

INTERPRETATION OF NEW YORK-NEW JERSEY AGREEMENTS OF 1834 AND 1921

WHAT appeared at first to be a routine case of collision between two motor vehicles on an interstate highway recently attained the status of a *cause célèbre*.¹ *Clarke v. Ackerman*, decided March 8, 1935, by the Appellate Division of the Supreme Court of the State of New York,² involves the application of the municipal law of the states of New York and New Jersey and the interpretation of a century-old compact between those two states. The compact itself has historic interest because it ended a jurisdictional controversy over the port of New York dating from June 24, 1664 when the Duke of York in a patent granted certain lands to the west and south of New York to Lord Berkley and Sir George Carteret.³

The facts in the case are simple. Defendant's automobile, bearing a West Virginia license, collided with plaintiff's motorcycle on the George Washington Bridge, which crosses the Hudson River from Fort Washington, up-town Manhattan, New York City, to Fort Lee, Bergen County, New Jersey. The point of collision was at or near lamp post No. 116, which is located approximately 817 feet west of the center of the span, and also an equal number of feet west of a sign which purports to mark the dividing line between the two states.⁴ Plaintiff commenced action in the Supreme Court, Special Term, New York City, under Section 52 of the New York Vehicle and Traffic Law,⁵ which permits service of process on a non-resident motor vehicle operator in an action growing out of any "accident or collision in which such non-resident may be involved while operating a motor vehicle on . . . a public highway in this state," by serving the process on the secretary of state. Service was so made. Defendant, appearing specially, challenged

1. Editorial, *New York Herald-Tribune*, Feb. 20, 1935; news item, *New York Times*, March 9, 1935; editorial, *ibid.* March 19, 1935.

2. 243 App. Div. 446, 278 N. Y. Supp. 75 (1935).

3. *McCarthy et al. v. The Sarah E. Kennedy*, 25 Fed. 569, 570 (D. C. N. J. 1885).

4. *Clarke v. Ackerman*, 154 Misc. 267, 276 N. Y. Supp. 833, 834 (1934).

5. STATE LAW, § 7, arts. 1, 3; N. Y. LAWS 1934, c. 251.

the validity of the service because the accident did not occur on a public highway in New York State.⁶ Thus the jurisdictional issue was squarely raised. Where was the *locus in quo*, in New York or in New Jersey?

Resolution of this issue necessitated the interpretation of two compacts between the states of New York and New Jersey: (1) a boundary and jurisdiction compact of 1834;⁷ and (2) a supplementary and amendatory compact of 1921⁸ providing for the creation of a Port of New York District and Authority. It further required the construing of certain legislation adopted concurrently by the two states, and in pursuance of the compact of 1921, empowering The Port Authority to build, own, and operate, among other public works, the George Washington Bridge.⁹

The principal provisions of the two compacts are as follow: (1) *The Compact of 1834*. The text of the first three articles is as follows:

Article 1. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson River, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea, except as hereinafter otherwise particularly mentioned.

Article 2. The state of New York shall retain the present jurisdiction of and over Bedlow's and Ellis' Islands, and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned, and now under the jurisdiction of that state.

Article 3. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the Bay of New York,

6. *Supra* note 4, at 835.

7. Signed September 16, 1833; N. Y. LAWS, 1834, c. 8; N. J. P. L. 1834, at 118 ff; approved by Congress, June 28, 1834; 4 STAT. 708.

8. Signed April 30, 1921; N. Y. LAWS, 1921, c. 154; approved by Congress, Aug. 23, 1921; 42 STAT. 174; PORT AUTHORITY STAT., (6th ed.) at 13, 29.

9. Approved by Congress, March 2, 1925; 43 STAT. 1094; New Jersey act authorizing construction of the Hudson River Bridge, N. J. P. L. 1925, c. 41; New York act, authorizing the same, N. Y. LAWS 1925, c. 211; PORT AUTHORITY STAT., at 96, 107, 138.

and of and over all the waters of Hudson River, lying west of Manhattan Island, and to the south of the mouth of Spuyten Duyvil Creek, and of and over the lands covered by the said waters to the low water mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water, lying west of the middle of the bay of New York and west of the middle of that part of the Hudson River, which lies between Manhattan Island and New Jersey.
2. The state of New Jersey shall have the exclusive jurisdiction of, and over the wharves, docks and improvements made and to be made on the shore of the said state, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.
3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters; provided, that the navigation be not obstructed or hindered.

Articles 4 and 5 in a similar manner delimited the jurisdiction of the two states of and over the remaining water areas and the submerged lands lying between their respective dry land areas. Articles 6 and 7 prescribed reciprocal rules for the serving of criminal and civil process on water areas involved in the compact, and Article 8 conditioned effectiveness of the compact on approval by Congress.

(2) *The Compact of 1921.* According to its recitals, this agreement supplemented and amended that of 1834. It provided, *inter alia*, the following pertinent to the present discussion: Article 2 created a "Port of New York District" and described its boundaries; Article 3 created "The Port of New York Authority" and constituted it "a body corporate and politic"; Article 6 conferred upon the Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within" the District, and many other important powers and duties; and Article 7 declared that The Authority should "have such addi-

tional powers and duties" as might thereafter be delegated to or imposed upon it from time to time by concurrent action of the legislatures of the two states concerned. Stipulations throughout the compact conditioned performance by The Authority upon prior concurrent agreement of the legislatures.¹⁰ Article 20 provided that "the territorial or boundary lines established by the agreement of 1834, or the jurisdiction of the two states established thereby, shall not be changed except as herein specifically modified."

As related to the lines of jurisdiction established under these instruments, the *locus* of the accident was as follows:¹¹ approximately 817 feet west of the center of the bridge and of a perpendicular dropped to the boundary in the river as fixed under Article 1 of the compact of 1834; exactly 1065 feet east of a perpendicular dropped from the bridge to the low water mark on the New Jersey shore of the Hudson River; and, vertically, several feet over a clearance line which is approximately 210 feet above surface level of the river. The specific question to be answered was, therefore, simply: Did New York or New Jersey have jurisdiction over that part of the span lying between the two perpendiculars?

The lower court ruled jurisdiction lay in New York. It admitted that "technically and literally . . . the accident occurred on the New Jersey portion of the bridge; the scene was over land and water owned by that state."¹² The "technical and literal" solution happened to be the correct one, but the court abandoned it in favor of the view that since the compact of 1834 granted to New York exclusive jurisdiction over the Hudson River and since the bridge spanned the river, it followed that New York had exclusive jurisdiction over and on the bridge. Said the court: "The sole element of geography should surrender to the weightier

10. *E. g.*, Arts. 6, 7, 10, 11, 17, 18.

11. Exhibit "A", General Plan and Elevation of Hudson River Bridge, submitted by The Port of New York Authority, together with a "Brief on Behalf of the Attorneys General of the States of New York and New Jersey and The Port of New York Authority as *Amici Curiae*," to the App. Div., First Dep't., N. Y. Sup. Ct., in *Clarke v. Ackerman*. Separate print.

12. *Clarke v. Ackerman*, *supra* note 4, at 835.

force of practicality."¹³ In passing, it summarily and properly rejected defendant's contention that jurisdiction lay in The Port Authority itself.¹⁴

The Appellate Division reversed the lower court and denied that New York had jurisdiction. In its deliberations it was no doubt greatly assisted by an exhaustive and skillful brief filed jointly by the Attorneys General of the states of New York and New Jersey and The Port Authority as *amici curiae*.¹⁵ The court repeated the construction placed upon the treaty of 1834 in several leading cases,¹⁶ and concluded that New Jersey never intended

13. *Id.* at 837.

14. *Id.* at 834. Defendant stated as a possible legal view, but did not so argue, that the bridge involved was not owned or operated by either state, but by the separate body politic known as 'The Port Authority.' By implication, jurisdiction in The Port Authority would oust jurisdiction in either or both states. The lower court declared this contention "not impressive," on the ground that "if the accident occurred to the east of the center of the bridge, New York could not exercise jurisdiction," and that it would, indeed, "exclude both states from jurisdiction." Quite properly, the court dismissed the contention, but with an argument at most *ab inconvenienti*. Brief for the defendant submitted on appeal dropped the contention. Nevertheless it merited further examination, and was thoroughly examined in the brief of *amici curiae*, *supra* note 11. The history of the circumstances leading up to the amending of the compact in 1921 and careful construction of the legislation adopted in pursuance of the amended compact indicate beyond doubt that "the Port Authority merely carries out the will of the two sovereign states, pursuant to the compact, under the legislative direction and administrative control of the two states. It is clearly a governmental instrumentality and agency of the two states." (Brief, *supra* note 11, at 9). It "is none the less a public instrumentality because it is the instrumentality of two states instead of one." (Opinion of the Hon Charles Evans Hughes, rendered to The Port Authority, Nov. 10, 1925; *id.* at 9). See also the excellent opinion by Mr. Justice Frankenthaler in *Bush Terminal Company et al. v. The City of New York et al.*, 152 Misc. 144, 147ff. 273 N. Y. S. 331 (1934). Under no reasonable view, then, could The Port Authority, although owner and operator of the bridge, be regarded as such a "body corporate and politic" as could oust jurisdiction in either or both states over the *locus in quo*. Though the Appellate Court did not expressly endorse this view, on the facts and the law it appears to be the correct one.

15. *Supra* note 11.

16. *People v. Central Railroad of New Jersey*, 42 N. Y. 283 (1870); *Ferguson v. Ross*, 126 N. Y. 459, 27 N. E. 954 (1891); *Central Railroad of New Jersey v. Jersey City*, 209 U. S. 473 (1908).

"to give up its prerogatives of sovereignty over any of the territory granted it by the treaty (i.e., in Article 1)"; that the "exclusive jurisdiction" granted to New York (in Article 3) was exceptional, for health, police, commerce, and navigation purposes only; and that this exceptional jurisdiction could not extend to include jurisdiction over the whole span of the bridge. It held, therefore, that the alleged tort occurred "within the territorial confines of the state of New Jersey."¹⁷ The court indulged the possibility, suggested no doubt by brief of *amici curiae*,¹⁸ that the bridge might be regarded as an "improvement" made to or on the shore of New Jersey, under Article 3, subdivision 2, of the treaty; that if the span out to the center were "analogized to a wharf or pier," and if such a comparison were "just," then jurisdiction over it was "retained by New Jersey to the center of the River." The decision rendered by the court is unquestionably the correct one. The *ratio decidendi*, however, fails in several instances to show the connection between premise and conclusion. Of greater consequence, though, to the settling of probable future jurisdictional controversies arising under the compact of 1834 is the court's omission of a clear statement of the relation of the jurisdictional lines established by the compact to the present situation of a river tunnelled-under and bridged-over. The court, indeed, hinted at the need for such a statement.¹⁹ There may, therefore, be some utility in attempting to plot the jurisdictional lines as they may reasonably be held to exist now.

To this end, it is necessary to interpret once again the compact of 1834. The compact of 1921, while describing an enlarged metropolitan area²⁰ over which the Port Authority was to exercise its special jurisdiction for the purpose for which it was created,

17. *Supra* note 2, at 79.

18. *Supra* note 11, at 26ff.

19. *Supra* note 2, at 79-80. The court said: "Aside from any precedent, however, we think that article third must be interpreted to some extent in the light of the situation as understood by the commissioners in 1834. It seems clear that at that time neither tunnels nor bridges were in their minds. . . ."

20. Art. 2; PORT AUTHORITY STAT., at 14 ff.

nevertheless did not alter the basic lines laid down in 1834.²¹ Hence, examination of this latter compact may be excluded from the present discussion. The concurrent legislation adopted by New York and New Jersey in pursuance of both compacts also does not disturb the basic grants of jurisdiction made in the 1834 agreement.²² That legislation has been carefully examined in the brief of *amici curiae* and need not now be re-examined. It remains necessary, therefore, merely to interpret the compact of 1834 with respect to its effects upon the present situation.

In interpreting the compact, the design of the parties must be discovered.²³ The restrictions of the common law, "by reason of their origin and purpose," are "not to be taken as decisive of the rights" of these states in their conclusion of this interstate agreement.²⁴ Those rights may be more adequately ascertained by resort to such principles of international law as are peculiarly applicable to the matter in hand.²⁵ In discovering the design, resort may be had to the history of the conduct of the parties in the period preceding the making of the agreement, as well as during the making, with relation to the subject matter of that agreement.²⁶ The

21. Brief, *supra* note 11, at 10.

22. *Id.* at 31.

23. 2 HYDE, *op. cit. infra* note 25, at 61 ff.

24. *Id.* at 61, n. 2.

25. Ample authority for the use of such principles in such cases already exists. The Supreme Court of the United States has regularly since 1789 applied rules derived from international law to the solution of interstate jurisdictional and other controversies, the states of the union being regarded for many purposes as if sovereign. See *Vermont v. New Hampshire*, 289 U. S. 593 (1933); *New Jersey v. Delaware*, 291 U. S. 361 (1934); also collected cases in SCOTT, J. B., *JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION*. Indeed, Chief Justice Fuller once asserted: "Sitting, as it were, as an international as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand." *Kansas v. Colorado*, 185 U. S. 125 (1902). For the interpretation of treaties, see WILSON & TUCKER, *INTERNATIONAL LAW* (9th ed. 1935) § 90; 2 HYDE, C. C., *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* §§ 530-535; and *Am. J. Int. L.*, (Supp. to Vol. 29, No. 4, Oct. 1935) 937ff.

26. 2 HYDE, *op. cit. supra* note 25, at 63. The history is set forth adequately in the following cases: *State v. Babcock*, 30 N. J. L. 29, 32, 33 (Sup. Ct. 1862);

objects to be achieved by the agreement must be kept in view. Throughout, however, "it must be borne in mind that the final purpose of seeking the intention of the contracting States is to ascertain the sense in which the terms of the agreement are employed."²⁷ "Declarations on the part of the negotiators of a treaty at the time of its conclusion . . . or even long subsequent to the perfecting of an agreement" are not without value as "indicating the understanding of the parties as to the sense in which particular terms were employed."²⁸ Where, however, the contracting states have, through their courts, legislatures, or other authoritative instruments, placed a definite construction on the terms of the agreement subsequent to its perfecting, and if such construction is at variance with the design of the parties in the making of the agreement but is nevertheless accepted by the parties, then such construction must be applied in any future dispute between the parties arising out of agreement.²⁹ For the present purposes, in interpreting the compact of 1834, emphasis will be laid upon those provisions of the instrument which have particular relation to the question of jurisdiction over that portion of the Hudson River which lies between the dry land areas of the states concerned.

The history³⁰ of the dispute between New York and New Jersey with respect to ownership and jurisdiction over the Hudson River dates from June 24, 1664, a few months after Dutch dominion over the territory now under discussion was transferred to the British

People v. Central RR. Co. of N. J., *supra* note 16 at 290-293; Hall v. Devoe Manufacturing Co., 14 Fed. 183, 188-191 (D. C. N. J. 1882); McCarthy et al. v. The Sarah E. Kennedy, *supra* note 3; Central RR. of N. J. v. Jersey City, 70 N. J. L. 81, 86-90, 56 Atl. 239 (Sup. Ct. 1903).

27. 2 HYDE, *op. cit.* *supra* note 25, at 63.

28. *Id.* at 68.

29. *Id.* at 72. Fortunately, the design of the parties to the agreement of 1834 appears not to have been supplanted by any subsequent construction inconsistent therewith. The controlling opinions and decisions of the courts of both states, the acts of the legislatures of the same, (and even the decisions of the Supreme Court of the United States) are consistent with the design of the parties as manifested in 1834. This is rather a remarkable record and facilitates the task of interpretation with special regard to the present situation.

30. *Supra* note 26.

crown. The terms of a grant made as of that date by the Duke of York to Berkley and Carteret apparently were not clear. In any event, New York and New Jersey asserted conflicting territorial claims through their entire colonial period and up to 1833, the former claiming the boundary to be at the low-water mark on the westerly shore of the river and the latter insisting that the boundary was in the middle of the river. The need for uniform regulation of the commerce and navigation of the (port and) river apparently accentuated the dispute. A legislative fiat "war" conducted by both states during the early 1800's and a final desperate filing of suit before the Supreme Court of the United States by New Jersey brought both states to a compromising mood. The compact was signed September 16, 1833, and approved by Congress June 28, 1834.³¹

The terms of the compact as set forth and summarized above have been pronounced by the Court of Appeals of New York as, in most particulars, clear and distinct.³² In effect they first fix the boundary between the two states and then create a pattern of jurisdiction, applicable to named and delimited water areas lying between the main land areas of the two states. Part of the pattern is applicable to certain of these water areas and runs in favor of New York beyond its boundary and within the domain of New Jersey; another part of the pattern is applicable to the remaining water areas and runs in favor of New Jersey beyond its boundary and within the domain of New York. We are here concerned with only that part of the pattern which runs in favor of New York, and, more particularly, with only that portion of the part which applies to the Hudson River. In drawing in the lines of the pattern it must be remembered that two purposes were uppermost in the minds of the negotiators, one to end the boundary dispute and the other to escape the uncertainties, impediments, and embarrassments³³ consequent upon the applicability of the legislation of

31. *Supra* note 7.

32. *People v. Central RR. of N. J.*, *supra* note 16, at 292, 296.

33. *Kiernan v. The Norma*, 32 Fed. 411, 413 (D. C. S. D. N. Y. 1887). The deci-

the separate states to contiguous water areas within the same port.

That one of the dominant purposes was to end the boundary dispute is borne out by the history of the disturbed relations between the two bodies politic for the preceding century and a half and more particularly by the declared object of the suit brought by New Jersey in 1829 before the Supreme Court of the United States, it being to ascertain and establish the eastern boundary line between the complainants (New Jersey) and the state of New York.³⁴ Hence Article 1 simply states that the "boundary . . . shall be in the middle of said (Hudson) river . . ." Nothing is said about any "grant" of domain by one state to the other.³⁵ The article obviously "did not alter or change what was before fixed, but rather established what was before unsettled."³⁶

What does the term "boundary" mean, as used in an agreement of this sort between two sovereign states?³⁷ In Mr. Justice Holmes' succinct language "Boundary means sovereignty."³⁸ What it means now it meant in 1834: a definite delimitation of the domain over which the sovereign exercises ownership and control.³⁹ The domain comprises land areas (including bodies of water in them), the earth beneath, and the suprajacent airspace.⁴⁰ The boundary, therefore, at the middle of the river, may be held to run down through the waters of the river, through the submerged land, and thence through the subsoil indefinitely; it also runs upward from the surface of the river into the air-space above to a distance indefinite.

On either side of the boundary the respective states exercise

sion in this case, however, is obviously wrong. Cf. the view of the Supreme Court of the United States, *infra* note 38.

34. *People v. Central RR. of N. J.*, *supra* note 16, at 292.

35. The Appellate Court, *supra* note 2, at 78, clearly erred in referring to "territory granted" to New Jersey by the treaty.

36. *Hall v. Devoe Manufacturing Co.*, *supra* note 26, at 188.

37. *Supra* note 25, on Sup. Ct.

38. "Boundary means sovereignty, since, in modern times, sovereignty is mainly territorial, unless a different meaning clearly appears." *Central RR. of N. J. v. Jersey City*, *supra* note 16, at 478.

39. 1 HYDE, *op. cit. supra* note 25, at 241 ff.

40. *Ibid.*; also WILSON & TUCKER, *op. cit. supra* note 25, §§ 35, 48, 59.

all the rights of a sovereign, subject of course to the limitations of the national constitution. Sovereignty and jurisdiction, however, are not synonymous: the latter is merely a right exercisable by the sovereign.⁴¹ The term sovereign is not found in the compact, but wherever the term jurisdiction is used, it is used consistently,⁴² as denoting merely a right exercisable by a sovereign. Many instances exist in international affairs of the exercise of jurisdiction by one sovereign within the domain of another.⁴³

Article 1 having fixed the boundary, the remaining articles⁴⁴ delineate the pattern of jurisdiction. Looking at Article 3 alone, New York received a right of jurisdiction exercisable beyond its boundary within the domain of New Jersey. To this grant of jurisdiction certain exceptions are made in favor of the grantor, New Jersey. This particular article has already been most elaborately construed by the Court of Appeals of New York.⁴⁵ There may, however, be some utility in indicating the limits of the grant and of the exceptions thereto. To this end the object of the grant ought to be stated in some detail. The terrestrial scope of the grant and the nature of the authority exercisable under it ought also to be indicated.

The object of the grant was practical. It was the second principal object of the compact. A water boundary is rarely marked. If juris-

41. WILSON & TUCKER, *op. cit. supra* note 25, §§ 34, 47.

42. With one exception, appearing in article 2, text set forth above. As construed by the Court of Appeals, *supra* note 16, at 294, this article fulfills the office of an exception to the operation of article 1. The islands mentioned are situate west of the boundary fixed in article 1. They had been, at the time of the making of the treaty, in undisputed possession and control of New York. New Jersey did not question the sovereignty of New York over them. In drawing the boundary to the east of them, the effect of such drawing would unquestionably, in the absence of all express exception, be to transfer sovereignty over them to New Jersey. That result was not desired. The negotiators, therefore, stipulated that New York should retain its then "present jurisdiction" over them. The term "jurisdiction" as here used, and having regard for the *status quo* of the undisputed titles to land areas within the water areas described, should be regarded as equivalent to "sovereignty."

43. 1 HYDE, *op. cit. supra* note 25, at 272 ff; WILSON & TUCKER, *op. cit. supra* note 25, at 116, §§ 68, 70.

44. Articles 2 to 7, inclusive.

45. *People v. Central RR. of N. J.*, *supra* note 16, at 292, 296.

diction of a court of New York or of New Jersey depended upon proof of the *locus* of a tort, or a crime, or the place of seizure of a vessel, it might upon trial be difficult to produce proof that the *locus* was on one or the other side of the boundary. "Great practical embarrassments would often arise, both in the decision of causes and in the service of process."⁴⁶ Similarly, great difficulties would arise in the alternate applicability of two, perhaps different, sets of navigation or quarantine laws during a passage in the port if the vessel happened to cross the boundary. Concurrent jurisdiction vested in both states could only complicate matters.⁴⁷ Practically, the only solution lay in giving one or the other state exclusive jurisdiction over distinct water areas, disregarding the effects of boundary for the purposes of the grant.⁴⁸ Precisely this was done in Article 3 (and in

46. *Kiernan v. The Norma*, *supra* note 33, at 412.

47. Concurrent jurisdiction does exist over some rivers in the United States. See 12 C. J. 395, n. 32 (c). Wherever "concurrent jurisdiction" or "joint control" over a particular area has been attempted in international affairs, exceedingly complex relationships have resulted. Sometimes the "joint control" has been the least of several possible other evils. See 3 MOORE, J. B., A DIGEST OF INTERNATIONAL LAW 277; 1 MOORE, J. B., INTERNATIONAL ARBITRATIONS, c. 7, at 196 ff; also, BUELL, R. L., INTERNATIONAL RELATIONS (Rev. ed. 1929) 489 ff. and treaties there cited. Certainly, with respect to interstate rivers in the United States, concurrent jurisdiction or "joint control" by the littoral states ought never to be presumed. It ought always to be assumed that jurisdiction runs to the boundary, unless an exception is clearly indicated.

48. Taking the situation as it would follow after only fixing the boundary, New York would have jurisdiction as sovereign over the waters of Lower New York Bay; The Narrows; half of Upper New York Bay east of a line running approximately north and south; and half of the Hudson River, east of a line running approximately north and south. This division of territory would leave to New Jersey jurisdiction as sovereign over the westerly half of Upper New York Bay, and the westerly half of the Hudson River up to 41°. New York would have jurisdiction over only that part of the commerce and navigation of the entire Port of New York which appeared in the waters under its jurisdiction as sovereign. It happens, however, that a very large part of the port facilities lie on the westerly side of the boundary, on the New Jersey shore. Consequently a large part of the port commerce appears there also, after having crossed the boundary, out of New York waters into New Jersey waters. From this set-up, it is evident that what was desired was the placing of virtually all of the commerce and navigation in the port, regarded as a natural and economic entity, under uniform rule laid down by one of the states. New York was selected as that state. As a result of article 3, New

Articles 4 and 5, with which we are not immediately concerned).

The terrestrial scope of the grant in Article 3 included the water areas and the submerged lands extending southward from the mouth of Spuyten Duyvil Creek (which bounds Manhattan Island on the north) and from the boundary to the low water mark on the New Jersey shore, subject to certain exceptions. For the beneficial exercise of the right granted "of and over" the waters, jurisdiction "of and over" the "lands covered by the said waters" was also granted.⁴⁹ In view of the objects of the compact, the jurisdiction over the submerged lands should be held to extend no further downward than is necessary to assure control over the waters by the grantee. Such a construction would except from the grant any jurisdiction over or in the subsoil beneath the submerged lands. This constitutes an implied restriction on the scope of the grant. On the other hand, however, there appears to be implied in the grant so much control over the air space above the water as is necessary to beneficial exercise of the grant of jurisdiction in the waters. Nothing in the compact prohibits such an implication, and the object of controlling surface navigation necessitates it. The precise vertical limits of this jurisdiction, so restricted and so extended by implication, depend upon the requirements of navigation. (It need merely be pointed out that the vertical limits of the jurisdiction so construed could not be held to extend to a bridge over the river erected at a height which does not in fact interfere with navigation,⁵⁰ nor to a tunnel under the river built through the

York can now lay down uniform rules for practically the whole water area of the port, reaching from the northernmost extremity of Manhattan Island, at which point appears the mouth of Spuyten Duyvil, to the sea.

49. *People v. Central RR. of N. J.*, *supra* note 16, at 296.

50. The clearance line of the George Washington Bridge is 213 feet above water level at the center; 210 feet at the United States Pierhead and Bulkhead Line on the New Jersey side; and 195 feet at the corresponding line on the New York side. (Exhibit "A", *supra* note 11). Since Congress approved the construction of the bridge and all such structures must, if they span navigable interstate streams, conform to the national regulations on the subject, it may be accepted that the bridge does not in fact interfere with navigation. It follows, therefore, that at least from the point of view of the vertical limits of the jurisdiction vested in New York under article 3, the bridge is not subject to that jurisdiction.

subsoil, which does not in fact disturb the submerged lands nor interfere with navigation.)

The terrestrial scope of the grant in Article 3 was diminished by three exceptions: New Jersey retained (1) its "exclusive jurisdiction" (*i.e.*, there was to be no concurrent jurisdiction) of and over: (a) "the wharves, docks, and improvements made and to be made on the shore of the said state"; and of and over (b) "all vessels aground on said shore or fastened to any such wharf or dock"; and (2) its "exclusive right of regulating the fisheries on the westerly side of the" boundary.

"The word 'shore' is obviously used in this provision in a general sense, as equivalent to side or margin of the river and bay, and not in the strict sense as applicable to the particular space between high and low water mark, as is its meaning when applied to the land at the edge or border of the sea or arm of the sea where the tide ebbs and flows."⁵¹ If the strict common law sense of the word is used, the reservation in favor of New Jersey results in absurdities. No such result ought to be indulged if a reasonable effect can be found for the provision. It has been found by the Court of Appeals of New York, which has held that the jurisdiction reserved to New Jersey over the wharves, etc., erected on the New Jersey shore extends the length of the structure,⁵² though the structure necessarily must be affixed to submerged lands under the jurisdiction expressly granted to New York by Article 3. The jurisdiction of New York in the submerged lands is restricted *pro tanto*. It should be added, however, that if the structure extends beyond the boundary, the jurisdiction of New Jersey ceases at the boundary, and New York has jurisdiction over that portion of the structure which is erected on its side of the boundary.⁵³

To assure the achievement of the second principal object of the compact, however, a proviso to exceptions (a) and (b) subjected all vessels aground on the New Jersey shore or fastened to any

51. *People v. Central RR. of N. J.*, *supra* note 16, at 298.

52. *Id.* at 298, 299.

53. Brief, *supra* note 11, at 28.

such wharf or dock to the quarantine or health laws, and laws in relation to passengers, of the state of New York.

The exception with regard to the fisheries requires no explanation. A proviso attached to the exception required that the navigation of the waters indicated should not be obstructed or hindered, the restriction operating in favor of New York which had by grant jurisdiction over that navigation.

A further exception to the jurisdiction granted to New York, recorded in Article 3, subsection 1, is not only superfluous⁵⁴ but has caused confusion in discovering the real design of the parties. In terms, it provided that "New Jersey shall have the exclusive right of property in and to the land under water, lying west of the" boundary. By operation of Article 1 New Jersey already had sovereignty over all the domain up to the boundary line; it therefore had the ultimate property rights of a sovereign in the submerged lands lying on its side of the boundary. There was no need to reserve a right of property in any of that domain. Efforts have been made to show that what New Jersey reserved under this exception was "a right as private owner of land lying within the state of New York." Such a view would pervert the whole design of the parties as set forth above, and it was properly rejected by the Supreme Court of the United States.⁵⁵ Though it had a property right in the submerged land, its jurisdiction over the same was restricted by the grant to New York, saving a special jurisdiction over structures projecting from the New Jersey shore applicable up to the boundary. It should be pointed out, however, that nothing in the treaty derogates from the sovereign rights of New Jersey in the subsoil beneath the submerged lands, up to the boundary, and it may therefore be stated that the jurisdiction of New Jersey for all purposes applies to all structures in and through that subsoil up to the boundary.

The nature of the authority exercisable by New York in the

54. *People v. Central RR. of N. J.*, *supra* note 16, at 298. The court believed that all three subsections to article 3 were "entirely unnecessary." It apparently was mistaken with regard to subsections 2 and 3.

55. *Central RR. of N. J. v. Jersey City*, *supra* note 16.

waters indicated remains to be summarized. Though the history of the conflict between New York and New Jersey might suggest that the jurisdiction was to be confined to the incidents of commerce and navigation in some restricted sense, in fact, it appears from the subsequent declaration of one of the negotiators for the state of New Jersey, Justice Lucius Q. C. Elmer, in an important early case decided in the New Jersey courts,⁵⁶ that the jurisdiction granted was very broad, thus: "It was to be a police jurisdiction of and over all vessels, ships, boats, or craft of every kind that did or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace." This view has been corroborated by the Court of Appeals of New York.⁵⁷ It would seem that a jurisdiction described so adequately in detail should occasion no great controversy with respect to its nature in the future.

It would appear, therefore, from the foregoing interpretation of the compact of 1834, and with respect to bridges over and tunnels under the Hudson River, situated south⁵⁸ of Spuyten Duy-

56. *State v. Babcock*, *supra* note 26.

57. *People v. Central RR. of N. J.*, *supra* note 16, at 299-300.

58. The Hudson River, viewed from the point of view of jurisdiction exercisable by either or both states over it, may be regarded as lying in three sections. Section A extends from a line (No. 1) across the river at the mouth of Spuyten Duyvil Creek southward to the mouth of the river, *i. e.*, to where the river enters Upper New York Bay. Section B extends from line No. 1 northward to the 41st parallel of north latitude (line No. 2). Sections A and B are about the same length, but that fact is not material to the present discussion. The territory on the west side of the river north of line No. 2 is part of the domain of New York. Section C of the river, extending northward from line No. 2, lies wholly within the domain of New York. Jurisdiction over Section A is determined in accordance with articles 1 and 3 of the compact of 1834, as interpreted above. Jurisdiction in section B is determined in accordance with the effects of the fixing of the boundary by article 1 of the compact of 1834. In the absence of any agreement to the contrary, the jurisdiction

vil Creek, and where the said structures do not in fact interfere with navigation on or in the river, that the states of New York and New Jersey have all the rights of a sovereign over the said structures up to the boundary, respectively, subject to the paramount authority of the United States, unless the exercises of any such right has been granted away by the possessor in some agreement subsequent to the compact of 1834 as amended in 1921. Nothing in the record discloses any such granting away of any of such rights over any of such structures.

As related to the above conclusion, the decision of the Appellate Court in *Clarke v. Ackerman*, denying jurisdiction in New York over the *locus in quo* situate on the westerly side of the center of the bridge (through which center the boundary happens to run) is the correct decision. Since New Jersey has jurisdiction over the bridge from the point above the center of the river westward, no value for present purposes can be assigned to the perpendicular dropped from the bridge to the low water mark on the New Jersey shore. The sign erected at the center of the bridge, indicating the alleged limits of the respective jurisdictions of New York and New Jersey, adverted to by the lower court in the same case,⁵⁹ appears to have been properly placed, presumably under the direction of The Port Authority. It appears also that the line of demarcation drawn in the Holland Tunnel, if coincident with the boundary running through the subsoil, indicates also the proper limits of the jurisdiction of the two states, respectively, in that structure. Pre-

of the two states in section B follows the customary rule with regard to jurisdiction in rivers in which boundaries lie, each state having jurisdiction up to the boundary. Jurisdiction over section C of the river lies wholly in New York. Jurisdiction over tunnels under and bridges over the river situate in section B would lie in the two states up to the boundary, respectively. Jurisdiction over such structures situate in section C would lie entirely in New York.

59. *Supra* note 4, at 835. Referring to contention of defendant that the *locus in quo* was within the jurisdiction of New Jersey because it was west of the sign at the center, the court said: "The second objection is not so free from entanglement. True, the sign at the center of the bridge indicates that the center is the dividing line. That factor is illuminating but not decisive."

sumably this line was also established under the direction of The Port Authority.⁶⁰

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60. The situation with respect to the jurisdiction in the Midtown Hudson Tunnel now being built should be held to be the same as that with respect to the Holland Tunnel.