belonging to or leading to the same, together with the soils, fields, woods, underwoods, mountains, hills, isles, lakes, rivers, rivulets, bays and inlets situate in or belonging unto the limits and bounds aforesaid, with all the rights of the Duke to the same, to have and to hold for the space of ten thousand years; in which deed the said William Penn covenanted inter alia to yield one-half the profits of the office of Registry &c., to the said Duke, who also reserved a right of distress for his rents. And this defendant refers to the said deed of lease and

shews that the same may, when produced in this cause, be taken as a part of this, its answer.

14. By a deed of feoffment, bearing date the twenty-fourth day of August, 1682, the said James, Duke of York, for due consideration therein mentioned, did bargain, sell, convey and confirm unto the said William Penn, his heirs and assigns forever, all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same town, lying and being upon the River Delaware, in America, and all islands in the said River Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises, duties, jurisdictions, liberties [31] and privileges thereunto belonging; and all the estate, right, title, interest, powers, property, claim and demand whatsoever, of his said Royal Highness, of, in or to the same, or any part or parcel thereof; saving always and reserving to his said Royal Highness, his agents and servants, free use of all ports, ways and passages into, through and out of the bargained premises, and every part and parcel thereof; to have and to hold the said town and circle of twelve miles of land about the same, islands, and all other the before mentioned or intended to be hereby bargained premises, with their appurtenances, unto the said William Penn, his heirs and assigns, to the only use and behoof of him the said William Penn, his heirs and assigns, forever, yielding and paying therefor yearly and every year unto his said Royal Highness, his heirs and assigns, the sum of five shillings of lawful money of England, at the feast of St. Michael the Archangel, only.

And in and by said indenture his said Royal Highness, for himself, his heirs and assigns, did covenant and grant to and with the said William Penn, his heirs and assigns,

Answer.

10 that his said Royal Highness, his heirs and assigns, would at any time or times thereafter, during the space of seven years next ensuing the date thereof, upon the request, and at the costs and charges in the law of the said William Penn, his heirs and assigns, do, make and execute, or cause or procure to be made, done and executed, all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and as-
 20 suring the said town and circle of twelve miles of land about the same, and islands, and all other premises, with the appurtenances, unto the said William Penn, his heirs and assigns, forever, as by the counsel learned in the law of the said William Penn, his heirs or assigns, shall be reasonably advised, or required.

20 And his said Royal Highness further thereby made, constituted and appointed John Moll of New Castle aforesaid, Esquire, and Ephraim Harman, of New Castle aforesaid, gentlemen, jointly and either of them severally, his true and lawfully attorneys, and by said presents, did give and grant unto the said John Moll and Ephraim Harman, his said at- [32] torneys, or either of them, full power and authority for him, and in his name and stead, into all and singular the premises thereinbefore mentioned, or intended to be thereby aliened, enfeoffed and confirmed, and into every or any part or parcel thereof, in the name of
 30 the whole, to enter, and quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to enter and receive; and after peaceable possession thereof had and taken as aforesaid, to deliver quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to the said William Penn, his heirs or assigns, or to his or their lawful attorney or attorneys, sufficiently authorized to receive and take the same, and him or them to leave in
 40 the quiet and peaceable possession thereof, according to

the true intent and meaning of said presents. And his said Royal Highness did further thereby allow of, ratify and confirm whatsoever the said John Moll and Ephraim Harman, his said attorneys, should lawfully do or cause to be done, in and about the premises, by virtue of said presents, to be as good and effectual in the law, to all intents and purposes whatsoever, as if his said Royal Highness had done the same in his own person, or had been present at the doing thereof.

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And this defendant craves leave to refer to the whole of said last recited indenture of feoffment, when produced in evidence or proved, at the hearing of this cause, and prays that the same, when so produced or proved may be taken as part of this, its answer.

By further deed or indenture of feoffment, bearing date the twenty-fourth day of August, 1682, the same James, Duke of York, for the due consideration therein mentioned, did bargain, sell, enfeoff, and confirm unto the said William Penn, his heirs and assigns forever, all that tract of land upon Delaware River and Bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware, and extending south to the Whore-hills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbours, bays, waters, rivers, isles, and inlets, belonging to or leading to the same; together with [33] the soil, fields, woods, underwoods, mountains, hills, isles, lakes, rivulets, bays, and inlets, situate in or belonging within the limits and bounds aforesaid; together with all sorts of minerals and all the estate, interest, royalties, franchises, powers, privileges and immunities whatsoever, of his said Royal Highness therein, or in or into any part or parcel thereof; saving always and reserving to his said Royal Highness, his agents and servants, free use of all ports, ways and passages into, through and out of the said

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Answer.

10 bargained premises, and every part and parcel thereof; to have and to hold the said tract of land, and all and singular other the premises, with the appurtenances, unto the said William Penn, his heirs and assigns, to the only use and behoof of him, the said William Penn, his heirs and assigns forever, to be holden of his said Royal Highness and his heirs, as of their castle at New York, in free and common soccage, yielding and paying therefor yearly and every year, to his said Royal Highness, his heirs and assigns, one rose, at the feast of St. Michael the Archangel yearly, if demanded.

20 And in and by said indenture the said William Penn covenanted for himself, his heirs and assigns, within the space of one year next ensuing the date of said presents, to set up an office or offices of Registry, wherein he should keep account of the rents and other profits arising out of said bargained premises, and annually to pay to his said Royal Highness one full moiety of all and all manner of rents, issues and profits, as well extraordinary as ordinary, as shall be made or raised upon, or by reason of the premises or any part thereof. And in said deed, his said Royal Highness reserved a right of distress for any unpaid arrears of said moiety of said profits.

30 And his said Royal Highness for himself, his heirs and assigns, did further covenant and grant to and with the said William Penn, his heirs and assigns, by said presents, that his said Royal Highness, his heirs and assigns, would at any time or times thereafter, during the space of seven years next ensuing the date thereof, upon the request and at the costs and charges in the law of the said William Penn, his heirs and [34] assigns, do, make, and execute, or cause or procure to be made, done and executed, all and every such further act and acts, conveyances and assurances, in the law whatsoever, for the further conveying and assuring the said tract of land, and all and singular

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other the premises, with the appurtenances, under the said William Penn, his heirs and assigns, forever, as by the manual learned in the law of the said William Penn, his heirs or assigns, should be reasonably advised or required.

And his said Royal Highness further thereby made, constituted and appointed John Moll of New Castle aforesaid, Esquire, and Ephraim Harman of New Castle aforesaid, gentleman, jointly, and either of them severally, his true and lawful attorneys, and thereby did give and grant unto the said John Moll and Ephraim Harman, his said attorneys, or either of them, full power and authority for him, and in his name and stead, into all and singular the premises thereinbefore mentioned, or intended to be thereby allowed, unfeoffed and confirmed, and into every, or any part or parcel thereof, in the name of the whole, to enter, and quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to take and receive; and after peaceable possession thereof had and taken as aforesaid, to deliver quiet and peaceable possession and seisin thereof, or of any part or parcel thereof, in the name of the whole, to the said William Penn, his heirs or assigns, or to his or their lawful attorney or attorneys, sufficiently authorized to receive and take the same, and him or them to leave in the quiet and peaceable possession thereof, according to the true intent and meaning of said presents. And his said Royal Highness did thereby allow of, ratify and confirm, whatsoever the said John Moll and Ephraim Harman, his said attorneys should lawfully do, or cause to be done, in and about the premises, by virtue of said presents, to be as good and effectual in law, to all intents and purposes whatsoever, as if his said Highness had done the same in his own person, or had been present at the doing thereof.

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Answer.

And this defendant hereby refers to the said indenture of feoffment and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

[35] 16.—That on or about the twenty-eighth day of October, 1682, the said William Penn, either in his proper person or by his attorney, did demand, and the said
 10 John Moll and Ephraim Harman, or one of them, being the said Duke's attorneys for such purposes, duly constituted as aforesaid, did with great form and solemnity, deliver and leave the said William Penn in the quiet and peaceable possession and seisin of the premises contained in both the said respective indentures of feoffment, pursuant to the power and authority given by the same respective indentures of feoffment by delivery to the said William Penn, of the fort at New Castle, and of turf and twig,
 20 and of water and soil of the River Delaware; memorandums of the delivery of seisin were duly prepared and attested by several witnesses, which memorandums, or records thereof, remain to this day. And this defendant hereby refers to the records and memorandums of the said liveries of seisin, and prays that they may when produced in this cause, be taken as parts of this, its answer.

17.—That on or about the said twenty-eighth day of October, 1682, the inhabitants of the town of New Castle,
 30 upon Delaware River, having heard the indenture read, made between his Royal Highness, James, Duke of York, &c., and said William Penn, wherein said Duke transferred his right and title to New Castle, and twelve mile circle about the same, with all powers and jurisdictions, and services thereunto belonging unto the said William Penn, and having seen by the said Duke's appointed attorneys, John Moll and Ephraim Harman, both of New Castle, possession given, and by their governor, the said William Penn, possession taken, whereby they were made subjects,
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Answer.

Under the king, to the said William Penn, did in the presence of God, solemnly promise to yield to him, the said William Penn, all just obedience and to live quietly and peaceably under his government. That of the said oath of allegiance and submission to the said William Penn, a memorandum was made and signed by said inhabitants of the town of New Castle, or by representatives thereof, which said memorandum, or a due record thereof, remains to this day. And this defendant hereby refers to the said memorandum of said oath of allegiance and submission, or to [36] the record thereof, and prays that the same when produced in this cause, may be taken as a part of this, its answer.

That shortly after the delivery of such possession and claim of said territory and River Delaware included within said twelve mile circle, to the said William Penn, as aforesaid, and sometime in the month of November, 1682, the said Duke of York's Commander-in-Chief and Council established at New York, issued a proclamation, declaration, or order, addressed or directed to the several justices of the peace, magistrates, and other officers at New Castle, St. Jones, Deale, alias Whore Kill, at Delaware, or within any of the bounds and limits mentioned in the said recited indentures of feoffment to the said William Penn. Said order or proclamation recites that the Royal Highness had been graciously pleased by instrument under his hand and seal, bearing date the twenty-fourth day of August, then last past, for the consideration therein mentioned, to bargain, sell, enfeoff, and convey unto William Penn, Esquire, his heirs and assigns forever, all that town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, with all islands, and the river and the soil thereof lying north of the southernmost part of the said circle, and all rents

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Answer.

and services, royalties, franchises, duties, jurisdiction, privileges and liberties thereunto belonging, and by another indenture of the same date, for the consideration therein likewise mentioned, had also bargained, sold, enfeoffed, and confirmed under the said William Penn, Esquire, his heirs and assigns forever all that tract of land upon
10 Delaware River and Bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware and extending south to the Whore Kills, otherwise called Cape in Lopen, with all isles, rivers, rivulets, bays and inlets, royalties, franchises, powers, privileges, and immunities whatsoever, and in and by the said indentures, appointed and authorized John Moll, esquire, and Ephraim Harman, gentleman, to deliver to him, the said William Penn, free and actual possession of the premises, as by the
20 said indentures, there produced and shown to said Commander-in-Chief and Council, and by them [37] well approved of and entered in the public records of said Province, did and may more at large appear; and said proclamation further recited that the said Commander-in-Chief and Council being thereby fully satisfied of the said William Penn's right to the possession and enjoyment of the premises; whereupon the said order or proclamation proceeded, that the said Commander-in-Chief and Council theretofore thought fit and necessary to signify and declare the foregoing to the persons to whom said
30 proclamation was addressed, to prevent any doubt or trouble that might arise or accrue, and to give them their thanks for their good services done in their several offices and stations during the time they remained under his Royal Highness' Government; which proclamation concluded as follows: "Expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn in and by the said indentures in the performance and enjoyment of which we wish you all happiness." And
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ANSWER.

This defendant refers to the said order or proclamation or the due record thereof, and prays that the same may, when produced in this cause be taken as a part of this answer.

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That the Duke of York having, by each of his said indentures of feoffment of the twenty-fourth of August, 1682, covenanted with the said William Penn to make and procure further assurance of the premises contained within the said recited indentures of feoffment as aforesaid, he, the said Duke of York, did in pursuance and performance of his said covenants, very shortly after the date of the said feoffments make his application to the said King, Charles the Second, for a more particular and express grant under the great seal of England, of the said lands and waters contained in the said feoffments, and since called the three lower counties, and did procure and obtain the same.

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Pursuant to the said application of the said Duke of York, the said King, Charles the Second, by his letters patent, under the great seal of England, bearing date at Westminster on or about the twenty-second day of March, which was in the thirty-fifth year of his said Majesty, Anno Domini 1683, which [38] date was not more than seven calendar months after the date of the said Duke's said feoffments, did give and grant unto said Duke of York, his heirs and assigns, all that, the town of New Castle, otherwise called Delaware, and all therein or thereunto belonging, situate, lying and being between Maryland and New Jersey in America; and all that tract of land lying within the compass or extent of twelve miles about the said town, situate lying and being upon the River Delaware, and all the islands in the said River Delaware, and the said river and soil thereof lying north of the southermost part of the said tract of twelve miles about the said town; and all that

Answer.

tract of land upon Delaware River and Bay, beginning twelve miles south from the said town of New Castle otherwise called Delaware, and extending south to Cap Lopen; together with all the lands, islands, soils, rivers harbors, mines, minerals, quarries, woods, marshes, waters lakes, fishings, hawkings, huntings and fowlings, and all other royalties, privileges profits, commodities and here
 10 ditaments, to the said town, fort, tracts of land, islands and premises, or to any or either of them belonging or appertaining with their and every of their appurtenances, situate lying and being in America, and all of the said King's estate, right, title and interest, benefit advantage, claim and demand whatsoever, of, in and to the said town, fort, lands or premises or any part or parcel thereof, and the reversion and reversions, re
 20 mainder and remainders thereof, together with the yearly and other rents, revenues and profits of the premises, and of every part or parcel thereof; to have and to hold the said town of New Castle, otherwise called Delaware, and fort, all and singular the said lands and premises with their and every of their appurtenances, thereby given and granted, or thereinbefore mentioned to be given and granted, unto the said James, Duke of York, his heirs and assigns forever; to be holden of the said King, his heirs and successors, as of his manor of East Greenwich, in his County of Kent, in free and common soccage, and
 30 not in capite or by Knight service; yielding and rendering, and the said James, Duke of York, for himself, his heirs and assigns, did thereby covenant and promise to yield and render unto the said King, his heirs and successors, [39] of and for the same, yearly, and every year, four beaver skins, when the same should be demanded, or within ninety days after such demand made.

And of the King's special grace, certain knowledge, and mere motion, for him, his heirs and successors, the
 40 said King did thereby give and grant unto the said

James, Duke of York, his heirs, deputies, agents, commissioners and assigns, full and absolute power and authority to correct, punish, pardon, govern and rule, all such the subjects of said King, his heirs and successors, or any other person or persons as should from time to time adventure themselves into any of the ports and towns aforesaid, or that should or did at any time thereafter inhabit the same, according to such laws, orders, ordinances, directions, and instructions, as by the said Duke of York, or his assigns, should be established; and in defect thereof, in cases of necessity, according to the good discretion of his deputies, commissioners, or assigns respectively, as well in all cases of matters capital and criminal as civil, both marine and others, so always as the said statutes, ordinances and proceedings be not contrary, but (as near as may be agreeable to the laws, statutes and government of the said King's realm of England; and saving and reserving to said King, his heirs and successors, the receiving, trying and determining of the appeal and appeals of any person or persons of, in, or belonging to the port, lands, and premises aforesaid, or touching judgment or sentence to be there made or given.

And by said Letters Patent the said King further granted that it should and might be lawful to and for the said Duke of York, his heirs and assigns, from time to time to nominate, make, constitute, ordain and confirm such laws as aforesaid, by such name or names, style or titles, as to him or they should seem good; and likewise to revoke, discharge, change and alter as well as to appoint singular governors, officers and ministers, which should thereafter be by him, or them, thought fit and expedient to be made or used within that aforesaid town, lands and premises; and also to make, ordain and establish all manner of laws, orders, directions, instructions, forms and ceremonies of government and

Answer.

magistracy, fit and necessary for and concerning the government of the said town, fort, lands and premises, so always as the same be not contrary to the laws and statutes of said King's realm of England, but (as near as may be) agreeable thereunto, and the same at all times thereafter to put in execution, or abrogate, revoke
 10 or change not only within the precincts of the said town, fort, lands and premises, but also upon the seas, in going and coming to and from the same, as he, the said Duke of York, or his heirs and assigns, in their good discretion, shall think fittest for the good of the adventures and inhabitants. And the said King did thereby further grant, ordain and declare that such governors, deputies, officers and ministers, as from time to time shall be authorized and appointed in manner and form
 20 aforesaid, shall and may have full power and authority within the said town, fort, lands and premises, to use and exercise martial law in case of rebellion, insurrection and mutiny, in as large and ample manner as the said King's Lieutenants, in his counties within his realm of England, had or ought to have by force of their commission of Lieutenancy, or any law or statute of his said realm.

And the King by said Letters Patent did further for himself, his heirs and successors, grant unto the said
 30 Duke of York, his heirs or assigns, in his or their discretions, from time to time, to admit such and so many person and persons to trade and traffic unto and within the said town, fort, lands and premises, and into every and any part and parcel thereof, and to have, possess and enjoy any lands and hereditaments in the parts and places aforesaid, as they shall think fit, according to the laws, orders, constitutions, and ordinances, by the said Duke of York, his heirs, deputies, commissioners and assigns, from time to time, to be made and
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answer.

established by virtue of, and according to, the true intent and meaning of said presents, and under such conditions, reservations and agreements, as the said Duke of York his heirs and assigns, should set down, order, direct and appoint, and not otherwise, as aforesaid.

[41] And the said King, did further of his especial Grace, certain knowledge, and mere motion, for himself, his heirs, successors, give and grant unto the said Duke of York, his heirs and assigns, by said presents, that it should and might be lawful to and for him, them, or any of them, at all and every time and times thereafter, out of any of the said King's realms or dominions whatsoever, to take, load, carry and transport, in and into their voyages for and towards the plantation of the said town, fort, lands, and premises, all such and so many of the said King's loving subjects, or any other strangers being not prohibited, or not restrained and that would become the said King's loving subjects, and live under his allegiance, and should willingly accompany them on the said voyage, together with all such clothing, implements, furniture, or other things, usually transported and not prohibited, as should be necessary for the inhabitants of the said town, fort, lands and premises, and for their use and defense thereof, and managing and carrying on the trade with the people there, and in passing and returning to and fro; yielding and paying unto the said King his heirs and successors, the customes and duties therefore due and payable, according to the laws and customs of the said King's realm. 10
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And the said King by said letters patent did also for himself, his heirs and successors, grant to the said Duke of York, his heirs and assigns, and to all and every such Governor and Governors, Deputy or Deputies, or their officers or ministers, as by the said Duke, or his heirs or assigns, should be appointed, to have power and authority 40

Answer.

of government, and command in and over the inhabitants of the said town, fort, lands and premises, that they and every one of them, should, and lawfully might, from time to time, and at all times forever thereafter, for their several defences and safety, encounter, repulse and expel and resist by force of arms, as well by sea as by land, and by all ways and means whatsoever, all such person and persons as, without the special license of the said Duke, his heirs or assigns, should attempt to settle and inhabit within the several precincts and limits of the said town, fort, lands and premises, and also all and every [42] such person or persons whatsoever, as should attempt at any time thereafter, the destruction, invasion, detriment or annoyance, to the parts, places, town, fort, lands and premises aforesaid or any part thereof.

And the said King did, by his said Letters Patent, declare his will and pleasure to be, and did thereby declare and grant, that said Letters Patent, or the enrollments thereof should be good and effectual in law, to all intents and purposes whatsoever notwithstanding the not well or true reciting or mentioning of the premises, or any part thereof, or of any former or other Letters Patent or grants whatsoever, made or granted of the premises, or of any part thereof, by the said King, or any of his progenitors, unto any person or persons whatsoever, bodies politic or corporate, or any other law or other restraint uncertainty or imperfection whatsoever to the contrary in any wise notwithstanding, although express mention of the true yearly value or certainty of the premises, or any of them, or of any other gifts or grants by him, or by any of his progenitors, theretofore made to the said Duke of York, in said presents was not made, or any statute, act, ordinance, provision, proclamation or restriction theretofore had, made, enacted or provided, or any other matter,

Answer.

cause or thing whatsoever, to the contrary thereof in any wise notwithstanding.

As by reference to said Letters Patent will more fully and at large appear. To which Letters Patent this defendant hereby refers and prays that the same may, when produced in this cause, be taken as a part of this, its answer.

That immediately after the said last mentioned Letters Patent had passed the great seal, the said Duke of York, who was no other than a trustee for the said William Penn therein, and had obtained them in pursuance of his said covenant for further assurance, did deliver over the same original last mentioned letters patent under the great seal, to the said William Penn, into custody and possession of whom, his heirs and assigns, the same did thereby pass and ever after remain.

[43] 20.—And this defendant further avers that, upon the making of the feoffments from the Duke of York to the said William Penn, and of the said Royal Letters Patent to the Duke of York, for the benefit of the said William Penn as aforesaid, the said William Penn straightway entered into full seisin, possession and exercise of the lands, territories, rivers, waters, the royalties, government and rights of government, and jurisdiction, whether legislative, judicial or executive, conferred by the said feoffments and said Letters Patent; and particularly entered upon the possession and full exercise of all of the titles, powers, royalties, privileges, franchises, jurisdictions, governments and rights of government conferred by said two last mentioned feoffments and said letters patent, within, upon and over the territory, lands, soils, waters, and property included within the compass of said twelve mile circle, and had and exercised, within said last mentioned bounds all and every the rights of a proprietor, under the terms of all of his muniments of title aforesaid.

Answer.

10 And further that in the improvement and settlement of said last mentioned territories, the said William Penn and his heirs expended large sums of money. That the said William Penn, and his heirs, continued in the possession, enjoyment and exercise of all the powers and privileges, rights and titles, jurisdiction and government of the said territories, lands and premises, with the full knowledge of, and with the full recognition of his governmental and proprietary rights therein by the Crown of England, and without its let or hindrance, from the time of the taking of possession and exercise of the same as aforesaid, until the time of the American Revolution, excepting that for a short period during the reign of Queen Anne of England, he was removed from the government of his said Provinces, but shortly thereafter was most fully and completely restored thereto. All of which by reference to 20 very numerous grants by William Penn and his heirs to sundry persons, and from numerous legislative, judicial and executive acts, laws, records, documents, provincial charters and acts of provincial settlement, will more fully and at large appear, to all of which this defendant prays leave to refer and to make the same, when produced in this cause, a part of this, its answer.

30 [44] 21.—That on or about the month of December 1682, the said William Penn under his hand and seal, as proprietor and governor of the Province of Pennsylvania, and of the said three Lower Counties, issued and published an Act of Union for annexing and uniting of the counties of New Castle, Jone's, and Whorekills, alias New Dale, to the Province of Pennsylvania. The said Act of Union, after sundry recitals of the title of the said William Penn to the said Province of Pennsylvania and the said Three Lower Counties, as by reference thereunto will fully appear enacted that the county of New Castle, Jone's and 40 Whorekills, alias New Dale, should be annexed, and by

Answer.

the authority of the said proprietor and governor, by and with the advice and consent of the deputies of the freemen of said Province, and counties aforesaid in assembly made, were thereby annexed unto the Province of Pennsylvania, as of the proper territory thereof; and that the people therein should be governed by the same laws, and enjoy the same privileges in all respects, as the inhabitants of Pennsylvania did or should enjoy from time to time therein, anything in said law, or any other law, act or thing, in said Province to the contrary thereof in any wise notwithstanding. And this defendant hereby refers to the said Act of Union and prays that the same when produced in this cause, may be taken as a part of this, its answer. 10

22.—That the union of the said Three Lower Counties to the Province of Pennsylvania continued in full force, both legislative and otherwise, until about the year 1701; in which said year, the said William Penn granted and promulgated a charter of privileges to the inhabitants of the said Province of Pennsylvania and said Three Lower Counties, called the Territories thereof, whereby he granted full permission under said charter of privileges for the said Province and the said Territories, to have and maintain several legislatures. That subsequent to about the year 1702, no further joint legislative assemblies of representatives from the Three Lower Counties and from the said Province of Pennsylvania were ever held. And this defendant hereby refers to the said charter of Privileges, to the acts and proceedings of the legislative bodies of [45] the Three Lower Counties, and of the said Province of Pennsylvania, so far as relating to the said legislative disunion between the Three Lower Counties and the said Province of Pennsylvania, and prays that the same may, when produced in this cause, be taken as a part of this, its answer. 20 30 40

Answer.

23.—That from the year 1682 down to the year 1776, the said William Penn and his heirs, under various wills, deeds of settlement, and descents, continually had, held, possessed, retained, and exercised the rights of proprietor and proprietors of the territory, lands, waters, and premises, included within the compass of the said twelve mile
 10 circle, under the powers, titles, and authorities granted to the original proprietor, and so held and exercised by him as aforesaid, and as modified by various charters of privileges granted by said proprietors to the Province of Pennsylvania, and the said Three Lower Counties. And this defendant prays leave to refer to the said wills, deeds of settlement, and descents, or to the due records thereof, and to the several charters of privileges, for further particulars in this behalf; and that the same may, when produced in this cause, be taken as parts of this, its answer.

20 24.—That at the date of the American Revolution, and by the Declaration of Independence, bearing date the Fourth day of July, 1776, the territorial limits of the State of Delaware extended to and included, inter alia, all those lands and that portion of the Delaware River, its waters and the soil and bed thereof to low water mark on the New Jersey shore, included within the compass of said twelve mile circle; and such its limits and boundaries had
 30 continuously been and remained down to the date of said Revolution from about the year 1682. That by said American Revolution, the State of Delaware became and was and from thenceforth has been, a free and independent state, and as such became entitled to have and to hold all such rights as free and independent states may have or hold to do all acts and things which independent states may of right do; and by force of the said Revolution and said Independence the said State of Delaware became invested with all and every power of govern- [46] ment
 40 in and over the territory of said State and the tide waters

Answer.

adjacent thereto, and particularly to the full extent of the limits and boundaries of said State as they existed at the time of said American Revolution as aforesaid, and also became invested, not only with all the property and rights of property, royalties, powers, and franchises, governmental powers and authority and jurisdictions within and appertaining to said State, which immediately before said Revolution were vested in the then and former proprietor or proprietors of its territory within the limits and bounds aforesaid, but also with all the property rights of property, privileges, franchises, powers, governmental power and jurisdictions, if any thereof yet then remained in the Crown of England, in manner and form as they were so vested in said Crown; that by means of said Revolution, the said independence of the State of Delaware and the Treaty of Peace between the King of Great Britain and the United States of America, concluded at Paris, September third, 1783, all that portion of the bed, soil and water of the Delaware River last hereinbefore mentioned, to low water mark on the New Jersey shore and included within the compass of said twelve mile circle, became vested in the simple in the State of Delaware; and so the title to the bed of said portion of said river, this defendant respectfully submits, hath ever since continued and now is.

25.—That to and in the said bed and soil of said portion of the Delaware River and to jurisdiction in and over said river, so as aforesaid claimed, this defendant hath title and right by long and peaceable possession, use and enjoyment, which use, possession and enjoyment began with the earliest determination of the said boundaries of said State as hereinbefore set forth and hath ever since continued, without interruption or dispute. That in, over and with reference to the portion of said Delaware River and the soil and the bed thereof, as a part of the recognized territory of said State of Delaware, the said State.

Answer.

10 hath from time to time conclusively passed and enforced legislative acts, its courts have continuously, both before and after the American Revolution, exercised jurisdiction and issued and enforced processes, writs, [47] orders, judgments and decrees, and the courts of the United States within the district of said State, have enforced their processes, orders and writs. That with reference to the rights of fishing and every regulation and control thereof in said river, within the limits of said twelve mile circle, the State of Delaware hath never relinquished or abandoned the proprietary rights which it hath always possessed, had and defended, from the inception of its title to the bed and soil and waters of said river, within the limits of said twelve mile circle, in the year 1682, to the present day, but on the contrary, this defendant saith that the said proprietary rights, and title to said fisheries and fish-
20 ings in said portion of said river, and the regulation and control thereof, this defendant hath continuously from the said year 1682 to the present day, claimed, exercised and defended.

30 That in the exercise, by this defendant, of proprietary right, jurisdiction and sovereignty, in and over the said twelve mile circle, its Legislature did, on May 27th, 1813, pass an Act entitled "An Act Ceding to the United States of America the jurisdiction which this State has over the Pea Patch, on certain conditions therein mentioned" (being Digest of Delaware Laws of 1829, page 673), in and by which the State of Delaware ceded to the United States of America, for the purpose of erecting forts, batteries, and fortifications thereon for the protection of the River Delaware and the adjacent country, a certain island in the River Delaware and within the twelve mile circle; which was thereupon in pursuance of said cession, occupied by the Government of the United States of America,
40 and fortifications were thereupon built thereon, and have

Answer.

ever since been maintained. That after said cession, and
 prior to the year 1847, the title of the United States of
 America under said cession, was questioned by James
 Humphrey who claimed through sundry mean convey-
 ances, under grants from the State of New Jersey; and
 that for the purpose of determining the right, title, sover-
 eignty and jurisdiction of the State of Delaware in and
 over the said island, at the time of said cession, as afore-
 said, to the United States of America, an arbitration of and
 concern- [48] ing the same was had, heard, and deter-
 mined by and before the Honorable John Sergeant of Penn-
 sylvania, who was designated as an arbitrator for the ex-
 press purpose of determining the said right, title, jurisdic-
 tion and sovereignty, under and pursuant to the authority
 of an Act of the Congress of the United States, approved
 August 8th, 1846, under which the said arbitrator was
 appointed, and, when so appointed, was constituted a spe-
 cial tribunal for determining the same. That the question
 of right, title, jurisdiction and sovereignty of the State of
 Delaware of, in, to and over the River Delaware and the
 soil thereof, within the twelve mile circle, was the very
 question involved in said litigation and determined by the
 said special tribunal so created for that purpose; and that
 in the said litigation and decision the parties to this suit,
 that is to say, the States of New Jersey and Delaware,
 were privies in estate to and with the respective parties.
 That during the hearing and determination of said arbitra-
 tion, full and accurate minutes of all proceedings were
 taken by the Secretary of the reference, who was then,
 theretofore and subsequently, the regular and only re-
 porter of the decisions of the District and Circuit Courts
 of the United States in the District of Pennsylvania and
 the Third Circuit; and that said minutes, having been
 carefully written out, were transmitted to the proper de-
 partment of the Government of the United States and

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Answer.

were, pursuant to a resolution of the Senate of the United States, printed and published as Senate Executive Document No. 21 of the first session of the Thirtieth Congress. That the decision of the said arbitrator was, that the title and jurisdiction to and over said island and to the river and soil thereof, within the said twelve mile circle, was
 10 in the said State of Delaware. That the said decision was reached after the most thorough examination of the facts, upon the original documents, the testimony of witnesses, the law applicable thereto, and the argument of able counsel representing both sides. And the defendant craves leave to refer to the said Senate Executive Document No. 21, and to the record and proceedings of the said arbitration and decision, when produced at the hearing of this cause.

20 [49] Whereupon this defendant, having fully answered, confessed, traversed and avoided or denied all the matters in the said Bill of Complaint material to be answered, according to the best knowledge and belief of this defendant, humbly prays this Honorable Court to enter its decree that this defendant be hence dismissed with its reasonable costs, in this behalf, most wrongfully sustained.

State of Delaware, by

REUBEN SATTERTHWAITE, JR.

30

Attorney General

Solicitor of the Defendant.

40

Notes.

(1)

NOTICE.

TO:

Hon. Reuben Satterthwaite, Jr., Attorney-General of the State of Delaware.

RE:

Please be advised that on Monday, December 9, 1929, the plaintiff will apply to the Court for the appointment of a Special Master. 10

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

Dated December 2, 1929. 20

Service hereof is acknowledged this 2d day of December, 1929.

REUBEN SATTERTHWAITE,
Solicitor for Defendant

30

40

Motion for the Appointment of a Special Master.

[2] **MOTION FOR THE APPOINTMENT OF A
SPECIAL MASTER.**

10 Comes now the State of New Jersey, by its Attorney-
General, and asks the Court for the appointment of a
Special Master to take testimony and prepare and file his
findings, with recommendations for a decree herein.

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

WALTER C. BACON,
Counsel.

20 December 9, 1929.

[1] **MOTION FOR THE APPOINTMENT OF A
SPECIAL MASTER IN THIS CASE.**

Mr. Duane E. Minard, of Newark, New Jersey, for the
motion.

30 January 6, 1930, Granted; and William L. Rawls,
Esquire, of Baltimore, state of Maryland, is appointed
Special Master in this cause, with the power to summon
witnesses, issue subpoenas, and to take such testimony as
may be introduced and such as he may deem necessary to
call. The master is directed to make findings of fact and
conclusions of law, and to submit the same to this court
with all convenient speed, together with his recommenda-
tions for a decree. The findings, conclusions and recom-
mendations of the special master shall be subject to con-
sideration, revision, or approval by the court. (280 U. S.
40 529; 74 L. ed. 595.)

10

NEW JERSEY-DELAWARE BOUNDARY CASE.

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1933

No. 13, Original.

STATE OF NEW JERSEY,

Plaintiff.

vs.

STATE OF DELAWARE,

Defendant.

*On Exceptions to the
Report of the
Special Master.*

Brief for Plaintiff.

WILLIAM A. STEVENS,

*Attorney General,
Solicitor for Plaintiff.*

GEORGE S. HOBART,

DUANE E. MINARD,

Counsel.

December 18, 1933.

INDEX

	PAGE
TABLE OF CASES.....	v
CONSTITUTION	viii
United States	viii
TREATIES	viii
STATUTES	viii
United States	viii
New Jersey	viii
Delaware	viii
STORIES	viii
PUBLIC DOCUMENTS	ix
TEXT BOOKS	x
STATEMENT OF THE CASE.....	1
Summary of Pleadings	2
The Master's Report	4
Exceptions to the Report.....	4
The Territory in Dispute.....	5
(1) In the river and within the limits of the circle.....	5
(2) In the river below the circle.....	5
(3) In the bay	5
Explanatory Maps	5
Features common to both maps.....	7
Distances	7
Appendices	8
History of Boundary Dispute.....	8
JURISDICTION	11
SUMMARY OF ARGUMENT.....	11
ARGUMENT	13

	Page
CHAPTER ONE	11
The Boundary Within the Twelve Mile Circle	11
I—THE ENGLISH TITLE	11
II—THE TITLE OF THE STATE OF NEW JERSEY	11
(a) Letters Patent of March 12, 1664 and Later Deeds.....	11
(b) The American Revolution.....	14
(c) Practical Construction of Boundary.....	14
(1) Action of Penn and the Proprietors.....	16
Estoppel	31
(2) Riparian Rights and Grants.....	35
Modification of the Common Law.....	36
Appropriation of Tidal Lands.....	47
Riparian Laws and Grants.....	48
Special Acts	50
Wharf Testimony	52
Grants Under General Laws.....	54
Grants to Delaware Corporations	57
Grants to the United States Government.....	62
Assertions by Delaware	63
Prescriptive Rights	64
(3) Several and Common Fisheries.....	69
(4) The Circular Boundary.....	70
(5) Boundary Laws and Maps.....	89
New Jersey Acts	83
Delaware Acts	89
Boundary Maps	92
(6) Exercise of Jurisdiction.....	108
Taxation	108
By the Royal Governors of New Jersey.....	109
By New Jersey	114
By Delaware	116
The Balance of Proof.....	122
(7) The Compact of 1905.....	124
Summary of Point II.....	132

	PAGE
III—THE TITLE OF THE STATE OF DELAWARE.....	133
Summary	133
(a) Government of Delaware Counties.....	136
(1) From 1664 to 1682.....	136
The Record Title on August 24, 1682.....	137
Alleged Possession by the Duke Prior to 1682....	139
Alleged Government by the Duke Prior to 1682....	141
Discussion of Defendant's Exhibits.....	143
Exhibit 510	143
Exhibit 513	145
Exhibit 514	148
Exhibit 515	149
Exhibit 516	150
(2) From 1682 to 1776.....	156
(b) Power of Crown to Grant Bed of River.....	162
(c) Feoffment of August 24, 1682.....	170
The Definition of Feoffment.....	171
The Terms of the Feoffment.....	173
The Construction of the Feoffment.....	175
Validity of Feoffment is Dependent on Possession...	181
The Feoffment Could Not Grant Bed of River.....	181
(d) Letters Patent of March 22, 1682/3.....	182
Procedure for Letters Patent.....	183
Terms of the Grant.....	189
(1) Surrender of Said Letters Patent.....	191
The Dover Document.....	201
(2) Claim of Title by Estoppel.....	226
The Act of Union.....	232
The Crown's Rejection of Penn's Claim of Title.....	232
Approval by the Crown of Deputy Governors.....	249
No Prescriptive Right in River East of Main Ship	
Channel	267
Ports and Admiralty Courts.....	269
(e) The Crown's Claim of Title.....	231
(f) Repudiation of Penn's Title by the State of Delaware....	274

	Page
IV—LITIGATION RELATING TO TITLE.....	284
(a) Penn v. Baltimore.....	284
The Proceedings Before the Chancellor.....	303
(b) Pea Patch Island Case.....	314
History of the Controversy.....	315
New Jersey Claim of Title.....	315
The Wall Opinion	320
Justice Baldwin's Opinion in Gale v. Behling.....	323
The Delaware Suit.....	328
Official Reports on Pea Patch Controversy.....	329
Intermediate Delaware Acts.....	330
The Sargeant's Opinion	330
Title to Pea Patch Island.....	349
 CHAPTER TWO	 352
The Boundary Below the Circle.....	352
Findings	352
Conclusion	353
Recommendation	353
Delaware Titles	353
The Thalweg Rule	359
The Question of the Boundary in the Bay is One of Substantial Importance	362
The Ship John Bed	366
The Planting Grounds	375
The Compact	376
A Practical Boundary	377
Delaware Laws	378
CONCLUSION	381
THE TRUE BOUNDARY.....	381

TABLE OF CASES.

	PAGE
<i>The American & Ocean Ins. Co.'s v. Bales of Cotton</i> , 1 Peters 511	281
<i>Arkansas v. Mississippi</i> , 250 U. S. 89.....	64, 67, 363
<i>Arkansas v. Tennessee</i> , 246 U. S. 158, 269 U. S. 152.....	363, 378
<i>Arnold v. Mundy</i> , 6 N. J. L. 1.....	20, 37, 38, 46, 164, 320, 362
<i>Attorney General v. Delaware & Bound Brook R. R. Co.</i> , 27 N. J. E. 1, aff. (1876) 27 N. J. E. 631.....	46, 72, 138
<i>Balley v. P. W. B. R. R. Co.</i> , 4 Harr. (Del.) Rep. 389.....	38
<i>Bell v. Gough</i> , 23 N. J. L. 624.....	38, 44, 48, 55, 170
<i>Benest v. Pison</i> , Knapp's Rep. 60-73.....	64
<i>Bennett v. Boggs</i> , 1 Bald. (U. S. C. C.) 60 (1830) 41, 43, 46, 65, 69, 73, 138, 320, 325, 326, 332, 345, 347	378
<i>Bichel v. Poke</i> , 5 Harr. (Del.) 325.....	37, 163
<i>Blundell v. Gatterall</i> , 5 Barn. & Ald. 268.....	42
<i>Bowman's Devises v. Waltham</i> , 2 McLean 376.....	38
<i>Bringhurst v. O'Donnell</i> , 14 Del. Chy. 225.....	168
<i>Browne v. Kennedy</i> , 5 H. & Johns. (Md.) R. 203.....	163
<i>Carter v. Murcott</i> , 4 Burrows 2162.....	363
<i>Cassia v. Tennessee</i> , 246 U. S. 289.....	38
<i>Clauson v. Primrose</i> , 4 Del. Chy. 643.....	73, 138
<i>Cobb v. Davenport</i> , 32 N. J. L. 369.....	281
<i>Coffee v. Grover</i> , 123 U. S. 1.....	38, 40, 65, 73, 138, 325, 326, 332, 344, 347, 348
<i>Corfield v. Coryell</i> , 4 Wash. C. Ct. Rep. 370, 6 Fed. Cas. 546	281
<i>Craig v. Radford</i> , 3 Wheat. 594.....	163
<i>Duke of Somerset v. Fogwell</i> , 5 Barn. & Cress. 383.....	280
<i>Fairfax's Devisee v. Hunter's Lessee</i> , 7 Cranch. 603.....	362
<i>The Fame</i> , 3 Mason 147; Fed. Cas. No. 4634.....	46, 69
<i>Fitzgerald v. Fannce</i> , 46 N. J. L. 536 (1884).....	65, 69, 114, 281, 326, 328, 331, 332, 343, 354, 362, 378
<i>Gale v. Behling</i> (Sen. Doc. No. 140, 25th Cong. 2nd Ses., Jan. 27 1838)	163
<i>Gann v. Fishers of Whitestable</i> , 11 H. of L. 192.....	363
<i>Georgia v. South Carolina</i> , 257 U. S. 516.....	34, 38, 164, 180, 331, 332, 349
<i>Gough v. Bell</i> , 21 N. J. L. 156	42, 69, 169
22 N. J. L. 441	44, 69, 347
23 N. J. L. 624	

	PAGE
Handly, Lessee v. Anthony, 5 Wheat. 374.....	35, 378
Hardin v. Jordan, 140 U. S. 371.....	50
Harlan & Hollingsworth v. Paschall, 5 Del. 435.....	38
Howard v. Ingersoll, 13 Howard 381.....	378
Hully v. Security Trust & Sd. Co., 5 Del. Chy. 578.....	38
Indiana v. Kentucky, 136 U. S. 479.....	67
Iowa v. Illinois, 147 U. S. 1.....	353
Johnson's Lessee v. M'Intosh, 8 Wheat. 543.....	13, 14, 142, 164
Kansas v. Colorado, 206 U. S. 46.....	50
Kean v. Rice, 11 Sarg. & Rawle 203 (1824).....	41, 65, 326, 344, 347
Lord Fitzwalter's Case, 1 Modern 106.....	163
Louisiana v. Mississippi, 202 U. S. 1.....	67, 84, 101, 362, 380
McCarter v. Hudson Water Company, 70 N. J. E. 525; aff. 70 N. J. E. 695.....	38
Marine Railway and Coal Co. v. United States, 257 U. S. 47.....	268, 315
Martin v. Hunter, 1 Wheat. 304.....	280
Martin v. Waddell, 16 Peters 367.....	13, 20, 42, 50, 162, 245, 320, 331, 332
Maryland v. West Virginia, 217 U. S. 1.....	67
Massachusetts v. New York, 271 U. S. 65.....	67, 163
Mayor and Council of the City of Hoboken v. Pennsylvania Rail- road Co., etc., 124 U. S. 656.....	50
Michigan v. Wisconsin, 270 U. S. 295.....	67, 107
Minnesota v. Wisconsin, 252 U. S. 273.....	56, 363
258 U. S. 149.....	363
Missouri v. Kentucky, 78 U. S. 395.....	122, 348, 349
Molcomson v. O'Dea, 10 House of Lords 593.....	163
Moore v. Attorney General, Irish Rep. 1929, Pt. 3 (March), 191	163, 344
Moore v. Ventnor Gardens, 105 N. J. E. 730.....	50
Morris v. United States, 174 U. S. 196, 226.....	50
Nabob of the Carnatic v. The East India Co., 2 Ves. Jun. 56....	312
New Jersey v. New York, 283 U. S. 336.....	29
New Jersey v. State of Delaware, No. 17 Orig., October Term, 1876, 205 U. S. 550 (1907).....	10, 63, 119, 124, 126
Open Boat, 1 Ware 18; Fed. Cas. No. 10548.....	362
Orr v. Hodgson, 4 Wheat. 453.....	281

	PAGE
<i>Paul v. Hazelton</i> , 37 N. J. L. 106.....	50
<i>Pea Patch Island Case</i> (Sargeant's Opinion), 30 Fed. Cas. 1123	213, 378
<i>Penn v. Baltimore</i> —"Breviate".....	64, 304
<i>Pittsburg v. Scott</i> , 1 Barr. 314, 315.....	43
<i>Pollard v. Hogan</i> , 3 Howard 212.....	281
<i>Pollard's Lessees v. Kibbe</i> , 14 Peters 353.....	13, 281
<i>Porter v. Investors Syndicate</i> , 287 U. S. 346.....	47
<i>Rhode Island v. Massachusetts</i> , 15 Peters 233; 4 How. 591; 12 Peters 657.....	8, 67, 121, 281, 285, 312, 342, 343, 344
<i>Rhode Island, Colony of, v. Colony of Massachusetts, Privy Council</i> , 1746, 3 Acts of Privy Council, Colonial Ser. 36.....	285
<i>Rhode Island v. Colony of Connecticut, Privy Council</i> 1727, 3 Acts of Privy Council, Colonial Series 10.....	285
<i>Rundie v. Delaware & Raritan Canal Co.</i> , 14 How. 80 (1 Wall. Jr. 275)	47
<i>St. Anthony Falls Water Power Co. v. Board of Water Comm'rs</i> , 168 U. S. 349.....	47, 50
<i>St. Louis v. Rutz</i> , 138 U. S. 226.....	47
<i>Shively v. Bowlby</i> , 152 U. S. 1.....	36, 46, 50, 164, 187
<i>Smoot Sand and Gravel Co. v. Washington Airport, Inc.</i> , 283 U. S. 348.....	315
<i>Sobolewski v. German</i> , 32 Del. Rep. 540.....	38
<i>State v. Morris</i> (Note to <i>Emery v. Collings</i>), 1 Harr. (Del.) 326	8, 121
<i>State v. Jersey City</i> , 25 N. J. L. 525.....	38
<i>State Board of Health v. Phillipsburg</i> , 83 N. J. E. 402.....	38
<i>State v. Reybold</i> , 5 Harr. (Del.) Rep. 484.....	38
<i>Stevens v. Paterson & N. R. R. Co.</i> , 34 N. J. L. 532 (N. J. Court of Errors & Appeals, 1870)	38, 46, 50
<i>Taylor v. Horde</i> , 1 Rep. Cas. K. B. 60.....	173
<i>Trinity Church Case</i> , 4 Paige (N. Y.) 498.....	37
<i>United States v. Holt State Bank</i> , 270 U. S. 49.....	50
<i>United States v. Percheman</i> , 7 Peters 51.....	281
<i>United States v. River Rouge Imp. Co.</i> , 269 U. S. 411.....	46
<i>United States v. Texas</i> , 143 U. S. 8, 621, 162 U. S. 1 67, 92, 103, 104, 106, 343	
<i>Vermont v. New Hampshire</i> , 289 U. S. 593.....	15, 35, 108
<i>Virginia v. West Virginia</i> , 246 U. S. 565.....	285

	Page
Ware v. Hylton, 3 Dallas 199.....	281
Warren v. Matthews, 6 Modern 73.....	143
Wooley v. Campbell, 37 N. J. L. 163.....	164
Wyoming v. Colorado, 259 U. S. 419.....	47

TABLE OF AUTHORITIES.
(Exclusive of Exhibits.)

U. S. CONSTITUTION

Article III, Sec. 2, Sec. 341.....	11
------------------------------------	----

TREATIES.

Treaty of Paris (1783)	38
Treaty of Amity, Commerce and Navigation (Jay Treaty) 1796	280

STATUTES.

United States.

Title 28, U. S. C. A.....	11
---------------------------	----

New Jersey.

P. L. 1851	48
P. L. 1864, Chapter 391	48
P. L. 1869, Chapter 383	49, 54, 128
P. L. 1871, Chapter 255	50, 55, 128
P. L. 1915, Chapter 242	55
P. L. 1917, Chapter 189	51
N. J. Comp. Stats. (1910).....	9

Delaware.

Laws, 1869, Chapter 382	86
Laws, 1889, Chapter 448	87
Laws, 1921, Chapter 4	87

HISTORIES.

British Empire, History of, Cambridge.....	285
Chalmers' History of the Revolt of American Colonies ..23, 37, 138, 153, 158	82
Chester County, Pa., Futhy & Cops (1881).....	213
Delaware, History of, Conrad's	213

	PAGE
Delaware, History of, Scharf's	23, 153, 192
Delaware, History of, Vincent's	137, 138, 153, 355, 378
Delaware, History of, Ferris'	23
England, History of, 1 Macaulay's	142
England, History of, Trevalyan's	284
Great Seal, History Notes, Maxwell-Lyte.....	184
Maryland, History of, Scharf's.....	153, 178
New Jersey, History of, Mulford's	23
New Jersey, History of, Smith's	23, 101
Pennsylvania, History of Proprietary Government, Shepherd's	138
Pennsylvania, Hazard's Annals	138
Pennsylvania, History of, Proud's (1797).....	23, 82, 207
Pennsylvania, Historical Review of the Constitutional Govern- ment of, Benjamin Franklin.....	159
Puttick & Simpson, Lib. of Wm. Penn, London, 1872.....	261
Trenton, History of, Princeton Univ. Press, 1929.....	320
United States, History of, Bancroft's.....	23

PUBLIC DOCUMENTS.

American State Papers, Foreign Rel. I, 148.....	65, 95, 344, 347
Attorney General Opinions.....	65, 95, 344, 347
Chamizal Arbitration (United States-Mexico) June 24, 1910....	392
Executive Message, Doc. 91, 18th Cong. 1st Session.....	316, 318
House of Representatives Report No. 59, 23rd Cong. 2d Ses....	316, 317
House of Representatives Report No. 92, 24th Cong. 1st Ses....	315, 316, 318
New Jersey Archives, 1st Series.....	23
New York Colonial Documents.....	23
Pennsylvania Archives, First Series	97
Second Series	98
Fourth Series	211, 212
Proceedings and Debates of Parliament.....	235
Report of the Resurvey of the Maryland-Pennsylvania Boundary, Part of the Mason & Dixon Line, 1909.....	261
Senate Doc. No. 21, 30th Cong. 1st Session	213, 378
Senate Doc. No. 40, 25th Cong. 2d Session	316
Senate Doc. 140, 25th Cong. 2d Session (1833).....	281, 323, 324
United States Army Engineers' Report, 1929.....	36

X

TEXT BOOKS.

	PAGE
Angell on Tide Waters.....	36, 42, 46, 50, 64, 168, 269, 361
Bacon's Abridgement	164
Blackstone's Commentaries	141, 167, 183, 369
Blackstone, "The Great Charters" (1759).....	216
Bouvier's Law Dictionary, Baldwin's Century Edition.....	24, 171
Bowen, "International Law" (1896).....	361
Chalmers' Colonial Opinions.....	37, 197
Clark's Summary of Colonial Law.....	169
Comyn's Digest	64, 141, 167
Corpus Juris, Vol. 59, p. 50.....	363
Creasy, "First Platform of International Law" (1876).....	361
Cruise's Digest of the Laws of England.....	187
Daniel's Chy. Pl. & Pr.....	311
Farnham on Waters.....	50, 361
"Fennia," Vol. 49, No. 1 (1929) by K. Haataja.....	359
Fenwick, "International Law" (1924).....	361
Fowler, New York Real Property Law.....	37
Greenleaf on Evidence.....	120
Hale's Treatise, "De Portubus Maris," Hargraves, No. 93.....	36
Hall, "Treatise on International Law" (Fifth Edition, 1904)....	361
Halleck, "International Law" (1908).....	361
Hyde, "International Law" (1922).....	361, 362
"Judicial Settlements of Controversies between States" (1918)	285
Kaekenbeeck, "International Rivers" (Grotious Soc. Pub., Lon- don, 1918)	361
Kent's Commentaries	36, 172
Leaming & Spicer.....	16, 17, 18, 27, 37
Lewis, Eminent Domain, 2d Ed.....	59
Malloy's Treaties	38, 280, 362
Moore's International Law Digest.....	64, 167, 350, 360
Moore & Hall, History and Law of Foreshore & Seashore (3d Ed.)	269
Oppenheim, "International Law" (1912).....	361
Phillimore, Comm. on International Law.....	64, 361
Pollock & Maitland.....	284
Puffendorf, "Elements of Universal Jurisprudence" (Clarendon Press, 1913)	361
Redmond's Treaties	362
Travers Twiss, "Law of Nations" (1861).....	361

	PAGE
Thorpe, American Charters.....	38
Vattel, Law of Nations.....	37, 64, 141, 361
Wheaton, "Elements of International Law" (Eighth Edition, 1866)	64, 361
Woolsey, "Introduction to the Study of International Law" (Sixth Edition, 1899)	361

Statement of the Case.

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1933.

No. 13, Original.

STATE OF NEW JERSEY,
Plaintiff,

vs.

STATE OF DELAWARE,
Defendant.

*On Exceptions to
the Report of the
Special Master.*

BRIEF FOR PLAINTIFF.

STATEMENT OF THE CASE.

This is an original action brought pursuant to a resolution of the legislature of plaintiff to ascertain the true boundary between the two states in Delaware river and bay. (*N. J. P. L. 1929, p. 834; Ex. 5.*) Issue was joined on complaint filed on June 23, 1929 and answer filed October 7, 1929.

On January 6, 1930 the case was referred to the Honorable William L. Rawls of Baltimore, Maryland, as Special Master, to take testimony and submit findings of fact and conclusions of law, together with his recommendations for a decree.

Hearings were held on 13 days between June 8, 1931, and June 6, 1932; 42 witnesses were produced by plaintiff and 8 by defendant. Plaintiff offered 682 exhibits (numbered 1 to 500, and 1001 to 1182, both inclusive). Defendant offered 264 exhibits (numbered 501 to 764, in-

Statement of the Case.

clusive). The record filed by the Special Master with his report, consists of the following volumes:

- 1—Pleadings and Testimony.
- 2—Descriptive list of Exhibits.
- 3—Plaintiff's Exhibits 1 to 50.
- 4—Plaintiff's Exhibits 51 to 139.
- 5—Plaintiff's Exhibits 140 to 182.
- 6—Defendant's Exhibits 501 to 599.
- 7—Defendant's Exhibits 600 to 729.
- 8—Plaintiff's Exhibits 183 to 238.
- 9—Plaintiff's Exhibits 239 to 368.
- 10—Plaintiff's Exhibits 369 to 500 and 1001 to 1132.
- 11—Plaintiff's Exhibits 1133 to 1138.
- 12—Plaintiff's Exhibits 1139 to 1182.
- 13—Defendant's Exhibits 730 to 764.

Oral argument was heard by the Master on September 12, 1932, and his report was filed October 23, 1933. Both parties have filed exceptions.

Summary of Pleadings.

The complaint alleges title and jurisdiction in the State of New Jersey, through letters patent of March 12, 1664, and June 29, 1674, from Charles II to the Duke of York, for the territory lying between the southern boundary of Nova Scotia, on the north or east, and Delaware river, on the south or west (including what is now the territorial limits of the State of New Jersey), and certain mesne conveyances by which the title and government of the Province of New Jersey passed through Berkeley & Carteret and Berkeley's successor, Billings, as proprietors thereof, until separated into East Jersey and West Jersey by the quinti-partite deed of July 1, 1676; thence the title and government of both provinces to the surren-

Statement of the Case.

der of their powers of government on April 15, 1702; thence with the title in the proprietors, and the government in the Crown of England, administered by Royal governors, until the American Revolution and the adoption of the Constitution of the United States, when plaintiff and defendant each became one of the original 13 states of the Union.

Plaintiff alleges that by virtue of its sovereignty, under the Declaration of Independence and the Constitution of the United States, and by virtue of the Provisions of the Treaty of Paris of February 3, 1783, it acquired title, in fee simple, to the bed of Delaware river and bay between the thalweg and the high water mark on the eastern shore thereof, and that it has ever since exercised sovereignty and jurisdiction thereover.

Defendant claims title to its territorial limits under two deeds of feoffment of August 24, 1682 from the Duke of York to William Penn; the first for the town of New Castle and the area surrounding the same within a compass of 12 miles, and the second for the area of that state south of such 12 mile circle; and by letters patent, dated March 22, 1682/3, from Charles II to the Duke of York, purporting to convey the same territory, by the same descriptions, as the deeds of feoffment. Under the first mentioned deed of feoffment and the letters patent defendant claims title and jurisdiction to the bed of Delaware river to low water mark on the eastern shore thereof, within a radius of 12 miles about New Castle, Delaware. Defendant also claims title by conquest in the American Revolution, and by the Treaty of Paris.

The complaint describes the controversy over the boundary line in Delaware river and bay, and the unsuccessful attempts made to settle it by treaty.

Statement of the Case.

The essence of the dispute, as stated in paragraph 1 of the complaint and admitted in paragraph 5 of the answer, is as follows:

"5. The controversy involved in this suit is where, in said river and bay, the exact division of territory between the parties lies. The plaintiff claims the ownership in fee simple of that portion of the subaqueous soil lying easterly of the thalweg thereof; the defendant claims ownership in fee simple of the whole bed of said river to low water mark on the easterly shore, lying within the circumference of a circle of a radius of twelve miles described about the Court House in the town of New Castle in the State of Delaware as a centre and all the islands in said river within the compass of said circle, and of that portion of the subaqueous soil of the remainder of said river and bay westerly of the geographical centre thereof" (*R. pp. 5 and 20*).

The Master's Report.

As to the territory *within* the circle, the Master found in favor of the defendant, and recommended that the river and the subaqueous soil thereof should be adjudged to belong to the defendant, "subject to the Compact of 1905."

As to the territory *below* the circle (both in river and bay), the Master found in favor of the plaintiff and recommended that the boundary below the circle should be adjudged "to be the middle of the main ship channel in said river and bay" (*Rep. p. 80*).

Exceptions to the Report.

Plaintiff has filed exceptions to the Report in so far as relates to the title within the circle.

Defendant has filed exceptions to the Report in so far as relates to the title below the circle.

Statement of the Case.

The Territory in Dispute.

(1) In the River and Within the Limits of the Circle.

Plaintiff and defendant both claim title to that part of the river which lies east of the thalweg, as it existed at the time of the American Revolution, to low water mark on the New Jersey shore.

(2) In the River and Below the Circle.

Below the southerly arc of the circle, extended across the river, and above the line dividing the river and bay, plaintiff claims title to the part of the bed of the river which lies east of the thalweg.

Defendant claims title to the geographical center of the river.

(3) In the Bay.

Plaintiff claims title to that part of the bed of the bay which lies east of the thalweg.

Defendant claims title to the geographical center of the bay.

Explanatory Maps.

The respective claims of the parties (with other information) are indicated graphically on two maps, submitted in the back of the book of appendices to this brief; namely,

(1)

A map of the river, based upon Exhibit 3 (U. S. C. & G. S. Chart No. 294), and Exhibit 2 (U. S. C. & G. S. Chart No. 295), showing the river, between the line dividing the river and the bay and the northerly limit of the circular boundary extended.

Statement of the Case.

The broken black line at the top of the map is the circular boundary between Pennsylvania and Delaware, as shown on the original map.

The red circular line, from the west side of the river, easterly and southerly, back to the center of the main ship channel at the bottom of the map, represents the rim of a 12 mile circle extended from the Pennsylvania-Delaware boundary line, which embraces the greater part of Salem County and a portion of Gloucester County, N. J., on the east side of the river. The county lines in New Jersey are shown on the map.

(2)

A map of the bay, based upon Exhibit 4 (U. S. C. & G. S. Chart No. 1218) and Exhibit 3 (U. S. C. & G. S. Chart No. 294), showing the bay, from the ocean to the dividing line between the bay and the river established by agreement of the parties (*Exs. 1; 181, pp. 42-5*).

The disputed part of the natural oyster grounds, known as the "Ship John Bed" is shown in broken hatched lines, and designated by the letter A in a circle.

The remainder of the natural oyster grounds of the plaintiff are so designated between the end of the maintained channel and the "Southwest Line."

The hatched area designated by the letter B in a circle, represents the other part of the disputed area in the bay.

The area in which plaintiff leases grounds for the transplanting of oysters is indicated by "Oyster Planting Grounds—Leasing Area" below the Southwest Line.

Statement of the Case.

Features Common to Both Maps.

On both maps the middle of the present main ship channel, or thalweg, is shown by a solid red line; the broken red line on the map of the river shows the center of the main ship channel, or thalweg, as it existed in 1779. The green line represents the geographical center in the bay and that part of the river between the southerly rim of the circle, extended, and the dividing line of the river and bay.

The shoals and islands in both bay and river, and the principal towns, water courses, light-houses, and channel buoys are shown as they appear on the original exhibits, but the sailing courses and distances and the depths of the water, shown on the original, have been omitted.

The parallel dotted lines in the river and bay represent the limits of the dredged and maintained channel. Below the end of the maintained channel, the main ship channel, or thalweg, is a natural channel in the bed of the current of the river as it flows through the bay.

A map showing the details of the county and municipal lines of plaintiff appears in the record as *Exhibit 46*.

Distances.

The distance from the northerly rim of the circle extended across the river to the southerly rim is approximately 24 miles.

The distance from the southerly rim of the circle to the dividing line of the river and bay is about 5 miles. The distance from said line to the ocean is about 45 miles.

*Statement of the Case.**Appendices.*

A separate book of appendices is submitted with this brief containing the complete text of the following exhibits;

A. The two opinions of Lord Hardwicke in *Penn v. Baltimore*.

B. Lord Hardwicke's decree in *Penn v. Baltimore*.

C. Opinion of Garret D. Wall respecting title to Pea Patch Island.

D. Mr. Justice Baldwin's charge in *Gale v. Behling*.

E. Opinion of Honorable John Sargeant in the Pea Patch Island Arbitration.

F. Chancellor Zabriskie's note in *Gough v. Bell*.

Map of Delaware river, and

Map of Delaware bay (described above).

History of Boundary Dispute.

Due to the lack of information or maps of the country, royal grants of lands in America contain very indefinite descriptions, particularly with respect to the extent of the grant into the country. For that reason 11 of the 13 original states were involved in boundary controversies when the federal constitution was adopted, including one between New Jersey and Delaware. *Rhode Island v. Massachusetts*, 12 Peters 657, 724; *United States v. Texas*, 143 U. S. 621, 639.

On December 21, 1781, the General Assembly of Pennsylvania invited plaintiff and defendant to join with it in ascertaining and determining the boundary line in Delaware river between Pennsylvania and New Jersey and in Delaware river and bay between New Jersey and Delaware, for the purpose of establishing limits of title and jurisdiction. Commissioners were appointed by Pennsyl-

Statement of the Case.

vania and New Jersey, but Delaware declined the invitation (*Ex. 182*) (although the Governor of Delaware recommended to the legislature the appointment of commissioners in response to that invitation). *State v. Morris*, Note to *Emery v. Collings*, 1 Harr. (Del.) 326.

An agreement as to boundary between Pennsylvania and New Jersey was negotiated by those commissioners and ratified by both states on April 26, 1783, five months before the Treaty of Paris (*Ex. 182*; 4 *N. J. Comp. Stats.* of 1910, pp. 5368-9). In 1820 plaintiff's legislature again appointed commissioners and invited defendant to join in ascertaining the boundary between the two states. A proposal to that effect, submitted to defendant by plaintiff, was not answered. The proposal was renewed, without success, in 1825 after the United States Government had twice applied to plaintiff's legislature for a cession of Pea Patch Island (which had been ceded to the government by defendant, by act of 1813) (*Ex. 161*, pp. 1, 6). The matter rested until 1872, when defendant, for the first time, asserted a claim of title in Delaware river, within a radius of 12 miles of New Castle, by arresting citizens for fishing therein, east of the main ship channel, without a Delaware license. Plaintiff's governor issued a proclamation claiming title and jurisdiction east of the channel in that area and authorizing citizens of New Jersey to fish therein without permission or license from any other state (*Ex. 161*, p. 7).

In 1873, defendant's legislature adopted a resolution appointing commissioners to determine "the whole subject of controversy," and plaintiff's legislature simultaneously adopted a resolution appointing commissioners "to settle and determine the limits of territory and jurisdiction" between the two states. A few days later defendant's legislature adopted another resolution excluding

Statement of the Case.

from the consideration of its commissioners any question of title to the soil of the river and limiting their consideration to the question of the right of plaintiff's citizens to fish therein.

The plaintiff then adopted a supplemental resolution authorizing its commissioners to settle so much of the dispute as defendant was willing to submit (*Ex. 161, pp. 3-5, 18-21*).

In 1875 defendant's legislature relieved its commissioners from further duty, which ended that attempt to agree on boundary (*Ex. 161, p. 21*).

The threat of defendant, in 1876, to renew the arrest of New Jersey fishermen, caused plaintiff's legislature to pass an act of March 30, 1876, authorizing the institution of a suit in this court (*Ex. 161, p. 24*); a suit was accordingly brought, in which a preliminary injunction was granted restraining defendant from interfering with the right of plaintiff's inhabitants to fish in the river east of the main ship channel (*Ex. 237, pp. 13-15*).

While that suit was pending, and before the hearings therein were concluded, plaintiff and defendant appointed commissioners (*Exs. 161, pp. 27-45; 162, pp. 14-15; 237, pp. 18-25*) who negotiated the compact of 1905 (*Ex. 161, p. 25*), which was ratified by both states, and approved by Congress January 24, 1907, (*Ex. 53; 34 Stat. L. Pt. 1, Ch. 394, p. 858*) and the suit was discontinued without prejudice (*New Jersey v. Delaware, 205 U. S. 550*).

The invasion of the Ship John oyster bed by Delaware oystermen in 1925 and 1926, brought about the appointment of commissioners by both states, in 1927, for the final adjustment of the boundary dispute (*Ex. 161, p. 46; Ex. 162, p. 20*). Fruitless negotiation resulted, except for a temporary truce under which that bed has been closed

Summary of the Argument.

pending the settlement of the boundary line by litigation
(*Ex. 161, p. 46*).

JURISDICTION.

Jurisdiction is founded upon Article III, Section 2 of the Constitution of the United States; Section 341, Title 28, U. S. C. A., p. 171.

SUMMARY OF ARGUMENT.

1. Plaintiff claims title by conquest in the American Revolution, and by the Treaty of Paris, as the successor to the Crown of England, to the bed of Delaware river and bay east of the thalweg, as it existed on July 4, 1776.

2. Plaintiff also claims title to the bed of the river, east of the thalweg, within a radius of 12 miles about New Castle, Delaware, by virtue of (a) a practical construction of the boundary by the parties and their predecessors in title; (b) a prescriptive right; (c) an equitable estoppel against defendant and its predecessors in title; and (d) a cession of defendant's claim of title.

3. Plaintiff claims that defendant never acquired any title to the bed of Delaware river east of the thalweg, prior to the American Revolution.

4. Plaintiff claims that William Penn, from whom defendant claims title to the bed of Delaware river, east of the thalweg, within a radius of 12 miles about New Castle, Delaware, never had legal title thereto.

5. Plaintiff claims that defendant cannot now claim any title under William Penn or his successors, to the bed of Delaware river east of the thalweg, within a radius of 12 miles about New Castle, Delaware, because by acts of its legislature in 1794 it declared that it had acquired

Argument.

the soil and lands within the known and established limits of the state (theretofore claimed by the Crown of Great Britain) by virtue of the Treaty of Paris and that the claims of the late and former pretended proprietaries (the Penns) thereto were not founded either in law or equity, and confiscated all soil and lands claimed by the proprietors and sold the same for its own benefit; whereby defendant repudiated the Penn title and all claims of the proprietors under the deeds of feoffment of 1682 or the supposed letters patent of March 22, 1682-3.

ARGUMENT.**Chapter One.****The Boundary Within the Twelve-Mile Circle.**

IN SO FAR AS RELATES TO THE BOUNDARY WITHIN THE CIRCLE, PLAINTIFF'S EXCEPTIONS TO THE REPORT OF THE MASTER AND HIS RECOMMENDATION FOR A DECREE SHOULD BE SUSTAINED AND THE BOUNDARY FIXED ON THE LINE OF THE THALWEG OF THE RIVER AS IT EXISTED AT THE TIME OF THE AMERICAN REVOLUTION.

In this chapter, references to exceptions are to those filed by the plaintiff and the exceptions are discussed under the same divisions, and in the same order, as outlined therein, except that those relating to the Compact of 1905 are discussed at the end of Part II of this chapter.

II. (a) *Letters patent of March 12, 1664 and Later Deeds.*

I.

THE ENGLISH TITLE.

The English title to the territory involved in this case was derived from the voyages of discovery of John and Sebastian Cabot in 1498, under a commission granted by the English King in 1496. *Johnson's Lessee v. M'Intosh*, 8 Wheat. 543, 575-6; *Martin v. Waddell*, 16 Peters 367, 408-9.

The Dutch claims were disposed of by the Treaty of Breda, of July 21, 1667 (*Ex. 16*), and the Treaty of Westminster, of February 9-19, 1673/4 (*Ex. 109*). *Johnson's Lessee v. M'Intosh*, 8 Wheat. 543, 575-6; *Pollard's Lessees v. Kibbe*, 14 Peters, 353, Justice Baldwin's separate opinion.

II.

THE TITLE OF THE STATE OF NEW JERSEY.

(a) *Letters Patent of March 12, 1664 and Later Deeds.*
(Exception 1.)

Plaintiff's title to the territory comprising the state of New Jersey, as far as low water line on the east side of Delaware river and bay, is based by the Master upon the letters patent from Charles II to the Duke of York, dated May 12, 1664 (*Rep. pp. 7-8; Finding No. 14, p. 75*), without exception by defendant.

After the Treaty of Westminster, which concluded, in 1673, the war between England and the Netherlands, ceded to Charles II the Dutch claim of title, the King issued new letters patent to the Duke of York, dated July 29, 1674, in the same form, for the same territory, and with the same powers, as contained in those of 1664 (*Exs. 9, pp. 41-2; 11, p. 13; 14, pp. 9, 17; 18*).

II. (c) Practical Construction of Boundary.**(b) The American Revolution.****(Exceptions 2-3.)**

By the Declaration of Independence of July 4, 1776, plaintiff, on the east side of Delaware river and bay, and defendant, on the west side thereof, became independent sovereign states, and by the Treaty of Paris, which concluded the war of the revolution, the King of England relinquished all claim to government and to proprietary and territorial rights in those states, respectively (*Johnson's Lessee v. M'Intosh*, 8 Wheat. 543, 584-5), and they became possessed, as sovereigns, of equal rights and title in the bed and waters of Delaware river and bay on their respective sides, to the line of the thalweg, throughout the length of their common boundary, unless either of them had a prior inconsistent title to any portion thereof (*Rep. pp. 6, 71; Conclusion No. 10, p. 79*).

(c) Practical Construction of Boundary.

The findings by the Master that at all times since 1783 defendant has claimed, asserted and exercised exclusive jurisdiction and dominion over the lands and waters of Delaware river to low water mark on the plaintiff's side thereof, within a radius of 12 miles about New Castle, Delaware; that the defendant has never abandoned its claim, dominion or jurisdiction thereover or acquiesced in the contrary claim of plaintiff; and that plaintiff has at all times recognized the existence of a boundary dispute with defendant (*Rep. Findings, Nos. 20, 21, 22, pp. 76-7*), are contrary to a large body of uncontradicted proof submitted by plaintiff, showing that, although the grants of 1664 and 1674 to the Duke of York extended his title only to low water mark on Delaware river and bay, plaintiff has acquired title to the subaqueous soil beyond low water mark within a radius of 12 miles about New Castle, now claimed by defendant, by (a) practical con-

II. (c) *Practical Construction of Boundary.*

struction of the boundary, (b) prescriptive right, (c) estoppel against defendant, and (d) concession by defendant, regardless of what title, if any, Penn or defendant acquired under the deeds of feoffment of 1682 or the letters patent of 1682-3, and, consequently, plaintiff has title as far as the line of the thalweg of the river in that area.

The importance of a practical construction of a boundary between two states is emphasized in the decision of this court in *Vermont v. New Hampshire*, 289 U. S. 593, 613-15 and cases there cited. The court said:

"The conclusion we have reached as to the correct construction of the Order-in-Council of 1764 and the resolution of Congress under which Vermont was admitted to statehood finds support in the practical construction given by both states to the boundary, thus defined, in the long continued failure of New Hampshire to assert any dominion over the west bank of the river, and in her long acquiescence in the dominion asserted there by Vermont" (citing cases). * * *

"A large amount of evidence, thought to have some bearing on the practical construction given to the boundary by the two states, has been introduced in the present suit." * * * "Of some, but by no means controlling significance, are instances of action by towns in New Hampshire recognizing low-water mark on the west bank as the boundary of the towns and of the state, and numerous deeds or other formal documents introduced in evidence affecting titles in each of the towns on the west bank of the river by which the property conveyed was extended to the river or included the privilege of the use of the water. In the absence of evidence of like character showing the assertion of title or jurisdiction in New Hampshire above the low-water line, these facts have some persuasive force in showing that inhabitants along the questioned boundary considered that it extended along the river at low-water mark."

II. (1) *Action of Penn and the Proprietors.*

(1) *Action of Penn and the Proprietors.*

(Exceptions 4-7.)

Out of the territory granted by Charles II to the Duke of York by letters patent dated March 12, 1664, with all royalties and powers of government (*Rep. 7-8*), the Duke conveyed, by lease and release, dated June 23, 24, 1664, jointly to Lord Berkeley and Sir George Carteret, the territory now comprising the State of New Jersey as far as the westward limits of his title on Delaware river and bay (*Rep. p. 8*), with all the appurtenances, royalties and powers of government, in as full and ample a manner as he had received the same under his letters patent (*Exs. 7; 8*); that conveyance was approved by the King (*Exs. 17; 54*), who, by Royal proclamation, dated December 9, 1672, declared Berkeley and Carteret to be absolute proprietors of New Jersey, and directed all persons to yield obedience to their laws and government, with sole power in them under the King to settle and dispose of the country (*Exs. 13, pp. 2-3; 17; 54*).

On February 10, 1665, Berkeley and Carteret established the government of their province by a document entitled, "The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and with all and every the adventurers and all such as shall settle or plant there" (*Leaming & Spicer, p. 12*).

Item VII of that document read as follows:

"That the inhabitants of the said Province have free passage thro' or by any seas, bounds, creeks, rivers or rivelets, &c. in the said Province, thro' or by which they must necessarily pass to come from the main ocean to any part of the Province aforesaid" (*Ex. 13, p. 1*).

They established courts, military defenses, and an assembly with power to enact laws "as near as may be con-

II. (1) *Action of Penn and the Proprietors.*

veniently agreeable to the laws and customs of his majesty's kingdom of England'' (*Leaming & Spicer, p. 15*), including the power—

“to create and appoint such and so many ports, harbours, creeks, and other places for the convenient lading and unlading of goods and merchandise, out of ships, boats, and other vessels, as shall be expedient; with such jurisdictions, privileges and franchises to such ports, &c. belonging, as they shall judge most conducing to the general good of the said Plantation or Province.” (*Leaming & Spicer, p. 16.*)

Lord Berkeley's undivided interest was acquired by Edward Billings, who took title, first in the name of John Fenwick as trustee, by deed of March 18, 1673, and later by deed of February 9, 1674, in the names of William Penn, Gawan Lawrie and Nicholas Lucas, as trustees (*Exs. 9, p. 28; 10, p. 2; 11, p. 21; 14, p. 10; 18; 19; 228; 229, p. 6; 231, pp. 17, 21*).

By agreement between Billings and his trustees and Sir George Carteret, the province was divided into East Jersey and West Jersey by a line running from the north-west corner thereof southeasterly to Egg Harbor on the Atlantic Coast, and by a reciprocal deed, dated July 1, 1676, Billings and his trustees conveyed to Carteret all their right, title and interest in East Jersey, and Carteret conveyed to Billings and his trustees all his right, title and interest in West Jersey, including, on each side, all islands, rivers, royalties, powers of government, franchises, harbors, etc. in the respective portions. The West Jersey section included all that part of the province bounded on Delaware river and bay (*Ex. 9, p. 36; Ex. 10, p. 3; Ex. 11*). The division line was approved by the Provincial Assembly and the Royal Governor on March 27, 1719 (*Ex. 204*).

II. (1) *Action of Penn and the Proprietors.*

Billings, Penn, Lawrie and Lucas, and their later acquired associates, thereafter continued to own and govern the province of West Jersey until the surrender of their government to Queen Anne on April 15, 17, 1702, and they thereafter retained title to the soil and all appurtenant privileges and rights (*Exs. 10, pp. 6-7; 11, pp. 29-36; 25*), and their successors still retain title to all undisposed of portions (*R. 262*).

By that surrender of government the provinces of East Jersey and West Jersey were reunited into one province of New Jersey, governed, from that time until the American Revolution, by a Royal governor appointed by the Crown, and an Assembly under his control (*Ex. 11, p. 36-7*).

The Queen's instructions, issued November 16, 1702, to Lord Cornbury, the first Royal governor, directed him to pass such laws as were necessary to confirm the title acquired in New Jersey under the grants of Charles II to the Duke of York and of the Duke to Berkeley and Carteret, and their successors, together with all privileges expressed in those conveyances "excepting only the right of government, which remains in us" (*Ex. 13, p. 14*).

On March 3, 1676, the proprietors of West Jersey, who had established their capitol of Burlington, on Delaware river, executed a written compact, with the freeholders and inhabitants of that province, entitled "The Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey in America," signed by Penn, Lucas, Lawrie and Billings as proprietors, and by 60 freeholders and inhabitants of that province (*Leaming & Spicer, pp. 382-411; Exs. 13; 147; 160*). When the first Assembly was convened on November 25, 1681, those Concessions and Agreements were formally adopted as the basis of government and

II. (1) *Action of Penn and the Proprietors.*

became the first constitution of the province of West Jersey (*Ex. 14, p. 12*).

Those Concessions and Agreements, attributed to the hand of William Penn (*Ex. 15, p. 4*), provided as follows:

"We (the proprietors) do also grant convenient portions of land . . . for Wharfs, Keys, Harbours . . . and also that the Inhabitants of the said Province, have free Passage through, or by any Seas, Bounds, Creeks, Rivers, Rivelets in the said Province, through which they must necessarily pass, to come from the main Ocean to any Part of the Province aforesaid . . ."

"That all the inhabitants within the said province of West Jersey, have the liberty of fishing in Delaware River or on the sea coast . . ."

The Assembly was empowered—

"By Act as aforesaid, . . . to direct and appoint places, for such and so many towns, cities, ports, harbours, creeks, and other places, for the convenient loading and unloading of goods and merchandize, out of ships, boats and other vessels, as shall be expedient, with such jurisdictions, privileges and franchises, to such cities, ports, harbours, creeks, or other places, as they shall judge most conducing to the general good of the said province, and the people thereof . . ." (*Exhibit 147, pp. 2-3.*)

Since all the settlements in West Jersey were in Delaware river or bay, or their tributaries, which afforded their only means of access and travel, as well as an important source of food for their inhabitants, Berkeley and Carteret, in their Concession and Agreement in 1665, and Penn, and his associate proprietors, in their Concessions and Agreements of 1676, gave primary consideration to the establishment of ports and other facilities for the accommodation of vessels, and free passage and use by their inhabitants in the rivers which accommodated their settlements.

II. (1) *Action of Penn and the Proprietors.*

The record shows that neither the proprietors nor the inhabitants ever regarded low water line as the limit of their use or title in Delaware river or bay.

In *Martin v. Waddell*, 16 Peters 367, involving title to lands in the bed of Raritan bay, also within the Duke's grant to Berkeley and Carteret, Chief Justice Taney observed:

(p. 414) " . . . the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell fish from its bottom, or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another."

In *New Jersey v. New York*, 283 U. S. 336, Mr. Justice Holmes said, with reference to this same river:

(p. 342) "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."

In *Arnold v. Mundy*, 6 N. J. L. 1, 111, Mr. Justice Rossell, said:

"And in this way others wrote to their friends, and in no part of the many public or private communications of the proprietors or inhabitants do we see even a hint that the navigable rivers of New Jersey were considered in any other point of view than, to use their own words, 'inlets which God and nature formed' as the highway to the country, or the fisheries as anything more than as the rich provision of the same bountiful Creator for the common use and benefit of the settlers. The proprietors were men who understood their rights, and were fearless in the defence of them. If those who

II. (1) *Action of Penn and the Proprietors.*

twice purchased New Jersey; who braved the dangers of an immense ocean; shared in the toils, sufferings, and privations of the first settlers; who claimed all strays by land, and wrecks by sea, in virtue of their grants, and never for a moment conceived that these grants swallowed up what, by the law of the land they left, had ever been considered the common rights of Englishmen: shall we, after a lapse of almost three centuries, insult the memory of the men who were an ornament to the human race, whose virtues have highly exalted their names, and whose labors have been a blessing to the world, by saying they knew nothing of their privileges, and that their birthrights were lost forever in the forests of New Jersey; that their boasted *Magna Charta* was a farce from which they could derive no benefit; and that liberty, which they so highly valued, was confined to the grants and concessions? or that our legislatures from time to time taking upon them to regulate fisheries of oysters as well as of floating fish for the public benefit, were totally ignorant of their powers, overstepped the bounds prescribed by the constitution to the destruction of the rights and interests of individuals? I think not. The foregoing facts speak strong language, and impress the mind more forcibly than volumes of abstruse and theoretical reasoning."

A formal commission, dated August 18, 1676, was issued by Penn, and his associate trustees, to James Wasse, Richard Hartshorne and Richard Guy for the management of the property of West Jersey (*Ex. 9, pp. 28-36*). Their instructions are contained in Exhibit 148.

Paragraph 3 of the commission instructed them to take information of soundings in rivers and creeks, mentioning particularly Delaware river, and to arrange for a surveyor to go up the Delaware river as far as New Castle, or further if navigable, since the proprietors intend to have a way cut across the country to Sandy Hook, and

II. (1) *Action of Penn and the Proprietors.*

the further up the river they go the shorter will be the distance (p. 2).

On August 26, 1676, Penn, and his associate proprietors of West Jersey, wrote a letter to Richard Hartshorne, one of those commissioners (*Ex. 149*), referring to the settlement of families at "Delaware side"—meaning West Jersey. New Castle is referred to as being on the other side of the Delaware river. It states that the object of the proprietors was to find a site for a town (*Ex. 148*). They did not like the site selected by Fenwick (Salem).

The letter refers to West Jersey as "our side" of the Delaware river.

On October 10, 1681, Penn issued instructions to his Commissioners for the settling of the colony: "Let the rivers and creeks be sounded on *my* side of Delaware river"; and to select a town site "where most ships may best ride, of deepest draft of water" (*Ex. 231, p. 35*).

Exhibit 149 contains a recital of Penn's activities in the dispute between Billings and Fenwick, and other matters, and describes the efforts that were made to develop the colony.

Contemporary history shows that at that time it was Penn's intention to build his city on the New Jersey side of the Delaware, in the vicinity of what is now Greenwich, along the Cohansey river. Penn's interest and activities in that neighborhood are evidenced by the frequent use of his name as "Pennsville" and "Pennsgrove," and an area of land which he acquired is still known as "Penns Neck."

The record is replete with evidence of Penn's title and interest in West Jersey at that time (*Exs. 15; 148; 149; 228; 231, p. 21; 234, p. 1*).

II. (1) Action of Penn and the Proprietors.

Hazard's *Annals of Pennsylvania* states that when Penn took title as a trustee of Billings to his interest he "became one of the chief instruments in settling West New Jersey" (*Ex. 231, p. 21*).

In 1680, the Duke's deputy governor at New York attempted to impose duties on imports and exports in Delaware bay and river. Penn, and his associate proprietors, immediately objected to these duties upon the West Jersey settlements. Penn submitted a long written argument in support of those objections (*Ex. 9, pp. 42-50*). He declared that the Duke had conveyed to his predecessors, as proprietors of West Jersey, the land with rights in *Delaware river and bay*. He addressed his opposition at first to the Duke, and then to Sir William Jones, to whom the Duke referred the matter.

The decision of Sir William Jones, rendered July 28, 1680, held against the Duke's right to impose the tax "or any other duty," pointing out that the territory was included in the grant from the Duke to Berkeley and Carteret without reservation of profit or jurisdiction. That decision was accepted by the Duke, and the Tax was discontinued August 6, 1680 (*Exs. 9, pp. 43-50; 11, pp. 20-25; 23; 1 N. J. Archives, 1st Series, pp. 323-4; 3 N. Y. Colonial Documents, p. 284*).

The importance of this subject to the colony of West Jersey is indicated by the space and consideration given to it by the historians. It is described at length in *Proud's Hist. of Pa.* (*Ex. 228, p. 18*); *Bancroft's Hist. of U. S.* (*Ex. 14, p. 12*); *Scharf's Hist. of Del.* (*Ex. 1154, p. 6*); *Mulford's Hist. of N. J.* (*Ex. 11, pp. 20-25*); *Smith's History of N. J.* (*Ex. 9, pp. 43-51*); *Ferris' History of Delaware* (*Ex. 230, pp. 8-9*); *Chalmers' Hist. of Revolt of Am. Col.* (*Ex. 229, pp. 6-7, 12*).

II. (1) *Action of Penn and the Proprietors.*

Extensive reviews of the arguments made by Penn in opposition to these duties are given by *Mulford* and *Smith*. *Ferris* says that Penn opposed the duties—"with a force of argument and clearness of demonstration, seldom equalled, and perhaps never surpassed" (*Ex. 230, p. 8*). Penn's argument was based squarely upon the rights of the inhabitants of West Jersey in the free use and enjoyment, without let, hinderance or tax, of Delaware river and bay, *and the contention that the King himself had no power to interfere with those privileges.*

These contentions of Penn furnish the key to the interpretation to be placed upon the circular boundary contained in the deeds of feoffment which he obtained from the Duke two short years thereafter, while Penn was still the chief proprietor of West Jersey. It would be contrary to equity and good conscience, and a reflection upon the character of both the Duke and Penn, to construe the circular boundary in the deed of feoffment to include the river bed to low water line on the New Jersey shore, and thereby exclude the inhabitants of West Jersey (and later of New Jersey) from what Penn himself described as "the bounds of the country we bought; the passage (Delaware river), God and nature made to it" (*Ex. 9, p. 44*) and which Penn had already granted to the inhabitants in his Concessions and Agreements of March 3, 1676 (*Ex. 13, p. 6*).

This apt definition of the river as the natural boundary (*Bouvier's L. Dict. Bald. 20th Cent. Ed., p. 136*) corresponds with the "natural Boundary" submitted by Penn for the deeds of feoffment (*Ex. 736*).

As a sequel to that proceeding, Penn applied to the Duke and obtained a deed, dated August 6, 1680, to Edward Billings, William Penn, Gawan Lawrie and Nicholas Lucas, proprietors of West Jersey (and two others who

II. (1) Action of Penn and the Proprietors.

had acquired intermediate interests), reciting all the grants and conveyances affecting West Jersey from the original letters patent to the Duke of 1664 to and including the partition deed of 1676, and conveying all the Duke's right, title and interest, powers, etc., in West Jersey:

"Together with all Islands Bays Rivers Waters Forts Mines Quarries Royalties Franchises and Appurtenances whatsoever to the same belonging or in any ways appertaining. And all the Estate Right Title Interest Reversion Remainder Claim and Demand whatsoever as well in Law as in Equity of him the said James Duke of York of in unto or out of the same or any part or parcel of the same. As also the free use of all Bays, Rivers and Waters Leading unto or lying between the said Premises or any of them in the said Parts of America for Navigation Free Trade fishing or otherwise To have and to hold unto the said Wm Penn Gawen Laury Nicholas Lucas John Edrige and Edmund Warner their Heirs and Assignes for ever" (*Exhibit 23*).

The advantages of the settlements in West Jersey on Delaware river, on account of that river as a means of travel and of supplying food for the inhabitants, are described in numerous exhibits (*15, pp. 8-22; 228, p. 15; 231, p. 1; 478, p. 3; 1154, pp. 5, 7*).

By February, 1681, when the proprietors had been increased to ten in number, the provincial assembly established certain rules for surveying the shore front on Delaware river from St. Pink Creek (Assunpink Creek, at Trenton) to Cape May, for the purpose of dividing the territory into tenths, so as to afford to each of the ten proprietors their proportion of the frontage on Delaware river (*Ex. 13, p. 7*), Penn was one of the proprietors and received his share of river front lands (*Exs. 114-117*). These rules were established six months prior to the deeds of feoffment of 1682 from the Duke of York to Penn. yet the grants made by the West Jersey proprietors to Penn, and accepted by him, were all dated in 1706.

II. (1) *Action of Penn and the Proprietors.*

In September 1681, Penn wrote a letter entitled— "The Present State of the Colony of West-Jersey," wherein he states that an earlier account of this colony "gave encouragement to many persons to purchase lands, and transport themselves, servants, and families thither, who have settled themselves in that colony, upon the great river of Delaware, and the creeks and harbors thereof; and have built some towns apt for trade, with convenient ports where large ships of considerable burthen have already unloaded."

"There are many creeks and bays adjoining, and belonging to Delaware river, besides other rivers and creeks along the Seashore which are navigable."

Penn described the title of the colony as derived from the King to the Duke of York and thence to Penn, Lawrie and Lucas in trust for Billings, "with all Lands, Rivers, Bays, &c."

He stated that "there is a large tract of land, containing about sixty English miles, lying along the river of Delaware"; that the people settle near together "for their conveniency of trade and commerce."

"For Transportation of passengers to West Jersey, ships set sail from London."

He described the rates "for goods, forty shillings a tun freight, to be landed at Burlington, or elsewhere upon Delaware river." "Sometimes ships go from Dublin, sometimes from Hull * * * or at Leith, Dundee or Aberdeen on the east, and at Aire on the west of Scotland, and at Dublin or Waterford in Ireland" (*Ex. 15, pp. 4-7*).

An Act of Assembly of West Jersey, November 21-23, 1681, established the Port of Burlington on Delaware river (*Ex. 13, p. 6*). Another act of May 2-6, 1682, required vessels entering Delaware river for Salem (within a radius of 12 miles of New Castle) to enter and clear at

II. (1) *Action of Penn and the Proprietors.*

that point, and prescribed the duties on imports (*Ex. 13, p. 8*). Another act of October 3-18, 1693, recites the invasion by strangers of the whalery in Delaware bay, and enacts that all persons, not residing in West Jersey or Pennsylvania, who shall kill or bring ashore any whale or whales in Delaware bay shall pay 1/10 of all oil and bone therefrom (*Ex. 13, p. 10*). The three lower counties of Delaware, for which Penn had 11 years before received deeds of feoffment, were not mentioned.

On May 12, 1697, the Assembly of West Jersey authorized the inhabitants of Salem County "to erect, build and make such damm's, banks, gates, sluces and works for the stopping daming and keeping the tide," from certain tidal lands in and about Alloway's Creek (within a radius of 12 miles of New Castle), and provided that the lands thus reclaimed should belong to the owners of the upland (*Leaming & Spicer, p. 554; Ex. 13, p. 11*).

These acts were all passed while Penn was in control of the Province, and two of them were passed *after* the deeds of feoffment to Penn.

Exhibit 1182 is a letter, dated March 15, 1683/4, from Charles II to Edward Byllynge, Governor of West Jersey, respecting the restraint and punishment of pirates. It directs Byllynge, as Governor of the Province of West Jersey, to have such a law passed in his colony, and to certify a copy to the King at the first opportunity.

This exhibit was issued one year after the deeds of feoffment and the supposed grant from the King to the Duke for Delaware. The only place to which such an act could apply was Delaware river and bay, since there was no commerce in any bays or ports on the ocean side of West Jersey. The King, by these instructions, recognized the jurisdiction of the governor of West Jersey over Delaware river and bay for the purpose of suppressing piracy.

II. (1) *Action of Penn and the Proprietors.*

Exhibit 152 is a letter from James Nevill, dated March 3, 1683, from Salem, N. J., to William Penn, reporting meetings with residents at Salem, held by Nevill at the request of Penn, who instructed him to inform the people that the government of West Jersey *belonged to Penn.*

This transaction occurred after Penn's arrival at New Castle, and about 7 months after the date of the deeds of feoffment (*Ex. 521-4*).

Exhibit 153 is a letter from James Nevill to Penn, dated May 23, 1683, representing that the people of the Salem colony earnestly desired Penn's protection. It urges Penn to acquire the lands between Salem Creek and Alloway Creek, and he afterwards acquired, by grant from the Proprietors of West Jersey, 15,553½ acres of land along Delaware river directly opposite New Castle, Delaware (*Exs. 113, 116*). Exhibit 116 recites that the land was surveyed "for William Penn, Proprietor and Governor of Pennsylvania and Proprietor of Salem Tenth, the greatest part of that tract of land commonly called Penns Neck"; includes a considerable portion of what is now called Lower Penn's Neck Township, and the village of Pennsville.

Exhibit 154 is an agreement, dated April 13, 1684, between William Penn and the executors of John Fenwick. It refers to William Penn as being proprietor by conveyance or deed "from ye said John Fenwicks" and recites that Penn had authority to take up and dispose of land for planting and improving the colony, subject to the reservation by Fenwick of 150,000 acres.

It recites that Penn is Proprietor, by conveyance from Fenwick, of lands in the colony of West Jersey. The other partners consent to Penn getting the neck of land between Salem Creek and Old Man's Creek, which is

II. (1) *Action of Penn and the Proprietors.*

thereby allotted to be disposed of or settled by William Penn.

The acceptance of that land by Penn, within twelve miles of Newcastle, indicates that Penn never claimed title to any land within a radius of twelve miles east of the river. In fact, he never claimed any part of the river itself.

Exhibit 159 contains extracts from historical sketches relating to the early settlements of West New Jersey, including the beginning of Penn's interest in New Jersey, from 1673, and shows conveyances of land by which Penn, on April 21, 1707, became the sole owner of all the proprietary lands in West Jersey (*pp. 3-4*).

Lists of grants by the West Jersey proprietors on the east side of Delaware river within a radius of 12 miles about New Castle, showing survey number, record, name of grantee and the area conveyed, appear on Exhibits 112 and 1165. Those indicated by the letter (x), on Exhibit 112 are for islands or land in the bed of the river below low water line. They were all made subsequent to the deeds of feoffment from the Duke of York to Penn, and Penn himself was one of the proprietors who made (and received some of) these grants down to the time of his death in 1718, as did his sons, as successor proprietors thereafter. Exhibit 113 shows the location of a number of grants in the river, within a radius of 12 miles about New Castle, eight of which (*Exs. 112, 118-123, 126*) are for islands in, or for parts of the bed of the river, below low water line. The last one was for Pea Patch Island. The validity of these grants has always been recognized in New Jersey and none of them has ever been challenged by defendant; although the Pea Patch island grant (*Ex. 126*) was challenged by the United States government under claim of title from defendant, after it had tried

II. (1) *Action of Penn and the Proprietors.*

in vain to purchase the island from the owner of the New Jersey title, and after having twice tried to obtain a cession thereof from plaintiff's legislature. The deed which the government obtained for that island, as the result of the arbitration and the Sargeant award, was recorded in Salem County, N. J., and not in Delaware.

These grants were presented from the records of the West Jersey proprietors, by their Surveyor General (*R. 253*). They include four grants to William Penn and ten surveys for *islands or lands in the river below low water mark* (*R. 254, 256, 259, 260*).

The grants to Penn were made while he was virtually the sole owner of the proprietary estate. Along with the other proprietors of West Jersey he was entitled to land dividends in proportion to his interest. From 1706 to 1716, inclusive, he received 47 grants aggregating 80,965 acres of land in West Jersey, 27,653 acres of which were in Salem County within a radius of 12 miles of New Castle. After his death in 1718, his sons, John, Thomas and Richard Penn, succeeded to his interest in Pennsylvania, Delaware and West Jersey. From 1737 to 1775, inclusive, they, and their successors in interest, received grants aggregating 75,919 acres, of which 55,051 acres were in Salem County, within a radius of 12 miles of New Castle (*Exs. 113-117; 1165; R. 257-8*).

Penn's, and his descendants', interest in West Jersey continued until after the American Revolution, and his titles were respected by the State of New Jersey after it became an independent sovereign. Richard Penn was still one of the proprietors of West Jersey on September 3, 1793 (*Ex. 1174, p. 15*).

Under these circumstances it is contrary to equity and good conscience that William Penn, or his successors in

II. (1) *Action of Penn and the Proprietors.*

title, should claim any title or advantage in Delaware river and bay from the deeds of feoffment of August, 1682, or from any grant from the Crown, to the prejudice of the interest of his associates or grantees, or his *cestui qui* trust.

Not a single instance is to be found in the entire record of 94 years, of any claim by Penn, or any of his successors, of any title or jurisdiction in the river or bay east of the main ship channel from the date of the deeds of feoffment to the American Revolution.

Considering his part in the settlement of West Jersey, and his familiarity with the provisions of the Concessions and Agreements issued by him and his associates in 1676, which the Duke's confirmatory deed of 1680 was intended to secure, it must be assumed that when Penn obtained the deeds of feoffment in 1682, he had no more intention of obtaining exclusive title to the river than he had of obtaining thereby exclusive title to nearly all of the County of Salem, and part of the County of Gloucester in West Jersey, which were included in a complete circle with a 12 mile radius.

Justice Baldwin in his charge to the jury in *Gale v. Behling* (Appendix D) said:

"In 1682, William Penn was proprietary of the three counties in his own right, and joint proprietor of West New Jersey in trust. He could, therefore, acquire no right in New Jersey in relation to his trust, or to the injury of his *cestui que* trust. To construe the deeds so as to do this, would be contrary to all rules of law; as derogatory to the honor and integrity of the Duke in granting what he had before confirmed, and Penn in accepting for his own use a grant of any part of what he held in trust for another. Besides, the main consideration of the deeds of feoffment was to reward William Penn for the services of his father, which could not

II. (1) *Action of Penn and the Proprietors.*

be done by granting him that which belonged to the proprietors of New Jersey. From these considerations an obvious rule of construction arises; the deeds to Penn must be construed strictly against the Duke, favorably to the elder grantee, under him, and strictly against the younger grantee; so that they shall not be held to grant the same thing twice."

Estoppel.

It therefore appears that Penn and his successors, including defendant (if it is the successor of any title through Penn to the lower counties) were estopped from claiming any title to the bed of Delaware river east of the middle of the main ship channel.

Admitting that the Duke of York had no title to the Delaware counties when he conveyed them to Penn in 1682 (*Rep. p. 13*), the Master attempts to cure that defect by application of the rule of equitable estoppel under the supposed Royal grant to the Duke of March 22, 1682/3 (*Rep. pp. 14-21*).

But assuming, for the argument, that the rule of equitable estoppel was applicable to both title and powers of government under the grant of March 22, 1682/3, the proprietors of West Jersey enjoyed the benefit of an equitable estoppel *prior, in point of time by two years, to Penn.*

Their title came from the Duke whose grant of 1680, to Billings, Penn, Lawrie, and Lucas, included:

"* * * all Islands Bays Rivers Waters Forts Mines Quarries Royalties Franchises and Appurtenances whatsoever to the same belonging or in any ways appertaining. And all the Estate Right Title Interest Reversion Remainder Claim and Demand whatsoever as well in Law as in Equity of him the said James Duke of York of in unto or out of the

II. (1) *Action of Penn and the Proprietors.*

same or any part or parcell of the same. As also the free use of all Bays Rivers and Waters Leading unto or lying between the said Premises or any of them in the said Parts of America for Navigation Free Trade fishing or otherwise To have and to hold unto the said Wm Penn Gawen Laury Nicholas Lucas John Edridge and Edmund Warner their Heirs and Assignes for ever" (*Ex. 23, p. 8*).

Delaware river and bay were the only waters to which that language could have applied.

If the Duke of York had any title to royalties or the power of government in the Delaware colony from 1664 to 1682, and conveyed them to Penn, he could derive that title only from the letters patent of 1664 and 1674, under authority of which he conveyed New Jersey and its appurtenances to Berkeley and Carteret in 1664, and West Jersey to Billings, Penn, Lawrie and Lucas in 1680. The rights and powers thus conveyed were interpreted by the Duke, by Penn and his associate proprietors, by the Assembly of West Jersey, and by the settlers, to include rights, title, royalties and powers of government in Delaware river and bay, including the bed thereof, and they acted accordingly at all times. Such rights, title, royalties and powers were recognized by the Crown and its Royal governors and the Provincial Assembly on numerous occasions, after the deeds of feoffment.

The proprietors of West Jersey were entitled to the benefit of the rule of equitable estoppel against the Duke under the grant of March 22, 1682/3 (if that grant was good, and survived), because their claim arose under the confirmatory grant of 1680, two years prior to any claim of Penn's under the deeds of feoffment.

Of all the men in the world, Penn was the last who could, with clean hands or a clear conscience, claim the benefit of equitable estoppel against the interest of his

II. (1) *Action of Penn and the Proprietors.*

cestuis Billings, and the other proprietors, and the inhabitants of West Jersey, who had joined with him in signing that solemn compact known as the "Concessions and Agreements," under which, and the Duke's Grant of 1680, he, Penn, had so often claimed and defended rights in the river and bay in the precise area now claimed by defendant under the deeds of feoffment and the grant of March 22, 1682/3). Defendant can have no better rights or title than Penn had, under whose title they claim.

This prior claim is well presented by Chancellor Zabriskie in his note on Mr. Sargeant's opinion, in *Gough v. Bell*, 21 N. J. L. 156, 166, printed as Appendix "F" to this brief.

The surrender of the powers of government by the West Jersey proprietors in 1702 returned to the Crown the royalties they had theretofore possessed. If it could be said (which it cannot) that they thereby surrendered to the Crown all the rights they had in the bed of tidal waters, those rights were not returned to the Crown until after the deeds of feoffment and the grant of March 22, 1682/3, and therefore could not have passed under them, but were retained by the Crown until the American Revolution and were acknowledged to the states by the Treaty of Paris.

It therefore appears that plaintiff has a prior and better right to the river east of the ship channel, under the doctrine of estoppel, than had Penn, or than defendant now has, if it is his successor in title.

This contention is not in conflict with Lord Hardwick's decision in *Penn v. Baltimore* (later discussed, and printed as Appendix "B" to this brief) because that case involved only Penn's title to *land*, and his western boundary.

II. (2) *Riparian Rights and Grants.*

No claim of Penn to the river was urged, considered, or decided in that case.

(2) *Riparian Rights and Grants.* (Exceptions 8-17.)

Delaware river and bay are tidal waters throughout the entire length of the boundary between the parties hereto.

The importance of this disputed area is indicated by the testimony of Hugh B. McCollum, a witness of ample qualifications and experience (*R. 293-4*), who made an investigation of the river front on the New Jersey side for the distance of approximately 24 miles, embraced within a radius of 12 miles about New Castle, and testified to the great economic value of that river frontage to the plaintiff. He described the uses to which it is adapted, the character and extent of the present development and improvement, and what, in his opinion, is likely to be its future development. All of the essential requisites to a highly industrial and commercial development of that river front exist there, including navigability, railroads, water, electric power, labor, and market.

He described three major developments which occupy 29,283 feet of river front, and others of lesser extent, made mostly on lands below low water line, granted by plaintiff (*R. 294*). Present and future development depends upon the use of the river below low water line (*R. 296*).

In this case the use of the shore lands depends on their access to, and conjunction with, navigable water. In that respect the circumstances are different from those in *Handley, Lessee v. Anthony*, 5 Wheat. 374, and in *Indiana v. Kentucky*, 136 U. S. 479, where there was no industrial use of shore lands requiring navigable access, and from those in *Vermont v. New Hampshire*, 289 U. S. 593, where

II. (2) *Riparian Rights and Grants.*

no navigation or navigable waters were involved. Here a boundary on low water line would be full of mischief. Aside from cutting off plaintiff's natural right to tidal waters under the thalweg rule, it would bisect each industrial unit, and such a division of jurisdiction would cause endless annoyance and conflict. The impracticability of such a line is apparent.

It would serve only to take away from the plaintiff something it has built, and give it to the defendant who has contributed nothing to its development.

The United States Government has spent (up to June 30, 1929) 45 million dollars to provide and maintain a 35 foot channel (passing this property) from Philadelphia to the capes. Twenty-eight million tons of freight passed this river front in 1928 (*U. S. A. Engineers' Rep., 1929, Pt. 2, pp. 270, 277*).

Delaware river affords the only water access for the commerce of a large part of the territory of plaintiff, and the future development thereof depends upon access by vessels and wharfs on the river and bay for a distance of 116 miles from Cape May to Trenton, N. J.

Modification of the Common Law.

Under the common law of England title to the bed of this river and bay, between high water marks on either side, was vested in the Crown of England, as one of the royalties thereof. (*Hale's Treatise, "De Portibus Maris," Hargraves No. 98; 3 Kent's Comm. 427; Angell on Tide Waters 20; Shively v. Bowlby, 152 U. S. 1*), and the power to establish ports for the use of commerce was likewise vested in the King (*Hale's Treatise, supra*). While the public had the right to the uninterrupted use of navigable waters for commerce and fishing (*Angell on Tide Waters,*

II. (2) Riparian Rights and Grants.

p. 17), it could not use the foreshore for private purposes (*Blundell v. Catterall*, 5 Barn. & Ald. 268).

These royalties were granted, within the territorial limits of the grant, to the Duke of York in the letters patent of March 12, 1664 (*Ex. 6*), and of July 29, 1674 (*Ex. 17*) and by him to Berkeley and Carteret by lease and release of June 23, 24, 1664 (*Exs. 7 and 8*) and by the Duke's confirmatory grant of August 6, 1680, to Penn and his associate proprietors of West Jersey (*Ex. 23*).

In each of the royal grants the powers of government conferred were to be exercised by the Duke, his heirs and assigns forever "as near as conveniently may be" agreeable to the laws, statutes and government of England (*Exs. 6, p. 3; 17, p. 3*); in his grant to Berkeley and Carteret the Duke conveyed his powers of government "in as full and ample a manner as the same is granted unto the said Duke of York by the said Letters Patent" (*Ex. 8, p. 3*). Equivalent terms were used in his confirmatory grant of 1680 to Penn and his associate proprietors for West Jersey (*Ex. 23, pp. 8, 9*).

Lord Cornbury's instructions directed him to govern the united province of New Jersey "as much as may be agreeable to the laws of England" (*Leaming & Spicer, 633; Ex. 13, p. 14*), and substantially the same words appear in the commission appointing him Royal governor of the province (*Leaming & Spicer, 650*).

The common law of England became the fundamental law of the British colonies in America, including those on the Delaware river and bay. (*Vattel, Law of Nations, p. 100; Chalmers' Hist. Rev. Am. Colonies, 97-8; Chalmers' Col. Op., 206-7, 511, 517; Arnold v. Mundy, 6 N. J. L. 1, 100-3; Fowler, N. J. Real Property Law, p. 6; Trinity Church Case, 4 Paige (N. Y.) 498; Exs. 9, p. 25; 11, p. 12; 228, p. 7; 231, p. 17; 361, p. 5*).

II. (2) *Riparian Rights and Grants.*

By the treaty of Paris, which concluded the war of the American revolution in 1783, the King of England acknowledged each of the several colonies, including New Jersey and Delaware, to be free sovereign and independent states and relinquished to them respectively, "all claims to the government, propriety, and territorial rights of the same, and every part thereof" (1 *Malloy's Treaties*, 587). The common law of England, and the statute law insofar as it had been adopted in practice, were adopted by defendant in its constitution of 1776 (*Ex. 662, p. 10*), and have been carried through to the present time in its constitutions of 1792 (*Ex. 663, p. 24*), 1831, and 1897 (*Ex. 664*). *Thorpe, Am. Charters*, p. 596, 635; *Clauson v. Primrose*, 4 Del. Chy. 643; *Sobolewski v. German*, 32 Del. Rep. 540, 545; *Harlan & Hollingsworth v. Paschall*, 5 Del. Chy. 435; *Bailey v. P. W. B. R. R. Co.*, 4 Harr. (Del). Rep. 389; *State v. Reybold*, 5 Harr. (Del). Rep. 484; *Bringhurst v. O'Donnell*, 14 Del. Chy. 225, 227-9; *Hully v. Security Trust & Sd. Co.*, 5 Del. Chy. 578.

Likewise in New Jersey the common law of England has prevailed in the colonies from the date of the grant of 1664 to the Duke of York for that territory. It was prescribed by the territorial government in 1672. (*Ex. 9, p. 25*) and by an act of the Colonial Assembly in 1678 (*Ex. 13, p. 5*). It was adopted in the first constitution of the state in 1776 and carried through to the present time (*Constitutions, July 2, 1776, Article XXII, Ex. 28, p. 8; June 29, 1844, Article X, par. 1, Ex. 8, pp. 34, 74; Arnold v. Mundy*, 6 N. J. Law 1; *Gough v. Bell*, 21 N. J. L. 156; 22 N. J. L. 441-454; *Bell v. Gough*, 23 N. J. L. 624, 654; *Corsfield v. Coryell*, 4 Wash. C. Ct. Rep. 370, 384; *Stevens v. Paterson & N. R. R. Co.*, 34 N. J. L. 532, 537; *State v. Jersey City*, 25 N. J. L. 525, 529; *McCarter v. Hudson Water Company*, 70 N. J. E. 525; -aff. 70 N. J. E. 695; *State Board of Health v. Phillipsburg*, 83 N. J. E. 402.

II. (2) Riparian Rights and Grants.

No Royal ports were ever established on Delaware river or bay. The undeveloped nature of the country and the necessities of the situation prompted the settlers to use the river and bay and the lands thereof below low water mark to suit their convenience. It appears that by common usage and custom, recognized, sanctioned and encouraged by the Proprietary governments, by the Royal governors, by acts of the colonial and state assemblies, and by the courts, indefeasible private rights were acquired in the bed of Delaware river and bay below low water mark during the colonial period, and after the American Revolution. Islands in, and sections of the bed of the river were conveyed by the West Jersey proprietors and exclusively used and occupied by the settlers (*Exs. 257, p. 2; 157, pp. 8-9; 158; 329; 335; 336; 342; 343; 346*), and those titles have always been sustained by New Jersey courts.

One of these islands (Matinicunk) was purchased by the Royal governor, himself, from the West Jersey proprietors, on January 26, 1710, and occupied by him in uninterrupted possession until 1739 (*Ex. 336*). The improvement and occupation of that island was recognized by the Privy Council as late as 1772 (*Ex. 346*).

At common law the franchise for public ferries vested solely in the King, but the Privy Council in 1730 found no objection to a law passed by the proprietary government of Pennsylvania, authorizing the establishment of two ferries across Delaware river between Philadelphia on the one side, at Camden and Gloucester, respectively, on the New Jersey side (*Ex. 491*).

Under a local common law, usage or custom, titles based on private appropriation were recognized in both Delaware (*Ex. 1152*), and New Jersey.

II. (2) *Riparian Rights and Grants.*

In *Corfield v. Coryell*, 6 Fed. Cas. 546, 554, decided in 1823, Mr. Justice Washington of this court, in the Third Circuit, rendered a decision in which he recites numerous acts of the proprietors from 1683 to the American Revolution recognizing private title and possession of riparian rights in the bed of the river and bay below low water mark. He concludes (*italics ours*):

“These acts prove, beyond a doubt, that the proprietaries of west New Jersey, from a very early period, asserted a right to the river Delaware, or to some part thereof, below low water mark, and along its whole length; and since the western boundary of the province, under the grant to the Duke of York, was precisely the same on the bay as on the river, it may fairly be presumed, independent of his grant to the proprietaries in 1680, and the concessions made by them in the year 1676, that this claim was extended to the bay, for the purposes of navigation, fishing and fowling.”

• • • • •

“Whether the claim of New Jersey extended to the middle of the bay, as we see by the compact with Pennsylvania it did to the middle of the river, is a question which we have no means of solving; but that the proprietors and inhabitants of west New Jersey made use of the bay, both for navigation and fishing, under a claim of title, from a period nearly coeval with the grants of the province, *can hardly admit of a doubt*. This right, indeed, is expressly granted by the Duke of York to William Penn, and the other proprietaries of west New Jersey by his grant, bearing date the *6th of August, 1680*. It contains a grant, not only of all bays and rivers to the granted premises belonging, but also the free use of all bays and rivers leading into, or lying between the granted premises, for navigation, fishing, or otherwise. The only objection which could have been opposed to the exercise of those acts of ownership under this grant was, that the duke had himself no title to the bay and river Delaware, under the royal grant to him. But

II. (2) *Riparian Rights and Grants.*

the presumption is, nevertheless, irresistible, that the benefits intended to be bestowed by this grant, and which were confirmed by the other acts of the provincial government before noticed, were considered by the inhabitants of the province as being too valuable not to be enjoyed by them. This use of the bay and river amounted to an appropriation of the water so used (Vattel, bk. 1, c. 22, Sec. 266); and this title became, as has before been observed, indefeasible, by the treaty of peace, except as against some other state having an equally good, or a better title."

After referring to the deeds of feoffment from the Duke of York to William Penn, in 1682, for the three lower counties of Delaware, *Justice Washington* says—

"And we are *strongly inclined to think* that, if the right of the former of these states (New Jersey) to the bay of Delaware, was founded on no other title than that of appropriation, by having used it for purposes of navigation and fishing, the effect of the Revolution, and of the treaty of peace, was to extend the limits of those states to the middle of the bay, from its mouth upwards."

William Penn, as proprietor of the Province of Pennsylvania, although his eastern boundary, like New Jersey's western boundary, extended only to the river or bay, likewise claimed and exercised title and jurisdiction below low water mark on his side of the river, including certain islands therein, and the use of the property under these claims was not interfered with, *Kean v. Rice*, 11 *Sarg. & Rawle*, 203, (1824).

In *Bennett v. Boggs*, 1 Bald. U. S. C. C. Rep. 60, 76, *Mr. Justice Baldwin* of this court, in 1830, in the Third Circuit, found that from a very early period in the history of New Jersey the inhabitants had acquired private property in the bed of the Delaware river below low water mark and that such rights were recognized as "capable of being devised and alienated with, or separate from, the land

II. (2) *Riparian Rights and Grants.*

to which they were annexed, subject to taxation, and taxed as other real estate" (p. 76).

In *Gough v. Bell*, 22 N. J. L. 441, decided by the New Jersey Supreme Court in 1850, it was held that private ownership and individual occupancy in lands under water in Delaware river existed prior to 1783 and was recognized and confirmed by an act of the New Jersey legislature of June 13, 1799, (*Patterson's laws* 416, Sec. 9), and by other acts of 1808, 1819, 1826, recited by the court at page 462 of the opinion. The court quotes from *Griffith's Annual Law Register*, p. 1290, Note 1, to show that such private rights had existed from the earliest times and had been subject to exclusive enjoyment and alienation like other property, and had been so recognized by the courts in actions of trespass for intrusions, and in actions in ejectment to recover possession. The court cites and follows *Bennett v. Boggs*, *supra*, and holds (p. 464) that this practice established a modification of the common law rule touching property in the soil and shores of navigable rivers. Reference is made to the original concessions and agreements to the West Jersey proprietors which granted convenient portions of land for wharves and keys, (p. 465).

The court cites (p. 468) the argument of counsel for New Jersey in *Martin v. Waddell*, 16 Peters 367, that—"the right of the riparian proprietors to wharf out to the public river (the navigable channel) is a local custom in New Jersey" and that private rights in the bed of Delaware river had grown up by "long usage." The court states that these facts were relied upon in support of the view adopted by the Supreme Court of the United States adverse to the claim of the proprietors in that case. The court also cites private rights of fishery and ferry, as were established in *Bowman's devisees v. Waltham*, 2 McLean 376; *Angell on Tide Waters*, 171, and

II. (2) *Riparian Rights and Grants.*

says that the State of New Jersey, as the successor sovereign to the crown, could not divest the owner of such property of any of those rights except by appropriation for public purposes (pp. 474-5), citing *Pittsburg v. Scott*, 1 Barr. 314, 315. (Agreeing with Penn's argument in 1680.)

Six years after his decision in *Bennett v. Boggs* Mr. Justice Baldwin, in the case of *Gale v. Behling*, in the Third Circuit (*Ex. 219*, pp. 19-20; Appendix D to this brief) charged the jury in an ejectment suit as follows:

"It appears that, from 1739 at least, islands in the Delaware have been surveyed under West Jersey proprietary warrants, and held by that title to the present day; so that there has been an uninterrupted exercise and enjoyment of a right of property by the proprietaries for 97 years. The government of the province had been in the Crown from 1702, so that these surveys, and possession taken under them, were acts of notoriety presumed to be within the knowledge of the local Governors, who were the immediate representatives of the Crown; and as the right was not contested, it would have been good by prescription, if the royal Government had continued for sixty years, from the time of the survey; but, as the State of New Jersey succeeded to the rights of the Crown, without ever questioning the right of the proprietaries to grant islands, every presumption which could be made in their favor against the Crown, applies to the State as its successor, by the declaration of independence, or in virtue of the treaty of peace, by the relinquishment of the King. It is also a matter of judicial history and knowledge, that the riparian owners of lands on the Delaware have from time immemorial, enjoyed the rights of fishery opposite their shores, which has been transmitted and conveyed as property, and is so recognised by the compact between Pennsylvania and New Jersey in 1783.

II. (2) *Riparian Rights and Grants.*

Various laws have also been referred to, regulating the right of fishing in the Delaware, which are direct and unequivocal claims and assertions of right; and what gives them greater weight is, that they are the acts of a royal Government over the province, whose boundaries must be presumed to be co-extensive with the exercise of legislative power. The King is, of course, presumed to have ratified and confirmed the acts of his Governor" (pp. 19-20).

When the case of *Gough v. Bell*, came to the New Jersey Court of Errors and Appeals (the court of last resort) in 1852 (23 N. J. L. 624) that court held:

(p. 658).

"That it has been the common understanding, as well in West as in East Jersey, that the owners of land bounding on navigable waters had an absolute right to wharf out and otherwise reclaim the land down to and even below low water, provided they did not thereby impede the paramount right of navigation, is undoubted. The usage to do so from the earliest settlement of the country has been universal; and until recently the right to do so was never questioned, either by individuals or by the government. A vast amount of labor and capital has been thus expended, to the great benefit of the community. Not only wild marshes, overflowed at extraordinary tides, but large tracts of mud flats lying below the ordinary high water line of our rivers and navigable creeks, such as by the common law of England are held to be the property of the sovereign, and such as in the case of *Lowe v. Govett* (3 B. & Add. 863) were the subjects of a parliamentary grant, have been embanked and reclaimed, and by great expense transformed from a perfectly useless to a very valuable and productive property, by individuals or companies who never thought of obtaining grants for them, or licenses to use them from the crown or the colonial government or the state. The mud flats lying outside of the banks, and subject to the daily overflow of the tides, are

II. (2) *Riparian Rights and Grants.*

now constantly resorted to for mud to repair the banks, and in many cases are indispensable to their maintenance.

There is the most ample evidence that this understanding and usage are of ancient date, and universal in all parts of the state."

• • • • •

(p. 662).

"What was the origin of the usage, it may be difficult to say. If it be conceded that it arose from a mistaken apprehension of the doctrines of the English common law, or from what must now be admitted to have been a mistaken construction of the original grants to the first proprietors, I do not see that this concession will materially influence the result. The mistake was universal, and was acted on throughout the states. Mr. Griffith, an eminent lawyer of *West Jersey*, and especially distinguished for his knowledge of land titles, says, in his *Law Register* for 1821-2, that the construction had always been, that in case of land bordering on either fresh or tide water rivers, the owners held to the middle of the channel. This construction was probably founded on the doctrine insisted on by the New Jersey commissioners of 1807, in their correspondence with the New York commissioners that the king having granted the rivers within and bounding on the province to the proprietors, as they assumed to be the fact, they thereby became private rivers, and thus the common law applicable to such rivers was attached to them. This doctrine has been overturned by the case of *Martin v. Waddell*, but the usage under it is a fact that remains. The rivers are not private rivers; but so far as the citizens in general have acted for a long series of years under a usage, reasonable in itself and conducive of public good, which led them to bestow labor and capital upon property, to which under other circumstances they might have had no title, such a usage presents just that new exigency of affairs to which the common law so happily and so justly adapts itself. The mistaken origin of a

II. (2) *Riparian Rights and Grants.*

usage will not necessarily prevent the courts from sanctioning it as right and lawful. Many of the most important doctrines of the common law had their origin in mistakes, one of its maxims being *communis error facit jus*.

A usage so universal and of such long standing, and in itself so reasonable, ought, in my opinion, to be adopted by the court as the law of the land. But this usage has besides the support arising from the fact, that it has been sanctioned, or at least acted upon and treated as legal, by many statutes of ancient and of modern dates." (*Italics ours.*)

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The court expressly referred to such rights on the Delaware river during the proprietary government of West Jersey down to 1702, and during the subsequent period to the American Revolution, when New Jersey was a crown colony governed by a Royal governor (*pp. 665-6*), and held that to that extent the common law of England is modified in this province by a common usage recognized by the original proprietors, by the crown, by the royal governors, by the assembly of the province, and by the legislature and the courts of the state (*p. 669-70*). This modification of the common law was also recognized in *Arnold v. Mundy*, 6 N. J. L. 1, 111; *Stevens v. Paterson and Newark R. R. Co.*, 34 N. J. L. 532, 545, (N. J. Court of Errors and Appeal, 1870); *Attorney General v. Delaware and Bound Brook R. R. Co.*, 27 N. J. E. 1; affirmed by the Court of Errors and Appeals in 1876, 27 N. J. E. 631; *Fitzgerald v. Faunce*, 46 N. J. L. 536 (1884), *Bennett v. Boggs*, 1 Bald. (U. S. C. C.) 60 (1830). The last three cases involved titles to the bed of Delaware river.

Such rights were recognized in *United States v. River Rouge Imp. Co.*, 269 U. S. 411, 418; *Shively v. Bowlby*, 152 U. S. 1, 17, 18; *Angell on Tide Waters*, pp. 17-18, 44, 142, 146-9 (mentioning Delaware river and bay), 196-7.

II. (2) *Riparian Rights and Grants.*

Modifications of the common law of England where the strict rules thereof were deemed inapplicable to the early settlements in this country and the necessities of the inhabitants, and the development of private rights under such a modification, were recognized by this court in *Wyoming v. Colorado*, 259 U. S. 419, 459, 460-2.

These authorities show not only a modification of the common law rule by which the inhabitants appropriated tidal lands on Delaware river and bay, but also the general extent of that practice and its official sanction. There are no contrary decisions in Delaware.

The decisions of the State courts respecting a rule of law prevailing within a state, are usually accepted and followed by this court. *St. Anthony Falls Water Power Co. v. Board of Water Commissioners*, 168 U. S. 349, 358; *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80; *St. Louis v. Rutz*, 138 U. S. 226; *Porter v. Investors Syndicate*, 287 U. S. 346.

Appropriation of Tidal Lands.

The record includes eight deeds, recorded in Salem County, New Jersey, conveying lands by descriptions which include the subaqueous soil of the river *to the channel*, on the east side of Delaware river within a radius of 12 miles about New Castle, by persons and corporations who had no public grant thereof, showing clearly that titles thereto by appropriation were recognized from the beginning of the 19th Century:

May 12, 1801—Pittman to Dalbow, (*Ex. 163*).

May 29, 1829—Dalbow to Bailey—Wilmington and New Jersey Steamboat Company (a corporation of Delaware) (*Ex. 164*).

March 11, 1837—Wilmington and New Jersey Steamboat Company to Fithian and Mulford, including the *then*

II. (2) *Riparian Rights and Grants.*

existing wharf of the steamboat company, with landing and wharf privileges (*Ex. 166*).

November 17, 1837—Dalbow to Wilmington and New Jersey Steamboat Company (a corporation of Delaware) (*Ex. 165*).

August 19, 1848—Fithian's Executors to Hurff (*Ex. 168*).

August 26, 1848—Mulford to Hurff "extending past the steamboat company's wharf" (*Ex. 167*).

October 6, 1848—Wilmington and New Jersey Steamboat Company (a corporation of Delaware) to Hurff, including "waters, water courses, rights, liberties, privileges" &c. (*Ex. 141*).

October 16, 1848—Hurff to Elkinton, "with all the pier and bridge from the shore to the farthest extent in Delaware river, beyond low water mark, with the x x waters, water courses, rights, liberties, privileges x x x".

A ferry property, with ferry slips, etc. below low water mark, was leased by Kinsey to Wheaton in 1844 (*Ex. 169*) and the lease was renewed by successive owners in 1845 (*Ex. 170*).

Riparian Laws and Grants.

Plaintiff's legislature in 1851, passed a law (approved March 18, 1851) recognizing and ending the ancient usage or local common law and asserting its title to such lands (*N. J. P. L. 1851, p. 335*). It still permitted shore owners to build on, or otherwise improve, their lands to low water mark, but for future use or structures beyond that line, they were required to obtain a license as provided in the act (*Bell v. Gough, 23 N. J. L. 624, 667-8*).

By Chapter 391, approved April 11, 1864 (*P. L. 1864, p. 681*) the legislature appointed a Board of Commis-

II. (2) *Riparian Rights and Grants.*

sioners with power to survey and examine lands lying under the waters of the New York Bay, Hudson river, Kill von Kull, Newark Bay, Arthur's Kill and Raritan Bay, and lands lying under water of the Delaware river opposite the County of Philadelphia, to obtain full information in order to ascertain the then present rights of the state in the same and the value thereof, and to fix and establish an exterior line in said bays and rivers beyond which no pier, wharf, bulkhead, or other permanent obstruction should be permitted.

By Chapter 383, approved March 31, 1869, (*P. L. 1869, p. 1017*) the legislature repealed the act of 1851 and provided that "said repeal shall not be construed to restore any supposed usage, right, custom or local common law, founded on the tacit consent of the state."

That act also forbade any erection upon, or reclamation of, any tide lands in certain parts of the state, without the grant or permission of the Board of Commissioners. Reservation was made to protect all previous grants made by special act of the legislature.

Section 4 of the act authorized conveyances, or leases, in the name of the State of New Jersey, for land under water, which could be acknowledged and recorded as deeds, to be issued by the commissioners, signed by the Governor and attested by the Attorney General, but such grants were limited in extent by the lawfully established bulkhead or pierhead lines. It forbade the making of any grant without payment to the state of compensation or rentals as may be fixed by lawful authority. The act appointed four commissioners (who became known as the Riparian Commission) to complete the work designed in the act of 1864, and to grant or lease state lands below high water mark and fix the price thereof.

II. (2) *Riparian Rights and Grants.*

The powers of the Riparian Commissioners were extended to Delaware river and bay by Chapter 256, approved March 21, 1871 (*P. L. 1871, p. 44*).

The right of plaintiff to assert its title to tidal lands and to regulate the use and sale thereof is well established. *Shively v. Bowlby*, 152 U. S. 1, 36; *Hardin v. Jordan*, 140 U. S. 371, 381-2; *Morris v. United States*, 174 U. S. 196, 226; *Kansas v. Colorado*, 206 U. S. 46, 93; *U. S. v. Holt State Bank*, 270 U. S. 49, 54-5; 1 *Farnham on Waters*, 51 53; *Angell on Tide Waters*, 65, 72, 132; *St. Anthony's Falls Water Co. v. Board of Water Commissioners*, 168 U. S. 349, 358; *Lewis, Eminent Domain, 2d Ed. Sec. 65b*, p. 114; *Martin v. Waddell*, 16 Peters 367, 410, 416; *Mayor and Council of the City of Hoboken v. Pennsylvania Railroad Company, etc.*, 124 U. S. 656; *Stevens v. Paterson & Newark R. R. Co.*, 34 N. J. L. 532; *Paul v. Hazelton*, 37 N. J. L. 106; *Moore v. Ventnor Gardens*, 105 N. J. E. 730.

Special Acts.

In the interval between the Acts of 1851 and 1871, riparian lands, below low water mark on the New Jersey side of the river, within a radius of 12 miles of New Castle, were granted by acts of plaintiff's legislature, with authority to the grantees to build, maintain, rebuild, and keep in repair, docks, wharves, piers and other appliances extending into the river a sufficient distance to accommodate vessels navigating on the river and to collect wharfage charges for the use thereof, as public wharfs. These grants are located on Exhibit 3, with a designation of the letter "L" (for legislative) preceding the number of the grant, (*R. 291*). They are:

1. In 1854 to Broadway and others at Pennsville (opposite New Castle) (*Ex. 41*). A wharf still exists on that location at the foot of Main Street, Pennsville, now owned by the Delaware-New Jersey Ferry Company, a corpora-

II. (2) *Riparian Rights and Grants.*

tion of Delaware (R. 282), as shown on Exhibit 131, (R. 280).

2. In 1855 to Elkington and others; also authorizing them to incorporate the Pennsgrove Pier Company. A dock was built under that act, and the structures, still existing, are shown on Exhibit 132 (R. 282). The wharf is now owned and used by Delaware-New Jersey Ferry Company, a corporation of Delaware. (Ex. 103). Grants of the additional land under water at this location were made by plaintiff to Pennsgrove Pier Company, in 1916, (Ex. 160), and to Delaware-New Jersey Ferry Company, in 1930, (Ex. 90).

3. In 1870, to Guest at Pennsgrove, opposite Wilmington (Ex. 44). A section of rock and pile foundation about 80 feet long shows that a wharf was built there, (R. 382; Ex. 134).

4. In 1870 to Messrs. Walker at Pennsgrove, extending 400 feet from high water mark (Ex. 48). At that place high water mark and low water mark are from 60 to 75 feet apart. That wharf was built at the foot of Maple Street, Pennsgrove. What remains thereof is shown on Exhibit 135. (R. 283-4).

5. In 1871 to Barber at Pennsgrove, extending 100 feet below low water mark, (Ex. 43). This wharf, built at the foot of West Harmony Street, Pennsgrove (opposite Wilmington), was formerly used for a ferry line, and is now used for landing pleasure boats. Exhibit 133 gives a description and sketch of this wharf, which now extends 400 feet on one side, and 430 feet on the other side, below low water line (R. 125, 282, 283).

II. (2) *Riparian Rights and Grants.*

Wharf Testimony.

Fourteen witnesses testified to the existence of ancient docks and wharves at Pennsville and Pennsgrove, *extending below low water mark*, and to their use as boat landings for the transportation to and from New Castle, Wilmington, Philadelphia, Boston and elsewhere, of passengers, manufactured products, farm implements, general merchandise, grain, coal, lumber and farm products, beginning beyond the recollection of the oldest living person.

While some of them mentioned the traditional history of those docks before their time, their personal recollections cover a period of almost a full century, (*Ex. 238, pp. 1, 27*). These witnesses describe wharves built before the days when legislative authority was considered necessary, as well as those built under special or general legislative grants of the State of New Jersey.

Testimony, to the same effect, of witnesses in the former case was offered, without objection:

Jenkins was born in 1836 and lived at Pennsville all his life. There were two wharves there as long as he could remember (*Ex. 238, p. 40*).

Harris was born in 1843 and there was a wharf at Pennsville as long as he could remember (*Ex. 238, p. 106*).

Tussey lived at Pennsgrove since 1866. There was a wharf at Pennsville as long as he could remember (*Ex. 238, p. 113*).

Ryan was born in 1852. There was one wharf at Pennsville and two at Pennsgrove as long as he could remember (*R. 326*).

Hall was born in 1854. There were docks at Pennsgrove and Pennsville from his boyhood (*R. 330*).

II. (2) *Riparian Rights and Grants.*

Elkington, a witness in this case, was born in 1845 and lived at Pennsgrove since 1849. The Summerill wharf there, built before his time, has existed during the entire period of his recollection, and has been used for 70 or 75 years. The Barber wharf was also in existence when he came to Pennsgrove in 1849. The Guest wharf was built in about 1872 or 1873. His father purchased a wharf at Pennsgrove in 1848. There was a pier there then, which was rented to boats. In 1855 his father organized the Pennsgrove Pier Company and rebuilt the wharf (*Ex. 42*). This witness produced title deeds to his father for the pier property in 1848 (*R. 306*).

Demwy, a witness in this case, was born in 1843 and has been on the river since 1866, as mate and master on vessels. There were docks at Pennsville and Pennsgrove at that time. The steamer "Rabold" began to use the Elkinton dock at Pennsgrove in 1853 and two vessels used it before that (*R. 123*).

Their testimony shows that such docks and wharves were, and still are, indispensable to the welfare of the inhabitants and the economic development of the territory (*R. 306-336; 522-540; Ex. 238*).

All these docks extended far enough into the river to accommodate vessels at low tide. All but one, are still in existence and use, and have been rebuilt and extended to meet the requirements of deeper draft vessels of the present day.

Defendant made no attempt to answer or contradict any of this proof, or to cross examine any of these witnesses. This testimony shows that for a period reaching back beyond the memory of our great-grandfathers there were docks and wharves below low water mark along the east side of the Delaware river within a radius of 12 miles of New Castle. None of them was authorized or ever taxed

II. (2) *Riparian Rights and Grants.*

by defendant. They came naturally as part of the social order of the colonists. They came as a part of the law of existence in the new country, and were recognized by the governments and courts from the earliest times.

The title deeds show that, as far back as 1801, formal conveyances were made by upland owners of lands under water *as far as the ship channel*, for dock and ferry purposes, and that, as early as 1829, these titles were purchased from New Jersey owners by Delaware citizens and corporations for the use of steamboat docks. The deeds of March 11, 1837, recite the existence of a wharf at that time, and existing wharves are referred to in the subsequent deeds of 1844, 1845 and 1848 above mentioned.

There is no evidence that any objection was ever made by defendant. Its citizens, individual and corporate, have owned and used these facilities under New Jersey titles, since 1828; more than a full century. During all these years, defendant has stood by and watched this invasion of what it now claims to be its territory, without objection.

Grants Under General Laws.

Up to 1851 the legislature of New Jersey acquiesced in the practice, which had existed in the colonies from the first settlements, of private appropriation of lands under water below low water line in the Delaware river and titles thus acquired were sustained by the courts. By the act of 1851 the legislature recognized that practice, but required a license to be obtained before such private rights could thereafter be acquired. By the act of March 31, 1869 (*N. J. P. L. 1869, p. 1017*) bulkhead and pier-head lines were directed to be established in the waters on the east side of the state and the act of 1851 was repealed, with the express proviso that such repeal should not be construed to restore any supposed usage,

II. (2) *Riparian Rights and Grants.*

right or custom or local common law, "founded on the tacit consent of the state", which the courts had found to exist, and had sustained in *Bell v. Gough*, 23 N. J. L. 624. That act also forbid the private appropriation of tidal waters below high water mark and required a grant to be obtained from the commission created by it. A reservation was made to protect titles acquired by the ancient usage of appropriation or by private acts of the legislature. That act did not at first apply to the Delaware river, but was extended to that river in 1871 (*N. J. P. L. 1871, p. 44*). From that time onward all private rights or titles below high water mark in Delaware river or bay could be acquired only by a grant or lease from the state from its Riparian Commission, or the Board of Commerce and Navigation, which succeeded to all of its powers and duties in 1915 (*Ch. 242, N. J. P. L. 1915, p. 432*).

In 1877 plaintiff's Riparian Commission made a map of the shore front on the east side of the Delaware river and fixed thereon the exterior wharf line in the river (*Ex. 144*). The part of that line southerly of a point about a mile and a half above Oldman's Creek is opposite Delaware, within a radius of 12 miles of New Castle. That line is located in the river at distances varying from 450 to 840 feet below low water line (*R. 337-9*). A new pier-head and bulkhead line was established by plaintiff's Board of Commerce and Navigation on August 12, 1916, between Pennsgrove (opposite Wilmington) and Cedar Point (opposite New Castle) (*Ex. 145*). That line is below low water mark throughout its entire length, varying in distances therefrom, from 375 feet at Deep Water Point to 3550 feet at Helms Cove. This map shows then existing docks (*R. 290-1, 340-1*). Subsequent grants of land made by plaintiff in the bed of the river extended to that line.

II. (2) *Riparian Rights and Grants.*

The consulting engineer of the New Jersey Board of Commerce and Navigation (since 1915) (*R. 85*) testified to the nature, extent and value of the structures erected below low water line, built under the old usage of private appropriation, under private acts of the legislature, and under grants made by the Riparian Commission or the Board of Commerce and Navigation (*R. 275*). These structures are shown on Exhibits 2, 3 and 57, and are listed with full information concerning them, respectively, on Exhibit 127, which shows the name of the purchaser, the date of the grant, the municipal location, the front footage, and the consideration paid (for grants obtained from the state), aggregating \$82,065.20. (*R. 84-90; 117-123; 130-155; 265-292*).

Exhibits 58 to 95, inclusive, contain 27 grants made by plaintiff, since 1883, of lands below high water mark, within a radius of 12 miles about New Castle, extending (except in three instances) (*Exs. 92, 93 and 94*), to the pierhead line established in 1916 (*Ex. 145*). These exhibits are bound in Volume 4 of the Record. Following each grant is a map showing the structures and, in most cases, a sketch and a description of the structures, showing their extent, uses and value, and, in some cases, the valuation at which they are assessed in New Jersey.

One of the grants, made in 1909 (*Ex. 93*), is to the United States government, on its application, for a lighthouse on Goose Island flats. One of them (*Ex. 94*) is a license for a cable crossing to use the bed of the river to the center of the main ship channel.

One of the grounds assigned by this court in determining the boundary between the States of *Minnesota v. Wisconsin*, 252 U. S. 273, in St. Louis bay, was stated by the court as follows:

II. (2) *Riparian Rights and Grants.*

(p. 279.)

“Extensive docks have been constructed from the Minnesota shore in both the upper and lower bays; those extending southwest from the Grassy point cross the boundary claimed by Wisconsin. The general situation of 1846 continued until long after 1861, but during the last thirty years extensive improvements required for a large and busy harbor have produced great changes.”

Grants to Delaware Corporations.

Delaware-New Jersey Ferry Company, which applied to plaintiff's Board of Commerce and Navigation and obtained a grant on May 19, 1930, for 252.41 lineal feet of riparian lands, extending from high water mark 913.52 feet on one side and 985.44 feet on the other side, into the river (*Ex. 90 with sketch attached*), is a corporation of the State of Delaware and operates the Pennsville-New Castle and the Pennsgrove-Wilmington ferries, as a successor company to the previous operators (*R. 170*).

That company was incorporated March 22, 1927, by Clarence A. Southerland, Wilmington, Del. (then Attorney General of Delaware; *33 Del. Rep. iii*); Joseph Handler, Wilmington Del. and Myrtle Davis, Wilmington, Del. The certificate of incorporation (paragraph eighth, p. 6), provides that they “being all the incorporators, shall have the direction of the affairs and of the organization of the corporation.” (*Ex. 103*).

Immediately after its incorporation, that company acquired title to ferry properties at Pennsville, Pennsgrove and New Castle.

Part of the Pennsville property was acquired for \$3,000. by deed, dated April 8, 1927, (*Ex. 104*), including the lands under water from high water mark on the east side of the river to the pierhead line established by the state of New

II. (2) *Riparian Rights and Grants.*

Jersey in 1916, and for a distance of 169.11 feet along the same (p. 2).

That deed recites that the premises conveyed thereby are located in the village of Pennsville, Salem County, New Jersey, and were vested in William D. Acton, the grantor, by the following conveyances:

(a) Deed of Francis J. Doyle, dated August 28, 1909, and (b) a quit-claim deed of Emma H. Acton, dated January 15, 1919, which two conveyances are recited to have vested in Acton—"whatever right, title and interest in the lands hereinabove described that has arisen from or has been acquired by virtue of the provisions of the act of the legislature of the State of New Jersey, adopted on or about March 16, 1854, wherein and whereby the said legislature did empower Thomas D. Bradway, Charles B. Newall and Jacob N. Mitchell, their heirs and assigns, to build, maintain, rebuild and keep in repair docks, wharves, piers, and other appliances in front of their lands at Pennsville and to extend the same into the Delaware river" (*Ex. 41*); (c) Deed of February 19, 1923, from the State of New Jersey for lands under water (*Ex. 89*); (d) Deed dated October 19, 1925, from the State of New Jersey for lands under water (*Ex. 88*); these deeds are all stated to be recorded in Salem County, New Jersey.

That deed (*Ex. 104*) also conveyed "all of the piers, wharves, rights and franchises possessed by said Acton in connection with the same and which said wharves and piers are located within the lines and boundaries set out in the foregoing description," together with all of the right, title and interest of the grantor in such portions of said wharves, piers and extensions thereof as lie south and southwest of the lands above described. It recites the intention to convey all the right, title and interest of the grantor "in any way obtained, whether by grant, user

II. (2) *Riparian Rights and Grants.*

or otherwise" in the lands described "with any erections or constructions located thereon together with the rights, franchises, privileges, wharves, piers and buildings now in the possession of the grantor, adjoining the above described tract and lying south or southwest thereof" (*italics ours*).

The remainder of the Pennsville ferry property, consisting of adjoining lands under water extending to the pierhead line established by the plaintiff in 1916, was acquired by deed, dated May 19, 1930, directly from the State of New Jersey, for \$2,524.10 (*Ex. 90*).

By deed dated August 9, 1927, (*Ex. 106*) that company acquired part of the Pennsgrove ferry property from Pennsgrove Pier Company, for \$5,000, which had been previously conveyed to the latter by the State of New Jersey (*Ex. 60, 62, 63*). The deed recites that they are the same premises so conveyed, together with lands conveyed to the Pennsgrove Pier Company by Charles K. Elkinton, October 6, 1855. The lands are described as located in the Borough of Pennsgrove, Salem County, New Jersey, and the deed is recorded in that county. This deed recites the incorporation of the Pennsgrove Pier Company by the New Jersey act, approved March 15, 1855 (*Ex. 42*), and the intention to convey the rights and privileges forming a portion of the pier property of the grantor at Pennsgrove, Salem County, New Jersey.

By deed dated August 9, 1927, (*Ex. 105*), that company acquired the remainder of its present ferry property at Pennsgrove from French's Hotel Company, for the sum of \$45,000, consisting of two tracts of land in the Borough of Pennsgrove, Salem County. The first tract describes land to low water mark. The second tract describes land from the high water line extending 1,135.38 feet to the pierhead line (*Ex. 145*) and running along the same 262.33

II. (2) *Riparian Rights and Grants.*

feet, and back to high water line a distance of 1,283.86 feet (p. 2).

The deed recites that the second tract is the same land conveyed by the State of New Jersey to the grantor, October 17, 1921, and refers to the plan attached thereto (*Exhibits 61, 62 and 63*). That deed was recorded in Salem County, New Jersey.

The ferry property at New Castle, Delaware, was acquired by Delaware-New Jersey Ferry Company in 1927 by three deeds (*Exs. 1150, 1151, 1152*), including wharves, piers and docks, and riparian rights beyond low water in the river, and in one deed (*Ex. 1151*) extending 600 feet into said river, and in another deed (*Ex. 1152*) extending to the Port Warden's line, with all the right, title and interest in and to all the mud flats and land under the waters of said river in front of said property—

“As far into the said river as such right, title and interest extends or should extend by law or *custom*, and all riparian rights insofar as said party of the first part has the right to grant the same, but only to the extent, as regards said right, title and interest, and riparian rights, that the same appertain to the above described and hereby granted tract or piece of land.”

These deeds show that the incorporators of Delaware-New Jersey Ferry Company, a corporation of Delaware, including the then Attorney General of Delaware, accepted, in 1927, its title to lands below low water line on the east side of Delaware river, within 12 miles of New Castle, part directly from the State of New Jersey, and part by deeds from others who had acquired their titles from the State of New Jersey, including those acquired by special acts in 1854 (*Ex. 41*), and 1855 (*Ex. 42*), and by previous user of Acton's predecessors (*Ex. 104*). By that title that company acquired 883.75 lineal feet of riparian

II. (2) *Riparian Rights and Grants.*

frontage, extending about 900 feet below low water line on the New Jersey side, within a radius of 12 miles of New Castle, at a cost of \$55,524.10 (*Ex. 127, 104, 106, 105*), which, with improvements, is valued at \$132,692.81 (*R. 277*). It purchased its property in New Castle, Delaware, by deeds whose maximum extension into the river was 600 feet (*Ex. 1151, p. 1*). It never obtained a grant of tidal lands on either side of the river from defendant.

It must be assumed that the incorporators, and counsel, of that company, regarded as valid, in 1927, the title derived from the State of New Jersey.

Other Delaware citizens and corporations have purchased the same title. The DuPonts, individually, and as E. I. DuPont deNemours & Company, between 1891 and 1929, acquired title from the State of New Jersey to lands below low water on the east side of the river, within 12 miles of New Castle, aggregating 3,487.15 lineal feet, at a cost of \$32,169.70 (*Ex. 127*). Upon the strength of this title they have improved a river frontage of two and one-half miles by the construction of expensive manufacturing plants. One plant is valued at \$8,714,500, of which \$88,490.00 is on land conveyed by plaintiff below low water mark. The commerce handled on that land below low water mark amounted, in 1930, to more than 13 million dollars (*Ex. 68, p. 3*). Another plant is valued at \$1,163,050, of which value only a small part is at present on land below low water mark granted by plaintiff. It cannot be lightly assumed that an organization of the magnitude and management of the DuPont Company would blindly invest such sums of money on a false title from plaintiff, if it could have obtained good title from its own state.

Hence it appears that of the 10,069.63 lineal feet of land below low water line on the east side of the Delaware

II. (2) *Riparian Rights and Grants.*

river, within 12 miles of New Castle, sold and conveyed by plaintiff, individuals or corporations of Delaware, (including the Kent grant, *Ex. 92*) have acquired 5,149.90 lineal feet, or more than half, for which they paid an aggregate of \$87,883.55.

Grants to the United States Government.

In addition to the grant of 1909 (*Ex. 93*) to the United States Government for a lighthouse on Goose Island flats, for which no corresponding grant was obtained from Delaware, the United States has sought other grants from plaintiff for lands below low water mark within 12 miles of New Castle, but in such cases it adopted the bipartisan policy of seeking grants for the same land from both states.

Plaintiff's exhibit 136 and defendant's exhibit 684 both conveyed, in 1907, to the United States the area shown on Exhibit 137, known as Artificial Island. It is partly outside the 12-mile radius (*Ex. 137*).

Exhibit 207 contains a New Jersey act, approved March 27, 1917 (*Ch. 189, P. L. 1917, p. 541*), authorizing the governor to cede to the United States the right, title and interest of New Jersey to submerged land in the river lying between Artificial Island and the Jersey shore. The deed was executed and ready for delivery, but was withheld by the governor, on the advice of the Attorney General that the grant could not be made *without compensation*, until an agreement respecting compensation was arranged. This is the occasion of which the Master (inadvertently, no doubt) says the Attorney General of plaintiff "ruled * * * that the grant could not lawfully be made". (*Rep. p. 52; Exception 8, p. 9.*) The last letter in Exhibit 207, relates to a proposed application to the Board of Commerce and Navigation to fix the

II. (2) *Riparian Rights and Grants.*

price, but such an application has not yet been made and the deed has never been delivered. A similar application of the United States to Delaware resulted in a grant of the same area by the legislature of that state on February 21, 1927 (*Ex. 686*).

Assertions by Delaware.

Except for an act of 1813, ceding all its "right, title and claim" to the jurisdiction and soil of Pea Patch Island (in which it did not assert any title) to the United States government (*Ex. 673*), defendant never asserted or claimed title to the bed of the river east of the ship channel until 1872. In that case, (*New Jersey v. Delaware*), this court, on March 26, 1877, ordered an injunction to restrain defendant from interfering with plaintiff's rights of fishery east of the ship channel, in this area, upon the following findings of fact (*Ex. 237, pp. 13-15*):

"And it appearing by allegations of the bill, duly verified by affidavit and other evidence of a public character, that for a long period of time, to wit more than 70 years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same, where the said river runs between the said state and the state of Delaware, and that (except as hereinafter stated) the citizens and inhabitants of New Jersey have, during said period, exercised the right of freely fishing in said river, in common with the citizens and inhabitants of said state of Delaware, * * *."

II. (2) *Riparian Rights and Grants.*

Prescriptive Rights.

In *Arkansas v. Mississippi*, 250 U. S. 39, 45, where the facts are similar to those in this case, this court, after declaring the thalweg rule as governing boundaries between states in navigable streams, in spite of certain state acts fixing a different line of boundary, said:

“We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. See *Arkansas v. Tennessee*, supra, and the cases cited at page 172.”

Title by prescription to tidal, as well as to other, lands, is recognized by many authorities. *Vattel, L. of Nations*, pp. 120, 123, 186, 190; 1 *Moore's Int'l L. Dig.*, 293-7; 1 *Fillimore, Int'l L.*, Secs. 255, 260; 1 *Wheaton Int'l L.* 207; 7 *Comyns' Digest* 71; *Benest v. Pison*, *Knapp's Rep.* 60-73; *Angell on Tide Waters*, 270-286.

In *Penn v. Baltimore* (*Ex. 643*, p. 23), Lord Hardwick said in 1750:

“But now in cases of this kind, of two great territories held of the crown, I will say once for all, that long possession and enjoyment, peopling and cultivating countries, is one of the best evidences of title to lands or district of lands in America, that can be: and so have I thought in all cases since I have served the crown: for the great beneficial advantages, arising to the crown from settling, &c., is that the navigation and the commerce of this country is thereby improved. Those persons therefore, who make these settlements, ought to be protected in the possession, as far as law and equity can.”

Plaintiff's jurisdiction to the middle of the ship channel in Delaware river and bay was officially recognized shortly after the Revolution, by Edmund Randolph, Attor-

II. (2) *Riparian Rights and Grants.*

ney General of the United States, in his opinion of May 14, 1793, in the matter of the British ship "Grange" seized in Delaware bay (*Am. State Papers, Foreign Rel. 148; 1 Opp. Atty. Gen'l 32*).

Plaintiff's title and jurisdiction, by prescription, in Delaware river and bay were adjudicated as part of the *res gestae* by Justice Washington, in 1825, in *Corfield v. Coryell* (6 Fed. Cas. 546); by Chief Justice Tilghman in *Kean v. Rice*, in 1824, (11 Sargeant & Rawl's Rep. 203); and by Justice Baldwin, in 1830, in *Bennett v. Boggs* (1 Bald. 60) and in 1836 in (*Gale v. Behling*) (*Ex. 219*).

The last mentioned case was a suit to eject defendant's grantee from lands lying east of the then main ship channel of Delaware river, within a radius of 12 miles of New Castle. The following are extracts from *Mr. Justice Baldwin's* charge to the jury:

"This protection is afforded by the presumption of law, that a long quiet possession either of land or a franchise began with a grant. This is what we call, in law, a title by prescription, not because it is believed that a grant ever in fact existed, but because the law will presume it, and not require any proof of the fact, or suffer it to be questioned. A direct grant of lands in a royal haven, may be presumed to have been made by the King, after sixty years uninterrupted possession, and whatever may be held by grant may be held by prescription, even against the Crown" (pp. 16-17).

"By an adverse possession is to be understood the exercise of acts of ownership in the soil, or the propriety right of jurisdiction and government, by one proprietary within the boundaries of the other, under the assertion of a right or color of title in himself to the place in controversy, as a part of his own territory or property. When there arises such a case, the actual possession of land, or the undisputed exercise of the right of property by granting it, or of jurisdiction by acts of legislation, affecting

II. (2) *Riparian Rights and Grants.*

it for a great length of time, the principle of prescription applies between two proprietaries, by which it will be presumed that an uninterrupted enjoyment of a right of property or government was founded on an original grant or a confirmation. It is on this principle alone that the title of the Duke of York, and of W. Penn, to the lower counties can vest, in opposition to the original right of the Crown. The same principle must also apply to the proprietaries of New Jersey, if they can show a similar foundation for the prescription of a grant from the Crown, or a confirmation to the extent of their possession, or exercise of jurisdiction over the Delaware or the islands in it. It is also a settled principle of the law of nations, that prescription applies between State and State, nation and nation, when the possession of territory, or the enjoyment of rights of sovereignty, has been long quiet and unquestioned (Vattell 121, Grot. 174, 180, Puff. 449)" (pp. 18-19).

• • • • •

"As to two proprietary governments separated by a large river, prescription applies in favor of each against the Crown, the common grantor under whom they both hold; and between each other it applies as between two nations, for neither proprietary claims from the other, or acknowledges any original right to what the one claims, to have ever been in the other, so as to make it a subject of grant or confirmation, in any way, but by a grant to himself from the Crown" (p. 19).

• • • • •

"And admitting that, by the first deed from the Duke of York, this island would be within the twelve mile circle; the adverse claim of the proprietaries of New Jersey, and the exercise of jurisdiction to the middle of the river, would bar the right of the Penns by prescription, whether they are considered as private persons, or as a proprietary government. As individuals, the Penns could claim no exemption from the effects of time, running on a long and uninterrupted possession

II. (2) *Riparian Rights and Grants.*

without an adverse possession or claim, by themselves; as a government, they must submit to the rule which prevails among States, that peaceable possession is evidence of original or agreed boundary. Thus the matter stood between the two proprietaries, till New Jersey and the three lower counties assumed the position and rights of independent States; the one abolished the royal, the other the proprietary government yet neither interfered with the right of soil within their limits, so that the only change effected was of government. This left the jurisdiction over the Delaware and its islands a matter between the two States" (20-21).

A verdict for the plaintiff returned by the jury on that charge was accepted without appeal by the United States, the real defendant therein, on the advice of the Attorney General (*Ex. 219, 220, pp. 1, 4*). It has never been reversed or overruled.

Similar facts and decisions are found in *Rhode Island v. Massachusetts*, 15 Peters 233, 272-3, and 4 How. 591, 629-630, 634, 638-9; *Indiana v. Kentucky*, 136 U. S. 479; 509-10, 515, 518-19; *Louisiana v. Mississippi*, 202 U. S. 1; *Maryland v. West Virginia*, 217 U. S. 1, 41, 44; *Michigan v. Wisconsin*, 270 U. S. 295, 308, 315-17; *United States v. Texas*, 162 U. S. 1, 61; *Arkansas v. Mississippi*, 250 U. S. 39, 45; *Massachusetts v. New York*, 271 U. S. 65, 95.

The facts stated in the cases above recited and the uncontradicted proof in this case show that, regardless of any title which Penn or defendant may have had (if they had any), title and jurisdiction to the bed of the river, east of the middle of the main ship channel, have been claimed, exercised and enjoyed by the original proprietors and their inhabitants from the early settlements along the river in the 17th century, under a common usage, or local common law, without interruption until 1871 when plaintiff by legislation asserted its own title, recognized by the

II. (2) *Riparian Rights and Grants.*

courts, both state and federal, as alienable and assessable, as well as indefeasible by the Crown or the legislature of plaintiff; that these titles were conveyed by deeds from the beginning of the 19th century, and by plaintiff since its first riparian act in 1851.

These ancient titles by appropriation were recognized by the Duke of York in his grant of 1680 to Penn, and others; by Penn throughout the period of his jurisdiction in New Jersey from 1676 to his death in 1718; by his sons and successors in title from his death until the American Revolution; by the crown throughout the entire period of colonial existence; by the Royal governors from 1703 to the American Revolution, and by plaintiff's legislature and courts from the American Revolution to the time of its assertion on its own sovereign title in 1851, and by its own grants from that time onward. Defendant has never objected to, or interfered with, this exercise of title and jurisdiction, but conceded plaintiff's rights therein by the compact of 1905 (hereafter discussed).

These facts establish plaintiff's prescriptive right.

The fact that plaintiff has known, since 1872 (or perhaps before) of defendant's latent claim of title and jurisdiction in this area, does not affect the title by prescription, except to strengthen it by defendant's inaction. The Master errs in his conclusion that plaintiff's knowledge of defendant's unasserted claim was sufficient to negative a prescriptive right.

The exercise of title and jurisdiction in that area by the proprietors and plaintiff was actual, continued, visible, notorious, distinct, and hostile to any such claim of the Penns or of defendant, yet none of them ever lifted a finger to establish, or secure a determination of, such claim.

II. (3) *Several and Common Fisheries.*

(3) *Several and Common Fisheries.*

(Exception 18.)

There were certain established several fisheries on the east side of Delaware river below low water mark, within a radius of 12 miles of New Castle.

Exhibit 1165 shows four such fisheries, designated, Dutch Fishery (two), Thompson's Fishery, and Hall's Fishery. That map was made in 1873, but we do not know how long those fisheries had existed prior to that time, except as to the Dutch Fishery, which had existed for three-quarters of a century before that date, as shown by Exhibits 171 to 179, inclusive. That fishery occupied the cove slightly southeast of Pea Patch Island, within a twelve-mile radius of New Castle (*R. 355; Ex. 1165*).

The official recognition of such several fisheries from the beginning of statehood by legislative enactments and judicial decisions appears in *Gale v. Behling, Ex. 219*, pp. 19-20; *Bennett v. Boggs*, 1 Bald. (U. S. C. C.) 60; *Fitzgerald v. Faunce*, 46 N. J. L. 536; and *Gough v. Bell*, 22 N. J. L. 441, 462, 464, affirmed, 23 N. J. L. 624.

These fisheries were maintained without interruption or objection from defendant from almost the beginning of its statehood. Not only were the title documents all recorded in Salem County, New Jersey, but one of the deeds (*Ex. 177*) was made by a Master in Chancery of New Jersey under a foreclosure proceedings conducted in plaintiff's courts.

The question of common fishery was settled by the Compact of 1905 (*Ex. 53*), and is not involved in this case.

II. (4) *The Circular Boundary.*

(4) *The Circular Boundary.* (Exceptions 19-21.)

Plaintiff contends that the so-called "12 mile circle" never was a complete circle, but only that part of the arc of a circle extending from the west side of Delaware river "northward and westwards unto the beginning of the fortieth degree of northern latitude" (*Exs. 253; 254*). A complete circle would have included, not only the bed of the river to low water mark on the east side thereof, as defendant claims and the Master found, but also nearly all of Salem County, and part of Gloucester County, in West Jersey (now New Jersey), of which Penn was then the chief proprietor (*Ex. 1155*). If a complete circle was intended, there is no explanation why defendant is not entitled to all the land, as well as the river, within that circle, except that the Duke's grants of 1664 to Berkeley and Carteret and of 1680 to Penn and his associates had already conveyed the land on the east side of the river. The answer to that proposition is that he also included the river in the conveyance of 1680.

His only title is in the letters patent of 1664 and 1674. If their bounds stopped at the east side of the river, he could not convey it to Penn of West Jersey in 1680, or to Penn of Delaware in 1682. If he obtained a Royal grant of it on March 22, 1682/3, as the Master found, the doctrine of estoppel, which the Master applies to the latter, inured first to the benefit of the former, as trustee for the West Jersey proprietors, whose equitable title was prior, by two years, to that of Penn of Delaware.

The idea of this anomalous boundary was conceived during the proceedings on Penn's application for the Pennsylvania grant.

The Master states that the proceedings in Penn's application for his Pennsylvania grant make it clear that the

II (4) *The Circular Boundary.*

distance of twelve miles from New Castle was fixed at the request of the Duke of York in order that the grant to Penn might not conflict with his own interests (*Rep. p. 11*). Those proceedings show that so little was known about the country that the Ministry gave notice of Penn's application to the Duke and Lord Baltimore in order to ascertain whether the territory Penn desired "would in anyway intrench upon" their territories under the Duke's grants of 1664 and 1674, "of New York and the possessions of those parts", or Lord Baltimore's grant of 1632 of Maryland (*Exs. 518, pp. 1-3; 242, p. 2; 1158*). Sir John Worden, the Duke's Secretary, claimed an interest for the Duke in the New Castle settlement, although he admitted at the time that it was not "strictly within the limits of the Duke's patent" (*Exs. 518, pp. 3-4; 243*). The Attorney General, whose opinion was sought on Penn's proposed boundaries, advised, on November 11, 1680, that they would not intrench upon Lord Baltimore's province of Maryland, or upon the Duke's patent for New York, since that patent was "bounded westward by the East side of the Delaware bay" (*Ex. 518, pp. 11-12*).

Having avoided any opposition from Lord Baltimore by accepting his suggestion of the Susquehanna Fort as Maryland's northern limits (*Exs. 518, pp. 5, 6-9; 244*), Penn avoided the more serious threat of opposition from the Duke's Secretary by agreeing upon a boundary line that would stay twelve miles north of New Castle (*Exs. 518, p. 7, 14-17; 245; 250, pp. 1-2; 251*), and Lord Chief Justice North, with the aid of Sir John Worden, drew that boundary as follows:

"a circle drawn at twelve miles distance from New Castle northward and westwards unto the beginning of the fortieth degree of northern latitude and then by a straight line westwards."

II. (4) *The Circular Boundary.*

(*Exs. 518, pp. 18-19; 253; 254*), which was incorporated in Penn's patent for Pennsylvania (*Ex. 361*).

In the Royal proclamation of April 2, 1681, to Lord Baltimore, and in a Royal proclamation of the same date to Penn, the boundary is described in the same words (*Ex. 256*).

Although Sir John Werden admitted on June 30, 1680, that the Delaware side was not "strictly within the limits of the Duke's patent" (*Exs. 518, pp. 3-4; 243*) and the Attorney General ruled, on November 10 of the same year, that the Duke's patent was "bounded westward by the East side of Delaware bay" (*Ex. 518, pp. 11-12*), Penn prevailed upon the Duke to give him a quit-claim deed, dated August 21, 1682, purporting to extinguish any claim which the Duke might have in the territory included in Penn's grant of Pennsylvania (*Ex. 520*). Since there is no conceivable reason for such a quit-claim deed from the Duke, Judge Rodney and Mr. Konkle (*Ex. 297, pp. 213-241*) assumed that this was merely a precautionary measure.

On October 10, 1681, ten months before the date of that quit-claim deed, and 22 months after the date of his grant of Pennsylvania, Penn instructed his commissioners in Pennsylvania to inform the settlers there that their grants from the Duke's governors at New York were void because the Duke "never had a grant from the King" (*Ex. 231, p. 36*).

It has never been suggested that the Duke had any title to any part of the territory included in Penn's grant. On the contrary it has always been held that the Duke's grant stopped on the East side of the Delaware river (*Ex. 27; Ex. 518, pp. 11, 12*); *Attorney General v. D. & B. B. R. R. Co.*, 27 N. J. E. 1; *Corfield v. Coryell*, 6 Fed.

II. (4) *The Circular Boundary.*

Cases, 546, 554; *Bennett v. Boggs*, 1 Baldwin C. C. 60, 73; *Cobb v. Davenport*, 32 N. J. L. 369, 381-2.

When the deeds of feoffment were made in 1682, the circular description of the northerly boundary of the Delaware colonies was used solely for the purpose of making that boundary conform to the southerly boundary of Pennsylvania.

Thrice in the same year that Penn received his deeds of feoffment, he described, in official documents, the territory they conveyed as extending 12 miles *north* and *west* of New Castle and as lying on the *west side* of said river and bay. Those instances follow:

On October 28, 1682, Penn appointed John Moll, and others, Justices of the Peace "for the Town of Newcastle, upon Delaware, and 12 miles *north and west* of the same." The oath of these justices, executed in writing on the same day, recites their appointment as Justices of the Peace for the Town of Newcastle, upon Delaware "and 12 miles *north and west* of the same" (*Ex. 231, p. 37*).

The Act of Union of December 7, 1682 (*Ex. 561*) prepared and signed by Penn, describes the three lower counties "on the river Delaware * * * lying on the *west side of said river and bay*" (*p. 1*) (*Ex. 231, pp. 38-9*).

In a letter, dated December 25, 1682 to William Darnall and others, Justices of the Peace in Sussex County (Delaware) (*Ex. 362*), Penn says:

"Since it hath pleased God to put the government of the *west side of the Delaware river and bay* into my hands" &c. (*p. 2*).

As soon as Penn received his grant of Pennsylvania he sent over his nephew William Markham to represent his interest there, and also Thomas Holme as his surveyor-general, with instructions to locate his boundary lines,

II. (4) *The Circular Boundary.*

particularly the southern boundary (*Ex. 292, p. 12*). Holme began this work in 1681 and produced a map, dated that year, showing the circular boundary *extending from the west side of Delaware river, just above Naman's Creek, westerly an indefinite distance (Ex. 1166)*. On March 14, 1683, Penn's court at Upland (Chester) accepted that boundary line (*Ex. 292, p. 12*), and on August 9, 1693, on petition to the governor and council, this boundary was extended "upwards on Naman's Creek along the southwest side of the northmost branch" (*Ex. 292, p. 12; Ex. 293, p. 9*).

That boundary continued for 8 years, until September 20, 1701, when a petition was addressed to Penn asking for a division line—

"according to the proprietary's letters patent from the King" (Ex. 293, p. 10; Ex. 292, pp. 12, 13).

A conference with Penn resulted in a warrant of October 28, 1701, to Isaac Taylor and Thomas Pierson to survey the line

"according to ye King's letters patent and deeds from the Duke and ye said circular line to be well marked two-thirds part of ye semi-circle" (Ex. 293, p. 10).

They were directed to admeasure and survey from the town of New Castle—

"Ye distance of twelve miles on a right line up ye River and from the said distance to divide between the said counties by a circular line extending according to the King's letters patent and deeds of feoffment from the Duke of York."

"And ye said circular line to be well marked Two-thirds part of a semi-circle." (Ex. 265; Ex. 567.)

The letters patent referred to was the grant for Pennsylvania (*Ex. 292, p. 13; Ex. 293, p. 13*).

II. (4) *The Circular Boundary.*

The commissioners reported that, on November 25, 1701, they met and decided unanimously—

“that the beginning should be at ye end of the Horse Dike next ye said Town of New Castle”

and from thence measure due north a distance of twelve miles and at that point—

“to run a circular line first eastward down to the river”

and then return to the twelve mile point and—

“run ye said circle westward until it shall complete the two-thirds part of ye said semi-circle.”

They reported that on November 26, 1701, they measured from the end of the Horse Dike north twelve miles to a white oak marked by twelve notches standing on the west side of the Brandywine Creek in the land of Isaac Hellman and from that white oak they did—

*“run eastwardly circularly * * * and * * * came to Delaware River on ye upper side of Nathaniel Lamplugh’s old house at Chichester.”*

They then returned to the white oak tree and

*“run westward * * * until we had extended * * * two-thirds parts of the semi-circle to a twelve mile radius.”*

This survey was completed December 4, 1701, and is signed by Israel Taylor and Thomas Pierson, the surveyors.

There is also the certificate of the commissioners of the counties on either side of the line, repeating the same circumstances as above described in the certificate of the surveyors (p. 1-2).

Annexed to that report are two maps, the first showing the circle as extending from the *west bank of the Delaware river* at Chichester around past the white oak tree to the hickory tree, which is described in the certificate

II. (4) *The Circular Boundary.*

of the surveyors as having been marked with three notches and standing near the western branch of Christiana Creek. The other map shows a *semi circle* on the west side of a perpendicular line *along the west side of the river*. It shows a perpendicular line up the center of the peninsula, presumably according to the order in council of November 13, 1685. *It shows no part of the circle extending into the Delaware river.* (*Ex. 265; Ex. 568; Ex. 293, p. 13*). It is stated in that report that that circular line (not a *circle*) is to be run

“according to the King’s letters patent and deeds of feoffment from the Duke of York.”

It very definitely states that it is not to be a circle but only

“two-thirds parts of the semi circle”

and is repeatedly referred to as a

“circular line.”

If it was the declared intention to describe the boundaries given in both the grant of Pennsylvania and the Duke’s deeds of feoffment, as is stated in the Report. Here is a practical contemporary interpretation by Penn himself of what the circular boundary in both documents meant.

So far as is known no attempt was ever made at any time to survey or determine the location, or mark any part, of the remainder of that circular line to complete a circle, or to extend it easterly across the river.

In a letter of November 20, 1705 (*Ex. 454*), Lord Cornbury stated to the Lords Commissioners:

“So that those lands known by the name of the lower counties (which lie on *the west side of Delaware bay*, and of which the Duke of Yorke granted a lease to Mr. Penn) is not contained in the grant from the King to the Duke.”

II. (4) *The Circular Boundary.*

An act of Assembly of Pennsylvania passed May 28, 1715, while Penn was still alive and active in the government of the Province, recites the grant of March 4, 1680-1, from Charles II to William Penn for Pennsylvania—

“bounded on the east by Delaware River . . .
on the south by a circle drawn at twelve miles distance from New Castle, *northward and westward* unto the beginning of the fortieth degree of northern latitude.”

and a grant Charles II to Duke of York for town of New Castle and the “*land lying within a compass (or circle) of twelve miles about the said town*” which the Duke of York “did (amongst other things) grant and confirm to the said William Penn.”

The act recites the terms of the warrant of October 28, 1701, for the survey, and of the surveyor's report. It recites the certificate of that fact dated December 4, 1701 (*Exhibit 265, p. 4*).

The act confirms “the said circular line so drawn and certified in manner aforesaid” which “is hereby declared to be the division line between the said County of New Castle and the County of Chester” (*Ex. 271*). That act was submitted to the Privy Council for approval in 1718 (*Exs. 272, 1149*), and was disallowed for the following reasons stated in a report of Lords Commissioners, made on July 9, 1719:

“This act contains a survey or description of the lands said to be granted to Penn by the charter of King Charles II.”

They state that how far the survey may be just they cannot take upon themselves to determine.

“And it may possibly take in the whole or some part of the three lower counties *belonging to his Majesty, to which Mr. Penn had no right or title,*

II. (4) *The Circular Boundary.*

though they have for some time been under his government." (*Ex. 273; Ex. 271, p. 7; 274.*)

The agreement of May 10, 1732, between the Penns and Lord Baltimore provided—"that a *semi-circle* should be drawn at 12 English statute miles around New Castle, agreeably to the deed of the Duke of Yorke to William Penn in 1682" (*Ex. 292, p. 4.*)

In the petition of Richard Penn, opposing Lord Baltimore's petition for confirmatory grant of Maryland to include the Three Lower Counties, filed Dec. 18, 1734, he describes the circular boundary

"of twelve miles distance from New Castle by a circle drawn, *northward and westward* and to the fortieth degree of north latitude."

Defendant offered in evidence warrants, surveys and grants of bank lots, at New Castle and vicinity on the west side of the river (*Exs. 570-610*). All but five were made in the name of Penn, during his lifetime, by James Logan and his two associate commissioners. All of them extend eastward 600 feet in the river, or to the ship channel (which then ran on the west side of Pea Patch Island and nearer to the west shore than now (*Ex. 729*)). The same is true of the report of May 1, 1789, establishing the boundaries of New Castle (*Ex. 611*), and the two plans of New Castle; one (*Ex. 612*) undated, and the other (*Ex. 613*) dated 1804.

In a letter of March 29, 1720, to Hannah Penn (*Ex. 476*), James Logan said—"We have only *one side* of the Delaware river" (p. 1). In another letter of his, dated January 1, 1725-6, to Hannah Penn, he says—"But alas we have but *one side* of but one river that is navigable" (*Ex. 485, p. 2*).

The "Case of the Three Lower Counties on Delaware in America" (*Ex. 484, p. 1*) submitted in 1725, describes

II. (4) *The Circular Boundary.*

the three lower counties as comprising "lands lying all along on the *west side* of the river and bay of Delaware." It recites the deeds of feoffment to Penn for possession "of the lands on the west side of the Delaware" stating that the Duke's patents of 1664 and 1674 "extended only to the east side of Delaware bay and river" (p. 2).

On December 18, 1734, Ferdinando John Paris, attorney for the Penns, filed a petition with the Privy Council for a confirmatory grant of Delaware Colony, in which he described its boundary as follows: "Twelve miles distance from New Castle by a circle drawn northward and westward and to the beginning of the fortieth degree of north latitude."

In a petition to the Crown in 1735 (*Ex. 639*), submitted by the freemen of the lower counties, they described that territory in five different places as "lands on the *west side* of Delaware"; (pp. 4, 5, 6, 8).

In the commission of Thomas and Richard Penn, dated August 21, 1756, appointing William Denny, Lieutenant Governor, they refer to the three lower counties as—

"lying on the *west side* of the bay and river of Delaware now commonly called and known by the name or names of the counties of Newcastle, Kent and Sussex upon Delaware."

—They state that their title thereto is derived from deeds of feoffment from the Duke of York to William Penn for—

"the said tract of land lying on the *west side* of the bay and river of Delaware" (*Ex. 1102*).

The Breviate, prepared by Penn's counsel in *Penn v. Baltimore* (*Ex. 1169*), contains the testimony of the witnesses in that case. They testified, without exception, that the three lower counties were located on the *west side* of

II. (4) *The Circular Boundary.*

Delaware river, without once referring to any part of the river itself. Some of that testimony is as follows:

James Logan:

“He (Penn) having obtained from the Duke of Yorke a grant of the said counties situate on *all the western side* of Delaware from the province of Pennsylvania southward.”

“Pennsylvania and the said counties lie on the *west side* of Delaware bay and river, and the Province of New Jersey on the east side thereof” (p. 8).

Edward Chambers:

“The Province of Pennsylvania *is not contiguous to the Province of New Jersey*, but are separated by Delaware river and bay which runs between them and Pennsylvania and the lower counties *lie on one and the same side*, viz., the *west side* of said bay and river” (p. 8).

William Rumsey:

“The lower counties and Province of Pennsylvania lie on the *west side* of the bay and river of Delaware” (p. 9).

Benjamin Tasker:

“The Province of Pennsylvania and the three lower counties . . . lie on the *west side* of the bay and river Delaware” (p. 9).

In answer to questions submitted by the Lords Commissioners, Penn's Lieutenant-Governor Gordon, in September 1731 (*Ex. 748*), described the title and boundaries of his province, in which he recites the Royal letters patent of 1680 as the source of title to the Province of Pennsylvania, and the deeds of feoffment of 1682 as the title to the three lower counties, which he says are “bounded on the *east by Delaware bay and the eastern ocean*” and “are but a narrow strip of land” (p. 2).

II. (4) *The Circular Boundary.*

Counsel for the Penns, in their argument in *Penn v. Baltimore*, refuted the idea that a complete circle was intended. They said the deed of feoffment for New Castle—

“in two several places, calls it expressly twelve miles of land; which absolutely destroys his (Lord Baltimore’s) contention of the circle, because a circle, whose circumference or periphery is but twelve miles, does not contain twelve miles of land, no not even if that circle *was compleat*; whereas ours is not half of a circle of land, as New Castle lies on the great river side, and does not contain anything near half twelve miles of land” (*Ex. 1169, p. 10*).

This argument clearly shows that as late as 1750, Penn’s counsel regarded nothing but land as included in the deeds of feoffment and that they never considered the circle, referred to in that deed, as being a complete circle.

They recite the agreement in May 10, 1732, the second section of which provided that there should be “the said circle mentioned in the said charter for Pennsylvania and deed of bargain and sale or feoffment of New Castle (or so much thereof as is requisite)” (pp. 4-5).

The charter of Pennsylvania describes it as a circular line *northward and westward* of New Castle, without mentioning anything *eastward or southerly*. The Duke of York’s deed of feoffment does mention a circle, but in this agreement the parties make no distinction between the requirements of the charter of Pennsylvania and that of the deed of feoffment. They evidently contemplated the same circular line in both documents.

That there was no intended virtue in the circle, *per se*, is shown by the Bill of April 13, 1683 for new letters patent (*Ex. 368*), in which the north boundary of the Delaware colony was moved northward to the Schuylkill river,

II. (4) *The Circular Boundary.*

and the circular line was forgotten. This shows that there was no design on the bed of the river.

Here is the same practical construction of that boundary by Penn's successors in title nearly seventy years after the deeds were made.

Proud (1797) describes the territory included in the first deed of feoffment as "the town of New Castle, alias Delaware town, and a district of twelve miles round it, *as far as the Delaware river*" (*Ex. 228, pp. 21-2*).

He says:

"In consequence hereof this territory, which before had been divided by William Penn, into the three counties of Newcastle, Kent and Sussex, became bounded *on the east*, by the river and bay of Delaware, and partly by the ocean . . . so that said line (the perpendicular line dividing the peninsula) touch the arch of a circle, drawn at 12 miles distant from Newcastle *to the river Delaware*; and thence from the end of the said line, on the northeastward, *to the river Delaware*, by the said arch" (italics ours) (*p. 29*).

Futhey & Cope, in their "*History of Chester County, Pennsylvania*" (1881) say:

"The southern boundary of Chester county exhibits some striking peculiarities. Its eastern end consists of an arc of a circle *commencing at the Delaware*, and ending at a point where it strikes the north-and-south line separating the States of Delaware and Maryland" (*Ex. 292, p. 1*).

There is not one document issued by Penn or his successors, by any department of the Crown Government, or by any person or body of persons in the colonies of Pennsylvania or Delaware prior to the American Revolution which describes the three lower counties, otherwise than lying on the *west side* of Delaware river, or which mentions the circular boundary as extending beyond the west

II. (4) *The Circular Boundary.*

side of the river. With the exception of the bank lots and the charter of New Castle, which extend only 600 feet into the river, or to the ship channel, there are no documents in existence before the American Revolution which purport to claim, or convey, title to any lands in Delaware river. There is no act, order, or writing of Penn to be found in the records claiming or attempting to exercise title or jurisdiction east of the ship channel.

Contrary to the general supposition, Mason and Dixon did not run the circular boundary line. The Taylor and Pierson survey is the only one ever made of the circular line, except for a short distance on the west end at the junction with the western tangent, until after 1880 (*Ex. 293, pp. 10-13; Ex. 292, p. 14; Ex. 291, p. 1*).

In 1849 the legislatures of Pennsylvania, Delaware and Maryland appointed commissioners to fix the junction of the boundaries of the three states.

These commissioners employed Colonel J. D. Graham, U. S. Topographical Engineer, who made the resurvey and remarked the boundaries in the vicinity of the intersection of the three states, and the circular boundary of 1701 for 3- $\frac{3}{4}$ miles northeastward from that point of junction (*Ex. 292, pp. 14-18; Ex. 293, pp. 13, 15*).

In his report Col. Graham, in 1849, stated that the circular boundary between Pennsylvania and Delaware from the point of junction of the three states to Delaware river was unmarked; that no survey of the circular line had ever been made since 1701; and that "no person at this time knows exactly where the line dividing Newcastle County, Delaware, and Delaware County, Pa., is, and where it enters the river" (*Ex. 293, pp. 14, 15*).

In 1892, at the request of the States of Pennsylvania and Delaware, the Superintendent of the United States

II. (4) *The Circular Boundary.*

Coast and Geodetic Survey designated W. C. Hodgkins, Assistant in that department, to resurvey and mark the circular boundary line and the westerly tangent therefrom dividing Pennsylvania and Maryland.

In 1901 he ran the boundary line between Mississippi and Louisiana confirmed by this court in *Louisiana v. Mississippi*, (202 U. S. 1, 55) and was referred to in that decision as "a well known expert in such matters."

His report on the Pennsylvania-Delaware boundary was published by the Treasury Department (Coast & Geodetic Survey) as Appendix No. 8 to its report of 1893 and is abstracted in Exhibits 294 and 295. It contained two maps (attached to Exhibit 294). The first map shows the old boundary line as stopping on the *west side* of the Delaware river, as does the second map of the triangulations of the new line as laid out in 1892. The broken line was officially adopted. That map shows the "Terminal Monument" as located on the *west side* of the Delaware river. Another Hodgkins map, similar to this and showing the same circular boundary and Terminal Monument, is Map 51 of Exhibit 1133.

In that report (*Ex. 295*) Mr. Hodgkins describes the process of the survey of 1701 and its inaccuracies (pp. 1-3).

He recites the appointment of commissioners in 1889, between Delaware and Pennsylvania, for resurveying the circular line (p. 20)—

"Starting from the Delaware River and going westward."

He identified the marks, on the *west side* of the river, of the survey of 1701 (p. 21). He described the difficulties of running and locating the circular line (p. 21), and the

II. (4) *The Circular Boundary.*

necessity of calling for aid from the United States Coast and Geodetic Survey (p. 23). He says:

“It was found that no single circle could be made to satisfy the conditions imposed by the commissions, a compound curve was therefore laid out”

composed of two circular arcs with different radii (p. 24), with a terminal monument near the Delaware river—“at the *eastern end* of the line.”

Beginning at page 24 of this exhibit is a detailed account of the surveyor's work, which is included in the exhibit not so much for the detail it contains, but to illustrate the impossibility of making such an anomalous boundary.

At page 30, are extracts of a report on this resurvey made by Edward B. Matthews, Assistant State Geologist of Maryland, who participated in the commission's deliberations. The references here begin at page 196 of that report (which is identified in the heading at the top of page 30) and is the complement of Exhibit 296 comprising extracts from the earlier pages of the same report.

The report then refers to the various surveys by Mason and Dixon (p. 30), and by Graham in 1849-50, which are fully described (pp. 31-2). Then follows the Hodgkins Survey of 1892 (pp. 33-5). He refers to the circular boundary as originating—

“*In the deed of feoffment from James, Duke of Yorke, to William Penn and the charter of Pennsylvania from Charles II*” (p. 33).

This exhibit also contains, at pages 36 to 49, a story of the circular boundary by one Hayes, appearing in the *Pennsylvania Magazine* in 1923. The Hayes article states—

“This unique curve boundary has only just been marked definitely and permanently on the ground,

II. (4) *The Circular Boundary.*

after more than 220 years of uncertainty. Not since 1701 had the line been run”;

He states that the disputes between the Penns and the Baltimores related only to southern and western boundaries, so far as Delaware was concerned (p. 38).

Mr. Hodgkins states that the survey of 1892 has its terminal monument “*on the bank of the Delaware*” (p. 46). His survey was submitted in the report of the joint commission, and adopted by the legislature of Pennsylvania on June 22, 1897, and by the legislature of Delaware on March 28, 1921 (*Ex. 291, p. 6*). That joint action of the states was approved by Congress on June 30, 1921.

The acts of the Delaware legislature concerning the circular boundary (*Ex. 291*) are as follows:

April 1, 1869, Chapter 382, Delaware Laws, 1869.

To settle and determine the dividing line between Delaware and Pennsylvania. It authorizes the Governor to appoint commissioners to act in conjunction with commissioners from Pennsylvania (p. 1), who are to settle, determine and locate the line between Delaware and Pennsylvania by extending the southerly line of Pennsylvania until it intersects the circular line of Delaware and that line is, with the approval of Congress, to be forever deemed the true boundary between the States. Section three authorizes the commissioners to survey and determine the circular line separating the two States—

“from the point of intersection therewith to the line directed to be extended by the first section of this act to the river Delaware”

and to monument that line every quarter mile “upon the circular boundary” (p. 2). That act was repealed, on March 8, 1871 (p. 3).

II. (4) *The Circular Boundary.*

April 25, 1889, Chapter 448, Laws of Delaware 1889, appoints certain persons therein mentioned as commissioners for Delaware, authorized to act with a similar commission of Pennsylvania, to examine, survey and re-establish the boundary line between Delaware and Pennsylvania.

When thus established the joint commission is to mark the location of that line by the erection of monuments and make a report of their operations (p. 4).

March 28, 1921. Chapter 4, Laws of Delaware 1921, accepts, approves and confirms the report of the commission appointed under the act of April 25, 1889 to survey and establish the circular boundary between Delaware and Pennsylvania.

It recites that such a report, with maps, data, descriptions and monuments, was filed in the office of the Secretary of State, June 1, 1898, and a duplicate in the office of the Secretary of Internal Affairs of the Commonwealth of Pennsylvania, duly signed by the commissioners of both states (p. 6). It states that said report—

“indicates that the line of the circle of New Castle was surveyed and re-established *in substantially the same location as it had been.*”

and that monuments had been erected along the line of the circle.

It says that the line so established is accepted, approved and confirmed as the proper and acceptable line to indicate the *limits* of the States of Pennsylvania and Delaware. The line thus accepted and approved is that part of a circle *northward and westward* of New Castle, with nothing *eastward or southward.*

In all the dispute and discussion about the circular boundary that occurred in Delaware during the twenty-

II. (4) *The Circular Boundary.*

four years that elapsed between the ratification of that boundary by Pennsylvania in 1897, and by Delaware in 1921, not a word appears of any claim beyond the Terminal Monument established on the *west bank* of the river.

Thus we have a practical construction by defendant 238 years after the deeds of feoffment were made, like that of Penn and his successors, that the circular boundary stopped on the west side of the river. It was so construed by *Justice Baldwin*, in 1838, in *Gale v. Behling* (*Ex. 219, pp. 13, 15*) and every construction by the parties in interest before or since confirms that construction.

It is a *monumented* practical construction of the boundary, within the decision of this court in *Vermont v. New Hampshire*, 289 U. S. 593, 616, adopted by defendant's legislature 70 years after the passage of its first act of 1852 defining this circular boundary as extending to the east side of the Delaware river (*Ex. 162, pp. 2-3*) and six years after the passage of its revision of 1915 (*Ex. 678*) again describing the same boundary. (Discussed herein under the heading "*Boundary Laws and Maps*"). This act of 1921, accepting and approving the circular boundary ending on the west side of the river, must be regarded as a repeal of the inconsistent provisions of the acts of 1852 and 1915 (discussed under the next heading).

A practical construction by the parties most interested, for such a duration of time, should be sufficient to establish a fact.

II. (5) *Boundary Laws and Maps.*

(5) *Boundary Laws and Maps.* (Exceptions 22-24.)

New Jersey Acts.

During the colonial period (between 1709 and 1752) the provincial assembly of New Jersey passed three acts defining the boundaries of the counties bordering on Delaware river, namely, Burlington, Gloucester, Salem (most of which lies within a radius of 12 miles of New Castle) and Cape May, and the precinct of Greenwich in Salem County, as extending to Delaware river or bay (*Exs. 35, 36*).

On November 21, 1821, the legislature of the *State* of New Jersey passed an act of title and jurisdiction defining the boundaries of Salem, Cumberland and Cape May counties as extending to the main ship channel in Delaware river and bay (*Ex. 37*). The same boundary for these counties is described in acts of November 28, 1822 (*Ex. 1181*), April 10, 1846 (*Ex. 39*), and November 28, 1882 (*Ex. 38*). The same boundary is fixed in an act of February 27, 1881, creating Old Man's Township in Salem County (*Ex. 40*).

Delaware Acts.

During the colonial period the provincial assembly of Delaware passed only two boundary laws: One on September 2, 1775 (*Ex. 660*), and the other on October 20, 1775 (*Ex. 659*), both defining boundaries of the counties between it and Maryland, without mentioning any boundary on the river side.

The first act of Delaware respecting its eastern boundary was contained in its Revised Statutes in 1852 (*Ex. 677*), the second section of which defined that boundary as *the circular line between it and Pennsylvania, surveyed and*

II. (5) *Boundary Laws and Maps.*

marked in 1701, under a warrant issued by Penn "in pursuance of the feoffment from the Duke of York, dated August 24, 1682, as the same has been held, occupied and recognized by the said States respectively, ever since that time; low water mark on the eastern side of the river Delaware, within the twelve mile circle from New Castle; and the middle of the bay below said circle."

Section 4 describes the dividing lines of the three counties of Delaware, without including any part of Delaware river and bay as belonging to any of the three counties (*Ex. 162, pp. 1-2*). Another boundary act of April 27, 1893, amends that of 1852 without any change in the eastern boundary of the state or of the counties (*Ex. 162, pp. 8-10*).

The Revision of 1915 repeats the eastern boundary as defined in the act of 1852, but omits reference to the Taylor & Pierson survey. It describes the north and the east boundary of New Castle County as follows:

"* * * on the North, by the State of Pennsylvania; on the East, by low water mark on the Eastern side of the Delaware River within the twelve mile circle described from New Castle, the Southerly perimeter of said circle from its intersection with said low water mark Westerly to the middle line of Delaware River, the middle lines of Delaware River and Bay Southerly to a point in said last mentioned line opposite the mouth of Smyrna River; * * *"
(*Ex. 678*).

The eastern boundary of the counties of Kent and Sussex is defined as in the middle line of the bay (*Ex. 678*).

In all these acts, title is rested upon the deeds of feoffment of August 24, 1682, from the Duke of York to Penn, without mention of any grant from Charles II to the Duke of York, although the original of that patent was claimed to have been produced before Sargeant in the Pea Patch Island case in 1849 (*Ex. 676, p. 28*), and on

II. (5) *Boundary Laws and Maps.*

January 26, 1849, the legislature of Delaware appointed a committee to procure the original of that charter. These acts could not have been passed in ignorance of such a document, if it existed.

The Taylor & Pierson survey of 1701 (*Ex. 265*) upon which the defendant's boundary acts of 1852 and 1893 were founded, ended on the west side of the river and was always so regarded. The statement in each of the three acts that the eastern boundary extends to low water mark on the east side of the river, is directly contrary to the history of the circular boundary line, as shown in the previous discussion under the heading "*The Circular Boundary*" and, as is there pointed out, defendant's act of 1921 accepting and approving the Hodgkins' line, which ended, and was monumented, on the west bank of the river, amounts to a repeal of inconsistent provisions in previous acts.

When defendant, in 1813, ceded its "right, title and claim" in Pea Patch Island to the United States Government, it had no act defining its eastern boundaries, or any description of the circular boundary, except that in the Taylor & Pierson survey, which ended on the west side of the river. As also previously noted, the only time when defendant ever attempted to exercise jurisdiction in the river was in 1872 when that attempt was restrained by this court.

On the contrary, plaintiff and its predecessor governments, from the settlement of the colonies, have continuously, uninterruptedly and without interference or objection from defendant or its predecessors in title or government, exercised the prerogatives of title and jurisdiction in the bed of the river within this disputed area east of the middle of the ship channel from the beginning of the settlement in the country, or for more than 250 years.

II. (5) *Boundary Laws and Maps.*

In the controversy between Texas and the United States over the northern boundary of Texas, similar acts had been passed by Texas in the assertion of her claims, but when the case came before this court in *United States v. Texas* (162 U. S. 1) the court said—

(pp. 88-9)

“Much significance is attached by the state to the fact that as early as 1860, by legislative enactment it created the county of Greer with boundaries that include the whole of the territory in dispute, and that it has ever since asserted its jurisdiction over both that territory and the people who inhabit it. However important such facts might under some circumstances be deemed, it must be remembered that during the whole of the period referred to the constituted authorities of Texas have been aware that the United States regarded the territory in dispute as under its exclusive jurisdiction and as a part of what is known as the Indian territory. The government has always disputed the claim of Texas.”

Boundary Maps.

Approximately 90 maps, dated from 1678 down, were offered in evidence to show what the map makers regarded as the boundary between plaintiff and defendant. Of these, 7 were offered by defendant showing the boundary on the east side of the river (*Exs. 720-6*). Exhibit 721 was defendant's state road map. Exhibit 723 was a road map issued by plaintiff in 1930. The record shows that plaintiff's State Highway Department contracted with a map company for this road map. The company furnished a U. S. Geological Survey map as the base map, with boundaries already on it, and printed the highways of the state on it. It was not intended as a boundary map and the Highway Department had nothing to do with the boundaries on it (*Exs. 186; 187; R. 494-501*).

II. (5) *Boundary Laws and Maps.*

Another was entitled "Map of the Delaware River district from Trenton, N. J., to Wilmington, Delaware, prepared by the Department of Wharves, Docks and Ferries of the City of Philadelphia, 1918". (*Ex. 722 (a), (b), (c)*). Here, again, the U. S. Geological Survey map was used as a base map, without any intention on the part of Philadelphia to define boundaries, or of responsibility for boundaries which the base map showed (*Exs. 183; 184*).

The other four (*Exs. 720, 724-6*), including all 5 sections of Exhibit 720, were U. S. Geological Survey Maps. Inquiry was made of the U. S. Geological Survey as to the sources of information for the boundary line shown on its maps. The Acting Director stated, in writing (*Ex. 185*), that this boundary location was based upon a statement in U. S. Geological Survey Bulletin, No. 13 (p. 77), published in 1885, reading as follows: "The line between New Jersey and Delaware is thus described in the Revised Statutes of Delaware, p. 2, viz:

Low-water mark on the eastern side of the river Delaware, within the twelve mile circle from New Castle and the middle of the bay, below said Circle" (*Ex. 1167*).

He says "This was the most reliable information available at the time the maps aforementioned were made showing the boundary line in question."

It therefore appears that the boundary shown on defendant's exhibits 723, 722 (a), (b) and (c), 724, 725 726 and 720 (a), (b), (c), (d) and (e) are all traceable directly to the description of Delaware boundaries contained in Bulletin No. 13, which in turn was copied from defendant's Revised Statutes of 1852 (*Ex. 677*), passed during the pendency of this dispute.

Defendant's Exhibit 757 contains extracts from "Boundaries, Areas, Geographic Centers, and Altitudes

II. (5) *Boundary Laws and Maps.*

of the United States and the several states," Bulletin 817, 2nd edition, U. S. Geological Survey, 1930 (which is a revision of Bulletin 13), with recitals, from different sources, of the alleged title of the Duke of York and Penn to the Delaware territory.

A reading of the text of that bulletin (*No. 817*), which is copied almost entirely from Bulletin 13, and of the foot notes, which are not printed in the exhibits, discloses that all the statements in both bulletins respecting title and boundaries in Delaware were derived from defendant's Boundary Act of 1852, except statements which refer to the surveys of the circular boundary described in *Exhibit 296, p. 13*.

Page 6 of Exhibit 757 contains a part of pages 116, 117 of Bulletin 817, including a reference to Senate Document No. 21, *First Session of the 30th Congress, published in 1848*, which defendant's counsel implied was the authority for the statements contained on those pages. This implication is incorrect, since the material printed on those pages was all copied from the original Bulletin No. 13, which stated plainly that the authority for the boundary therein stated was the Revised Statutes of Delaware of 1852.

That the Departments of the United States Government are not committed to a boundary on the east side of the river is shown by other government maps and records.

The United States Coast and Geodetic Survey has never shown a Delaware boundary on the east side of the river. Three of its maps are in evidence, all showing the circular boundary as stopping on the *west side* of the river, namely:

Map of Delaware bay and river, fig. 1 in "Tides and Currents in Delaware Bay and River" (1926) (*Ex. 140*).

II. (5) *Boundary Laws and Maps.*

Section of Sailing Chart No. 1000, Atlantic Coast, Cape Sable to Cape Hatteras, United States Coast & Geodetic Survey, published at Washington, D. C., Feb. 1927, re-issued, August, 1929 (*Ex. 1137*).

United States Coast & Geodetic Survey Chart 295, Delaware River, Wilmington to Philadelphia, 1931 (*Ex. 2*).

The Attorney General of the United States, in an opinion dated May 14, 1793, recognized the jurisdiction of New Jersey to the middle of the ship channel in Delaware river and bay (*Am. Stat. Papers, For. Rel. 1 148; 1 Opp. Atty. Gen. 32*).

In 1839 David H. Burr, Geographer to the House of Representatives of the United States, made a map showing the circular boundary as ending on the west side of the river (*Ex. 1133, Map No. 34*).

The Record discloses no Department of the United States Government recognizing defendant's claim of boundary on the east side of the river, except the Geological Survey of the Department of the Interior, which accepted, without question, defendant's Revised Statutes as a basis for the boundary line shown on its maps.

A particularly important collection of maps in evidence, showing the circular boundary of Delaware as ending on the west side of the river, is that of those prepared by the agents, and at the direction, of William Penn, or his successors, and used by them for their own purposes. They are admissions which bind defendant, since it claims to be the successor in title of the Penns.

1. "Copy of part of Holme's map of Pennsylvania began in 1681" (*Ex. 1166*) by Thomas Holme, Surveyor-General of William Penn (*Ex. 292, p. 12*), approved and adopted by Penn's court at Upland (Chester) March 14, 1683 (*Ex. 292, p. 12*).

II. (5) *Boundary Laws and Maps.*

2. Taylor and Pierson map of circular boundary between Pennsylvania and Delaware, 1701 (*Map 1, Ex. 1133*), already mentioned in connection with the circular boundary.

3. Senex map of Pa. and Md. Boundary, Penn Mss. "Boundaries," Vol. 11, p. 18, Pa. Hist. Soc. Feb. 3, 1731. (*Map 2, Ex. 1133*): This map is endorsed in the hand of Ferdinand John Paris, the attorney for the Penn Proprietors.

4. "A map of parts of the provinces of Pennsylvania and Maryland with the counties of New Castle, Kent and Sussex on Delaware according to the most exact surveys yet made drawn in the year 1740". Dated, Philadelphia, Oct. 20, 1740 (*Map 4, Ex. 1133*). This map was drawn by Benjamin Eastburn, Surveyor-General of Pennsylvania, by appointment of the Penns, 1733-1741, and was made for use in their case against Lord Baltimore.

5. Draft of line between Md. & Pa., Penn Mss. "Boundaries" (1740), (*Map 6, Ex. 1133*). This map is in the hand of Dr. John Taylor, Surveyor of Chester and Lancaster Counties, son of Isaac Taylor. The endorsement of the map is in the hand of Thomas Penn, Proprietor and Governor of Pennsylvania (son of William Penn), who was then resident in Pennsylvania. The map was prepared for the case of *Penn v. Baltimore*.

6. Penn map of Pa.-Md. Boundaries, Breviate, *Penn v. Baltimore* (1740) (*Map 5, Ex. 1133*).

7. Nicholas Scull—"Map of improved part of the Province of Pennsylvania, January 1st, 1759 (*Map 9, Ex. 1133*). Nicholas Scull was Surveyor-General of the Province of Pennsylvania, by appointment of the Penns, when this map was made. His term extended from 1748 to 1761 (*Pa. Archives, 2nd Ser. Vol. IX, p. 628*). This

II. (5) *Boundary Laws and Maps.*

map was dedicated to "Thomas and Richard Penn, True and Absolute Proprietaries and Governors of the Province of Pennsylvania and counties of New Castle, Kent and Sussex on Delaware".

8. Map accompanying the agreement between Lord Baltimore and Thomas & Richard Penn, July 4, 1670. (*Pa. Archives, First Series, Vol. IV (Ex. 1134).*)

9. A Map entitled "To the Honorable Thomas Penn and Richard Penn, Esquires, True and Absolute Proprietaries and Governors of the Province of Pennsylvania and the Territories thereunto belonging and to the Honorable John Penn, Esquire, Lieutenant-Governor of the same. This map of the Province of Pennsylvania is Humbly dedicated by their Most Obedient Humble Serv't W. Scull." (Printed April 4, 1770.) (*Map 11, Ex. 1133.*)

This map bears an acknowledgment of assistance afforded the maker of the map in the course of his work "by the several Deputy Surveyors of this province" and of "Jos. Shippen, Esqr. Provincial Secretary, John Luken, Esqr. Surveyor-General" (All Penn agents).

10. "A map of Pennsylvania * * * Laid down from actual surveys and chiefly from the late map of W. Scull published in 1770; and humbly inscribed to * * * Thomas Penn and Richard Penn, Esquires true and absolute Proprietaries & governors of the Province of Pennsylvania * * * (1777)" (*Map 12, Ex. 1133.*)

This collection of official Penn maps extends from the Taylor and Pierson map of 1701, made under the personal direction of William Penn, to the American Revolution, without showing, in one single instance, any boundary line of the Delaware colony extending beyond the west side of the river. These maps represent the contemporary construction placed upon that circular boundary by Penn and

II. (5) *Boundary Laws and Maps.*

his successors and agents, throughout the entire period of their possession of the deeds of feoffment. None of them ever claimed, and none of these maps shows, the circular boundary described in the grant of Pennsylvania or the *deeds of feoffment* as extending beyond the west side of the river, or as consisting of more than "two thirds of a semi-circle".

Fifty three other maps were offered by plaintiff (*Exs. 98, 1133, 1135-6, 1140-4, 1180*), and two by defendant (*Exs. 727, 729*), showing the circular boundary stopping on the west side of the river.

Because the photostat copies of maps did not show as clearly as the originals, the shadings representing boundaries, plaintiff called Colonel Lawrence Martin, Chief of the Division of Maps of the Library of Congress, to explain them (*R. 664-717*). His testimony was given with the originals of the maps before him.

Only the most celebrated of those maps will be mentioned.

1. A Map of Pensilvania, New-Jersey, New York and the Three Delaware Counties published by Lewis Evans, March 25, 1749, according to Act of Parliament (*Map 7, Ex. 1133*).

2. A general Map of the Middle British Colonies, in America; viz. Virginia, Maryland, Delaware, Pensilvania, New-Jersey, New-York, Connecticut, and Rhode Island: By Lewis Evans, 1755 (*Map 8, Ex. 1133*). This map is cited as authority by Thomas Jefferson in his "Notes on the State of Virginia," (1781) (p. 16). The first edition was printed by Benjamin Franklin and his partner Hall (*R. 686-7*).

Several other editions of Lewis Evans' maps dated from 1749 to 1794 were produced by Col. Martin from the files

II. (5) *Boundary Laws and Maps.*

of the Library of Congress, all showing the circular boundary stopping on the west side of Delaware river (R. 687-694). He produced one, of 1752, bearing a note that the black lines shows the true limits, according to decree in Chancery, May 15, 1750 (R. 694) (*Penn v. Baltimore*). George Washington, in working on boundaries, and water navigation to the west, referred to the Evans map (R. 706).

3. A map of the British and French dominions in North America with the roads, distances, limits and extent of the settlements, humbly inscribed to the right honorable the Earl of Halifax and the other right honorable the Lords Commissioners for Trade and Plantations by their lordships most obliged and very humble servant, Jno Mitchell (*Feb. 13, 1756*) (*Ex. 1144*). This map is cited in Vincent's History of Delaware (*Ex. 505, pp. 15, 16*). The northern boundary of the State of Delaware is represented by a line of dots alone, and extends from the boundary of Maryland eastward to the west bank of the Delaware river, but not beyond the bank (R. 668). On this map there is a note, opposite Delaware, reading:

"The bounds of Pennsylvania and Maryland Delaware Counties are here laid down according to the late decree in chancery, which is not supposed otherwise to affect the claims of any" (R. 670).

(*Penn v. Baltimore.*) Jean Pownall, the Secretary of the Lords Commissioners of Trade and Plantations, signed a note on the face of the map indicating that it was prepared in accord with the order of the Lords Commissioners (R. 678).

Colonel Martin never saw any copy of the Mitchell map that carried the circular boundary across the Delaware river (R. 680). A copy printed in 1755 was used before the Supreme Court of the United States as an exhibit in-

II. (5) *Boundary Laws and Maps.*

volving geographical considerations twice in the year 1926, and twice in that same year it was accepted in evidence before the Lords of the British Privy Council. In the period before 1926, the Mitchell map was submitted in evidence in a number of cases between the States, before the Supreme Court of the United States. Congress likewise used Mitchell's map in consideration of boundary disputes, on the question of fixing boundaries between the States. The Mitchell map was used in the discussion of the boundary between Maryland and Virginia; Ohio and Michigan; Maine and New Brunswick; and a number of other cases (*R. 681*). Statements made under oath by John Adams and by Benjamin Franklin show that the Mitchell map was the principal one relied upon by both the American and British authorities in fixing the original territory limits of the United States. Colonel Martin regarded the boundary lines between the Colonies; i. e., the boundary lines of Delaware shown on the Mitchell map, as reliable, having regard to the fact that it was made under the jurisdiction of the Lords Commissioners of Trade and Plantations in the middle of the eighteenth century (*R. 682*).

Beginning, at least, in the first decade of the eighteenth century the Lords Commissioners of Trade and Plantations began to write the Royal Governors in the North American Colonies every few years, sending them questionnaires about a great many of the Provinces and Colonies, including question of boundaries especially. A number of these questions and answers were preserved and are available (*R. 683*).

As a result of these questionnaires there was assembled considerable information in support of the claims of the different Colonies. When John Mitchell began making this map in the year 1750, he had become sufficiently acquainted with George Dunk, Earl of Halifax, who

II. (5) *Boundary Laws and Maps.*

was President of the Lords Commissioners of Trade and Plantations, so that he was allowed access to that great batch of boundary material. Mitchell's maps therefore present a more adequate and supporting bases of boundaries of the American Colonies in 1755 than any other map that was made at that period. All the English editions of Mitchell's map after the first edition, contain ten columns of text printed in the Atlantic Ocean east of the State from Delaware to Florida, and that information indicates the bases of the original map, and the bases of the revision of the map after it had been used in England, France and America for a few years. The beginning of those ten columns of text contains three paragraphs, which, he read into the record, showing what materials Mitchell used originally, and in the revision of the map, from the British Admiralty (R. 683-684).

4. Map of the Provinces of New York and New Jersey with part of Pennsylvania, etc., drawn by Capt. Holland, engraved by Thomas Jeffreys, Geographer to his Majesty, and improved from the modern surveys of those colonies down to the year 1773 (*Ex. 1143*). That map was recognized as authority in *Louisiana v. Mississippi* (202 U. S. 1, 48).

5. Faden Map of New Jersey, December 1, 1777 (*Ex. 98*). It was included in Smith's History of New Jersey, reprint of 1910, and describes the northerly boundary of Delaware as a "circular line" which extends only to the west side of Delaware river. From a point opposite Chester it shows by dotted line the main ship channel in the river at that time, as well as other lesser channels in the bay.

Faden was Geographer to the King, and made generally trustworthy maps (R. 714).

II. (5) *Boundary Laws and Maps.*

6. A map of the country between Albermarle Sound and Lake Erie, comprehending the whole of Virginia, Maryland, Delaware and Pennsylvania, etc. (*Ex. 1142*) made by Thomas Jefferson to accompany his "*Notes on the State of Virginia,*" published in 1788. On that map the northern boundary of Delaware extends to the west bank of the Delaware river (*R. 704*) and out to the middle, and from that point south, the boundary extends down the middle of the Delaware bay to the capes (*R. 705*).

7. Delaware from the best authorities. W. Barker, sculp. Engraved for Carey's American Edition of Guthrie's Geography Improved. (In Carey's American Atlas. Phila., Mathew Carey, 1795, Map No. 11 (*Map 19, Ex. 1133*)).

8. Delaware. Engraved by A. Doolittle, Newhaven (in Carey's American Pocket Atlas. Second edition . . . Phila., 1801, bet. pp. 68 and 99) (*Map 26, Ex. 1133*).

9. Geographical, Statistical, and Historical Map of New Jersey. (From a complete Historical, Chronological and Geographical American Atlas. Phila., H. C. Carey, & I. Lea, 1822, Map No. 17) (*Map 30, Ex. 1133*).

10. Pennsylvania Map by H. C. Carey and I. Lea, Philadelphia (1825) (*Map 32, Ex. 1133*).

11. New Jersey Map. H. C. Carey and I. Lea, Philadelphia (1825) (*Map 31, Ex. 1133*).

The five preceding maps are all Carey, or Carey & Lea, maps which were famous during the first quarter of the 19th century. The copy of the Pennsylvania print of Carey & Lea in 1825 shows the boundary of Delaware by a line of dashes and dots from the west bank of the Delaware river, westward and southward around the circle and by a similar line southward on the west side of Delaware (*R. 701*). On Carey's map of New Jersey, 1825,

II. (5) *Boundary Laws and Maps.*

Delaware's boundary is shown in the same way and begins at the same point (*R. 702*). Carey & Lea maps were recognized and cited as authority by this court in *United States v. Texas*, 162 U. S. 1, 54, 55, 80.

12. Map of Pennsylvania, constructed from County Surveys authorized by the State and other original documents by John Melish (*Map 29, 1133*). Maps of John Melish were cited and relied upon as correct by both the United States and Spain in the negotiations for the treaty between them in 1819, and by both Texas and the United States in the controversy over the boundary between Texas and Indian territory. They were found correct and relied upon by and reproduced in the reported decision of this court in *United States v. Texas* (162 U. S. 1), wherein the Melish maps are cited 28 separate times.

13. A new map of Maryland and Delaware with their canals, roads and distances by H. P. Tanner, 1844. (In collection "Maps of New Jersey, Pennsylvania, Maryland and Delaware * * *" Phila., 1846, Map 3) (*Map 36, Ex. 1133*). One of Tanner's maps was cited and used in the opinion of this court in *United States v. Texas* (162 U. S. 1, 55, 56).

14. New Jersey, reduced from T. Gordon's map, by H. S. Tanner, Phila. S. Augustus Mitchell, 1846. (In collection "Maps of New Jersey, Pennsylvania, Maryland and Delaware * * *" Phila. S. Augustus Mitchell, Map No. 1) (*Map 37, Ex. 1133*). Maps published by S. Augustus Mitchell were cited as authority by this court in its opinion in *United States v. Texas* (162 U. S. 1, 55, 56, 57, 59, 80, 87).

15. Delaware and Maryland. New York, J. H. Colton & Co., 1856 (*Map 44, Ex. 1133*).

16. Colton's Delaware and Maryland, N. Y., J. H. Colton, 1863 (*Map 45, Ex. 1133*).

II. (5) *Boundary Laws and Maps.*

His maps were cited as authority by this court in *United States v. Texas* (162 U. S. 1, 56).

17. Map of the Peninsula embracing Delaware and the Eastern Shores of Maryland & Virginia * * * by D. G. Beers & Co., Wilmington, Boughman, Thomas & Co., Pub., 1868 (*Map 46, Ex. 1133*).

18. Map of State of Delaware. Page 4, Atlas of State of Delaware, by D. G. Beers, Pomeroy & Beers, Philadelphia, 1868 (*Map 48, Ex. 1133*).

19. Map of Brandywine, Hundred, Delaware. Page 7, Atlas of State of Delaware, by D. G. Beers, Pomeroy & Beers, Philadelphia, 1868 (*Map 47, Ex. 1133*).

Col. Martin says, Map 48 is from the Atlas of the State of Delaware, from actual survey made under the direction of D. G. Beers. The colors there are intended to indicate boundaries. It is hand-colored (*R. 698*), to show not only the edge of the map, but also separate colors to show counties, towns and hundreds. Map 47 is a map of Brandywine Hundred, page 7. A dash line indicates the north boundary of Delaware, stopping at the western shore of the Delaware river (*R. 699*).

This atlas of Delaware was cited as authority by the Attorney General of Delaware in fixing the division line between the river and bay (*Ex. 1, p. 6*) and was used in the histories of Delaware by Vincent (*Ex. 503, p. 15, 16*); Scharf (*Ex. 1180*) and Conrad (*Ex. 1133, Map 52*).

20. Sheaffer, "An Historical Map of Pennsylvania," Pa. Hist. Soc. (1875), (*Map 50, Ex. 1133*). Col. Martin says he has used this map and it is a praiseworthy attempt to make an accurate historical map (*R. 702*). The northern boundary of Delaware, as the western boundary, is indicated by a solid black line. The broken line completing what we might term a semi-circle around the west

II. (5) *Boundary Laws and Maps.*

side of Delaware bay, near New Castle, is indicated by "Delaware Circle 1782," and it appears to have the same circle drawn on the same 12 mile radius as the northern boundary of Delaware. Both ends of the circle run into the west side of the river (*R. 703*).

21. Sketch showing portions of the States of Delaware, Pennsylvania, Maryland and New Jersey; with the boundary line between Delaware and Pennsylvania, the positions of the stone monuments marking the line laid out in 1892, the lines of the triangulation, etc. Surveyed and drawn for the Joint Boundary Commission by W. C. Hodgkins, C. E. Assistant, U. S. Coast and Geodetic Survey, Chief of party, 1892 and 1893 (*Map 51, Ex. 1133*) issued by the United States Coast and Geodetic Survey.

This map shows the triangulation by which Mr. Hodgkins established the circular boundary in 1892-3. It shows the adopted boundary in broken lines, and the "Terminal Monument" established by him, on the west side of Delaware river.

22. The other Hodgkins map attached to Exhibit 294 is similar to map 51 of Exhibit 1153 and shows in broken lines the circular boundary as established by Mr. Hodgkins, and the "Terminal Monument" fixed by him, on the west side of the Delaware river.

Three of these Hodgkins' maps (which includes Col. Graham's map of 1849) show the circular boundary as ending on the west side of the river and were all official maps of defendant made by persons acting in its service, and the boundary shown thereon was officially adopted by defendant's legislature in 1921 (*Ex. 291, p. 6*).

23. A map of Delaware from "History of Delaware," by J. Thomas Scharf, 1888 (*Ex. 1180*), showing the eastern limits of Delaware on the west side of Delaware river and bay throughout the entire length of the state.

II. (5) *Boundary Laws and Maps.*

The failure of any of these maps, or of any of the remaining 30 maps offered in evidence but not here particularly described, to show a boundary of Delaware on the east side of the Delaware river, demonstrates that no such boundary was ever recognized by any of the geographers or map-makers of the period prior to the American Revolution, or since (except the U. S. Geological Survey Maps heretofore discussed).

It is a matter of particular significance that the Pomeroy & Beers, *official atlas of Delaware* (*Ex. 1133, Maps 47, 48*) published in 1868, 16 years after the first Delaware boundary act describing the easterly boundary at low water mark on the east side of the river within the 12 mile circle, does not show the circular line as crossing the river. (*Ex. 1180*). It is no less significant that the same map should receive the stamp of official approval of the Attorney General of Delaware (*Ex. 1, p. 6*), and be exclusively used in the three principal histories of that state; Vincent (*Ex. 503, pp. 15-6*); Scharf (*Ex. 1180*) and Conrad (*Map 52, Ex. 1133*).

Forty-three of these maps were published prior to, and twelve since, 1852, when defendant's legislature passed its first act defining its eastern boundary as extending to the east side of the Delaware river, but none of them shows that boundary.

In *U. S. v. Texas*, 162 U. S. 1, 51, this court, after reaching its conclusion as to where the boundary line between Texas and Indian territory should commence, said:

"This conclusion is strongly fortified by an inspection of the numerous maps placed before us, and which were made prior to February 8, 1860, on which day the legislature of Texas, with knowledge that the territory in dispute was claimed by the United States, passed an act creating the county of Greer, and thereby assumed that it was part of

II. (5) *Boundary Laws and Maps.*

the territory properly and rightfully belonging to that state at the time its independence was achieved, as well as when it was admitted into the Union."

In *Michigan v. Wisconsin* (270 U. S. 295), this court said (p. 316):

"A large number of maps published and available to the public during the years between 1837 and 1878, without exception, show the islands as a part of Wisconsin; and during the same time they do not appear in any survey or upon any map as belonging to Michigan. Never, so far as we are able to find from the record, have they been recognized in any practical way as a part of Michigan or, prior to the commencement of this suit, claimed by that state."

• • •

From this consideration of the maps of eminent authorities, both official and private, not one of which (except those U. S. Geological Survey maps whose boundary information was taken from defendant's statute of 1852) shows a boundary on the east side of the river, it is plain that no such boundary was ever recognized, officially or otherwise, by any impartial authority from 1682 to the present time.

This discussion of boundary laws and maps shows an overwhelming case of practical construction of the boundary between plaintiff and defendant, not only by defendant and by Penn and his successors, but also by all the official and unofficial geographers and map makers from the beginning of colonial history to the present time.

II. (6) *Exercise of Jurisdiction.*

(6) *Exercise of Jurisdiction.*

(Exceptions 25-28.)

In addition to the proof of the exercise of jurisdiction in the river, within a radius of 12 miles about New Castle, by Penn and the colonial proprietors, discussed under sub-headings (c) (1) by plaintiff, and the state and federal courts, discussed under sub-headings (c) (2) and (c) (3) of this chapter, there is other proof of the exercise of such jurisdiction by the Royal Governors, the Provincial Assembly, the State legislature, and by plaintiff's courts and judicial officers.

Taxation.

In *Vermont v. New Hampshire*, 289 U. S. 593, 616, Mr. Justice Stone, in delivering the opinion of this court, said:

"The fact that in the period of over a century following Vermont's admission to statehood this (1909) is the first well authenticated instance of an effort on the part of the New Hampshire authorities to tax property located on the west bank of the river is of substantial weight in indicating acquiescence by New Hampshire in a boundary line restricting her jurisdiction to the river at the low-water mark."

The uncontradicted testimony in this case shows appropriations of subaqueous soil, east of the channel within the disputed area, by the inhabitants from the early days. It shows conveyances of such lands since 1801. It shows that large sums of money have been expended upon these lands, and upon more than 10,000 lineal feet of additional such lands conveyed, in over 30 grants, by plaintiff to private parties, principally citizens of *defendant*. It shows that these lands and their improvements, including docks, wharfs, ferry slips and other structures, to a very large valuation, have always been assessed by plaintiff and its

II. (6) *Exercise of Jurisdiction.*

municipal subdivisions, and have *never* been, or attempted to be, assessed by defendant or any of its political subdivisions (R. 123-158).

One of these properties, embracing subaqueous soil for a distance of 900 feet below low water line (R. 124), partly acquired by appropriation to the ship channel, and partly from plaintiff to the pierhead line of 1916, owned by New Jersey-Delaware Ferry Company, a corporation of Delaware, of which the then Attorney General of defendant was an incorporator, is assessed in Pennsgrove, New Jersey at \$32,000.00 (*Ex. 62, p. 2*), and has been assessed in that borough for 35 or 40 years within the knowledge of the assessor who testified in this case (R. 124). Another property of the same company at Pennsville, New Jersey is assessed there at \$80,000.00 (*Ex. 91, R. 276-7*).

Another property, extending for distances, in some cases of more than 4400 feet *below* low water line in the disputed area (*Ex. 64*), owned by the DuPont Company, also a corporation of Delaware, is assessed at \$8,714,500 (*Ex. 69, R. 136-143*).

Plaintiff has exercised the jurisdiction of taxation over this property from the introduction of taxes in the American colonies to the present day, without interruption, question or contrary claim by defendant.

By the Royal Governors of New Jersey.

On January 28, 1701, Lord Cornbury was appointed Vice Admiral of the Province of New York and the Colonies of Connecticut, East Jersey and West Jersey (*Ex. 1173*). His commission did not include Pennsylvania or Delaware, hence his jurisdiction over Delaware bay existed by virtue of his appointment as Vice Admiral of the Colony of West Jersey.

II. (6) *Exercise of Jurisdiction.*

The instructions from Queen Anne to Lord Cornbury, when he became Royal governor of the united provinces of West Jersey and East Jersey in 1703, gave him power and authority to order and appoint "so many ports, harbours, cayes, havens and other places for the conveniency and security of shipping, and for the loading and unloading of goods and merchandise, as by you, with the advice and consent of our said Council, shall be thought fit and necessary" (*Leaming & Spicer, p. 655*).

On August 16, 1730, while the three lower counties of Delaware were still united under the government of Pennsylvania, Mr. Penn's Council, charged with the government of the joined colonies (*Exs. 228, p. 40; 410*), of which James Logan was secretary (*Ex. 228, p. 42*), received word of the arrival of a suspicious vessel at Lewes, in Sussex County, Delaware. They appealed to Lord Cornbury, who happened to be in Philadelphia at the time, as Vice Admiral of New Jersey having jurisdiction over Delaware river and bay. On their petition he issued a commission for seizing and bringing up the vessel (*Ex. 156*).

In 1704 the assembly of the Three Lower Counties, (acting for the first time independently of the assembly of Pennsylvania) passed "An Act for erecting and maintaining a fort for her Majesty's service at the town of New Castle upon Delaware," imposing a duty on vessels coming from the sea into the river where the major part of the vessel was not owned by persons residing on the river and bay of Delaware. Penalties were imposed for failure to stop and anchor such vessels for the purposes of inspection and duty (*Ex. 228*).

On pages 44-47 of that exhibit there is a circumstantial narrative of the attempt of Richard Hill and two other Philadelphian merchants to sail their vessel past the

II. (6) *Exercise of Jurisdiction.*

New Castle fort and to resist the payment of the duty. Their boat was fired upon and hit. The New Castle collector came aboard.

That exhibit recites that Lord Cornbury "Governor of New Jersey, and as such claiming to be vice-admiral of the river Delaware, happened, at that time, to be at Salem, a little lower down, on the Jersey side of the river; to him the prisoner was brought (the New Castle collector), to give an account of his conduct. After French (the collector), had been sufficiently reprimanded by Lord Cornbury, upon a suitable submission and promises made, he was at length dismissed" (p. 46).

With respect to this action of Lord Cornbury, Proud says—"This put a finishing stroke to these proceedings at the Fort of Newcastle; and thus ended the enterprise" (p. 46).

The Minutes of the Provincial Council of Pennsylvania of August 7, and October 15, and 21, 1708, disclose deliberations respecting the defense of Delaware river and bay (*Ex. 1162*) including the following statement:

"And no power given to our Govr. (Penn) by the Royal Charter or otherwise, as we know of, to fitt out Vessels of Warr or Privateers; but in as much as the River and Bay below, as well as our Sea Coasts, are Chiefly under the Care and Command of the Ld. Cornbury, who is Govr. of the Jerseys and Vice Admiral of the same, Therefore, we think it not improper for those concerned in Trade and Navigation here, who depend upon such Safe guard, to Expect the Benefit of the Vice admiral's authority, which Extends not only to fitt out Ships of war, but also to arrest Ships and Vessels for the Defence of the Sea and Sea Coast, wch none can do as Govr. without Special Commission or Lycense from the Queen for the purpose.

"This is not the first time that Coll. Seymour's name has been made use of to Amuse us, for we

II. (6) *Exercise of Jurisdiction.*

never heard that he exercised his Power of Vice Admiral in this River; But the Ld. Cornbury does, and we are told upon another Occasion, he Convinced the Govr. that he had Ample Authority for so doing; x x x”.

In 1747, the Provincial Council of Pennsylvania considered the subject of privateers in Delaware river and bay. It has already been noted that this subject was intrusted by the King to the proprietary governor of West Jersey on March 15, 1683/4 (*Ex. 1182*). The minutes of the Pennsylvania Council of September 21, 1747, state—

“His Excellency Mr. Belcher, the Governor of New Jersey, being in Town, Mr. Lawrence & Mr. Taylor were desir’d to take an opportunity to inform him of the many mischeivous consequences that arose from the Liberty Pilots took of going on board Vessells before they knew whether they were Friends or Enemies; and that as no measures to be taken by this Government or the Lower Counties wou’d avail, unless the same or as effectual ones were taken in Jersey, he wou’d be pleas’d immediately on his return to Burlington to take this important affair into his Consideration, & give the necessary Orders.” (*Italics ours.*)

The minutes of September 25, 1747, state—

“Mr. Lawrence & Mr. Taylor report, that agreeable to the Request of the Council they had waited on his Excellency the Governor of New Jersey, & endeavour’d to shew him how much the safety of both Governments depends on putting the Pilots under proper Restrictions” (p. 2).

“His Excellency was pleas’d to say that if the President & Council wou’d write to him on this Subject on his return to Burlington, he wou’d then take it in Consideration & do the best he cou’d” (p. 3) (*Ex. 1163*).

The foregoing records show a jurisdiction over Delaware river and bay exercised by the proprietary governor

II. (6) *Exercise of Jurisdiction.*

of New Jersey from March 1683/4, and by the Royal governors from 1701 to 1747, as recognized by Mr. Penn's Council in Pennsylvania. Nowhere is there any claim of any jurisdiction in the river or bay by, or on behalf of Pennsylvania, or by the Lower Counties, except the attempt of the latter to collect duties in 1704, and, although that attempt occurred within a radius of 12 miles of New Castle, the jurisdiction of the Governor of New Jersey was recognized, and no similar attempt was ever repeated.

In each of the years 1765 and 1768 the Provincial Assembly of New Jersey, under a Royal governor, enacted laws to regulate the method of taking fish in the Delaware river and to prevent obstructions in the navigation thereof (*Ex. 34, p. 1*), without any exception of that portion within a radius of 12 miles about New Castle.

On December 21, 1771, the Provincial Assembly of New Jersey, under a Royal governor, enacted a law, declaring Delaware river a common highway for the improvement of navigation and appointing a commission to clear, open, enlarge the river and deepen the channel. The act specified certain offenses, and their punishment, and provided that violations should be tried and determined in the courts "within this Colony" opposite to and adjoining the part of the river in which the offense was committed. No distinction was made in the act between the part of the river within a radius of 12 miles of New Castle and other parts (*Ex. 205*). A concurrent act, in the same language, had been passed on March 9 in the same year by the Provincial Assembly of Pennsylvania (*Ex. 1017*), which was submitted to the Privy Council for approval. It was considered by the Lords Commissioners, who obtained an opinion of the Attorney General as to its validity on account of its attempt to exercise control over navigable rivers (*Ex. 1024*). The Attorney

II. (6) *Exercise of Jurisdiction.*

General advised in favor of approving the act because of the necessity of the river as access to the province for the purpose of trade (*Ex. 1025*).

If that jurisdiction existed in the proprietary governors, the Royal Governors and the Provincial Assembly of New Jersey down to the American Revolution, without any exception as to the area within the 12 mile circle, it must have vested, afterwards, in plaintiff, at least as far westward as the center of the main ship channel.

By New Jersey.

The Legislature of New Jersey since the establishment of its first constitution in 1776, has enacted 92 laws regulating fishing in Delaware river and bay. None of these laws make any distinction between the portion of the river within a radius of 12 miles of New Castle and any other portion (*Ex. 34*).

The following are instances of the exercise of jurisdiction by the courts of New Jersey in the river, below low water mark, within a radius of 12 miles about New Castle:

1. Exhibits 208, 209, 210 and 212 show that between October 5, 1809, and February 27, 1813 (before its cession by Delaware to the United States) Pea Patch Island was sold as a part of the estate of Clement Hall under authority of the Orphans' Court of Salem County, New Jersey.

2. Exhibit 213 shows that Pea Patch Island was again sold to satisfy a judgment in the Court of Common Pleas of Salem County, February 21, 1831, as the property of Henry Gale, located in that county, within the State of New Jersey.

3. Exhibit 219 shows that the United States District Court for the District of New Jersey, in November 16, 1836, exercised jurisdiction in a suit (*Gale v. Behling*) to

II. (6) *Exercise of Jurisdiction.*

eject certain persons from Pea Patch Island, which was defended by the United States of America, without raising any question of jurisdiction; on the advice of the Attorney General, no appeal was taken from the judgment for the plaintiff entered on the verdict of the jury against the government officers in possession of the island.

4. Exhibit 177 shows that the Dutch fishery was sold under an order of the New Jersey Court of Chancery.

5. Exhibit 178 shows that by a like decree of the New Jersey Court of Chancery, a Special Master thereof, on September 23, 1872, made a conveyance of that fishery.

6. Exhibit No. 143 contains the record, April 27, 1903, of a Justice Court of Salem County, New Jersey, of the complaint, arrest, plea of guilty, and fine, in a criminal complaint against James Wildon and Henry Shilling, of New Castle, Delaware, charging that on April 26, 1903, they fished in the Delaware river opposite Church Landing, New Jersey, 100 fathoms east of the range lights, within the jurisdiction of New Jersey, in violation of an act of the legislature of New Jersey, approved March 23, 1901. This record was produced by the Justice of the Peace before whom this case was tried (*Ex. 143; 318*). Although the defendants claimed that they were in the waters of the State of Delaware, they pleaded guilty.

7. Exhibit No. 206 is a certified copy of the record on the arrest of Charles Matson and Harry Bolwell for illegal fishing in Delaware river off Finn's Point Cemetery, May 20, 1912. The complaint was made by a warden of the Fish and Game Commission of the State of New Jersey, alleging unlawful use of a drifting gill net in the Delaware river between New Jersey and Delaware at a point about five hundred yards from the New Jersey shore in violation of a New Jersey act for regulating fishing in the waters of Delaware river and bay (p. 1). The

II. (6) *Exercise of Jurisdiction.*

defendants were tried on June 12, 1912, (p. 3); found guilty, and sentenced to pay a penalty of \$100. each, with costs.

8. An appeal was taken and a trial *de novo* had in the Salem County Court of Common Pleas (p. 3), where the judgment of the Justice of the Peace was affirmed (p. 4).

No records have been produced of any exercise of jurisdiction by defendant's courts in that area. The only proven instance of such exercise of jurisdiction in the federal courts in Delaware occurred when a judgment by default was entered, in 1839, in the United States Court for that District, in an ejectment suit for the recovery of possession of Pea Patch Island. In that case the process was not served by a court officer and the owner of the island received no notice of the suit. Hence it cannot be regarded as a judicial proceeding (*Ex. 223*).

By Delaware.

Some exhibits were offered by defendant to show acts of jurisdiction in the river, within the radius of 12 miles about New Castle.

Exhibits 570, 590 and 594 to 610, inclusive, show warrants, surveys or grants issued by Penn, or his agents, for bank lots along the west side of Delaware river at New Castle from 1701 to 1708, except one which is in 1736 (*Ex. 606*). They uniformly describe the land "to extend 600 feet into the river or to the channel" or "to the ship channel."

Exhibits 591 and 592 are surveys, and Exhibit 593 is a warrant for a survey, of Reedy Island located on the west side of the channel, and, like the others, they extend 600 feet into the river.

II. (6) *Exercise of Jurisdiction.*

Exhibit 611 is a report of Commissioners, dated May 1, 1798, reciting an act of the Delaware Assembly of June 3, 1797, for establishing the boundaries of the Town of New Castle, and that boundary is described as extending "600 feet into the River Delaware".

Exhibits 612 and 613 are maps of Town of New Castle, showing a boundary extending 600 feet into the river.

There is no attempt in any of these documents to assert any claim to, or convey any right, title or interest in, the bed of the river beyond the ship channel. At New Castle the river is now nearly 3,000 yards wide (*Ex. 2*), but at the time of those acts the channel ran west of Pea Patch Island, and much nearer than now to the Delaware shore (*Ex. 181, maps 2 and 4*).

Exhibits 615, 668, 669, 670 are acts passed between July 26, 1751, and January 29, 1811, authorizing the operation of Ferries across Delaware river. They relate only to rights on the west side, and do not purport to authorize the exercise of any rights on the east side. In one or two instances there is permission to build a ferry slip extending into the river for a short distance. Such ferry acts were common on both sides of the river, in New Jersey and Pennsylvania, as well as in Delaware. They were never regarded as conferring any rights on the opposite side.

They do not name any landing place for the ferries on the east side of the river, although within the 12 mile circle. It therefore appears that the legislature of Delaware did not undertake to exercise jurisdiction on the east side of the river, but, on the contrary, it was particular to say that the exclusive privilege of the franchise did not apply to the people on the east side, and that, while all people of Delaware who used a public conveyance to cross from New Castle must use the M'Calmont Ferry,

II. (6) *Exercise of Jurisdiction.*

people from the east shore could use any other ferry (*Ex. 699*).

What arrangement was made on the east side for those ferries is not recorded, but exhibits already discussed herein show that the present successors of the original operators of the New Castle ferry purchased lands below low water line for their ferry slip on the east side of the river, from the plaintiff, or its grantees.

Exhibit 673 is an act, passed May 27, 1813, ceding to the United States "all the right, title and claim" of defendant to jurisdiction and soil of Pea Patch Island. Previous to obtaining that cession, the representatives of the federal government tried, unsuccessfully to buy the island from the owner who held title thereto under a grant of the proprietors of West Jersey made in 1784 (*Exs. 126; 221, p. 10*), and defendant knew of that title at the time its cession was made. Notwithstanding that cession, the federal government applied in 1822, and again in 1825, for a cession of the same island from plaintiff's legislature (*Ex. 161, pp. 2-7*). The controversy over title to that island is discussed under Part IV of this brief.

Exhibits 684 to 688, inclusive, relate to cessions by defendant to the United States, in the river east of the ship channel within the 12 mile circle. Exhibit 684 is an act of April 4, 1907, for Artificial Island shown on Exhibit 688. A grant from New Jersey for the same area was obtained by the United States in 1907 (*Ex. 136*).

Exhibit 685 is an act of April 14, 1925, for the lands adjacent to Bulkhead Dike. A map of the area was introduced as Exhibit 687. The United States government applied to New Jersey for a grant of the same land, and the circumstances surrounding that application, and the

II. (6) *Exercise of Jurisdiction.*

correspondence pertaining thereto, are given in Plaintiff's Exhibit 207.

Exhibit 686 is a Delaware act of February 21, 1927, for lands under water in the Delaware river for construction of Bulkhead around portions of "Dan Baker" and "Stoney Point" shoals. The act does not say that the ceded area is within the limits of the state of Delaware. The area involved is shown on Exhibit 687. The United States applied to, and obtained from, plaintiff a grant of the same area and rights (*Ex. 136*).

In each case of a cession by defendant to the United States for lands in the 12-mile circle, except for a lighthouse on Goose Island Flats, where it applied only to New Jersey, the United States has applied to both states for concurrent grants. Consequently these exhibits (684 to 688) cannot be regarded as a sole exercise of territory or jurisdiction by defendant, or as an acknowledgment by the United States of its claim to territory or jurisdiction in the area ceded.

Over plaintiff's objection, defendant offered in evidence Exhibits 691 and 694-718, containing the testimony of its witnesses, given February 2 and 3, 1905, in a former case instituted in 1877, and discontinued without prejudice in 1907 (*New Jersey v. Delaware*, 205 U. S. 550), wherein those witnesses *over objection of plaintiff on the occasion of their appearance*, were permitted to express their opinions upon the question of defendant's title and jurisdiction in the river within the 12-mile circle. Their testimony does not relate to the bay.

This testimony was objected to in 1905 because it was hearsay, but was received, subject to objection, for further consideration. It is objected to now on that ground and also because, although this case is between the same parties, it is upon a different cause of action, and the

II. (6) *Exercise of Jurisdiction.*

former case having been dismissed without prejudice, nothing was finally adjudicated therein. There the question related to the right of common fishery, which was permanently settled by the Compact of 1905, and it is not involved in this case. There the boundary involved was only within a radius of 12 miles about New Castle, and then only as an incident to the right of common fishery. Here we have a boundary case involving the settlement of the boundary for the entire distance between the two states.

The testimony of witnesses in that case in 1905, even though they are all dead, is not admissible in this case on another issue a quarter of a century later. *1 Greenleaf on Evidence, 201.* It should be disregarded by the court. Nevertheless, until it is stricken out we are compelled to treat it as in the record for the purposes of this brief.

Some observations respecting that testimony are pertinent. Most of it was purely negative. That a witness, however distinguished, never heard of the title of defendant to the bed of the river in the 12 mile circle questioned (as those witnesses testified) is no proof of defendant's title. They were all vague and devoid of specific dates, places or instances. Official acts, of which there must have been record evidence, were permitted to be stated from memory, without the support of official records then (or now) produced. Opinions were admitted without any statement of supporting facts.

Motives of state pride and patriotism were admitted by some, and manifested by all, of the witnesses. A number of the witnesses were federal court officers whose testimony was received unsupported by any records or by any official authority of the United States government.

Much of the testimony was based on hearsay and tradition. All of the instances of alleged exercise of juris-

II. (6) *Exercise of Jurisdiction.*

diction by Delaware federal courts (none by the state court being mentioned) were conditions subsequent to the commencement of the old suit in 1877, and of course were not admissible in evidence therein, because the consideration of that case must be limited to the circumstances existing at the time the bill therein was filed.

The east channel, referred to by a number of those witnesses, was the channel east of Pea Patch Island, which at the times mentioned had become the main ship channel, although prior to 1830, the main ship channel was west of that island.

On the whole, that testimony was vague and indefinite, and possessing, as it did, all these legal defects, it is inconceivable that it should receive consideration as evidence. The case having been dismissed by consent, the weight or admissibility of that testimony was never decided. No instance of the exercise of jurisdiction by defendant in the disputed area was proven in either the former or the present suit. Defendant cannot prove its title by judges or lawyers who had never read the reported decisions of their own state, or public documents relating to the subject in question, contradicting their testimony, or by the action of the court officers who do not produce their records.

In that case a number of distinguished judges and lawyers of Delaware testified that they had never before heard that state's title to the bed of the river to low water mark on the east side questioned by anybody. A controversy over that question was mentioned by *Chief Justice Harrington* of the Delaware Supreme Court in *State v. Morris*, 1 Harr. (Del.) 326, decided in 1835, and by *Mr. Justice Baldwin* in *Rhode Island v. Massachusetts*, 12 Peters 657, 724, decided in 1838. It was the subject of a Governor's message to the legislature of Delaware in 1781, and of

II. (6) *Exercise of Jurisdiction.*

much legislative consideration in 1820-1822, as well as involved in the title to Pea Patch Island which was in controversy from 1813 until the Sargeant Award in 1848, including the trial of *Gale v. Behling* before Mr. Justice Baldwin, in 1838, in which three or four of the most prominent lawyers in Delaware were employed.

Testimony subject to some of these criticisms was referred to by this court in *Missouri v. Kentucky* (78 U. S. 395) as follows:

"These things may prove that, in the opinion of the judge and sheriff, the island belonged to Missouri, but they do not go further and put the State in any better position than she was, if they had not occurred. And so with the location of the New Madrid claim in 1821. He doubtless, believed he had authority to locate his warrant on the island, but surely the State cannot claim that she acquired any right by this proceeding. There is, therefore, nothing in this record which shows that Kentucky has not maintained, for a long course of years, exclusive possession and jurisdiction over this territory and the people who inhabit it."

"The evidence to be considered consists of the testimony of living witnesses, the physical changes and indications at and above the island, and the maps and books produced by the complainant. In a controversy of this nature, where state pride is more or less involved, it is hardly to be expected that the witnesses would all agree in their testimony. And as this conflict does exist, it is necessary to consider the evidence somewhat in detail, in order to justify the conclusions we have reached concerning it."

The testimony of those witnesses was then, and is now, inadmissible under any rule of evidence, and although it is in the record (over double objection) it should be disregarded in the consideration of the case.

II. (6) *Exercise of Jurisdiction.*

Exhibit No. 689 contains a Delaware law relating to the Board of Pilot Commissioners (Revision 1915, Sections 953-971). Section 16 recognizes plaintiff's concurrent jurisdiction in both the river and bay. The act is limited in its scope to defendant's own ports and to its own waters. There is nothing in the act defining the territory of the State of Delaware.

Exhibit No. 690 contains a list of 11 Delaware laws relating to the Board of Pilot Commissioners passed between 1881 and 1915. None of these acts contains anything different from what is contained in Exhibit 689, in so far as concerns any attempt to exercise jurisdiction over Delaware river and bay.

The Balance of Proof.

That is all the proof offered to show an exercise of jurisdiction by defendant east of the main ship channel in Delaware river. It is respectfully submitted that this evidence fails to show *any* exercise of jurisdiction therein by defendant.

On the contrary, much proof of the exercise of jurisdiction by plaintiff, uninterrupted and unquestioned by defendant, appears in the discussion of the several previous sub-headings of this brief.

The Master's findings Nos. 20 and 21 (*Rcp. pp. 76-7*) are not supported by the weight of the evidence.

II. (7) Compact of 1905.

(7) Compact of 1905.

(Exceptions 91-3.)

In the months of April and May, 1872, officers of defendant arrested 20 or more citizens of plaintiff while fishing in Delaware river, east of the middle of the river, within a radius of 12 miles of New Castle, on the claim that that part of the river belonged to defendant and that the fishermen were violating a law of defendant, passed the previous year (*Ex. 693, p. 22*). That was the first, and only, time that defendant has ever attempted to enforce its laws, or assert any authority or jurisdiction, therein. A controversy arose between the two states, described in the proclamations and correspondence of their respective governors recited in Exhibit 693, pp. 23-38. Plaintiff's legislature authorized the appointment of a commission to settle the dispute, but defendant declined to join in that project (*ibid*). Plaintiff, by leave of the court, filed its bill of complaint March 13, 1877, praying for the ascertainment of the true boundary between the two states and of the rights and estate of petitioner in the bed of the river in that area, and of the rights of its citizens and inhabitants to fish therein, and that defendant be enjoined from interference therewith (*Ex. 693, pp. 40-41*).

A motion for preliminary injunction, argued March 18, 1877, resulted in an order of March 26, 1877 (*State of New Jersey v. State of Delaware, No. 17, Original, October Term, 1876*), reading as follows:

"This cause coming on to be heard on a motion for a preliminary injunction made on behalf of the complainant, and being argued by Mr. Frelinghuysen and Mr. Vanatta for the complainant, and by Mr. Bayard for the defendant, and it appearing by the allegations of the bill, duly verified by affidavits and other evidence of public character, that for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed

II. (7) Compact of 1905.

and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same, where the said river runs between the said State and the State of Delaware, and that (except as hereinafter stated) the citizens and inhabitants of New Jersey have, during said period, exercised the right of freely fishing in said river, in common with the citizens and inhabitants of said State of Delaware, but that recently, to wit, from and since the year 1872, the State of Delaware has claimed exclusive jurisdiction of the whole of said river from the southerly line of Pennsylvania southwardly to the distance of twelve miles below the town of New Castle, and has interfered with and claimed to control the right of fishing thereon, and has exacted fines and other impositions from the said citizens and inhabitants of New Jersey for fishing as aforesaid, unless they would take out licenses for that purpose from the authorities of the State of Delaware, and pay certain fees and exactions for said licenses, and has caused to be arrested certain of said citizens and inhabitants for refusing to comply with such requirements; and that the State of Delaware still threatens and intends to enforce its said claims, which are resisted by the State of New Jersey; and that the public peace between the citizens and inhabitants of said States is liable to be endangered and interrupted by reason of the premises; and this suit being brought for the purpose of determining the true boundary line between the said States, and settling the controversies between them in reference to the matters aforesaid; therefore—

It is ordered by the court that an injunction do issue to enjoin and restrain the said State of Delaware, its officers, agents and servants, that they and each and every of them do henceforth desist and refrain from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river

II. (7) Compact of 1905.

Delaware, as they have heretofore been accustomed to do, before the said interference; and from arresting, imprisoning, trying, fining, or in any manner punishing, or seizing, holding or selling any property of any citizen or resident of New Jersey for fishing in said river as aforesaid, until this court shall make other order to the contrary" (*Ex. 237, pp. 13-15*).

Defendant filed its answer, claiming title and jurisdiction in the bed of the river to low water mark on the east side within a radius of 12 miles of New Castle. A compact having been agreed upon between the parties (*Ex. 237, pp. 18-26*), the case was, on April 15, 1907, discontinued without prejudice (*205 U. S. 550*).

That case involved only the right of common fishery by citizens of plaintiff in Delaware river within a radius of 12 miles of New Castle. The pleadings did not include any question of territorial jurisdiction or boundary outside that area (*Ex. 693*). No question was raised in that case by defendant respecting grants theretofore made by plaintiff of lands under water below low water line in the area in dispute, or respecting the right, title and interest of the grantees, or respecting appropriations to their exclusive use, by citizens of New Jersey of lands below low water line in that area. Such titles and interests have never been questioned by defendant, and have been enjoyed and exercised, continuously, by plaintiff from the first legislative grant of such lands in 1854 down to the present time, and such appropriations have been made and enjoyed since before 1801, according to the present record.

The Compact was ratified by plaintiff's legislature March 21, 1905 (*Ex. 161, pp. 35-6*); by defendant's legislators on March 20, 1905 (*Ex. 161, pp. 14-15*) and approved by Congress January 24, 1905 (*Ex. 53; 34 St. L. Pt. I, Ch. 394, p. 858*).

II. (7) Compact of 1905.

The Compact recites the controversy between the parties:

“relative to jurisdiction of such portion of the Delaware river as is included within the circle of 12 miles radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom.”

It recites the pendency of the suit in this court and the injunction granted therein in 1877 (*Ex. 53, p. 1*).

Articles I and II provide for concurrent jurisdiction in civil and criminal processes on the entire river.

Article III provides for concurrent rights of common fishery by the inhabitants of both states on any part of the river between low water marks, “except so far as either state may have heretofore granted valid and subsisting private rights of fishery.” The Compact further provides as follows:

“Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States.

Article VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware river, or the ownership of the subaqueous soil thereof, except as herein expressly set forth” (*Ex. 53, p. 5*).

The Master, after quoting said sections, said:

“Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide” (*Rep. p. 54*).

II. (7) Compact of 1905.

He found that this Compact recognized a right of riparian owners to wharf out on the easterly side of the Delaware river within the 12 mile circle but that it did not convey to plaintiff title to any part of the river or to any part of the subaqueous soil thereof, and did not in anywise alter or affect the boundaries of the respective states (*Rep. p. 77, Finding No. 23*). He recommended a decree as follows: "That within the 12 mile circle the river and the subaqueous soil thereof shall be adjudged to belong to the State of Delaware, subject to the Compact of 1905" (*Rep. p. 80, Recommendation No. 1*). That finding and that recommendation appear to be inconsistent and indefinite.

At the time the Compact was made owners of the shore front, referred to by the Master as "riparian owners" had no right to wharf out, and had no rights below high water mark. Under the heading "*Riparian Rights and Grants*" of this brief, it appears that such rights were recognized prior to an Act of 1851 (*N. J. P. L. 1851, p. 335*). From that time until the enactment of Chapter 383, in 1869, (*N. J. P. L. 1869, p. 1007*) they still had the right to wharf out to low water line without public permission, but the Act of 1851 was then repealed and thereafter private use of the land below high water mark could not be acquired except by a grant from plaintiff, at other places in New Jersey, and that law was applied to the Delaware river and bay in 1871 (*N. J. P. L. 1871, p. 44*).

Numerous grants were made by plaintiff in the bed of the river below low water mark, between 1854 and the date of the Compact (*Exs. 3, 41, 42, 43, 44, 48, 70, 92; R. 125, 280, 282, 291, 382-4, 522-40*).

After the Compact was made, plaintiff, without objection by defendant, continued to make grants of the bed of

II. (7) Compact of 1905.

the Delaware river below low water mark in that area; 25 of these are shown in this record (Exs. 58-69; 73-91; 93-7; 2; 3; 57; 127; R. 120; 291; 84-90; 117-123; 130-155; 265-292).

Most of these grants extend to the bulkhead lines established by plaintiff in 1877 (*Ex. 144*) or to a later one in 1916, both of which were below low water mark at distances varying from 378 to 3,550 feet (*Ex. 144, R. 339; Ex. 145; R. 275, 290-1, 340-1*).

The Compact constituted the settlement of a litigation in which the boundary, including territory and jurisdiction within a radius of 12 miles of New Castle, was directly in controversy. Defendant claimed to low water mark on the east side. Plaintiff claimed to the middle of the ship channel, and it had granted lands, and citizens of both states had purchased such titles from plaintiff and possessed and improved them at great expense, in the bed of the river below low water mark. This, although not involved in the lawsuit any more than the oysters and clams mentioned in Article VI of the Compact, was considered by the commissioners, and they agreed that plaintiff "on its own side of the river," should "continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights" under its own laws. If that language referred to lands between high and low water mark, *only*, it was meaningless, since defendant never claimed such lands. Plaintiff had, for 60 years, prior to the date of the Compact, made a practice of conveying the bed of the river to navigable water at low tide (*Exs. 41, 42, 43, 44, 48*). Docks and other permanent fixed improvements, accessible to vessels at low tide, were built on these tracts, and are still in use.

On that state of facts, the above quoted language of the Compact was adopted. It meant lands below low

II. (7) Compact of 1905.

water mark, or it meant nothing, since there were no grants by plaintiff of land *between* high and low water marks.

When the Master says that Compact conveyed no title to any part of the subaqueous soil of the river or in anywise altered or affected the boundary (assuming, as he does, that the boundary is at low water mark) (*Rep. p. 77, Finding No. 23*), he overlooks the very important exception in Article VIII of the Compact, reading:

“Nothing herein contained shall affect the *territorial limits*, rights or jurisdiction of either State of, *in* or over *the Delaware river*, or the *ownership of the subaqueous soil thereof*, except as herein expressly set forth” (*Ex. 53, p. 5*). (Italics ours.)

That exception, taken with Article VII, can have but one meaning respecting “territorial limits” “*in*” “the Delaware river, or the *ownership of the subaqueous soil thereof*,” namely, to concede to plaintiff its claim of title and jurisdiction, and the right to convey that title and exercise that jurisdiction, in the subaqueous soil in the river *below* low water mark east of the main ship channel.

It has been so interpreted by both parties ever since, and that interpretation has not been questioned in this suit.

Not only has plaintiff continued to grant this land (to the extent of above 10,000 lineal feet) ever since that Compact was made, but such grants have been accepted during that time by citizens of defendant to the extent of more than 5,000 lineal feet, for considerations aggregating more than \$87,000.

Plaintiff has acted upon that interpretation, without a single objection from defendant, for the past 28 years. It established its new pierhead line in that area in 1916 (*Ex. 145*), and all the grants made since that time by

II. (7) Compact of 1905.

plaintiff have extended to that line, including those made to and accepted by citizens of defendant; in several instances to a Delaware corporation, in which the Attorney General of defendant was one of the incorporators at the time the grant was obtained, and these grants have been improved by the purchasers to the extent of several millions of dollars. Defendant has never yet objected to, or raised any question about, these grants.

Plaintiff submits that these facts show a practical construction by both parties of this Compact which has been acted upon by plaintiff, and acquiesced in by defendant, during the past 28 years, and that the Master is in error if the language he uses (*Finding No. 23, Rep. p. 77*) means that defendant did not concede to plaintiff by that Compact any title to any part of the subaqueous soil of the river below low water line on the east side thereof, and did not in anywise alter or affect the boundary, as then claimed by defendant on that low water line. Plaintiff contends that that Compact did concede to plaintiff title to the subaqueous soil of the river, within a radius of 12 miles of New Castle, to the extent necessary to accommodate navigation and commerce to the industries which have developed, and used, or may develop and use, the subaqueous soil on that side.

The Master therefore errs in finding and concluding that defendant has title to low water mark on the east side of the river, within a radius of 12 miles about New Castle, and that this Compact did not in anywise alter or affect that boundary.

II. Summary.**Summary of Point II.**

For the reasons set forth under this Part II, plaintiff respectfully submits that it has title and jurisdiction to the bed of Delaware river westward to the thalweg thereof, as it existed at the time of the American Revolution, within a radius of 12 miles about New Castle, on the following grounds:

(a) By conquest in the American Revolution and by the Treaty of Paris of 1783.

(b) By a practical construction of that boundary by plaintiff and its predecessors in title and acquiesced in by defendant and its alleged predecessors in title.

(c) By prescription.

(d) By the doctrine of equitable estoppel operating in favor of plaintiff and its predecessors in title and against defendant and its alleged predecessor in title.

(e) By cession from defendant to plaintiff in the Compact of 1905.

III. Summary.

III.

THE TITLE OF THE STATE OF DELAWARE.

Summary.

Before discussing the questions arising under the Delaware title, we set forth the events and the grants upon which defendant rests its claims to the bed of the river within the Circle between the thalweg and the low water mark on the New Jersey shore.

The following is a summary thereof as stated in defendant's answer, the paragraph numbers being the same as those in the "further answer" (R. pp. 40-74):

1. Title in the Crown of England by the discoveries of Sebastian Cabot in 1497-8, Captain John Smith in 1606, and Lord Delaware, Governor of Virginia, in 1611.

2. The establishment of the Dutch Settlements on the west side of the Delaware after the voyage in 1609 of Henry Hudson and the maintenance of the Dutch Settlements for fifty years and a Dutch grant to Samuel Godyn, 1631. It recites Swedish Settlements and the Dutch Conquest thereof in 1655.

3. The royal grant to the Duke of York of March 12, 1664 and the Duke's Commission of April 2, 1664 to Nicolls as Deputy Governor, over the territory thereby conveyed; and the royal commission of April 25, 1664 to Nicolls and others, for the purpose of reducing the Dutch Colonies to the obedience of the Crown of England.

4. The Conquest of the Dutch Colonies, including those on the west side of the Delaware river, resulting in the Treaty of Breda, July 31, 1667, whereby title thereto was confirmed in the Crown of England; the subsequent government thereof, by the governors of the Duke of York,

III. *Summary.*

as a dependency of the government at New York, with the rights of a proprietary therein.

5. The reconquest by the Dutch in July, 1673, and the submission to the Dutch Government in September of that year; the reconquest by the English seven months thereafter and the continued exercise of the powers of the government by the government at New York as a dependency of New York.

6. The Treaty of Westminster, February 1674, restoring the Dutch settlements west of the Delaware to the British Crown.

7. The Letters Patent to the Duke of York, June 29, 1674, confirming the grant to the Duke of York of 1664.

8. The grant to William Penn of March 1680 for the Province of Pennsylvania.

9. The Proclamation of Charles II of March 4, 1681 respecting his grant to Penn for the Province of Pennsylvania.

10. Release of the Duke of York to Penn, August 21, 1682, of his right, title, and interest to the Province of Pennsylvania.

11. A deed of feoffment, August 24, 1682, from the Duke of York to William Penn for the Town of New Castle and a tract of land within the compass of a 12 mile circle thereabouts, which defendant claims to include the river Delaware and the soil thereof within such a circle to low water mark on the New Jersey shore, but not including the land within that circle on the east side of the Delaware river.

12. Another deed of August 24, 1682, for the territory below the 12 mile circle to the Capes.

13. Delivery of possession under deeds of feoffment, October 28, 1682.

III. *Summary.*

14. A proclamation of the Duke of York's Deputy Governor at New York.

15. A grant of March 22, 1682-3 from King Charles II to the Duke of York for the lands included in the two deeds of feoffment, by the same description, the delivery of said letters patent to William Penn and the custody and possession thereof by him, his heirs and assigns.

16. The uninterrupted possession of the soil and government of the three lower counties of Delaware from 1682 until the American Revolution.

17. By virtue of the Declaration of Independence, defendant became a free and independent state and by force of the Revolution and that independence it became vested with all the powers of government in and to the territory and tide waters as they existed at the time of the American Revolution.

Not only with respect to the powers of government and jurisdiction which immediately before the Revolution were vested in the proprietors thereof, but also with all the property rights then remaining in the Crown of England, and by means of said Revolution and independence and the Treaty of Paris of September 3, 1783, between the King of Great Britain and the United States, all that portion of the bed, soil and water of the Delaware river within a radius of 12 miles of New Castle to low water mark on the New Jersey shore became vested in fee simple in the defendant and has ever since so continued.

18. Long and peaceable possession, use and enjoyment thereof, and the exercise of jurisdiction therein.

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

(a) *Government of Delaware Counties.*

(1) *From 1664 to 1682.*

(Exceptions 29, 30.)

The Master states that the record shows that "in fact" governmental powers were granted to Penn by the deeds of feoffment (p. 54); and he implies that title to subaqueous soil may be vested by grant "to a government" (p. 57).

He concludes that the Duke had a *de facto* title to and was the *de facto* proprietary of the territorial settlements from the date of the English Conquest of the Dutch in 1664 until the date of the feoffment of August 24, 1682 (p. 72, par. 3).

The questions whether the Crown could lawfully grant title to the bed of navigable rivers, and whether (if such grant could be made at all) it could be made only as incident to the grant of the powers of government, are discussed elsewhere—under the heading, "Power of Crown to Grant Bed of River."

The questions whether the bed of navigable rivers could be granted by feoffment, and whether the feoffment of 1682 under which defendant claims title, purported to convey or did in fact convey powers of government, are also discussed elsewhere—under the heading, "Feoffment of August 24, 1682." The present point is limited to the question whether the Duke of York, from 1664 to 1682, was the *de facto* proprietary of the Delaware Colony and had a *de facto* title thereto, either by virtue of legal or actual possession thereof, or by virtue of the exercise of government thereover; and as incident to such question, whether said colony was governed as a dependency of the Colony of New York.

The point is that if the Duke did not have possession of the Delaware territory when he gave Penn the feoff-

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

ments of 1682, those documents were of no effect to transfer title, as the Duke could not deliver possession (by means of the feoffments plus the ceremony of "livery of seisin") unless he himself had possession.

The Record Title on August 24, 1682.

It should first be noted that it never has been claimed that on August 24, 1682, the Duke had any record title to the territory described in the feoffments of that date. On that date the territory to which the Duke had record title was limited to that described in the letters patent of *March 12, 1664*, whereby the King had granted to him all the lands from the west side of Connecticut "to the east side of Delaware Bay."

The further grant of June 29, 1674, from the King to the Duke has the same description (*pars. 6 and 11 of Complaint; R. pp. 5, 7*).

The answer states that the defendant "believes" that the King granted said territory to the Duke as alleged in the complaint (*pars. 6 and 11 of Answer; R. pp. 20-24*).

The authorities are unanimous that the territory described in said grants to the Duke stopped at the *east* side of the river and bay.

In Vincent's *History of Delaware* the following statement is made as to the grant of March 12, 1664:

"It took in all of New Netherlands belonging to the West India Company and the possessions of the city of Amsterdam on the east side of the Delaware; but it did not take in the city's colony, or what was then known as New Sweden, which was situated on the west side of the Delaware.

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the west side of the Delaware, from Philadelphia to the Virginia line, or from the 38th to the 40th degree of north latitude on the Peninsula between

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

Chesapeake bay, the Susquehanna river and the Delaware, had been granted by his father, Charles I, to Cecilius, Lord Baltimore" (*Ex. 232, p. 1*).

The opinion of the Attorney General to the Privy Council, dated November 11, 1680, considers the petition of Penn for the grant of a tract of land in America and referring to the grant of 1664 says:

"And the Patent granted to his Royal Highness, of New-York, being bounded Westward, by the East side of Delaware Bay, is sufficiently distinguished from the Grant desired by Mr. Penn, which is bounded Eastwardly, by Delaware Bay or River; * * * " (*Ex. 518, p. 11*).

On May 1, 1706, the Lords of Trade wrote to Lord Cornbury, Governor of New York, that they "are satisfied that Newcastle and the two lower Counties are not included in the grant" (*Ex. 619*).

On August 5, 1721, the opinion of Raymond and Yorke was submitted to the Commissioners of Trade and Plantations wherein they stated "upon consideration of the whole matter (we) are of opinion that no part of Delaware River or the islands lying therein are comprize'd within the granting words of the said Letters Patent or of the said annex't extract of the grant of New Jersey; but we conceive that the right to the same still remains in the Crown" (*Ex. 27*). *Hazard's Annals of Pennsylvania* (*Ex. 231, p. 33*); *Shepherd, Hist. of Prop. Gov't Pa.* (*Ex. 235, pp. 1, 2*); *Vincent, Hist. of Del.* (*Ex. 232, p. 1*); *Chalmers, Hist. Revolt Am. Col.* (*Ex. 229, p. 4*); *Corfield v. Coryell, 6 Fed. Cas. 546*; *Atty. Gen'l v. D. & B. B. R. Co., 27 N. J. Eq. 1*; *Bennett v. Boggs, 1 Bald. (C. C.) 60, 73*; *Cobb v. Davenport, 32 N. J. L. 369*.

The Duke himself made no claim under these grants to any territory west of the Delaware. In his commission of April 2, 1664, to Richard Nicholls, he recites the grant

III (a) *Government of Delaware Counties—(1) 1664-1682.*

of 1664 and describes its limits "to the East Side of Delaware Bay." He appoints Nicholls "my Deputy Governor *within the lands, islands and places aforesaid*" to execute and perform the powers "which are by the said Letters Patent granted unto me" (*Ex. 513, pp. 20, 21*).

After the confirmatory grant of June 29, 1674, for the same territory, the Duke, on July 1, 1674, issued his commission to Edmund Andros as Lieutenant-Governor, wherein he recites the confirmatory grant and the description of the territory therein granted, "to the East side of Delaware Bay," and appoints him to be his Lieutenant-Governor "*within the lands, islands and places aforesaid*" (*Ex. 531, pp. 31-2; Ex. 357*).

Alleged Possession by the Duke Prior to 1682.

Although the Duke did not have record title to the Delaware Colony, it is claimed that he had acquired possession thereof by virtue of the English Conquest of the Dutch in 1664. So far as the Duke had anything to do with that enterprise, he was not acting for himself but as the representative of the Crown as Lord High Admiral of England (*Ex. 501, p. 43*); any title that might be claimed by virtue of such conquest devolved upon the Crown, and not upon the Duke.

The expedition was directed and paid for (*Ex. 348*) by the King; the Duke did not even go with it; the latter's sole relation to it was that Colonel Nicholls, who was in command of the military phase of the expedition, pursuant to the instructions of the King, happened to be the Deputy Governor who had been appointed by the Duke as such, two months after the expedition was initiated.

The details of the instructions *issued by the King* to the Duke and later to Colonel Nicholls and others as the King's Commissioners, are set forth in *Exhibits 348 and 351*.

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

The proclamation issued by the commissioners when they arrived at New Amsterdam is set forth on page 6 of *Exhibit 9*. It is entitled, "By his Majesty's Command"; it recites their commission by "his majesty"—"to expel or to reduce to his majesty's obedience," all foreigners, etc.

The Dutch at New Amsterdam surrendered on August 27, 1664 (*Ex. 9, p. 13*); and the commissioners then issued orders to one Carre to bring "in obedience to his majesty" those who had "seated themselves" at Delaware bay "on his majesty of Great Britain's territories, without his knowledge and consent" (*Ex. 9, p. 17*).

Carre was successful in his enterprise and upon his arrival at New Castle the Dutch surrendered and signed articles of agreement dated October 1, 1664, wherein no reference is made to the Duke of York but solely to "his majesty's authorities," "his majesty's laws and justice," "his majesty's dominions."

This agreement was made by Carre "on behalf of his Majesty of Great Britain" and the Burgomaster representing the Dutch and the Swedes inhabiting "in Delaware Bay and Delaware River."

(*Ex. 228, p. 2; 230, pp. 3-4; 231, pp. 3-6; 232, p. 5; 353; 531, pp. 23, 24.*)

In view of these historical facts about which there is, and can be, no dispute, there is no basis for the claim that the Duke at the date of the feoffment in 1682 had either the legal or actual possession of any part of the Delaware Colony.

III. (a) Government of Delaware Counties—(1) 1664-1682.

Alleged Government by the Duke Prior to 1682.

It is claimed, however, that prior to 1682 the Duke, through his representatives, exercised the power of government in the Delaware Colonies, and that the exercise of such power proves that he was in possession of the Delaware Colonies—described in the Master's Report as "a *de facto* title to and the *de facto* proprietary of" the Delaware settlements (*Rep. p. 72, par. 3*).

As a subject of the King, the Duke had no power to wage war or to make a conquest or to claim title to the conquered territory (*1 Bl. Com. pp. 257-263; 7 Comyns Dig. 49; Vattel Law of Nations 387, 390*).

Still less did the Duke have any legal right to exercise the power of government in that territory (to which, as shown above, he did not even have record title) *without* the specific grant of such power.

Colonel Nichol's instructions from the King (before he had been appointed the Duke's Governor in New York) was to drive out the Dutch and reduce the territory, including the Delaware Colony, to obedience to his Majesty and to "only keep possession till his Majesty is informed and satisfied otherwise" (*Ex. 9, p. 19*).

Shortly after the conclusion of the Treaty of Westminster, Charles II, under date of February 19, 1673-4, issued instructions to the Dutch government to deliver possession of the Delaware colonies to Edmond Andros and directed him to take possession thereof "*for us and in our name*" (*Ex. 358*). Three months later Charles II issued his confirmatory letters patent, of June 29, 1674, to the Duke of York for the territory previously granted in 1664, in the same terms, by the same description and with the same powers, limiting the southerly or westerly boundary by the east side of the Delaware river (*Ex. 17*). Obviously the King did not intend to grant the Delaware

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

colonies to the Duke of York, or at that time recognize any powers or title of the Duke in that territory. Moreover, Major Andros' commission as the Duke's Deputy Governor, was not issued until July 7, 1674, five months after the King had directed him to take possession of the Delaware colonies in the King's name (*Ex. 357*). *This status was never changed.*

The Governors of New York, appointed by the Duke, had no legal right to exercise authority in territory which had not been granted to the Duke; so far as their exercise of authority in the Delaware Colony purported to be in the name of the Duke, it was a usurpation of the King's authority. (*1 Macaulay's History of England, p. 141.*)

Whatever authority the Duke's governors exercised in the Delaware Colony, was performed as the representatives of the King and not of the Duke.

So, also, with the grants of lands in Delaware, made by the Governor and Council in New York. They must be regarded as made on behalf of the King, and not on behalf of the Duke.

In *Johnson's Lessee v. M'Intosh*, 8 Wheaton 543, 595, this court said:

"If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown,

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained either by making an entry with the surveyor of a county, in pursuance of law or by an order of the governor in council, who was the deputy of the King, or by an immediate grant from the crown."

It is also claimed by the defendant that further evidence of the exercise of actual government and of possession is found in the establishment of courts at New Castle and elsewhere and in the making and confirming of certain grants of land by the Duke's Deputy governors; and in support of this argument reference is made to *Exhibits 510, 513, 514, 515 and 516 (Rep. p. 10)*. An examination of these exhibits will show that they do not justify the Master's conclusion.

Discussion of Defendant's Exhibits.

Exhibit 510.

This contains extracts from Linn's "Charter to William Penn," etc. There is nothing in this exhibit which shows that these laws were promulgated or enacted by the Duke or under his authority; on the contrary, the preface recites that they were collected "out of Severall Laws now in force in his Majesties American Colonyes and Plantations." It is, therefore, apparent that these laws were already in existence in the colonies at the time of the Delaware grant of 1664.

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

The preface further shows that they were published March 1, 1664, at "Hemsted, Long Island" by virtue of a commission from the Duke to Nicolls, Deputy Governor, dated April 2nd, 1664.

There is one further significant recital in the preface, to wit, that the laws were established *by the authority* of the letters patent granted to the Duke on March 12th in the sixteenth year of the reign of Charles the Second. But the territory described in those letters patent extended *only to* the Delaware river and did not include any of the river or bay or land to the west thereof, and, hence, on their face these laws when originally promulgated, had no application to any part of Delaware territory.

It is claimed, however, that the exhibit shows that on September 25, 1676, "Andross" as Lieutenant and Governor General under the Duke, proclaimed that these laws should be enforced "in this river and Precincts."

But such a proclamation does not indicate that these or any other laws became such *by virtue of any power of government in the Duke*; even if Andross as Deputy Governor of the Duke had any power of government in or over the territory to which the Duke had no title and of which he was not in possession, the sanction of these laws did not come from the Duke nor from the authority conferred by his grant of 1664, but from the Crown.

The exhibit itself shows that these laws were promulgated by the authority and in the name of the Crown. Thus, reference is made to the agreement made by Carre "on the behalf of his Majesty of Great Britain" (p. 3); and the oath of allegiance to his Majesty is set forth at length; reference is also made to the terms of the agreement whereby the "Burgers and Planters" submit themselves to his Majesty's authority.

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

The exhibit then sets forth a list of "ordinances," the most important of which provided:

"14. Respecting the tenure of the land at Delaware, it is to be held in free and common socage, as his Royal Highness by his Majesty's patent holds all his territories in America, that is to say, according to the custom of the Manor of East Greenwich, only with this proviso, that they likewise pay the quit rents, reserved in their several patents as an acknowledgment to his Royal Highness" (p. 9).

The exhibit then states the instructions issued to the sheriff during the short period of the Dutch occupancy, which was terminated by the Treaty of Westminster of 1674 (p. 19). This was followed by the ordinance of September 25, 1676, above mentioned.

There is nothing to show that the Duke of York ever heard of the ordinance, but whether he did or not there is nothing in the ordinance itself to show that it was issued by the authority of the Duke; on the contrary, the above quotation therefrom shows that the Deputy Governor issued it "in his Majesty's Name" (p. 22).

Exhibit 513.

This is the document entitled, "Duke of York Record 1646-1679" which purports to be an Authorized Transcript from the Official Archives of the defendant, comprising letters patent, grants, surveys and other documents during said period.

An examination of the various patents and grants set forth in this exhibit shows the following:

In the grants which recite the character of the grantor his authority is stated "commissioner for His Majesty," "Commander in Chief over all the forces employed by His Majesty to reduce the Dutch * * * under His Majesty's obedience."

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

In the grants (eleven in number) which specify for whose use the quit rents are prepared, they are for the use of his Majesty and the grants made by order of the court in which many authorities are cited (twenty-three in number) the recital is "by the King's authority."

The remaining grants are either abbreviated or incomplete.

Whatever authority there may have been in the grantors, such authority did not originate in the Duke of York, but in the King of England.

It may be noted that *not one* of the grants purports to convey tidal lands within either the river or the bay; it is true that some of them use the phrases "in Delaware bay" or "in Delaware river," but the grants themselves show that these phrases do not describe the *location* of the lands. The phrases obviously mean "in Delaware river settlement or colony."

The history of the style in which these grants were made and the effect thereof are set forth in detail in *Exhibit 465* in the opinion of Attorney General Northey of July 30, 1713, wherein he states:

That Richard Nicholls, first English Governor under the Duke of York—"Proprietor of the said Province" (of New York) arrived in 1664; that most of the inhabitants applied to him for patents of land, which were granted in his own name as Lieutenant-Governor and sealed with his private coat of arms.

That Governor Lovelace who succeeded Nicholls in 1668, pursued the same method of granting patents and used his own private seal and arms.

That Edmond Andros succeeded Governor Lovelace in 1673 and likewise made grants in his own name but used the provincial seal of the Duke of York (p. 1).

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

That Thomas Dongan succeeded Andros in 1683 and used the same style in granting patents.

That on the death of Charles II, King James II sent to Dongan a new commission in the royal style with a double seal, but nevertheless Dongan continued to grant patents in his own name under the ducal seal, including the charter of the City of New York .

That E. Andros succeeded Dongan in 1687 as Governor of all the English dominions from Nova Scotia to the river Delaware, which was soon succeeded by the Revolution.

That in 1691, Henry Sloughter appeared as Governor under the great seal of England of the province of New York and from thence forward all succeeding governors used the royal style in royal grants and the great seal of the province.

That little land lying near the river was left unplanted in 1708 when her Majesty issued her directions to Governor General John Lovelace for regulating the grants of land (p. 2).

That many of the quit rents are in arrears and that the disorder in making the early grants makes it impossible to prepare a rent roll (p. 3).

The second query submitted to the Attorney General was whether a confirmation of a previous grant for other services and demands than those mentioned in the earlier grant released the tenant from fulfilling the intermediate rent obligations in the first grant (p. 4).

In answer the Attorney General says that a writ of cessavit (*cessavit per biennium*) lies only where a tenure is created by a grant in fee farm—

“which could not be by grants before K James 2d came to the throne he being a subject, but where there is a tenure as by the grants of the crown . . . the writ of cessavit lies” (p. 5).

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

This exhibit shows the conclusion of the Attorney General that the Duke of York was *only a subject prior to his becoming King*. Hence he acquired nothing by conquest, and had no title to grant to Penn for the three lower counties.

These opinions show that the grants made by Lovelace and Andros were, in fact grants by the Crown. By Nicholls' commission from the Duke of York, his authority was limited "within" the lands granted to the Duke by Charles II grant of March 12, 1664. But Nicholls purported to grant as one of the King's commissioners (*Ex. 513, pp. 25-26*). The same is true of Andros' commission from the Duke, but he was commissioned by the King to receive and administer the Delaware colony (*Ex. 358*).

The Duke's governors, as such, could not exercise any authority on the west side of the river or bay. Such exercise of authority, in so far as it purported to be exercised in the name of the Duke of York, was a usurpation of authority.

Exhibit 514.

This is an extract from the Journal of one Jasper Danckaerts. It does not appear who he was or where he obtained the information; the exhibit refers to Newcastle as the "capital of justice," and states there are three "minor" courts at Salem, on the east side of the river, another at Upland on the west side and the third at Burlington on the east side. The journal is dated in the year 1679. The statements therein about the courts are somewhat unreliable in view of the following facts:

(a) The territory east of the bay and river in which Salem and Burlington are located had been conveyed by the Duke to Berkeley and Carteret and set up as a separate colony twelve years before the journal was written (*Exs. 7 and 8*).

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

(b) The King had confirmed the title of Berkeley and Carteret in the government of the territory east of the bay and river seven years before the journal was written (*Ex. 13, pp. 1, 2*).

(c) By proclamation of the King of June 13, 1674, the title and power of government of Carteret had been confirmed five years before the journal was written (*Ex. 13, p. 3*).

In view of these facts the journal of an unknown traveler cannot be taken seriously as proof of the establishment of courts in Delaware under authority of the Duke of York, or as proof of the establishment of an appellate court at Newcastle.

Exhibit 515.

This contains extracts from records of the Newcastle court.

The first extract gives the record of a trial at New Castle on appeal from a court in Salem respecting title to land in New Jersey. No reference is made to the Duke of York, or to any supposed authority of the Duke to establish the court.

The extract then recites the arrival of Penn with his deeds of feoffment and the livery of seisin on October 27, 1682.

Under date of November 2, 1682, there is set forth the record of a proceeding in New Castle held "in the Name of-or: Soueraigne Lord CHARLES the 2d: and by Commission and Appointment of William Penn, Esqr; Propriety: & Governor: of *Pensilvania*."

Then follows the record of a speech by Mr. Penn with a recommendation to the magistrates.

"In Regard that for want of a prsent assembly there are not as yett fitting Lawes Regulacons

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

orders and by lawes for ye Contry provyded Hee ye Propriety: therefore recommended the magistrates in ye Interim to follow and take the Lawes of his Royll: highnesse provided for the Province of New Yorke for their Guyde Soe farr Forth as they are Consistent and not Repugnant to ye Lawes of England assuring ye Inhabitants of this and the other twoo Counties downwards that they Should haue and Injoy full Equall, and ye same, Priviledges wth: those of those of ye Province of Pensilvania, and that for the future they Should bee Governed by Such Lawes and orders as they themselues by their deputys and Representatives Should consent to, and that hee would call an assembly for ye purpose as soon as Conveniently might bee; etc." (pp. 9, 10).

There is nothing in this exhibit to show the establishment of any laws or courts *under the authority of the Duke of York.*

Exhibit 516.

This is made up of extracts from Vol. 12 of "Documents Relating to the Colonial History of the State of New York."

Several of these documents refer to events during the Dutch occupancy, with which we are not now concerned.

Others show that the exercise of government in Delaware was not by virtue of the authority from the Duke but from the Crown. The following are illustrations (*italics ours*):

October 24, 1664.

George Cartwright and Samuel Maverick, "his Majesty's commissioners" commissioned Colonel Nicolls to repair to Delaware bay and there take special care for the good government of the place and to depnte such officer or officers therein as he shall think fit "for the manage-

III. (a) *Government of Delaware Counties—(1) 1664-1682.*
 ment of his Majesty's affairs, both civil and military,
until his Majesty's pleasure be further known" (p. 45).

June 14, 1671.

Order of the Council at New York forbidding vessels to ascend Delaware river above Newcastle and declaring tenure of lands in Delaware as held in free and common socage as his royal highness by his Majesty's patent holds all his territories in America (p. 50). This related to quality and not source of title.

May 17, 1672.

Order of the Council at New York directing the officers of the Delaware colony to take care "*that his majesty and his royal highness interest there be not infringed by persons from Maryland who pretend an interest at the Horekill*" who have sent surveyors to lay out the land and directing the officer to continue observance of orders received from his royal highness government "*until his majesty or his royal highness pleasure be signified to the contrary*" (p. 52).

November 4, 1674.

Gov. Andros appointment of commissaries in the Town of New Castle "*in Delaware river and dependencies.*"

Recites receiving "*this place and government in behalf of his Majesty from the Dutch,*" does "*in his Majesty's name*" appoint commissaries (pp. 56-7).

September, 1676.

Ordinance of Gov. Andros introducing Duke's laws in Delaware "*in his Majesty's name*" (p. 62).

Paragraph 11 reads—"That all writs, warrants and proceedings at law, shall be *in his Majesty's name*, it having been practiced in ye government ever since the first writing of the law book, and being his royal highness special pleasure and order" (p. 64).

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

August 13, 1677.

Gov. Andros appoints Capt. Billop as sub-collector of customs on Delaware river and directs him to discharge his duty in accordance with the acts of Parliament and of all seizures to distribute one-third to the informer, one-third to Capt. Billop and *one-third to the King*. Instructs him to observe orders received from the chief collector or principal officers of the custom (p. 67).

October 28, 1678.

Gov. Andros order the justices of Newcastle to protect the inhabitants on the east side of Delaware river in the possession of their land (p. 69).

May 1, 1680.

Gov. Andros warrant for the arrest of Philip Carteret for presuming to exercise authority and jurisdiction in New Jersey (pp. 69-70).

Note: These two documents illustrate the arrogant usurpation by Gov. Andros of authority over territory with which he was not concerned, and which he knew had been properly conveyed and confirmed by the Duke and King to others.

The real question here is not whether the Delaware Colony was governed as a dependency of the New York Colony, but whether it was governed by the Duke or by the Crown. During the period in question, settlements on the Delaware were too small to justify a separate government. The chief settlement, which was located at New Amstel (afterwards New Castle) had scarcely thirty families in the year 1659 (*Vincent's History of Delaware, 313*). There was no substantial development during the following years; even as late as the year 1700 the Privy Council under the persuasion of Penn, included the Delaware counties under the Deputy Governor and the Ad-

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

miralty Court of Pennsylvania, because they could not support an independent government; hence it was quite natural that they should be governed from New York.

But they could not be, and were not in fact or in law governed by the Duke; he had no title west of the river and bay; his grant of 1664 stopped east of the river and bay; and if he claimed title by conquest, such title did not belong to him, but to the Crown.

In so far as the Duke or his agents attempted to exercise, or did in fact, exercise powers of government in the Delaware Colony during this period they were either usurpers or were acting as the representatives of the Crown.

Although Nicholls, under his commission from the Duke of 1664, and Andros, under his commission from the Duke of 1674, had no authority to exercise jurisdiction or powers of government on the west side of the river (*Exhibits 513, 531, 357*), they and other Deputy Governors undertook to do so for a period of about twenty years following the Conquest of 1664. But whatever they did west of the river was on behalf of the Crown, and not of the Duke of York; as to Nicholls, he had a commission from the Crown (see *Exhibits 349-354*); and as to Andros, he was acting as the *King's* "agent" (*Ex. 358*).

The fact that these governors were limited by their commissions from the Duke to the east side of Delaware river but exercised jurisdiction on the west side is noticed by Sharf (*Hist. of Del.*) (*Ex. 501, p. 47*), Chalmers (who states that this power was usurped (*Ex. 229, p. 4*), Vincent (*Ex. 232, p. 1*), Scharf (*Hist. of Md.*) (*Ex. 1153, p. 11*) and Rodney (*Ex. 297, p. 210*).

Both Scharf and Vincent state that the settlements west of the Delaware were then clearly within the limits of Maryland under the grant of 1632 to Lord Baltimore

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

(Ex. 1153, p. 11, Ex. 232, p. 1), a fact which Penn admitted in 1683, when he was arguing that Lord Baltimore had lost the three lower counties to the Dutch, and that they had been acquired by the Crown in 1664 (Ex. 545, p. 4), which is inconsistent with the theory of British title by discovery (Ex. 228, p. 26), as well as with Penn's claim of title under the deeds of feoffment of lands conquered by the Duke.

On May 24, 1680 the Duke issued a commission to John Levin to make a thorough investigation of the affairs of the Duke's properties in America. Specific instructions were given to ascertain the rent or tax paid or due from every person during the preceding six years "at New York, Esopus, Albany, Long Island and all other places." No mention is made of the Delaware colony (*Ex. 231, pp. 27-8*).

On February 13, 1692-3, Thomas Trevor, Attorney General, rendered an opinion to the Privy Council Committee that the prerogatives and sovereignty had not been granted by the Crown, and that while the Duke of Yorke, as proprietor of New York, may assign his property in New Jersey to others, he cannot by any such grant absolutely sever New Jersey from New York, but it still remains part thereof and dependent on the government of New York (*Ex. 383*).

If this opinion is correct then the three lower counties if a dependency thereof, were never separated from New York in so far as the prerogative and sovereignty of the Crown was concerned.

The case is much stronger respecting New Jersey, which was included in the grants to the Duke, than with respect to Delaware, which was not included in his grants, and where his governors exercised extra-territorial jurisdiction.

III. (a) *Government of Delaware Counties—(1) 1664-1682.*

Penn's attorney, Paris, in August 1734, drafted a form of petition opposing Lord Baltimore's application for a confirmatory grant, including the three lower counties, wherein he recited that the Delaware settlements constituted the lesser settlements of the Dutch West India Company and were appurtenant to and dependent upon the great settlement of New Netherlands ("but now called the Provinces of New York and New Jersey") (*Ex. 277, p. 1*). That draft of petition was not filed. The draft that was filed on December 18, 1734, as revised by Sr. William Murray, Solicitor General, omits that recital entirely, but it recites that the Duke, when he made the deeds of feoffment in August 1682 "had for a long time been in full possession" of the three lower counties "under grants from the Crown" (*Ex. 279; pp. 2-3*). This contention was frequently repeated by, or on behalf of, the Penns, and was based solely on the theory that the Duke's grants of 1664 and 1674, included the settlements west of the Delaware, as appurtenances of the territory and government of lands on the east side of the river.

We accordingly submit that whatever powers of government of the Delaware Colony were administered during this period by the British Governors at New York, they were exercised by virtue of the prerogatives of the Crown and not because the Delaware Colony was regarded as appurtenant to the New York Colony, or because the Duke or his governors had any legal right to exercise such powers.

III. (a) *Government of Delaware Counties—(2) 1682-1776.*

(2) *From 1682 to 1776.*

(Exceptions 31, 32, 68)

The Master found that during the period from 1682 until 1701 the colonies of Delaware and of Pennsylvania were governed by a joint legislative assembly, and that thereafter and until the American Revolution the Colony of Delaware (though having its own separate legislature) continued to acknowledge Penn and his successors as proprietaries and governors; and that from 1682 until 1776, Penn and his successors possessed the lands and waters within the boundaries of Delaware as fixed by the feoffments and exercised full and exclusive control and dominion thereover; he concludes that by virtue of the uninterrupted and undisturbed "possession" of Penn and his successors, they acquired a good title against the Crown of England (Rep. p. 74, pars. 8, 9; p. 78, par. 3).

We submit that the historical facts do not justify either the findings or the conclusion.

On December 4, 1682, an Assembly, consisting of an equal number of representatives from Pennsylvania and from the Delaware counties called "Territories," met at Upland and passed the so-called "Act of Union" (*Ex. 561*).

It recites the grant from the King to Penn for Pennsylvania and the release by the Duke of York of his claim thereto; and the grant by the Duke to Penn of the tract of land from twelve miles northward of New Castle to Cape Henlopen, "lying on the *west* side of the said river and bay," as by two deeds of feoffment dated August 24, 1682, "doth more at large appear." It then annexed the three counties to Pennsylvania "as of the proper territory thereof."

III. (a) *Government of Delaware Counties—(2) 1682-1776.*

The letters patent for the province of Pennsylvania required the submission of this Act to the Crown for approval; but no evidence has been offered that it was so submitted.

The defendant claims that this Act of Union is evidence of the exercise by Penn of the power of government in Delaware. But as the Act was passed *before* the letters patent of March 22, 1683, it is difficult to see how that Act could give Penn any better title than that which he already claimed by virtue of the feoffments; they did not grant any power of government; and even if they did, the *Duke* could not *assign* to Penn or to anybody else such power, if any, as he might *then* have had—certainly not without the approval of the Crown.

Defendant introduced, as *Exhibit 738*, an endorsement which appears on an act (*Ex. 561*) presented to the Lords Commissioners on February 19, 1700-1 by Edward Randolph, Royal Surveyor General of the colonies, as an exhibit attached to his report of that date, referring to the act, "by which Mr. Penn claims the government of the 3 lower counties" and "by which Mr. Penn claims a right to exercise gov't over the inhabitants of ye 3 lower counties."

The report to which that copy of the act was attached is *Exhibit 404*. It is entitled, "An abstract of my paper humbly presented to the Right Hono'ble the Lords Comm'rs for Trade shewing the high crimes and increasing misdemean'r and male adm'acon of the govern'rs in the several proprieties on the continent of America, and islands adjacent." Part of it is entitled "The three lower countys of Newcastle, Kent and Sussex, lying in Delaware Bay" respecting which he states—

"Mr. Penn has the soil granted him by two deeds of feoffment from the late Duke of Yorke, but he usurps the government and exercises regal power

III. (a) *Government of Delaware Counties—(2) 1682-1776.*

over them, upon an imaginary title, grounded upon a sham law of his own contriving; made at Chester, in the county of Newcastle, by wheedling the credulous inhabitants to entreat him to take them under his protection and government which they had by that Act put him into" (p. 1).

In introducing that exhibit defendant explained that it was for the purpose of showing that the Act of Union was submitted. This is not a submission of a law under the provisions of the Pennsylvania charter; it requires that a transcript or duplicate of all laws be submitted to the *privy council* within *five* years after their enactment, and any of such laws as within six months after submission are *declared* by the King in *council* to be objectionable shall be void (*Ex. 361, p. 6*).

Randolph made this report, in February 1700-1 (17 years after the Act of Union was passed), to the Lords Commissioners. Counsel for defendant admitted that neither this nor the other Delaware laws were ever officially submitted (*R. 737*). This is also stated by Shepherd (*Ex. 235, p. 19*) and by Murray, Solicitor General (*Ex. 494, p. 2*).

An appropriate criticism is that of *Chalmers* in his "*Introduction to the History of the Revolt of the American Colonies*" (*Ex. 229*), where he states the Act of Union was adopted "without considering they had as little right to unite themselves to it as to Canada or Peru."

Shepherd (*Ex. 235*) says:

"But whatever 'rights, privileges, franchises, royalties and jurisdictions' may have been granted to Penn by the Duke of Yorke, they did not, and could not, legally empower him either to assume the government of the lower counties, or to unite them with the province."

Further criticisms of the Act of Union appear in the following exhibits: 234, 297, 405, 447, 535, 1146, 1147, 1156.

III. (a) *Government of Delaware Counties—(2) 1682-1776.*

Of particular interest are the comments of Benjamin Franklin as set forth in his "Historical Review of the Constitutional Government of Pennsylvania."

"To unite the subtlety of the serpent with the innocence of the dove is not so easily done as said, having in this instance experienced the weight of his credit and the power of his persuasion he was no sooner landed than he formed a double scheme for uniting the province with the territory, though it does not appear he was properly authorized so to do, and to substitute another frame of government in lieu of the former; which, having answered the great purpose of inducement here at home (in England) for collecting of subjects, he was now inclined to render somewhat more favorable to himself in point of government."

(*Ex. 1155, p. 2.*)

Franklin then quotes the complaint of the Assembly of 1704 addressed to Penn as follows:

" 'And as to the conveniency of the union of the Province and Lower Counties, we cannot gainsay it, if the King had granted thee the government as the Duke had done the soil; but, to our great grief and trouble, we cannot find that thou had any such grant; and if thou had, thou would not produce it, though often requested so to do;

Therefore we take it the harder that thou, who knew how precarious thy power was to govern the lower counties, should bring thy province into such a state and condition' " (p. 3).

At the same meeting of the Assembly at Upland which passed the Act of Union, the Act of Settlement was put through by Penn (*Ex. 560*).

This document purports to be an act of settlement or constitution for the establishment of the government. In it Penn recites that he is "Proprietary and Governor of the Province of Pennsylvania and the territories thereunto belonging" (p. 1).

III. (a) *Government of Delaware Counties—(2) 1682-1776.*

It provides for legislation "in the said Province, and territories thereof, that is not inconsistent with, but according to the powers granted by the King's Letters Patent to the Proprietary and Governor" (p. 4).

Like the Act of Union, this act was never submitted to the Crown or the Privy Council for approval, as required by the provisions of the grant of Pennsylvania. It, therefore, like that act, cannot be regarded as effective.

The "Union" did not last. Before Penn returned to England in October, 1701, dissensions had arisen in the three lower counties, due to his failure to show any right to the powers of government thereof. He called the Assembly in session at Philadelphia on September 16, 1701, and addressed it in an effort to pacify the dissenters. Being unable to do so, and to appease their discontent, he accepted the surrender of the then existing frame of government, and on October 28, 1701, just before leaving, he presented a new charter of privileges (*Proud's Hist. of Pa.*, pp. 435-443).

Details of the quarrels are described in *Exhibits 235, 649 and 650.*

Chalmers (*Ex. 229*) refers to the separation of the lower counties in October 1701 and the sending of representatives of the Delaware colony to England "to represent their wrongs." He says they complained to the British ministers that they had applied to Penn for the means of defense without effect (p. 12); and "that, tho for eighteen years he had exercised over them every act of jurisdiction, he could show no charter from the crown."

While Penn was thus attempting to usurp the power of government in Delaware and the inhabitants thereof were protesting and objecting until the separation in 1701, proceedings were had before the Privy Council

III. (a) *Government of Delaware Counties—(2) 1682-1776.*

which resulted in a judgment on November 13, 1685, settling the dispute between Lord Baltimore and Penn whereby one-half of the area "lying towards the Bay of Delaware and the Eastern Sea be adjudged to belong to his Majesty and that the other half remaining to Lord Baltimore as comprized within his charter" (*Ex. 264*). This adjudication was one of the outstanding features of the litigation between Penn and Baltimore, the details of which are discussed under the heading "Litigation Relating to Title."

So far as the present point is concerned it is sufficient to say that regardless of Penn's usurpation of the power of government, the Privy Council by this decision of 1685 held that the territory *belonged to his Majesty*. Obviously such an adjudication by the highest court of the British Empire is not a recognition of the right of Penn to either the title or government, but the contrary thereof.

Some of the other historical facts that show conclusively that Penn did *not* have "the uninterrupted and undisturbed possession, *as against the Crown*", are the rejections of his claim of title by the Crown, the repeated acknowledgments over a long period of years that Penn's deputy governors were subject to the approval of the Crown, the refusal or inability of Penn himself on demand either from the Crown or from Delaware to produce proof of his title, the written statements of Penn and his agents and attorneys over a long period of years, the Order in Council of June 23, 1709 (confirming the previous Order of 1685) (*Ex. 631*), and the proceedings of the Council for Plantation Affairs of January 11, 1769, (*Ex. 290*). These and other facts are discussed under the heading "The Crown's Claim of Title."

III. (b) *Power of Crown to Grant Bed of River.*

(b) *Power of Crown to Grant Bed of River.*

(Exceptions 33-35.)

The construction of the feoffment of August 24, 1682, is discussed under the next point; here we consider the question of the power of the Crown as trustee for the people of the nation to convey the bed of a navigable river or any part thereof.

The plaintiff urges that the dictum in *Martin v. Waddell*, 16 Pet. 367, states the correct rule on this subject. We quote (italics ours):

"We do not propose to meddle with the point, which was very much discussed at the bar, as to the power of the king since Magna Charta to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as give him an immediate and exclusive right of fishery, either for shell fish or floating fish within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But from the opinions expressed by the justices of the Court of King's Bench, in the case of *Blundall v. Caterall*, 5 Barn. & Ald. 287, 294, 304, 309, and in the case of *The Duke of Somerset v. Fogwell*, 5 Barn. & Cress. 883, 884, the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant. The point does not, however, arise in this case unless it shall first be decided that in the grant to the Duke of York the king intended to sever the bottoms of the navigable waters from the prerogative powers of the government conferred by the same charter; and to convert them into mere franchises in the hands of a subject, to be held and used as his private property. And we the more willingly forbear to express an opinion on this subject, because it has ceased to be a matter of much interest in the United States. For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right

III. (b) *Power of Crown to Grant Bed of River.*

to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation'' (p. 410).

In addition to *Blundell v. Catterall* and *Duke of Somerset v. Fogwell*, cited *supra* in the above quotation, the following English cases support this view: *Lord Fitzwater's Case*, 1 Modern 106; *Carter v. Murcott*, 4 Burrows 2162; *Molcomson v. O'Dea*, 10 House of Lords 593; *Gann v. Fishers of Whitestable*, 11 H. of L. 192; *Warren v. Matthews*, 6 Modern 73; *Moore v. Attorney General*, Irish Rep. 1929, pt. 3, (March) 191.

In *Massachusetts v. New York*, 271 U. S. 65, this court held:

(p. 88)

"On the other hand, a grant of the soil under water in private ownership would have set material limits on the free exercise of the sovereign control of New York over the navigable waters of the state and on the free use of the principal waterway of the newly settled territory. All these considerations lead to the conclusion that the grants in the Treaty of Hartford did not convey to Massachusetts, which took in private ownership, any title in the bed of the lake, unless the technical language employed in the grants compels us to take an opposite view."

(p. 89)

"The dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in

III. (b) Power of Crown to Grant Bed of River.

private ownership. *Martin v. Waddell* and *Shively v. Bowlby*, supra. Such grants are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548, 9 L. ed. 773, 822-824; *Shively v. Bowlby*, supra. It follows that wherever there is a grant by a state having plenary power to make it, of the rights and title of government and sovereignty over a specified territory, or where, in a grant of land to be held in private ownership by one state within the limits of another, there is a reservation to the grantor state of these sovereign rights, the grant or reservation carries with it, as an incident, title to lands under navigable waters."

See also: *Johnson v. M'Intosh* (8 Wheaton 595); *Shively v. Bowlby* (152 U. S. 1, 10-11, 13-15, 57); *Arnold v. Mundy*, 6 N. J. L. 1, 86, 87, 88, 89, 92-94, 107, 108, 109, 111; *Gough v. Bell*, 21 N. J. L. 156, 160; *Same case*, 22 N. J. L. 441, 457, 458; *Wooley v. Campbell*, 37 N. J. L. 163, 165.

In *Gough v. Bell*, supra, at p. 160, the court said (italics ours):

"The title to this country, according to the theory of the times, was that of discovery. It belonged to the British nation, but vested in the King as the head thereof, all below high-water as a part, of the sovereignty or regalia, 2 *Bacon's Abr.* 177 2 *Blk. Com.* 14, 104, yet he held them, as he did the sea and the arms thereof and the navigable rivers of Great Britain, in trust for the public. And although there are some old royal grants, under which exclusive fisheries are held in the tide-waters, and others are also claimed by prescription, yet these grants of the King were considered a usurpation upon the common rights of the people, the powers of Parliament, and the sixteenth chapter of Magna Charta, whilst it confirmed all such grants as were

III. (b) *Power of Crown to Grant Bed of River.*

prior in date to the reign of Henry 2nd, restrained their being granted from that period. This is the view taken by Kirkpatrick, Ch. J., in *Arnold v. Mundy*, 1 Halst. 71-4, and is fully sustained by the authorities there referred to.

It is true this distinction is usually applied to the granting of a several fishery in navigable rivers or arms of the sea; but it is on the ground that it interferes with the rights of Parliament, or of the people to a common fishery, and if the mere interference with them by grant is void by Magna Charta, then surely their *entire destruction by the absolute grant of the premises under water must be null also*" (p. 160).

In a note to *Gough v. Bell* the reporter (afterward Chancellor Zabriskie) in the course of his criticism of Sargent's opinion in the Pea Patch Island Case said (*italics in original*):

"But laying aside all technical, narrow views of the case, the great rules that ought to have controlled this decision are those laid down by Justice RANDOLPH in the text. That the King of England held his country as part of the public domain, subject to the same restrictions as were then by law imposed upon him in England. That he there held the great rivers and the soil thereof in trust for *all* his subjects, and could not alien or appropriate them to some of them in exclusion of others. That any grant of the river Delaware to Penn, was subject to those rights in his subjects to whom he had granted, and who had settled on the east shore of the Delaware. That they retained a right in the Delaware equal to that of Penn or his grantees until the revolution; and each having this equal right until then, there was then no obstacle to the application of the rule established *jure gentium*, that when two States border on a river to which neither has prior or better right, each holds to the middle of the stream" (21 N. J. L. at p. 169).

III. (b) *Power of Crown to Grant Bed of River.*

In his Report the Master discussed the case of *Martin v. Waddell* and pointed out that the case did not involve the question of the power of the Crown to grant subaqueous soil, saying that there was a "vast difference" between the question whether title to subaqueous soil may be retained in private ownership, and the question whether title thereto has been vested by valid grant to a *government* (italics ours; pp. 54-57).

It is quite true that *Martin v. Waddell* did not involve the question of the power of the Crown to grant the bed of navigable waters, but the court did discuss that question (by way of dictum) and said there was no such power; the dictum is persuasive, especially when it is sustained by other cases decided, both before and since, as well as by numerous text books.

Some of the other authorities that sustain the plaintiff's view are the following:

Bacon's Abridgement, Vol. 8 (p. 18):

"3. *Of his Prerogative in Seas and Navigable Rivers.*

It is universally agreed, that the king hath the sovereign dominion in all seas and great rivers; which is plain from Seldon's account of the ancient Saxons, who dealt very successfully in all naval affairs, and therefore the territories of the English seas and rivers always resided in the king."

(pp. 18-9) *Note*

"The shore, as to this purpose, is the land lying between high water and low water-mark in *ordinary* tides; and this land belongeth to the king *de jure communi* both in the shore of the sea, and the shore of the arms of the sea. And that is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows. 29 Ass. 93."

III. (b) Power of Crown to Grant Bed of River.

(p. 20)

"But notwithstanding the king's prerogative in seas and navigable rivers, yet it hath been always held, that a subject may fish in the sea: for this being a matter of common right, and the means of livelihood, and for the good of the commonwealth, cannot be restrained by grant or prescription."

Comyn's Digest (Vol. VII).

(pp. 44-5)

"The king's prerogative comprehends all the liberties, privileges, powers and royalties allowed by the law to the crown of England. Co. L. 90, b. St. Praer. 5. Vide Roy, (A. 1, 2).

For the king has not any prerogative, but such as the law allows. 12 Co. 76. 2 Inst. 496. 63 (Moor. 672. Show. P. C. 75. 4 T. R. 410).

And by the st. of Marl. 52 H. 3.5. and other confirmations of *magna charta*, it was enacted, *quod magna charta teneatur tam in his, quae ad regem pertinent, quam ad alios.*

And therefore no prerogative of the king can be claimed contrary to *magna charta*. 2 Inst. 36."

Moore's International Law Digest (Vol. 1):

(p. 56)

"So, although the king is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to change or alter the laws which have been received and established in these kingdoms, and are the birthright of every subject; for it is by those very laws that he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner do they declare and ascertain the rights and liberties of the people, and therefore admit of no innovation or change but by act of parliament."

Blackstone states that *Magna Charta* prohibited for the future the grants of exclusive fisheries (4 Com. 424).

III. (b) Power of Crown to Grant Bed of River.

Angell on Tide Waters:

(p. 25)

“Hence the people of England are not only, *prima facie*, entitled to the use of the sea, &c. for the purposes hereafter to be considered, but their right in this respect cannot be restrained or counteracted by any royal grant, on the ground that the king is the legal and sole proprietor. In favor of this view of the subject, we have the treatise of Lord Hale, and also the opinion of one of the modern Judges of the King’s Bench, (Mr. J. Bayley), who says, ‘Many of the king’s rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing, and the king can make no modern grants in derogation of those rights.’ It is unquestionably true, as regards the authority of the crown, as was asserted by one of the learned judges in *Browne v. Kennedy*, in Maryland, that ‘the subject has, *de commune jure*, an interest in a navigable stream, such as a right of fishery and of navigation, which cannot be abridged or restrained by any charter or grant of the soil or fishery, since *Magna Charta* at least.’ ”

(Note) *Browne v. Kennedy*, 5 H. & Johns. (Md.) R. 203.

“No grant, therefore, by the king, before the Revolution, can be set up in this country. It is indeed true, that the crown had originally the power to defeat and restrict the public right of fishing, for it is proved by the private rights which now exist in England, and which have ever been recognized as valid. In the Statute 2 Hen. VI c. 15, A. D. 1423, which prohibits the standing of nets over thwart rivers, there is a saving to the king’s liege people of ‘their right, title, and inheritance in their fishings.’ Blackstone assumes, that the crown had this power, but thinks that the exercise of it was prohibited by the charter of king John, and the subsequent charter of Hen. III, by which even all grants of private fisheries made under Richard I were annulled; so that, he concludes, an

III. (b) Power of Crown to Grant Bed of River.

exclusive right of fishing in a public river ought now to be at least as old as the reign of Hen. II (2 Black. Com. 39)."

Clark's Summary of Colonial Law:

(p. 3)

"I. In its colonial possessions, the crown possesses the same right of sovereignty, and (in general) the same prerogative as in the mother country."

(p. 4)

"On the other hand, the king is bound in the colonies, as at home, to govern according to established law. (4) It is necessary, therefore, to consider to what laws the colonies are subject."

(Note)

"(4) The common law of England is the common law of the plantations, and all statutes in affirmance of the common law passed in England antecedent to the settlement of any colony, are in force in that colony, unless there is some private act to the contrary, though no statutes made since those settlements are there in force, unless the colonies are particularly mentioned. 'Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear.' I Chal. Op. 195; and 2 *ib.* 202. 'English subjects carry with them your Majesty's laws wherever they form colonies.' Per Attorney and Solicitor-General Pratt and Yorke.—'In a place occupied by the king's troops, the subjects of England, would impliedly carry the law of England with them.' Per Lord Ellenborough, *C. J.*, in *Rex. v. The Inhabitants of Brampton*, 10 East. 288."

The rule that the Crown could not convey to one or more of its subjects what it held in trust for all of them, has been modified by local custom in New Jersey to the extent that riparian proprietors have a right of several fishery in tide waters in front of their land (*Gough v. Bell*, 22 N. J. L.

III. (c) *Feoffment of August 24, 1682.*

441, 462, 464); and also have the right to construct wharves, ferries and piers, and to reclaim and improve the shore to the low water line, and to use the same for any lawful purpose that does not obstruct navigation. *Gough v. Bell*, 23 N. J. L. 624, 669.

But this modification of the ancient and inalienable ownership of the Crown in the bed of the river does not affect the present point; the defendant concedes the title of the plaintiff to low water mark on the plaintiff's shore, so that the territory in question is only that part of the bed of the river from said low water mark westerly to the thalweg.

If the bed of a navigable river was inalienable by the Crown, then the application of that rule disposes of the defendant's claim of title to the bed of the river.

It is, however, argued in behalf of defendant that the deed of feoffment of August 24, 1682, from York to Penn, with its covenant of further assurance (even though York had no title at that time), followed by the letters patent of March 22, 1682-3, from the Crown to York, gave Penn title to the Delaware Colonies, *including* the bed of the river.

We accordingly proceed to these documents.

(c) *Feoffment of August 24, 1682.*
(Exceptions 29, 30, 33-39, 43, 58-62.)

The feoffment from the Duke to Penn is an important link in the defendant's chain of title; *without* it the grant of March 22, 1682/83, from the *King* to the *Duke*, is inoperative. The feoffment is prior in date to the grant; admittedly, the Duke, when he gave the feoffment to Penn, had no title of record to the territory therein described; hence, if for any reason the feoffment is invalid, then the covenant of further assurance contained

III. (c) *Feoffment of August 24, 1682.*

therein cannot be tied to the grant for the purpose of creating a title in the feoffee (Penn) either by estoppel or otherwise.

Let us first note that we need consider the feoffment (as well as the subsequent grant) with reference solely to the territory in dispute, i. e., that part of the *bed of the river* easterly of the thalweg to plaintiff's low water mark within a radius of 12 miles about New Castle. This distinction may become important as there might be a difference between the title to the land area and the title to the water area, described in the feoffment and the grant.

Plaintiff urges that the Master, in his consideration of this subject, fell into several errors both of fact and of law. Preliminary to the discussion thereof we note:

The Definition of a Feoffment.

The term is derived from the word "feoffare" or "infeudare," to give one a fief, and is properly *donatio feudi*. At common law, the mode of transferring a freehold estate in lands; a conveyance of corporeal hereditaments, by delivery of the possession upon or within view of the land; a deed under the seal of the grantor whereby he grants or gives lands to the grantee. The gift of any corporeal hereditament to another. But by the mere words of the deed the feoffment is by no means perfected. There remains a very material ceremony to be performed, called "livery of seisin," without which the feoffee has a mere estate at will (25 C. J. 1045).

The following definition and notes are from *Baldwin's Century Edition of Bouvier's Law Dictionary* (p. 408):

"A gift of any *corporeal hereditaments* to another. It operates by transmutation of possession; and it is essential to its completion that the seisin be passed. *Watk. Conv.* 183.

III. (c) *Feoffment of August 24, 1682.*

The conveyance of a *corporeal hereditament* either by investiture or by livery of seisin. 1 *Sullivan, Lect. 143*; 1 *Washb. R. P. 33*; *Chal. R. P. 363*.

The instrument or deed by which such *hereditament* is conveyed.

This was one of the earliest modes of conveyance used in the common law. It signified originally the grant of a fee or feud; but it came in time to signify the grant of a free inheritance in fee, respect being had rather to the perpetuity of the estate granted, than to the feudal tenure; 1 *Reeve, Hist. Eng. Law 90*. The feoffment was likewise accompanied by livery of seisin; 1 *Washb. R. P. 33*. The conveyance by feoffment with livery of seisin has become infrequent, if not obsolete, in England, and in this country has not been used in practice; *Cruise, Dig. tit. 32, c. 4, Sec. 3*; *Shepp. Touchst. c. 9*; 2 *Bla. Com. 20*; *Co. Litt. 9*; 4 *Kent 467*; *Perkins, c. 3*; *Com. Dig.*; 12 *Viner, Abr. 167*; *Bacon, Abr.*; *Dane, Abr. c. 104*; 1 *Sullivan, Lect. 143*; *Stearn, Real Act. 2*; 8 *Cra. 229*."

Chancellor Kent says (3 *Comm. 12 Ed.*):

(p. 481)

"The feoffment operated upon the possession without any regard to the estate or interest of the feoffer; and though he had no more than a naked or even tortious possession, yet, if the feoffer had possession, the feoffment had the transcendent efficacy of passing a fee by reason of the livery, and of working an actual disseisin of the freehold. It cleared away all defeasible titles, divested estates, destroyed contingent remainders, extinguished powers, and barred the feoffer from all future right, and possibility of right, to the land, and vested an estate of freehold in the feoffee. In this respect the feoffment differed essentially from a fine or common recovery; for the conusor in the fine, and the tenant to the *proceipe*, must be seised of the freehold, or of an estate in fee, or for life, otherwise the fine or recovery may be avoided."

III. (c) *Feoffment of August 24, 1682.*

(p. 506)

"A feoffment in fee did not originally pass an estate in the sense we now use it. It was only an estate to be enjoyed as a benefice, without the power of alienation, in prejudice of the heir or the lord; and the heir took it as a usufructuary interest, and in default of heirs, the tenure became extinct, and the land reverted to the lord."

The effect of a deed of feoffment was stated by Lord Mansfield in *Taylor v. Horde*, 1 Rep. Cas. K. B. 60:

"A feoffment operates on the possession; without any regard to the estate or interest of the feoffer."

"To make a feoffment good and valid, nothing is wanting, but possession; and where the feoffer has possession, though it be as bare and naked as the gentleman would have it, yet a freehold passes by reason of the livery." *Poph 39. Litt. Sec. 595, 599, 611, 698. Co. Litt. 366. b. 367, a.*

The Terms of the Feoffment.

Plaintiff requested the Master to find that the feoffment did not purport to convey powers of government (Exception 36). The Master said:

"This discussion, however, (referring to the discussion concerning the right of the Crown to grant subaqueous soil) is not applicable to the instant case because the record shows that in fact governmental powers were granted to William Penn by the deeds of feoffment for Delaware" (*Rep. p. 54; Exception 33*).

But no such grant of power can be found in the feoffments. We are concerned here only with the document which describes the territory to the *north* of the circle, but it may be noted that so far as concerns the lack of grant of power of government there is no difference between the two feoffments.

The feoffment for the territory north of the circle is in evidence as defendant's Exhibit 521; and that for the

III. (c) *Feoffment of August 24, 1682.*

territory south of the circle is included in defendant's Exhibit 522; for present purposes we need examine only the former. By this document the Duke "doth bargain sell enfeoffe and confirm unto the said William Penn his heirs and assigns forever all that the town of New Castle otherwise called Delaware and all that tract of land lying within the compasse or circle of twelve miles about the same situate lying and being upon ye River Delaware in America and all islands in the said River Delaware and the said river and the soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town together with all rents services royalties franchises duties jurisdictions liberties and privileges thereunto belonging and all the estate right title interest powers property claims and demand whatsoever of his said Royal Highness or in or to the same or to any part or parcel thereof" saving and reserving to the Duke his agents and servants "free use of all ports waies and passages into through and out of the bargained premises and every part and parcel thereof."

Habendum "the said town and circle of twelve miles of land about the same islands and all other the before mentioned or intended to be hereby bargained premises with their appurtenances unto the said William Penn his heirs and assigns to the only use and behoof of him the said William Penn his heirs and assigns forever."

Reserving to the Duke a yearly rental of five shillings.

The Duke covenants that at any time or times during seven years next ensuing the date of the deed upon request and at the cost and charge of Penn he will "make and execute or cause or procure to be made done and executed all and every such further act and acts conveyances and assurances in the law whatsoever for the further conveying and assuring the said town and circle of twelve miles or

III. (c) *Feoffment of August 24, 1682.*

land about the same and islands and all other the premises with the appurtenances" unto Penn as by advice of counsel Penn shall reasonably require.

The deed appoints two attorneys who are to enter upon the property and *take possession* thereof and deliver it to Penn.

It should be noted that there is no recital of the authority of the Duke to execute the document.

There is nothing therein which can be construed to include a grant of powers of government.

It is claimed by the defendant that the language in the document "the said river and the soil thereof" conveys the bed of the river; but this overlooks the fact that whatever else the Duke might or might not have owned at that time, he, as a subject of the King, certainly had no title to the bed of navigable rivers; the Crown itself did not have power to make such a grant, as we have shown elsewhere under subhead (b). The habendum in this document makes no mention of "the said river and the soil thereof."

While the feoffment uses the word "royalties" in the granting clause, it is obvious that the Duke had no more power than any other subject of the Crown to convey "royalties" to Penn or to anybody else.

The Construction of the Feoffment.

There has never been any serious claim heretofore that the feoffment conveyed powers of government. The question whether such power was conveyed has been considered on other occasions and has always been answered in the negative.

The draft of patent prepared by Attorney General Williams and submitted to James II on December 10, 1688

III. (c) Feoffment of August 24, 1682.

(*Ex. 550*) intended for Penn and to cover the three lower counties, recites—

“and the said William Penn hath also as he doth humbly acknowledge (supposing the said tract of land and premises had passed to him by the said indenture according to such our intentions) (referring to the deeds of feoffment which are previously recited) made use of and exercised prerogatives jurisdictions and powers within the said tract of land and premises which as he is now advised he could not nor can maintain or justify by virtue of the said indenture from us or otherwise howsoever” (pp. 4-5).

Wherefore, that draft of patent proposed to “pardon, acquit, release and discharge the said William Penn * * * of and from all manners of treasons, felonies, misprisons of treason or felony, * * * and of or from all forfeitures and penalties for the said offenses * * *” (pp. 4-6).

Here is an acknowledgment written by the Attorney General for the Duke of Yorke himself, when King James of England, that the deeds of feoffment did not contain any powers of government and the fact that the new grant proposed a grant of title, is an admission that the deeds of feoffment did not convey any.

In the draft of a proposed new patent which Penn prepared and submitted on May 23, 1705, to the Lords Commissioners in connection with the negotiations for surrender of the powers of government (*Ex. 310*), he inserted the following clause: “To quiet the minds of people and to avoid all occasions of animosities and disputes, a general pardon to all people formerly concerned in the administration” (p. 10).

The sole purpose of this clause was to excuse himself from penalties, treasons or imprisonment which might result from the exercise of governmental powers under the deeds of feoffment, which he knew were not contained

III. (c) Feoffment of August 24, 1682.

therein, and about which he had had so much difficulty with the Privy Council and the royal ministers; here again admitting his lack of the powers of the government as well as his lack of title to the soil.

Throughout the controversy with Lord Baltimore over the boundary between the lower counties and Maryland in 1685, it was repeatedly stated that title of soil and not powers of government were involved (*Ex. 1169, pp. 6-7*), and no powers of government were submitted or considered in *Penn v. Baltimore*.

His claim of title under the deeds of feoffment was rejected as unsatisfactory by the Lords Commissioners on June 23, 1702 (*Ex. 436*), and by Attorney General Northey on October 17, 1717 (*Ex. 471, 635*). The claim of defendant under those deeds was rejected by District Attorney Wall in 1834 (*Ex. 152*) and by *Mr. Justice Baldwin* in 1837 in *Gale v. Behling* (*Ex. 219*). They were totally ignored by Lord Chancellor Hardwick in his decision in *Penn v. Baltimore*, and by *Mr. Sargeant* in his decision in the Pea Patch Island Case in 1848.

They were rejected by Solicitor of the Treasury Penrose in 1843 (*Ex. 759*) where he reviews (p. 8) the claim of title in the Duke and finds no title there which, he says, "was considered a fatal objection to the operation of the deeds of the Duke of York to William Penn, which were in evidence (*in Gale v. Behling*), to pass the right of soil and jurisdiction to the latter."

Exhibit 542, dated May 20, 1801, states, respecting title the three lower counties:

"The islands in the Delaware River were granted to our late proprietor by the Duke of York in the same deeds with the lower counties but these deeds being found defective for want, as has been said, of a title in the Duke, the Crown has also considered these so much within its power to grant that large

III. (c) *Feoffment of August 24, 1682.*

advances have been made by another towards obtaining them directly from the Crown, which would also be a great inconveniency to the province especially should the soil of the river be granted with the islands as it was by the Duke of York's deeds to our proprietor, for in that case the title of all the water lots of Philadelphia and wharves upon the river would become at least disputable" (p. 3).

Scharf, in his *History of Maryland* (Ex. 1153), quotes *Chalmers' Annals*, p. 613, as follows:

"Dissatisfied with the immense region which he had lately acquired, or considering the whole as unprofitable, 'unless he could carry it southward to Chesapeake,' Penn had continually solicited the Duke of York, though in vain, for a grant of the *Delaware colony*. Wearied at length, with solicitation, or hoping for benefit from a possession which had hitherto yielded him none, the prince conveyed, in August, 1682, as well the town of New Castle, with a territory of twelve miles around it, as that tract of land extending southward from it, upon the river Delaware, to Cape Henlopen. But no transaction could be more liable to objection; none could reflect more dishonor on both parties, because both knew that the title of what was now sold was extremely exceptionable, since it belonged to another. For the Duke's patents did not include it within his boundaries; and for twenty years his councillors had advised him against procuring an inclusive grant, because they foresaw that the whole must one day devolve on him, with the crown itself. He could transfer, therefore, no other right than mere occupancy, in opposition to the legal claim of Lord Baltimore, whose charter carried up his northern limits 'to that part of the estuary of the Delaware which lieth under the 40th degree of latitude.' And he conveyed to him only the soil of a territory whose extent it was impossible to describe, because it could not be ascertained, *without any of the powers of jurisdiction*, which were, however, immediately assumed by Penn, because grave men and philosophers can do, without ceremony, what

III. (c) *Feoffment of August 24, 1682.*

would cover others with shame. Having thus gratified his followers and his ambition, he departed for Pennsylvania, in order to enlarge the scene of action, because his active mind was never happy except while engaged in intrigue" (pp. 12-13).

The title of Penn under the deeds of feoffment was reviewed by *Justice Baldwin (Ex. 219)* as follows:

• • • • •
 "This grant of the King (1664 from Charles II to the Duke of Yorke to the east side of Delaware River) severed from the royal dominion a described portion of territory, beyond the bounds of which neither the Duke, or his grantees could make any claim of rights, in opposition to the acknowledged sovereignty of the King, over what was ungranted" (pp. 8-9).

• • • • •
 "No patent or grant from the Crown, for the three counties, has ever appeared; and, from the opinion of the Crown lawyers, to whom the matter was referred, it would seem that none ever issued, at least not so far as to bind the King. (Chalmers, 40, 1.) This territory then remained as part of the royal domain, not having been severed by actual grant. As it was not in the original patent to the Duke of York, he could have no claim, by grant, beyond the east side of the Delaware" (p. 10).

• • • • •
 "Neither deed (of feoffment) contains any recital of a patent or grant from the King to the Duke, though in the grant from the Duke of New Jersey to Lord Carteret and Berkeley, the patent to the Duke is recited. Both deeds contain a grant of seignories and royalties, the effect of which was to grant not only the soil, but the rights of a proprietary as to jurisdiction and government, yet no authority for such a grant is referred to. We find, however, by an authentic document, the act of union between the people of the three counties and William Penn, annexing them to the province of Pennsylvania, dated 7th December, 1682, the nature

III. (c) *Feoffment of August 24, 1682.*

of the title which the Duke claimed and conveyed, set forth in the preamble and recitals" (pp. 10-11).

• • • • •
 "Two questions arise on these deeds, 1st. Whether they passed any title. 2nd. Their construction as to boundaries.

It is a settled principle of the British Government, that a subject cannot acquire territory to himself by the right of conquest. All acquisitions so made accrue to the Crown. (Chalmers, 69.)

No subject can create or erect a seigniority or proprietary government unless he held them by a grant of these franchises from the King. A royalty a seigniority, or propriety, can be held only by act of Parliament, letters patent, or prescription. (4 Com. Dig., 454, D. 1; Daris. Rep., 165, &c.)

"These would be fatal objections to the operation of the deeds of the Duke of York to pass either the right of soil or jurisdiction to William Penn, if the title to either depended alone on those deeds;" (pp. 11-12).

"We have stated to you that, in strictness, no title passed by the deeds of the Duke, because being a subject of the King, any territory acquired by conquest by the Governors of New York, became the domain of the Crown, which the Duke could not grant, nor could he create a proprietary government by his own authority" (p. 16).

The following discussion of the matter is from the note to *Gough v. Bell*, 21 N. J. L., at p. 167:

"The deed from the Duke of York to Penn, of August 24, 1682, for the 12 mile circle (award, p. 11), conveys only *property*, a tract of land, the river, and the soil thereof, without the right of government. By this deed, then, the power of government was left in the King or Duke, wherever it had been before the date of it; and if so, then also the *regalia*, including the right to the soil under the river as an inseparable incident to the power of government. That Penn, either as proprietary

III. (c) *Feoffment of August 24, 1682.*

of Pennsylvania, or of Newcastle, exercised *permissively* (and it was only *permissively*), powers of government within the circle, might by prescription confer jurisdiction so far as *in fact* they were exercised, but would add no force to this deed; nor on the other hand, would the deed extend the prescriptive jurisdiction beyond the limits of its actual exercise."

Validity of Feoffment is Dependent on Possession.

Plaintiff requested the Master to find that the possession (of the territory described in the feoffment) was not in the Duke (*Exception 38*). The Master found that the Duke was the *de facto* proprietary from 1664 until the date of the feoffment (*Rep. p. 72, par. 3*).

The question whether this finding is correct has been discussed elsewhere under subhead (a) 1, to which we refer. Here it is sufficient to say that if plaintiff's argument in that respect is sound, then the Duke had no actual or legal possession of the Delaware colonies (and still less of the bed of the Delaware River) at the date of the feoffment; and, hence, we have an additional bar to Penn's claim of title in that the possession of the territory described in the feoffment was not in the feoffor at the date thereof.

The Feoffment Could Not Grant Bed of River.

The authorities above cited show that grants by feoffment were limited to corporeal hereditaments. The authorities cited under subhead (b) show that not even the Crown had the lawful right to grant the bed of navigable rivers.

For both these additional reasons the feoffment is invalid in so far as it granted "the river and the soil thereof," even if we assume that at its date the Duke had possession of the territory described therein.

III. (d) *Letters Patent of March 22, 1682/3.*

(d) *Letters Patent of March 22, 1682/3.*

(Exceptions 40 to 62)

If Penn and his successors, prior to the Revolution and the Treaty of Paris, had no title to the bed of the river within the Circle, then the defendant's sole claim thereto arises by reason of its creation as a sovereign state by virtue of the Revolution and the ensuing Treaty.

Hence, this phase of the case turns on whether title to the bed of the river was in the Crown at the time of the Revolution or had been previously granted to Penn.

Under the heading "Feoffment of August 24, 1682" we have discussed the rights of Penn that are alleged to have accrued to him by virtue of the feoffments of that date from the Duke; if plaintiff's argument that the feoffments did not convey to Penn any title to the bed of the river is sound, then we are not concerned with the letters patent of March 22, 1682/3.

If, however, plaintiff is wrong in that respect, then we come to a consideration of the various questions arising under the letters patent.

Defendant's claim is that by virtue of the covenant of further assurance in the feoffment, the title of the Duke as set forth in the letters patent enured to the benefit of Penn and that thereby a good title passed to Penn by estoppel either in law or in equity or both for the lands described in the letters patent, including the bed of the river within the circle.

There are two fundamental questions arising under this claim of the defendant; the first is whether the letters patent were delivered to Penn and remained in the possession of himself and his successors, or whether after the sealing thereof they were surrendered to the Crown; and the second is whether if it should be found that they

III. (d) *Letters Patent of March 22, 1682/3.*

were *not* surrendered, did Penn thereby, under the doctrine of estoppel, obtain title to the bed of the river.

The Master answered both these questions in the affirmative; plaintiff claims that he was in error in one or the other or both of such conclusions; if either conclusion is wrong, then the chain of title is broken.

Procedure for Letters Patent.

The following summary of the procedure will assist in the discussion of the letters patent, the surrender thereof (as claimed by plaintiff) and the proposed new grant of April 13, 1683. This procedure is described by Blackstone as follows:

"II. The *King's grants* are also matter of public record. For as St. Germyn says, the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or aught besides, are contained in charters, or *letters-patent*, that is, open letters, *literoe patentis*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called *writs close*, *literoe clausae*, and are recorded in the

III. (d) *Letters Patent of March 22, 1682/3.*

close-rolls, in the same manner as the others are in the *patent-rolls*.

Grants or letters-patent must first pass by *bill*: which is prepared by the attorney and solicitor general, in consequence of a warrant from the crown; and is then signed, that is, subscribed at the top, with the king's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, '*per ipsum regem*, by the king himself.'

Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery; so that the *sign manual* is the warrant to the *privy seal*, and the *privy seal* is the warrant to the great seal: and in this last case the patent is subscribed, '*per breve de privato sigillo*, by writ of *privy seal*'" (*II Com. Chap. 21, pp. 346-7*).

Maxwell-Lyte, in "*Historical Notes on the Great Seal of England*" (1926) (*Ex. 203*), also describes the procedure:

The successive steps of grants or letters patent were—

1. The King sends a petition bill approved by him to his Secretary;

2. The Secretary retains the King's bill and sends a transcript thereof under the Signet Seal to the Keeper of the Privy Seal, after making a docket entry of the writ in his own office;

3. The Keeper of the Privy Seal retains the warrant from the Keeper of the Signet, makes a docket entry of a new warrant issued by him to the Lord Chancellor;

4. The Chancellor causes the ultimate Letters Patent to be prepared pursuant to instructions in the Privy Seal warrant, which he retains, and he issues the Letters

III. (d) *Letters Patent of March 22, 1682/3.*

Patent under the Great Seal after having enrolled them in the Patent Roll (p. 2).

Warrants to the Signet usually bore the Royal Sign Manual, which, soon after 1444, became essential to the validity of the King's bill.

Pages 6-8 of the Exhibit give detailed illustrations of the procedure of a Royal Charter applicable to all three dates—1603, 1664 and 1669.

1. Petition to the Crown.
2. Reference to law officer.
3. Report of law officer.
4. Warrant to law officer to prepare document.
5. Submission of document prepared by law officer which, when given the Sign Manual, became the King's bill and was forwarded to the Signet Office.
6. Signet Office bill to the Privy Seal Office.
7. Privy Seal warrant to the Lord Chancellor.
8. Final instrument engrossed at the Letters Patent Office of the Chancellor ready for the Great Seal; the Great Seal affixed; the enrollment in the Patent Rolls; the payment of the Hanaper fees (p. 8).

The important original document was the King's bill, indicating the intentions and prescribing the actual form of the words to be used in the final instrument under the Great Seal. These received the signature of the King.

In the time of Charles II the Attorney General had a clerk known as the Clerk of the Patents, whose duty it was to prepare the bills for examination and approval of the Attorney General and afterwards for the signature of the King (p. 9). *Exhibits 364 and 368* illustrate this. The word "ex" or "exd" in front of R. Sawyer's name indi-

III. (d) *Letters Patent of March 22, 1682/3.*

cates that it was examined by the Attorney General, for such was Sawyer at the time. The summary or "doquet" in the left-hand lower corner of those documents shows the summary of their contents made by the Attorney General for the information of the King and at the top "Carolus Rex" is the King's signature or Sign Manual, which gave the authority to the Keeper of the Signet to issue a warrant to the Privy Seal and thence forward through the Great Seal.

The practice of a notation either on the fold of drafts of letters patent or on the back of documents ready for the Great Seal indicated the place where the document was prepared; namely, "apud West Monasterium" is explained at the bottom of page 12 and top of page 13 (illustrated by the endorsement shown on the bottom of *Exhibit 364*). This was done pursuant to a change in practice by Sir Francis North, who was Keeper of the Great Seal, 1682-1685, who required that the clerks who drafted such documents should indicate on all of them that they are drafted at Westminster (p. 12).

In the Reign of Edward I arose the practice of inserting in the lower right-handed corner of Letters Patent the surname of the officer of the Chancellor's office primarily responsible for the preparation of the final letters patent (p. 13).

Duplicates were obtainable for a specified fee (p. 14).

The lace or cord by which the seal was affixed to the document is described on page 14. The pendant seal, still in use, is traceable to the Reign of Edward the Confessor (p. 15).

The obverse of the Great Seal has always shown a figure of the sovereign enthroned and the reverse has always shown the figure of the sovereign on horse-back,

III. (d) *Letters Patent of March 22, 1682/3.*

except the seal of George V, the present King, who is represented as standing in naval uniform (p. 17). The size of the Great Seal is described on page 17 as five inches in diameter. There were slight variations (p. 17).

When James II left Whitehall in 1688 (December 10-11) he took the Great Seal from Lord Jefferys and threw it into the Thames near Vauxhall (p. 18).

Mr. Giuseppi, a present Assistant Keeper of the Public Records, in his "*Guide to the Manuscripts*" &c. (1923), (Ex. 202), gives a description of procedure of which the following is an abstract:

It appears that the Privy Seal was one of the necessary steps in passing an instrument under the Great Seal. An ordinance of Henry VI had prescribed that all bills of the King should be delivered to his secretary and letters resulting therefrom should be directed under the Signet Seal to the keeper of the Privy Seal and thence under the Privy Seal to the Chancellor, who prepared the letters patent themselves and affixed the Great Seal of England. This procedure received Parliamentary authority in 1535 by virtue of a statute 27 Henry VIII, Caput II. This statute remained in force until 1851 when by an act of 14 and 15 Vict. c 82, the Signet Office was abolished and the Signet bill ceased to be the Lord Privy Seal's authority for his warrant to the Lord Chancellor (p. 1).

These grants are construed most favorably for the King and against the grantee. *Cruise Digest of the Laws of England, Vol. 5, p. 44; Shively v. Bowlby, 152 U. S. 1, 10.*

III. (d) Letters Patent of March 22, 1682/3.

The Reason for the Letters Patent of March 22, 1682/3.

The circumstances leading up to the making of this grant are as follows:

Penn controlled West Jersey and Pennsylvania and desired to secure title to Delaware in order that his control of the Delaware Valley might be complete; he knew that the Duke had no title on the *West* side of Delaware river and bay. He persuaded the Duke to get a grant from the King, "Penn paying the expense and receiving assurance from the Duke that when he became King he would give the territory below the Newcastle circle wholly to Penn." (Art. by Konkle in July 1930 number of Pennsylvania Magazine of History and Biography entitled, "*Delaware: A Grant Yet Not A Grant.*" (Ex. 297, pp. 241, 2.)

In a letter from Logan to Thomas Penn of October 9, 1731, the writer said:

"But being sensible of the weakness of his title under the Duke who had none himself for he was bounded by Delaware. He was at the charge (as I have often heard him say) of taking out at his own cost a patent from the King to the Duke on his promise of conveying the same to him" (Ex. 535, 297, p. 217). (Ex. 535; Ex. 297, p. 217.)

According to Defendant's *Exhibit 736*, (letter dated Feb. 5, 1682/3 from Penn to Lord Hyde; there called "Hide"), he had sent a letter to the Duke enclosing "a natural boundary for that tract of land he so often pleased to promise a patent for." He states that he has "ordered two manors for the Duke of 10,000 acres apiece, and intend two more." For which he promises quit rents of one penny per acre. He says that their value, besides the quit rent, will be great within a few years.

He asks Lord Hyde's assistance to get this grant and promises beavers and otters to the King, the Duke, and

III. (d) *Letters Patent of March 22, 1682/3.*

Lord Hyde for hats and muffs, of which he says he has already sent some.

Although this letter was written six months after the date of the deeds of feoffment, it does not mention the deeds of feoffment or any obligation of the Duke under a covenant of further assurance.

On March 12, 1682/3 the Attorney General presented a "Bill" for letters patent, which was signed by the King (*Ex. 364*), as the initial step that resulted in the issuance of the patent, and became the warrant for the Signet.

The writ of the Privy Council for the Great Seal was received on March 22, 1682/3 (*Ex. 365*) and the letters patent under the Great Seal were issued the same date.

Terms of the Grant.

A photostatic copy of the letters patent, as copied on the Patent Roll, is in evidence as Plaintiff's Exhibit No. 367; and a printed copy appears as Exhibit 363.

They grant to the Duke of York:

1. Town of New Castle, otherwise called Delaware, and the fort therein or thereunto belonging situate between Maryland and New Jersey—
2. "and all that tract of land lying within the compass or circle of 12 miles about the said town situate, lying and being upon the river of Delaware."
3. "All islands in the said river of Delaware."
4. "The said river and soil thereof lying North of the southernmost part of the said circle of 12 miles about the said town."
5. "All that tract of land upon Delaware river and bay beginning 12 miles south from the said town of Newcastle otherwise called Delaware and extending south to Cape Lopin."

III. (d) *Letters Patent of March 22, 1682/3.*

6. "Together with all the lands, islands, soil, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowling"
7. "All other royalties privileges, profits, commodities, and hereditaments, to the said town, fort, tracts of land, islands and premises, or to any or either of them belonging or appertaining with their and every of their appurtenances."
8. "All our estate, right, title, interest, benefit, advantage, claim and demand, whatsoever, of in or to the said town, fort, lands or premises."

Habendum—"the said town of Newcastle, otherwise called Delaware and fort and all and singular the said lands and premises with their and every of their appurtenances unto the Duke of Yorke his heirs and assigns forever."

Grants absolute power and authority to correct punish, pardon, govern and rule.

Statutes, ordinances and proceedings, are to be not contrary but as near as may be agreeable to the laws, statutes and government of the realm of England.

Reserves hearing and determination of appeals of all persons—

"in or belonging to the town, fort, lands and premises aforesaid."

Grants powers to change laws, governors, officers or ministers—

"used within the aforesaid town, forts, lands and premises."

Grants power to make laws, orders, etc. of government and magistracy for the government of—

"said town, fort, lands and premises"

not contrary to but as near as may be agreeable, with the laws and statutes of England.

III. (d) (1) *Surrender of Said Letters Patent.*

Grants powers of colonization and the transportation of persons and property for the inhabitants of—

“said town, forts, lands and premises”

Reserves customs and duties on import and export under the laws of England.

Rescinds former patents in conflict therewith.

The descriptions of the two tracts therein are substantially the same as those contained in the feoffments for the town of New Castle and for the territory from 12 miles below New Castle to the capes, respectively (*Ex. 521, 522, p. 4*).

Defendant claims that this grant was obtained for the benefit of Penn and was immediately delivered to him by the Duke. There is no claim that the Duke thereafter conveyed to Penn the premises therein granted by the Crown, but defendant claims that the Duke became trustee of the title under the covenants of further assurance contained in the deeds of feoffment.

(1) *Surrender of Said Letters Patent.*

The defendant claims that the original of the letters patent is now in its possession among the archives at Dover. Plaintiff, on the other hand, insists that the original document was surrendered to the King a few days after it was sealed and that thereby defendant's chain of title is again broken.

The circumstances which the plaintiff claims demonstrate that the letters patent were surrendered, are as follows:

The circular line which formed the easterly end of the southern boundary of the Province of Pennsylvania, as fixed by the grant from the King to Penn for that province, dated February 28, 1680/1 (*Ex. 361*), was fixed for

III. (d) (1) *Surrender of Said Letters Patent.*

the purpose of keeping Penn a distance of at least twelve miles from the Newcastle settlement. The distance of twelve miles was based on the erroneous impression that the fortieth degree of latitude crossed the river between New Castle and Chester; both Penn and the Duke thought the boundary would strike that parallel, ignorant of the fact that the fortieth degree was near Philadelphia (*Ex. 294*).

As shown elsewhere, Penn's desire to control the navigation of the river prompted him to obtain from the Duke the feoffments of August 24, 1682, for the territory extending from a circular boundary mentioned in the Pennsylvania charter to Cape Henlopin; and when the Duke applied to the King for an express grant to carry out the conveyance of further assurance in the feoffments, such grant which resulted in the letters patent of March 22, 1682/3, followed substantially the descriptions of the two tracts as set forth in the two feoffments.

In the year 1681 Penn had instructed his Deputy Governor Markham to settle with Lord Baltimore the boundary between Pennsylvania and Maryland. What happened is described by Scharf in his *History of Delaware* (*Ex. 1154*):

“When Markham arrived at Upland he found Lord Baltimore there; the boundary question at once came up, and was as quickly let drop when Markham found that the lines could not be run according to the two charters respectively without giving to Baltimore some lands which Penn was resolved to keep as his own” (p 6).

“This interview, however, much to the astonishment of all parties, resulted in the discovery, from actual observation, the Upland itself was at least twelve miles south of the 40th degree, and that the boundaries of Maryland would extend to the Schuylkill.”

III. (d) (1) *Surrender of Said Letters Patent.*

“This discovery at once ended the conference, and gave fresh incentives to Penn in his efforts to obtain from the Duke of York a grant of the Delaware settlements, in as much as without such grant, he had now reason to fear the loss of the whole peninsula” (*Ex. 1135, p. 12*).

This incident is also described in Exhibits 231, 293, 294 and 544.

When Penn arrived on October 27, 1682, he was advised of this development and he realized that under Lord Baltimore's claim there would exist a strip of land between the 12 mile circle, twelve miles distant from Newcastle, and the fortieth degree of latitude at the Schuylkill river which was included in Lord Baltimore's grant but for which Penn had no grant either in his letters patent for Pennsylvania, the deeds of feoffment, or in the royal grant of March 22, 1682/3, for which he had arranged before leaving England. It was for this reason that he communicated, as quickly as the facilities of the time permitted, with the Duke of York for the purpose of having that strip included in the proposed royal grant. Evidently that information was not received in time to stop the grant of March 22, 1682/3, but it did arrive in time to cause its surrender and the prompt initiation of steps for a new and enlarged grant within a few days after the March grant had been sealed. This circumstance is noted by Shepherd (*Hist. Prop. Gov. Pa.*) (*Ex. 235, p. 6*), who states that the Duke—

“Not satisfied with this, and probably in pursuance with his agreement with Penn . . . he gave up this charter and petitioned the King for a further and more beneficial grant.”

The result was a bill for a new grant (*Ex. 368*), prepared by Robert Sawyer, Attorney General, on April 13, 1683, at the request of King Charles, which bears the King's signed manual at the top.

III. (d) (1) *Surrender of Said Letters Patent.*

A printed copy appears in *Exhibit 369*. The main body of *Exhibit 368*, which is the authority for the grant, is printed in *Exhibit 369* (pp. 5 to 11) where it is given its proper official designation as a Signet Office bill (Home office).

The summary on the lower left hand side is the resume of the contents of the document which it was the custom to provide for the docket entry of such instruments.

That bill was entered first in the Signet Office (*Ex. 369, p. 1*) and then in the Privy Seal office (*Ex. 369, p. 3*), where the warrant for the great seal (*Ex. 365*) was issued. In each of these offices a docket entry was made by copying the docket summary of the Attorney General, appearing in the lower left-hand corner of the original bill.

The original bill (*Ex. 368*) recites—

“Whereas our dearest brother James, Duke of Yorke hath surrendered unto us certain l^res patents bearing date the two and twentieth day of March now last past whereby wee did grant unto him all that town of Newcastle, otherwise called Delaware & fort thereunto belonging lyeing between Maryland & New Jersey, in America and several other lands, tenemts and hereditaments therein menc’ioned which surrender wee have accepted and by these p’sents doe accept.”

It then authorizes a grant to the Duke of York of—

“all that the towne of Newcastle, otherwise called Dallaware and fort therein or thereunto belonging scituate; lyeing and beinge between Maryland and New Jersey in America and all that river called Delaware and the soyl thereof and all islands in the said river and all that tract of land upon the west side of the river and bay of Delaware which lyeth from Skoolkill Creeke upon the said river unto Bombeys hook and backwards into the Minqua’s

III. (d) (1) *Surrender of Said Letters Patent.*

countrey and from Bombay Hook on the said river and bay unto * * * Cape Henlopen now called Cape James, being the South point of Asea warmett inlett and backwards into the woods three Indians dayes journeyes being formerly the claim or possession of the Dutch'' (pp. 5-6).

It is noticeable that the description of this proposed grant makes no reference to the 12 mile circle and contains no separate intention to convey the soil of the river, as distinguished from the soil of the land. The only purpose of the proposed grant being to extend the northerly boundary of the three lower counties to the Schuylkill river, it must be assumed that no change was intended in the other boundaries conveyed by the deeds of feoffment. In that case the term "river and soil thereof" in the deeds of feoffment are interpreted by the language of this deed to mean that the word "soil" applied to the land and not to the river. Naturally the bed of a river would not be regarded as soil in the sense that that word was used at that, or any other, time. It has elsewhere been shown that where a royal grant, or other conveyance, intended to convey the bed of waters the word "bottom" or "bed" was used.

This is the grant which Mr. Konkle says "never became a grant" (*Ex. 297, p. 241*).

Exhibit 495 is taken from an original manuscript trial brief in the handwriting of Ferdinando John Paris, attorney for the Penns, made May 3, 1750, in the preparation for the trial of the case of *Penn v. Baltimore*, relating to the proposed grant of April 13, 1683.

The exhibit shows the bill for the new grant (*Ex. 368, 369, p. 5*) at the Signet Office. It also shows, as of the 16th of April, the docket entries at the Signet and Privy Seal Offices (*Ex. 369, p. 1; Ex. 370, p. 1*).

III. (d) (1) *Surrender of Said Letters Patent.*

Then the following:

“16. Entry at ye Hanaper office and certificate that it passed”

which in this trial brief is stated to be proven as follows:

“to be proven viva voce.”

This shows that Paris, who drew the petition and the account of the grants set forth in Exhibit 494 (pp. 3, 5), knew that the grant of March 22, 1682/3 set forth in Exhibit 494 (p. 8), was surrendered. He also knew that the grant was not delivered to Penn as stated by him in Exhibit 494 (p. 8, bottom).

This entry also indicates that he did not have the grant of April, 1683, to offer in evidence, but proposed to prove it by oral testimony. *Exhibit 366* shows that in the case for which trial brief was prepared, Paris obtained and used a certified copy of the patent roll instead of the original grant of March 22, 1682/3, showing that he did not have the original, and the certified copy (*Ex. 366*) shows that it was used in evidence.

The official record of the delivery of Letters Patent is the Hanaper Record of payment of fees. There is no such record of the proposed grant of 1683.

These documents conclusively show that the grant of March 22, 1682/3 was surrendered. The King specifically states under his signature that he accepted that surrender. It was a dead document, and the knowledge of that fact prevented Penn from ever citing it, or claiming anything under it. That grant was an act of grace. It did not convey such an absolute title that could not be divested by the surrender of that grant. Numerous instances are of record of the King granting over again lands already granted even where there was no surrender of the former grants.

III. (d) (1) *Surrender of Said Letters Patent.*

The Crown on October 7, 3 W. & M. (1791), granted over again to the Colony of Massachusetts Bay part of the territory previously granted to the Duke of York between St. Croix River and Kennebec River (*Chalmers' Opinions*, p. 107, 109, 129).

Even though the grants of Pennsylvania and Maryland invested in the proprietors the fullest powers of government, nevertheless both of those governments were taken away from the proprietors by the Crown. The fact that they were subsequently restored does not alter the fact that if the Crown could take away the governments it could keep them (*Ex. 750*, p. 1).

The province of Maryland was in the hands of the Crown in the reign of King William and Queen Anne, (*Op. Wm. Paca. Chal. Op. 320; Ex. 750*, p. 1) and continued from 1688 to 1715 (*Ex. 742*, p. 1).

The Colony of Virginia was in the hands of the Crown in the reign of William and Anne, *ibid*, p. 327.

Pennsylvania was taken from Penn by Queen Anne.

With such extreme cases of record, it cannot be doubted that the King could effectively accept a voluntary surrender. His sign manual reciting that surrender and its acceptance was the highest character of proof possible under the British system of government.

Further evidence of the surrender of the letters patent is found in the failure of Penn and his successors and their agents and attorneys to produce or even to cite it on numerous occasions when such a grant would have been useful or conclusive as a muniment of title. The following is a list of some of such instances:

1. Penn's second Frame of Government, April 2, 1683 (*Ex. 563*).

III. (d) (1) *Surrender of Said Letters Patent.*

2. Penn's petition for hearing, August 18, 1685 (*Ex. 262*).
3. King James' draft of patent, Dec. 10, 1688 (*Ex. 550*).
4. The Royal Governor's address, August 6, 1691 (*Ex. 382*).
5. Penn's petition for restoration of Government, July 5, 1694 (*Ex. 384*).
6. Report of Attorney and Solicitor General, July 25, 1694 (*Ex. 387*).
7. Penn's presentation of his title before the Attorney and Solicitor General, July 25, 1694 (*Ex. 387*).
8. Penn's third Frame of Government, November 7, 1695 (*Ex. 564*).
9. Penn's warrant for the Taylor & Pierson Survey, October 28, 1701 (*Ex. 265; 567*).
10. Penn's commission to Andrew Hamilton, October 27, 1701 (*Ex. 1042*).
11. Penn's Charter of Privileges, October 28, 1701 (*Ex. 409*).
12. Penn's commission to the Pennsylvania Council, October 28, 1701 (*Ex. 410*).
13. Penn's letter to the Lords Commissioners, June 22, 1702 (*Ex. 434*).
14. Penn's answer to queries, November 11, 1702 (*Ex. 1044*).
15. Penn's answers to queries, November 30, 1702 (*Ex. 444*).
16. Penn's proposal for surrender, June 18, 1703 (which admits he has no royal grant) (*Ex. 301*).
17. Penn's letter of Lords Commissioners, May 1, 1706 (*Ex. 619*).
18. Penn's letter, June 29, 1708 (*Ex. 457; 622*).

III. (d) (1) *Surrender of Said Letters Patent.*

19. Logan's letter, May 12, 1709 (*Ex. 1156*).
20. Penn's memorial, July 31, 1701 (which admits he has no royal grant) (*Ex. 318*).
21. Logan's letter, January 20, 1712 (which admits Penn had none) (*Ex. 461*).
22. Penn's act for corroborating circular boundary, 1712 (*Ex. 271*).
23. Logan's letters of July 2, 1713 (*Ex. 464*) and September 29, 1715 (which admits that Penn had none) (*Ex. 470*).
24. Deputy Governor Keith's address to the New Castle Assembly, July 13, 1717 (*Ex. 633*).
25. Penn's petition for approval of laws, December 9, 1718 (*Ex. 273*).
26. Springett Penn's commission, January 7, 1725 (*Ex. 628*).
27. Logan's letter, October 17, 1726 (*Ex. 487*).
28. Deputy Governor Gordon's report, September, 1731 (*Ex. 748*).
29. Penn-Baltimore agreement, May 10, 1732, drawn by Paris (*Breviate*, p. 36).
30. Deputy Governor Gordon's letter, April 26, 1735 (*Ex. 639*).
31. Petition of Justices and Grand Jury, Sussex County, May 6, 1735 (*Ex. 640*).
32. Same for New Castle County (*Ex. 641*).
33. Paris, hearing on Evans Application, April, 1756 (*Ex. 648, p. 6; 399, p. 2; 342, p. 2*).
34. Thos. and Richard Penn commission to Denny, August 21, 1756 (*Ex. 1102*).
35. Reed opinion September 7, 1818 (*Ex. 218, p. 1*).
36. Weart letter, January 8, 1820 (*Ex. 216, p. 3*).

III. (d) (1) *Surrender of Said Letters Patent.*

37. Rodney & Reed opinion, July 2, 1820 (*Ex. 216, p. 6*).
38. Delaware Boundary Act, October 1852 (*Ex. 677*).
39. Witness Bradford, February 2, 1905 (*Ex. 694*).
40. Witness Niels, February 2, 1905 (*Ex. 696*).
41. Witness Gray, February 2, 1905 (*Ex. 691*).
42. Witness Cooper, February 2, 1905 (*Ex. 700*).
43. Judge Rodney, July, 1930 (*Ex. 297, pp. 210, 211*).

In view of the foregoing facts about which there is no dispute, we are obliged to take issue with the statement in the Master's Report that "the *only* basis for plaintiff's contention that the letters were surrendered is the recital in the grant" (of April 13, 1683) (*Rep. p. 24*). That recital is, of course, important and ordinarily might be deemed conclusive; it states that the Duke *has surrendered*—not that he intends to surrender or proposes to surrender or will surrender *on the condition* that a new grant be issued.

The Master further states that the consideration for the new patent "was to be the surrender of the old" (*Rep. p. 20*) but no *consideration* either for the issuance of a patent or for the surrender thereof was necessary. It is true that the proposed new patent of 1683 never became effective but that fact cannot alter the fact that the original patent had been surrendered.

In his Report the Master discusses the evidence that the original letters patent were offered in evidence in the litigation relating to the title. This will be discussed under the next heading.

III. (d) (1) *Surrender of Said Letters Patent.*

The Dover Document.

Defendant, however, asserts that the best possible proof that the original of the letters patent was not surrendered, is the production of the original itself; and it claims that the document known as the Dover document, which is now in its possession, is such an original.

Exhibit 529 is a printed copy, and Exhibit 189 is a photostat copy, of that document. The consideration thereof involves a discussion of the litigation relating to the title, particularly *Penn v. Baltimore*; also a consideration of the history of the document in the Dover Archives and comments as to its form, the seal thereon, etc.

In the bill of complaint in *Penn v. Baltimore*, filed in June, 1735, Ferdinando John Paris, Penn's solicitor, alleged that immediately after the letters patent of March 22, 1682/3 passed the Great Seal, the Duke of York, who was a trustee for Penn therein, delivered the original thereof to Penn "and the same is now in the custody and possession of the plaintiffs ready to be produced in this honorable court" (*Ex. 536*).

Concerning this grant it is stated in the Breviate (*Ex. 1169*).

"for we have the very original charter itself under the Great Seal, in our custody, ready to produce, which, if the Duke had intended for himself, and to defeat our title by, he would have kept, and not Mr. Penn, who was at this time of passing it, and for a considerable time longer, over in America" (p. 4).

In *Exhibit 530* John Page, an attorney of the Penns since 1707 (*Breviate, 552*), swore before the Lord Mayor of London that the copy of the grant annexed thereto was "a true copy of the same letters patent which many years ago came into the custody of this deponent among other grants and deeds of William Penn."

III. (d) (1) Surrender of Said Letters Patent.

Such a claim was never made by Penn or any of his successors, and now appears for the first time, more than half a century after the date of the document, made by attorneys unfamiliar with the proceedings from 1682 to 1705, but they never fulfilled their promise. The original was not offered in evidence in *Penn v. Baltimore*. They offered only a certified copy of the Patent Roll entry thereof (*Ex. 366*), described by them in the "Breviate" as:

"From the chappel of the rolls, a copy of letters patent granted to James, Duke of Yorke his heirs and assigns (without any recital), of all that town of Newcastle, etc."

At the end of the description of this document are the following words—

"This copy is proved from the rolls by Paris and is rocha No. 6" (*Breviate, p. 379*).

At the bottom of page 4 of Exhibit 366 will be found this identification—

"22 Mar. 35 Car. 2d 1682 Rocha No. 6."

Defendant introduced Exhibit 735 for the purpose of showing, on the last lines of page 2, that the original grant to the Duke of York of March 22, 1682/3, was offered in evidence in *Penn v. Baltimore*, but this exhibit does not say that the documents there enumerated were offered in evidence. It was a list of the documents mentioned in the complaint, as is shown by its heading: "The substance of the original Bill."

Since that exhibit contained only a small portion of the original list, defendant undertook to ascertain from the whole whether it showed the Rook-Paris certified copy of the Chancery Roll which Paris introduced in that case (*Ex. 366*). Later defendant's counsel stipulated—

"that an examination of the photostat copy of the original record of the decree in the case of *Penn v.*

III. (d) (1) *Surrender of Said Letters Patent.*

Lord Baltimore (an extract from which appears in defendant's Exhibit No. 735) fails to show any further reference to the grant of King Charles II to the Duke of York, dated March 22, 1682, or to a copy thereof" (*R. p. 740*).

Exhibit 735 contains extracts from the record of the case of *Penn v. Baltimore* taken from the Public Record Office reference entry book of Decrees and Orders in Chancery (1749 B). Obviously this is not an original record. This exhibit is introduced to show that "The said Grant to the Duke of Yorke, dated the 22d day of March 1682" therein mentioned must have been the original because other documents, shown in this exhibit as "Copy of &c," indicate an intention to distinguish between originals and copies (*R. p. 733-4*).

The official "Chancery Decree Roll No. 1856" shows this exhibit as follows:

"22 March 1682-3, Grant to the Duke of York."

The Breviate (written by Penn's counsel and referred to in the official Chancery Record. *Chy. Pro. 1714-1756 Division Sewell, 210/2*) states, under the heading "Written evidence which is proved in the cause" (*16 Pa. Arch. 2d Ser. 378*),

"35^o Car. II, 1682.

From the chappel of the Rolls, a copy of Letters Patent granted to James Duke of Yorke, his heirs and assigns (without any recital) of All the town of New Castle &c" (pp. 378-9).

This is the document introduced in this case as *Exhibit 366*, which shows at the end that it was "Exa'd with Mr. Booke 17 May 1742. F. J. P." in the handwriting of Ferdinando John Paris, one of the Penn solicitors in *Penn v. Baltimore* (620-1) and in the lower left hand corner is the following note:

"This paper writing was shown to Ferdinando John Paris, Gent'l at the time of his examination

III. (d) (1) *Surrender of Said Letters Patent.*

taken in Chancery on the behalf of John Penn and others, Esqr's, compl'ts ag't Charles Calvert Esq'r Lord Baltimore in the Kingdom of Ireland, Def't"

This note is signed with the name of "Edw'd Northy, by J. P." The initials "J. P." are in the handwriting of John Page, one of the Penn's counsel in that case (621-2) and who had been attorney for William Penn from 1705 until his death in 1718 (*Breviate*, 552).

That document, and most of the other documentary evidence, was presented in *Penn v. Baltimore* and proved by the testimony of Ferdinando John Paris (*Breviate*, p. 379; *Ex. 366*).

Immediately after listing the Chappel Roll copy of that grant, the *Breviate* states (p. 38):

"We have the original charter itself under the great seal, ready to produce &c."

but the argumentative note following refutes that very statement. There is no evidence in this case that the original was produced.

Checking up the complete list of 277 exhibits (numbered in sequence) as introduced in *Penn v. Baltimore*, contained in the original Chancery Decree Roll and the chronological descriptive list of all exhibits offered therein (pp. 217-504), as contained in the *Breviate*, with Exhibit 735 (as far as it goes) we find the following discrepancies respecting the description of documents:

1. Exhibit 735 (p. 2) shows—

"The said charter to the councell of plimouth &c."

In the *Breviate* (p. 220) that document is referred to as:

"From the Chappel of the Rolls, a *copy* of letters patent &c."

III. (d) (1) *Surrender of Said Letters Patent.*

In the original Chancery Decree Roll (No. 1856) that document No. 3, is referred to as:

“Charter to the council of Plymouth.”

2. The Breviate uses the word “original” in referring to the two deeds of feoffment August 24, 1682 (pp. 365, 366).

In the original Chancery Decree Roll those two deeds are Nos. 7 and 8, and are referred to as “Grant of New Castle to William Penn” and “grant of the south tract to William Penn,” respectively.

In Exhibit 735 (p. 2), they are referred to as—“The said grant of Newcastle to William Penn &c” and “The said Grant of the south tract to William Penn &c.”

3. In the original Chancery Decree Roll the grant to the Duke of Yorke, March 12, 1663/4, is referred to as—“Letters Patent to James, Duke of York.”

In the Breviate that exhibit is referred to as—

“From the Chappel of the Rolls, *copy* of the grant” &c. (p. 245).

4. The Official Chancery Decree Roll shows a grant April 10, 1606 (No. 92) as—

“Letters Patent to Sir Thomas Gates and others.”

The Breviate list describes that exhibit as—

“From the Chappel of the Rolls. A *copy* of Letters Patent &c” (p. 219).

5. The Official Chancery Decree Roll shows a grant May 23, 1609 (No. 93), as—

“Letters Patent to Robert Earl of Salisbury and others.”

The Breviate list describes that exhibit as—

“From the Chappel of the Rolls. A *copy* of Letters Patent” &c.

III. (d) (1) *Surrender of Said Letters Patent.*

6. The Official Chancery Decree Roll shows Governor Fletcher's Commission of October 21, 1692 (No. 103) as—
 "Letters patent to Benjamin Fletcher."

The Breviate list describes that exhibit as—
 "From the Chappel of the Rolls, a commission under the great seal," &c. (p. 409).

7. The Official Chancery Decree Roll shows Penn's restoration of Government of August 20, 1694 (No. 104) as—

"Letters Patent to William Penn."

The Breviate list describes that exhibit as—

"From the Chappel Rolls, a commission under the Great Seal," &c. (p. 411).

8. The Official Chancery Decree Roll shows Instructions to Nicholls, et als., of April 23, 1664 (No. 138) as—

"Instructions to Colonel Richard Nicholls and other commissioners to visit the colony of Massachusetts."

The Breviate list describes that exhibit as—

"Copy from the Books at the Board of Trade of Public instructions," &c. (p. 246).

There are many more instances like these, where the Official Chancery Decree Roll mentions exhibits without using the word "copy," which defendant assumes indicate originals, but in every such case the Breviate shows that only copies were introduced.

There are many instances in the Official Chancery Roll where orders in council are referred to as copies, but there are 23 exhibits designated "Order in Council" which the Breviate shows were all copies obtained from the proper offices.

In only two instances does the Official Chancery Decree Roll refer to exhibits as "original," viz., in describing

III. (d) (1) *Surrender of Said Letters Patent.*

document Nos. 246 and 264. In only three instances does the Breviate refer to exhibits as "original," viz., the Release of the Duke of York to Penn, Aug. 21, 1682 (p. 363); the deed of feoffment for New Castle (p. 364); and the deed of feoffment for the tract below New Castle (p. 636).

The Breviate not only fully describes each exhibit in the case, but states whether it is an original or a copy, and if a copy, from what office or source it was obtained.

It seems unnecessary to pursue this subject further to demonstrate that the language of Exhibit 735 (p. 2), "The said grant to the Duke of Yorke, &c," does not prove that *the original* was introduced.

Paris and Page both knew that Penn's title to the lower counties was questionable. Paris, as attorney for Springett Penn in opposing the Earl of Sutherland's application for a grant thereof, could produce no such grant before the Attorney General in October in 1717 (*Ex. 471, 635*). Page wrote to Ward on August 6, 1719, that Penn's title thereto was "very bad" (*Ex. 475*). This belated claim of possession of the original has no other support than their statements in the complaint and Breviate, which, in turn, are traceable as the sources of every statement subsequently made anywhere, that Penn had possession of that grant.

That the grant of March 22, 1682/3 was immediately delivered to Penn, as stated by Paris, is impossible. Penn left England, with his deeds of feoffment, on August 6, 1682, and arrived in New Castle October 27, 1682. *He remained in Pennsylvania until July 12, 1684, when he returned to England (1 Proud, Hist. Pa., p. 287; Ex. 535).* It is admitted in the Breviate (p. 380) that Penn was, at the time of the making of that grant "and for a considerable time longer over in America."

III. (d) (1) *Surrender of Said Letters Patent.*

Penn returned to England to defend his title to the lower counties against Lord Baltimore (*Ex. 535*). In the controversies which Penn had with Lord Baltimore in 1685; with the Lords Commissioners in 1701/5 with Quarry and Randolph in 1701/2; and with the Delaware Assemblymen in 1700/1, Penn never claimed to have, or offered to produce, such a grant. It is not cited in his title documents mentioned in his Act of Union, Act of Settlement, or elsewhere in his lifetime.

Logan, who was in better position to know than any other person, said, September 29, 1715 (*Ex. 470*), that the deeds of feoffment were all Penn had "to show for any title." On April 17, 1726 he wrote (*Ex. 486, 532*) that Penn never received the promised royal grant. On October 17, 1726, (*Ex. 487, 533*) he wrote that he had never heard of any such grant but the draft of 1688, which did not pass because of the flight of King James II on December 10, of that year. This draft he describes as the only one Penn ever had, and which he showed to certain persons from the lower counties, at Major Donaldson's house.

On June 10, 1691, Penn wrote to his agent in Pennsylvania:

"I would also you should know, I have a patent of the lower counties, some years since; that when there is occasion for it, you may allege so, but not otherwise" (*Ex. 228, p. 22*).

He doubtless refers to the 1688 draft which Logan mentions.

Exhibit 189 is a photostat copy of a document at Dover which defendant claims to be the original of the grant of March 22, 1682/3.

What purports to be a seal attached to this document consists of two small pieces of wax without form or in-

III. (d) (1) *Surrender of Said Letters Patent.*

pression and not over one and a half inches in diameter; they are not in any sense all, or any part, of the Great Seal of England.

The document contains none of the notations on the fold at the bottom of the grant which invariably appear on original grants as indicating an entry in the Hanaper Office or otherwise, as illustrated by Plaintiff's Exhibits 190-191-193, or any endorsement on the back as illustrated by Exhibits 191-192.

A careful comparison of Exhibit 189 with the official Patent Roll record of that grant (*Ex. 367*) was made by Hardy & Page, expert Record Agents of London (*Ex. 1170*).

The Patent Roll record is used as the basis of this reprint and the differences in spelling or words appearing in the Delaware document are inserted above the line in italics.

That comparison shows numerous errors in Exhibit 189, not only in spelling but also in words, and indicates that the document at Dover *is not even a correct copy of the original*. How, when and by whom it was made is not known. The only proof offered by defendant of its authenticity is the testimony of Benjamin David in the Pea Patch Island case in 1848 (*Ex. 675*) and a letter dated December 8, 1904, from Sara Wister Miller offered in the old case in 1904 (*Ex. 537*). Mr. David produced that document and testified that he came into custody of four deeds—"the deeds above" marked with the letters "J. R. Coates," as agent for Jacob G. Morris, who was the son-in-law of J. R. Coates, deceased. He says:

"Mr. Coates received them as agent or attorney of the Penn estate, during a visit to England, from some members of the Penn family." "The deed from King Charles to the Duke of Yorke. I cannot speak of the others. I suppose they came to Mr.

III. (d) (1) *Surrender of Said Letters Patent.*

Coates' possession in the same way. Mr. Coates came from England 10 or 15 years ago."

"I understood, it was generally understood, that Mr. Coates was the agent of the Penns for managing their estates in America. I am the brother-in-law of Mr. Morris."

"It is so long ago since I heard Mr. Coates narrate how he came possessed of these deeds, that I cannot speak with absolute confidence of what was done."

"I think he told me that, being at Stoke Poges, Mr. Penn asked him if he would like to go into the charter room, where he might find some papers that would be interesting to him as an American; that he was welcome to any of them he wanted."

"Mr. Coates found in the charter room these deeds, as I suppose, and also the charter of the state of Pennsylvania."

Mr. Coates was living within 7 years, presumably of the date of the witness' testimony. Mr. Morris was in Europe and did not testify.

"The box was first opened by me this morning"
(pp. 7-8).

This testimony is hearsay.

The deed from King Charles to the Duke of Yorke is not identified, and the subject matter of the deed is not mentioned, or its date.

He does not say when he came into custody of the four deeds mentioned. He describes his understanding of how the one deed came in the possession of Coates and *supposes* that the others came in the same way.

There is no corroboration of Mr. David's testimony. There is no proof that Mr. Coates was the agent of the Penns. They executed a Power of Attorney when they appointed agents. M'Kean & Physick were so appointed in July 7, 1791 (*Ex. 1171*). How long they continued as

III. (d) (1) *Surrender of Said Letters Patent.*

such does not appear but they were still acting at the close of 1794 (*Ex. 1176*). If Coates was then agent, his authority is doubtless provable.

He says Mr. Coates came from England 10 or 15 years ago which would be in 1832 or 1837, and he infers (but does not state) that he brought with him those deeds and the charter of the State of Pennsylvania at that time. That this is erroneous is demonstrated by the fact that what he refers to as the Pennsylvania charter was brought by Coates from London in 1810, and was deposited in the archives of Pennsylvania in 1812 (*Pa. Archives 4th series, Vol. 4, p. 769, 772*).

In one place the witness says—Mr. Coates received these deeds as agent or attorney of the Penn estate. In another place he says—they were received by Mr. Coates as "papers that would be interesting to him as an American."

Mr. Coates' narrative of how he acquired these deeds occurred "so long ago that his recollection is not clear, he says—"I think he told me." "

The statement of Penn "respecting these documents" "that he was welcome to any of them he wanted" is extraordinary, to say the least.

He does not say they were in a box and mentions the box only on cross examination. It is hard to believe that the box "was first opened" on the morning of his testimony.

The lack of interest of Mr. Penn in these documents, and the casual manner in which Mr. Coates is supposed to have carried them away, are facts inconsistent with the idea that these were original documents.

Mrs. Miller's letter, inadmissible in evidence except by the indulgence of the Master in the old case, refers to

III. (d) (1) *Surrender of Said Letters Patent.*

four papers (unidentified) loaned to plaintiff's attorney therein "to use in the boundary suit between New Jersey and Delaware" which she says came into her possession as follows:

"They belonged to Mr. J. R. Coates, who had received them from some of the Penn family. My mother's brother, Jacob G. Morris married J. R. Coates' daughter and through her the papers came to my uncle, who left them at his death in 1854 to my mother, Mrs. Caroline Pennock."

Upon the death of her mother in 1882 the papers came into her possession. She has been familiar with the papers since they were inherited by her mother and at that time the paper "stating from whom the documents were originally received, was in the box with them, and it is, I believe, in my uncle, Jacob G. Morris' handwriting."

"I am unable to find the paper of which Mr. Miller spoke to you."

This letter identifies no documents or papers. It is hearsay evidence as to the origin, but nothing as to the identity, character or authenticity, of the papers referred to (p. 2).

Exhibit 541 contains extracts from the Delaware Senate Journal upon the occasion of the ceremony, on February 14, 1909, when that document, and others, were presented to defendant. The orator of that occasion makes numerous statements which are now known to be incorrect.

This much is clear: The document at Dover is the one doubtfully referred to as an original in the Pea Patch Island case. It is the one mentioned by Solicitor of the Treasury Penrose (*Ex. 759, p. 11*). It is not the document used in *Penn v. Baltimore*. Although it was brought to this country in 1810 (*4 Pa. Archives, 4th series, 769-722*), it was not produced in *Gale v. Behling* in 1838.

III. (d) (1) *Surrender of Said Letters Patent.*

In the *Pea Patch Island* case the United States was represented by two distinguished lawyers of Delaware, Hon. John M. Clayton, United States Senator from Delaware 1828-1848 and Secretary of State in President Taylor's Cabinet, and Hon. James A. Bayard, then United States District Attorney for the District of Delaware (*3 Conrad's Hist. Del.*, pp. 872, 906). These gentlemen were unwilling to accept that document as an original. They introduced it as "An original deed, as it was said." (*Sen. Ex. Doc. No. 21, 30th Cong., 1st Ses., p. 8.*) The reporter of that case commented upon that document in a note to the Sargeant opinion (*30 Fed. Cas. 1123, 1135*) as follows:

(Note)

"The history of this deed is quite singular. It is not printed in any of the ancient books of Delaware Laws, though the Duke of York's are in all of them. It does not seem to have been put on record in either New York, Pennsylvania or Delaware. It appears, moreover, that when the Earl of Sutherland applied, about the year 1716, for 'a charter of certain lands lying upon Delaware Bay in the three lower counties, which he represents he is ready to prove do belong to the crown,' and where the persons concerned for Mr. Penn, and several mortgagees and purchasers under him, and their agents, were heard before the attorney and solicitor general, Northey and Thompson, that after much search of publick offices the existence of this deed was not discovered: and, that too, in a case where there is so obvious an impression on the minds of the attorney and solicitor general, that there must be some other title, that they say, 'they presume the said Duke of York might have some other grants thereof, which Mr. Penn might give an account of, but cannot, being under a lunacy;' and which made them therefore submit, whether it would not be reasonable that the king's title should be established in chancery before any grant should be made of the premises. *Chalm. Op. 39-57.*"

III. (d) (1) *Surrender of Said Letters Patent.*

For the purpose of showing that the Dover document lacks the great seal of England, plaintiff offered certain exhibits showing that Great Seal.

Exhibit 194 is letter from J. S. & A. B. Wyon to Theodore Runyon regarding seals of Charles II, July 9-11, 1877, accompanied by a list of all the seals of Charles II, with the probable date of use and the place where impressions can be found. With that letter they delivered a box of plaster casts of those Great Seals, both obverse and reverse sides. That box of seals was produced before the Special Master in this case, together with a photograph of each side of each seal in exact size which are Exhibits 195 to 200, inclusive.

Exhibit 201 contains extracts from a book entitled "*The Great Seal of England*" 1887, in British Museum, London, England, published by Alfred B. Wyon, one of the members of the firm of J. S. & A. B. Wyon, Medalists and Chief Engravers of Her Majesty's Seals, who wrote the letter which constitutes Exhibit 194.

This exhibit describes all the Great Seals used by Charles II, not only during the period of his reign in England, but also during the preceding period, after the death of Charles I, when he claimed the throne of England, but was in exile abroad by reason of the wars under Cromwell.

Here the seals are accurately described as to diameter, technique, character of material, design of obverse and reverse side, and the period during which they were used, with instances of their use and references thereto.

For the better illustration of the appearance, marginal notations, endorsements and Great Seals of accepted original letters patent, plaintiff presented for the court's inspection an original grant of Henry VIII to Thomas

III. (d) (1) *Surrender of Said Letters Patent.*

Temmes and wife, February 28 (35 Henry 8th) A. D. 1543, recorded in Patent Roll 35 Henry 8th, Part 5, M. 36, C. 66, 726, obtained in London for the purpose of showing several things characteristic of original grants.

It bears the great seal of England of Henry the Eighth in its actual size and thickness (except for a piece broken off) and the size and thickness of the cord attaching the seal, with notations by the Six Clerk of the Lord Chancellor, with which all letters patent were issued (p. 543).

The Six Clerk who drew the grant signed his own name and made an endorsement on the back stating that it was a "perpetuity." Such an endorsement is characteristic of every original grant. The endorsement on the grant under consideration states in substance—"Ye patent to Thomas Temmes and Elizabeth, his wife" with the signature of the clerk who made the endoresement. The essential characteristic of such a grant is the endorsement and the great seal of that size. Exhibit 190 is a photograph of the bottom of the grant with the reverse of the great seal, and a notation on the fold at the bottom (544). This grant, with Exhibits 190 and 191, are to show what the great seal is, its exact size, etc. (545). The original grant was marked for identification as Plaintiff's Exhibit "A" (546).

Plaintiff also exhibited an original grant of Charles II to John Clerke and Edward Stratford, dated December 20, 1677, recorded, Patent Roll, 29 Charles II, Part 10, C. 66, 3197. The endorsement reads "Perpetuity" and grant to Major Clerke, et al.; signed "Pigott" (546). That was marked for identification as Plaintiff's Exhibit "B" (553).

Exhibit 190 is a photograph of Great Seal, marginal notation and endorsement on original grant Henry VIII

III. (d) (1) *Surrender of Said Letters Patent.*

to Thomas Temmes (Reverse, marginal notation), February 28, 1543-4.

Exhibit 191 is a photograph of the obverse and endorsement of the same grant.

Exhibit 192 is a photograph of the obverse of the Great Seal, marginal notations and endorsement on original grant Charles II to John Clerke and Edward Stratford, December 20, 1677.

Exhibit 193 is a photograph of reverse of the Great Seal and marginal notations of the same grant.

These four exhibits are offered to illustrate the size and appearance of the Great Seal of England and the marginal notations and endorsements characteristic of original grants.

Exhibit 730 is a photograph of the endorsement on the back of the Dover document and Exhibits 761-4 show the seal thereon.

No explanation appears for the absence of the Great Seal from the Dover document. The casual remark that time has eradicated it is unconvincing. The record shows that many Great Seals of much older date are still perfect, at least in the impression even though cracked or broken. The great seals of all the grants exhibited to the court and shown in the photographs, show the impression of the matrix clearly. In 1759 Sir William Blackstone wrote "*The Great Charters.*" At page XLVI he describes an original Great Charter of 9 Hen. III, dated in 1224, then at Durham Cathedral, upon which the Great Seal was entirely perfect, as the plates at pp. 59 and 67 of that book shows. He also states (p. 1) that an original of the Charter of the Forests of 1224 was also then at Durham Cathedral "the seal whereof * * * is still perfect."

III. (d) (1) *Surrender of Said Letters Patent.*

Since the Great Seal constitutes the sole authentication of Royal Letters Patent, no document purporting to be an original can be accepted as such, which does not carry convincing evidence of the presence of the Great Seal. Presumptions on that score cannot be entertained without some support of visual fact.

In support of its contention that the Dover document is *the original grant* of March 22, 1682-3, defendant offered Exhibit 731, consisting of a "Case," certain documents, and the opinion of Sir Henry Maxwell-Lyte upon certain questions submitted by defendant, *ex parte*, and without submission to plaintiff or giving it an opportunity to be represented or to cross examine.

The "case" was prepared by the defendant. It recites the grant of March 4, 1680-1, for Pennsylvania and refers to the previous grant for Maryland and to the grant of March 12, 1663/4, to the Duke of York for lands there described.

It recites the feoffments of August 24, 1682, quoting a part of the description respecting the boundary about New Castle.

States "The evidence shows" that after these deeds were made (p. 3), doubts arose of the Duke's title, and, to cure this supposed defect the Duke obtained from Charles II letters patent of March 22, 1682/3.

States "it was subsequently stated by William Penn that on obtaining these letters patent, James, Duke of Yorke handed them to him."

[There is no proof of this statement, and none is referred to in the statement. Such a statement was never made until 1735 and then by Paris.]

Cites enrollment of those letters patent.

III. (d) (1) *Surrender of Said Letters Patent.*

States "It is assumed that William Penn was not satisfied with the terms of the letters patent of 22nd March, 1682/3, because the Duke of Yorke in April 1683 obtained from Charles II a fresh grant in more advantageous terms."

[No evidence thereof is stated. There is no proof that the Duke obtained a fresh grant in 1683. *The contrary is proven.*]

Refers to the signed bill of April 13, 1683, for the new grant and quotes part of it respecting the surrender of the previous grant, but omits a very important part of that recital namely, "which surrender we have accepted and by these presents doe accept" (*Exs. 368, 369, p. 5*).

States Lord Baltimore's objection to the new grant, and the proceedings thereon (p. 4).

Refers to the conclusion of the boundary dispute between Maryland and Delaware by decision in *Penn v. Baltimore*.

States that in 1930 a dispute arose between New Jersey and Delaware as to the title of the bed of the river, within the limits of the deeds of feoffment of August 24, 1682, which dispute is now pending in court.

[This statement ignores all of the previous history of the controversy shown by the exhibits and records in this case.]

States that in the course of the case certain documents were offered in evidence.

Document No. 1—Letters patent, March 22, 1682/3 (*Ex. 189*).

Document No. 2—Writ of privy seal, March 12, 1682/3 (*Ex. 365*).

III. (d) (1) *Surrender of Said Letters Patent.*

Document No. 3—Bill for new grant, April 13, 1683 (*Ex. 368*), (p. 5).

Document No. 4, 4a, 4b, 4c—Copies of letters patent (*Exs. 190 to 193*).

Other exhibits in the case were also submitted but in addition thereto, defendant submitted, as part of its case, to Sir Henry Maxwell-Lyte certain documents not then in evidence in this case, but which later appear, for the first time attached to Exhibit 731. Document No. 12, purporting to be a catalog of a loan exhibition in London in 1932 (p. 7), and documents 17 and 17a, are not included in the exhibit and it is therefore impossible to determine their contents, relevancy, or pertinence.

States that plaintiff urges that the document at Dover is not the original "But is a duplicate thereof" and that the original was surrendered.

[Plaintiff does claim that the document at Dover is not the original, but it does not claim that it is a "Duplicate." This statement probably accounts for the efforts shown in the exhibit to prove no fees charged for a duplicate. Plaintiff claims the document at Dover is an incorrect copy.]

States that plaintiff supports this contention by noticing the absence of endorsement and signature on the back or margin of the document, and that this "shows that it is a duplicate and not the original letters patent" (p. 8).

States that plaintiff also contends that letters patent under great seal always have various endorsements on them, which are not found on duplicates and that duplicates are never sealed in green wax, but with wax of another color.

[This is too narrow an interpretation of plaintiff's contentions. Exhibit 203, Sir Henry Maxwell-Lyte's book on

III. (d) (1) *Surrender of Said Letters Patent.*

the seals shows instances of originals sealed with yellow wax (Oxford University Charter, *Ex. 203, p. 15*.)]

States that Mr. H. Stuart Moore has examined the original privy seal on document No. 2 and is of opinion that the hole therein was purely an accidental one. Contains further statements of Mr. Moore describing the hole (p. 9).

[Mr. Moore was not sworn. He is a stranger to the case and the introduction of his opinion or statements as a basis for the opinion of Sir Henry is irregular. No qualification is shown to indicate the value of his opinion on the subject.]

Defendant then requests Sir Henry to examine certain original documents "in order that the Supreme Court may be aided in arriving at a correct understanding of them."

22 specific questions are submitted (pp. 10-13).

The explanatory note (pp. 13-14) shows certain documents omitted from the exhibit: Document No. 7 because of its size, and documents Nos. 12, 17 and 17a, because of their length.

[If they were important to the opinion of Sir Henry Maxwell-Lyte their omission from the record is a defect which impairs the value of that opinion.]

Document 13a shows the Hanaper fees paid for the grant of March 22, 1682-3 (p. 28).

Documents 12a, 14, 15, 15a, 16 and 16a are introduced in the attempt, by negative proof, to show that there is no fee charged in the records for a duplicate of that grant. This effort is based upon defendant's assumption that plaintiff is limited to the contention that the Dover copy is a duplicate. It is of little consequence whether it is

III. (d) (1) *Surrender of Said Letters Patent.*

a duplicate, or a copy, so long as it appears that it is not an original.

The opinion of Sir Henry on the 22 questions submitted, together with some voluntary additions, is given on pages 40 to 47 of exhibit.

He states in paragraph 3 that his opinion is predicated upon a case submitted to him, which he identifies.

Paragraph 4 answers questions No. 1 as to what was the practice or rule for a valid surrender of letters patent in the reign of Charles II. He describes the practice of the middle ages of noting the surrender on the patent roll but "I cannot say whether this practice prevailed in the reign of Charles II." He refers to a collection of original patents which have been returned into chancery for cancellation, which cancellation he says has been examined by Miss Stokes.

[This answer, so far as to the present case is concerned, is very indefinite. Numerous instances of surrendered, or revoked, letters patent which are not so entered on the patent roll, are given by Sir Henry in Exhibit 203 (pp. 11-12, 21) as occurring in 1673, 1403 and 1305; and one by Penn's attorneys in Exhibit 1169 (p. 1), occurring in 1635.]

Question No. 23 asks what is the distinction between a duplicate letters patent and an exemplification. The answer is that the duplicate is "in exactly the same terms as the original" (p. 42).

[Exhibit 1170 shows that if the patent roll (*Ex. 367*) is a correct copy of the original, the Dover document (*Ex. 189*) contains "not exactly the same terms as the original" and is not even a correct copy thereof.]

The 4th question asked whether duplicate letters patent could be obtained except at the time when the original

III. (d) (1) *Surrender of Said Letters Patent.*

patent was issued. The answer is that persons desiring copies after the issuance of originals would "presumably" apply for an exemplification.

[This is merely an assumption and overlooks entirely the possibility of obtaining copies of letters patent through other than official sources.]

Questions 5 and 6 are, respectively, what are the distinguishing characteristics between original and duplicate letters patent, and does the color of the wax determine whether the document is an original or a duplicate. These two questions are referred to in paragraph 8. The first one is answered "I have seen the word 'duplicata' at the bottom of letters patent but in other respects they are not to be distinguished from the contemporary versions."

[This answer does not even imply that the word "duplicata" always appears. The answer is silent on question 6 about the color of the wax. Sir Henry's book states that the color of the seal on originals is usually green, but the Letters Patent of Oxford University, a duplicate and a triplicate were sealed with green wax (*Ex. 203, p. 15*).]

Question 7 asks whether it is a requisite to the validity of letters patent that they should bear the signature of any official or other person other than the name of the clerk (Pigott). That question is not answered, although paragraph 9 of the opinion, purporting to answer it, refers to the sur-name of the officer but does not refer to the part of the question which inquired about the signature of any *other official*.

Question 8 asks whether it is requisite for the validity of letters patent that they should have any endorsement on their backs.

Paragraph 10 of the opinion answers this question in the negative, but both the question and the answer ignore

III. (d) (1) Surrender of Said Letters Patent.

the fact of the practice of using such endorsements, regardless of whether they were essential to the validity of the document (p. 43).

Question 9 asks the reason for the endorsements on the fold at the bottom of Ex. 190 to 193.

Paragraph 11 of the opinion answers that in such manner as not to give the reason for them, or at least any reason which would excuse the absence of such notations on the Dover document.

Questions 11 and 12 ask whether the absence of any endorsement on the bottom of the Dover document, or of the Hudson Bay Company grant, is any indication that those grants are not original letters patent.

Paragraph 13 of the opinion merely says "that it does not appear that there was any need for endorsements or memoranda thereon."

[He does not say whether that absence indicates lack of originals.]

Question 13, based upon photostatic copies, asks whether they show characteristics of original letters patent.

Paragraph 14 answers this question by saying that the Dover grant has all the characteristics of original letters patent. He states that the absence of a box for the seal is immaterial (p. 44). [It would seem that the accurate determination of whether a document was an original, or otherwise, especially one that does not purport to bear any original signature or a recognizable seal, must necessarily require an examination of the *original* subject, and that any admissible or satisfactory expression of opinion could be based on nothing less than an inspection thereof.]

Question 18 inquired what books of the Hanaper are extant covering the period of March and April 1682-3.

III. (d) (1) *Surrender of Said Letters Patent.*

Paragraph 19 of the opinion states that the accounts of the Hanaper office from September 29, 1682 to September 29, 1683 are missing. [This period includes the date of the grant of March 22, 1682/3 and six months thereafter so that it is impossible to say what those accounts may contain about duplicates or originals of grants in that period] (p. 45).

Paragraph 22 of the opinion states that the absence in certain accounts of any mention of fees for a duplicate of the grant of March 22, 1682/3 is in his opinion "practically conclusive," that no such duplicates "were issued during that year."

[In the first place he does not venture to say that this is conclusive; secondly, the Dover document may not have been an official duplicate; and third, as a duplicate it may not have been issued that year; fourth, the records of the period are missing. The history of that document, as shown by other exhibits, would indicate that the Penns did not regard it as having any value.]

Sir Henry Maxwell-Lyte volunteered, in paragraph 23 of his opinion, the unrequested opinion that in the document signed by the Attorney General in the lower right-hand corner of Exhibit 368, it is proposed by the Attorney General that "after surrender" of the letters patent of March 22, 1682/3, a fresh grant should be made, and he therefore thinks "it is fairly obvious that such surrender was not to be made except in exchange for the fresh letters patent contemplated" (p. 46).

The words "after surrender" do not appear in the document on Exhibit 362, in the translation of it in print in Exhibit 369 (p. 11), in the signet or Privy Council Dockets (*Ex. 369, pp. 1, 5; Ex. 37, p. 1*), or elsewhere. On the contrary the words are unmistakably definite—"upon a surrender *made* to your Majesty by his royal Highness

III. (d) (1) Surrender of Said Letters Patent.

James, Duke of Yorke," etc. The word "made" indicates past tense and that the surrender had then been accomplished. It also states, "your Majesty is hereby pleased to grant."

The bill to which that docket note is attached, as signed by the King, states—

"Whereas our dearest brother James, Duke of Yorke *hath surrendered* unto us certain letters patent * * * which surrender wee *have accepted* and by these presents doe accept" (*Ex. 369, p. 5*).

There can be no doubt about the tense of those verbs. There is nothing to justify this voluntary opinion or interpretation.

Those words were not essential to, or intended to be included in, the new grant. Their function was confined to the recital of a *fait accompli*.

The concluding sentence of paragraph 23 shows what additional steps were missing to accomplish a complete grant pursuant to the King's bill of April 13, 1683. The record shows that of these succeeding steps the entrance into the docket of the signet office was made in the language (and tense) used by the Attorney General in the bill (*Ex. 369, p. 1*) and is exactly repeated in the docket book of the privy seal office (*Ex. 370*) and that is as far as it went (p. 47).

The manner in which these questions were submitted, the incomplete and (in some respects) incorrect statements of fact submitted, the affidavit form of the answers, and the absence of an opportunity to plaintiff of correcting these errors or of cross examination, render this exhibit inadmissible; or, if admitted, show that the opinion is entitled to but little weight. Its exclusion was not pressed solely to avoid further delays in the submission of this case (*Stipulation, R. p. 740*).

III. (d) (2) *Claim of Title by Estoppel.*

(2) *Claim of Title by Estoppel.*

The Master found that by virtue of the issuance of the letters patent of March 22, 1682/3, a good title by estoppel in law as well as in equity passed to Penn for the lands described therein, including the subaqueous soil of the river within the Circle (*p. 78, pars. 1, 2*).

If these letters were in fact surrendered by Penn, then the question whether the doctrine of estoppel applies becomes unimportant; if, however, the court concludes that the letters were never in fact surrendered, then the question arises as to the legal effect thereof.

It should first be observed that we do not have to consider whether estoppel applies to the *lands* of the colony or State of Delaware, but only whether it would apply to the bed of the river.

The plaintiff claims that the doctrine has no application to the bed of the river for the following reasons:

1. The feoffment to which the letters are supposed to be tied for the purpose of creating estoppel, did not convey power of government and did not purport to do so. Hence, there was no "further assurance" in the feoffment with *relation to the powers of government*. The conveyance of the bed of a navigable river (even if it could be granted at all) could be made only as incident to and inseparable from the powers of government.

2. The deeds of feoffment could not convey government, first because the Duke had none; and second, only letters patent or an Act of Parliament could do so. It does not appear that Lord Hardwick considered them as conveying government, since he mentions only title. Therefore the grant of March 22, 1682/3, created no equitable estoppel for the benefit of Penn, because the covenant of further assurance could not be construed to obli-

III. (d) (2) Claim of Title by Estoppel.

gate the Duke to procure extraordinary powers, unrelated to the question of mere title.

3. The Duke had no power of government under his grants of 1664 and 1674 with relation to any territory west of the Delaware river and bay.

4. Even if the Duke did have power of government west of the river and bay, he could not by estoppel or other wise *re-grant* or assign such power to somebody else—at least without the permission and approval of the Crown; hence, even if the estoppel should be held to apply to the legal title to the land, it could not transfer the power of government to Penn and therefore could not operate to transfer to Penn title to land under navigable waters. In the case of a private person, respecting private property, the doctrine of equitable estoppel might apply, and such was the kind of a case cited by Lord Hardwick as his authority, but that doctrine can not be applied to powers of government, or royalties. A delegation of the powers of government was conferred by the Crown upon an individual of its own selection and the grantee could not alienate his special privileges without the consent of the Crown. How then could it be alienated by operation of law, without the consent of the Crown?

The Duke's grant of title and government of New Jersey to Berkeley and Carteret was confirmed by Charles II directly to the grantees and their successors and assigns by proclamations of December 9, 1672 and June 13, 1674 (*Ex. 13, p. 1-3*).

On February 13, 1692/3, Thomas Trevor, Attorney General, rendered his opinion to the Lords Commissioners (*Ex. 383*), in which he stated that in obedience to an order of February 8, 1692, he has examined the charter of Connecticut and the grants to the proprietors of East and West Jersey and that he is of opinion that their Majes-

III. (d) (2) *Claim of Title by Estoppel.*

ties, in virtue of their prerogative and sovereignty which is not granted away by the charters or grants, may appoint Governors for those places with such powers and authorities that may be necessary and reasonable. He is of opinion that the proprietor of New York (Duke of York) may assign his propriety in New Jersey to others but cannot by such grant absolutely sever New Jersey from New York, but it still remains part thereof and dependent on the government of New York.

When the surrender of government by the proprietors of East and West New Jersey in 1702 was decided upon, a representation of the Lords of Trade, submitted October 2, 1701, to the Lords Justices of the Privy Council regarding the title of proprietors of East and West Jersey, expressed dissatisfaction that the grants from the Duke of York to Berkeley and Carteret, without any direct or immediate authority from the Crown, could be valid to convey the right of government, which they were informed was inalienable from the person to whom it is granted and could not be assigned to another, much less divided, subdivided or conveyed. They recommended (April 18, 1699) a trial of the right of government of the proprietors (*Ex. 13, pp. 12-13; Ex. 11, p. 34*).

Quo warranto proceedings were thereupon instituted to test the right of government of those proprietors, but were suspended upon the surrender of government (*Ex. 11, pp. 31-36*).

If that is so, how could the Duke of York, without the Crown's consent, alienate the powers of government of the three lower counties, if the grant therefor of March 22, 1682/3 had remained (or did remain) unsurrendered and had continued (or did continue) in force?

Suppose the Duke had conveyed to Penn the Crown of England with all its prerogatives. Could Penn claim the

III. (d) (2) *Claim of Title by Estoppel.*

benefit of an equitable trust when the King came to the throne?

The rule of equitable estoppel, like other legal principles, has its appropriate application. It applies only to the usual circumstances of private transactions and private property.

5. The bed of the river belonged to the Crown, in trust for the nation; it could not be conveyed by feoffment from the Duke (even if he had title) or even from the King.

6. Penn himself had waived his rights (if he had any) under the conveyance of further assurance in the feoffment; he knew at the time the feoffment was given to him that the Duke had no title—and, indeed, he instructed his own commissioners in 1681 to so state to the settlers, to induce them to accept in exchange of lands for those on the site of the proposed city of Philadelphia (*Ex. 231, p. 35*).

His attempt to get a new grant for a larger area than that described in the grant of March 22, 1682/3 operated as a waiver of his rights of further assurance; after failing to obtain the new grant he could not reverse his position and reinstate his rights, if any, under the former grant.

7. Whatever rights the Duke may have had prior to 1682 in the Delaware Colonies, either by virtue of the conquest thereof or by virtue of his alleged possession or by virtue of the alleged exercise of the power of government, had been granted by him to Berkeley and Carteret prior to the date of the feoffment.

Assuming that the Duke under the grants to him from the King of 1664 and 1674 had acquired any title or power of government in the Delaware river and bay, any such

III. (d) (2) *Claim of Title by Estoppel.*

title or power had been conveyed by him to Berkeley and Carteret by the deed and release of June 23, 1664 and June 24, 1664, and by the confirmatory deed of August 6, 1680 to Byllinge and others, the successors in interest of Berkeley and Carteret in the Province of West Jersey.

The territory described in these two deeds has the same description as in the deeds to the Duke of 1664 and 1674; the Duke conveys to the grantees with as full and ample powers as had been granted to him by the King, including the power or jurisdiction granted to or exercised by the Duke under the grants from the King (*Exhibits 20 and 23*).

In 1680 Penn himself claimed that the Duke had conveyed to the proprietors of West Jersey the land with the rights in Delaware river and bay "in as ample a manner as it was granted to the Duke by the King" (*Ex. 228, p. 18*).

The occasion for this claim was the opposition of Penn to the duties imposed by the Deputy Governors of the Duke on the Delaware bay commerce. The matter was referred to Sir William Jones. His decision was given on July 28, 1680, and held against the right of the Duke to impose the tax or any other duty on the ground that the territory was included in the grant from the Duke to Berkeley and Carteret without reservation of profit or jurisdiction; the tax was discontinued on August 6, 1680; and to confirm the rights of the West Jersey proprietors (in accordance with the claim then made by Penn), the Duke made his confirmatory grant of August 6, 1680 (*Ex. 9, pp. 43-50; Ex. 11, pp. 20-25*).

III. (e) *The Crown's Claim of Title.*

(e) *The Crown's Claim of Title.* (Exceptions 63-74.)

The Master found that by various acts of the Crown of England from 1682 until 1776, title and possession of Penn to Delaware, and the power of government of Penn and his successors thereover were recognized and confirmed, and that as the Crown of England did not take any action to dispossess Penn and his successors from the administration of the government or from the occupancy of Delaware, the title of Penn and his successors and their power of government were "ratified and confirmed" by the Crown (*Rep. p. 76, pars. 18 and 19*).

The Master concludes that by virtue of the uninterrupted and undisturbed possession of Penn, Penn and his successors acquired good title against the Crown (*Rep. p. 78, par. 3*).

The plaintiff respectfully submits that these conclusions are erroneous for the following reasons:

1. The Act of Union and other statutes relating to Delaware were ineffective because they were never submitted to the Crown for approval as required by the letters patent for the Province of Pennsylvania.
2. The record shows that from 1682 until the death of Penn in 1718 his claim of title was frequently questioned and rejected by the Crown.
3. The record shows that during the negotiations relating to Penn's proposed surrender of the power of government in Pennsylvania, Penn himself abandoned his claim of government to Delaware.
4. The record shows that Penn's deputy governors in Pennsylvania, though appointed as governors of Delaware from 1702 until the American Revolution, were so appointed only upon the execution of a declaration by Penn

III. (e) *The Crown's Claim of Title.*

and his successors that the approval of the governors should not be construed to diminish the Crown's claim of title to Delaware.

5. Even if there was a prescriptive right in favor of Penn and his successors, such right did not extend to any part of the river, east of the main ship channel thereof, because there was no possession of such part of the river or any exercise of jurisdiction therein by Penn or his successors prior to the Revolution.

The Act of Union.

The Act of Union of 1682 whereby Penn sought to annex Delaware to Pennsylvania was ineffective for that purpose not only because Penn had no power of government over Delaware, but also because the Act itself was never submitted to the Crown for approval as required by the grant for Pennsylvania. After numerous arguments and quarrels on the subject, the Delaware Counties separated in 1701. The details of this have been discussed under the heading "Government of Delaware Counties from 1682 to 1776."

The Crown's Rejection of Penn's Claim of Title.

The judgment of the Privy Council of November 13, 1685, whereby the eastern half of the area, "lying towards the Bay of Delaware and the Eastern Sea," was held to belong to His Majesty (*Ex. 264*), has been mentioned under the heading "Government of Delaware Colonies from 1682 to 1776," and is further discussed under the heading "Litigation Relating to Title." In 1709 the matter again came before the Privy Council on the petition of Lord Baltimore to review the judgment of November 13, 1685. The proceedings are set forth in *Exhibits 630, 631*. The result was that said Order of Council was "ratified and confirmed in all its points."

III. (e) *The Crown's Claim of Title.*

In 1769 a petition was presented by Maryland and Pennsylvania for confirmation of proceedings respecting the boundaries of those provinces. The proceedings were approved but with a declaration reading as follows:

“• • • such Approbation shall not be construed in any manner to diminish or affect His Majesty's Claim of Right to the three lower Counties of Newcastle Kent and Sussex nor Prejudice any Prerogative Power Property Title or Interest of His Majesty His Heirs and Successors, in or to the said Territories Districts or Tracts of Land or any part thereof, nor any Estate or Interest of any of the Planters, Proprietors, Tenants, or Occupiers of any Lands Tenements or Hereditaments lying within the same, which the Petitioners had not a Right or Power, by Virtue of the respective Charters or Grants, under which they Claim to bind or Conclude” (*Exhibit 290*).

Penn's Abandonment of Claim to Government of Delaware.

Penn's claim of title to the soil and government of Delaware was continuously under attack, both in England and in that colony, from 1702 to the American Revolution, and afterwards in the state of Delaware, where it was repudiated by the Legislature in 1792-4. See subhead (f), “Repudiation of Penn's Title.”

This trouble became so serious that the union Penn had formed between the three lower counties and Pennsylvania was shipwrecked upon those doubts of his title to the lower counties, and in 1703, in order to save his title to the soil of the three lower counties, Penn offered to surrender not only his *claim* of government therein but also his *acknowledged* powers of government in Pennsylvania. This intention was evidenced a few months after the ruling of the Lords Commissioners that the Duke of York could not alienate the powers of government in East

III. (e) *The Crown's Claim of Title.*

and West Jersey conferred upon him by the grants of 1664 and 1674 (*Ex. 11, pp. 31-36; Ex. 13, pp. 12-13*).

Chalmers (*Ex. 229*) refers to the accusation in June, 1702, of Randolph, alleging that Penn "had usurped the government of the three lower counties on Delaware" (*Ex. 433*), and says—

"When he (Penn) found that his answers were disregarded as unsatisfactory * * * he proposed to the Secretary of State to resign his jurisdiction to the Queen" (p. 14).

He describes the negotiations for the surrender which finally failed, due, he says, to the opinion of Lord Godolphin and others that the purchase would be unprofitable, the opposition of Penn's mortgagees and creditors, and a disinterested ministry (p. 15).

The first documentary evidence of the proposal of surrender appears in a letter of May 21, 1703, from the Lords Commissioners to the Earl of Nottingham, then Principal Secretary of State (*Ex. 440*), enclosing copies of letters passing between them and Mr. Penn on that subject, and stating that they are unable to do anything about it (*Ex. 298*). The Earl of Nottingham's reply of June 8, 1703, (*Ex. 299*) states that he has acquainted the Queen with that letter and that she instructed him to advise the Lords Commissioners that she is willing to treat with Penn for his proprietary government, and desires them to hear his proposals and terms and report to her.

Thereupon, on June 10, 1703, Secretary Popple (*Ex. 300*), advised Penn of the receipt of the Queen's instructions respecting his proposal for the surrender of the government of "Pennsylvania", and requesting him to lay his proposals before them in writing on the following Tuesday.

III. (e) *The Crown's Claim of Title.*

On January 18, 1703, Penn presented a document (*Ex. 620; Ex. 301*) which purports to be his proposal for the surrender "of ye government of my Province of Pennsylvania," as the heading reads, but, in item numbered one, it asks that the government of the Province of Pennsylvania and territories continue as a "distinct government under the Crown, that it hath always been and now is."

Item number three prays "that a patent pass to me and my heirs for the three lower counties of New Castle, Kent and Sussex, called the counties annexed, all territories of Pennsylvania, according to a grant begun by ye late King James, and had been finished had he stayed the week longer at Whitehall, as may appear by a bill drawn in pursuance of his warrant signed Will Williams, Attorney and Solicitor General."

The seventh paragraph relates to rights, privileges, jurisdictions, powers, etc., granted to him "by patent as Lord of the Soil and Waters and Proprietor of the Country," but no patent is specified, and it probably refers to that of Charles II to him in 1680 for Pennsylvania (*Ex. 229, p. 13*).

This document is dated twenty-one years after the supposed grant of March 22, 1682-3, and yet in paragraph three Penn admits that he has no grant for the three lower counties, and undertakes to explain why he had not obtained one. He refers to the proposed grant of December 10, 1688, offered as Exhibit 550.

A connection between Penn's proposal of surrender of government and the surrender of government by the proprietors of East and West Jersey is indicated by Exhibit 302, containing a report from the Lords Commissioners to Parliament of June 18, 1703. The *Proceedings and Debates of Parliament* (Vol. III, pp. 16-18) contains a report which refers to Penn's proposal (partly included

III. (e) *The Crown's Claim of Title.*

in Exhibit 621) and states that having prevailed upon East and West Jersey to surrender rights of government, endeavors have since been continued with others.

It sets forth Penn's proposal for surrender—"Of his government of Pennsylvania" (*Ex. 301, p. 1*), and states that Penn demands larger powers than he offers to yield—

"and likewise a new and positive grant of the three lower counties, called Newcastle, Kent and Sussex to which we do not find he has any good title, though he has a long time exercised the same authority there as in the province of Pennsylvania" (*p. 3*).

It states that they have prevailed with Penn to give—

"a declaration under his hand, that her Majesty's approbation (of governors) should not be construed in any manner to diminish or set aside her Majesty's claim of right to the three lower counties."

The report further states that thereupon her Majesty was pleased to approve of John Evans, as Deputy Governor (*p. 4*).

A letter from Penn dated January 2, 1704, to the Lords Commissioners (*Ex. 305*) waives the conditions of surrender stated in his proposal (*Ex. 301*), and states that he will be satisfied—"with my seigniory and proprietary privileges," and one or two other exceptions not pertinent. He does not refer to the desired patent for Delaware, mentioned in paragraph 3 of the proposal.

In reply thereto, Secretary Popple, on January 11, 1704 (*Ex. 307*), pursuant to instructions of the Lords Commissioners of the day before (*Ex. 306*), submitted to Penn certain queries, with a request for answer in writing respecting the specifications mentioned in his letter of January 2, 1704 (*Ex. 305*). The first query is—

"What is meant by seigniory and proprietary privileges?" A full and distinct account is desired of what

III. (e) *The Crown's Claim of Title.*

those privileges are and how far they are understood to extend. Preceding the queries is a statement that there was read to the Lords Commissioners a draft of a letter upon Penn's—

“proposal for surrendering his *right* of government of Pennsylvania and his *claim* to the government of the three lower counties” (p. 1).

Penn's answer to those queries, dated January 12, 1704-5, contains no reference to, or mention of, the three lower counties (*Ex. 308*).

An order of the Lords Commissioners, dated March 9, 1704-5, (*Ex. 309*) recites Penn's desire to know what he is expected to surrender so that he can prepare a draft. They ordered that he be advised that they—

“expect he should surrender his letters patent for the government of Pennsylvania, and all the powers therein contained, reserving to himself the propriety of the soil and the quit-rents thereof.”

No reference is made to the three lower counties.

In response to that order, Penn submitted, on May 23, 1705, a draft of a proposed new patent for Pennsylvania and the three lower counties (*Ex. 310*).

That exhibit includes the notes that appear on the margin of the original, now on file in the Public Record Office, of which Exhibit 310 is a correct printed copy. At the outset Penn recites that he is proprietary governor of Pennsylvania—“and the territories thereunto belonging.”

The marginal criticism says—

“These words to be left out; for that, in the patent for Pennsylvania there is no mention of territories belonging thereto.”

III. (e) *The Crown's Claim of Title.*

The next reference purports to secure to Penn his rights, properties, etc., of and within the said province—

“and the territories thereunto belonging or appertaining or reputed to belong or appertain.”

The marginal criticism says—

“these words to be left out alover for ye reason aforesaid” (p. 1).

The expression—“& territories” appears once on page 2, five times on page 3, once on page 4, thrice on page 5, twice on page 6, twice on page 8, and twice on page 9, without any marginal notes respecting them. The marginal note on page 1, to the effect that these words are to be omitted—“alover for ye reason aforesd”—was intended to mean that all reference to the territories was to be omitted.

It recites that said province has been—“divided into six counties.” The marginal criticism is—“which are they?” (p. 6).

The reason for this question is, at that time there were three counties in the Province of Pennsylvania and three counties in the Delaware territory. The Lords Commissioners had no intention of acknowledging the three lower counties as having any part in this transaction.

The proposal for a discharge and release—“of and from all forfeitures, rents, quit-rents, arrearages” is accompanied by a marginal criticism as follows:

“This is proper for the previous consideration of the Ld. H. Treasurer, as immediately relating to ye Revenue” (p. 9).

Inasmuch as these are supposed to apply not only to the province but also to the—“territories or reputed territories thereof or any part of the same,” it is obvious that Penn intended thereby to avoid any obligations for rents, profits or quit-rents under the second deed of feoff-

III. (e) *The Crown's Claim of Title.*

ment from the Duke, which required Penn to account for half of the rents, issues and profits of the territory below the 12 mile circle, of which he had made no accounting or payments, as well as to any punishment for exercising powers of government in the three lower counties without authority from the Crown, which was a repetition of his attempt, more fully recited in the proposed grant of December 10, 1688.

The omission of any reference in this proposed draft to any specific grant for the three lower counties indicates that Penn had abandoned such a scheme since the criticism thereof contained in connection with his first proposal (Ex. 304, paragraph 3d). He contented himself in this proposed draft with a vague and indefinite reference to—

“territories thereunto belonging or appertaining or reputed to belong or appertain to the province of Pennsylvania.”

And even this inclusion is criticized.

Such a grant as he here proposed was never made.

Exhibit 310 (pp. 11-12) contains Penn's observations on the objections of the Lords Commissioners, as noted in the margin of his proposed draft. His defense of the inclusion of the word "territories" is contained in the first paragraph of these observations. He makes no assertion of title whatever. The reasons which he gives for including them are purely political, and not in any sense legal (p. 11).

He does not answer the question on page 6 as to which are the six counties there referred to.

The proceedings of the Lords Commissioners on November 13, 1705 (*Ex. 1148*), recite the attendance of Penn, and state that he was made acquainted with the several objections their Lordships had to the new draft of a patent desired by him.

III. (e) *The Crown's Claim of Title.*

They recite that Penn desired that draft of patent to be returned to him for amendment, and also his draft of surrender.

On January 15, 1705-6, Penn submitted a new draft of his proposed surrender (*Ex. 312*). It purports to surrender, resign, release, and quit claim to the Queen all of Penn's powers and authority to enact legislation within the province of Pennsylvania—

“& the territories thereof or thereunto reputed to belong”

and other governmental powers, there enumerated (p. 1), which he enjoyed or claimed under

“any letters patent from the crown of England or otherwise howsoever” (p. 2).

He does not recite any of his muniments, or claims, of title, thereby endeavoring to avoid the criticisms of his mention of the three lower counties in the earlier draft.

Upon this new proposal the Lords Commissioners made a report on February 5, 1706-7 (*Ex. 313*), reciting the instructions from the Queen to trade with Penn for the surrender of

“the proprietary government of Pennsylvania, and his other *claims and pretensions* of government to the adjoining territories.”

They recite the grant of Pennsylvania, and express the opinion that certain advantages, therein enumerated, would result to the Crown from the surrender of the powers of government therein contained (p. 1).

They approve of the proposal to return that government to the Crown and make certain observations as to the terms. They think the surrender ought to be absolute and unconditional, including—

“all right, claim and pretension, as well to the government of Pennsylvania, as to that of Newcastle and the two lower counties” (p. 3).

III. (e) *The Crown's Claim of Title.*

Having raised no question as to Penn's right to the powers of government under his grant for Pennsylvania, but having raised serious questions concerning his
 "claim and pretension"

to the three lower counties, the Lords Commissioners here suggest a method of disposing of the whole proposition in one document without undertaking to determine the validity of the claims to the three lower counties.

Since this report contains no reference to any grant of the Crown for the Delaware counties, or to Penn's deeds of feoffment, it appears that he made no claim of title to the Delaware counties thereunder.

On March 18, 1706-7, William Lowndes, then Secretary to the Treasury, sent a communication to the Lords Commissioners acknowledging receipt of their report of February 5, 1706-7, on Penn's proposed

"surrender of the proprietary government of Pennsylvania and his *other claims and pretensions* of government to the adjoining territories,"

and requesting them to reconsider their report and advise the Lord Treasurer of the advantages which the Crown will receive from purchasing back said colonies (*Ex. 314*).

In compliance with that request the Lords Commissioners, on May 12, 1707, directed eight queries to Penn for fiscal information (*Ex. 315*). Penn's reply was submitted July 2, 1707 (*Ex. 516*).

Exhibit 318 is a letter, dated July 31, 1710, from one of the Secretaries of State, transmitting to the Lords Commissioners a memorial from Penn respecting the surrender of his government, and requesting an investigation and report (p. 1).

It refers to Penn as "Proprietary and Governor of Pennsylvania" only. The memorial is entitled, "The

III. (e) *The Crown's Claim of Title.*

Memorial of William Penn, Proprietor and Governor of *Pennsylvania*, in relation to his government in *that province.*" (Italics ours.)

It recites the grant of Charles II to Penn for *Pennsylvania* (p. 2) and proposes to surrender the government *thereof.*

He recites his—

"Very great expense and trouble in asserting the right of the Duke of Yorke, to a tract of land on the lower parts of Delaware bay (p. 3) against the Lord Baltimore, the principal part of which tract the said Duke had granted to William Penn."

He recites that, afterwards the Duke, when on the throne—

"Did actually give him the whole, but his sudden removal prevented the full execution of the grant intended for a more entire confirmation thereof, with all necessary powers of the government."

He prays that this affair may be settled and confirmed (p. 4).

Acting on that memorial, Secretary Popple, on November 10, 1710 (*Ex. 319*), informed Penn that the Lords Commissioners have under consideration the proposal for surrender—"of your government of Pennsylvania" and are taking notes of the expense which he had described in Exhibit 316, and submits six questions relating to the same information requested previously on May 12, 1707 (*Ex. 315*). Penn submitted a reply thereto on December 7, 1710 (*Ex. 320*) in which he makes no mention of the three lower counties.

On February 2, 1710-11, Penn submitted a new memorial, supplementing his previous proposals or memorials, respecting the surrender of government (*Ex. 321*). It is en-

III. (e) *The Crown's Claim of Title.*

titled—"A Memorial from Will'm Penn, Esq., Propriet & Govern'r—Chief of the Province of Pennsylvania" (p. 1). *It does not mention the three lower counties and contains nothing but complaints concerning his misfortunes.*

Exhibit 322 contains two documents from the Lords Commissioners, dated February 13, 1710-11.

The first is a letter of transmittal to Lord Dartmouth, then Secretary of State, of a report, which recites consideration of Penn's memorials as—

"Proprietary and Governor of Pennsylvania, in relation to his government of that province" (p. 1).

They express the opinion that revesting—"The government of Pennsylvania" in the Crown would benefit the trade of the Kingdom in the ways enumerated in their earlier report of February 5, 1706-7 (*Ex. 313, p. 3*).

It states that, having laid before her Majesty the State of the Case of William Penn—

"In relation to his government of Pennsylvania" (p. 4).

they recommend that such surrender should be absolute and that Penn should renounce—

"all right, claim or pretension whatsoever as well as to the said government of Pennsylvania as to that of Newcastle and the other lower counties" (p. 5).

Nowhere else in this report is there a reference to the three lower counties. Every other reference is limited to the province of Pennsylvania. From the recitals therein of Penn's claims, it would appear that he had *abandoned* entirely any idea of a grant of the three lower counties and his information, upon which the Lords Commissioners base their conclusion of the advantage to the Crown resulting from this surrender, related to the Province of Pennsylvania, alone.

III. (e) *The Crown's Claim of Title.*

Through Edward Harley (Earl of Oxford) then Secretary to the Treasury, the Lord Treasurer, on October 6, 1711, sent to the Attorney General the report of the Lords Commissioners on Penn's proposed surrender of government of Pennsylvania with a copy of Penn's grant of Pennsylvania, requesting perusal thereof and other papers or evidences which he may think necessary to be produced by Penn.

"And when you shall be fully satisfied as to his title, that you will please to prepare ye draft of such a surrender thereof to her Majesty."

and submit the same to the Lord of the Treasury (p. 1) (*Ex. 323*).

The original of this document bears an endorsement indicating that it was used in evidence in connection with the testimony of Simon Clement (uncle and advisor of Hannah Penn) in a proceeding between Hannah Penn and Springett Penn respecting the estate of William Penn (p. 2) but for what purpose, or to what effect, the record fails to disclose.

Under date of February 25, 1711-12, Edward Northey, Attorney General, reported to Earl Oxford (Secretary to the Treasury) and Earl Mortimer (Lord Treasurer) (*Ex. 325*).

He recites consideration of the report of the Lords Commissioners (*Ex. 322*), and of Penn's grant for Pennsylvania—

"with other deeds relating to Mr. Penn's title thereto, & to the government of the tract of land on Delaware river and bay now called the town or colony of Newcastle alias Delaware."

and says "he has made out to me his title thereto."

He submits a draft of surrender of the powers of government of both territories (p. 1).

III. (e) *The Crown's Claim of Title.*

Defendant claims that the phrase "made out to me his title thereto" as here used, means that, by the documents presented, Penn had convinced the Attorney General that he had title not only to Pennsylvania but also to the three lower counties. This interpretation is incorrect for several reasons:

1. It was merely a technical term used to indicate a representation of title, or the presentation of the documents under which title is claimed.

2. In 1701-2 certain petitions and memorials of the members of assembly of the three lower counties were presented to the Lords Commissioners wherein they prayed that Penn be obliged "to make appear" what title he had to the three lower counties (*Ex. 425*). The Lords Commissioners on May 12, 1702, appointed a day for hearing and directed Penn "to make out his title" (*Ex. 426*). The same term is repeated in Exhibit 427.

When Penn appeared and "made out" his title, the Lords Commissioners held it was unsatisfactory (*Ex. 436*).

In *Martin v. Waddell*, 16 Peters 367, 407, Chief Justice Taney used that term as follows,— "The plaintiff makes title under certain charters." That this was not intended to mean that plaintiff had *proven* his title is shown by the fact that it was a suit in ejectment in which a jury had found for the plaintiff (*p. 369*) and the decision of this court reversed that judgment and held that the title plaintiff *made out* was bad (*p. 418*).

In a number of the documents the Lords Commissioners directed Penn "to make appear" what title he had (*Ex. 425*) and "to make out his title" (*Exs. 426, 427*). When Penn did "make out" his title before them, they found it unsatisfactory (*Ex. 436*).

III. (e) *The Crown's Claim of Title.*

These citations show that it was a term commonly used as a representation of a claim of title and not as proof of title.

3. There is no subsequent instance in which that opinion was cited or regarded by Penn, or his successors, or by the Crown or its ministers, as deciding Penn's title to the three lower counties. The declarations in favor of the Crown's rights in the three lower counties continued until the American Revolution, and that report of the Attorney General was never subsequently mentioned anywhere, not even by Sir Edward Northey himself in an opinion on the same question six years later.

4. That occasion was on October 21, 1717, when he (with the Solicitor General) rendered an opinion on the application of the Earl of Sutherland for a grant of the three lower counties (*Ex. 471; 624*). After hearing the parties and considering all that was presented on behalf of the Earl of Sutherland in support of the King's title, and on behalf of the Penns in support of their own, and allowing all presumptions in favor of the suppositions and unsupported claims of the latter, the Attorney General concluded to submit to the Queen's consideration whether—

“it would not be reasonable that your Majesty's title should be established by the court of Chancery before any grant should be made of the premises. And if any grant should be made” he submits “whether the claims of Purchasers or grantees under Mr. Penn who have improved part of the said three lower counties should not be established. *But if Mr. Penn should have a title to the three lower counties by virtue of the two grants made to him by the late King James in 1682 when Duke of Yorke we have not received any answer why he should not account according to his covenant &c.*” (Italics ours.)

III. (c) *The Crown's Claim of Title.*

If Sir Edward's statement in 1711 that "he has made out to me his title" by the two deeds of feoffment, meant that Penn had *proved* his title to the three lower counties, he could not have entertained such a doubt in 1717 when he had the same two deeds, and much more, if he chose to regard it as proof, upon which to decide anew the very same question.

In *Penn v. Baltimore* Mr. Paris, Penn's solicitor, claimed on behalf of Penn that the grant of March 24, 1682/3, of Charles II to the Duke of Yorke for Delaware was delivered by the Duke to Penn as a muniment of his title to Delaware. If that was so, Paris who represented the Penns before the Attorney General on that occasion in 1717 would have produced, and the Attorney General would have mentioned, that grant.

In Exhibit 325 Penn, himself, failed to mention that grant. In Exhibit 471 Penn's representatives claimed title to Delaware for the Duke under the grant of 1664 (p. 5) as an appurtenance to New Jersey. They "presumed" that the late Duke "might" have some other grants (p. 6) but they produced none, although the Patent Rolls were available to show whether any were granted, and the grant of March 22, 1682-3 was of record there. If it had not been surrendered (as the Earl of Sutherland showed it had been (p. 3)), it could have been found with the deeds of feoffment and the Pennsylvania grant among Penn's papers.

Exhibits 752 and 625 contain references to a long series of proceedings respecting the proposed surrender of government. In most instances the three lower counties are not mentioned, and where mentioned, only the deeds of feoffment are cited. The only reference to the grant of March 22, 1682/3 is followed by the words "if the same had been granted to him, the said Duke" (*Ex. 625, p. 2*).

III. (e) *The Crown's Claim of Title.*

That exhibit recites a warrant, authorized by Queen Anne, for the payment of 1000 pounds Sterling on account of an agreement of acceptance of the surrender of government, for 12,000 pounds Sterling (*Ex. 625, p. 3*). That warrant was dated September 9, 1712 (*Ex. 625, pp. 4-5*).

It recites the proposals for surrender and transfer to the Queen of "the several powers of government granted to him by letters patent of our late royal uncle, King Charles II and by deeds from our late royal father, King James I (when Duke of York) in Pennsylvania and other places in those parts."

This warrant is dated thirty years after the supposed grant of March 22, 1682-3—yet it does not mention such a grant. With respect to Penn's title to the Delaware counties it mentions only the deeds of the Duke of York to Penn.

Exhibit 480 is an extract from a letter from Simon Clement, uncle and advisor of Hannah Penn, to James Logan, respecting title to three lower counties dated March 29, 1723. It states that "Our hopes are that when we can once come to treat with the ministry about confirming the agreement for the sale of the powers of government, we shall get that title (three lower counties) confirmed."

The exhibits relating to the proposed surrender of government show that, during the period of negotiations, covering 20 years (during ten of which Penn conducted the negotiations in person) Penn's title to the three lower counties was continually questioned, and not once did he, or anyone on his behalf, produce, or claim to have, the grant of March 22, 1682/3, or any other royal grant. On the contrary Penn repeatedly admitted he had no such grant, and explained why he did not have it. At the very last, Mr. Clement expresses, in 1723, the lingering hope

III. (e) *The Crown's Claim of Title.*

that the Penn title to the three lower counties may yet be confirmed.

These "various and sundry acts of the Crown of England, its Ministers and Officers" did not "recognize and confirm" the title and possession and the power of government of Penn and his successors, but, on the contrary, continuously and consistently disputed his and their claim. There is nothing in this record which shows royal approval of Penn's claim to either the title or the government or even of acquiescence therein. No prescriptive right can be justly predicated upon such a record.

Approval by the Crown of Deputy Governors.

Although the royal grant to Penn for Pennsylvania (*Ex. 361*) constituted him the true and absolute proprietor of all the lands it reserved to the Crown the faith and allegiance of Penn and the inhabitants of the colony, and the sovereignty thereover (p. 3). The right to appoint deputies was recognized, although not expressly conferred.

From 1682, when the deeds of feoffment were made, until the death of Charles II on February 6, 1684/5, Penn assumed control over the government of the three lower counties as an adjunct of his province of Pennsylvania was not disturbed.

The administration of the affairs of Pennsylvania with the three lower counties was founded in reason. Scharf states that at that time each of the three lower counties contained from 100 to 120 families, "hardly enough to support a well regulated government" (*Ex. 1154, p. 8*), and the seat of the royal government of New York was too remote for any effective administration.

Parliament, in the exercise of sovereignty over the province in 1694/5, passed an act for preventing frauds

III. (e) *The Crown's Claim of Title.*

and for the regulation of trade in the colonies (7-8 *William III, Ch. 22, 9 Stat. at L. 435*).

Section 16 of that act required that all governors nominated and appointed by such proprietaries shall be allowed and approved by the King and take certain prescribed oaths before entering upon their respective governments (*Ex. 1037*).

On May 8, 1697, Mr. Popple, Secretary of the Lords Commissioners, advised Penn (*Ex. 1038*) of an address of the House of Lords recommending the strict observance and execution of certain acts of parliament respecting the colonies, and proposing to His Majesty that the proprietaries of plantations, where the King has no governors of his own nomination, should enter into security on behalf of their deputy governors to obey and observe all instructions sent them under the acts of parliament. The letter encloses a form of a bond for Penn's compliance. Having received no response from Penn, Mr. Popple again addressed him on December 30, 1697 (*Ex. 1039*). Penn replied, under date of February 14, 1697-8 (*Ex. 1040*), complaining that he should be required to give security "for deputies of the King's approbation" and stating that if he may appoint deputies he is sufficient security for their obedience of the acts of navigation. He suggests that, if security be required, no deputy should be approved who did not give his own security.

On August 31, 1699, an Order in Council was issued (*Ex. 1041*) calling attention to the fact that Col. Markham resided in the Province of Pennsylvania as Lieutenant Governor for Penn, acting *without* His Majesty's allowance or approbation for the same as required by act of Parliament. It orders disallowance and disapprobation of Mr. Markham as Lieutenant Governor and suggests that Penn nominate another person to be presented for his Majesty's approbation.

III. (c) *The Crown's Claim of Title.*

In compliance with that Order, Penn issued a commission, dated October 27, 1701 (*Ex. 1042*) to Andrew Hamilton as Deputy Governor. In that commission he recites that he is the absolute proprietary and governor in chief "of the Province of Pennsylvania and counties thereunto belonging." He recites the grant of March 4, 1680, from Charles II to himself for the province of Pennsylvania with powers of government, etc., and the deeds of feoffment from the Duke of York for the territory of the three lower counties, to which he refers as the "territories belonging to the said Province of Pennsylvania or counties thereunto annexed," with powers of government. He alleges no grant from King to the Duke, or to himself (p. 1).

He appoints Andrew Hamilton deputy or lieutenant governor "of said province and territories" (p. 1) and provides that the commission shall "continue in force till my further order" (p. 2). There appears to be no record of any action by the Privy Council on that appointment until Penn submitted a petition on October 26, 1702 (*Ex. 1043*) praying that Andrew Hamilton should receive "at least a temporary approbation." It was referred to Lord Cornbury for examination and report in view of the imputation that Hamilton lies under "which hath hereto interfered with his permanent appointment." (He was considered ineligible because he was a Scotchman.)

On November 11, 1702 the Commissioners reported to Her Majesty (*Ex. 1044*) their approval of the appointment of Hamilton subject to the reservation that such approval—

"be not construed or extended in any manner to diminish or set aside your Majesty's right and title to the three lower counties upon Delaware river adjoining to Pennsylvania" (p. 1).

III. (e) *The Crown's Claim of Title.*

They also recommend that Penn be required to give a speedy answer in writing to four queries delivered to him by the Lords Commissioners in May, 1702, the fourth query of which is as follows:

"4. By virtue of what title does he, the said Mr. Penn pretend to the propriety of the soil and power of government of the 3 lower counties."

The Privy Council, by order dated November 11, 1702 (*Ex. 1045*), approved Hamilton as deputy governor

"of Her Majesty's Province of Pennsylvania, and territories thereunto annexed"

for one year, conditioned upon furnishing of security.

"And providing also that the said William Penn do further return to Her Majesty's Commissioners for Trade and Plantations a direct answer in writing to the 4 queries delivered to the said William Penn some time past" (p. 2).

Also that Penn

"do further declare under his hand that Her Majesty's said allowance shall not be construed in any manner to diminish or set aside Her Majesty's *right and title* to the three lower counties upon Delaware river" (p. 1).

Penn's answers to the four queries, mentioned in Exhibits 1044 and 1045, were received by the Lords Commissioners, November 30, 1702. The answer to the fourth query was as follows (*Ex. 1044*) (p. 3):

"My title to the three lower counties is by deeds of feoffment from the Duke of Yorke and his letter of Attorney to his President & Surveyor General and Clerk of ye Peace, to give me possession, and submission, which they readily did by Turf and Twig and Water; as also by a ready acknowledgment of me as governor in open Court of Sessions,"

States that the Duke—

"intended a confirmation and further grant by letters patent, when King; as appears by Sr. Wm.

III. (e) *The Crown's Claim of Title.*

Williamses draft, by his order in '88; but obstructed by the disorder ye Court was in a little before ye Revolution, and which I humbly hope, for the reasons therein expressed, will not be refused to be perfected by our Gracious Queen" . . .

In which enterprise he hopes he shall not want (lack) the Lords Commissioners' mediation.

No mention is made of a royal grant of March 22, 1682/3.

On December 1, 1702, Mr. Popple (*Ex. 1046*) acknowledged Penn's answers to the four queries, which had been read before the Lord's Commissioners,

"And they have thereupon directed me to acquaint you, that though they do not think it altogether satisfactory, yet, . . . they are willing at present to acquiesce with it."

"They have likewise ordered me to remind you, that by Her Majesty's order in council of the 11th of the last month, you are further required to declare under your hand, that Her Majesty's allowance of Colonel Andrew Hamilton to be your deputy governor in Pennsylvania shall not be construed in any manner, to diminish or set aside Her Majesty's right and title to the three lower counties upon Delaware river."

He states that they expect a performance of this requirement and thereupon will issue an order for the taking of security for Hamilton.

In compliance with that demand Penn on December 4, 1702 submitted a declaration respecting Hamilton (*Ex. 1047*). Therein he declares and promises that he

"will take no advantage of the Queen's royal approbation of my deputy governor, Colonel Andrew Hamilton, for one year to elude or diminish her pretensions or claim of right to the government of the lower counties upon Delaware, now under the

III. (e) *The Crown's Claim of Title.*

administration of said Hamilton in conjunction with the Province of Pennsylvania."

A letter of the same date (*Ex. 1048*) to the Lords Commissioners, transmitted that declaration, in which Penn states that he has signed—"a paper that I hope will please you, and can sign no other without signing away those dear bought counties * * * as well in soil as government."

On December 8, 1702, Secretary Popple acknowledged (*Ex. 1049*) Penn's letters of the 4th and 7th of December, 1702, and stated that the papers enclosed were laid before the Lords Commissioners, who upon consideration of Penn's declaration—

"relating to Her Majesty's right to the three lower counties upon Delaware river,"

"not finding the same so conformable to Her Majesty's order in council as they conceive it ought to be, their lordships have directed me to return it you, and therewith also to send you (as I do here enclosed) the form of a declaration prepared by ourselves in conformity to Her Majesty's said order."

Which the Lords Commissioners

"desire you to dispatch accordingly upon 4 large papers."

He states that upon receipt thereof they will not delay what remains to be done under Her Majesty's order.

The form reads:

"I, underwritten, do by these presents declare and promise, that the Queen's royal approbation and allowance of Colonel Andrew Hamilton to be deputy governor of Pennsylvania and the three lower counties upon Delaware river, for one year only shall not be construed in any manner to diminish or set aside Her Majesty's claim of right to the said three lower counties," etc. (p. 1).

III. (e) *The Crown's Claim of Title.*

On December 10, 1702 (*Ex. 1055*) Penn submitted a new declaration in that form (*Exs. 1050, 1051*).

An order of the Privy Council of January 21, 1702/3 (*Ex. 1052*) states that they had required from Penn the several conditions prescribed in that Order in Council (p. 1) and received a certificate of security, a declaration with respect to Her Majesty's claim of right to the three lower counties, and Penn's answer to the four queries; and that they are—

“further examining the pretensions and claim of Mr. Penn to the power of government in the three lower counties” (p. 2).

They recommend that the royal approbation of Hamilton be extended to May 1, 1704.

The Order in Council approves that report (p. 3) extending Andrew Hamilton's Deputy Governership to May 1, 1704 (*Ex. 1053*).

The proceedings respecting the approval of John Evans as Deputy Governor, from his nomination July 7, 1703, until his approval July 30, 1703, are shown in Exhibits 1054 to 1059, inclusive. The same declaration was required and made respecting the Crown's claim of title to the three lower counties (*Ex. 1058*), and the approving order of the Privy Council declares the royal approbation of Evans' appointment as Deputy Governor of *Pennsylvania* “without limitation of time,” and of the *three lower counties* on Delaware “*during his Majesty's pleasure only.*”

From this time forward the same declaration was required and the same distinction was made between the tenure and term of deputy governors of *Pennsylvania* and of the three lower counties, *with respect to each and every deputy governor down to the time of the American Revolution* (*Exs. 1037-1132*).

III. (e) *The Crown's Claim of Title.*

During the proceedings respecting the appointment of Gookin as Deputy Governor, from his nomination on May 20, 1708 until his approval on July 8, 1708 (*Exs. 1060-1066*), Penn again rebelled against the form of declaration. On June 29, 1708 (*Ex. 457; Ex. 622*) he wrote to the Commissioners referring to a conversation which he had with some of them about letting things return to their former method and balance, and in which conversations, he says, he hinted at the mischiefs that might follow breaking up the former method and balance.

He refers to "factious tempers" (meaning doubtless his critics in the three lower counties), and says—"I hope therefore you will think fitt to returne & contenance the Union." He regards as severe treatment—"The Bords entering upon my Title to the lower Countys, after So solemn a Deed of possession given me," &c. (p. 1).

A clear understanding of the meaning of the subsequent parts of this letter requires a reference to the endorsement written on the original thereof in the British Public Record Office, reading:

"Letter from Mr. Penn relating to the declaration he is to make to her Majesty's right to the three lower counties adjoining to Pennsylvania."

Penn says:

"Let it not be expressed to the Queen's right at large but add that of *government* of the lower counties, which was all the Board at worst pretended to * * * which I am ready to sign; and as that was the true intent of the declaration I submitted to, till I either surrendered my government at large or *got* * * * *the government thereof* according by a patent for the same."

He appeals to the Board—"To make the present case as easy for me * * * as your good sense and good honor * * * will allow you" (p. 2).

III. (e) *The Crown's Claim of Title.*

That exhibit, taken in connection with Exhibits 1044, 1045, 1046, 1047 and 1052 shows that at that early date a sharp controversy existed between Penn and the Crown Ministers about his *title* to the three lower counties. He did not claim "the government thereof" for which he admitted he had no grant.

More than half a century later the counsel for his family repeatedly stated, in the Breviate, that the suit of *Penn v. Baltimore* related only to "the boundaries and title of soil" (*Ex. 1169, pp. 6, 7*). Nothing was there claimed about the *powers of government*.

The first declaration submitted by Penn on December 4, 1702, declares that he "*will take no advantage of the Queen's royal approbation * * * to elude or diminish her pretensions or claim of right to the government of the three lower counties upon Delaware.*" (Italics ours.)

By this language he tried to limit the question to "*pretensions or claim,*" instead of *right*, and to the "*government,*" instead of *title*.

In his letter accompanying that declaration Penn declared that he could not sign any other form "without signing away" those counties "as well in *soil* and *government.*" He was afraid of his title to the *soil*. He was willing to acknowledge the Crown's claim of right to the *government*.

The Lords Commissioners refused that form of declaration (*Ex. 1049*) and prescribed a form to protect the Crown's right "*to the said three lower counties,*" which clearly implied title to the *soil* as well as to the *government*. When the declaration in the prescribed form was submitted to the Privy Council by the Lords Commissioners, they announced that they were further examining the pretensions and claim of Penn "*to the power of gov-*

III. (e) *The Crown's Claim of Title.*

ernment" of the three lower counties, thereby indicating that the question of title to the *soil* had been disposed of in the reservations in favor of the Crown (*Ex. 1052*).

In a letter of June 29, 1708 (*Ex. 457, 622*) Penn pleaded for the recognition of his claim of *title* under the deeds of feoffment from the Duke of York. He does not mention or set up, any claim whatever under the royal grant of March 22, 1682. He urged that the declaration be changed so as to limit the reservation of the *government* of those counties, at least until the surrender of the government of Pennsylvania should be disposed of.

Here is a plain confession by Penn of the insufficiency of his title to the *government* and an admission that he had no patent or grant therefor. In spite of these pleadings, the Commissioners insisted upon their form of declaration, and Penn submitted such a declaration on July 2, 1708 (*Ex. 1065, 623*) with a letter in which he says—

"I have submitted to what you are pleased to say you could not help, and that time and other circumstances will not allow me to set that matter of the Queen's right to the lower counties in a better explanation."

"The scruple being only about *right of government*."

Thereupon Gookin was approved by the Privy Council as Deputy Governor of *Pennsylvania* "without limitation of time" and of the *three lower counties* "during his Majesty's pleasure only."

On September 8, 1709, the Commissioners reported (*Ex. 459, 654*) upon certain laws passed in Pennsylvania, which had been submitted pursuant to the requirements of Penn's charter. One of those acts, entitled—"An act for the further securing the administration of the government" purporting to apply to Delaware, as well as to Pennsylvania, provided that in case of the death, absence

III. (e) *The Crown's Claim of Title.*

or removal of the Deputy or Lieutenant Governor—"of said three counties," Newcastle, Kent and Sussex, the president of the council of the Province of Pennsylvania shall assume the administration of Government, and, with the advice and consent of the Speaker of the House of Representatives of said three lower counties and the three presiding magistrates for the said three counties, said speaker and magistrates shall have full power and authority as lieutenant governor of these counties as effectually as a deputy or lieutenant governor, commissioned by the governors or governor-in-chief and approved by his Majesty. It repeals a similar act previously enacted.

(This act is given in Volume 1, p. 101, of the Laws of the Government of Newcastle, Kent and Sussex.)

The Commissioners' report (*Ex. 459*) states that they have had the Attorney General's opinion on that act and they object thereto because it eludes the requirement of royal approbation of Lieutenant Governors.

On October 24, 1709 (*Ex. 460*), the Privy Council approved the report of the Lords Commissioners and disallowed the act for the reasons therein stated.

On September 13, 1716, the Privy Council received Penn's petition for the approval of William Keith as Lieutenant Governor, reciting Penn as absolute proprietary and Governor-in-Chief of the Province of Pennsylvania, and nominating Keith "to be Lieutenant-Governor of said province of Pennsylvania."

There is no mention of the three lower counties. It was referred to the Lords Commissioners (*Ex. 1067*) and the subsequent proceedings thereon, including the royal approval on December 17, 1716, are included in Exhibits 1068 and 1073.

Notwithstanding the omission in the petition of any reference to the three lower counties, the Privy Council

III. (e) *The Crown's Claim of Title.*

approved the appointment of Keith as Governor of the three lower counties, as well as of Pennsylvania, and required of Penn the same form of declaration, reserving his Majesty's right to the three lower counties and provided that his term as Lieutenant-Governor of Pennsylvania "without limitation of time," and of the three lower counties "during his Majesty's pleasure only" (*Ex. 1073*).

On May 14, 1719, Lieutenant-Governor Keith wrote to the Secretary of the Lords Commissioners (*Ex. 473*) stating that Mr. Penn's heir at law has assumed the powers of government in Pennsylvania and sent a commission over to Keith, which, being unattended with any directions from the King or Ministry, he has advised the council and assembly, who desire the publishing of the commission, to suspend publication until his Majesty's pleasure is known (p. 1). He requests that his appointment be approved (p. 2) (*Ex. 747*). This communication followed the death of Penn in 1718, and refers to the succession of his heirs as proprietaries of Pennsylvania.

The proceedings respecting the appointment of Patrick Gordon as Deputy Governor, from the filing of the petition on February 12, 1725, until his final approval on August 2, 1733 (including a continuance after his original expired term), is covered by Exhibits 1074 to 1083, inclusive. The same routine was followed and the same declaration, reserving the Crown's right to the three lower counties, was demanded of, and filed (*Ex. 1076*), by Springett Penn, who represented himself as the grandson and heir of the late William Penn, and by Hannah Penn, widow, and the appointment was made for Pennsylvania without limitation of time, and for the three lower counties during the King's pleasure only. In those proceedings a petition was filed by Springett Penn reciting

III. (e) *The Crown's Claim of Title.*

his claim of title to Pennsylvania under the grant of March 4, 1680, and to the three lower counties under the deeds of feoffment of the Duke of Yorke. No mention is made of any grant from the Crown (*Ex. 628*).

At this time the monotony of the proceedings respecting the approval of deputy governors (as far as the three lower counties were concerned) was broken by the submission of a document entitled "The Case of the Three Lower Counties on Delaware River, in America" (*Ex. 484*), which though unsigned, comes with the sanction of high authority. This document came from the Penn Manuscripts "*Papers Relating to the Three Lower Counties*" deposited in the Historical Society of Pennsylvania, at Philadelphia, and bears an endorsement "In March 1725/6" in the handwriting of Ferdinando John Paris, Attorney for the Penn family. It is cited in *Puttick & Simpson, lib. of Wm. Penn, London, 1872*, and the "*Report of the Resurvey of the Maryland-Pennsylvania Boundary, part of the Mason & Dixon Line,*" 1909 (*Source Material*), p. 277. That document recites that "The Three Counties, which at this day compose the *Philadelphia Assembly*, called the Pennsylvania government, and the other Three lower counties, which compose the *Newcastle Assembly*, are lands lying *all along on the west side of the River and Bay of Delaware*" (p. 1).

It states that the English government at New York granted lands time after time—

"lying on the west side of the Delaware bay and river."

until Penn obtained his grant of 1680 for Pennsylvania.

It states that after that grant, the New York governors continued their authority over the rest of the country and granted lands as formerly until 1682 when Penn pro-

III. (e) *The Crown's Claim of Title.*

duced deeds of indenture from the Duke of York for possession

“of the remainder of the lands on the west side of Delaware . . . to manage for their joint benefit, and to account yearly to his Highness for half of the quit rents, etc.”

It states that upon the sight of these deeds the New York governors desisted from meddling thereafter with the lands on the west side of Delaware. Being the Duke's deputies, they presumed not to question the validity of the deeds or to represent that the Duke's patent from the King extended only to the east side of the Delaware bay and river or to say that the Duke being a subject had no power or right by conquest or discovery, “but only by grant from the Crown” (p. 2).

It states that there was no King's governor near at hand under whose rule the people of Delaware could be more conveniently placed, and that it is claimed that the Crown never intended to make Penn proprietary or hereditary governor of the lower counties, as indicated by the fact that upon the nomination of each deputy governor a distinction has been made between the three counties of Pennsylvania and the three lower counties, not only in the term of the appointment but also in the requirement with respect to the three lower counties that Penn sign a declaration that the King's approbation

“should in no wise diminish the Crown's right to appoint a governor for the three lower counties.”

It states that this is the true manner of Penn's first getting possession of the soil and dominion of the three lower counties and that the family at this time have no other right to show for their pretensions to either the lands or the government thereof (p. 3).

It states that Penn was no purchaser of the three lower counties for any valuable consideration. He merely pro-

III. (e) *The Crown's Claim of Title.*

enured the management and disposal of them, as agent or steward for the Duke of Yorke, on the promise of accounting for one-half of the profits but has never accounted for anything.

It states that the family now claim, from such a long usurped possession, these counties as all their own.

It states that Penn intruded himself into the possession of these lands—

“without any Colour of Right derived from the Crown, so is it generally believed, that he had as slender an Authority to shew, for his taking upon him the Exercise of a Sovereign Power over His Majesty's Subjects living in these counties, by granting Privileges destructive of the Royal Prerogative and settling the People under a Form of Government very different from the Constitution of *England*.”

It states that the question is where the merit of the Penn family is to have these lands confirmed to them by the Crown or be longer indulged in the appointment of a governor, when the family at that time had the presumption to contest the Crown's right to both the soil and dominion thereof (p. 4).

The endorsement of this document reads:

“*Case Of the Three Lower Counties on Delaware River, in America, (claimed at this Time by the Penn Family) with respect to both the Property of the Lands, and the Government of the people.*”

Proceedings respecting the appointment of George Thomas as Deputy Governor, from the filing of the petition on March 31, 1737, to his approval on February 15, 1737/8, is covered by Exhibits 1085 to 1090, inclusive and Exhibit 751. The petition prayed for the royal allowance and approbation “in the accustomed manner” (*Ex. 1085*). The usual routine was followed in so far as concerned the

III. (e) *The Crown's Claim of Title.*

declaration reserving the Crown's right to the three lower counties and the approval of Thomas as governor of Pennsylvania, without limit of time, and of the three lower counties, during his Majesty's pleasure. This proceeding however was interrupted by a petition of Lord Baltimore filed April 19, 1737, (*Ex. 1087; Ex. 751*) opposing the appointment of Thomas on the ground that Lord Baltimore's grant of Maryland included the three lower counties and that the Penns therefore had no legal title thereto. The petition recited Lord Baltimore's application for confirmatory grants, the suit in chancery in *Penn v. Baltimore* and other matters. He prays that no person be appointed Deputy Governor over the three lower counties on the recommendation of the Penns until the dispute over their title is settled and that meanwhile a neutral person be appointed.

A hearing was held before the Lords Commissioners, attended by John and Richard Penn, "Proprietors of Pennsylvania," and Ferdinando John Paris and William Murray, his solicitors, and by Mr. Sharpe on behalf of Lord Baltimore. In that hearing Penns' solicitors stated that they claimed title to the three lower counties under the deeds of feoffment from the Duke of Yorke. No mention was made of any royal grant. Mr. Murray submitted to the Board whether long possession and cultivation was not sufficient title, thereby excluding the idea of any royal grant. Lord Baltimore's counsel replied that the deeds of feoffment gave Penn no title because the Duke of Yorke had no right at the time he made the grant. Again no mention is made of a royal grant. The Lords Commissioners reported in favor of the approving George Thomas, and decided on May 26, 1737, to make no representation regarding the right to the three lower counties, or the boundary between them and Maryland, until the Chancery suit should be determined (*Ex. 751; 1087*).

III. (e) *The Crown's Claim of Title.*

The proceedings respecting the approval of James Hamilton as Deputy Governor, from the filing of the petition on March 12, 1748, to the approval of May 20, 1748, are covered by *Exhibits 1091 to 1094a*, inclusive. The petition requested his appointment "in the accustomed manner." The same declaration was filed "in such manner as hath been formerly made, relating to his Majesty's right to the said three counties" (*Ex. 1091*) with the same distinction of term of office between the province of Pennsylvania and the three lower counties.

The proceedings respecting the approval of Robert Hunter Morris, as Deputy Governor, from the filing of the petition on June 21, 1754, to the approval July 23, 1754, are covered by *Exhibits 1094b to 1097*, inclusive. The same declaration was required and filed reserving the Crown's right to the three lower counties and the same distinction was made in the term as between Pennsylvania and the three lower counties.

From this time onward the appointment of Deputy Governors was accompanied by the same declaration and the same distinction as to term of service as previously recited. We refer to names, exhibits and dates as follows:

William Denny, proceedings from May 12, 1756, to August 21, 1756 (*Ex. 1098-1102*)—pausing here to mention, respecting the Denny proceedings, that in the commission to Denny, issued by Thomas and Richard Penn (*Ex. 1102*) they recite their title to the three lower counties which, they say, are located "*on the west side* of the bay and river Delaware," as derived from the deeds of feoffment from the Duke of York, and that they issued the commission in virtue of said deeds. They do not mention any royal grant.

James Hamilton, proceedings from July 19, 1759, to August 29, 1759 (*Ex. 1103-1105*).

III. (e) *The Crown's Claim of Title.*

John Penn, proceedings from June 15, 1763, to July 19, 1771 (*Ex. 1106-1122*), including reappointments, and without variation in forms, except that in the Order of Council of September 15, 1769 (*Ex. 1119*), John Penn is appointed Deputy Governor for Pennsylvania for the term of three years from December 1, 1766, "and of the three counties of Newcastle, Kent and Sussex, during his Majesty's royal will and pleasure only."

Richard Penn, proceedings of July 17, 1771 (*Ex. 1121*).

John Penn, proceedings from July 19, 1771, to September 11, 1775 (*Ex. 1122-1132*), including reappointments, and he continued to be such Deputy Governor until the American Revolution.

The last approval, on August 23, 1775 (*Ex. 1131*) retained the same requirement of declaration "relating to his Majesty's right to the three lower counties as hath been formerly made," and contained the same distinction of term, except that the term of Governor of Pennsylvania was limited "during the infancy of said John Penn," (the son of Thomas Penn), unless sooner revoked "and no longer," whereas, as governor of the three lower counties, he was to continue "during his Majesty's royal will and pleasure only."

This relentless policy, for an unbroken period of more than 70 years, of the Lords Commissioners and of the King or Queen in Privy Council, of insisting upon the repeated declaration of William Penn and his successors, in spite of the resistance of the former on two occasions, reserving the *right* of the Crown to the three lower counties (as distinguished from a *pretension* or claim to the government only, as William Penn twice tried to interpret it), and of making the distinction that the term of the governors should be in Pennsylvania in the control of the Penns but their term in the three lower

III. (e) *The Crown's Claim of Title.*

counties should be during the King's will and pleasure only, indicates a clear and continuous intention to refuse to recognize any title in the Penns to the three lower counties. In this chain of exhibits they required Penn to declare his title (*Ex. 1044*), and when he did declare it, (*Ex. 444*) the Lords Commissioners advised him that that title was not satisfactory (*Ex. 1046*).

This attitude of the Crown and its Ministry destroys the argument of Lord Hardwick and Mr. Sargeant, that the Penns remained in undisputed possession of the three lower counties. The only privilege which the Crown and its Ministry acknowledged during all of those years was that of suggesting, as governor of the three lower counties, the same persons whom they nominated as governor of Pennsylvania. This was a matter of convenience and economy, from the point of view of the royal exchequer because of the inconsequence of the lower counties and their inability to support an independent governor, and the great care which the Crown and its Ministry observed to prevent the exercise of that privilege from ripening into a right is illustrated by the repeated requirements of the declarations and the conditions of the appointment.

No Prescriptive Right in River East of Main Ship Channel.

If, in spite of the numerous objections and protests on the part of both the Crown and its representatives and of the inhabitants of the Delaware Colony against Penn's claimed right to the government or possession of that colony, the Master should be sustained in his conclusion that Penn and through him the State of Delaware acquired a prescriptive title, the question still remains *how far* does that prescriptive right extend.

Even if Penn and his successors had acquired a prescriptive right to the *soil* of Delaware, we submit that

III. (e) *The Crown's Claim of Title.*

that right did not extend to that part of the bed of the river which is east of the main ship channel; Penn and his successors never had any actual possession of that area and never exercised jurisdiction therein or thereover.

“ ‘One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy.’ *Hunnicut v. Peyton*, 102 U. S. 333, 369, 26 L. Ed. 113, 121. Still more is this true as against independent sovereign rights.”

Marine Railway & Coal Co. v. U. S., 257 U. S. 47, 65.

Even before the deed of feoffment the Province of West Jersey and its inhabitants had begun to exercise rights in the Delaware river within twelve miles of New Castle; such exercise of rights continued for many years by the State of New Jersey without interruption or objection.

As early as 1665 the “Concession and Agreement” (*Ex. 13*) established a government for West Jersey including courts, military defenses and a legislature; this document gave the inhabitants free passage by seas, rivers, etc. through or by which they must pass to come from the main ocean; the legislature was given power to create ports and other places for the loading and unloading of goods out of vessels “as shall be expedient.”

In 1676 “The Concessions and Agreements of the Proprietors” (including Penn) contained substantially similar provisions (*Ex. 147, p. 2*). Further details of both documents are given under Part II, subhead (c) (1).

The exercise of jurisdiction on the New Jersey shore by riparian rights and usages is set forth under Part II, subhead (c) (2); and under the same subdivision under the title “The Prescriptive Rights” there is a summary of the decisions recognizing plaintiff’s prescriptive rights in the river and the bay.

III. (e) *The Crown's Claim of Title.*

The exercise of the rights of fisheries is set forth under Part II, subhead (c) (3).

The exercise of jurisdiction in the river by the Royal Governors of New Jersey and later by the courts of New Jersey after its Constitution was established in 1776, and the assessment and collection of taxes by the plaintiff over a period of years without objection or protest, are set forth under Part II, subhead (6).

On this record we submit that if either of the parties is entitled to prescriptive rights in the Delaware river east of the main channel, such right was acquired by the plaintiff and not by the defendant.

Ports and Admiralty Courts.

Under English law ports could be created by

(1) Prescription or usage;

(2) Institution of the king.

1 *Blackstone*, pp. 263, 4;

Moore & Hall, History and Law of Foreshore & Seashore (3rd Ed.), p. 321;

Angell on Tidewaters, p. 179.

On October 19, 1697, Attorney General Trevor and Solicitor General Hawes rendered their opinion that at that time ports in the plantations could be created only by the Commissioners of Customs, under the direction of the Lord Treasurer or Commissioners of the Treasury; that the power of appointing ports was not granted to the Duke of Yorke by his letters patent, and that the Duke's grant to Berkeley and Carteret conveyed no such power, because the Duke had none granted to him by the Crown (*Ex. 396*).

There is no evidence that the King ever licensed any port on the Delaware river or bay, or that the Duke of

III. (e) *The Crown's Claim of Title.*

Yorke ever undertook to do so, but the fact that such ports came into existence, and were recognized by the Crown, is apparent throughout the history of the colonies of New Jersey, West Jersey, Pennsylvania and Delaware.

Penn successfully defended the independence of the existing ports of Burlington, Salem and Gloucester, in West Jersey, against duties imposed upon the imports and exports in 1680 (*Ex. 9, pp. 42-50; Ex. 11, pp. 20-25; Ex. 230, pp. 8-9; Ex. 229, p. 12; Ex. 228, p. 18; Ex. 14, p. 12; Ex. 1154, p. 6*).

In 1681 Penn wrote that convenient ports had been established in West Jersey "where large ships of considerable burden have already unloaded." He described *sixty miles* of Delaware water front where people settle near together "for their conveniency of trade and commerce." "For the transportation of passengers to West Jersey, ships sail from London." He describes the rates for merchandise "to be landed at Burlington and elsewhere upon Delaware river" from Dublin, Hull, Leith, Dundee, Aberdeen, Aire, and Waterford (*Ex. 15, pp. 6-7*).

Royal recognition of the West Jersey ports, as early as March 1683/4, is evidenced by Exhibit 1182, wherein Charles II directs the governor of that province to pass a law to restrain and punish pirates; Exhibit 756 shows what purports to be instructions of February 10, 1699-1700, to the Governor of West Jersey, to send to England for trial pirates seized in that province (*Ex. 756, p. 2*).

Without questioning the existence or legality of such ports, the Royal Government began in 1696, and continued until the American Revolution, to exercise admiralty jurisdiction therein by its Surveyor-General of Customs and Admiralty Courts, and by taking bonds of all lieutenant governors of the adjacent territories for the

III. (e) *The Crown's Claim of Title.*

faithful observance of the laws of trade (*Ex. 750, pp. 2-3; Ex. 1038*).

The claim of Penn, and the other proprietaries, that their grants vested in them powers by land and sea, including admiralty jurisdiction, was rejected and finally, on December 14, 1696, he, with others, stated that they would receive such jurisdiction as a favor (*Ex. 1145*).

On May 24, 1699, the Commissioners of Customs considered reports of Edward Randolph, Surveyor-General of Customs in His Majesty's plantations, and Col. Robert Quary, Judge of the Court of Admiralty in the Province of Pennsylvania, and referred to the Lords Commissioners certain questions, including whether Governor Markham of Pennsylvania should not be removed for, *inter alia*, countenancing illegal trade and refusing to submit to the Admiralty jurisdiction (*Ex. 397; Ex. 398*). As a result, Markham was removed as Governor, and Penn was directed to name another (*Ex. 401*).

In 1700 Penn issued commissions to certain persons as "water bailiffs" for Philadelphia and for the County of New Castle. When his authority was challenged he withdrew the commissions (*Ex. 403, 406, 422, 428*).

On July 7, 1702 the Attorney General submitted an opinion to the Lords Commissioners that Penn's commissions to the bailiffs did not convey admiralty jurisdiction and that Penn had no more power to commission water bailiffs than to commission a judge or register (*Ex. 431, 432, 434, 435, 437, 438*).

The question of the appointment of water bailiffs recurred in the form of Port Wardens, created by an act of Assembly of Pennsylvania in February, 1774, which on submission to the Privy Council for approval, was, on March 2, 1774, declared by Richard Jackson, Attorney

III. (e) *The Crown's Claim of Title.*

General to be objectionable (*Ex. 1028*). Disapproval was recommended by the Lords Commissioners on May 12, 1774 (*Ex. 1029*), concurred in by the Privy Council Committee June 20, 1774 (*Ex. 1030*), and adopted by the King in Council July 6, 1774 (*Ex. 1031*).

Defendant introduced as Exhibit 569 an extract from the records of the Court of Vice-Admiralty at New Castle in the case of the schooner "Sarah" on July 28, 1727.

It recites His Majesty's commission under the Great Seal of the High Court of Admiralty of England, October 26th, directed to Joseph Brown constituting him judge of a Court of Vice-Admiralty for the Province of Pennsylvania and Territories thereupon depending.

Presumably this exhibit was introduced to show exercise of admiralty jurisdiction in New Castle, but this was an admiralty court established by the High Court of Admiralty of England under the King's Commission and the Judge received his authority from that source. The paper does not show where the offenses were committed, but assumes they were committed in Delaware Bay. At that time the King had jurisdiction over the tidal waters of the entire bay.

As early as January 9, 1685 the Lord Treasurer directed the Commissioners of Customs to prepare a form of security and other papers for the collection of duties in the three lower counties *as a separate plantation* (*Ex. 378*), but on March 17, 1696-7 the King approved the suggestion of Penn "that the same persons that are to serve for the province of Pennsylvania, should also serve for the lower counties" because they were both on the same river (*Ex. 394*). Consequently the exercise of jurisdiction by the Court of Vice-Admiralty in the case of the "Sarah" was improperly predicated upon the theory that the three lower counties were territories depending upon Pennsylvania.

III. (e) *The Crown's Claim of Title.*

It exercised jurisdiction over the two provinces independently of each other. Their relationship under that jurisdiction was simply that the same persons who exercised the jurisdiction in Pennsylvania should also exercise jurisdiction in the three lower counties and this arrangement was one of obvious convenience.

On September 21, 1721, the Lords Commissioners recommended to the Privy Council that no grant to the islands of the Delaware river (then applied for by Captain Gookin) should "extend to deprive any of your Majesty's subjects from the free navigation and fishery of the said river." On May 17, 1722, the King, by order in council, expressly approved that recommendation (*Ex. 27a, pp. 2, 3, 7*).

An act of 1701 to establish a port at New Castle was disapproved (*Ex. 452, p. 2*) because Penn had no authority to pass such an act.

On July 25, 1724, Sir William Keith, "Governour of our said counties and province of Pennsylvania, issued a patent to Wessal Alrichs in the name of George, by the grace of God of Great Britain * * * King, to set up and operate a ferry between Newcastle and Salem across Delaware River" (*Ex. 614*). No mention is made of the proprietaries or their government.

These records show that Penn never exercised jurisdiction in Delaware River (or in the bay), but that such jurisdiction was always exercised by the representatives of the Crown, as in other tidal waters.

III. (f) *Repudiation of Penn's Title by State of Delaware.*

(f) *Repudiation of Penn's Title by the State of Delaware.* (Exceptions 75-78.)

In 1776 the first Constitution of the State of Delaware was adopted.

Art. 25 provides:

"The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, * * * " (*Ex. 662; p. 10*).

On February 22, 1777, defendant's legislature passed an act providing:

"* * * That so much of every act of Assembly prescribing the taking or subscribing any oath or affirmation of allegiance to the King of Great Britain for the time being; or acknowledging any authority in him, or the Parliament of Great Britain, or in the heirs and devisees of William Penn, esq. deceased, formerly Governor of this state, or in any other person whatsoever as Governor; and so much of every act of Assembly as declares, directs or commands, any matter, act or thing repugnant or contrary to, or insistent with, the present constitution of this state, framed and established by the late convention, shall and are hereby declared to be repealed and absolutely null and void" (*Ex. 1172*).

On July 7, 1791, John Penn of Stoke Pogis and John Penn of Wimpole street gave power of attorney to McKean and Physick to sell their lands and collect rents in Delaware (*Ex. 1171*); whatever title William Penn may then have had was vested three-fourths in John Penn, Jr., and one-fourth in John Penn (*Ex. 1174, p. 15*).

On June 12, 1792, Delaware adopted a new Constitution, Article I, Section 7, provides:

"In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel,

III. (f) *Repudiation of Penn's Title by State of Delaware.*

• • •: He shall not be compelled to give evidence against himself; nor shall be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land."

Article I, Section 8, provides:

"• • • nor shall any man's property be taken or applied to public use, without the consent of his Representatives, and without compensation being made" (*Ex. 663; p. 3*).

On January 16, 1793, the defendant's House of Representatives, after considering several petitions "respecting the Claims of the late Proprietaries to Quit-Rents and vacant lands in this State" and a letter dated April 23, 1792 from said McKean and Physick, "Agents of John Penn the Younger and John Penn, Esquires," unanimously adopted the following resolutions:

1. "That the issuing of any Warrant for the Surveying of any vacant or unappropriated Lands in this State, by any Person or Persons whatever, other than such as may Act under the Authority of the State, is an Usurpation of the Sovereignty of the State.

2. That it is the Sense of this House, that no Surveyor in this State, ought, or legally can, execute any Warrant, issued in the Name of any Person, not authorized by this State for that Purpose.

3. That it be recommended to the Citizens of this State, to take up no Warrants, and to accept of no Patents or Deeds whatever, from John Penn the Younger and John Penn, or either of them, or their Agents or Attornies.

4. That a Committee of three be appointed to bring in a Bill to open an Office for the Sale of vacant Lands; and further, to make null and void all pretended Warrants, Surveys, and Grants, which have been made since the first Day of January 1792, or which hereafter may be made in the Name of any Person, other than under the Authority of this

III. (f) *Repudiation of Penn's Title by State of Delaware.*

State, and for the Confirmation of all Warrants and Surveys, made, previous to the first Day of January, 1792" (*Ex. 1179; pp. 1, 2*).

A further resolution at the same session approved the conduct of a certain surveyor "in having refused to lay any Warrants issued by Thomas M'Kean, Agent for certain Persons stiling themselves Proprietaries of the State of Delaware, for surveying Lands in this State" (*Ex. 1179, p. 3*).

On February 2, 1793, defendant's legislature passed a statute entitled, "An ACT concerning vacant and uncultivated Lands." This statute recites that "the minds of the good people * * * are much alarmed and disquited by warrants for surveying lands, being issued without the authority of the state"; and then provides as follows:

"That if any person or persons, inhabitants of this State, shall, after the passing of this act, take or receive any warrant, or shall make, or cause to be made, any survey in consequence of such warrant, or shall take or receive any grant, deed, indenture or other writing, from any person or persons not acting under the authority of this State, for any vacant and uncultivated lands in this State, the person or persons so offending shall forfeit and pay for every such offence, the sum of One Hundred Dollars, to be recovered in any Court of General Quarter Sessions of the Peace and Gaol Delivery."

Section 2 enacts that no warrant issued since July 4, 1776, "shall be laid or surveyed by any surveyor; nor any patent granted, or deed received, on any warrant or survey, either issued or made since the fourth day of July aforesaid, under the penalty of One Hundred Dollars for each and every such warrant, survey, patent, or deed, to be recovered as aforesaid" (*Ex. 1157*).

On June 19, 1793 defendant's legislature passed a statute entitled, "An Act for opening and establishing a Land

III. (f) *Repudiation of Penn's Title by State of Delaware.*

Office within this State, and for the sale of all vacant and uncultivated lands therein."

This act provides for the appointment of a surveyor in each county and for the issuing of warrants, for the recording of surveys and warrants, and for the settlement of disputes as to boundary line, etc.; it provides that all grants under authority of said act shall convey an estate in fee simple and protects grants made prior to the year 1776 (*Ex. 1036*).

On September 3, 1793, the said agents of the Penns issued a pamphlet entitled, "A Calm Appeal To The People Of The State of Delaware" (*Ex. 1174*).

The pamphlet recites what the agents consider to be the sources and the evidence of the Penn title and makes an argument against the validity of the Delaware statutes.

After pointing out that the "younger Mr. Penn" was an infant during the war and had never been in the United States until after the peace and that the "other gentleman" had taken the oath of allegiance to the State of Pennsylvania and was a citizen many years before the treaty, it then discusses whether there was any legal basis for a forfeiture of their estates; referring to one of the Delaware statutes under consideration, it says:

"By that public act, all authority under the crown of Great Britain ceased: But how it gave the people of Delaware a title to the lands of Messieurs Penns, more than to those of any other individuals in the state, we cannot divine. Some kind of hocus pocus or legerdemain must have brought it about" (*Ex. 1172; p. 15*).

The "Appeal" expresses the hope for the election of "wise and virtuous representatives" and concludes (*italics in the original*):

"We trust the event will prove, that the people in Delaware will not be made stalking-horses, that

III. (f) *Repudiation of Penn's Title by State of Delaware.*

they will prefer justice to paltry interest, and be perfectly convinced, that *honesty is the best policy*" (*Ex. 1174; p. 26*).

In due course the matter came before the Delaware Legislature in 1794; with full knowledge of the claims of the heirs of William Penn, the Legislature refused to purchase the Penn title or otherwise to recognize it, and instead thereof decided (*as plaintiff now claims*) that the Penns had no title, and that the *only* title which was valid was the title of the British Crown, which passed to the defendant by virtue of the Revolution and the ensuing Treaty of Peace.

This choice is set forth in the Act of February 7, 1794, entitled a "*Supplement to an act, intituled, An Act for opening and establishing a Land Office within this State, and for the sale of all vacant and unlocated lands therein.*"

This act recites:

"WHEREAS the right to the soil and lands within the known and established limits of this state, was heretofore claimed by the crown of Great Britain: *And whereas* by the definitive treaty between his Britannic Majesty and the United States of America, his said Majesty relinquished all rights, proprietary and territorial within the limits of the said United States, to the citizens of the same, for their sole use and benefit; by virtue whereof the soil and lands within the limits of this state became the right and property of the citizens thereof, and who at the time of passing the act to which this is a supplement, had, and now have, full power and authority, by their Representatives, to dispose of the same for their sole benefit, emolument and advantage, *And whereas* the claims of the late and former pretended proprietaries of this state, to the soil and lands contained within the same, are not-founded either in law or equity; and it is just, right, and necessary, that the citizens thereof

III. (f) *Repudiation of Penn's Title by State of Delaware.*

should be secured in the enjoyment of their estates, rights and properties" (*Ex. 665; p. 1*).

It then provides for surveys and warrants, reserving the rights of those claiming under patents, warrants and grants issued prior to January 1, 1760, made or granted by the Duke of York, the proprietaries of Maryland, or "the pretended proprietaries of this State" (*Ex. 665, p. 2*).

On the basis of the foregoing evidence plaintiff submitted requests for findings of fact, and (based upon such findings) a conclusion of law as follows:

"By the acts of its legislature in 1792, 1793 and 1794 defendant repudiated the Penn title under the deeds of feoffment and the grant of March 22, 1682/3, and asserted its title and jurisdiction within its territorial limits by virtue of the American Revolution and the Treaty of Paris, under which it acquired title, in Delaware river and bay, only to the middle of the main ship channel thereof as it then existed" (*Exception 78, p. 40*).

The Master made no findings of fact on this subject, but concluded that the Act of 1794 denied the "ownership" of the ungranted lands in the Penns and did not refer to the boundaries of the State which, he says, "had become fixed and determined on July 4, 1776" (*Rep. p. 48*).

He then concluded:

"The preamble contained in the Act of the Delaware Legislature of February 7, 1794, does not in law constitute an estoppel or election binding upon the State of Delaware with respect to the source of the title of the State of Delaware to any of the lands or waters comprised within the metes and bounds of the State of Delaware" (*Rep. p. 79, par. 6*).

III. (f) *Repudiation of Penn's Title by State of Delaware.*

Under the above provisions of the Delaware Constitutions the interest, if any, of the elder John Penn, a citizen of Pennsylvania, in Delaware, could not be taken without due process, and no record of any such taking appears.

As far as relates to the interest, if any, of John Penn, Jr., who was then a subject of Great Britain, his rights, if any, were protected by the Treaties of 1783, and 1796.

The former provides in Article VI:

Article VI: "There shall be no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in person, liberty, or property; * * *"

Article IX of the same Treaty provides for the restitution of lands confiscated by either side during the war, previously belonging to subjects of the other side (*1 Malloy's Treaties, 586, 589*).

The "Treaty of Amity Commerce and Navigation" (Jay Treaty) between the United States and Great Britain (concluded November 19, 1794; ratified October 28, 1795; proclaimed February 29, 1796) providing, in Article IX, as follows:

"It is agreed that British subjects who now hold lands in the territories of the United States, * * * shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell and devise the same to whom they please, in like manner as if they were natives;" (*1 Malloy's Treaties, p. 597*).

If the title of the Penns was good when the defendant became a sovereign state, as the defendant now claims, the said statutes were invalid. *Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603; Martin v. Hunter, 1 Wheat, 304, 370;*

III. (f) *Repudiation of Penn's Title by State of Delaware.*

Craig v. Radford, 3 *Wheat.* 594, 599-600; *Orr v. Hodgson*, 4 *Wheat.* 453; *Ware v. Hylton*, 3 *Dallas* 199; *Hopkirk v. Bell*, 3 *Cranch* 454; *The American & Ocean Ins. Co. v. Bales of Cotton*, 1 *Peters* 511; *U. S. v. Percheman*, 7 *Peters* 51; *Pollard's Lessees v. Kibbe*, 14 *Peters* 353, 395, 407; *Rhode Island v. Mass.*, 12 *Peters* 657, 749; *Coffee v. Grover*, 123 *U. S.* 1; *Pollard v. Hogan*, 3 *Howard* 212.

If, however, the title of the Penns was *not* good on July 4, 1776, then the *only* title which defendant now has to the bed of the river is by virtue of its becoming an independent sovereign on July 4, 1776.

No challenge was ever made against said statutes until, in the course of this litigation, the defendant seeks to repudiate the repudiation.

The effect of the Delaware statutes was decided in *Gale v. Behling*, (*Sec. Doc. No. 140, 25th Cong. 2nd Ses., Jan. 27, 1838*) (Reprinted as Appendix "D" to this brief), wherein *Justice Baldwin* said:

"On her becoming a State, Delaware had an election to consider herself as succeeding to the rights of the proprietaries of the three counties; and standing in their place, as to all their former rights of soil, in virtue of the deeds of the Duke of York, in which case she would have been entitled to all presumptions founded on prescription against the Crown, to the same extent that the Penns were, or Delaware might claim, as succeeding to all the rights of the Crown, as devolved on her by the revolution; and, repudiating the deeds of the Duke as usurpation on the acknowledged prerogative of the King, elect to hold the lands of the proprietaries in the original right of the Crown" (p. 23).

* * * * *

"This solemn repudiation of any claim under the deeds to Penn, and the express claim asserted by the relinquishment of the Crown as the source of the title of the State, to the unappropriated lands

III. (f) *Repudiation of Penn's Title by State of Delaware.*

within their boundaries, precludes the State from claiming any benefit, by prescription, from the long possession of soil and government by the Penns from 1682 to 1776, or by the deeds of the Duke of York; and, as the State asserts title by the treaty of peace, as a cession by the King, she can have no better right than the King had at the time of the treaty or before;" (p. 23).

• • • • •

"Having, however, abjured any other than the title of the Crown, she must rest upon that in support of the right which she ceded to the United States by the act of 1813; that title is not valid, because the principle of prescription had previously made good the title of the New Jersey proprietaries under the patent to the Duke of York, according to their possession or claim under or by color thereof" (p. 24).

The Delaware acts repudiating the Penn title are capable of but one interpretation. If the land which defendant took, and has ever since retained, or sold for its profit, under those acts, belonged to the Penns, those acts were unconstitutional and void. It is, however, necessary for the court to avoid, if possible, a conclusion that they are unconstitutional. That can be done only by assuming that the recitals in the Act of 1794 are true and that the title to the three lower counties was in the Crown at the time of the American Revolution. That construction being possible and reasonable, and defendant having elected to rely upon the King's title, and acted thereunder for a period of more than 130 years, it is now estopped from claiming, through the Penns, a title which it then repudiated *and has never acquired from them*. If defendant was wrong then, it cannot, in equity, now take advantage of its own wrong; particularly a wrong that it has never righted.

If it derived its title from the Crown by conquest and the Treaty of 1783, as it claimed in the recital in the Act

III. (f) *Repudiation of Penn's Title by State of Delaware.*

of 1794, then it came into the Union on a basis of equality with plaintiff and both took title to the middle of the main ship channel of Delaware river and bay as it then existed, and defendant's present claim of title to the bed of the river east of the middle of the channel in the twelve mile circle falls.

The Master concedes that the treatment of the Penn heirs may have been "harsh" but concludes that it cannot serve to "unsettle" the boundaries of the state which had "theretofore been fixed and determined" (*Rep. p. 58*).

Whether the boundaries had in fact been "theretofore" fixed and determined is discussed elsewhere. So far as the present point is concerned, the plaintiff claims that the defendant, by its own conduct, through its duly authorized representatives, with full knowledge of the claims of the Penn heirs, deliberately adopted the position that the heirs of Penn had no title to any of the lands of the State of Delaware on July 4, 1776; this decision has remained unquestioned and unattacked until the present litigation arose, when the defendant seeks to evade the effect of its own legislation.

It should be added that regardless of the question of the legal effect of the Delaware statutes and of the belated attempt to excuse them, they have an important bearing on the practical construction of the boundary; whatever may be the present position of the defendant, these statutes show that *during the years 1792, 1793 and 1794*, the defendant placed no reliance upon the alleged title of Penn to any part of the land or water or of the land under water *then* claimed by the Penns.

IV. (a) *Penn v. Baltimore.*

IV.

LITIGATION RELATING TO TITLE.

(a) *Penn v. Baltimore.*

(Exceptions 79-87.)

The dispute between Penn and Lord Baltimore as to the title to the Delaware counties began in 1682. The story of the dispute leading to the decision of the Privy Council of November 13, 1675, is set forth in Exhibits 46; 228 (pp. 25-8); 236; 259; 261-4; 295; 371; 1159; 1161; 1169; 544; 546; 547; 561; 296, (pp. 7-9); 501, (pp. 74-5); 235, (pp. 9-10); 297, (p. 242); 229, (p. 9); 236, (p. 1).

The Privy Council was the development, under Henry VII, of the Council of William the Conqueror, which in turn was the successor of the ancient Witan of the Saxons (*Trevalyan's Hist. of Eng., pp. 124, 275*). From the reign of Henry III there was a constant increase in its powers and functions (*3 Stubbs. Const. Hist. of Eng. 254*). It acquired the character of a distinct court of last resort in the reign of Edward I, when its lesser jurisdictions were transferred to the courts of Common Bench and King's Bench (*2 Pollock & Maitland, 668*).

Blackstone's description is as follows:

"The power of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. * * * But in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; * * * being a special flower of the prerogative; with regard to these, although they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases, or rather the appeal lies to the king's majesty himself in council. Whenever also a question arises between two provinces in America, or

IV. (a) *Penn v. Baltimore.*

elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council; * * * But from all the dominions of the crown, excepting Great Britain and Ireland, an *appellate* jurisdiction (in the last resort) is vested in the same tribunal; which usually exercises its judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given" (*Book 1, Chapt. 5, p. 231*).

Exhibit 750 contains extracts from *Cambridge History of the British Empire*, further summarizing that procedure.

Decisions of the Privy Council are cited by Brown, in *Judicial Settlement of Controversies between States 1918* (pp. 573, 577), as follows:

Colony of Rhode Island v. Colony of Conn., Privy Council 1727. 3 Acts of Privy Council, Colonial Series 10.

Colony of R. I. v. Col. of Mass., Privy Council 1746, 3 Acts of Privy Council, Colonial Series 36.

Its jurisdiction was recognized by this Court in *Rhode Island v. Mass.* (12 Peters 657, 740, 743), and in *Virginia v. West Virginia* (246 U. S. 565, 597-8).

The reports of the Privy Council Committee were the decisions, and the orders in council were the judgments, of the court of last resort in the British Empire.

The history of the proceedings leading to the Order in Council of November 13, 1685, need not be given in detail, but some of the points may be quoted as follows:

IV. (a) *Penn v. Baltimore.*

Lord Baltimore's title to the entire Delaware peninsula below the 40th degree of latitude has never been honestly questioned. The Dutch, and the Duke's governors advanced specious arguments, which Penn adopted as his own, to deprive Baltimore of possession. In his early negotiations with Baltimore, Penn acknowledged his title (*Ex. 544, p. 20*) and tried to purchase a Pennsylvania outlet on Chesapeake bay (*Ex. 236, p. 5*). When that attempt failed, he adopted the argument that Baltimore had lost that territory to the Dutch and that by the Dutch treaties of Breda and Westminster, title thereto was vested in the Crown (*Ex. 228, pp. 26-7; Ex. 236, pp. 7-8*). He says "this is the *Jus Gentium*, the law of nations." Three years before in opposing the duties on imports and exports of West Jersey, Penn argued the direct opposite (*Ex. 9, pp. 42-50*).

At the same time he attempted elsewhere, on many occasions, to support his title to the lower counties by the argument that the Duke of York had conquered those territories from the Dutch and therefore had title to convey. He even recited that fact in the proposed grants of April 13, 1683, and December 10, 1688.

That argument would have destroyed the title of the Duke (if he had any), under which he claimed the lower counties, since the Duke had no conveyance thereof after (or before) the Treaty of Westminster. His claim of ownership in the King was destructive of his own title.

Throughout these negotiations Penn carefully avoided any claim of title either under the deeds of feoffment or any grant of March 22, 1682/3, which he did not once mention. He claimed to be a tenant of the Duke (*Ex. 236, pp. 5, 7; Ex. 228, pp. 25-7; Ex. 261, p. 1; Ex. 1159*). He also claimed that the Delaware peninsula was part of the territory conveyed to the Duke by the Royal grant of 1664

IV. (a) *Penn v. Baltimore.*

and the confirmatory grant of 1674 (*Ex. 236, p. 6; Ex. 228, p. 27*); which he knew to be untrue, as he also knew to be untrue his claim that there were Dutch and Swedish settlements on the west side of Delaware when Baltimore's grant of Maryland was made in 1632, and that Cape Henlopen was twenty-five miles below the mouth of Delaware bay (*Ex. 295, p. 6; Ex. 561, p. 1*).

As we have shown elsewhere, as soon as Penn discovered that the grant of March 22, 1682/3, did not convey all the land that he thought it did, he proceeded to negotiate for another patent—known as the patent of April 13, 1683 (*Ex. 371, p. 1*).

In the midst of the proceeding before the Privy Council in the controversy between Penn and Lord Baltimore, Charles II died, February 6, 1684/5, and was immediately succeeded by the Duke of York who, on that date became King James II and head of the Privy Council.

Although two years had now elapsed since the grant of March 22, 1682/3 passed the Great Seal, and (as alleged by Paris in 1735 and now by defendant) delivered to Penn, as the perfection of his title to the territory therein described, with powers of government, not once during the Penn-Baltimore controversy, from 1683 to the final decree of Lord Hardwick in 1750, was that grant ever produced or the power of government thereunder ever claimed by or on behalf of Penn. On the contrary, throughout the entire proceedings it is repeatedly stated that the difference between them "is about a title to land and not of power" (*Ex. 262; Ex. 1169, pp. 6, 7; Ex. 546, p. 13*).

As a result of Lord Baltimore's objection to the passing of the proposed grant of April 13, 1683, hearings were held September 2 and October 9, 1685, before the Privy

IV. (a) *Penn v. Baltimore.*

Council Committee (*Ex. 546, pp. 13, 14; Ex. 1169, p. 7*). On October 15, 1685 that Committee agreed upon a report that the land in dispute "does not now belong to Lord Baltimore but since it remains doubtful what are the true boundaries of Delaware, which their lordships now adjudge to belong to his Majesty" they are to meet again for the settlement of those boundaries between his Majesty and Lord Baltimore (*Ex. 546, p. 15; 263, p. 1*).

On October 31, 1685 the Privy Council Committee proposed—

"that the whole peninsula or tract of land called Delaware, from east to west, as far as Cape Henlopen, southward may be divided into two equal parts, between his Majesty and my Lord Baltimore."

and Lord Baltimore was allowed one week in which to present objections in this proposal (*Ex. 546; 263, p. 1*).

On November 7, 1685, the Privy Council Committee resolved to report their opinion to His Majesty (King James II) that for avoiding further difficulties the land between the river and bay of Delaware and the sea on the one side and Chesapeake bay on the other be divided into two equal parts by a line from the latitude of Cape Henlopen to the fortieth degree of northern latitude.

"and that one half thereof lying towards the bay of Delaware and eastern sea be adjusted to belong to His Majesty and that the other half remain to Lord Baltimore as comprised within his charter."

(*Ex. 546, p. 17; 263, p. 2*), and on November 13, 1685, that decision of the Privy Council Committee was adopted as the judgment of the King in Council by Order in Council, directing that the land be forthwith divided accordingly, and that Baltimore and Penn to take notice "and give due and ready obedience thereunto" (*Ex. 264*).

IV. (a) *Penn v. Baltimore.*

That Order in Council adjudicated the title of the three lower counties, east of the Maryland boundary fixed therein, to belong to the King.

That decision is an adjudication by the highest court in the realm that no title passed by the deeds of feoffment and that the Royal Grant of March 22, 1682/3 had been surrendered and was non-existent.

The decision was not unsatisfactory to Penn, who had pretended throughout to represent the Duke in order to gain the weight of that influence, because he expected the Duke (now the King) to give him a new grant and he devoted all his efforts in that direction.

Although Chalmers says King James was unwilling to confirm the deeds of feoffment, he did, however, make a belated attempt to do so on December 10, 1688, on the eve of his attempted flight. Mr. Konkle (*Ex. 297*) states that in 1687 or thereabouts—

“James II gave Penn re-assurance as to his own charter, by offering him a draft of a charter for Delaware, whose uncertain title was causing Penn great trouble in his efforts to bind ‘Pennsylvania’ and Delaware together.”

He states that although Penn refused this draft of charter he kept it and brought it to America but did not show it to anybody—

“not even Secretary Logan”

He did show to a delegation from the Delaware counties, one paragraph as—

“proof that James intended to make good his Delaware title, as Penn had demanded he do.”

He states that this draft was probably destroyed by Penn (p. 243) and that on the evening of December 10,

IV. (a) *Penn v. Baltimore.*

1688, after James II had disposed of his family in several places, late at night he—

“bethought himself of his promise to his foster son, Penn, about Delaware”

and called in Sir William Williams and directed him to draw such a charter as Penn wanted.

He states that about midnight King James approved the draft and sent it to be engrossed on parchment ready for his signature, but that the King left without signing the document and it was found in the Hanaper office nearly 65 years later, and copied by Mr. Paris, Penn's attorney in *Penn v. Baltimore* (p. 244). This is not strictly correct, since the Earl of Sutherland had a copy in 1717 (*Ex. 471, p. 10*).

This appears to be the draft of charter referred to, in various papers in *Penn v. Baltimore*, as being in the Hanaper office. This is also the document about which there is mention of a certificate of the Clerk of the Hanaper that a grant was there, it is also the document referred to by Paris in his notes on the preparation for trial in *Penn v. Baltimore*, where he says:

“Entry at ye Hanap (er) : “To be proved viva voce
& Cert (ificate) that is : per order”
passed.” : (*Exhibit 495*)

Mr. Konkle cites James Logan as saying that this draft of December 10, 1688 was responsible for a statement in the Declaration of Right of 1689 of the parliamentary party claiming title in the British Crown to all of Delaware, and compelling Penn to acknowledge the validity of that claim in every commission of a governor that he was allowed to appoint.

He states—“The result was that the title to Delaware was never fully settled until our revolution in 1776.”

IV. (a) *Penn v. Baltimore.*

Since crown lands can be granted only by letters patent *under the Great Seal*, and since it is admitted that this document never passed the Great Seal, its value lies principally in the recitals it contains. It admits that Penn never had the powers of government and pardons his treasons, &c., for exercising them without authority. It admits that the deeds of feoffment did not convey title; hence the purpose of the grant. *It recites the Order in Council of November 13, 1685, as having decided the title then to be in the Crown.* By its omission of reference to the grant of March 22, 1682/3, to the King himself, when Duke of York, it confirms the surrender and acceptance of that grant in April, 1683. It admits that no legal title in the King, or equitable title in Penn, existed under that grant.

In his answer of November 30, 1702 (*Ex. 444*) to the queries of the Lords Commissioners respecting his title to the Lower Counties, Penn said:

“My title to the three lower counties is by deeds of feoffment from the Duke of Yorke and his letter of Attorney to his President & Surveyor General and Clark of ye Peace, to give me possession, and submission, which they readily did by Turf and Twig and Water; as also by a ready acknowledgment of me as governor in open Court of Sessions,”

“the Duke intended a confirmation and further grant by letters patent, when King; as appears by Sr. Wm. Williamses draft, by his order in 88; but obstructed by the disorder ye Court was in a little before ye Revolution, and which I humbly hope, for the reasons therein expressed, will not be refused to be perfected by our Gracious Queen.”

In which enterprise he hopes he shall not want (lack) the Lords Commissioners' mediation.

IV. (a) *Penn v. Baltimore.*

In his proposal for Surrender of Government, June 18, 1703 (*Ex. 301*), Penn prays:

“that a patent pass to me and my heirs, for the three lower counties of Newcastle, Kent and Sussex, calling the counties annexed, or territories of Pennsylvania, according to a grant begun by ye late King, James, and had been finished had he stayed the week longer at Whitehall, as may appear by a bill drawn in the place of his warrant signed William Williams, Attorney or Solicitor General” (p. 1).

In his memorial respecting the surrender of his government (*July 31, 1710, Ex. 318*) Penn recites that afterwards the Duke when on the throne—

“did actually give him the whole, but his sudden removal prevented the full execution of the grant intended for a more entire confirmation thereof, with all necessary powers of the government.”

In a letter of October 9, 1731 (*Ex. 535*) Logan says that the year following the Order in Council of 1685 the King “ordered a patent for them to your father with large powers of government, but this never passed the Seal.”

Penn’s counsel in the Breviate (*Ex. 1169*) say:

“As to Mr. Penn’s obtaining further assurance from the Duke, after this express grant to the Duke, within the 7 years, the Duke, soon after Mr. Penn’s return to England, became King and afterwards abdicated, before the 7 years expired” (p. 4).

“And, had the Duke of York continued a subject, Mr. Penn might have compelled him to have made further assurance”

and that if it be asked why, after the Order in Council of November 13, 1685, Penn did not obtain further assurance from the King, the answer is

“that though it was agreed and ordered how the lower counties should be divided, yet, the line of

IV. (a) *Penn v. Baltimore.*

division was not run, but was still to be done . . . and that division line not being run in that king's time (who abdicated before the 7 years which were mentioned in his covenant expired) Penn therefore could not, at any time hitherto, apply for further assurance" (p. 7).

Hence, it appears unmistakably that Penn never had the grant of March 22, 1682/3, or any other Royal Grant, save a copy of that of December 10, 1688, which admittedly never passed the Great Seal.

The third attempt to obtain a royal grant for the three lower counties was made by Penn on May 23, 1705 (*Ex. 310*). Again he tried therein to obtain pardon for treason &c. on account of his admittedly unlawful attempt to administer the government there.

The second period of this controversy extends from the Order in Council of November 13, 1685, to June 23, 1709. The details of the proceedings are covered by Exhibits 629, 458, 266, 267, 268, 269, 270, 630, 631 and 264 (pp. 4-5).

Only the important features will be noted. It appears that nothing was done under the Order in Council of November 13, 1685, to establish the boundary therein ordered. The matter was revived by an address of the governor, council and assembly of Maryland submitted to Her Majesty, Queen Anne, on January 8, 1707/8, praying for the settlement of those boundaries. That address was referred on the same day to the Privy Council Committee who took up the matter on February 5, 1707/8, and a series of proceedings followed, which were much delayed by the failure of Penn to appear and supply information requested of him. He finally attended on April 26, 1708 (*Ex. 629*) and the parties were directed to negotiate an agreement between themselves, but failing to agree, they were ordered on January 5, 1708/9, to attend on the following Wednesday (*Ex. 629, pp. 6-7*).

IV. (a) *Penn v. Baltimore.*

Meanwhile on January 9, 1708/9, Lord Baltimore filed a new petition praying that the Order in Council of November 13, 1685, be set aside, which the Privy Council on that day referred to the Lord Commissioners for examination and report (*Ex. 226*), and on January 18, 1708/9, Penn filed a counter-petition praying for the dismissal of that petition (*Ex. 629, p. 10; 267*).

On January 27, 1708-9, the Privy Council issued its Order in Council, reciting several hearings of the parties before it and dismissing Lord Baltimore's petition (*Ex. 267; 629, p. 10*).

On April 16, 1709, the Privy Council received a petition from Penn for the settlement of the boundaries according to the Orders in Council of November 13, 1685, and January 27, 1608-9. It was that day referred to the Lords Commissioners.

On May 19, 1709, the Privy Council received a petition from Lord Baltimore praying relief against the two previous Orders of Council against him (*Ex. 269*).

Hearing was set for June 9, 1709, and postponed to the 23d of that month (*Ex. 270, 630*).

On June 23, 1709, the Privy Council issued its Order in Council, reciting the attendance of both parties and a full hearing, and ordering that Lord Baltimore's petition be dismissed and that the Order of Council of November 13, 1685, "be ratified and confirmed in all its points; and be put in execution without further delay" (*Ex. 264; 631*).

Throughout this proceedings, also, neither the deeds of feoffment nor the grant of March 22, 1682/3 are mentioned.

In the Penn-Baltimore boundary agreement of May 10, 1732, negotiated and prepared by him, Paris recites the

IV. (a) *Penn v. Baltimore.*

source of Penn's title as the grant of Pennsylvania 1680 and the deeds of feoffment of 1682. He does not mention the grant of March 22, 1682/3. That is the agreement upon which the suit of *Penn v. Baltimore* was based, in the complaint in which he had the temerity in June 1735 to allege that such a grant existed and was in the possession of the Penns.

At the hearing before the Lords Commissioners, on April 1, 1756, on the application of Dr. Evans for a grant of islands, Paris represented the Penns in opposition, and set up the same title. He did not mention the grant of March 22, 1682/3 (*Ex. 339, p. 2; 342, p. 2; 648, p. 6*). This was after the *Penn v. Baltimore* case was over.

The third period of this controversy extends from May 10, 1734, to the commencement of the Chancery Suit of *Penn v. Baltimore*. It involves a petition of Lord Baltimore filed about May 10, 1734, praying for a confirmatory grant of Maryland to include the Delaware peninsula as far north as the 40° of latitude, notwithstanding the words "*Hactenus inculta*" contained in his grant of 1632. An opposing petition was filed by Richard Penn. The report of the Privy Council Committee of May 10, 1734 (*Ex. 275*), refers to a report of the Lords Commissioners previously made on those two petitions. Hearings had been held, at which it appeared that an agreement of May 10, 1732, had been entered into between Lord Baltimore and John, Thomas and Richard Penn, for the adjustment of the boundaries according to the Orders in Council of November 13, 1685, and June 23, 1709, which agreement Lord Baltimore claimed had expired by its own terms, but which the Penns claimed was still in force. The Lords Commissioners recommended that the matter be adjourned until the end of Michaelmas term to give the Penns an opportunity to proceed in equity, for the specific enforcement of their agreement. The Privy Council Com-

IV. (a) *Penn v. Baltimore.*

mittee approved that report and recommendation, and so reported to the Privy Council, which on May 16, 1734, approved that report and recommendation and issued its Order in Council accordingly (Ex. 276).

In August, 1734, Lord Baltimore filed a new petition, again praying for a confirmatory grant of Maryland to include the Delaware peninsula (Ex. 637), in opposition to which the Penns filed a counter-petition.

On August 8, 1734, the Privy Council referred Lord Baltimore's petition to the Lords Commissioners (Ex. 278).

Exhibit 277 contains extracts from a draft of the Penn counter-petition, prepared by Ferdinando John Paris, as their Attorney, in August, 1734, opposing Lord Baltimore's petition. It does not appear that this particular draft of the petition was ever used, although it is to be found in the printed case of *Penn v. Baltimore*.

It recites that the Penns are proprietors and governors of the three lower counties with the title thereto derived from—

- (a) The deeds of feoffment.
- (b) The grant of March 22, 1682/3.
- (c) A further grant of April 16, 1683.

Paris submitted that draft for approval to Dudley Ryder, Solicitor General, who struck out the reference to proprietorship and governorship of the three lower counties, and to the last two title documents, and the petition was filed with the sole reliance for title based upon the deeds of feoffment (Ex. 279).

That petition, filed December 18, 1734, recites the grant of March 4, 1680, Charles II to Penn for Pennsylvania, the southern boundary of which agrees with the northern

IV. (a) *Penn v. Baltimore.*

boundary of Lord Baltimore on the fortieth degree of northern latitude with the exception—

“of twelve miles distance from New Castle by a circle drawn, *northward and westward* and to the beginning of the fortieth degree of north latitude.”

It prays that the Penns *be not required to set forth their right to the three lower counties* in answer to Lord Baltimore's petition (p. 4), and that the petition of Lord Baltimore be dismissed. It also prays *for a confirmatory grant in favor of the Penns* in accordance with the agreement of May, 1732, between Lord Baltimore and the Penns (p. 5).

It is evident that the more cautious Solicitor General was unwilling to claim that these grants existed.

That petition was referred on December 19, 1734 (*Ex. 280*) to the Privy Council Committee, by whom it was referred to the Lords Commissioners.

They reported to the Privy Council, on January 16, 1734/5 (*Ex. 281, 638*), stating that what is commonly called the three lower counties on Delaware supposed to be excepted from Lord Baltimore's grant by the words *hactenus inculta—*

“appear to us to be included in the limits granted by King Charles I to the Lord Baltimore's ancestors, but they have been in the possession of the Penn family for several years.”

Wherefore the Lords Commissioners deemed it proper to communicate the purport of the petition to the agents of the Penns to afford them an opportunity to lay before the Lords Commissioners what they should think proper in relation to this petition,

“and to their title to the said lands.”

IV. (a) *Penn v. Baltimore.*

The report recites the frequent attendance by Richard Penn and his agents, who promised, time after time,

“to lay an account of their title before us; but after having kept us in expectation thereof for several months, they at last refused to proceed therein, whereby we are disabled from offering anything to your Majesty relating to their claim, except what we find by our books.”

They then recite that whenever the Penns have nominated a person for royal approbation to be deputy governor of the Province of Pennsylvania and of the said three lower counties they have given declarations under their hands and seals which are extant in that office from 1702 to 1733 whereby they acknowledge and agree

“that the said approbation and allowance shall not be construed in any manner to diminish or set aside the right claimed by the Crown to the said three lower counties.”

They recite that upon Penn’s refusal to proceed, they examined the facts alleged in Baltimore’s petition and state (p. 2), that under Lord Baltimore’s grant of June 20, 1632—

“There is no room to doubt that the lands in question are comprised within the limits described in that grant.”

They refer to proceedings on Order in Council of April 4, 1638 and a previous order of July 2, 1633, on the petition of Claybourne respecting title to the island of Kent in Chesapeake Bay and the hearings thereon, and then they recite the Order of the Council therein holding that the island belonged to Lord Baltimore, and (p. 3) rejecting Claybourne’s petition for a patent.

They also find that upon a dispute between Lord Baltimore and the Duke of York

“for whom Mr. William Penn was then agent”

IV. (a) *Penn v. Baltimore.*

concerning Delaware, wherein the Lords of the Privy Council Committee reported their opinion in May 1683 that the land intended to be granted to Lord Baltimore was only uncultivated lands inhabited by savages and that the land then in dispute (Delaware) was inhabited and planted by Christians prior to Baltimore's patent, and the proposal of the division of the peninsula by a perpendicular line from the latitude of Cape Henlopen to the fortieth degree of northern latitude; that the easterly half be adjudged to belong to his Majesty and the other half to Lord Baltimore.

They recite that soon after King James ascended the throne (February 6, 1684/5) that report was ordered to be carried into execution

"and was confirmed by the late Queen in 1709."

They state that as the sense of the Crown and the Lords of the Council in the several discussions seem to have been governed by the acceptation of the purpose of the words "*hactenus inculta*," they here observe

"that notwithstanding these words are in the preamble, yet they are not inserted by way of restriction in the body of the granting part."

They think the authorities seem equal with regard to these interpretations (p. 4).

They submit whether the sense in which those words were understood by the Privy Council in 1633 and 1638 (in the Claybourne matter)—

"being so soon after the date of Lord Baltimore's petition, when the real intention of the Crown in that grant might have been more clearly known to the Lords of the Council, or the later decision thereupon, when this matter was again made the subject of an inquiry in council so long afterwards as 1683 and 1685, should have the preference."

IV. (a) *Penn v. Baltimore.*

They state that they cannot enter into any examination of the claim of the Penn family "because they have declined to proceed therein before us"; and that, if it should be determined that the right to the lands in question still remains in the Crown, they offer the opinion that Lord Baltimore "hath very just pretensions to your Majesty's favor" (p. 5). On this occasion, under the advice of Solicitor General Ryder, the Penns were afraid to submit their title to the scrutiny of the Privy Council.

The Order in Council in the Claybourne matter above recited was urged by Lord Baltimore in 1685 and he was directed to produce a record of it, but for some unaccountable reason he could not then find a record of it (*Ex. 263*).

Chalmers (*Ex. 229, p. 16*) relates that when Lord Baltimore petitioned, in 1734, for a confirmatory grant which would include the Delaware counties "which the Penns had long occupied * * * without a title" the Board of Trade discovered that this territory "was undoubtedly included within his (Baltimore's) grant and that his claim seemed to be equitable."

The foregoing report was received by the Privy Council on February 12, 1734-5 and referred to the Privy Council Committee for consideration and report (*Ex. 282*). That committee, on the following day, ordered copies to be distributed to the parties (*Ex. 283*), and, on March 4, 1734-5, fixed a hearing at the first meeting after Easter, with notice to all parties to be heard with counsel (*Ex. 284*). The Privy Council Committee reported May 10, 1735 (*Ex. 638*) that it had considered the Baltimore and Penn petitions (p. 5) and, considering the agreement of May 10, 1732, between Baltimore and the Penns, it recommends the adjournment of further consideration of the subject until the end of Michaelmas term next, to afford the Penns an opportunity

IV. (a) *Penn v. Baltimore.*

to proceed in the Court of Chancery to enforce the agreement (p. 6). On May 16, 1735, the Privy Council approved that report and ordered accordingly.

The course adopted by the Privy Council Committee and the Privy Council was dictated by the fact that an agreement existed between the Penns and Lord Baltimore, the adjudication and enforcement of which was cognizable only in the Court of Chancery.

In connection with the preparation of his draft of petition (*Ex. 277*), Paris wrote to John Penn, November 7, 1734, stating that he "got the original charter and deeds from Mr. Page"; that he tried to get the Attorney and Solicitor General to attend but was unable to do so (*Ex. 734*).

If this letter is offered in evidence to prove that Paris had the original charter for the three lower counties it is insufficient, because the original charter he refers to is not identified. Mr. Page is doubtless John Page. If he had the original in 1734 why was it necessary for him to obtain the Rooke certified copy from the patent roll in 1742 (*Ex. 366*)? On August 6, 1719, he had written to George Ward stating—"as to the lower three counties our title to them is very bad" (*Ex. 474*). If Paris then had the original grant of March 22, 1682-3, the Solicitor General would not have stricken the reference thereto from the petition.

The Master found that the Order in Council of November 13, 1685, and the proceedings incident thereto, recognized Penn as the equitable owner of the Colony of Delaware (*Rep. p. 76, par. 16*).

We do not understand where the Master obtained this impression of the effect of that decision. So far as recognizing Penn as the equitable owner, the decision is to the

IV. (a) *Penn v. Baltimore.*

contrary, that is that the one-half lying towards the bay of Delaware and the eastern sea "be adjudged to belong to his Majesty" and that the other half remain to the Lord Baltimore as comprised within his charter (*Ex. 264, p. 2*).

The Master further found that by the Order in Council of August 9, 1694, and by letters patent of August 20, 1694, the title and possession of Penn to the soil of Delaware and the powers of government of Penn thereover, were formally "recognized, ratified and confirmed by the Crown of England" (*Rep. p. 76, par. 17*).

This Order in Council recites the appointment of Fletcher, *by the royal commission*, as Captain General and Governor-in-Chief over the Province of Pennsylvania and all the territory and tracts of land depending thereon; it approves some, and rejects other laws. There is nothing in this exhibit which recognizes or approves title and possession of Penn, or powers of government, in Penn over Delaware.

The document referred to by the Master "letter patent under the great seal of August 20, 1694" is presumably Exhibit 555—the revocation of Fletcher's commission as governor of Pennsylvania. (There is no other exhibit of that date.) This merely recites that the province of Pennsylvania and the adjacent colonies were in danger of being lost from the Crown of England, and thereupon the Crown revokes the commission of Fletcher as governor of Pennsylvania in the territories depending thereon and "restores" Penn to the administration of the government of said province and territories. The exhibit makes no reference whatever to the "title and possession" of Penn.

IV. (a) *Penn v. Baltimore.**The Proceedings before the Chancellor.*

The Master concluded that by the decision and decree of the chancellor the title of the successors of Penn to the lands and waters within the boundary of the colony of Delaware, as fixed by its title deeds, was adjudicated to be a good equitable title (*Rep. p. 78, par. 5*).

Here we submit that the Master reached the erroneous conclusion that the decisions in this case established the title of Penn to the Delaware counties—an error which it may be noted is also to be found in Mr. Sargeant's opinion in the Pea Patch Island case. What was actually decided is stated in the Report of the Resurvey of the Maryland-Pennsylvania Boundary, Part of the Mason and Dixon Line (*Ex. 296, p. 2*), as follows:

“The final decision of Lord Hardwick was based not on the questions usually considered, such as the rights conveyed by the grants of Charles I to Baltimore, and of Charles II and James II to Penn. But upon whether the Baltimores should be compelled to carry out the terms of the agreements of 1724 and 1732.”

For convenience, we have included the two opinions in that case in the Book of Appendices as Appendix “A” and the decree therein, as Appendix “B.”

In the complaint the Penns set up their claim of title to both Pennsylvania and the three lower counties. In his answer (Fol. 206) Lord Baltimore stated that he had always looked upon the three lower counties to be his right, and that he had never acknowledged or believed that Penn had any right or title thereto whatsoever.

On this branch of the case Ferdinando John Paris, the solicitor of the Penns, who negotiated the agreement involved in that case, testified that he could not take upon himself to say positively how far the defendant at the

IV. (a) *Penn v. Baltimore.*

time of entering into the said agreement with the plaintiffs was acquainted with the plaintiffs' title, either to the province of Pennsylvania, or to the three lower counties of New Castle, Kent and Sussex.

He also testified that as he never heard that Penn's title to Pennsylvania (he does not mention three lower counties) was imperfect or insufficient, and that he always understood the agreement, the substance thereof appeared to him to be that, in consideration of Lord Baltimore's releasing to the plaintiffs his claim to the three lower counties, the plaintiff would release to him a part of the Province of Pennsylvania; in *which light he conceived that the plaintiffs' title to Pennsylvania was the matter that was essential and material to the plaintiff* (*Breviate, p. 640*).

The record shows that Penn's counsel did not consider his title to be a question at issue in the case, but only the question of the enforcement of an agreement, the mutual consideration of which was an exchange of Lord Baltimore's *pretensions* to the three lower counties for what the Penns regarded as their more solid title to that part of Pennsylvania, consisting of a strip about 9 miles wide lying between the line of the 40th degree of latitude and the line agreed upon.

The case involved in no way any question of Penn's claim of the powers of government.

The Breviate repeatedly defines the difference between Penn and Lord Baltimore, during the years of controversy before the Privy Council, as "touching boundaries and title of soil" (*Ex. 1169, pp. 6, 7*).

That controversy had been before the Privy Council in one form or another since May, 1683. Between August 8, 1734, and May 16, 1735, the Privy Council and its com-

IV. (a) *Penn v. Baltimore.*

mittees considered a petition of Lord Baltimore for a confirmatory grant of Maryland, excluding the "*Hactemus inculta*" clause of the original grant of 1632, so as to remove the doubt about the inclusion of the Delaware settlements, and the petition of the Penns, contra (*Ex. 278, 284, 275, 277*). During the hearings in that proceeding the agreement of May 10, 1732 between the parties was pleaded by the Penns. Lord Baltimore denied that it was in force. That issue the Privy Council deemed to be within the province of the chancery, and on May 16, 1735, it made its Order in Council (Lord Chancellor Hardwick participating) (*Ex. 276*) postponing further consideration—

"that the said John, Thomas and Richard Penn may have an opportunity to proceed in a court of equity to obtain relief upon the said articles so insisted upon by them, according as they shall be advised" (*Ex. 276, p. 2*).

What the Penns "insisted upon" was the validity of the agreement, despite the lapse of the date therein provided for its fulfillment, as appears from the report dated May 10, 1735, of the Privy Council Committee (*Ex. 275, p. 2*). Hence it here appears, also, that the question to be submitted to the Court of Chancery was, not the *title* of the parties but, whether the agreement was still in force and whether the parties should be required to perform according to its terms.

The opinion recites the objections of defendant:

1. Want of title in plaintiff.
2. Lack of jurisdiction of court.
3. Lack of proper parties—Attorney General and devisees of Penn.

The court sustains its jurisdiction on the ground that here are articles of agreement (though otherwise he says

IV. (a) *Penn v. Baltimore.*

final jurisdiction would be in the Privy Council) and the sole question is whether a final decree can be made without the Attorney General and the other persons not joined before the court.

He sustains the objection for lack of the Attorney General as a party, on the allegation of defendant that the Duke of York had no legal estate in the three lower counties until six months after his deeds of feoffment to Penn.

He decided that the Attorney General should be made a party to state the right of the Crown.

Before proceeding to consider the next opinion in this case it is necessary to discuss the intermediate answers of the Attorney General.

The Attorney General filed two answers. His first answer (*Ex. 753*), filed June 14, 1745, neither admits or denies any allegations of the complaint.

It recites the grant of 1680 for Pennsylvania "bounded on the east by Delaware river" (p. 1).

It insists that no agreement between Penn and Lord Baltimore should be allowed to prejudice the right of the King in or to any of the premises in question and prays the court to preserve "all such right, title and interest, of, in, or to the premises as shall appertain or belong to His Majesty" (p. 2).

His second answer (*Ex. 754*), filed July 15, 1747, neither admits or denies any allegation of the complaint.

It saves and reserves "on behalf of His Majesty" all manner of benefit, etc., and prays that the court will "take care of and preserve all such right, title and interest of, in or to the premises as shall appertain or belong to his Majesty" (p. 1).

IV. (a) *Penn v. Baltimore.*

The decision of May 15, 1750, states that the bill is founded on the articles of agreement which recited the grant of Maryland in 1632 and the grant of Pennsylvania in 1681 "and stating a title to the plaintiffs derived from the Duke of Yorke, to the three lower counties by deeds of feoffment bearing date 24 August 1682." (No mention is made of a royal grant of March 22, 1682/3.)

It states that the bill was for a specific performance and execution of the articles and that "what else was in the cause came by way of argument to support, or objection to impeach, this relief prayed."

It states that the Attorney General has "now left it to the court to make a decree, so as not to prejudice the right of the crown."

Original jurisdiction in cases relating to boundaries is in King & Council. "*This court therefore has no original jurisdiction on the direct question of the original right of the boundaries.*" (Appendix "A," p. 12.)

The bill (& jurisdiction) was founded on articles of agreement, the specific performance of which is sought.

"The King in council is the proper judge of the original right" * * * but if an agreement for boundary is disputed it is a question of equity jurisdiction for specific performance.

In an agreement for settlement of boundaries, "The boundaries so settled are to be presumed to be the true and ancient limits."

It refers to a license to settle these limits by orders in council in 1685 and 1709, wherein the Crown is said to have ordered this division to be made so far as respects the lower counties exactly the same as provided in the agreement, but the court does not mention that those orders decreed that the easterly half of the peninsula belonged to the Crown.

IV. (a) *Penn v. Baltimore.*

It refers to "Both charters"—i. e., that of Penn for Pennsylvania and that of Baltimore for Maryland. (Does not mention any grant to Penn of three lower counties.)

It cites cases to show that the Court of Chancery has jurisdiction to decree specific performance of an agreement "though it afterwards appears that one of the parties had no title." Hence it appears that the court did not rest its jurisdiction on the title of either party, but solely upon the assumption of title as evidenced by the agreement.

It holds that "this therefore is a particular, certain, specific contract of the parties, that these shall be the boundaries; nothing left to the judgment of the commissioners, who are merely ministerial to run the line & according to the agreement, and set the marks. Therefore it is not like an award, but is an agreement, which this court will see pursued."

"It is not necessary for the court to resort to the original right of the parties; it is sufficient, if doubtful."

It states that since the boundaries are "doubtful, it is a most proper case for an agreement" and that "the parties could not resort back to the original rights between them, for if so, no agreements can stand: whereas an agreement, entered into fairly and without surprise, ought to be encouraged by a court of justice."

It states that the three lower counties passed by the deeds of feoffment.

"In 1683 the Duke takes a new grant from the crown; and having granted before, was bound to make further assurance &c."

No mention is made of the surrender of that grant of March 22, 1682/3, or the failure of the proposed grant of April 13, 1683.

IV. (a) *Penn v. Baltimore.*

It holds it sufficient if plaintiffs have an equitable estate, and considers the possession of the Penns and their power to appoint governors, but does not refer to the conditions under which they were appointed for three lower counties or the declarations required before their approval by the Crown.

“Indeed all the acts of possession are with the *salvo jure* of the crown.”

“Now I am of opinion, that full and actual possession is sufficient title to maintain a suit for settling boundaries; a strict title is never entered into in cases of this kind; neither ought it. * * * so that being to pass by plaintiffs it is not material whether they have title to convey or not.”

It holds that long possession and enjoyment, peopling and cultivating countries, is one of the best evidences of title to lands, or district of lands in America that can be.

This may be true as between private parties, which is the only light in which the parties were regarded by the court, for *nothing is said about royalties, government or any title to the rivers.*

“and I shall express in the fullest words, that this decree is entirely without prejudice to any prerogative, right or interest of the crown. I will go further; that, as I do not know how far that interest of the crown may be, I will reserve liberty for either party to apply to this court, if by any act or right of the crown, execution of this decree shall be obstructed.”

“I am of opinion to decree a specific performance of this agreement without prejudice to any right, etc., of the crown.”

The decree (Appendix “B”), provides:

“that the said articles did not bind or prejudice any prerogative, property, title or interest of the crown, in or to the territories, districts, or tracts of land, comprised in said articles, or any part thereof.”

IV. (a) *Penn v. Baltimore.*

“But the decree was to be without prejudice to any prerogative, power, property, title or interest of his Majesty, his heirs and successors, in or to the said territories, districts, or tracts of land, or any part thereof;”

Lord Hardwick assumed that the grant of March 22, 1682/3, was still in existence. He ignored the fact that the decision of the Privy Council of November 13, 1685, held that *Penn had no title at all*. Without that grant, Penn's only title rested upon the deeds of feoffment which did not convey the powers of government. Only letters patent under the great seal could convey Crown lands. Nothing less could convey powers of government. An equitable trust under the covenants of further assurance, if the deeds of feoffment conveyed any title to lands, could extend only to land and not to government. The Penns often admitted that only soil and boundaries, and not powers of government, were involved in the controversy with Lord Baltimore. Lord Hardwick's decree could at most have affected title to soil, and not powers of government. But the reservation in that decree applied to the Crown rights of soil as well as government, and subsequent events in the same matter, as well as in the approval of Deputy Governors show, that the reservation made by the Crown extended to title as well as government. The effect of that decree extended only to matters between the Penns and Lord Baltimore, and not to any matters between the Penns and the Crown, where the difficulty of title and government lay, and particularly the question of Royalties in the bed of the tidal waters of Delaware river.

At the time of the decision this court had no jurisdiction to decide questions of pure law or of title. It was necessary to send such cases to the courts of common law for adjudication. It was not until the statute of 15 and

IV. (a) *Penn v. Baltimore.*

16 Victoria (1851-2) that Parliament passed an act authorizing the Court of Chancery to determine questions of "title or right without requiring the parties to proceed at law to establish the same" (2 *Daniel's Chy. Pl. and Pr.* 1002-3).

It is therefore clear that the Lord Chancellor did not undertake to decide questions of title. Also, that he did not undertake to determine any questions of the powers of government in the three lower counties, or any title to the bed of Delaware river.

The decree provides for a commission "for the actual running in and laying out *the part of the circle* and the several lines in the articles mentioned" and "that a true and exact plan and survey thereof with the best and most exact and accurate descriptions that can be given of the same be made up, signed and sealed by the same commissioners on both sides and by their principals," etc. (*Ex. 643, p. 2*).

Those boundaries were laid down according to that decree by John Mitchell on his map (*Ex. 1144*), as described by Col. Martin. The circular boundary between Pennsylvania and the three lower counties was not run by the commissioners appointed under Lord Hardwick's decree (*Ex. 293, pp. 14, 15; Ex. 295, p. 36*). The only boundary run under that decree was from the westerly side of the circular boundary westward (*Ex. 295, p. 38*).

Defendant's Exhibit 760, containing extracts from the bench notes of Lord Hardwick on the argument of October 25, 1743, are not regarded as having evidential value, since they refer only to arguments of counsel. They show, however, that the Attorney General claimed title in the Crown (p. 3).

IV. (a) *Penn v. Baltimore.*

Some light on the effect of Lord Hardwick's decision, so far as the Penn title was concerned, is reflected by the decisions of this court.

In *Rhode Island v. Massachusetts* (12 Peters 657) that case was discussed. The opinion (p. 738) states that questions concerning boundaries of contiguous pieces of land, manors and lordships of counties palatine were cognizable in the high court of Chancery, but the question of title to any defined part was cognizable only in a court of law.

It states that the King could make and unmake boundaries in any part of his dominion, except in proprietary provinces, which power he exercised in various ways, including by order in council as in the case of the dispute between Massachusetts and New Hampshire. In council he settled boundaries in virtue of his prerogative where there was no agreement; but if there was a disputed agreement the King could not decree on it.

(p. 740)

“Chancery could and did act on agreement between them as to their boundaries, in the case of *Penn v. Baltimore*, although they could not have done so had they stood at arms length; in which case the King and Council could alone have decided the original boundary on an appeal.”

That the case of *Penn v. Baltimore* involved no powers of government is indicated by the further observations of this court in that case.

It cites the case of *Nabob of the Carnadic v. The East India Company*, in which the defendant pleaded sovereignty. The English court of Chancery held that it had no jurisdiction between two sovereigns (2 *Ves. Jun.* 56, 60).

Holds (p. 742) 1. That the settlement of boundaries by the King and Council is by his prerogative, acting on a political question between dependent corporations or proprietaries in his dominion without the realm.

IV. (a) *Penn v. Baltimore.*

2. The settlement of boundaries in Chancery is necessarily a jurisdictional question whether it relates to the boundary of provinces, according to an agreement between the owners, as in *Penn v. Baltimore*, or in other classes of cases mentioned where the parties appear in their corporate capacities, but where the parties assume the character of a sovereign it is a political question on which no municipal court can act and chancery has no jurisdiction but to dismiss the bill.

(p. 743)

“In the colonies there was no judicial tribunal which could settle boundaries between them * * *. The only power to do it remained in the King, where there was no agreement; and in Chancery, where there was one, and the parties appeared.”

Turning now to proceedings subsequent to Lord Hardwick's decree, it appears that neither party was satisfied to rely solely upon that decree. They filed a joint petition to the Privy Council, the proceedings whereon are abstracted as follows:

The proceedings on that petition, extending from June 26, 1767 to January 11, 1769, are given in Exhibits 287, 645, 646, 288, 289, 287 and 647. They consist of consideration by the Privy Council Committee, the Lords Commissioners, and by the Attorney and Solicitor General, whose opinion and suggestions are contained in Exhibits 289 and 647.

The result was an Order in Council of January 11, 1769, approving the report of the Privy Council Committee, and adopting the opinion of the Attorney and Solicitor General, and ordering the approval of the boundaries fixed in the Chancery decrees, on the following condition:

“But his Majesty doth hereby declare that such approbation shall not be construed in any manner to diminish or affect his Majesty's claim of right to the

IV. (b) *Pea Patch Island Case.*

three lower counties of New Castle, Kent and Sussex nor prejudice any prerogative, power, property, title or interest of his Majesty, his heirs and successors in or to the said territories, districts or tracts of land or any part thereof * * * which the petitioners had not a right or power, by virtue of the respective charters or grants under which they claim, to bind or conclude" (*Ex. 287, pp. 4-5; Ex. 647, pp. 5-6*).

For eighty-four years, from the Order in Council of 1685, to this Order in Council of 1769, the Penns struggled under the load of a condemned title to the three lower counties, yet at the end of it all, on the brink of the American Revolution, this reservation appears unimpaired, in favor of the Crown's claim of right to the three lower counties.

(b) *Pea Patch Island Case.*

The decision of January 15, 1849, of John Sargeant (*Ex. 676*) under an arbitration agreement of the parties thereto respecting title to Pea Patch Island, located at the bend in the river between Finns Point (New Jersey) and Delaware City (Delaware) (*Ex. 3*), was offered by defendant, over the objection of plaintiff, that that case was not between the same parties, was not the decision of a court, and is not binding upon plaintiff (*R. p. 429*).

It is obvious that the decision therein, under a voluntary agreement of arbitration, between other parties, on an agreed issue of title (not boundary) and with express exceptions by the arbitrator that he cannot, and does not intend to, affect the question of the boundary between the states, cannot be binding or even persuasive, and is not *res judicata* in the present case.

The arbitrator states that the settlement of the boundary is "not to be decided in the arbitration, New Jersey and

IV. (b) *Pea Patch Island Case.*

Delaware not being parties to the submission, nor having agreed to submit their rights" (*Ex. 676, p. 1*).

See *Marine Railway and Coal Co. v. United States* (257 U. S. 47).

Smoot Sand and Gravel Co. v. Washington Airport Inc. (283 U. S. 349, 350, 351).

History of the Controversy.

During the war of 1812 a British frigate sailed up the Delaware river. The people of Newcastle and Wilmington were alarmed and appealed to the federal authorities for protection. The reply of the Secretary of War was that, since the Federal Government had no money, it could not build a fort to protect the river unless the necessary funds were furnished by the people and the cities interested, in which event he promised that the government would, in time, repay it with interest.

Thus was conceived the idea of a fort on Pea Patch Island, afterward called Fort Delaware (*H. R. Rep. No. 92, 24 Cong. 1st ses., p. 12*).

Citizens of Newcastle and Wilmington had no difficulty in obtaining from the Delaware Legislature an act, passed May 27, 1813 (*Ex. 673*), ceding to the United States "All the right, title and claim which this state has to the jurisdiction and soil of the island in the Delaware commonly called the Pea Patch" reserving jurisdiction for civil and criminal process.

New Jersey Claim of Title.

Title to that island was already claimed, and the claimant was then in actual possession, under grant 181 from the Proprietors of West New Jersey, on a warrant, dated October 27, 1784, of Atkinson to Hall (*Ex. 126*). That title

IV. (b) *Pea Patch Island Case.*

passed through a succession of mesne proceedings or conveyances (*Ex. 208 to 212*) to Henry Gale on February 27, 1813, three months before the Delaware act of cession.

The island was purchased by Gale from the administrators of Clement Hall on February 27, 1813, under an order of the Orphans' Court of Salem County, New Jersey (*Ex. 212*).

As soon as Dr. Gale obtained possession of the island he went upon it to clear away and operate a fishery, with the aid of 13 men. One of those men was Eli Herbert, who testified on October 4, 1836, that, while he was there in the early spring of 1813, General Bloomfield and two other officers of the United States Government came there to see if the island would answer for a fort. They offered Dr. Gale \$30,000 for the island, but the offer was refused (*Ex. 221, p. 10*).

On May 27, of the same year the Delaware act of cession was passed, and, in the fall of that year, United States soldiers forcibly took possession thereof for the United States (*Ex. 221, p. 3*).

President Jackson twice (February 19, 1831 and January 20, 1832) sent messages to Congress recommending the appropriation of money to buy Gale's title, and on January 23, 1835, the House Committee on Military Affairs approved the appropriation and reported favorably House Bill 673 including it. The first recommendation of the President failed because it came but a week before the adjournment. The second recommendation was approved but defeated by failure of Congress to pass the military appropriation bill of that year. (*Doc. 91, 18th Cong. 1st ses.; H. R. Rep. No. 59, 23rd Cong. 2d ses.; H. R. Rep. 92, 24th Cong. 1st ses.; Sen. Doc. 40, 25th Cong. 2d ses.*)

IV. (b) Pea Patch Island Case.

After a futile protest, Dr. Gale began an ejectment suit, in 1815, against officers of the United States then in possession, in the United States Circuit Court for the District of New Jersey (*H. R. Rep. No. 59, 23rd Cong. 2d. ses. p. 9*) and that case was ready for trial in April, 1820.

At the suggestion of J. McIlvaine, then United States District Attorney for New Jersey, made January 20, 1820, the government employed to assist him, Hon. Richard Stockton, a member of the Constitutional Convention, a signer of the Declaration of Independence, and described by McIlvaine as "the most influential and able counsellor at our bar." The government directed George Reed, Jr., then United States District Attorney for Delaware, to assist and also employed Caesar A. Rodney, an eminent lawyer of Delaware, for the same purpose.

Mr. Rodney and Mr. Reed attended at Trenton for the trial of the case in April, 1820, but it was adjourned to October. They say, in their letter of July 2, 1820, that this will afford them an opportunity to obtain a special jury and to collect more testimony.

On the joint recommendation, made April 20, 1822, of Mr. McIlvaine and Mr. Stockton, who had misgivings about the Delaware title, the United States applied to the Legislature of New Jersey, in 1822, for a grant of Pea Patch Island to strengthen its defense in that litigation, and repeated the application in 1825. Those applications were unsuccessful, for the reasons stated in Exhibit 161 (pp. 2-7).

A motion of the United States, to include the State of New Jersey as a party, was denied in October 1822. Thereupon the suit in the Circuit Court, was discontinued and another was commenced in the New Jersey Supreme Court.

IV. (b) *Pea Patch Island Case.*

The government removed the New Jersey Supreme Court case to the United States Circuit Court in April, 1823, but it was remanded to the Supreme Court (*Executive Message, Doc. 91, 18th Cong. 1st. ses. p. 7*).

On application of the United States the New Jersey Supreme Court ordered the case to be tried before a foreign jury. The case was noticed for trial at the November term, in 1825, but was adjourned because neither Mr. Van Dyke nor Mr. Reed (Delaware counsel) could attend (*H. R. Rep. No. 92, p. 17*).

On application of the United States, the case was removed to the United States Circuit Court, where it was tried before *Justice* Baldwin of this court, holding the Circuit and a jury in November, 1836, resulting in a verdict of the jury in favor of the plaintiff, under *Justice* Baldwin's charge (*Ex. 217, 219*).

When Gale had become impoverished and insane, the island was sold by the sheriff of Salem County, New Jersey, by virtue of an execution against Gale in the Salem Court of Common Pleas, on September, 1831, to Jonathan Trumbell Hudson (*Ex. 213, 218*) and he, and his successors under that title were acknowledged by the United States Government as claimants in subsequent negotiations, including the arbitration agreement.

Exhibit 226 is a certified copy of a deed from James Humphrey, successor of Jonathan T. Hudson, by deed of April 5, 1844, (*Ex. 224*) to the United States of America, dated June 9, 1847, for Pea Patch Island "in the County of Salem, State of New Jersey."

The deed from Humphrey to the United States was dated, executed and acknowledged on June 9, 1847, and instead of being held in escrow until the award was made, as the agreement provided (*Ex. 675, p. 3*), it was, on Oc-

IV. (b) *Pea Patch Island Case.*

tober 8, 1847 (three days before the Sargeant hearings began) recorded in Salem County, N. J., in compliance with a letter from Major General C. H. Briggs, Adjutant General's office, U. S. War Department, dated October 7th, 1847, to the Clerk of Salem County, transmitting that deed for record (*Ex. 225 and 226*). That deed was never recorded at any time in the State of Delaware.

Thus every instrument by which title to the island was transferred, beginning with the grant of 1784 from the Proprietors of West Jersey to and including the deed to the United States in 1847, was recorded in Salem County, New Jersey, and not elsewhere.

On November 24, 1831, the New Jersey Legislature passed an act (*Ex. 214*) vesting in the successors of Henry Gale all the right and title of the State of New Jersey in Pea Patch Island "situate in the River Delaware, in the County of Salem, and State of New Jersey." That act recites the title of Edward and Clement Hall to the Pea Patch Island pursuant to a survey from the Western proprietors of New Jersey, October 27, 1784, approved November 3, 1784, and duly recorded in the Western Division of New Jersey (*Ex. 126*); title in Henry Gale through conveyances from Edward Hall and Clement Hall (*Ex. 211 and 212*); that "it hath been suggested that the State of New Jersey hath some title thereto, and by reason thereof doubts have arisen concerning the title of the said Henry Gale." It states that for divers good consideration, and also for consideration of a dollar, all the right and title of the State of New Jersey in the Pea Patch Island situate in the Delaware River (p. 1) "in the Township of Lower Penns Neck, County of Salem, State of New Jersey" as described in the above mentioned survey of the Western proprietors, is granted and conveyed to Henry Gale.

IV. (b) *Pea Patch Island Case.**The Wall Opinion.*

Contrary to the unofficial opinion of Mr. Sargeant, stands certain official opinions, now to be set forth.

On June 9, 1834, Garrett D. Wall, then United States District Attorney for the District of New Jersey, pursuant to a request of the Secretary of War, submitted his opinion (*Ex. 215*) respecting the conflicting claims of title of Dr. Gale, and the United States under the Delaware cession act, to Pea Patch Island, which an accompanying letter states "was a work of some labor, and more research." The opinion is reprinted as Appendix "C."

The value of this opinion depends upon an understanding of the qualifications of its author.

"In 1812 he was elected by joint meeting clerk of the Supreme Court and held the office for five years. In 1829 he was elected governor and chancellor but declined and in 1835 was elected to the United States Senate. . . . Later he became one of the judges of the Court of Errors and Appeals where his great legal learning was conspicuously displayed." (*1 Hist. of Trenton, Princeton University Press, 1929, p. 608.*)

He was counsel in the famous cases of *Arnold v. Mundy* (6 N. J. L. 1), *Bennett v. Boggs* (1 Bald. C. C. 60) in the United States Circuit Court for the District of New Jersey, and *Martin v. Waddell* (16 Peters 366) in this court. These are the leading cases, not only in New Jersey, but are cited and quoted in every subsequent reported case involving similar questions. Those cases all preceded his opinion on the Pea Patch title.

That opinion contains a comprehensive review of the early grants and titles and of the history of the neighbourhood and the origin of the island, "within memory," about 60 or 70 years before that date, and its gradual enlargement from accretion, and the title and possession of

IV. (b) *Pea Patch Island Case.*

Dr. Gale and his forcible dispossession, without lawful authority, by the United States.

He recites the concessions and agreements of Penn and his associates in 1676 and other proceedings of the Proprietors and of the New Jersey and West Jersey assemblies relating to rights of the inhabitants of West Jersey in Delaware river, including the erection and maintenance of the wharves, quays, and harbours, fisheries and whaleries. He recites the surveys of the island in the river made by the West Jersey Proprietors and other laws of the colonies and State of New Jersey asserting their title to the ship channel in the river. He refers to the repeated efforts of New Jersey to secure an agreement respecting the boundary and the refusal of Delaware to appoint commissioners for that purpose. He says:

“The State of New Jersey has, and for near fifty years has had, laws regulating the fisheries in the Delaware, which assert her jurisdiction, and regulate the exercise of the right of fishing in the whole extent of the Delaware river and bay” (p. 13).

Then follows a statement of principles and deductions in support of the right of the State of New Jersey to the island, which he supports by authorities, including the following statements:

“1. The best expounder of the rights under those ancient and public grants for colonization and government, is the occupation and enjoyment. For more than sixty years, New Jersey has exercised an adverse dominion, under a claim of right, over the waters of the Delaware. This will bind nations, as well as individuals. *Vattel 182, s. 266-4.*

2. By the terms of the grant, the Delaware is made the western boundary; it was granted expressly for colonization, and the powers of Government were granted with the soil. Upon the purchase of so large a tract as New Jersey, bounded on its whole western border by the Delaware, it

IV. (b) *Pea Patch Island Case.*

would be difficult to presume that any right in that river was excluded. It was essential to the purposes of the grant, and all presumption must be in its favor.

3. The claim and holding have always been to the middle of the Delaware. Usurpation and prescription are much more necessarily used between sovereign states than individuals. *Vattel 254, s. 147.*

Prescription composes a title as firm and just as that of property itself, established and supported by the same reasons. *Vattel 253, s. 141-2.*"

He cites the opinion of the Attorney and Solicitor General Raymond and York in 1721 and that of Judge Washington in *Corfield v. Coryell*, and then states:

"I think the right of New Jersey is undeniable, if no adverse grant can be shown; none such can be shown, which has or ever had validity.

Delaware never was granted by the King, the only rightful grantor. If the question was *de novo*, I think that no doubt would exist that the grant under which the three lower counties of Delaware are held would be invalid. If it is good at all, it is because possession has ripened it into a title. But it can go no farther than the possession goes."

He then states that the only pretended grants for Delaware are the deeds of feoffment from the Duke of York to Penn, which he says were ineffective to convey title in the river, because such title could be acquired only by a grant from the King.

He states that the conquest of the Dutch gave no title to the Duke, he being a subject. Of the deeds of feoffment he says:

- "This title, by conquest, would seem to be the one relied on by the Duke. This is confirmed by the mode of conveyance, *by deed of feoffment*, an extraordinary mode of conveying wild lands &c., and best adapted to convey a possessory right.

IV. (b) *Pea Patch Island Case.*

It may be well doubted whether *subaqueous soil*, incapable of possession, as well as rights of jurisdiction, and other rights, incapable of delivery, would pass by deed of *feoffment*.

Then there is no valid grant from the King to any person for the river Delaware; and the right arising from the revolution and the treaty of peace, as well as the general law of nations, allots to the contiguous States, respectively the jurisdiction and propriety in the river to the middle of Delaware, from its mouth upwards.

In looking at the grant made by the Duke of York to William Penn of New Castle and the twelve mile circle, it is obvious that it would include a considerable portion of the county of Salem, the whole of the town of Salem, and several other places then actually settled and inhabited under former grants made by the Duke of York, under title derived from the King. The several deeds of feoffment made by the Duke to William Penn being *void*, cannot be extended beyond what was actually possessed under it; and it must now be limited by that possession.

I am not aware that Delaware has ever asserted her claim to the waters of the Delaware, even to the channel, except in the cession made to the United States" (p. 16-18).

All the documents and records mentioned by Senator Wall in his opinion are in evidence in *Gale v. Behling* (*Senate Doc. 140, 25th Cong., 2d ses. p. 5*), and the present case.

Justice Baldwin's Opinion in Gale v. Behling.

This case was tried by a justice of this court, then presiding in this circuit.

The official minutes of the United States Circuit Court in that case are contained in Exhibit 217, which is dated November 16, 1836. It contains a list of the jury and of the witnesses and exhibits presented at the trial on that

IV. (b) *Pea Patch Island Case.*

date, with the verdict of the jury in favor of Dr. Gale and against the government officers. Then following is the execution for possession (pp. 2-3), and an alias execution, with the Marshall's return of delivery of possession to the plaintiff (pp. 4-5).

That suit was defended by the United States, by at least 4 eminent lawyers. There was no plea to the jurisdiction of the court.

The facts are fully set forth in *Exs. 216, 220, 221, 223* and *227* hereinafter discussed.

In his letter of November 30, 1836, Mr. Green states that plaintiffs produced and proved at that trial every document and fact named in General Wall's opinion (*Ex. 215*) of June 9, 1834. This record shows that there was also introduced, by stipulation, the affidavits of a number of witnesses. (*Senate Doc. 140, 25th Cong. 2d. ses., pp. 5, 10-15*).

No appeal was taken by the United States, on advice of the United States Attorney General (*Ex. 220, p. 4*).

Such a clear and cogent statement of the law by a Justice of this court, based upon a thorough review of the facts from the lips of witnesses who testified to facts within their recollection, but now lost to memory, deserves full consideration. The two cases are not between the same parties, but the title under which they claimed, respectively, came from the same sources as in this case.

His charge to the jury (*Ex. 219*) amounted, practically, to a direction of a verdict for plaintiff, and contains a statement of the law (which is the law of the case) by a Justice of this court. That charge is vital in this case. Since it is printed in full as Appendix "D" in the book of appendices, we limit ourselves here to a general statement of his conclusions.

IV. (b) *Pea Patch Island Case.*

He cites and follows *Justice* Washington's decision in *Corfield v. Coryell* (4 Wash. 371), and his own decision *Bennett v. Boggs* (1 Bald. 60), holding that the grant of 1664 to the Duke of York conveyed title only to low water mark on the east side of the Delaware (p. 9).

He reviews the law respecting the thalweg rule and holds it applicable to Delaware river within the 12 mile circle. He reviews the title history of both states, and construes the deeds of feoffment of the Duke of York to Penn as conveying no title in the river or bay. He discussed the law of adverse possession, and holds that New Jersey has title to the bed of the river by prescription against both the Crown and the State of Delaware, as well as by the Treaty of Paris, as far as the middle of the main ship channel then existing west of Pea Patch Island, including that island. He reviews the Delaware act of 1794 repudiating the Penn title and holds that this was an election by the State of Delaware to rely upon the title of the Crown, and not upon that of Penn, to the territory of that state. He says:

"This solemn repudiation of any claim under the deeds to Penn, and the express claim asserted by the relinquishment of the Crown as the source of the title of the State to the unappropriated lands within their boundaries, precludes the State from claiming any benefit, by prescription, from the long possession of soil and government by the Penns from 1682 to 1776 or by the Deeds of the Duke of York; and, as the State asserts title by the treaty of peace, as a cession by the King, she can have no better right than the King had at the time of the treaty or before."

He holds that even if Delaware had claimed title under Penn, there was sufficient evidence to support the right in the New Jersey proprietors, by prescription, to the island in question. Then he says:

"Having, however, abjured any other than the title of the Crown, she must rest upon that in sup-

IV. (b) *Pea Patch Island Case.*

port of the right which she ceded to the United States by the act of 1813; that the title is not valid, because the principle of prescription had previously made good the title of the New Jersey proprietaries under the patent to the Duke of York, according to their possession or claim under or by color thereof."

The Master points out that the letters patent of March 22, 1682/3 were not before the court at the time *Justice Baldwin* delivered this charge (*Rep. p. 62*). In our view that is unimportant because he sustains the New Jersey title, both on the ground of prescription and also upon the election of Delaware in 1794 of the Crown title and repudiated the Penn title.

The decision stands as the only judicial determination ever made of the title to Pea Patch Island, and the rights of plaintiff and defendant in the river within the so-called 12 mile circle, except and until plaintiff's rights therein were again sustained by the decision of this court on the argument of the application for preliminary injunction in 1872 (*Ex. 237, p. 13*).

It may be observed that in *Re Grange*, (Atty. Gen. Opp) 1793; *Corfield v. Coryell*, 1823; *Kean v. Rice*, 1824; *Bennett v. Boggs*, 1830, and *Gale v. Behling*, 1836, plaintiff's boundary in Delaware river or bay was the essential and principal question decided in competent tribunals of acknowledged jurisdiction. In each instance that boundary was held to be the middle of the main ship channel. If not strictly *res judicata* these decisions should be controlling after the passing of a century without any of them being reversed or overruled.

James S. Green, the United States District Attorney who tried the case, in a letter of May 8, 1837, to the

IV. (b) *Pea Patch Island Case.*

Attorney General of the United States, submitting a copy of *Justice Baldwin's* charge, said:

"As to the charge of the judge, I was satisfied with it at the time as fair and impartial, and as presenting to the jury the whole case, both as to the law and fact. After a full and laborious examination of the *Pea Patch* case, I have no hesitation in saying that, in my opinion, the second trial, could the government procure it, would result as the first" (*Ex. 219*).

He also reported on November 23, 1836, to the Secretary of War, as follows:

"The subject was fully and elaborately discussed, and Judge Baldwin delivered a clear, impartial and satisfactory charge to the jury. I am not aware that anything more could have been done. Exceptions were noted to permit review before the United States Supreme Court if desired" (*Ex. 220, p. 1*).

All the evidence and proofs were submitted (*Ex. 220, p. 2*).

Justice Baldwin's charge and the verdict were submitted by the Secretary of War to United States Attorney General Butler, who replied on November 18, 1837:

"I do not find any sufficient ground for writ of error. The material opinions expressed by the court on the legal points, appear to me to be correct; and the questions of fact on which the case turned, were fairly submitted to the jury" (*Ex. 220, p. 4*).

The contemporaneous opinions of these eminent lawyers, one of whom had the advantage of participating in the trial, and both of examining all the evidence as well as the decision, cannot be disregarded.

Since the decision of Lord Hardwick in *Penn v. Baltimore* was known to *Justice Baldwin* and to Senator Wall, it cannot be presumed that they were ignorant of the fact

IV. (b) *Pea Patch Island Case.*

that in that case Penn claimed to have a grant from the Crown for the three lower counties and the statement by these authorities that there was no valid grant from the Crown in existence, must be presumed to be predicated upon their opinion that the grant of March 22, 1682-3 was then non-existent.

Justice Baldwin's conclusion that Penn had title to the three lower counties, through the deeds of feoffment and long possession approved by the Crown, like that of Lord Hardwick, is, however, proven to be incorrect by the evidence, presented for the first time in this case, of the repeated objections made by the Crown and its ministers to Penn's claim of title under those deeds, and the constant reservations in favor of the Crown title made in the royal approval of Penn's nominees for governor of the three lower counties.

The Delaware Suit.

After Dr. Gale's successor obtained his judgment of possession in *Gale v. Behling* in 1836, the officers of the United States executed a lease for the island from Gale's successor and remained in possession thereunder until 1839, when they were dispossessed under a writ of ejectment issued out of the United States District Court for the District of Delaware, under a default judgment obtained by the United States without notice to, or knowledge of, the owner of the island.

Exhibit 222 is a record of that proceeding, wherein the United States brought suit against its own agents, in possession under lease from Gale's successor which the War Department had authorized and approved. The declaration was filed May 7, 1839, and subpoena issued returnable in ten days, and served, not by the United States Marshall but by Col. Thompson upon his associate

IV. (b) Pea Patch Island Case.

government agents on the island, who sent it to the War Department at Washington for necessary attention. There it was held without notice to the lessor, until after the return day of the subpoena. On that return day, the United States District Attorney of Delaware appeared and obtained judgment by default, and a writ of ejectment was promptly served upon the government officers in possession under the lease. A month afterwards the War Department notified its lessor, the owner of the island, of the judgment and ejectment and thereafter used these instruments to club him into the submission of the dispute to arbitration (*Ex. 223, p. 12; Ex. 227, pp. 3, 5, 6*).

Official Reports on Pea Patch Controversy.

The story of this transaction is told in the official publications of the United States Congress (*Ex. 216, 220, 221, 223, 227*).

Exhibit 216 contains a letter from McIlvaine, United States District Attorney for New Jersey, to the Secretary of War, dated April 20, 1822. He says that to prevent too much confidence in the title derived from the State of Delaware, he recommends an application to the New Jersey Legislature for a grant of the island, which, he says, "would at least be a prudent measure." He then proceeds to describe the title of Gale, of New Jersey and the State of Delaware (p. 19).

He says:

"I have examined all the books and records that can be found relating to the subject, and am satisfied that a grant from Charles to the Duke of York for the property conveyed by the Duke to William Penn cannot be found, and in all probability was never made."

"There is some ground for believing that in 1683 (one year after the grant from the Duke to William Penn) the Duke obtained from his brother a war-

IV. (b) *Pea Patch Island Case.*

rant for *passing a patent*, but there is no evidence that it ever was done, or even of the *contents* of that warrant."

"On the whole, it will be found that the islands in the Delaware have never been granted by the sovereign; that in regard to the Pea Patch, Delaware, to say the least, has no better title to it than New Jersey; and that it is a fair subject for negotiation and settlement between the two States" (p. 20).

Exhibit 223 contains a letter of October 8, 1839 from the Solicitor of Treasury, to Wall and Southard, suggesting means of adjustment of the differences, in which he admits that the decision in the Circuit Court in New Jersey was "acquiesced in by the War Department at once and the matter is now revived only in obedience to the directions of Congress" (pp. 8, 11).

Intermediate Delaware Acts.

Action by the legislature of Delaware, subsequent to its cession of Pea Patch Island to the United States in 1813 (*Ex. 676*), is contained in *Exhibit 674*, consisting of Resolutions of January 28, 1837, January 23, 1843, and February 28, 1853, proposing a re-cession of Pea Patch Island to defendant for the purpose of trying the title as between it and plaintiff, which was never done.

The Sargeant Opinion.

(*Reprinted as Appendix "E"*)

The reliance placed on that opinion by defendant and the Master (*Rep. pp. 41-6, 62*) requires a full discussion thereof to point out what we conceive to be the errors therein, as well as the fact that the record in that case was not as complete in this case.

IV. (b) *Pea Patch Island Case.*

Mr. Sargeant says:

"The importance of the case consists chiefly in this; that it involves the question of the boundary for nearly twenty-five miles, between the two States just named. It is true that the settlement of that boundary is not submitted, nor to be decided in the arbitration, New Jersey and Delaware not being parties to the submission, nor having agreed so to submit their rights" (*Ex. 676*).

The evidence in the present case shows a great mass of documentary evidence which was not submitted in that arbitration.

Mr. Sargeant states that when *Justice* Baldwin charged the jury in *Gale v. Behling*, the case of *Martin v. Waddell* had not been decided. He states that the question decided in *Martin v. Waddell* was "that after the surrender to the Crown in 1702, by the Proprietors of East New Jersey, of the powers of government, they had no right in the navigable rivers within the charter limits of New Jersey, nor to the soil under them, and have had none since."

This statement is incorrect because *Martin v. Waddell* decided only that the *East* Jersey Proprietors retained no right in the navigable rivers after the surrender, by virtue of the grant of the Duke of Yorke. It clearly appears from *Gough v. Bell*, that rights in navigable waters were held subsequent to that surrender by custom and modifications of the common law, which grew up in the colonies. The *locus in quo* involved in *Martin v. Waddell* was the Raritan bay where a different condition existed from that on the Delaware because it was admittedly within the Duke's grant.

From this misapplication of *Martin v. Waddell* the arbitrator concludes that the *West* Jersey Proprietors had no rights in the river Delaware. In the same manner he misinterprets the decision of the New Jersey Supreme

IV. (b) *Pea Patch Island Case.*

Court in *Arnold v. Mundy*. He also incorrectly states that *Arnold v. Mundy* was a decision of the highest court in New Jersey. It was, in fact, a decision of the Supreme Court which was never affirmed by the Court of Errors and Appeals, which is the highest court in New Jersey, and was not afterwards followed, either by the Court of Errors and Appeals or the Supreme Court in New Jersey in subsequent cases, or by Chief Justice Taney in *Martin v. Waddell*, and, although not expressly reversed, its principal holding was overruled in *Gough v. Bell*, *Corfield v. Coryell* and *Bennett v. Boggs*.

The arbitrator states that there was no evidence to show that the State of New Jersey ever claimed title to the island. The fact that the parties in that case failed to produce evidence is controlling only in that case, and is no proof that there is none on that point. Plenty of such evidence was offered in *Gale v. Behling*.

Prior to 1835 Chief Justice Harrington of the Delaware Supreme Court discussed this boundary dispute in his decision in *State v. Morris* (reported as a note to *Emory v. Collins*, 1 Harr. Del. 326), in which he reviewed the controversy between the two states over this boundary line from 1782 to the date of that decision, referring to official action taken by each state during that period.

All this information is set forth in *Exhibit 161*, in this case, except Chief Justice Harrington's decision which is a reported case.

All of this material was available in the form of public documents at the time the Pea Patch Island case was decided by Mr. Sargeant, and it suffices to refute his statement that New Jersey had never claimed title to that island.

He cites the grants of New Jersey to the Duke of York and to Berkeley and Carteret, the confirmatory grants

IV. (b) *Pea Patch Island Case.*

(p. 15), and the opinion of Raymond and York in 1721 (p. 16), and correctly concludes that there was no royal conveyance of land to the Duke beyond the west side of the river and bay, but he overlooks the rights acquired by the proprietors and inhabitants under usage or prescription, with the sanction of the Crown, as discussed herein.

He states that if the title to the river, including Pea Patch Island, was in the Crown on July 4, 1776, and the original property was in neither state, it would have become vested in the two states, and New Jersey would have been entitled to the eastern portion and Delaware to the western portion.

This statement overlooks the fact that at that time the main channel of the Delaware river at that point was west of the island and, under the law of nations and the decisions of this court, the island would have belonged to New Jersey.

He recites the two deeds of feoffment of 1682 from the Duke of York to Penn, and livery of seizin thereunder, erroneously attributing a literal interpretation to the words "in the Delaware river," which Exhibit 1168 shows was only a term of reference to the Delaware settlements and had no intrinsic relation to the river itself. That literal interpretation is also contrary to the contemporary interpretation placed upon those deeds of feoffment by Penn himself, and by his successors and representatives throughout the whole controversy, as shown by *Exhibit 1169*.

He states "that Penn remained in quiet possession," which is contrary to the facts shown throughout this brief.

The arbitrator then states that the Duke of York had no title from the Crown and that "it is certain that no

IV. (b) Pea Patch Island Case.

such grant has been produced, and it is assumed, as a fact, that no formal grant had been made to him by the Crown." He assumes, however, "that the Duke of York was somehow empowered to deal with the territory on the west side of the Delaware river, and the river itself, as being connected with the operations he was conducting to protect or recover it from the Dutch" (p. 23).

The conquest of the Dutch, and the protection of the territory subsequent thereto, had been intrusted to commissioners appointed directly by the Crown, and the enterprise was carried on at the Crown's expense, and that the Duke himself had nothing whatever to do with the enterprise, unless it was in the capacity of Lord High Admiral in providing the ships pursuant to the directions of the Crown.

The arbitrator admits that the Duke could not have acquired title by conquest, and says—"but that in such a war, enabling him to quiet the inhabitants or strengthening the defense of the country, it was not unnatural nor unreasonable to suppose that he might be intrusted with a large discretionary power, and even with rights in himself for its better execution, especially considering the relationship he stood to the King, and that he himself 'was the heir presumptive to the crown'" (pp. 23-24).

This supposition of the arbitrator is illfounded, as shown in the discussion herein, and especially by the fact that King Charles after the second treaty with the Dutch directed them to deliver possession of this territory to Edmond Andros on behalf of the Crown. The Duke had nothing to do with quieting the inhabitants or strengthening the defense of the country. That was intrusted by the Crown directly to his commissioners, who acted under express instructions from the Crown and at the Crown's expense.

IV. (b) *Pea Patch Island Case.*

The administration of government from New York was for the King and not the Duke.

The arbitrator erroneously states that jurisdiction and powers of government were transferred to Penn by the Duke of York. The deeds of feoffment purported to contain no powers of government but merely the "soil."

The arbitrator states "the Duke of York and his governors did make claims along the Delaware, and did confirm titles derived from the Dutch and the Swedes."

This is an incorrect statement, since the grants or confirmations of title made by the Governors at New York were made in the King's name and the quit rents were made payable to the King. All of their acts of government were exercised in the King's name.

The arbitrator concludes that the Duke of York subsequently accepted a patent from the Crown. He was evidently unaware of the *surrender of the grant and of the subsequent attempts of Penn to obtain one, and his repeated admissions that he had none.*

He states that the three lower counties became "de facto a province or colony." This is incorrect in the light of the subsequent proceedings. On innumerable instances the title of the three lower counties was held to be in, and was reserved to, the Crown. Powers of government were never recognized, or even claimed by Penn, in any proceeding in England or in *Penn v. Baltimore.*

He refers to the "Act of Union" adopted December 7, 1682, and recites some of its provisions but does not mention the method by which Penn procured this Act and its repudiation shortly thereafter by the inhabitants of Delaware.

The Act of Union was never submitted to the King for approval. On the contrary it was criticized by Quarry and

IV. (b) *Pea Patch Island Case.*

Randolph, the King's officers in the colonies, and Penn's right to enact it was challenged before the Privy Council and the Lords Commissioners. The King never assented, and his ministers always objected. One of the grounds assigned by the Delaware members of Assembly for separating from Pennsylvania and restoring their independence, was the failure to submit the acts of Assembly to, and obtain their approval by, the Crown.

The arbitrator then refers to the grant of March 22, 1682-3 from Charles II to the Duke of Yorke for the three lower counties (p. 27).

He states "the original patent was here produced—brought from England some years ago by the late John R. Coates, Esq." and he describes how Coates acquired it, which he says "now comes to us from the possession of Mr. Penn with the presumption that it has been there accompanying his possession as a part of his title."

In saying "The original patent was here produced" the arbitrator displayed more confidence than did the distinguished Delaware counsel who introduced it. The complete record of that case, including testimony, exhibits and arguments of counsel, is published in Senate Executive Document No. 21, 30th Congress, 1st Session. That record shows, at page 8, that that document was there introduced as "An original deed, *as it was said.*" Nothing but the doubt of its originality can explain the necessity of introducing the same conveyance in three other forms (p. 9, of that document), (p. 28). There are at least 43 instances of title exhibition by Penn and his successors where it was not mentioned. Abundant proof shows it was surrendered 20 days after its issuance.

Exhibit 675 contains a copy of the testimony of Benjamin David taken from the record of the Pea Patch Island case, which is the testimony upon which the above quoted

IV. (b) *Pea Patch Island Case.*

statement of the arbitrator is based, and from which exhibit it appeared that the document presented before the arbitrator is the identical one now in possession of the defendant at Dover, a photostat copy of which was offered in evidence as Exhibit 189, and the authenticity of which is challenged in this case by Exhibits 190 to 203, inclusive, and Exhibit 1170.

He says "the original, or a sworn copy or exemplification of it was an exhibit accompanying the bill of complaint in the case of *Penn v. Lord Baltimore* and was in evidence in that case; and the original was offered to be and probably was, produced."

This is again an assumption, since *only* the exemplification appears to have been introduced in that case (p. 28).

He refers to the objection made in *Penn v. Baltimore* that the grant to the Duke succeeded the deeds of feoffment and was made for the Duke's and not for Penn's use. Then he quotes the statement of Paris that "We have the very original charter itself under the great seal, in our custody, ready to produce it." This statement was never substantiated, as proven by the fact that on many occasions, during his lifetime, Penn admitted the lack of such a grant and his efforts to obtain one.

He erroneously states that the decision of Lord Hardwicke in 1750 "made a final end to all controversy in England (for there never has been a dispute since)."

It is true that as a result of that decision the boundary between Delaware and Maryland was ultimately settled, but that decision did not settle the question of the title of Penn to the three lower counties.

On many subsequent occasions Penn's title was questioned, and whenever a governor was appointed for the three lower counties the appointment was made only after

IV. (b) *Pea Patch Island Case.*

a declaration by Penn and his successors, and the approval was given upon the express condition, that it did not prejudice the claim of title of the Crown to the three lower counties, and the very Order in Council which approved the boundary, as finally settled pursuant to the decision in *Penn v. Baltimore*, contains the following reservation:

“But His Majesty doth hereby declare that such approbation shall not be construed in any manner to diminish or affect his Majesty’s claim of right to the three lower counties of New Castle, Kent and Sussex nor prejudice any prerogative, power, property, title or interest of his Majesty, his heirs and successors in or to the said territories, districts or tracts of land or any part thereof * * * which the petitioners had not a right or power, by virtue of the respective charters or grants under which they claim, to bind or conclude” (*Ex. 287, pp. 4-5*).

He states that after the separation, the government, powers and rights of property remained in Penn until the revolution. This is disproven by the conditions under which the governors were appointed and by other evidence in the present case, showing that the government of the colonies was in the hands of Deputy Governors appointed under a distinction, in each case, between their government in Pennsylvania and in the Delaware colony. And his authority was recognized only in virtue of his Royal approbation, separately, as governor of the lower counties.

He refers to the Order in Council of 1685 as deciding against Lord Baltimore, but he does not say that that order declared that the territory east of the boundary therein described belonged to the Crown and not to Penn.

He cites the opinion of Attorney General Northey of February 25, 1711-12, on one of the occasions when Penn’s title was questioned and he quotes the Attorney General as saying “and he has made out to me his title thereto,”

IV. (b) *Pea Patch Island Case.*

which the arbitrator interprets to apply both to Pennsylvania and Delaware counties. In that very proceeding the Lords Commissioners of Trade and Plantations refused to acknowledge Penn's title to the three lower counties, although there was no question about his title to Pennsylvania.

The arbitrator construes the term "made out" as meaning a *proof* of title, which is an incorrect interpretation because it is herein previously shown from decisions of this court, that term is regarded not as "proving title" but merely as the *representation of a claim* of title.

He refers to the proceedings in 1717, on the application of the Earl of Sutherland for a grant of the three lower counties and the opinion of Attorney General Northey and Solicitor General Thompson in that proceeding. He says "they state, also, that no deed from the Crown was produced" and that they also said "but they presume the said late Duke of Yorke might have some other grants thereof, which Mr. Penn might give an account of, but cannot, '*being under a lunacy.*'"

This last quoted part was not their statement, but merely a recital of the statements of Penn's representatives to them. The fact was that on that occasion (29 years after the supposed grant from the King to the Duke) Penn's attorneys and representatives, including Mr. Paris, could produce no such grant. Penn never survived that lunacy, yet his family are supposed to have had the document which the arbitrator calls an original. They could have at least produced, or referred to, the patent roll entry, or an exemplified copy thereof, as they did in *Penn v. Baltimore*, but knowing that that grant had been surrendered they, of course, did not undertake that proof.

IV. (b) *Pea Patch Island Case.*

He states that the Earl of Sutherland's application was not "further pursued." He was apparently unaware of the fact that at this juncture that application was withdrawn, which accounts for the fact that the proceedings in Chancery ensued. From these facts the arbitrator concludes that the title "passed undisturbed by the Crown through five reigns and a revolution, and the province continued as it was founded in 1682, though it was always in view of the authorities of England, and as has been seen, frequently subjected to the examination of the King's legal advisors."

It is apparent from this statement that the facts and records were not before the arbitrator respecting the continuous controversy about that title and the repeated declarations and reservations of the Crown's claim thereto, or of Penn's repeated admissions of lack of title and attempts to obtain one from the Crown.

Lord Hardwick, as quoted by the arbitrator, said "that the Lords of the Council have *remitted* this matter, very properly, to be determined in another place, on the foot of the contract". The word "*remitted*" is hardly correct. They merely suspended the proceeding before them until the question of the agreement had been decided in the proper tribunal.

The Lord Chancellor admits that the Privy Council could not decree a specific performance. The enforcement of the agreement was never referred to the Privy Council. They took no action respecting it, but to suspend an entirely different proceeding on Lord Baltimore's petition for a grant, which was before them. When the Penns pleaded the agreement, that proceedings stopped.

The arbitrator refers to the statement of Lord Hardwick that the case involved boundaries between two provincial governments and three counties. But the con-

IV. (b) *Pea Patch Island Case.*

text of Lord Hardwick's decree shows that only the boundary between Maryland and Pennsylvania was involved. The eastern boundary of Delaware was not involved. Exhibit 1169, containing extracts of the Breviate in that case, prepared by Penn's own counsel, shows that the property involved was west of the river and did not involve any part of the river itself, and also that that suit concerned only boundaries and title to the soil, and not any question of government.

He says that although the decree reserved a right to the parties to subsequently apply to the court, this was not used; "no act or right of the Crown was interposed." Here the arbitrator overlooks both of the answers filed by the Attorney General to protect the rights of the Crown, *as well as the reservation to that effect in the decree.*

He then argues the question of estoppel against the Duke in favor of Penn under the supposed grant from the King. But this argument is beside the point here; first, because that estoppel would not apply to the plaintiff in this case, and second, because there appears in this case, which did not appear before the arbitrator, the fact that that grant was surrendered a few days after it was made, that such surrender was accepted by the Crown, and that an intended new grant was never consummated on account of the objections from Lord Baltimore, and that Penn in 1688, and again in 1705, attempted in vain to obtain such a grant. Moreover if there was an estoppel, it inured first to the West Jersey Proprietors.

From this discussion of the doctrine of estoppel the arbitrator concludes that Penn had an equitable estate, "which is quite as available as a legal estate."

This overlooks the fact that an equitable estate could include *no title or royalties in Delaware river.* The

IV. (b) *Pea Patch Island Case.*

arbitrator then states that Lord Hardwick's decree "settled the validity and legal sufficiency of these deeds, the right of the province under them, and, of course, the boundaries, as described in the deeds."

This is erroneous. The suit did not depend on the title, as Lord Hardwick held. The validity of the deeds of feoffment, or the royal grant (then erroneously supposed to be still in existence) was not determined with respect to any title in or to the Delaware river. That case involved only the question of boundaries and soil, and in nowise affected powers of government or rights to subaqueous soil.

Lord Hardwick rested his jurisdiction on a *contract* between the parties in respect to their boundaries, not upon the boundary controversy itself. This court, in *Rhode Island v. Massachusetts* (12 Peters 657, 740) said Lord Hardwick could not have exercised jurisdiction if the parties had "stood at arm's length; in which case the King and council could alone have decided the original boundary on an appeal."

It therefore appears that Lord Hardwick's jurisdiction rested upon the necessary mutual admission of title which the agreement was presumed to contain, and the question of title, *per se*, was therefore not at issue, or necessary to be decided, in the chancery case. The only questions were the interpretation of the agreement and whether equity required its enforcement.

He says that that decree was universally acquiesced in by common consent and remained the law of the land thence forth (p. 36).

This overlooks all of the previous and subsequent proceedings respecting Penn's title, including the reser-

IV. (b) *Pea Patch Island Case.*

vation in the Order in Council already quoted respecting the Crown's title to the three lower counties.

He states that 24 years have elapsed "without controversy or question in England, its boundaries acknowledged by the Crown" until the meeting of delegates of the colonies of 1774. This statement is incorrect as is already shown. The arbitrator then implies that, because New Jersey consented to the admission of Delaware into the Union, it accepted its boundaries. This is a fallacy because the record in this case shows that the river boundary between the two colonies was in dispute as early as 1782, as recognized by a message of the governor in that year to the legislature of that state suggesting the appointment of commissioners to meet with commissioners already appointed by New Jersey to settle that boundary line. This is shown by *Chief Justice Harrington's* opinion in *State v. Morris* already cited, which was published more than ten years prior to the arbitrator's decision.

Another proof of the fallacy of this statement is the fact, as stated by this court in *Rhode Island v. Massachusetts* (12 Peters 657, 724) and repeated in *United States v. Texas* (143 U. S. 621, 639),

"that at the adoption of the Constitution there were existing controversies between eleven states respecting their boundaries; which arose under their respective charters and had continued from the first settlement of the colonies."

The court then mentions each of the disputes, including —"one yet subsists between New Jersey and Delaware."

That statement appears in the opinion of *Mr. Justice Baldwin* (who presided in the case of *Gale v. Behling*), delivered at the October Term of this court in 1838, ten years before *Mr. Sargeant* decided the *Pea Patch Island* case. *Justice Baldwin* then enumerates such of those

IV. (b) *Pea Patch Island Case.*

boundary disputes as had then already been decided by this court (including the one then before it).

This proves conclusively that when the colonies entered the Union they did *not* accept the boundaries then claimed by the other colonies, and this applies to New Jersey. The arbitrator again states that the Delaware boundaries "had never been even questioned by the Crown, from the beginning but in every way sanctioned . . . but it was settled in England before the Revolution." This has already been shown to be incorrect. He also states "New Jersey has had no controversy with Delaware, and has none at present, so far as is known. When Delaware became a state there was no subsisting controversy with anybody as to her boundaries." This has already been shown to be incorrect by numerous citations from cases and evidence, including *Justice Baldwin's* statement above quoted in *Rhode Island v. Massachusetts*.

He states that what Delaware claimed as its boundaries before the American Revolution it achieved by conquest thereby. This statement presents an irreconcilable inconsistency. It was precisely the view which Delaware took in 1792-4 (as shown by Exhibits 1171, 1172, and 1174-1179, 665 and 1036), when it repudiated the Penn title, including any boundary therein contained east of the channel of the river. Title could not be derived both from conquest *and* the Penn deeds. The war was not against Penn.

This statement ignores the ruling of Edmund Randolph, Attorney General of the United States, May 14, 1793, Re British ship "Grange," seized in Delaware Bay by the French frigate "L'Embuscade." (*Am. St. Papers*, F. R. I 148; 1 Op. Atty. Gen'l 32) already cited, and the decisions of *Justice Washington* in *Corfield v. Coryell*, *Chief Justice Tilghman* in *Kean v. Rice* and *Justice Baldwin* in

IV. (b) *Pea Patch Island Case.*

Bennett v. Boggs all rendered before Mr. Sargeant's award.

The arbitrator states that "if there had been (as there was not) an outstanding royal claim of any sort, that according to *Martin v. Waddell*, it would have instantly become vested in the sovereignty." Then he erroneously deduces "that if the deed from the King to the Duke of York had never existed, then only the two deeds from the Duke of York, still—as the province had been founded upon them * * *, and received as such into the Union of the colonies, * * * it would be very difficult indeed to maintain that her limits and boundaries were not incontestably proved by those deeds, unless they interfered with some superior and better right." It is unnecessary to repeat the facts which show the error of this conclusion. He states that, "a colony or province without any deed at all, would, under the like circumstances, have become a state * * * with the same rights and privileges as the other states." That is true, but under such circumstances the law is well settled, as elsewhere discussed, that the boundary between that State and New Jersey, which came into the Union on bases of equality with Delaware, would have taken its possession in the center of the ship channel in the river.

The arbitrator's argument is based on the assumption of no royal patent or grant, indicating a lack of faith in the document introduced before him (p. 38).

He erroneously states that by the Order in Council of November 13, 1685, the river boundary of Delaware was fixed at "the present line." Neither that Order in Council, nor its repetition in 1709, referred to *the river* boundary, and both of them decreed *to the King* all of the peninsula east of the perpendicular line thereby established as the western boundary of Maryland. Again he erroneously states "the original right has never been opposed since."

IV. (b) *Pea Patch Island Case.*

He criticizes *Justice Baldwin's* allowance of the Delaware title by possession and says that the contrary was "long ago decided and settled in England" which is not correct, as has already been shown. He also incorrectly states that the Delaware boundaries "stood defined and authenticated in the deeds of the Duke of York, in the patent of the King, in the proceedings of council, and in the high court of Chancery." These are all shown to be erroneous by the record in this case; the last two, by the documents themselves. The deeds of feoffment were never accepted as good title in England. The patent of the King was surrendered and never renewed. The proceedings in council were directly to the contrary.

He interprets the deeds of feoffment and the supposed grant of the King to include the Dutch and Swedish settlements from Cape Henlopen to Philadelphia, particularly those of Newcastle and Christiana within the 12 miles circle (pp. 40-41). Obviously, the deeds of feoffment did not extend so far. The Dutch titles were secured to the inhabitants by the express instructions of the King and the agreement of submission in 1664.

He says that the same terms used in the Duke's deeds and the supposed royal grant were used in patents and grants intended to cover navigable rivers. This is incorrect because royal grants, intended to convey title to the bed of a stream where the grant did not convey the land on both sides of navigable waters use the words "with the *bed* and soil of the river," or "the *bottom* and soil," of the river, as appears from several grants cited in *Moore v. Attorney General* (Irish Reports, 1929, Part III, March, pp. 191, 221, 223). He also overlooks the fact that a proper construction of those deeds and that grant required a recognition of the fact that at the time they were made it was not within the province of the King himself, to convey the bed of tidal waters,

IV. (b) *Pea Patch Island Case.*

because they belonged to him in a sovereign capacity, and not by inheritance.

He refers to the judgment in favor of Dr. Gale in the United States Circuit Court in New Jersey and then says that the United States "got a judgment" in the United States Court of Delaware and that the "records of both were produced." This he calls a conflict of jurisdiction, but he omits to state that the Delaware judgment was connived, and by default, and was not a judgment on the merits of the case. Under such circumstances those judgments could not be regarded as in conflict. In the case of New Jersey the government appeared and defended, without raising the question of jurisdiction. That question was not involved in the Delaware case because the only person having an adverse interest in the suit had no notice thereof until a month after the judgment by default was entered.

He says that the trial in New Jersey was "essentially ex-parte, with a very imperfect exhibition of evidence" (p. 47). That statement is most astounding in view of the record of that litigation from four official public documents all published prior to the hearings before Mr. Sargeant (*Exs. 216, 220, 221, 223*).

In the face of these facts it cannot be truthfully said that the trial in *Gale v. Behling* was "essentially ex-parte, with a very imperfect exhibition of evidence" (p. 47).

The arbitrator's statement, on page 53, that there was no evidence to establish a single instance of the exercise, by New Jersey, over any part of the river and island, is definitely contradicted by the decisions in *Re Grange, Corfield v. Coryell*; *Bennett v. Boggs*; *Gough v. Bell* (23 N. J. L. 624); *Kean v. Rice*, and other cases and documents cited in this brief.

IV. (b) *Pea Patch Island Case.*

The arbitrator feels called upon to extoll the character and quality of the witnesses upon whose testimony he chooses to rely. The value of such testimony was properly appraised by this court in *Missouri v. Kentucky*, 78 U. S. 395.

Twelve witnesses gave negative testimony. That is the same kind of testimony that was given by a number of witnesses in 1902-3 in the former suit between New Jersey and Delaware. Such testimony would not be admissible under the recognized rules of evidence, without showing some basis for the opinion and without being supported by the records of the official acts referred to.

The arbitrator repeats that New Jersey has never objected to the claim of Delaware or set up any claim of her own. This is incorrect. He refers to acts of the colonial legislature of New Jersey which bounded the counties by the river, and states that the act of 1822, extending those boundaries to the channel, was ineffective because it was passed after the cession of Pea Patch Island to the United States by Delaware. This argument is *non sequitur*. That cession, *per se*, could not affect the correct boundaries. Obviously the colonial assembly did not attempt to include the King's river and bay, which the state legislature, after the Revolution, had the right to do. He fails, however, to observe that at that time the State of Delaware had passed no act defining its river boundary. None was passed until 1852. By his argument, the cession of Pea Patch Island in 1813 was in the same class of selfserving acts.

Upon all this he concludes that Delaware had title to the Pea Patch Island when it ceded it to the United States in 1813 (p. 56).

This discussion of the Arbitration decision shows how incomplete and inaccurate his information was regarding

IV. (b) *Pea Patch Island Case.*

the essential elements of the case, and how far he strayed from judicial paths to reach his decision.

The many unwarranted assumptions which characterized this opinion, present in striking contrast the simple coherent statement of fact and law, and the judicial reasoning of Justice Baldwin's charge in *Gale v. Behling*.

Mr. Sargeant's decision has not been cited as authority in any reported case. A pertinent criticism of that opinion appears as a note to *Gough v. Bell* (21 N. J. L.) at pages 166 to 169, inclusive, written by Abraham O. Zabriskie, then Supreme Court Reporter, and afterwards Chancellor of the State of New Jersey, which is reprinted in full as Appendix "F".

Title to Pea Patch Island.

Pea Patch Island has been within the territorial limits of New Jersey since the American Revolution.

In *Missouri v. Kentucky* (78 U. S. 395) the controversy arose over title to Wolf Island in the Mississippi river, which formed somewhat after the manner of Pea Patch, and like it, divided the river. In the course of time the main channel of the river shifted from the west to the east side of the island. Missouri claimed that that shift of channel moved its easterly boundary so as to include the island within its territory.

The court held that if in 1763 when the Louisiana territory was ceded to the United States, or in 1820 when Missouri was admitted to statehood or at any intermediate period Wolf Island was east of that line it belonged to Kentucky—

“If the river has subsequently turned its course and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandons remains, as

IV. (b) *Pea Patch Island Case.*

before, the boundary between the states, and the island does not, in consequence of this action of the water, change its owner" (Hefter, p. 43, Sec. 66; Caratheodery Du Droit Inter., p. 62 (p. 119)).

Referring to the east channel, the court said:

"It is equally true that now it is the main highway for the business of the river; but the point to be determined is: Was it so as far back as 1763 or 1820, if in the investigation of such an inquiry positive certainty is not attainable, yet the evidence furnished by the defendant affords reasonable solution of it" (p. 120).

See also 1 *Moore's Int'l Law Digest*, p. 747.

The deductions to be drawn from this discussion is that the decision of *Justice Baldwin*, and not that of Mr. Sargeant, defines the law of this case. At the time Pea Patch Island was ceded to the United States by Delaware, it was not within the territorial limits of that state, but of New Jersey. Had the use of the island been other than for fortifications, or if any civil government was involved, plaintiff would, undoubtedly, have resisted, but it naturally would not oppose the public welfare, or interfere with a purely military establishment. On each of the occasions, 1822 and 1825, when the United States asked for a cession of the island from New Jersey, the governor and the legislature, in 1822 expressed their willingness to cede it, "if the subject was freed from the danger of affecting both the rights of a citizen and the question of interstate boundary" (*Ex. 161*, pp. 4-5), and in 1825, "if any arrangement can be made between the parties by which the question of boundary between the two states shall not be drawn into question and the case (of Gale's claim which had then been in litigation for ten years) can be decided on the claims of individuals only" (*Ex. 161*, pp. 5-7).

IV. (b) *Pea Patch Island Case.*

At the time of the Revolution the main channel of the river was west of the island and that was the correct boundary between the states when they came into existence.

Plaintiff's right, title and interest was ceded to Gale's successors in 1831. By hazarding, in the arbitration, a title which had already been sustained in an appropriate proceeding in a court whose jurisdiction was not questioned, they lost their title by that decision, whether it was right or wrong, because they agreed it should be final. No one is in position, or inclined, to now question the title of the United States. The only question here involved respecting that island, insofar as the plaintiff is concerned, is jurisdiction, which, of course, is of no interest to the United States.

*The Boundary Below the Circle.***CHAPTER TWO.****The Boundary Below the Circle.**

IN SO FAR AS RELATES TO THE BOUNDARY BELOW THE CIRCLE THE DEFENDANT'S EXCEPTIONS TO THE REPORT OF THE MASTER AND HIS RECOMMENDATION FOR A DECREE SHOULD BE OVERRULED AND THE REPORT SUSTAINED.

(Defendant's Exceptions 1 to 4; 6 to 13.)

This chapter relates to the boundary below the southerly rim of the twelve-mile circle, extended, consisting of about five miles of river to the dividing line between the river and bay agreed to by the parties in 1907 (*Ex. 161, pp. 40-5*) and shown by that designation on both of the maps in the back of the book of appendices to this brief; together with 45 miles from that line to the ocean at the capes. Plaintiff contends that the true boundary is the thalweg, or middle of the main ship channel, as shown by a solid red line, in this area, on Exhibits 3 and 4 and on the maps in the book of appendices. Defendant claims that the true boundary is the geographical center of the river and bay in this area, as shown by the irregular green line on Exhibits 3 and 4 and on said maps (*Rep. p. 63*). The Master's discussion of the evidence, appearing at pages 63-71, led him to the following findings of fact, conclusion of law and recommendation for a decree;

Findings.

"24. The record establishes that as early as Fisher's Chart of Delaware Bay (1756) there has been a well-defined channel of navigation up and down the bay and river. This channel has, since the Revolution, been regularly marked by the government.

"25. That Delaware river and bay, on account of shoals, are not equally navigable in all directions,

The Boundary Below the Circle.

but the main ship channel must be adhered to for safety in navigation.

"26. The testimony shows that the bay is only an expansion of the lower part of the Delaware river; that the current in the bay is mainly tidal; but the testimony shows that there is flow of water through the bay and that a maximum current velocity is found in the ship channel.

"27. Approximately two billion cubic feet of fresh water per day drains into the bay. It does not spread out uniformly. Observations have proved that it tends to concentrate along the Delaware shore of the bay. By dividing the channel between the capes into three nearly equal parts observations show that about five times as much fresh water comes down the southerly channel as does the northerly channel along the New Jersey shore" (*Rep. pp. 77, 78*).

Conclusion.

"10. The record shows the existence of a well-defined deep water sailing channel in Delaware River and Bay constituting a necessary track of navigation, and the boundary between the States of Delaware and New Jersey in said bay is the middle of said channel" (*Rep. p. 79*).

Recommendation.

"2. That the true boundary between the plaintiff and the defendant below the twelve-mile circle shall be adjudged to be the middle of the main ship channel in said river and bay" (*Rep. p. 80*).

Delaware Title.

The deed of feoffment from the Duke of York to Penn, in 1682, for the territory below the 12 mile circle (*Ex. 524*), and the certificate of livery and seisin therefor (*Ex. 526*), show clearly that no part of the Delaware bay was included therein.

The Boundary Below the Circle.

The language of that grant has been construed by Justice Baldwin in *Gale v. Behling* (*Ex. 219, p. 14*) as follows:

“A reference to the second deed will tend to ascertain the meaning of the first: there is no grant of any part of the river, or any island below the beginning point of the second tract; a grant of the use of the harbors, waters, &c., belonging to the river and bay, precludes any construction which would make the deed pass the river, bay, or its waters, beyond the low water line. No word or expression is in it, which could be made to include anything else; the grant is of the free ‘use and passage into and out of all harbors, bays, waters, rivers, isles, and inlets, belonging to, or leading to, the same.’ (Delaware river and bay.)”

The grant of March 22, 1682-3 (*Ex. 529, 189*) contains the same description as the deed of feoffment.

There is no record of any claim by defendant that either the deed of feoffment or the Royal grant of March 22, 1682/3 ever conveyed any part of the bay.

While defendant's boundary laws of 1852, 1893 (*Ex. 162, pp. 2-3, 8-9*) and 1915 (*Ex. 678*) describe the boundary to low water line on the east side within the 12 mile circle, they describe the boundary below the 12 mile circle as “the middle of the bay,” which defendant, in 1885, interpreted to mean “the middle of the channel” (*Ex. 1, p. 2*). No different claim was ever made by defendant until after 1925, during the negotiations of the commissioners which resulted from the raid of the Ship John Bed in that year.

The only basis of title in the bay suggested by defendant's answer is by conquest in the Revolutionary war and relinquishment to it in the Treaty of Paris.

These findings, conclusion and recommendation of the Master are amply sustained by the evidence and the

The Boundary Below the Circle.

authority cited to support them. All the evidence of the physical characteristics of the bay, and all the maps showing topography of the bottom of the bay, soundings, channels, etc. were furnished by plaintiff, except three maps (*Exs. 727, 728 and 729*) which support plaintiff's contention. They were not contradicted or questioned by defendant and it offered no testimony on the subject, except those three maps.

The log of the "Half Moon," kept by Robert Jouett, Henry Hudson's mate, on that famous voyage of 1609, shows that they entered Delaware bay on August 28, 1609, and made the following observations of its physical characteristics:

"Then we found the land to trend away N. W., with a great bay and river. But the bay we found shoal, and in the offing we found ten fathoms, and had slight beaches and dry sands. Then we were forced to stand back again, so we stood back S. E. by S., three leagues, and at 7 o'clock we anchored in eight fathoms of water, and found a tide set N. W. and N. N. W., and it rises one fathom, and flows S. S. E. And he that will thoroughly explore this great bay, must have a small pinnacle, that must draw four or five feet water, to sound before him. At 5 in the morning we weighed, and steered away to the eastward on many courses, for the more northern land is full of shoals; we were among them, and once we struck, and we went away and steered away to the S. E., so that we had 2, 3, 4, 5, 6 and 7 fathoms, and so, deeper and deeper" (*Vincent's History of Delaware, 94-5*).

Thirty-one charts, showing a well defined main ship channel through the river and bay, and the topography of the bottom of the bay, with shoals and other obstructions indicated, were offered in evidence, dated as follows: 1739, 1740, 1749 (*Ex. 1133, maps 3, 4 and 7*); the famous Fisher charts of 1756 (*Ex. 99*), 1776, 1777, and 1778 (*Ex. 181, maps 1, 2 and 3*); 1775 (*Ex. 1143*); the Faden map of 1777

The Boundary Below the Circle.

(*Ex. 98*); the Barras-Knight chart of 1779, made by the British Navy (*Ex. 181, map 4*); the Churchman map of 1788, the Carey chart of 1775, the Sotzmann chart of 1797, Adlum & Wallis chart of 1799, Carey map of 1801, Mellish map of 1822 (*Ex. 1133, maps 16, 19, 22, 25, 26 and 29, respectively*); the Shallus map of 1799-1801; Luffman map of 1814 and the Tanner map of 1823, introduced by defendant (*Exs. 727, 728 and 729, respectively*); and a map approved by John Quincy Adams, President of the United States, in 1829 (*Ex. 181, map 6*). Each of those 21 charts shows that channel as running west of Pea Patch Island.

The remaining ten charts, dated from 1834 to 1931, except the Morris map of 1839 (*Ex. 1133, map 41*), are official charts of the United States Coast and Geodetic Survey, including the Williams Chart of 1834 (*Ex. 181, map 7*), and are dated 1848, 1849, 1850 (*Ex. 181, maps 9, 10 and 11*); 1926, (*Ex. 140, p. 2*); 1929, (*Ex. 1137*); 1930, (*Exs. 3 and 4*); 1931, (*Ex. 2*).

Each of those ten maps shows the main ship channel as running east of the Pea Patch Island. The testimony in *Gale v. Behling*, (*Ex. 221*), taken from Senate Document No. 21, p. 33, and the affidavits in the former case of *New Jersey v. Delaware*, on file in this court (*Ex. 238*), show that the first sizable vessel to use the east channel (that is, east of Pea Patch Island) was the "Pennsylvania" in about 1830 (*Ex. 716*). Witnesses in that case who personally remembered the main ship channel west of Pea Patch Island were: Stanton (*Ex. 238, pp. 6, 23, 24*); Jenkins (*Ex. 238, pp. 43, 44*); McCarson (*Ex. 238, p. 56*); Rain (*Ex. 238, p. 79*); Dunham (*Ex. 238, pp. 98, 103*); Wheaton (*Ex. 238, p. 125*); Strimpel (*Ex. 238, p. 136*); Redstreak (*Ex. 288, pp. 144, 145*); and Rogers (*Ex. 716, pp. 2, 7, 8*).

It therefore appears that at the time of the American Revolution, and thereafter until 1829, the recognized main

The Boundary Below the Circle.

ship channel throughout the bay was substantially as it is now, but in the river it passed west of Pea Patch Island. Some of these charts are described and authenticated by the testimony of Colonel Martin (*R. 712-15*). The channel throughout the bay and river, as it was marked by buoys in 1847, is shown on an official map of the United States Coast Survey of that year (*Ex. 181, map 8*).

The physical characteristics of Delaware bay, with information as to tides, currents, topography and other details, were given by scientific and expert witnesses in this case. Harry A. Marmer, Tidal Engineer of the United States Coast and Geodetic Survey, for the past 23 years, testified that for the past ten years, as Assistant Chief of the Division of Tides and Currents, and as Chief of the section of field work, he has made a study of Delaware river and bay. The result of those studies, to the date of that publication, are shown in "Tides and Currents in Delaware River and Bay" (*Ex. 140*), published by his department and containing information on these subjects from 1840 to 1926. The essence of his testimony (*R. 302-6*) is as follows:

Between the Capes, during the flood tide, during the whole day, 178 billion cubic feet of water is carried into the bay. This quantity goes out of the bay on the ebb tide, plus two billion cubic feet per day of fresh water which drains into the bay. It does not spread out uniformly. Current observations prove that it tends to concentrate along the Delaware shore of the bay. By dividing the channel between the Capes into three nearly equal parts, observations show that about five times as much fresh water comes down the southerly channel along the Delaware shore as does in the northern channel along the New Jersey shore.

The Boundary Below the Circle.

The current turns to flood about 1½ hours earlier on the Jersey shore than on the Delaware shore because of the larger quantity of fresh water flowing on the Delaware shore. The current passes down the bay regardless of the Maurice River Cove.

His testimony is corroborated by J. Richards Nelson, Assistant Biologist of the New Jersey Oyster Investigation Laboratory, whose daily duties include observations of tides, currents, salinity and other elements which enter into the biology of oysters, which is a very large industry in Delaware bay, including the area in dispute. His testimony (*R. 356-372*) is based upon current-meter readings to determine flow and velocity, and shows that the longer duration of the ebb tide, than the flood tide, is due to the river discharge of fresh water flowing through the bay in such force and volume as to influence tidal motion and salinity in the ocean 50 miles beyond the capes. His exhibit 190 gives both descriptive and graphic results of current-meter readings, and shows clearly that the bay, throughout its entire length is a flowing body of water, independent of tides; that the bay is exactly what the United States Coast Pilot (*Ex. 102, p. 44*) describes it to be—"only an expansion of the lower part of Delaware river," with the volume of the river consisting of approximately two billion cubic feet per day of water flowing through the bay to the ocean principally through the main ship channel between submerged flats on either side of that channel, and that the deepest water, as well as the greatest velocity of flow, is in the main ship channel itself.

The United States Coast Pilot (*Ex. 102*), used by the Master (*Rep. pp. 64-6*), is a publication of the United States Coast and Geodetic Survey, giving precise sailing instructions and information of navigable waters. It devotes considerable space to this information in Delaware river and bay (*pp. 51-62*). An examination of that exhibit

The Boundary Below the Circle.

will show conclusively, as does the oral testimony of the witnesses Marmer and Nelson, and the 31 river charts in evidence, that Delaware river and bay contains a natural, well defined main ship channel, marked by buoys, light-houses and other indications, which is the only safe channel, and the necessary track, for the ordinary vessels of commerce, on account of the prevalence of shoals, blind sloughs and other obstructions to navigation, on either side of that main ship channel.

While there are other minor marked channels, by which small vessels reach the mouths of the streams on either side of the bay, they lead only to those streams and are not of sufficient depth or direction to accommodate any of the general commerce through the bay.

This proof is not questioned or contradicted by defendant, and it offered no testimony on the subject. It therefore constitutes a large body of competent proof which the Master was justified in accepting as fact.

The Thalweg Rule.

The reason for the thalweg rule, as described in many authorities, is to afford to the states on either side of a navigable stream equal access to the lanes of commerce. It appears to be uniformly accepted among the nations of the world as the correct rule applicable to all rivers and bodies of water where there exists an unequal opportunity for navigation in all directions in the body of water involved, and where there is a recognized, established main ship channel, or necessary track of navigation, throughout the body of water.

An article in the magazine "Fennia" Vol. 49, No. 1 (1929), pp. 9-15, by K. Haataja entitled, "Sur la révision de la frontière finlandaise", has a discussion of the thalweg rule as applied to certain of the frontiers of Finland

The Boundary Below the Circle.

and discusses the means by which the actual line of the thalweg may be physically fixed and the various tests by which the line is determined. After stating that the "deep channel" "naturally constitutes the thalweg," he says:

"The thalweg of the river is, therefore, here in the channel which accompanies the river and whose depth is considerably greater than the normal depth of the two sides of the channel.

There are many exceptions to the general rule explained above. First of all, in determining the thalweg, it is not necessary to accord a decisive influence to the chasms formed by the river, but one must find a continuous channel, which is deep and follows the course of the stream."

(Note: The original is in French and the above quotation is our translation.)

All the tests mentioned by this author for the determination of the thalweg unite to support the claim of the plaintiff with respect to Delaware river and bay, that is;

(a) The depth of the water in the channel where the plaintiff claims the boundary should be fixed is greater than the normal depth on the sides.

(b) The greatest amount of water passes through this channel on its way to the ocean.

(c) This channel is customarily followed by commercial traffic.

The rule is stated as follows, in 1 *Moore's International Law Digest*, p. 616:

"Where a navigable river forms the boundary of conterminous states, the middle of the channel—the *flum aquae* or thalweg—is generally taken as the line of their separation, the presumption of law being that the right of navigation is common to them both. * * * But where the river not only separates the conterminous states, but also

The Boundary Below the Circle.

their territorial jurisdictions, the thalweg, or middle channel, forms the line of separation through the bays and estuaries through which the water of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object. The division of the islands in the river and its bays would follow the same rule.' "

Other authorities that support the plaintiff's view respecting both river and bay, are: Vattel, "*Law of Nations*," p. 120; Puffendorf, "*Elements of Universal Jurisprudence*," (Clarendon Press, 1931), p. 28; Kaekenbeeck, "*International Rivers*," (Grotious Soc. Pub. London, 1918), p. 175; Farnham on Waters, Vol. 1, p. 30; Angell on Tide Waters, p. 15; Phillimore, *Comm. on Int'l Law*, Vol. 1, p. 239; Bowen, "*International Law*" (1896), p. 10, Sec. 29; Creasy, "*First Platform of International Law*," (1876), p. 221, sec. 230, p. 222, sec. 231; Fenwick, "*International Law*" (1924), p. 247; Hall, "*Treatise on International Law*" (Fifth Edition 1904), pp. 122-3; Halleck, "*International Law*," Vol. 1, Chap. VI, Sec. 23, p. 182 of Fourth Edition (1908); Hyde, "*International Law*" (1922), p. 244, sec. 138; Oppenheim, "*International Law*" (1912), p. 270, sec. 199; Travers Twiss, "*Law of Nations*" (1861), p. 206, sec. 146; Wheaton, "*Elements of International Law*" (Eighth Edition, 1866), p. 274, sec. 192; Woolsey, "*Introduction to the Study of International Law*," (Sixth Edition, 1899), p. 78, sec. 62.

That rule was applied to both rivers and bays, in twenty-three foreign treaties, negotiated between 1763 and 1878, cited in the Argument of the United States before the International Boundary Commission (*United*

The Boundary Below the Circle.

States—Mexico) under the provisions of the Convention of June 24, 1910, known as the "Chamizal Arbitration," as well as in that case; also in four other foreign treaties during the period, cited by Professor Hyde (*1 Hyde's Int'l Law*, p. 244, Notes 3 and 4); also in treaties in which the United States was a party: With Great Britain, September 3, 1783 (*1 Malloy's Treaties*, 587), as construed by Mr. Justice Story in "*The Fame*," (3 *Mason* 147; *Fed. Cas. No. 4634*); Treaty of Ghent (*1 Malloy's Treaty*, 612-23), construed by Mr. Justice Ware in "*Open Boat*," (*1 Ware* 18; *Fed. Cas. No. 10548*); *Webster-Ashburton*, August 9, 1842 (*1 Malloy's Treaties*, 651-2); *Canadian International Boundary*, April 11, 1908, (*1 Malloy's Treaties*, 816); with Great Britain, June 15, 1846, (*1 Malloy's Treaties*, 657); with Great Britain, May 8, 1871 (*1 Malloy's Treaties*, 714); with Great Britain, April 11, 1908, (*1 Malloy's Treaties*, 825); (The last two treaties are cited in *Louisiana v. Mississippi*, 202 U. S. 1); with Mexico, February 2, 1848, and November 12, 1884, (*Hyde's Int'l Law*, 245; *1 Malloy's Treaties*, 1083, 1109, 1122, 1159, 1160); with Great Britain, January 24, 1903, (*1 Malloy's Treaties*, 94); with Spain, December 10, 1898, (*2 Malloy's Treaties*, 1691).

The same rule was adopted with respect to rivers and bays in the treaties resulting from the World War involving: Germany, (*Redman's Treaties*, 3348-9); Austria, (*ibid* p. 3165-7); Hungary, (*ibid* 5558-9).

The same rule was adopted for rivers and bays by the Institute of International Law, in Article III of its draft of international regulations for navigation of rivers, adopted in 1887, (*Hyde's Int'l Law*, 245, Note 1).

This rule has been followed by this court, with respect to rivers and bays, in *Louisiana v. Mississippi*, 202 U. S. 1; Justice Baldwin's charge to the jury in *Gale v. Behl-*

The Boundary Below the Circle.

ing, (*Ex. 219, p. 4*); *Iowa v. Illinois*, 147 U. S. 1; *Minnesota v. Wisconsin*, 252 U. S. 273, 282; same case 258 U. S. 149; *Arkansas v. Tennessee*, 246 U. S. 158; *Cissna v. Tennessee*, 246 U. S. 289; *Arkansas v. Mississippi*, 250 U. S. 39; *Georgia v. South Carolina*, 257 U. S. 516.

Many applications of the rule are shown by the treaties and cases cited in *59 Corpus Juris*, 50, and notes.

The authority which sustains the Master's application of this rule to the river, below the southerly rim of the 12 mile circle, and to the bay is so overwhelming that there can be no question about the correctness of his findings, conclusion and recommendation for decree. These authorities also show that the same rule applies within the 12 mile circle, if plaintiff is correct in its contentions argued in Chapter One of this brief.

The Question of the Boundary in the Bay is One of Substantial Importance.

Valuable property is involved, as well as a practical construction of the boundary under which plaintiff and its inhabitants have held, used and enjoyed those portions of the bed of the bay east of the main ship channel and west of the geographical center, as shown on Exhibit 4, and reproduced on the map of the bay contained in the book of appendices accompanying this brief. Two such areas are primarily involved; the first, area "A," shown in yellow on Exhibit 4, and by broken hatched lines on the map of the bay in the book of appendices, and area "B" shown in brown hatched lines on Exhibit 4, and by solid hatched lines on the map of the bay.

The catching and cultivation of oysters have been the subject of legislative regulation in New Jersey (Province and State), by numerous acts beginning with March 27, 1719 (*Ex. 31*) and continuing to the present time (*Ex. 32*).

The Boundary Below the Circle.

Delaware bay east of the ship channel, including areas "A" and "B," has been the subject of legislative regulation, continually, since March 21, 1871 (*Ex. 50*). That act authorized the incorporation of an Oyster Growers' Association, which supervised the oyster industry for a department is maintained under the scientific supervision of Dr. Thurlow C. Nelson, Professor of Zoology at number of years until a state oyster commission was organized, which was succeeded, in 1915, by the present Board of Shell Fisheries (*R. 174*). Through the co-operation of the Oyster Growers' Association (which still exists) and the Board of Shell Fisheries, a research Rutgers University, who is Biologist of the Board, and J. Richards Nelson, as Assistant Biologist (*R. 175*). This scientific supervision has existed since 1888, when the work was begun by Dr. Julius Nelson, the father of the two Nelsons now carrying on the work (*R. 356-9*).

At the joint expense of the Oyster Growers' Association and the State Board, oyster shells have been planted on the natural beds, to the extent of about 600,000 bushels a year, for a number of years past, at an annual cost of from \$75,000 to \$85,000, for the purpose of providing a hard bottom for the attachment of oyster spawn (*R. 176*). During the spawning season millions of eggs are thrown into the water by each female oyster, and there fertilized by the sperm of the males. These eggs hatch into larvae which have the power of mobility for about two weeks, at the end of which time they attach themselves to hard surfaces in the bottom and commence the formation of their shells. There they are permanently located and continue to grow, unless engulfed in sand or mud. The purpose of the shells on the bottom is to keep them out of these destroying elements. These young oysters are subject to certain natural enemies which live in high salinity waters. Their instinctive aversion to high salin-

The Boundary Below the Circle.

ity causes them, during their mobile period, to move up stream into waters of low salinity, away from their enemies. By this process nature has designated the location of these natural beds at a point where the river flow of fresh water is sufficient to dilute the salinity of tide water below the point at which the sea enemies of the oyster can survive, and where their food supply, which comes chiefly from fresh water, is best.

The "Southwest Line" was established by the State of New Jersey to mark the southerly limits of such natural oyster grounds. Oysters do attach below that line but few of them survive the attacks of their natural enemies.

The natural beds are used for the production of seed; that is, young oysters of a year or less growth which have grown shells of sufficient hardness to protect them against most of their sea enemies. Experience has shown that oyster larvae attach in such density as to interfere with their favorable growth on account of lack of room and highly competitive food conditions. On this account the practice began, many years ago, and has since rapidly increased, of transplanting these seed oysters to the unoccupied area below the southwest line on lands leased by the state to citizens thereof for that purpose, as later discussed with regard to the planting grounds.

A law of New Jersey, known as the Rough Cull Law, requires the sorting of the material dredged from the natural beds and the return, by throwing overboard, of the empty shells and other useless substances, so as to help maintain a hard bottom in the beds. A minimum of 15% of shells is allowed to be retained as the limit of practical operation.

Police (or guard) boats are provided by plaintiff to enforce this law, and to protect the beds from invasion by boats not duly licensed by plaintiff (*R. 182, 196*).

The Boundary Below the Circle.

Boats are licensed to dredge on the natural beds during May and June of each year, at an annual fee of \$4.50 per gross ton of boat (*R. 179*). In 1930, 213 boats, of an aggregate gross tonnage of 7,900 tons, were licensed, in addition to approximately 200 "tongers"; small boats used in certain reserved areas for dredging oysters by hand tongs (*R. 252*).

Under the regulation imposed by plaintiff, the oyster industry east of the ship channel in Delaware bay has, during the past 25 years, increased from an investment of from 5 to 20 million dollars, and the annual product has increased from one and one-half million dollars to five million dollars. The industry employs about 3,000 persons during the fall and winter and about 5,000 persons during the dredging season in the spring. A considerable number of municipalities in Cumberland County depend largely on the oyster industry for their business, and for the livelihood of their inhabitants (*R. 187*).

The Ship John Bed.

Area "A" is known as the "Ship John" natural oyster bed. It is located entirely east of the main ship channel (*Ex. 4*), and contains 830 acres which would be cut off of the remainder by a boundary on the geographical center. It is a part of the natural beds consisting of nearly 30,000 acres, shown on Exhibit 111, all located east of the main ship channel above the Southwest Line, established by plaintiff's legislature as the dividing line between the natural beds, where its residents are licensed to dredge for seed oysters, and the planting grounds where plaintiff leases the bed of the bay to oyster planters for growing to maturity the seed secured from the natural beds (*Ex. 49*).

The Boundary Below the Circle.

Under the regulation above described, the oyster grounds in the Ship John area, here in dispute, have been steadily increased by plaintiff from a few lumps of oyster seed, too small for successful working (*Ex. 100*), to a practically continuous area of valuable seed (*R. 160-1, 177; Ex. 101*).

In 1925, between April 29 and July 12, several Delaware boats, ranging from one to seven per day (*R. 215-16*), invaded this area, under a claim of right by their captains to dredge there, in disregard to the warnings of the plaintiff's guard boat. A controversy then arose which precipitated this suit. In 1926 two more boats came and their captains were arrested and indicted in Cumberland County, New Jersey, for violation of the New Jersey laws (*Exs. 107, 108*). In order to avoid actual conflict, representatives of the two states agreed to close this bed pending the settlement of the controversy by commissioners appointed for that purpose (*R. 180-2*). Their failure to agree caused the passage of the resolution of plaintiff's legislature for the institution of this suit (*Ex. 5*), and the Ship John bed has remained closed by agreement of the parties, pending the determination of the true boundary in this litigation.

An investigation made by Mr. Rutter, the official Surveyor of the plaintiff's Board of Shell Fisheries (*R. 159*), showed the quantity of oysters in the disputed area (*R. 162; Ex. 101*) to be about 600,000 bushels, valued at \$300,000 (*R. 164*). Before the bed was closed, it yielded annually about one quarter of a million bushels of seed oysters (*R. 180*), valued at \$125,000 which, capitalized at 5%, represents a value of that disputed area of 2½ million dollars (*R. 193*).

Fifteen oystermen testified to their personal knowledge of Ship John bed from 1859 to the present time (*R. 198-248*). They verified the conditions shown on Exhibits 100

The Boundary Below the Circle.

and 101 with respect to the growth of that bed, during the past 25 or 30 years, as a result of planting shells and the enforcement of the Rough Cull law. They testified that they were regularly on the Ship John bed daily during each dredging season, and none of them ever saw any Delaware boats on that bed until the invasion of 1925, with the exception of one day some 10 or 11 years ago (*R. 235*), and once in 1917 (*R. 226*), when, in both instances the Delaware boat left as soon as the New Jersey guard boat came into view (*R. 226, 235*).

The witnesses so testifying, with the date from which their knowledge began, are: Sharpe, 1873 (*R. 235*); Edward Gaskill, 1910 (*R. 198-200*); H. S. Sockwell, 1910 (*R. 247*); Campbell, 1882 (*R. 202-4*); Lake, guard boat captain for 30 years, 1878 (*R. 210-11*); Hinson, 1894 (*R. 217-18*); Elcana Gaskill, 1871 (*R. 219-221*); Bacon, Superintendent of Maurice River Cove Oyster industry since 1902, but familiar with the Ship John bed since 1859 (*R. 222-3*); H. R. Sockwell, 1914 (*R. 226*); Riggin, 1878 (*R. 227-9*); Blackman, 1871 (*R. 230*); Fowler, 1900 (*R. 179*). Henry S. Sockwell testified that from 1920 to 1926 he was a part owner in Delaware boats and his boats, against his objection, joined in the raid of the Ship John bed in 1925. He said that the reason for this raid was that the Delaware oystermen were short of oysters on the Delaware side of the river (*R. 247-8*).

The only part of this testimony which is disputed was that Delaware boats had never dredged at Ship John bed prior to 1925. For this purpose four witnesses were introduced by defendant, whose testimony is summarized as follows:

John T. Buckson has been an oysterman on the bay for 57 or 58 years, and has had his own boat since 1883. He is familiar with Ship John Light and the natural oyster

The Boundary Below the Circle.

beds there. He dredged oysters at Ship John Light (*R. 458*) in about 1897. He had no trouble. Other Delaware boats dredged around Ship John Light, but he cannot say any more than that they dredged there below it and all around it. He was out on the bay and saw them. He cannot say when that occurred, or over how long a period of time it occurred. It occurred at various times.

One Delaware boat that worked over in New Jersey had some trouble—that was the only one he knew of. That boat got into trouble for dredging in the neighborhood of Ship John Light.

He dredged at Ship John Light in 1887, but saw no other boats there then. He has not been there since (*R. 462*). The trouble to Delaware oyster boats dredging in the vicinity of Ship John occurred three or four years ago; somewhere about 1927.

Ship John is closer to the Jersey shore than it is to the Delaware shore. The channel is on the west side of Ship John (*R. 457-63*).

Thomas Munsey started in the bay on an oyster boat in 1865 and was on the bay every year until 1895. He dredged around Ship John Light and had no trouble. He felt he was in his rights in working to the west of Ship John. He and Captain Buckson went to Wilmington and employed counsel. They were advised that they were in their rights because they were nearer the Delaware shore than they were to the Jersey shore. The attorney advised them to go there and work and if they got into trouble to appeal the case. They consulted counsel because they wanted to be on the right side of the law. The question was raised because they felt there were oysters there which belonged as much to them as to New Jersey. Says he did not know those oysters were claimed by New Jersey, but they consulted counsel because they thought they had the

The Boundary Below the Circle.

right to dredge between the light and the main channel (R. 660-69).

He does not remember when he consulted counsel, but it might have been in the 80s or even in the 90s. He had been to the beds before. He consulted counsel because he wanted to know how to proceed if he got into trouble. He thought there might be trouble. He dredged over there three or four years, or four or five times, during the period that he was on the bay. The first time he went was about 1868 or 1870. He could not tell how many times he went but he is sure that it was more than four times.

It was not his regular place to dredge. He usually dredged on the "Delaware side." When he was working there then, ships went up between where he was working and the Ship John Light. The ship channel is west of Ship John (R. 470-2).

John A. Tarburton began in the oyster business in 1913 and has been on the river ever since. Delaware boats during that period have dredged in the beds at and around Ship John bed. He has seen them there. He thinks there were about 20 there in the season of 1922.

When the oysters are thicker there than near the shore the oystermen go there. They go from time to time. He always felt within his rights (R. 473-4).

He never dredged on Ship John bed in his life. When he saw Delaware boats on Ship John bed he was dredging down the bay approximately three miles from Ship John. He could see that they were west of Ship John Light. He never saw any Delaware boats east of Ship John Light.

He saw the Delaware boats there in 1924—"The beginning of this argument." He never saw Delaware boats there before that, except when they would go by. . . .

The Boundary Below the Circle.

Jersey boats were dredging there at the time, among the Delaware boats.

He thinks he saw Delaware boats there in 1927, but he is not exact as to dates. Since then the bed has been closed under a gentleman's agreement (R. 476-81). Those are the only occasions he ever saw Delaware boats there.

The uncertainty of this witness about dates, indicates that it was probably in 1925 that he saw Delaware boats on the Ship John bed. That is the time fixed by plaintiff's witnesses. Since the area was closed during and since the 1926 season, he must be mistaken about the subsequent years.

George H. Walls was a licensed oysterman by both states, Delaware and New Jersey. He obtained his first license in New Jersey in 1888, and obtained a license in Delaware the same year, and held licenses from both states until 1925. He worked both shores every year. He dredged on or near Ship John Light every spring. He saw Delaware boats dredging between the center of the main ship channel eastward as far as Ship John Light, several years before the dispute came up. The main dispute came up about 1924.

Between 1925 and 1927 he dredged in the vicinity of Ship John Light from the center of the main ship channel east as far as the light. During that time New Jersey boats were dredging around Ship John Light. The New Jersey watch boat was present but did not interfere, while he was "dredging in the State of New Jersey."

It was the watch boat "Dianthes" in 1925. Captain Lake was officer of that boat.

He last dredged oysters at Ship John bed in 1925 and 1927 in the "Doris." Other Delaware boats were there. That was in 1925, about June 20th. There was no trouble.

The Boundary Below the Circle.

He saw Captain Lake there every day he was dredging. But Captain Lake said nothing to him. He could not tell how many boats were there in 1927. He was there himself—that is all he can tell.

This dispute started in 1924. There was no trouble before that. The two states entered into a gentleman's agreement and neither state worked there. He thinks that was in 1924, but he does not know when.

He dredged there before the gentleman's agreement, he thinks, but does not know. Emerson Tarburton got into trouble for dredging there (*R. 482-88*).

The testimony of these four witnesses shows how self-contradictory and indefinite they were, on direct and cross examination, on the subject of Delaware boats dredging on Ship John bed.

Although testifying on direct that he dredged there in 1897 (*R. 459*), Buckson stated on cross examination that he had not been there since 1887. He and Munsey were in such doubt about their right to go there that they consulted counsel at Wilmington sometime in the "80s" or "90s" (*R. 466, 470*).

Munsey went there only four or five times between 1868 and 1905. It was not his regular place to dredge (*R. 471*). Tarburton never dredged there in his life (*R. 476*). Walls dredged under a New Jersey license until 1925. He says he continued to dredge the Ship John bed without a Jersey license up to 1927, but in this he must be mistaken because the trouble which resulted in closing the area occurred in 1925. Of course Walls' New Jersey license entitled him to dredge at Ship John. He admits he was "dredging in the state of New Jersey" (*R. 483-4*). He does not say he ever saw any Delaware boats at Ship John bed, prior to 1925 or 1927, and as to that time

The Boundary Below the Circle.

he corroborates the enumeration of boats given for 1925 by Captain Lake (*R. 216*), who he saw there at the time (*R. 486-7*).

There is some uncertainty about dates among the witnesses, which is not unnatural, but since those on both sides refer generally to the "trouble" that started the present "dispute," they undoubtedly refer to the same episode of the general invasion of Ship John bed by Delaware boats in numbers. The time of this occurrence is fixed as 1925, not only by Mr. Fowler, who had official connection therewith and with the closing of the area in 1926 (*R. 181*), but also by Captain Lake's very minute record of days, dates and names of boats made by him at the time (*R. 216*).

Except for the single instance in 1887 when the Delaware legislature passed an act authorizing its citizens to dredge for oysters "at any point or points south of Ship John Light," which it repealed at the very next session (*Ex. 681*), *there is no evidence of any official claim of defendant to the Ship John bed, or that it ever attempted to exercise any jurisdiction thereover, or to keep off Jersey boats, which were, admittedly, always present.*

Plaintiff took steps to punish Delaware invaders of that bed by procuring indictments of two of them, Buckaloo and Tarburton (*Exs. 107, 108*). The cases were not pressed on account of the agreement to settle the controversy by the treaty negotiations which followed.

The weight of the evidence is that Delaware boats never came to that bed (unless it was on some infrequent unobserved occasions, as defendant's testimony seems to indicate, and the incidents described by Sharp (*R. 235*) and Sockwell (*R. 226*), when (in both instances), the "Michael Martin" fled upon the approach of plaintiff's guard boat), until 1925 when, instead of engaging in whole-

The Boundary Below the Circle.

sale conflict and arrests, both parties prudently attempted a friendly settlement and closed the area in the meantime.

The weight of this evidence also shows that plaintiff has been in peaceable and uninterrupted possession and enjoyment of all the Ship John bed area for more than 70 years within the memory of living persons.

While residents of Delaware made individual claims, in 1925, of their right to dredge in Ship John bed, defendant has never claimed such a right or attempted to exercise any authority or jurisdiction in that area. Meanwhile plaintiff has exercised the prerogatives of title and jurisdiction in that area at least since 1858, within the knowledge of witnesses in this case. Plaintiff has exercised these prerogatives not only by the investment of large sums of money to protect and enlarge the natural oyster beds there and by patrolling the area and licensing boats to dredge therein, but in 1874, by act of its legislature (*Ex. 29*), it conveyed to the United States Government the site of the Ship John Lighthouse located east of the ship channel in the midst of this Ship John oyster bed. No corresponding grant was applied for or obtained from Delaware.

Independent of the question whether the boundary is the center of the main ship channel or the geographical center of the bay, which is elsewhere considered, this long possession of Ship John bed, acquiesced in by defendant without complaint or interruption, and supported by an original claim of title, accepted as good by the United States and never since questioned, is sufficient to support a title by prescription.

*The Boundary Below the Circle.**The Planting Grounds.*

The purpose of the planting grounds below the southwest line has been explained under the preceding heading. Lands in this area, to the extent of between 31,000 and 32,000 acres (*R. 252*), have been leased by plaintiff to its citizens, at seventy-five cents per acre per year (*R. 183*), for transplanting seed oysters dredged from the natural beds and their cultivation to marketable size and condition.

In order to prepare the bottom for such transplanting, the lessee is required to spend from three to five hundred dollars per acre (*R. 183*). When so prepared, he requires from seven to nine thousand bushels of seed oysters per unit of 15 acres, which cost him about fifty cents per bushel to procure (*R. 184*).

Disputed area "B" of the planting grounds, comprises a portion of the bed of the bay $10\frac{1}{4}$ nautical miles long and $3\frac{1}{4}$ nautical miles wide of the widest part (*R. 166*), and contains 18,010 acres of ground suitable for oyster planting (*R. 185, 187, 238, 250*), of which 1144 acres (represented by 20 or 30 separate leases) have been leased (*R. 238, 250*); part of it for 20 years past (*R. 238*).

The demand for leasing area is constantly increasing (*R. 239*). The annual rental value to plaintiff of this disputed area "B" is \$14,250.00, which, capitalized at 5%, represents a value of \$285,000.00.

Plaintiff's lessees have an investment in this area, in the 1144 acres leased, of an average of about \$650.00 per acre or a total of approximately three-quarters of a million dollars. Defendant has never objected to the leasing of this land by plaintiff or to its use by the lessees; nor has it ever claimed title or jurisdiction therein; until after the present controversy arose in 1925.

The Boundary Below the Circle.

In this area plaintiff ceded to the United States Government, in 1909, areas for existing lighthouses at Miah Maull Shoal (*Ex. 128*) and at Cross Ledge (*Ex. 129*). No corresponding grants were applied for, to, or obtained from, defendant.

Plaintiff and its lessees have improved this originally valueless unoccupied area, and, by years of labor and great expense, have brought it into usefulness and profit. Defendant's acquiescence during the past 20 years is sufficient (independent of the question of original title) to justify a court of equity in sustaining a title in plaintiff by prescription.

The Compact.

In addition to the foregoing proof of the exercise by plaintiff of uninterrupted title and jurisdiction to the bed of Delaware bay, both in the Ship John bed and in the planting grounds, there is a further and conclusive bar to defendant's present claim of title on jurisdiction over any part of these oyster grounds, east of the ship channel, in the compact of 1905 (*Ex. 53*), in the provision of Article VI therein, reading as follows:

"Art. VI. Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State."

Plaintiff therefore regards as unassailable its title and jurisdiction to natural oyster beds and planted grounds in Delaware bay east of the middle of the ship channel.

The main ship channel is clearly marked by the U. S. Government. If the boundary line followed the green line, or geographical center, in the bay it would come in and take some of Jersey's possessions that it now has and on which Jersey men have spent their own money to improve.

The Boundary Below the Circle.

It would bring the line in where poaching could be done by both states, without any certainty of practicable prevention, which has not been done before because Delaware has no interest on the east side of the channel.

All the oyster beds claimed by plaintiff are east of the ship channel. There are none in the channel. All of the oyster beds heretofore claimed by defendant are west of the channel. The natural and feasible line for practicable operation as a boundary is the ship channel (*R. 190*).

New Jersey has never undertaken to plant anything on the west side of the ship channel, even where the geographical line might extend over the channel.

A Practical Boundary.

The practical difficulties of jurisdiction that would arise from a boundary shaped like a streak of lightning, as the line of geographical center shows on Exhibit 4, need no extended explanation. Such a line would be totally impracticable, would secure to defendant nothing it has ever claimed and would cause endless conflict and confusion. It is not the function of a court to establish a boundary that will make trouble. It should be the purpose of this court to fix a practicable line that could be recognized and which would be permanently and conveniently marked, as the ship channel is.

Practical oystermen with experiences covering the past 60 years or more testified that they had always regarded the ship channel, which is definitely marked and determinable, as the limit of their privileges under New Jersey dredging licenses and they, and others, dredged to that line (*C. M. Robbins, R. 243, 245; D. Robbins, R. 240, 242; Sharpe, R. 236-7; Berry, R. 232-3; H. S. Sockwell, R. 247-8*). The practical difficulties which would attend the

The Boundary Below the Circle.

enforcement of the laws of either state on a line so irregular and uncertain as the geographical center of the bay were described by the President of plaintiff's Board of Shell Fisheries and others, running as it would through important oyster beds. He predicted constant strife and conflict of authority due to the uncertainties of the line (*Fowler, R. 188-90; H. S. Sockwell, R. 249; D. Robbins, R. 242; E. Gaskill, R. 198*).

Another practical difficulty with a boundary on the geographical center is the fact that it would not remain fixed in one place, due to the constant erosion of the shores that has always occurred, and is now occurring, in Delaware bay. Evidence of such erosion is abundant, covering a period of about 160 years. *Corfield v. Coryell*, 6 Fed. Cas. 546, 547; *Gale v. Behling, Ex. 221*, pp. 2, 6, 7-8; *Pea Patch Island Case, Ex. 676*, p. 4; *Senate Document No. 21, 30th Cong. 1st Session*, pp. 33 et seq.; *Ex. 216*, pp. 2, 7, 8; *Ex. 238; R. 320-5, 504-522, 527, 531-2, 536-7, 541-2; Ex. 1139; Vincent's Hist. Del.*, pp. 58-61; *Bichel v. Poke*, 5 Harr. (Del.) 325, 326.

The necessity of establishing a well defined boundary line, well marked and distinctly perceivable to the eye, and that will not fluctuate, has been emphasized by this court in *Arkansas v. Tennessee*, 269 U. S. 152, 157; *Handly's Lessees v. Anthony*, 5 Wheat, 374, 383-4; *Howard v. Ingersoll*, 13 Howard 381, 424.

Delaware Laws.

Between 1818 and 1929 defendant's legislature enacted 83 separate acts respecting the regulation, culture and dredging of oysters in Delaware bay (*Ex. 680*).

The oyster grounds affected are described as lying west of Blake's channel, which is shown on the map attached to Exhibit 240, as lying west of the main ship channel.

The Boundary Below the Circle.

Additional acts are included in Exhibit 239, all of which, likewise limit the area to Blake's channel, except an act of 1887, which extends the area to the middle of the ship channel (*Ex. 239, p. 5*) but this limit was returned to Blake's channel by an act of 1897 (*Ex. 239, p. 7*). It was again removed to the middle of the ship channel by an act of 1915 (*Ex. 239, p. 12*).

In 1909 an act was passed creating an oyster commission and providing for a survey of the oyster grounds in Delaware bay and for marking the boundary thereof (*Ex. 239, p. 9*).

An act of 1915 (*Ex. 239, p. 12*) refers to a chart or survey dated July 1, 1910, of the oyster grounds including the bottoms occupied on that date. The only act of defendant's legislature which could possibly be construed as affecting oyster grounds east of the main ship channel was passed April 22, 1887, authorizing citizens of Delaware to dredge for oysters at any point "south of Ship John Light," but that act was repealed at the next session (*Ex. 681*).

Pursuant to the act of 1909, above mentioned, a survey was made jointly by the Delaware Oyster Commission and the United States Bureau of Fisheries in 1910. A printed report thereof entitled "Condition and Extent of the Natural Oyster Beds of Delaware" was published by the United States Department of Commerce and Labor, Bureau of Fisheries, Document No. 745, Government Printing Office, 1911 (*Ex. 240*). Attached thereto was a map (offered in evidence with the report) showing *all* of the oyster beds in the state of Delaware as described in the report. Part of those beds are described as lying between Blake's channel and the main ship channel on the Joe Floger shoal, and other parts as lying between that channel and the Delaware shore. The map shows Ship John

The Boundary Below the Circle.

Light but indicates no Delaware oyster beds in that vicinity. All of the oyster beds shown on the map are west of the main ship channel, which is also shown on the map.

In *Louisiana v. Mississippi* (202 U. S. 1), this court considered a case, like this one, in which the two states were in disagreement over their boundary and the consequent ownership of oyster beds. The history of that case is similar to this one, including a survey of the oyster beds by the United States Bureau of Fisheries. The report of that survey was offered in evidence, and concerning it, this court said:

(p. 56)

“In 1897, Louisiana requested the United States Commission of Fish and Fisheries to make an investigation and report upon certain technical matters in connection with the oyster industry of that state, which investigation was made in February, 1898, by the United States Fish Commission steamer *Fish Hawk*. A map was made of the area investigated in St. Bernard parish, and that map is given in the opening statement as Diagram No. 4. Louisiana's ownership was clearly recognized.”

By the same token plaintiff's ownership east of the main ship channel was likewise “clearly recognized,” not only by the report and map in Exhibit 240, but also by the unbroken succession of Delaware Acts. Those in Exhibit 681 serve only to emphasize the rule.

Exhibit 679 contains a list of titles of 39 acts of Delaware relating to fishing, passed between 1829 and 1905. Not one of them describes any territorial limits indicating its application *east* of the main ship channel, or exclusive jurisdiction in any part of the river or bay. On the contrary, Chapter 463, Delaware Laws, entitled “An act for the protection of sturgeon,” approved, May 19, 1897 (XX *Del. Laws*, p. 476), which forbids taking of sturgeon in Delaware bay and river or their tributaries between June

The True Boundary.

30 and December 31, without limitation as to territory, expressly provides that it shall be effective only upon the passage of concurrent acts by New Jersey and Pennsylvania.

All of the foregoing considerations lead to the conclusion that defendant's exceptions 1 to 4, and 6 to 13, both inclusive, should be overruled, and Master's findings 24 to 27, inclusive; conclusion 10; and his recommendation for decree 2, should be sustained.

CONCLUSION.**THE TRUE BOUNDARY.**

(Plaintiff's Exception 96.)

Part XXVIII (p. 61) of Plaintiff's Proposed Findings of Fact, Conclusions of Law and Form of Decree sets forth what the plaintiff conceives to be the true boundary line as follows:

"The true boundary line between the States of New Jersey and Delaware is ascertained and established as the middle of the main ship channel of Delaware river and bay from the point therein where the same is intersected by the northerly circular boundary of Delaware, extended, to Overfalls Light, located between Cape May, New Jersey, and Cape Henlopen, Delaware, as maintained and marked by the United States Government, and shown on U. S. Coast and Geodetic Survey Charts Nos. 294 and 295, published June, 1930; except from a point therein between Pennsville, New Jersey, and Newcastle, Delaware, to a point in the angle thereof between the black and red buoys, located about 1,300 feet northwesterly of Elsinboro Point, as on said chart 294, between which points said boundary follows the deepest channel on the west side of the Bulkhead Shoal, Pea Patch Island, and Pea Patch Shoal, as that channel is shown on a map entitled—

The True Boundary.

'A chart of Delaware river from Bombay Hook to Ridgley Creek with soundings &c taken by Lt. Knight of the Navy, composed and published for the use of pilotage by J. F. W. Des Barres, Esq., June 1, 1779,' published in the Atlantic Neptune for the use of the Royal Navy of Great Britain, 1775-1780 (Vol. 3, copy 5, p. 1:25) on file in the Division of Maps of the Library of Congress, Washington, D. C. (Map No. 4, Exhibit 181)."

The plaintiff submits that for the reasons set forth in Chapter One (relating to the boundary within the circle), its exceptions to the Master's Report and to his recommendation for a decree should be sustained; and that for the reasons set forth in Chapter Two (relating to the boundary below the circle), the defendant's exceptions to the Master's Report and to his recommendations for a decree should be overruled.

The boundary line, as described in the above proposed form of decree, is the Thalweg, that is, the center of the main channel (in both the river and the bay) as the same existed at the time of the American Revolution and also at the time of the Treaty of Paris. We submit that this line is the true boundary and that the decree of this Court should be entered accordingly.

WILLIAM A. STEVENS,
Attorney General,
Solicitor of Plaintiff.

GEORGE S. HOBART,
DUANE E. MINARD,
Counsel.

December 18, 1933.

ERRATA
to
PLAINTIFF'S MAIN BRIEF
BEFORE UNITED STATES SUPREME COURT.

PAGE

- iii Under subhead (d) insert
 "The Reason for the Letters Patent of March 22, 1682/3
 . . . 188"
- iii 1. 2 from bottom, the words "(e) The Crown's Claim of
 Title . . . 231" should follow "(2) Claim of Title by
 Estoppel"
- iv. 1. 12, strike out "'s" after "Sargeant"
- ix 1. 21, "392" should be "362"
- 6 1. 17, "181" should be "161"
- 10 1. 8, strike out the figures "3-5,"
- 10 1. 22, "pp. 14-15" should be "p. 13"
- 10 1. 24, "p. 25" should be "pp. 28-30"
- 11 1. 2, "p. 46" should be "pp. 47-48"
- 13 1. 5, "Sebasian" should be "Sebastian"
- 13 1. 28, "July" should be "June"
- 17 1. 18, "p. 21" should be "pp. 15-25"
- 17 1. 18, after "228" insert "pp. 8-19"
- 25 1. 20, after "23" insert "p. 8"
- 37 1. 5, "July" should be "June"
- 37 1. 32, "N. J." should be "N. Y."
- 38 1. 8 from bottom, "Ex. 8" should be "Ex. 28"
- 48 1. 17, after quotation, insert "(*Ex. 142*)"
- 51 1. 11, "160" should be "60"
- 55 1. 8 from bottom, "August 12" should be "August 21"
- 56 1. 7 from bottom, "94" should be "67"
- 57 1. 21, "Clarence" should be "Clarence"
- 58 1. 16, "Newall" should be "Newell"
- 70 1. 13, "1155" should be 1165"
- 73 1. 5 from bottom, "(p. 2)" should be "(p. 1)"

PAGE	
77	l. 19, strike out “ , p. 4”
81	l. 23, “(pp. 4-5).” should be “(<i>Breviate p. 37</i>).”
88	l. 17, “pp. 2-3” should be “pp. 1, 2”
89	l. 18, “(<i>Ex. 1181</i>)” should be “(<i>Exs. 38; 1181</i>)”
89	ll. 18, 19, strike out “and November 28, 1882 (<i>Ex. 38</i>)”
89	l. 20, “27” should be “7”
89	l. 20, “Old Man’s” should be “Oldmans”
94	l. 13, strike out “p. 13”
95	l. 15, “Map No. 34” should be “Map No. 35”
99	l. 16, “ <i>Ex. 505</i> ” should be “ <i>Ex. 503</i> ”
105	l. 14, “1153” should be “1133”
109	l. 7 from bottom, “January” should be “June”
110	l. 10, “1730” should be “1703”
115	l. 23, strike out “; 318”
117	l. 11, “ <i>Ex. 2</i> ” should be “ <i>Ex. 3</i> ”
118	l. 2, “699” should be “669”
126	l. 3 from bottom, “161” should be “162”
126	l. 2 from bottom, “1905” should be “1907”
139	l. 13, “ <i>Ex. 531</i> ” should be “ <i>Ex. 513</i> ”
140	l. 6 from bottom, “531” should be “513”
141	l. 8 from bottom, “possesison” should be “possession”
153	l. 18, strike out “531”
177	l. 16, “152” should be “215”
188	ll. 22, 23, strike out “(<i>Ex. 535, 297, p. 217</i>)”
193	l. 6, “1135” should be “1153”
198	l. 9 from bottom, insert after “14” “Report as to”
199	l. 9, “admits” should be “admit”
199	l. 5 from bottom, “399” should be “339”
199	l. 2 from bottom, “Reed” should be “Read”
199	l. 2 from bottom, “218” should be “216”
199	last line, “Weart” should be “Wirt”
207	l. 20, “475” should be “474”
212	l. 26, “14” should be “4”
218	l. 2 from bottom, “March 12” should be “March 22”

PAGE

224 l. 5 from bottom, "362" should be "368"

224 l. 3 from bottom, "37" should be "370"

235 l. 1, "January" should be "June"

241 l. 26, "516" should be "916"

242 l. 23, "November 10" should be "November 4"

246 l. 16, "624" should be "635"

247 l. 16, "325" should be "301"

247 l. 2 from bottom, "if" should be "as"

252 l. 27, "1044" should be "444"

255 l. 1, "1055" should be "1050"

280 l. 23, "providing" should be "provided"

284 l. 8, "1675" should be "1685"

284 l. 8, strike out "46"

284 l. 9, strike out "1161"

284 l. 11, strike out "236, p. 1"

290 l. 12, insert in bracket before "p. 244", "(*Ex. 297*)"

290 l. 23, "is" should be "it"

291 l. 4, after "contains" insert "(*Ex. 550*)"

291 l. 11, "to" should be "from"

294 l. 5, "226" should be "266"

294 l. 15, "1608-9" should be "1708-9"

301 l. 2 from bottom, "as" should be "from"

320 l. 3, "stands" should be "stand"

330 l. 21, "676" should be "673"

345 l. 23, "possession" should be "position"

350 l. 14, "deductions" should be "deduction"

350 ll. 27, 29, 34, strike out quotation marks

355 last line, "1775" should be "1773"

356 l. 3 from bottom, "288" should be "238"

357 l. 23, "is" should be "are"

360 l. 8 from bottom, after semi-colon insert "(*italics ours*)"

364 ll. 6 and 7 should follow line 12

379 l. 4 from bottom, "are" should be "is"