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MartIn Vs. Waddell

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Appellant : Martin

Respondent : Waddell

Judgement :

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Martin v. Waddell

41 U.S. (16 Pet.) 367

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF NEW JERSEY

SYLLABUS

Ejectment for one hundred acres of land, covered with water, in Raritan Bay, in the Township of Perth Amboy, in the State of New Jersey. The land claimed lies beneath the navigable waters of the Raritan River and Bay, where the tide ebbs

and flows, and the principal right in dispute was the property in the oyster fisheries in the public rivers and bays of East New Jersey. The claim was made under the charters of Charles the Second to his brother the Duke of York in 1664 and 1674 for the purpose of enabling him to plant a colony on the continent of America. The land in controversy is within the boundaries of the charters, and in the territory which now forms the State of New Jersey. The territory in the grant, by succeeding conveyances, became vested in the proprietors of East Jersey, who conveyed the premises in controversy to the defendant in error. The proprietors, by the terms of the grant to them, were originally invested with all the rights of government and property which were conferred on the Duke of York. Afterwards, in 1702, the proprietors surrendered to the Crown all the powers of government, retaining their rights of private property. The defendant in error claimed the exclusive right to take oysters in the place granted to him by virtue of his title under the proprietors. The plaintiffs in error, as the grantees of the State of New Jersey, under a law of that state passed in 1824 and a supplement thereto, claimed the exclusive right to take oysters in the same place. The point in dispute between the parties depended upon the construction and legal effect of the letters patent to the Duke of York, and of the deed of surrender, subsequently made by the proprietors.

The right of the King of Great Britain to make this grant to the Duke of York, with all of its prerogatives and powers of government, cannot at this day be questioned.

The English possessions in America were not claimed by right of conquest, but by right of discovery. According to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nations by which any portion of the country was first discovered.

The grant to the Duke of York was not of lands won by the sword, nor were the government and laws he was authorized to establish intended for a conquered people.

The country granted by King Charles the Second to the Duke of York, was held by the King in his public and regal character, as the representative of the nation, and in trust for them. The discoveries made by persons acting under the authority of the government were for the benefit of the nation, and the Crown, according to the principles of the British Constitution, was the proper organ to dispose of the public domain. Cited, *Johnson v. McIntosh,* 8 Wheat. 595.

When the Revolution took place, the people of each state became themselves sovereign, and in that character held the absolute right 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, therefore, made

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by their authority must be tried and determined by different principles from those which apply to grants of the British Crown, where the title is held by a single individual in trust for the whole nation.

The dominion and property in navigable waters and the lands under them being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund entrusted to his care for the common benefit. In such cases, whatever does not pass by the grant remains in the Crown for the benefit and advantage of the whole community. Grants of that description are therefore, construed strictly, and it will not be presumed that the King intended to part from any portion of the public domain unless clear and special words are used to denote it.

The rivers, bays, and arms of the sea, and all the prerogative rights within the limits of the charter of King Charles, undoubtedly passed to the Duke of York and were intended to pass except those saved in the letters patent.

The questions upon this charter are very different. It is not a deed conveying private property, to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of

a great political community, and in that light it should be regarded and construed.

The object in view of the letters patent appears on the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed as nearly as circumstances would permit according to the laws and usages of England, and in which the Duke, his heirs, and assigns, were to stand in the place of the King and administer the government according to the principles of the British Constitution, and the people who were to plant this colony and to form this political body over which he was to rule were subjects of Great Britain, accustomed to be governed according to its usages and laws.

The land under the navigable waters within the limits of the charter passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England and the soils under them are held by the Crown. The policy of England since Magna Charta -- for the last six hundred years -- has been carefully preserved to secure the common right of piscary for the benefit of the public. It would require plain language in the letters patent to the Duke of York to persuade the Court that the public and common right of fishing in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended in this one instance to be taken away. There is nothing in the charter that requires this conclusion.

The surrender by the proprietors to Queen Anne in 1702 was of "all the powers, authorities, and privileges of and concerning the government of the province," and the right in dispute in this case was one of these privileges. No words are used for the purpose of withholding from the Crown any of its ordinary and well known prerogatives. The surrender, according to its evident object and meaning, restored them in the same plight and condition in which they originally came to the hands of the Duke of York. When the people of New Jersey took possession of the reins of government and took into their own hands the power of sovereignty, the

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prerogatives and regalities which before belonged either to the Crown or the Parliament, became immediately and rightfully vested in the state.

Quaere. Whether on a question which depends not upon the meaning of instruments formed by the people of a state or by their authority, but upon the letters patent granted by the British Crown, under which certain rights are claimed by the state, on one hand, and by private individuals, on the other, if the Supreme Court of the State of New Jersey had been of opinion that upon the face of the charter the question was clearly in favor of the state, and that the proprietors holding under the letters patent had been deprived of their just rights by the erroneous judgment of the state court, it could be maintained that the decision of the court of the state on the construction of the letters patent bound the Supreme Court of the United States. The decision of the state court upon the letters patent by which the province was originally granted by the King of Great Britain is unquestionably entitled to great weight. If the words of the letters patent had been more doubtful, *quaere* if the decision of a state court on their construction, made with great deliberation and research, ought to be regarded as conclusive.

The defendant in error, the lessee of William C. H. Waddell, instituted, to April term 1835, in the Circuit Court of the United States for the District of New Jersey, an action of ejectment against Merrit Martin and others for the recovery of certain land covered with water, situated in the Raritan Bay, below high water mark in the State of New Jersey. The defendants appeared to the suit, and at April term 1837, the cause was tried by a jury, which found a special verdict on which judgment was afterwards entered for the plaintiff, from which judgment, the defendants prosecuted this writ of error.

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TANEY, CH.J., delivered the opinion of the Court.

This case was fully argued at the last term. But it was not then decided,

because the important principles involved in it made it proper that the case should be heard and determined by a full Court, and as some of the Justices were not present at the former hearing, a reargument was ordered. In pursuance of this order, it has been again elaborately discussed by counsel, and having been carefully considered by the Court, I am instructed to deliver its opinion.

The questions before us arise upon an action of ejectment instituted by the defendant in error, who was the plaintiff in the court below, to recover one hundred acres of land, covered with water, situated in the Township of Perth Amboy in the State of New Jersey. At the trial in the circuit court, the jury found a special verdict, setting forth, among other things, that the land claimed lies beneath the navigable waters of the Raritan River and Bay, where the tide ebbs and flows. And it appears that the principal matter in dispute is the right to the oyster fishery in the public rivers and bays of East New Jersey.

The plaintiff makes title under the charters granted by Charles II to his brother, the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on this continent. The last-mentioned grant is precisely similar to the former in every respect, and was made for the purpose of removing doubts which had then arisen as to the validity of the first. The boundaries in the two charters are the same, and they embrace the territory which now forms the State of New Jersey. The part of this territory known as East New Jersey, afterwards, by sundry deeds and conveyances which it is not necessary to enumerate, was transferred to twenty-four persons, who were called the Proprietors of East New Jersey, who, by the terms of the grants, were invested, within the portion of the territory conveyed to them, with all the rights of property and government which had been originally conferred on the Duke of York by the letters patent of the King. Some serious difficulties, however, took place in a short time between these proprietors and the British authorities, and after some negotiations upon the subject, they in 1702 surrendered to the Crown all the powers of government, retaining their rights of private property.

The defendant in error claims the land covered with water, mentioned in the declaration, by virtue of a survey made in 1834

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under the authority of the proprietors and duly recorded in the proper office. And if they were authorized to make this grant, he is entitled to the premises as owner of the soil and has an exclusive right to the fishery in question. The plaintiff in error also claims an exclusive right to take oysters in the same place, and derives his title under a law of the State of New Jersey passed in 1824 and a supplement thereto passed in the same year. The point in dispute between the parties therefore depends upon the construction and legal effect of the letters patent to the Duke of York and of the deed of surrender subsequently made by the proprietors.

The letters patent to the duke included a very large territory extending along the Atlantic coast from the River St. Croix to the Delaware bay, and containing within it many navigable rivers, bays and arms of the sea, and after granting the tract of country and islands therein described,

"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, profits, commodities and hereditaments to the said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances, and all the estate, right, title, interest, benefit and advantage, claim and demand of the King, in the said land and premises,"

the letters patent proceed to confer upon him, his heirs, deputies, agents, commissioners and assigns the powers of government, with a proviso that the statutes, ordinances, and proceedings established by his authority should

"not be contrary to, but as nearly as might be agreeable to, the laws, statutes and government of the realm of England, saving also an appeal to the King, in all cases, from any judgment or sentence which might be given in the colony, and authorizing the duke, his heirs and assigns, to lead and transport out of any of the

realms of the King to the country granted, all such and so many of his subjects, or strangers not prohibited, or under restraint who would become the 'loving subjects' of the King, and live under his allegiance, and who should willingly accompany the duke, his heirs and assigns."

The right of the King to make this grant, with all of its prerogatives and powers of government, cannot at this day be questioned.

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But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British Crown in the country discovered by its subjects on this continent and the principles upon which it was parceled out and granted.

The English possessions in America were not claimed by right of conquest, but by right of discovery. For according to the principles of international law as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants. The grant to the Duke of York therefore was not of lands won by the sword; nor were the government or laws he was authorized to establish intended for a conquered people.

The country mentioned in the letters patent was held by the King in his public and regal character, as the representative of the nation and in trust for them. The discoveries made by persons acting under the authority of the government were for the benefit of the nation, and the Crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains, and upon these principles rest the various charters and grants of territory made on this

continent. The doctrine upon this subject is clearly stated in the case of *Johnson v. McIntosh,* 8 Wheat. 595. In that case, the Court, after stating it to be a principle of universal law that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers, proceeded to say that

"if the discovery be made and possession 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 benefit of the whole nation, and 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 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 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."

This being the principle upon which the charter in question was founded, by what rules ought it to be construed? 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 to give him an immediate and exclusive right of fishery, either for shellfish 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 *Blundell v. Catterall,* 5 Barn. & Ald. 287, 294, 304, 309, and in the case of *Duke of Somerset v. Fogwell,* 5 Barn. & Cres. 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 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 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

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when the title is held by a single individual in trust for the whole nation.

Neither is it necessary to examine the many cases which have been cited in the argument on both sides, to show the degree of strictness with which grants of the King are to be construed. The decisions and authorities referred to apply more properly to a grant of some prerogative right to an individual, to be held by him as a franchise, and which is intended to become private property in his hands. The dominion and property in navigable waters, and in the lands under them, being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund entrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the Crown, for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly, and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it. But in the case before us, the rivers, bays and arms of the sea, and all prerogative rights, within the limits of the charter, undoubtedly passed to the Duke of York, and were intended to pass, except those saved in the letters patent. The words used evidently show this intention, and there is no room, therefore, for the application of the rule above mentioned.

The questions upon this charter are very different ones. They are whether the dominion and propriety in the navigable waters and in the soils under them passed as a part of the prerogative rights annexed to the political powers conferred on the duke? Whether, in his hands, they were intended to be a trust for the common use of the new community about to be established or private property to be parceled out and sold to individuals for his own benefit? And in deciding a question like this, we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it for the century and more which has since elapsed are all entitled to consideration and weight. It is not a deed conveying private property, to be interpreted by the rules applicable to cases of that description.

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It was an instrument upon which was to be founded the institutions of a great political community, and in that light it should be regarded and construed.

Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England, and in which the duke, his heirs and assigns, were to stand in the place of the King, and administer the government according to the principles of the British Constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

It is said by Hale, in his treatise de Jure Maris, Harg. Law Tracts 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British Crown,

"That although the King is the owner of this great coast, and as a consequent of his propriety, hath the primary right of fishing in the sea, and creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof as a public common of piscary, and may not, without injury to their right, be restrained of it unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty."

The principle here stated by Hale, as to "the public common of piscary" belonging to the common people of England, is not questioned by any English writer upon that subject. The point upon which different opinions have been expressed is whether, since Magna Charta, "either the King or any particular subject can gain a propriety exclusive of the common liberty." For undoubtedly, rights of fishery, exclusive of the common liberty, are at this day held and enjoyed by private individuals under ancient grants. But the existence of a doubt as to the right of the King to make such a grant, after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years, and how carefully it

has preserved this common right for the benefit of the public. And there is nothing in the charter before us indicating that a different and opposite line of policy was designed to be adopted in that colony. On the contrary, after enumerating in the clause herein before quoted, some of the prerogative rights annexed to the Crown, but not all of them, general words are used, conveying "all the estate, right, title, interest, benefit, advantage, claim and demand" of the King, in the lands and premises before granted. The estate and rights of the King passed to the duke in the same condition in which they had been held by the Crown, and upon the same trusts. Whatever was held by the King, as a prerogative right, passed to the duke in the same character. And if the word "soils" be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters patent with "other royalties," and conveyed as such. No words are used for the purpose of separating them from the *jura regalia*

and converting them into private property, to be held and enjoyed by the duke apart from and independent of the political character with which he was clothed by the same instrument.

Upon a different construction it would have been impossible for him to have complied with the conditions of the grant. For it was expressly enjoined upon him as a duty in the government he was about to establish, to make it as near as might be agreeable in their new circumstances to the laws and statutes of England, and how could this be done if in the charter itself this high prerogative trust was severed from the regal authority? If the shores and rivers and bays and arms of the sea and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish, had been converted by the charter itself into private property, to be parceled out and sold by the duke for his own individual emolument? There is nothing, we think, in the terms of the letters patent nor in the purposes for which it was granted that would justify this construction. And in the judgment of the court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable

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waters of England, and the soils under them, are held by the Crown.

This opinion is confirmed by referring to similar grants for other tracts of country upon this continent, made about the same period of time. Various other charters for large territories on the Atlantic cost were granted by different monarchs of the Stuart dynasty to different persons for the purposes of settlement and colonization, in which the powers of government were united with the grant of territory. Some of these charters very nearly resembled in every respect the one now in controversy, and none of them, it is believed, differed materially from it in the terms in which the bays, rivers and arms of the sea and the soils under them were conveyed to the grantees. Yet in no one of these colonies has the soil under its navigable waters and the rights of fishery for shellfish or floating fish been severed by the letters

patent from the powers of government. In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common the benefits and advantages of the navigable waters for the same purposes and to the same extent that they have been used and enjoyed for centuries in England. Indeed it could not well have been otherwise, for 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 shellfish from its bottom or fasten there a stake or even bathe in its waters without becoming a trespasser upon the rights of another. The usage in New Jersey has in this respect, from its original settlement, conformed to the practice of the other chartered colonies. And it would require very plain language in these letters patent to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England and which was preserved in every other colony founded on the Atlantic borders was intended in this one instance to be taken away. But we see nothing in the charter to require this conclusion.

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The same principles upon which the court have decided upon the construction of the letters patent to the Duke of York, apply with equal force to the surrender afterwards made by the twenty-four proprietors. It appears by the special verdict, that all the interest of the duke in East New Jersey, including the royalties and powers of government, were conveyed to these proprietors, as fully and amply, and in the same condition, as they had been granted to him, and they had the same dominion and propriety in the bays, and rivers and arms of the sea, and the soil under them, and in the rights of fishery, that had belonged to him under the original charter. In their hands, therefore, as well as in those of the duke, this dominion and propriety was an incident to the regal authority, and was held by

them as a prerogative right, associated with the powers of government. And being thus entitled, they, in 1702, surrendered and yielded up to Anne, Queen of England, and to her heirs and successors,

"all the powers and authorities in the said letters patent granted, to correct, punish, pardon, govern and rule all or any of her majesty's subjects or others who then were inhabitants or thereafter might adventure into or inhabit within the said Province of East New Jersey, and also to nominate, make, constitute, ordain and confirm any laws, orders, ordinances, directions and instruments for those purposes, or any of them, and to nominate, constitute or appoint, revoke, discharge, change or alter any government or governors, officers or ministers, which were or should be appointed within the said province, and to make, ordain and establish any orders, laws, directions, instruments, forms or ceremonies of government and magistracy, for or concerning the same, or on the sea, in going to or coming from the same, or to put in execution, or abrogate, revoke or change such as were already made, for or concerning such government, or any of them, and also all the powers and authorities by the said letters patent to use and exercise martial law in the said Province of East New Jersey, and to admit any person or persons to trade or traffic there, and of encountering, repelling and resisting by force of arms, any person or persons attempting to inhabit there without the license of them, the said proprietors, their heirs and assigns, and all other the powers, authorities and privileges of and concerning the province last aforesaid, or the inhabitants

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thereof, which were granted, or mentioned to be granted, by the said several above-recited letters patent, or either of them,"

which said surrender was afterwards accepted by the Queen.

We give the words of the surrender as found by the special verdict, and they are broad enough to cover the *jura regalia* which belonged to the proprietors. They yield up "all the powers, authorities and privileges of and concerning the

government of the province," and the right in dispute was one of these authorities and privileges. No words are used for the purpose of withholding from the Crown any of its ordinary and well known prerogatives. The surrender, according to its evident object and meaning, restored them in the same plight and condition in which they originally came to the hands of the Duke of York. Whatever he held as a royal or prerogative right was restored, with the political power to which it was incident. And if the great right of dominion and ownership in the rivers, bays, and arms of the sea and the soils under them were to have been severed from the sovereignty and withheld from the Crown; if the right of common fishery for the common people stated by Hale in the passage before quoted was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms, and would not have been left for inference from ambiguous language.

The negotiations previous to the surrender have been referred to in order to influence the construction of the deed. But whatever propositions may have been made or opinions expressed before the execution of that instrument, the deed itself must be regarded as the final agreement between the parties, and that deed, by its plain words, reestablished the authority of the Crown, with all of its customary powers and privileges. And when the people of New Jersey took possession of the reins of government and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the Crown or the Parliament became immediately and rightfully vested in the state.

This construction of the surrender is evidently the same with that which it received from all the parties interested at the time it was executed. For it appears by the history of New Jersey

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as gathered from the acts, documents and proceedings of the public authorities that the Crown and the provincial government established by its authority always afterwards in this territory exercised the same prerogative powers that the King was accustomed to exercise in his English dominions. And as concerns the

particular dominion and propriety now in question, the colonial government from time to time authorized the construction of bridges with abutments on the soil covered by navigable waters, established forts, authorized the erection of wharves, and as early as 1719 passed a law for the preservation of the oyster fishery in its waters. The public usages also, in relation to the fisheries, continued to be the same. And from 1702, when the surrender was made, until a very recent date, the people of New Jersey have exercised and enjoyed the rights of fishery for shellfish and floating fish as a common and undoubted right without opposition or remonstrance from the proprietors. The few unimportant grants made by them at different times, running into the navigable waters, which were produced in the argument do not appear to have been recognized as valid by the provincial or state authorities nor to have been sanctioned by the courts. And the right now claimed was not seriously asserted on their part before the case of *Arnold v. Mundy,* reported in 1 Halst. 1, which suit was not instituted until the year 1818; and upon that occasion, the supreme court of the state held that the claim made by the proprietors was without foundation.

The effect of this decision by the state court has been a good deal discussed at the bar. It is insisted by the plaintiffs in error that as the matter in dispute is local in its character and the controversy concerns only fixed property within the limits of New Jersey, the decision of her tribunals ought to settle the construction of the charter, and that the courts of the United States are bound to follow it. It may, however, be doubted whether this case falls within the rule in relation to the judgments of state courts when expounding their own Constitution and laws.

The question here depends not upon the meaning of instruments framed by the people of New Jersey or by their authority, but upon charters granted by the British Crown, under which certain rights are claimed by the state, on the one hand, and by

private individuals on the other. And if this Court had been of opinion that upon the face of these letters patent the question was clearly against the state, and that the

proprietors had been derived at their just rights by the erroneous judgment of the state court, it would perhaps be difficult to maintain that this decision, of itself, bound the conscience of this Court. It is, however, unquestionably entitled to great weight. It confirms the construction uniformly placed on these charters and instruments by the other public authorities and in which the proprietors had so long acquiesced. Public acts and laws both of the colonial and state governments have been founded upon this interpretation and extensive and valuable improvements made under it. In the case referred to, the sanction of the judicial authority of the state is given to it. And if the words of the letters patent had been far more doubtful than they are, this decision, made upon such a question with great deliberation and research, ought in our judgment to be regarded as conclusive.

Independently, however, of this decision of the Supreme Court of New Jersey, we are of opinion that the proprietors are not entitled to the rights in question, and the judgment of the circuit court must therefore be

Reversed.

THOMPSON, JUSTICE, dissenting.

The premises in question in this case are a mud flat covered by the waters of the Bay of Amboy in the State of New Jersey. The cause comes up on facts found by a special verdict in the court below, by which it appears that the lessors of the plaintiff produced upon the trial a regular deduction of title from Charles II down to themselves, and the premises in question are admitted to be within the grant. And the general question in the case is whether this mud flat passed under the grant, and in virtue of the several conveyances set out in the special verdict became vested in the proprietors of New Jersey as private property. The opinion of a majority of the Court is against this right, in which opinion, however, I cannot concur, and shall briefly assign the reasons upon which my opinion rests.

Some objections have been made to the right of maintaining

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an action of ejectment growing out of the nature of the subject matter in controversy. There can be no grounds for such an objection. The subject in question is the right to land, and not to water. It is the ordinary case of an ejectment for land covered with water, and the premises are so set out and described in the declaration, and the special verdict finds that the lessors of the plaintiff, under the title by them shown, entered into the tenements with the appurtenances in the declaration mentioned, and were thereof possessed until the defendant afterwards entered upon and ejected, expelled, and removed the plaintiff from such possession. So that the subject matter in controversy is found not only to be susceptible of actual possession, but to have been so possessed and enjoyed.

A majority of the Court seems to have adopted the doctrine of *Arnold v. Mundy,* decided in the Supreme Court of New Jersey, 1 Halst. 1, in which it is held that navigable rivers, where the tide ebbs and flows, and the ports, bays and coasts of the sea, including both the waters and the land under the water, are common to the people of New Jersey, and that, under the grant of Charles II to the Duke of York, all the rights, which they call royalties, passed to the duke, as governor of the province, exercising the royal authority, and not as the proprietor of the soil, but that he held them as trustee for the benefit of all settlers in the province and that the proprietors did not acquire any such right to the soil that they would grant a several fishery, and that no person who plants a bed of oysters in a navigable river has such property in the oysters as to enable him to maintain an action of trespass against anyone who encroaches upon it. And this rests on the broad proposition that the title to the land under the water did not and could not pass to the Duke of York as private property. To maintain this proposition it must rest on the ground that the land under the water of a navigable river is not the subject of a private right, for if it can be conveyed by words, the grant in the present case is broad enough to pass the title to the land in question.

It is worthy of observation that the course of New Jersey in relation to this claim is hardly consistent with her pretensions. In the case of *Arnold v. Mundy,* the Chief Justice said, upon the revolution, all these rights became vested in the people of

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Jersey as the sovereign of the country and are now in their hands, and the legislature may regulate them &c.; But the power which may be exercised by the sovereignty of the state is nothing more than what is called the *jus regium,* the right of regulating, improving and securing the same for the benefit of every individual citizen. The sovereign power itself therefore cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people.

If this be the received doctrine in New Jersey in relation to the navigable waters of that state and the oyster fisheries, they remain common to all the citizens of New Jersey, and never can be appropriated to any private or individual use, and all laws having such object in view must be utterly null and void, and it is difficult to perceive how the law of New Jersey, found by the special verdict, can be sustained. This act declares that the shore and land covered with water may be set apart and laid out by commissioners for the purpose of growing and planting oysters thereon, reserving such parts as might be judged necessary for public accommodation, provided that nothing in the said act contained should authorize the commissioners to present any obstruction or cause any injury to the navigation of the said sound and river or to any fishery or fisheries therein. Here the legislature treats these flats in all respects as land, to be used for planting and growing oysters, and for the use of which a revenue is derived to the state by the payment of a rent reserved. It is not the use of the water for any public purpose that this law contemplates, but an exclusive right to the use of the land under the water, in contradistinction to the use of the water for purposes of navigation, and that this law is so to be considered is manifest from the proviso that no obstruction should be made to the fishery or fisheries therein; and here is a manifest distinction made between a fishery and an oyster bed. For if it had been understood that the fisheries included oysteries, the enacting clause and the

proviso would present a glaring inconsistency. The enacting clause authorizes the setting apart the oystery to exclusive private use, when, by the proviso, no obstruction is to

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be made to the fisheries. So that if an oystery is a fishery, the owner is deprived of the exclusive use of it. The act seems to be founded upon a distinction clearly held up, in many cases to be found in the books, between an oystery and a fishery, in the common use of the term. The one applying to the use of land under the water, which is peculiarly adapted to the growing of oysters, and to be used for that purpose in the cultivation of oysters as other lands are used for the purpose to which they are particularly adapted, whereas a fishery in common acceptation has reference to the use of the water for floating fish, and this is a very obvious and natural distinction.

That the title to land under a navigable stream of water must be held subject to certain public rights cannot be denied. But the question still remains what are such public rights? Navigation, passing, and repassing are certainly among those public rights. And should it be admitted that the right to fish for floating fish was included in this public right, it would not decide the present question. The premises in dispute are a mud flat, and the use to which it has been and is claimed to be applied is the growing and planting of oysters. It is the use of land, and not of water, that is in question. For the purpose of navigation, the water is considered as a public highway, common to all, like a public highway on land. If land over which a public highway passes is conveyed, the soil passes subject to that use, and the purchaser may maintain an action for an injury to this soil not connected with the use, and whenever it ceases to be used as a public highway, the exclusive right of the owner attaches; so with respect to the land under water, the public use for passing and repassing, and all the purposes for which a public way may be used, are open to the public, the owner nevertheless retaining all the rights and benefits of the soil that may not impede or interfere with the use as a public highway. Should a coal mine, for instance, be discovered under such highway, it would belong to the owner of the soil and might be used for his benefit, preserving

unimpaired the public highway. So with respect to an oyster bed, which is local and is attached to the soil. It is not the water that is over the beds that is claimed -- that is common and may be used by the public -- but the use of the soil by the owner which is consistent with the use of the water by the public

is reserved to the owner. Suppose this mud flat should, by the wash from the shore or the receding of the water or in any other manner be filled up and become solid ground (which is by no means an extravagant supposition), would not the proprietors be considered the owners of this land and have the exclusive right to the use and enjoyment of it if they had in no way parted with such right? This cannot be denied if the soil passed to and became vested in the proprietors under the grant to them. It surely would not be claimed by the state, it being no longer susceptible of public use.

The case of *Brown v. Kennedy,* 5 Har. & Johns. 195, is fully to this point. The question there related to the right to the soil in the bed of a navigable river which had been diverted to a canal, and it was held that the property in the soil covered by the water was vested in the lord proprietary by the charter of Maryland; that by the common law, the right was in the King, and he might dispose of it *sub modo;* that the property in the soil may be granted, subject to the *jus publicum;* that by the terms of the charter to Lord Baltimore, they clearly passed the property in the soil covered by any waters, within the limits of the charter; and if the bed of the river had not been conveyed away, it would have remained in the proprietary, and if an island had sprung up, it would have been his, or if the bed of the river had been left bare, it would be his, as the *jus publicum* would be destroyed.

The rules and principles laid down by Lord Hale, as we find them in Hargrave's Law Tracts, are admitted as containing the correct common law doctrine as to the rights and power of the King over the arms of the sea and navigable streams of water. We there find it laid down that the King of England hath a double right in the sea, *viz.,* a right of jurisdiction, which he ordinarily exercises by his admiral, and a right of propriety or ownership. Harg. 10. The King's right of propriety or ownership

in the sea and soil thereof is evinced principally in these things that follow. The right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the coast whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the King is the owner of this

great coast, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof as a public common of piscary, and may not without injury to their right be restrained of it unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty (p. 11). In many ports and arms of the sea there is an exclusion of public fishing by prescription or custom (p. 12), although the King hath *prima facie* this right in the arms and creeks of the sea, *communi jure,* and in common presumption; yet a subject may have such a right in two ways.

1. By the King's charter or grant, and this is without question. The King may grant fishing within some known bounds, though within the main sea, and may grant the water and soil of a navigable river (p. 17), and such a grant (when apt words are used) will pass the soil itself, and if there shall be a recess of the sea, leaving a quantity of land, it will belong to the grantee.

2. The second mode is by custom or prescription. There may be the right of fishing without having the soil, or by reason of owning the soil, or a local fishery that arises from ownership of the soil (p. 18). That, *de communi jure,* the right of the arms of the sea belongs to the King; yet a subject may have a separate right of fishing, exclusive of the King and of the common right of the subject (p. 20). But this interest or right of the subject must be so used as not to occasion a common annoyance to the passage of the ships or boats, for that is prohibited by the common law as well as by several statutes. For the *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*

wherewith public rivers or arms of the sea are affected for public use (p. 22) -- as the soil of a highway, in which, though in point of property may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified (p. 36).

These rules, as laid down by Lord Hale, have always been considered as settling the law upon the subjects so which they apply, and have been understood by all elementary writers as governing rules and have been recognized by the courts of justice

as controlling doctrines. They establish that by the common law, the King is the owner of all navigable rivers, bays and shores. That he owns them in full dominion and propriety, and has full power and authority to convey the same; that he may grant a several fishery in a navigable stream, and the common law has annexed only two limitations upon this power: that these waters shall remain highways for passage and navigation and that whilst they remain ungranted, there is a common right of fishery in them; but subject to these limitations, the King has as full power to convey as an individual has to convey the land of which he is the owner.

I see nothing to countenance the distinctions set up, that the King holds these subjects as trustee any more than does the dry land, or that he cannot convey them discharged of the right of common fishery. There is no reason for such distinction with respect to land under water. The true rule on the subject is that *prima facie* a fishery in a navigable river is common, and he who sets up an exclusive right must show title either by grant or prescription. This is the doctrine of the King's Bench in England in the case in 4 Burr. 2163. It was an action of trespass for breaking and entering the plaintiff's close, called the River Severn, and the defense set up was that it was a navigable river, and an arm of the sea, wherein every subject has a right to fish, and that an exclusive right cannot be maintained by a subject, in a river that is an arm of the sea, but that the general right of fishing is common to all. But this doctrine was not recognized by the court. Lord Mansfield said, the rule of law is uniform. In rivers not navigable, the

proprietors of the land have the right of fishing on their respective sides, and it generally extends *ad filum medium aquae.* But in navigable rivers, the proprietors of the land on each side have it not; the fishery is common; it is *prima facie* in the King, and is public. If anyone claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him unless he can prove such a prescriptive right. Here it is claimed and found. It is therefore consistent with all the cases that he may have an exclusive privilege of fishing, although it is an arm of the sea; such a right shall not be presumed, but the contrary, *prima facie;* but it is capable of being proved, and must

have been so in the present case. And Yates, Justice, says, he was concerned in such a case, but the right was not proved, and so found common, but such a right may be proved. It may be appropriated by prescription, and he refers to the royal salmon fishery in the River Banne, in Sir John Davies' reports, and says it is agreeable to this, and that it is a very good case. That it appears by it that the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in the arm of the sea. And he refers to the case in 1 Mod. 105, where, he observes, Lord Hale says truly, if anyone will appropriate a privilege to himself, the proof lieth on his side. Now if it may be granted, it may be prescribed for, for a prescription implies a grant.

In the argument of this case, the counsel on the part of the defendant referred to the case of *Warren v. Matthews,* as reported in 6 Mod. 73, where it is said every subject of common right may fish with lawful nets &c.;, in a navigable river, as well as in the sea, and the King's grant cannot bar them thereof, and this case has been much relied on in the argument of the case now before the Court. But this report of the case in 6 Mod. 73 is clearly a mistake. It is the only case to be found in which the broad proposition here stated is recognized, that the King's grant cannot bar the subject of the common right of fishing. And in the report of the same case, 1 Salk. 357, the case as stated is that one claimed *solam piscariam* in the river Ex, by a grant from the Crown. And Nott, Chief Justice, said, the

subject has a right to fish in all navigable rivers, as he has to fish in the sea, and a *quo warranto* ought to be granted to try the title of this grantee, and the validity of his grant. Lord Nott here, no doubt, meant to speak of the *prima facie* right of the subject. For if he intended to say that no such exclusive right could be given by grant from the King, it would be absurd to issue a *quo warranto* to try the title and validity of the grant, if by no possibility a valid grant could be made. At all events, it is very certain that the King's Bench, in the case of *Carter v. Murcot,* did not recognize the doctrine of *Warren v. Matthews,* as reported in 6 Mod. 73. And under these circumstances, it is entitled to no weight in the decision of the case now before the court.

It is unnecessary to refer to the numerous cases in the English books on this subject; the doctrine as laid down in the case of

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Carter v. Murcot is universally recognized as the settled law on the subject, and is fully adopted and sanctioned by the courts of this country. Numerous cases of this description have come before the courts in the State of New York, and the principles and rules as laid down in the case of *Carter v. Murcot* fully recognized and adopted. In the case of *James v. Gould,* 6 Cow. 376, the court in referring to that case, place the decision upon it, and say, "this is the acknowledged law of Great Britain and of this state," and cases are referred to showing such to be the settled law.

In the case of *Johnson v. McIntosh,* 8 Wheat. 595, this Court said that 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 as a branch of the royal prerogative. And this principle is as fully recognized in America as in Great Britain; all the lands we hold were originally granted by the Crown; our whole country has been granted, and the grants purport to convey the soil as well as the right of dominion to the grantee. Here the absolute ownership is recognized as being in the Crown, and to be granted by the Crown, as the source of all title, and this extends as well to land covered by water

as to the dry land; otherwise no title could be acquired to land under water. There is in this case no intimation that any of the lands are vested in the Crown as trustee, but as absolute owner. If lands under water can be granted and are actually granted, the grantees must, of course, acquire all the right to the use and enjoyment of such lands of which they are susceptible as private property, as much so as the dry land, and there can be no grounds for any implied reservation of ungranted rights in the one case more than in the other, and the grant of the soil carries with it, of course, all the uses to which it may be applied, among which is an exclusive or several fishery. All grants of land, whether dry land or covered with water, are for great public purposes, subject to the control of the sovereign power of the country. So the grant of the soil under water, which carries with it a several fishery, is subject to the use of the water for the public purposes of navigation, and passing and repassing, but it is nowhere laid down as the law of the land that a several fishery is a part of the *jus publicum* and open to the use of the public. So long as the

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fishery remains ungranted, it is common and may be used by the public; but when granted to individuals, it becomes private property as much as any other subject whatever, and I think the law is too well settled that a fishery may be the subject of a private grant to be at this day drawn in question.

If, then, according to the principles of the common law, the King had the power to grant the soil under the waters of a navigable stream, where the tide ebbs and flows, and if such grant of soil carries with it the right of a several fishery to the exclusion of a public use, the remaining inquiries are whether the grant of Charles II to the Duke of York in the year 1664 did convey the premises in question? and if so, then, whether this right was surrendered by the proprietors of New Jersey to Queen Anne in the year 1702?

This charter to the Duke of York is one containing not only a grant of the soil, but of the powers of government. This Court, in the case of *Johnson v. McIntosh,* in noticing the various charters from the Crown, observe that they purport to convey

the soil and right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the Crown, or was vested in the colonial government, the King claimed and exercised the right of granting the lands. Some of these charters purport to convey the soil alone, and in those cases in which the powers of government as well as the soil are conveyed to individuals, the Crown has always acknowledged itself to be bound by the grant, and in some instances, even after the powers of government were revested in the Crown, the title of the proprietors of the soil was respected. The Carolinas were originally proprietary governments; but in 1721, a revolution was effected by the people, who shook off their obedience to the proprietors and declared their dependence immediately on the Crown, and the King purchased the title of those proprietors who were disposed to sell. Lord Carteret, however, who was one of the proprietors, surrendered his interest in the government, but retained his title to the soil, and that title was respected till the revolution, when it was forfeited by the laws of war.

This shows the light in which these charters, granting the soil, were considered by this Court. That they conveyed an absolute

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interest in the soil and passed everything susceptible of private and individual ownership, of which a fishery is certainly one, according to the settled law, by the authorities I have referred to. Subject always, as before mentioned, to the *jus publicum* or rights of navigation and trade, but of which the right of a common fishery forms no part after the soil has been conveyed as private property.

It is unnecessary to notice particularly the various charters and mesne conveyances set out in the special verdict. It was admitted on the argument that the premises in question fall within these conveyances and vested in the proprietors of New Jersey all the right and title, both of soil and the powers of government, which passed to the Duke of York under the charter of Charles II. The terms employed in the description of the rights conveyed, are of the most comprehensive character, embracing the land, soil, and waters. After a general

description and designation of the territory embraced within the charter and comprehending the premises in question, it adds,

"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, profits, commodities and hereditaments, to the said several islands, lands, and premises belonging and appertaining, with all and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim and demand of, in, or to the said lands 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 premises hereby granted or herein mentioned unto our brother James, Duke of York, his heirs and assigns forever, to be holden of us, our heirs and successors in free and common socage."

If these terms are not broad enough to include everything susceptible of being conveyed, it is difficult to conceive what others could be employed for that purpose. The special verdict, after setting out the mesne conveyances by which the title is deduced down to the proprietors of New Jersey, sets out a confirmation of the title in the proprietors by Charles II as follows:

"And the jurors, on their oath aforesaid, further say that the said Charles II, afterwards, to-wit, on 23 November in the year of our Lord 1683,

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by a certain instrument in writing, duly executed, bearing date on the same day and year last aforesaid and reciting the said last-mentioned indenture from the said Duke of York to the said twenty-four proprietors, did recognize their right to the soil and government of the said Province of East New Jersey, whereof the tenements aforesaid, with the appurtenances, in the declaration aforesaid are parcel, and did strictly charge and command the planters and inhabitants and all other persons concerned in the same to submit and yield all due obedience to the laws and government of the said twenty-four proprietors, their heirs and assigns, as absolute proprietors and governors thereof, who, in the words of the said

instrument in writing, had the sole power and right, derived under the said Duke of York, from him, the said Charles II, to settle and dispose of the said Province of East New Jersey upon such terms and conditions as to the twenty-four proprietors, their heirs and assigns, should deem meet."

Here is the most full recognition and confirmation of the right and title of the proprietors to the soil, with the absolute power to dispose of the same in such manner as they should think proper. The absolute ownership could not be expressed in a more full and unqualified a manner. In the case of *Fairfax v. Hunter's Lessee,* 7 Cranch 618, the question was as to the legal effect and operation of certain descriptive words in a charter of Charles II, and MR. JUSTICE STORY, in giving the opinion of the Court, said

"The first question is whether Lord Fairfax was proprietor of and seized of the soil of the waste and unappropriated lands in the Northern Neck by virtue of the royal grants of Charles II and James II, or whether he had mere seignoral rights therein as lord paramount, disconnected with all interest in the land except of sale and alienation. The royal charter expressly conveys all that entire tract, territory, and parcel of land situate &c.;, together with all the rivers, islands, woods, timber, &c.;, mines, quarries of stone, and coal, &c.;, to the grantees and their heirs and assigns to their only use and behoof, and to no other use, intent and purpose whatsoever."

"It is difficult," said the Court,

"to conceive terms more explicit than these to vest a title and interest in the soil itself. The land is given, and the exclusive use thereof, and if the union of the title and the exclusive use do not constitute the complete and absolute

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dominion in the property, it will not be easy to fix any which shall constitute such dominion."

The terms here used are certainly not more broad and comprehensive than those used in the charter under consideration, and if they will pass the right to the soil in the one case, they certainly must in the other. The land in the one case being covered with water and in the other not can make no difference as to the passing of the title if land under water can be conveyed at all, and whatever the public right to the use of the water may be, it can give no right to the use of the land under the water, which has, by the grant, become private property. And if, as I think, the authorities clearly show a grant of the soil carries with it the right to every private use to which it can be applied, including the cultivation of oysters, there can be no ground upon which this can be claimed as a common right. A several fishery and a common fishery are utterly incompatible with each other. The former is founded upon and annexed to the right of soil, and when that right of soil is acquired by an individual, the several fishery begins and the common fishery ends.

Did the proprietors, then, by the surrender of Queen Anne in the year 1702, relinquish any rights of private property in the soil derived under the charter of Charles II? I think it very clear that they surrendered nothing but the mere powers of government granted by the charter, retaining, unaffected in any manner whatever, the right of private property.

The special verdict states the surrender as follows:

"That on 15 April, in the year 1702, the said twenty-four proprietors and the other persons in whom, by sundry means conveyances and assurances in the law the whole estate, right, title and interest in the said Province of East New Jersey were vested, at the said last-mentioned date, as proprietors thereof by an instrument in writing under their hands and seals, bearing date the same day and year last aforesaid, did, for themselves and their heirs, surrender and yield up unto Anne, Queen of England, &c.;, and to her heirs and successors, all the powers and authorities in the said letters patent granted to correct, punish, pardon, govern, and rule all or any of her said majesty's subjects or others who then were, as inhabitants, or thereafter might adventure into or inhabit, within the

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said Province of East New Jersey. And also to nominate, make, constitute, ordain, and confirm any laws, orders, ordinances, directions, and instruments for those purposes or any of them, and to nominate, constitute, or appoint, revoke, discharge, change, or alter any governor or governors, officers, or ministers which were or should be appointed within the said province, and to make, ordain and establish any orders, laws, directions, instruments, forms, or ceremonies of government and magistracy for or concerning the same, or on the sea, in going to or coming from the same, or to put in execution or abrogate, revoke, or change such as were already made for or concerning such government or any of them. And also the powers and authorities by the said letters patent granted to use and exercise martial law in the said Province of East New Jersey. And to admit any persons to trade or traffic there. And of encountering, repelling, and resisting by force of arms any person or persons attempting to inhabit there without the license of them, the said proprietors, their heirs and assigns. And all other the powers, authorities, and privileges of and concerning the government of the province last aforesaid or the inhabitants thereof which were granted or mentioned to be granted by the said several above-recited letters patent or either of them. And that the said Queen Anne afterwards, to-wit, on the 17th day of the same month of April in the year last aforesaid, did accept of the said surrender of the said powers of government so made by the said proprietors in and over the premises last aforesaid."

I do not perceive in this surrender a single term or expression that can in the remotest degree have any reference to the private property conveyed by the grant or to any matter except that which related to the powers of government; all the enumerated subjects manifestly have relation only to such powers. And after this specification of particulars comes the special clause "and all other the powers, authorities, and privileges of and concerning the government," necessarily implying that the specified subjects related to the powers of government, and the acceptance by the queen manifestly limits the surrender to such powers; she accepts the said surrender of the said powers of government so made by the proprietors in and over the premises.

If there was anything in the language here used which could

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in the least degree render doubtful the object and purpose of this surrender, the memorials of the proprietors, and the correspondence which took place on the subject, referred to on the argument, as contained in the collection of Leaming & Spicer, must remove all doubt and show that the surrender was confined exclusively to the powers of government and intended to operate not only as a surrender of such powers, but as a confirmation of all right and title to the soil and private property of the proprietors. And if so, the proprietors' right must depend upon the power of the King to grant the right claimed in the premises and the construction of the charter as to what it does embrace. And I have endeavored to show that by the settled and uncontradicted principles of the common law, the King had the power to grant the land under the water of a navigable river, and that such grant carries with it to the grantee all rights of private property of which the susceptible, subject to the *jus publicum;* that the grant of the soil necessarily carries with it a several and exclusive fishery, which is utterly incompatible with the rights of a common fishery, and which, of course, can form no part of the *jus publicum,* and that the grant in question of Charles II to the Duke of York conveyed all private right in the soil which could be conveyed by the King, all which rights, by sundry mesne conveyances, became vested in the proprietors of East New Jersey, and from them to the lessor of the plaintiff.

And I can discover nothing in the authorities giving countenance to the idea that the King held the land covered by the waters of a navigable river as trustee or by a tenure different from that by which he held the dry land. And I must again repeat, if the King held such lands as trustee for the common benefit of all his subjects, and inalienable as private property, I am unable to discover on what ground the State of New Jersey can hold the land discharged of such trust and can assume to dispose of it to the private and exclusive use of individuals. If it was a trust estate in the King for the benefit of his subjects, and upon the revolution the government of New Jersey became the trustee in the place of the King, and the trust devolved upon such government, and the land became as inalienable in the government of

New Jersey as in the hands of the King, and the state must be bound to hold all such lands subject to the trust, which, as contended, embraces

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a common right of fishery in the waters and the dredging for oysters in the land covered by the waters, and if this be so, there certainly can be no power in the state, without a breach of trust, to deprive the citizens of New Jersey of such common right and convert these oyster grounds to the private and exclusive use of individuals.

There is nothing in the case, in my judgment, showing a usage in the state by which the proprietors have, either directly or by implication, relinquished or abandoned any right of property which they derived under the charter of Charles II. All the authority exercised by the state in granting ferries, bridges, turnpikes, and railroads, &c.;, are the exercise of powers vested in the government over private property for public uses, and formed a part of the powers of government surrendered by the proprietors to Queen Anne, and it is only since the decision in *Arnold v. Mundy* that the private right of the proprietors to the lands under the waters in New Jersey has been denied and assumed by the state to grant the same to individuals, and even in such cases it has been done cautiously and apparently with hesitation as to the right of the state. In the two cases referred to on the argument, of a grant to N. Burden, on 8 November, 1836, and to Aaron Ogden on 25 January, 1837, of land under the water, the grant is a mere release or quitclaim of the state; but the proprietors have been in the habit of making grants for land under the water from the time of the surrender to Queen Anne down to the year 1820, and numerous instances of such grants were referred to on the argument.

With respect, however, to the right of fishery, there is, in my judgment, a marked distinction, both in reason and authority, between the right in relation to floating fish and the right of dredging for oysters. The latter is entirely local and connected with the soil. There are natural beds of oysters, but in other places there is a peculiar soil adapted to the growing of oysters. They are planted and cultivated by

the hand of man, like other productions of the earth, and the books in many cases clearly hold up such a distinction and speak of the oyster fishery as distinct from that of floating fish, 5 Burr. 2814; and in the case of *Rogers v. Allen,* 1 Camp. 309, this distinction is expressly taken. It was an action of trespass for breaking and entering

the several oyster fishery of the plaintiffs in Burnham River and fishing and dredging for oysters. The defense set up was that the *locus in quo* was a navigable river in which all the King's subjects had a right to fish and dredge for oysters, and evidence was introduced showing that all who chose had been accustomed to fish in Burnham River for all sorts of floating fish, without interruption, and it was contended that a fishery was entire, and that as it had been proved that it was lawful for all the King's subjects to catch floating fish, so they might lawfully dredge for oysters. But Heath, Justice, ruled otherwise and said a fishery was divisible -- a part may be abandoned and another part of more value may be preserved. The public may be entitled to catch floating fish in the River Burnham, but it by no means follows that they are justified in dredging for oysters, which may still remain private property, and although a new trial was granted upon another point in the case, the doctrine as above stated was not at all impugned by the Court of King's Bench.

Upon the whole I am of opinion that the judgment of the circuit court ought to be affirmed.

BALDWIN, JUSTICE, also dissented.

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