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ELLIS ISLAND
ITS LEGAL STATUS

February 11, 1963

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ELLIS ISLAND
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ELLIS ISLAND
Its Legal Status

An opinion has been requested on the legal status of Ellis Island in New York Harbor. Ellis Island has been determined under the provisions of section 3(g) of the Federal Property and Administrative Services Act of 1949 to be surplus to the needs of all Federal agencies.

Over a period of several years, efforts have been made to dispose of the Island through competitive sale and, through the Department of Health, Education, and Welfare, to dispose of it under section 203(k) of that Act for public health or educational purposes. None of these efforts have resulted in a satisfactory offer from the standpoint of the Federal Government. A number of special bills were introduced in the 87th Congress regarding the disposition of the Island to interested persons, and hearings on those bills were held by the Intergovernmental Relations Subcommittee of the Senate Committee on Government Operations. In the course of those hearings, questions were raised on the legal status of the property. This opinion is intended to answer those questions.

Description

Ellis Island would be substantially a rectangular island were it not almost bisected by a ferry slip on the long side of the island which faces roughly southeast. It is situated in the New York Harbor on the west, or New Jersey, side of the Hudson River or upper New York Bay, about 1100 feet from the New Jersey shore, or about 600 feet from the end of piers extending from that shore, and about a mile and a quarter from the lower tip of Manhattan Island. It is approximately 2100 feet north of Liberty Island, on which is located the Statue of "Liberty Enlightening the World". The Statue and the Island have been declared to be a National Monument.

Ellis Island contains by present estimate approximately 27.5 acres, of which about 3 acres ("by estimation to ordinary high water mark, two acres, three roods and thirty-five perches") in the northern part of the Island, sometimes called Island Number 1, constituted the Island at the time it was acquired by the Federal Government in 1808. The remainder of the Island is filled-in land. By letter in the National Archives dated April 11, 1908, the Chief Engineer

and Superintendent, United States Public Buildings, advised the Commissioner of Immigration that

> (1) The original Ellis Island contained, as nearly as I can determine, between 2 and 3 acres. * * *
>
> There were first added certain docks and bulkheads to said original island at various times prior to say 1890, which brought the so-called original island area up to about 3.30 acres.
>
> Between 1890 and 1892 additional bulkheads were built and filling performed and the area brought up to about 11.07 acres.
>
> In 1896, further bulkhead construction was undertaken and the area was brought up to about 14.20 acres. This area was subsequently added to in 1896 and 1897, and brought up to about 20.66 acres.
>
> In 1897 an additional island, connected by a solid crib bulkhead was constructed southwest of the original island, said extension containing 3.31 acres.
>
> In 1906, the so-called hospital, or west, island was built, containing 4.75 acres. It is connected to Ellis Island extension by a pile and timber gangway.

It was still further enlarged in 1934 and now has 35 buildings containing approximately 513,000 square feet of floor space.

In addition, the Government owns, and is prepared to dispose of with the island proper, submerged lands in a rectangle surrounding the island containing, along with the land above water, 2,092,500 square feet, or approximately 48 acres.

History

Ellis Island was one of three islands in New York Harbor known as the three Oyster Islands.

The second largest, Ellis Island was then known as Little Oyster Island. It had been named Kioshk or Gull Island by the Mohegan Indians (Schoolcraft, H.R., Report of the Aboriginal Names and Geographical Terminology of the

State of New York, Part I, Valley of the Hudson, p. 26; Wilson, J. C., The Memorial History of the City of New York, v. I, p. 52f). It was also known as simply Oyster Island, and as Bucking Island and Gibbet Island, the latter appellation being derived, it is supposed, from the fact that it was used for hanging pirates, one of them being the pirate Gibbs. (Valentine's Manual of the City of New York, 1855).

The smallest of the Oyster Islands lies to the south of Great Oyster (now Liberty) Island. It is apparently now nothing but a shoal at least partially submerged.

Ellis Island was purchased from the Indians in 1630 by Mynher Michael Paw (or Paauw), a Dutch settler (O'Callaghan, E. B., The History of New Netherland, v. I, p. 125f). However, some time between 1674 and 1680, Governor Edmond Andross of the Royal Colony of New York, granted Little Oyster (Ellis) Island to Captain William Dyre (N. J. Boundary Papers, v. IV). On April 23, 1686, William Dyre and Mary Dyre conveyed the Island by deed to Thomas Lloyd (Register New York County, Liber 13, p. 202), who in turn conveyed it to Enoch and Mary Story (Register New York County, Liber 13, p. 210).

In 1785, Samuel Ellis, from whom the Island got its present name, advertised the Island for sale (Loudon's New-York Packet, January 20, 1785). Samuel Ellis died in 1794, leaving a will in which he devised "Oyster Island, commonly known by the name Ellis's Island" to the child, not then born, of his daughter Catherine Westervelt, "should it be a son." (Abstract of Wills, Surrogate, New York City, 1786-1796, v. 15, p. 325). A male child was in fact born to Catherine Westervelt and was christened Samuel Ellis but a few years later died intestate. Letters of administration were granted to the child's mother. (Abstract of Wills, Surrogate, New York City, 1796-1800, v. 15, p. 263). On December 24, 1806, Samuel Ellis Ryerson executed a deed conveying title to Ellis Island to John A. Berry (Register, New York County, Liber 145, p. 432). The deed recited that, after the death of the infant Samuel Ellis, the Island passed into the hands of the two remaining daughters of the original Samuel Ellis, namely Elizabeth Ellis Ryerson and Rachel Ellis Cooder.

On April 21, 1794, "the soil from high to low waters mark around Ellis's Island" was ceded by the Corporation of the City of New York to the people of the State of New York, for the purpose of erecting fortifications for the defense of the City (Minutes for the Common Council of the City of New York, April 14, 1794; April 21, 1794). On April 6, 1795, the New York State Legislature appropriated $100,000 to fortify Governor's, Bedloe's and Ellis Islands (Laws of New York, 1795, ch. 43).

By Act dated February 15, 1800, of the New York State Legislature (Laws of New York, 1797-1800, p. 454; Laws of 1800, ch. 6), jurisdiction over "Oyster" Island, "Bedlow's" Island and Governor's Island was ceded to the United States.

By Act dated March 20, 1807, of the New York State Legislature (Laws of New York, 1807, ch. 51), the Governor, Lieutenant-Governor, Chancellor, Chief Justice of the Supreme Court of New York State, and Mayor of the City of New York were appointed Commissioners to determine what land on Staten Island and Long Island should be required for defense and the transfer of its jurisdiction to the United States. On July 20, 1807, Colonel Jonathan Williams, Chief Engineer of the United States Army, reported to a Committee of the Common Council of the City of New York the results of his survey of the defenses of New York Harbor (Minutes of the Common Council, v. IV, p. 512ff). On August 24, 1807, the Committee of the Common Council recommended that additional works and fortifications be erected on Ellis Island (Minutes of Common Council, v. V, August 24, 1807). On July 25, 1807, Governor Daniel D. Tompkins wrote to Colonel Williams that a deed had been drawn transferring the Island to the State of New York but that it had not been consummated because of the death of Samuel Ellis (Public Papers of Daniel D. Tompkins v. II, p. 5f).

On March 18, 1808, the New York State Legislature passed an act entitled "an act supplementary to an act entitled 'an act to cede the jurisdiction of certain lands to the United States' passed 20th March, 1807" (Laws of New York, 1808, c. 51). It provided, in substance, that the Governor should survey the land called "Ellis or Oyster Island" and contract and agree with the owners thereof "for the whole or so much of the same * * * as the president of the United States shall judge requisite for fortifications, and to purchase the same in the name of the people of this state * * *." If the owners could not be identified, or any of them were infants, non compos mentis, or outside the State, the Governor was authorized to acquire title, and he was then "required and empowered to convey and grant all the right, title and interest of this State to the United States * * *."

On April 18, 1808, Daniel D. Tompkins, Governor of New York, filed in the Court of Chancery of the State of New York a petition for a writ ad quod damnum to assess the value of the interests of persons claiming title to Ellis Island and for judgment vesting title thereto in the people of the State of New York. On April 27, 1808, the Chancellor of the State of New York directed that a writ issue to the Sheriff of the City and County of New York, directing that he inquire whether the person or persons owning Ellis Island would suffer damage by reason of the taking thereof by the State of New York for the purpose of the cession, and to return the writ together with the findings of a jury to the Chancery Court. The return of the Sheriff and the inquisition of his Jury

dated June 18, 1808, set forth that "John A. Berry, Samuel E. Ryerson, Nancy Ryerson, William Kingsland and Rachel, his wife, and others, to the Jurors aforesaid unknown" had or claimed title to the said Island, and they assessed the value of the Island and the damages that would be sustained by its owners at $10,000. On the same day, the Governor of New York deposited with the Register of the Court of Chancery the sum of $10,000, whereupon the Chancellor entered a decree vesting title in "Ellis or Oyster Island" in the People of the State of New York.

On June 30, 1808, Governor Daniel D. Tompkins executed a deed to the United States conveying and granting "all the right, title and interest of the State of New York in and to the lands, tenements and appurtenances above mentioned and described." The lands "above mentioned" included the lands commonly known and called Ellis's or Oyster Island, situated in the Bay of New York, surrounded on all sides by the said Bay, which Island contained, by estimation, to ordinary high water mark, two acres, three roods and thirty-five perches. The deed recites the legislative authority for the transfer, the proceedings in the Court of Chancery that culminated in a decree of the Chancellor of the State of New York vesting title in the People of the State of New York, and the payment to the Governor of New York by and on behalf of the United States of the sum of $10,000, the amount assessed as damages in the condemnation proceedings, and $183.10, the costs paid by the State of New York in those proceedings. This deed was delivered to the then Secretary of War.

Ellis Island was operated as an Army installation, known as Fort Gibson, until 1861, when Fort Gibson was dismantled and a naval magazine was set up in its place (Kobbe, Gustav, New York and its Environs, Harper and Brothers, 1891, American Cyclopedia, and Register of Important Events of the Year 1891, p. 525). On May 7, 1880, the New York Legislature enacted a law releasing and ceding the title and jurisdiction of the State of New York to lands under water at Bedloe's Island, Ellis's Island and other islands to the United States.

On May 26, 1880, Alonzo B. Cornell, then Governor of the State of New York, executed a deed granting unto the United States of America title and jurisdiction of lands covered with water at Bedloe's Island, Ellis Island and elsewhere. That deed is recorded in the Office of the Secretary of State of New York in Book of Patents No. 44, on pages 604, 605, 606, 607 and 608.

On April 11, 1890, the President approved a joint resolution of Congress (26 Stat. 670) which authorized the Navy to remove the naval magazine from Ellis Island and appropriated the sum of $75,000 for the establishment of the magazine elsewhere. It also appropriated $75,000 to enable the Secretary of the Treasury to improve Ellis Island for immigration purposes. Additional

appropriations were made to the Secretary of the Treasury for use at Ellis Island for immigration purposes by the sundry civil appropriation act of 1890 (26 Stat. 372), the deficiency act of March 3, 1890 (26 Stat. 867) and the sundry appropriation act of 1891 (26 Stat. 949). See 20 Ops. Atty. Gen. 379 (1892). Ellis Island was transferred to the Secretary of the Treasury on May 24, 1890, and was formally opened as an immigration station on January 1, 1892 (Appleton's Annual Cyclopedia and Register of Important Events of the Year 1892, p. 521). By section 7 of the Act of February 14, 1903 (32 Stat. 828), control over the immigration of aliens into the United States was transferred from the Secretary of the Treasury to the Secretary of Commerce and Labor.

On November 30, 1904, the Riparian Commissioners of the State of New Jersey, acting on an application made to them on behalf of the United States and under authority vested in them by an act of the New Jersey Legislature, approved February 10, 1891, entitled "A further supplement to an act entitled 'An Act to ascertain the Rights of the State and of Riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this State' approved April eleventh, one thousand eight hundred and sixty-four" and other unlisted acts, executed and delivered to the United States of America for the sum of $1,000 a deed granting all the right, title and interest of the State of New Jersey in and to land under water surrounding Ellis Island. That deed recited that the United States is "the owner of lands comprising what is known as Ellis Island in the Bay of New York, County of Hudson and State of New Jersey, which lie above high water mark and in front of which the lands under water hereinafter described are situated". The deed further provided as follows:

> It is distinctly understood and agreed that by accepting the within grant The United States of America does not waive any rights or privileges which it would possess had not the same been accepted, and that no rights of the grantee of any kind whatsoever shall be prejudiced by such acceptance.

The deed was recorded on December 23, 1904, in the Office of the Register of Hudson County, New Jersey, in Book 888 of Deeds, at page 277.

By section 3 of the Act of March 4, 1913 (37 Stat. 737), the Bureau of Immigration and Naturalization was transferred from the Department of Commerce and Labor to the newly created Department of Labor. A deed, dated July 22, 1938 (recorded at page 171, Book 1936 of Deeds, Hudson County, N.J.) from The Central Railroad Company of New Jersey, and a grant from the State of New Jersey, dated August 1, 1938 (recorded in Liber F-2, Folio 149, in the office of the Board of Commerce and Navigation of the State of New Jersey, at Newark), conveyed to the United States an easement appurtenant to Ellis Island for an 8-inch water pipe line to a point on the New Jersey shore. Reorganization Plan No. 5 of 1940, effective June 14, 1940, transferred the Immigration and Naturalization Service and its functions to the Department of Justice.

Ellis Island was vacated by the Immigration and Naturalization Service in 1954 and was declared excess on November 3, 1954. It was determined to be surplus property on March 4, 1955.

This paper is not directly concerned with Liberty Island, a companion island, containing 12.0 acres. However, inasmuch as much of the history and legal aspects of Ellis Island are closely bound to Liberty Island, a discussion of the history of the latter island is set forth below.

The Mohegan Indians called Liberty Island "Minnissais", meaning Lesser Island. Prior to the English occupation of New Amsterdam, Liberty Island, Ellis Island and a third island now substantially submerged were known as the Oyster Islands, Liberty Island being called Greater Oyster Island. On December 2, 1667, the English Governor Nicholls granted it to Captain Robert Needham, his first counsellor and a leading member of his administration. Captain Needham almost immediately sold it to Isaac Bedloe (or Bedloo or Bedlow) who is said to have been a native of New Amsterdam, one of the substantial Dutch residents at the time of the English conquest in 1664, and an Alderman under the new foreign administration (Magazine of American History, vol. 13, p. 406). Other authorities describe him as originally bearing the name Isaac Bethlo, being a native of Calais in Picardy. He is said to be of a French Huguenot family who had found a temporary home in Holland and had come to America in 1652 at the invitation of Governor Stuyvesant (See, Baird, Huguenot Emigration, Phila. 1885, vol. 1, p. 179). In any event, Isaac Bedlow was an important person under both the Dutch and English occupation. On August 19, 1670, Governor Lovelace directed that the island, described as "Love Island", owned by Isaac Bedlow, be a privileged place where persons were free from arrest. (See Broadhead, History N.Y. vol. 2, note to p. 168.) The Island has also been known as "Corporation Island".

Isaac Bedlow died in 1672 or 1673. Thereafter, his children Isaac Bedlow, Sarah Burger, Catherine Hassarden and Mary Smith by instrument in writing dated December 29, 1693, divided the estate equally. In 1738 it was used as a Quarantine Station (Stone's Hist. N.Y., p. 109) by the City of New York, which feared "that smallpox and other malignant fevers may be brought in from South Carolina, Barbados, Antigua, and other places, where they have great mortality." Over the course of years, Mary Smith, one of the daughters, became legally possessed of the island by inheritance and purchase and on August 9, 1732, conveyed her estate to two trustees, Adolph Philips and Henry Lane. In 1746, Adolph Philips sold "Bedlow's Island" to Captain Archibald Kennedy, of the British Army, for 100 pounds. Thereafter, it was known generally as Kennedy's Island. Kennedy permitted the use of his island again as a temporary quarantine station. In 1749 or 1750, it was purchased by New York City for 1000 pounds as a site for a pest house. During the Revolutionary War it was used by the British for a military hospital, which

was burned by the Americans (Doc. Col. Hist., vol. 8, p. 775).

The Act of February 15, 1800, of New York, by which the State of New York ceded to the United States jurisdiction over Oyster (Ellis) Island, also ceded jurisdiction to the United States over Bedloe's Island. Similarly, by the Act of May 7, 1880, New York released and ceded its title and jurisdiction to lands under water at Bedloe's Island, as well as at Ellis Island. This was followed by the deed of May 26, 1880, hereinabove referred to in connection with Ellis Island.

Bedloe's Island was operated as an Army installation, later known as Fort Wood, in memory of a distinguished hero of the War of 1812, who was killed in 1814 during an attack on Fort Erie. Construction of a land battery, in the shape of an 11-point star, was begun on the island in 1806 and finished 5 years later. Following the War of 1812, Fort Wood served at various times as a Corps of Artillery garrison, ordnance depot, and recruiting station, and intermittently as a quarantine station.

By Joint Resolution of the Congress approved March 3, 1877, the President was authorized to designate and set apart a site for the colossal statute of "Liberty enlightening the world" and to provide for the permanent maintenance and preservation thereof. Bedloe's Island was selected, and the statue was "inaugurated" on October 28, 1886. On November 16, 1886, President Cleveland in a letter to the Secretary of the Treasury directed pursuant to that joint resolution that the statue be at once placed under the care and superintendence of the Light House Board, and that it be from thenceforth maintained by said Board as a beacon. (VIII Richardson, Messages and Papers of the Presidents, p. 495) About one acre in the northwest part of the military reservation was, by agreement dated January 31, 1887, between the Secretaries of War and the Treasury, set aside as a lighthouse reserve, and a brick hospital building there was fitted up for the light keeper. President Theodore Roosevelt approved the recommendation contained in a letter to him dated December 28, 1901, from the Secretary of War that the statue be returned to the War Department.

Bedloe's Island was considered as a site for the immigration station that later was to be established on Ellis Island. On March 12, 1890, Congress passed a concurrent resolution which directed the Senate Committee on Immigration and the House Committee on Immigration and Naturalization to investigate and report on certain matters pertaining to immigration, including "the official correspondence in the proposal to make Bedloe's Island, in the harbor of New York an immigrant depot, what title the Government has to such island," etc. No such report on Bedloe's Island by either of those committees can be located.

By Proclamation (No. 1713) of October 15, 1924 (43 Stat. 1968), under section 2 of the Antiquities Act of June 8, 1906 (34 Stat. 225), President Coolidge designated certain areas, with the historic structures and objects thereunto appertaining, to be national monuments. Among those areas was "The site [at Fort Wood, New York] of the Statue of Liberty Enlightening the World, the foundations of which are built in the form of an eleven-pointed star and clearly define the area comprising about two and one-half acres."

Executive Order 6228 of July 28, 1933, transferred certain cemeteries and parks from the War Department to the Interior Department. Among those listed under the heading "National Monuments" was the "Statue of Liberty, Fort Wood, New York."

By Proclamation No. 2250, dated September 7, 1937 (51 Stat. 393), President Franklin D. Roosevelt enlarged the Statue of Liberty National Monument by including "All lands on Bedloe's Island, New York, not now a part of the Statue of Liberty National Monument, including all uplands and marginal submerged lands as comprised Fort Wood prior to evacuation thereof as a military reservation."

By Joint Resolution approved August 3, 1956 (Public Law 936, 84th Congress, 70 Stat. 956), the name "Bedloe's Island" was changed to "Liberty Island." That law recited that there would be established, at the foot of the statue, The American Museum of Immigration.

Boundary Dispute Between New York and New Jersey

Underlying the legal status of Ellis Island is the boundary dispute between the States of New Jersey and New York, the nature of which is outlined in The New York Harbor Problem, 5 Corn. L. Q. 373, 377 (1920) as follows:

> A source of continued dispute in the early days of the two States lay in the controversy over title to the waters of New York harbor. On the one hand, New York by the terms of the grant from the Duke of York to Lord Berkeley and Sir George Carteret of the territory later constituting the State of New Jersey, laid claim to the waters of the Hudson River and New York bay to high water mark on the New Jersey shore while New Jersey, threatened with unfriendly control of her wharves and shore improvements, contended that by the Revolution she had conquered from the Crown a sovereignty extending to the middle of the river.

Numerous attempts were made to settle the dispute. Commissioners representing the two states met at Newark in 1807, but no agreement was reached. Other

conferences were held with like effect. In 1829, no agreement having been reached, New Jersey filed a bill in equity against New York in the Supreme Court of the United States. No appearance was ever entered by the State of New York although efforts were made to compel such action. New Jersey v. New York, 28 U.S. (3 Pet.) 461, 7 L.Ed. 741; 30 U.S. (5 Pet.) 284, 8 L.Ed. 127; 31 U.S. (6 Pet.) 323, 8 L.Ed. 414. As set out in Devoe Manufacturing Company, 108 U.S. 401, 2 S.Ct. 894, 27 L.Ed. 764 (1883), the bill filed by the State of New Jersey stated, in part, as follows:

> "*** that, by the fair construction of the said grants and by the principles of public law, New Jersey is entitled to the exclusive jurisdiction and property of and over the waters of Hudson River from the 41st degree of latitude to the Bay of New York, to the filum aquae, or middle of the river, and to the midway or channel of the Bay of New York and the whole of Staten Island Sound, together with the land covered by the waters of the river, bay and sound, in the like extent; that, while the said two States were Colonies, New York became wrongfully possessed of Staten Island and the other small islands in the dividing waters between the two States; that the possession thus acquired by New York had been since acquiesced in, New York insisting that her possession of said islands had established her title; that New York has no other pretense of title to said islands but adverse possession; that, as such possession has been uniformly confined to the fast land thereof, the title of New Jersey to the whole waters of the Staten Island Sound remains clear and absolute in New Jersey, according to the terms of said grants; * * *. The bill prays that the eastern boundary line between New Jersey and New York be ascertained and established; that the rights of property, jurisdiction and sovereignty of New Jersey may be confirmed to the filum aquae or middle of Hudson River, from the 41st degree of north latitude on said river through the whole line of the eastern shore of New Jersey, as far as said river washes and bounds New Jersey, down to the Bay of New York and to the channel or midway of said bay, and to all the waters and the land they cover lying between the New Jersey shore and Staten Island, and all other waters washing the southern shores of New Jersey within and above the Narrows; that New Jersey may be quieted in the full and free enjoyment of her property, jurisdiction and sovereignty in said waters; and that the right, title, jurisdiction and sovereignty of New Jersey in and over the same, as part of her public domain, may be confirmed and established by the decree of this court.

In a communication from the Governor of New York (No. 268, In Assembly, March 11, 1831), relative to the boundary line between the State of New York and the State of New Jersey, the following statement is made:

> It seems to be a mere question of sovereignty over the waters, inasmuch as New Jersey admits in her bill of complaint, that whatever right she may have had to the islands, those rights have been lost by adverse possession and the lapse of time.

Finally, on September 16, 1833, in New York City, Commissioners representing the two states entered into a compact "respecting the territorial limits and jurisdiction of said states." That agreement was ratified by New York (Laws N. Y. 1834, p. 8, c. 8) and New Jersey (Laws N. J. 1833-34, p. 118) and the consent of Congress was granted by the Act of June 28, 1834 (4 Stat. 708, ch. 126). Three years later, on February 15, 1836, New Jersey dismissed its suit against New York in the Supreme Court of the United States.

Because of the importance of that compact to any discussion of the legal status of Ellis Island, the text thereof is set forth below in full, together with the stipulation expressed by the Congress in granting its consent:

> WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:
>
> Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q. C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.
>
> ARTICLE FIRST. 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 SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's 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 THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel 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.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Schooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the light-house at Prince's bay to the mouth of Mattavan creek; subject to the following

rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, 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 Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters: Provided, That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to, the shore of the state of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the

authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three and of the independence of the United States the fifty-eighth.

B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively, -- therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, Provided, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

On December 23, 1889, the two states entered into a subsequent agreement, whose function, according to the Act of the New Jersey Legislature recited in the agreement, was "to locate and mark out the boundary line between the State of New Jersey and the State of New York, in lands under water in the Arthur Kill, Kill Van Kull, New York Bay and the Hudson River." The consent of Congress was not obtained to that agreement.

On July 11, 1919 (41 Stat. 158, ch. 11) Congress consented to a compact or agreement between the States of New Jersey and New York for the construction, operation, repair and maintenance of a tunnel or tunnels under the Hudson River between the cities of Jersey City and New York.

On August 23, 1921, (42 Stat. 174, ch. 77) Congress granted its consent to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York. The agreement provides in Article 20:

> 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.

The Joint Resolution of Congress consenting to the agreement provided that "nothing therein contained shall be construed as impairing or in any manner affecting any right of jurisdiction of the United States in and over the region which forms the subject of said agreement."

State Jurisdiction Over Waters

It will be noted that the 1833 compact carefully distinguishes between the territorial limits and jurisdiction of the two states. The state jurisdiction over the waters on the western side of the Hudson River and Bay of New York, and the rights and powers of the two states resulting therefrom, have been the subject of considerable litigation.

The earliest reported case involving the 1833 compact appears to be State v. Babcock, 30 N. J. Law (1 Vroom) 29 (1862) involving an indictment in New Jersey for obstructing the free navigation of the Hudson River by placing, sinking and lodging in said river, and upon the shore of New Jersey in said river, certain ships, schooners, boats and other vessels. Justice Elmer,

one of the commissioners for the State of New Jersey who signed the compact or agreement of September 16, 1833, in dismissing the indictment for lack of jurisdiction, stated at page 30:

> The waters of the Hudson, although exclusively within the jurisdiction of New York, are a common highway for all the citizens of the United States. Any obstruction to that highway, placed on the shore above low water mark, which shore remains exclusively within the jurisdiction of New Jersey, either by means of vessels, logs, stones, or other temporary obstructions placed there, or by means of a wharf or other improvements which are injurious to navigation, is of course indictable in this state; while obstructions below the low water mark where not only the water but the land under the water are exclusively, except as to the fisheries, within the jurisdiction of New York, can only be punished by proceedings in the courts of that state or of the United States. If by docks, as used in the compact, is meant, as I suppose according to the American usage, the spaces between the wharves, the land covered by the waters within such docks is also within the jurisdiction of this state, and obstructions placed therein, which are injurious to the navigation, may be indicted in our courts.

The court recognized that New Jersey had jurisdiction for certain purposes, but in this early case recognized that New York was vested with certain authority over the waters on the New Jersey side of the Hudson to the exclusion of authority in that regard in New Jersey. The court said at page 31:

> It has been earnestly insisted that the safety of property holders on the Jersey shore requires us to hold that obstructions in the river, outside of the low water line, if injurious to the navigation of vessels coming to that shore, are offences against our laws and indictable in our courts. But apprehensions of this kind, which are probably altogether imaginary, will not justify us in departing from the plain meaning of the compact. Although, for some purposes, New Jersey is bounded by the middle of the Hudson river, and the state owns the land under the water to that extent, exclusive jurisdiction, not only over the water, but over the land to the low water line on the Jersey shore, is in plain and unmistakable language, granted to, or rather

acknowledged to belong to the state of New York.

Section 2 of Article Third of the 1833 compact gives New Jersey "exclusive jurisdiction" over wharves, docks, and improvements on the shore of New Jersey. This provision was dealt with by a New York Court at an early date in People v. The Central Railroad Company of New Jersey, 42 N. Y. 283 (1870), writ of error dismissed 79 U.S. 455, which declined to abate as nuisances, or cause the removal of, certain wharves, bulkheads, piers, railroad tracks, and other erections, placed by the defendant in the harbor of New York, and extending into said harbor and the Hudson River, about a mile from the New Jersey shore. The court stated, at 42 N. Y. 304, that: "the jurisdiction of New Jersey over wharves, docks and improvements on her shore extends to and embraces the whole subject of wharves, docks and improvements, and includes the power to prescribe when and where and how they shall be erected, and to exercise all the control over them that government can possess over the property of its citizens."

The Court analyzed in detail the provisions of the 1833 compact. It considered especially the nature of the exclusive jurisdiction of the State of New York under Article Third over the waters, and lands covered by water, on the New Jersey side of the Hudson River and Bay of New York. After pointing out the exceptions in that Article to New York's exclusive jurisdiction over such waters and lands covered by water, the Court said at 42 N. Y. 297:

> These provisions clearly show that it was not the intention of New Jersey, in giving jurisdiction to New York over the waters of such State, to relinquish any of the important rights of property which were acquired by or conceded in the first article of the said treaty.

With reference to New York's prior claim to title to the land under water to the low water mark on the New Jersey shore, the Court said at 42 N. Y. 297:

> It was this very claim and the legal rights and consequences resulting from it, if allowed, which New Jersey had long resisted. This was in legal effect renounced and abandoned by this State in the first article of said treaty; and New Jersey as a sovereign, independent, co-equal State, acquired thereby, if she did not before possess, all the rights of proprietorship in said river and bay west of the center thereof possessed by this State east of the same center line.

The nature of New York's jurisdiction, the Court said, was further made clear by the exception to New Jersey's jurisdiction over the wharves, docks and improvements on the New Jersey shores. The Court said at 42 N. Y. 299:

> This exception explains the object and nature of the jurisdiction intended to be given to New York. 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.

The Court followed at 42 N. Y. 300 with a general statement of the nature of New York's qualified and limited jurisdiction over said waters which has been followed by New York, New Jersey and Federal courts without substantial departure:

> The remaining articles of said agreement, all fairly considered, conduce to the same construction, and confirm the view that the jurisdiction conferred upon this State over the waters of said river and bay was a qualified and limited jurisdiction conferred for police and sanitary purposes, and to promote the interests of commerce in the use and navigation of said waters, and was not designed to confer or create control over the lands or domains of New Jersey, or to give to this State any right to interfere with her complete political or governmental jurisdiction as a sovereign State of and over her own soil, and its appurtenances, and of and over every description of property of any appreciable value within her territorial limits.

The admiralty jurisdiction of the Federal district courts in New York and New Jersey has been considered in a number of cases, although not consistently in view of differing interpretations of the decision of the Supreme Court of the United States in Devoe Manufacturing Company, 108 U.S. 401

(1883), hereinafter discussed. The first of such cases was United States v. The Julia Lawrence, 6 Am. L. Rev. 383, 26 Fed. Cas. 670, No. 15,502 (D. C. S. D. N. Y., 1871), the full text of which opinion is set out by Judge Blatchford in his decision in the later case of The L. W. Eaton, 9, Ben. 289, 15 Fed. Cas. 1119, No. 8,612 (D. C. S. D. N. Y., 1878). The former case held that the Federal District Court for the Southern District of New York had jurisdiction to seize a ship in the waters of the Bay of New York on the New Jersey side but outside the low-water mark on the New Jersey shore. The rationale of the case was that the territorial limit of the Southern District of New York was the boundary line between the States of New York and New Jersey at the time the judicial district was formed and that those limits were not affected by the 1833 compact, particularly since the Congress, in approving the compact, provided that "nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement." This provision was interpreted as meaning that the United States retained the same jurisdiction over the waters of the bay as they originally possessed on the organization of their courts.

The jurisdiction of the District Court for the Southern District of New York to attach a steamship lying in the Morris Canal Basin, at Jersey City, made fast to piles driven into the bottom and about 40 feet from the side of the dock, the basin communicating directly with the waters of the Hudson River, was upheld. The Argo, 7 Ben. 304, 1 Fed. Cas. 1100, No. 515 (D. C. S. D. N. Y., 1874).

In The L. W. Eaton, 9 Ben. 289, 15 Fed. Cas. 1119, No. 8,612 (D. C. S. D. N. Y., 1878), the jurisdiction of the District Court for the Southern District of New York to seize a vessel afloat in the navigable waters of the Hudson River fastened, by means of lines, to a dock at Jersey City, New Jersey, outside the low-water mark, the wharf projecting into the navigable waters of the Hudson River lying west of Manhattan Island and to the south of the Spuyten Duyvel Creek, was also upheld. The Court relied directly upon United States v. The Julia Lawrence, cited above, to the effect that the jurisdiction of the Federal district courts was not affected by the 1833 compact.

The Court in Malony v. City of Milwaukee, 1 Fed. 611 (D. C. S. D. N. Y., 1880) upheld the jurisdiction of the U. S. marshal for the District Court for the Southern District of New York to attach certain boats in the New Jersey central basin within the limits of Jersey City, New Jersey, the court having determined that the basin in which the boats were seized was, thirty years prior thereto, a

part of the Bay of New York and outside the ordinary high-water line on the New Jersey shore. The Court relied on The L. W. Eaton, cited above, in denying that the effect of the 1833 compact was to enlarge the jurisdiction of the District Court for the Southern District of New York to the high-water mark on the New Jersey shore, instead of being limited to the low-water mark as it was admitted to have been prior to 1833.

The rationale underlying those decisions, i. e., that the jurisdiction of the Federal district courts was not affected by the 1833 compact, was overturned by the Supreme Court of the United States in Devoe Manufacturing Company, 108 U.S. 401, 2 S. Ct. 894, 27 L. Ed. 764 (1883). This was an original action in the Supreme Court, being a petition for a writ of prohibition to the Federal District Court for the District of New Jersey. The sole question at issue was whether that district court had jurisdiction in admiralty over a vessel afloat but fastened by a hawser to the end of a dock in the Kill Van Kull, between Staten Island and New Jersey, at a place about three hundred feet distant in the stream from the line of ordinary low-water mark. In denying the writ and thereby confirming the jurisdiction of the District Court for the District of New Jersey, the Supreme Court established a new rule with respect to the effect of an interstate compact changing the boundaries between states. The Court stated at 108 U.S. 413:

> We are all of the opinion that, when the act of Congress of 1789 declared that the New Jersey district should consist of the State of New Jersey, it intended that any territory, land or water, which should at any time, with the express assent of Congress, form part of that State should form part of the District of New Jersey. By sections 530 and 531 of the Revised Statutes, the State of New Jersey constitutes a judicial district. The intention is, that the boundary of the district shall be coterminous with the boundary of the State. The same is true as to the Southern District of New York, and as to the district across the water at the locus in quo, which is the Eastern District of New York. That district was created by the act of February 25th, 1865, chap. 54, 13 Stat. 438, to consist of "the counties of Kings, Queens, Suffolk and Richmond, in the State of New York, with the waters thereof." By section 541 of the Revised Statutes, the Northern District of New York is defined as including the counties of Albany, Rensselaer,

> Schoharie, and Delaware, with all the counties north [and west] of them; the Eastern District as including "the counties of Richmond, Kings, Queens, and Suffolk, with the waters thereof;" and the Southern District as including "the residue of said State, with the waters thereof." It is consonant with the convenience and habits of the people, that, when any place is within the limits and jurisdiction of a State, it should not be joined to the whole or a part of another State, as to the jurisdiction of the courts of the federal government; and it is not to be presumed, in view of the terms of the statutes on the subject, and of the necessity for the consent of Congress to all compacts between the States, that such separation can be intended unless clearly expressed. Where Congress declares that such a judicial district shall consist of such a State, and afterwards the boundary of the State is so lawfully altered as to include or exclude a particular piece of territory, it is a reasonable construction to say, that the judicial district shall, ipso facto, without further legislation by Congress, expand or contract accordingly.

The New Jersey District Court to which the writ of prohibition was to be addressed had upheld its jurisdiction in the matter in Hall v. Devoe Manufacturing Co., 14 Fed. 183 (D. C. D. N. J., 1882).

The Supreme Court said that the reservation in the Act of June 28, 1834, that nothing in the compact shall impair any right of jurisdiction of the United States in and over the islands and waters which formed the subject of the compact, was satisfied without applying the reservation to the jurisdiction of any particular Federal court. It merely evidenced an abundance of caution inasmuch as the United States had previously been ceded jurisdiction over Bedloe's Island and Ellis Island. The Supreme Court did not directly construe Article Third of the 1833 compact, inasmuch as the case was governed by Article Fourth. It did, however, note that United States v. The Julia Lawrence and The L. W. Eaton (both of which involved Article Third) had reached a result contrary to this case, and stated that it was endeavoring to settle the question of the effect of the compact on the territorial jurisdiction of the Federal courts. It said, at 108 U.S. 413:

> What may be the effect of the exception, whether it affects the boundary line itself, or only amounts to a concession of extra-territorial jurisdiction to the one State and the other, beyond the territorial boundary, is not necessary to be decided in the present case. For, in either view, it is clear that the waters in which the tug was lying when she was seized were in the boundaries of the State of New Jersey. The only jurisdiction given to the State of New York, beyond the boundary line specified in Article First, over the waters

> of the Kill van Kull, is that specified in Article Fourth, by which it is declared that "the State of New York shall have exclusive jurisdiction of and over the waters of the Kill van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island, in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that State, and for executing the same." The rest of that article relates to Staten Island sound west of Shooter's Island, and has no reference to this case. The jurisdiction thus conceded to New York is clearly a limited one, and cannot, in any view, be regarded as altering the general boundary line; and as the tug, when seized, was on the New Jersey side of that line, she was within the State of New Jersey, not because she was fastened to the dock on the shore of New Jersey, but because she was within that part of the waters between Staten Island and New Jersey which, by Article First of the agreement, is set apart to New Jersey.

The holding in the Devoe case on the effect of the 1833 compact on the boundaries of Federal judicial districts was expressly recognized in The Mary McCabe, 22 Fed. 750 (D. C. S. D. N. Y., 1884), involving a libel to recover for repairs and supplies furnished to the schooner Mary McCabe. However, as in the holding in the Devoe case, the court was not called upon to decide whether the boundary line of the center of the bay or river was itself altered by the exceptions in the 1833 compact or whether the exceptions merely amounted to a concession of extraterritorial jurisdiction. The Court stated at page 751:

> Assuming what is most favorable to the libelant, that the "bay of New York" includes the lower bay as well as the upper bay, so that this schooner, if not aground or fastened to any dock at Keport, might be within the jurisdiction of New York under the above article 3; still, the exception of "vessels aground or fastened to the dock" would apply to the present case, and make this schooner, at the time when the supplies were furnished and delivered to her, within the jurisdiction of New Jersey, although the testimony as to her exact situation is not very explicit. * * * The libel must, therefore, be dismissed.

The 1833 Compact was directly construed, although without extended discussion, by the New Jersey District Court in The Sarah E. Kennedy, 25 Fed. 569 (D. C. N. J., 1885), which relied on the Devoe case. The Court said at page 572:

> It appearing that the brig was seized on waters west of the middle of the Hudson river, she was lying within the territorial limits of the state of New Jersey, and hence within the admiralty jurisdiction of this court. The motion to dismiss must therefore be refused.

However, a contrary result was reached in The Norma, 32 Fed. 411 (D. C. S. D. N. Y., 1887), which also relied on the Devoe case. The Court said at page 413f:

> These provisions seem to me to show plainly that, as respects the land under water between the middle line of the river and the low-water mark on the western shore, except the docks and vessels fastened thereto or ashore, the state of New Jersey has nothing more than the mere right of property, -- the naked legal title. She holds this as she might hold the title or exclusive right of property in any other land within the state of New York, and in the same way that any private individual might own it; that is, subject to the "exclusive jurisdiction" which article 3 of the agreement confers upon the state of New York. The "waters" of this part of the Hudson, moreover, are by article 3 expressly "set apart for New York" as unequivocally as the waters of the Kill van Kull, in the Case of Devoe Manuf'g Co., 108 U.S. 401, 2 Sup. Ct. Rep. 894, were held to be "set apart for New Jersey."
>
> The question should be determined with reference to practical objects, and not to mere theoretical or imaginary lines. The agreement was designed to secure practical ends to avoid practical difficulties; and, in doing so, it plainly excluded the state of New Jersey from the functions of sovereignty, legislative or judicial, over "the waters" of the Hudson below low-water mark on the western shore; and gave all functions, legislative and judicial, to the state of New York over these waters, except certain minor privileges as to fisheries reserved to the state

of New Jersey. The boundaries of a state, for practical purposes, are the boundaries that limit its sovereignty and jurisdiction.

The Revised Statutes, §541, in defining what shall constitute the Southern district of New York, after defining the Northern and Eastern districts, says that the Southern district "includes the residue of the state, with the waters thereof." These words evidently refer to all those waters that appertain to the state of New York adjacent to the counties of the Southern district, and of which the state of New York has exclusive jurisdiction. There is no similar language in reference to the district of New Jersey; nor by any reasonable implication, as it seems to me, can those waters of the Hudson river, over which, by the agreement between the states, ratified by congress, the state of New Jersey has no jurisdiction whatever, be deemed a part of the district of New Jersey. As those waters, by the express agreement of the states, and the assent of congress, "are set apart to New York," and declared to be within its "exclusive jurisdiction," they are a part of the waters of the state of New York, within the meaning of section 541, and therefore within the limits of the Southern district of New York.

It should be noted at this point that the Court made no reference to People v. The Central Railroad Company of New Jersey, 42 N. Y. 283 (1870) to the effect that the "exclusive jurisdiction" of the State of New York over the waters on the western side of the Bay of New York and the Hudson River was a qualified and limited jurisdiction for police and sanitary purposes. Moreover, The Norma was decided before the Supreme Court of the United States in 1908, in the case of Central Railroad Company v. Jersey City, discussed below, specifically approved a decision in that case by the New Jersey courts to the same effect as the decision in the New York court in People v. Central Railroad Company of New Jersey, supra.

Atlantic Dredging Co. v. Bergen Neck Ry. Co., 44 Fed. 208 (C. C. S. D. N. Y., 1890), involved a bill for an injunction to restrain the Railway Company from obstructing a navigable channel leading from the waters of New York Bay into the City of Bayonne, New Jersey, the head of the channel being within the city limits of Bayonne. The plaintiff had dredged the channel, and the defendant, whose repair yards were located in Bayonne, was laying its tracks so as to cross the channel by embankment or trestle. In vacating a temporary injunction previously granted in the action, the court said:

> I am not satisfied that this court, sitting in the southern district of New York, has jurisdiction of this action, which is concerned with structures in process of erection on the soil of New Jersey, although such structures may project into the waters of a navigable channel coming up from the Bay of New York. People v. Railroad, 42 N. Y. 283; In re Devoe Manuf'g Co., 108 U. S. 401, 2 Sup. Ct. 894.

In Ferguson v. Ross, 126 N. Y. 459, 27 N. E. 954 (1891), a New York shore inspector brought an action to recover a penalty under an 1875 act, as amended, for depositing dredgings from a slip at the City of New York into the waters of the North or Hudson River opposite that City but on the New Jersey side of the river about one-fourth of a mile from the New Jersey shore. As to the jurisdiction of the Court, it said at 27 N. E. 954:

> It is insisted, however, in the first place, that, the deposit having been made within the territorial limits of New Jersey, the State of New York has no jurisdiction to enact a law subjecting persons to liability for any act done within the territory of that state. The case of People v. Railroad, 42 N. Y. 283, furnishes a satisfactory answer to this objection. By the compact entered into between New York and New Jersey, the particulars of which are set forth in the opinion in that case, the middle of the North river was declared to be the boundary between the two states, but by the third article exclusive jurisdiction of and over all the waters of the Bay of New York and of the Hudson river lying west of Manhattan Island and to the south of Spuyten Duyvil Creek, and of and over the lands covered by said waters to low-water mark on the New Jersey side thereof, was ceded to the State of New York, reserving to the State of New Jersey jurisdiction of wharves, docks, and piers on the Jersey shore. The purpose of vesting exclusive jurisdiction over these waters in the State of New York was to promote the interests of commerce and navigation, which would, as supposed, be best subserved by giving to this state the exclusive control and regulation of waters of the bay and harbor of New York.

The next admiralty case involving the 1833 compact was The Rosemary, involving a forfeiture libel, for violation of customs revenue laws, of a vessel in the waters stretching westerly from the middle of the Hudson River opposite Manhattan Island and outside the low-water mark. The

District Court for the District of New Jersey, relying on The Norma, supra, held that the action should have been instituted in the Southern District of New York. 23 F. (2d) 103 (1927). However, the Circuit Court of Appeals reversed the lower court, 26 F. (2d) 354 (C. C. A. 3, 1928), stating at page 356:

> We are not unmindful that there is a conflict of decision on this subject in the earlier decisions of the District Courts of New York and those of New Jersey, but we feel the weight of reasoning, the acquiescence of the two states, and the trend of later judicial decision unite in vindicating the assertion of jurisdiction exercised by Judge Nixon of the District Court over the water in question forty years ago in The Kennedy, 25 F. 571. There a schooner was seized under process of that court when afloat and at anchor on the westerly side of the center line of the Hudson river, and Judge Nixon rightfully upheld the jurisdiction of the District Court * * *.

Certiorari was denied sub nom. Sound Motor Boat Service, Inc. v. U.S. at 278 U.S. 619.

In this connection, see Carroll v. United States, 133 F. (2d) 690 (C. C. A. 2, 1943), in which the Court recognized but avoided the issue, saying at page 693:

> Nor did it serve to fulfill the alternative condition of venue under §2 of Suits in Admiralty Act that the ship was "at Jersey City" at the time of trial -- again assuming that venue was to be judged as of that date. We should have no ground for saying that the stipulation meant any more than that she was at that time moored to a wharf in that city; and if so, she was not within the jurisdiction of the Southern District of New York, whether the western boundary of that district be the Jersey shore (The Norma, D. C., 32 F. 411), or the thread of the Hudson River. The Rosemary, 3 Cir., 26 F. 2d. 354.

The rights of the State of New Jersey with respect to property on the western side of the river and bay have been discussed in a number of cases. New Jersey's power to tax such property was upheld at an early date in State, Morris Canal and Banking Company v. Haight, Collector of Revenue of Jersey City, 35 N. J. L. (6 Vroom) 178 (1871), which, however, did not cite

the 1833 compact. The Court pointed out, at page 181, "The tide ebbs and flows over the premises granted by the State to the prosecutors under the act of 1867, and it is not uncovered by the water at low tide." The leading case in this area is Central R. R. Co. of New Jersey v. Jersey City, 70 N. J. L. 81, 56 Atl. 239 (1903), aff'd 72 N. J. L. 311, 61 Atl. 1118 (1905), aff'd 209 U. S. 473, 28 S. Ct. 592, 52 L. Ed. 896 (1908), which discusses in detail the effect of the 1833 compact. That case involved a tax levied by Jersey City upon lands of the plaintiff railroad lying between the middle of New York Bay and its low water mark on the New Jersey shore. It upheld the power of New Jersey with respect to the western side of the bay and river notwithstanding the "exclusive jurisdiction" of the State of New York under Article Third of the 1833 compact in that area, which has been admitted to be in the State of New Jersey under Article First thereof. Mr. Justice Garrison of the Supreme Court of New Jersey analyzes in detail the provisions of the 1833 compact in a lengthy opinion, which opinion was specifically approved by the Court of Errors and Appeals of New Jersey and by Mr. Justice Holmes of the Supreme Court of the United States on the appeal of the case. Much of the important and often-cited opinion of Mr. Justice Garrison is set out below, beginning at 56 Atl. 243:

> The brief historical review of the controversy between the two states has made it apparent that the question at issue between them was, in its ultimate essence, one of sovereignty, and that the settlement of this question was the one pressing matter, although other questions were to be settled as well. That this was recognized by each state in providing a modus of settlement is evident from the language of the statutes by which the respective commissioners were appointed and empowered. Upon this point the titles of these acts are suggestive, that of New York being "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey," while that of New Jersey was "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York"; and in the enactments themselves the same duality of objects to be settled is at all times observed in the statutes of each state. In plain terms, therefore, the commissioners were empowered to negotiate respecting two things, and thereby to settle two things, namely, limits of territory and jurisdiction. Nowhere is there any intimation that those two were deemed to be one and the same thing. Bearing this fact in mind, and that the main point in controversy was that of sovereignty,

the compact itself may be read with a reasonable expectation that the main point submitted to the commissioners was not lost sight of, and also that both of the powers reposed in them were duly executed. This expectation is fully justified by the terms of the compact. Article 1, in clear and explicit language, fixed the boundary line between the states as the middle of Hudson river and of the Bay of New York. This disposed of the question of territorial limits, and, had this been the only matter submitted to the commissioners, would have exhausted their authority in the premises. They were, however, empowered to deal also with jurisdiction. Hence the qualification with which article 1 concluded, "except as hereinafter otherwise particularly mentioned." To fulfill the conditions of this clause, the matters to be particularly mentioned must be "otherwise" - - that is, must alter or modify what has gone before; and, secondly, must be capable of exception-- that is, of subtraction from it, hence must be less than what had preceded. Articles 2 and 3 fulfill with precision each of these conditions, and from their position and context admit of no other rational interpretation than that they are the excepted matters to be particularly mentioned by which the otherwise unqualified concession of territorial limit was to be modified and abridged. This was effected in article 2 by providing that New York should retain its jurisdiction over certain islands lying in the waters mentioned in article 1, while article 3 continued the subtracting process by stipulating that New York should enjoy exclusive jurisdiction over all the waters included within the territorial limits of New Jersey up to low-water mark on the New Jersey shore, subject to certain property rights and jurisdictions which are excepted in favor of New Jersey, which thus constituted an exception to an exception. The remaining articles are not directly pertinent.

It will have been noted that sovereignty, eo nomine, is not mentioned in these articles, and yet no one contends that it was not disposed of by them. There are, in fine, two declarations contained in these articles, either of which may carry sovereignty, namely, territorial boundary and jurisdiction; the first by imperative implication, the other by signifying governmental jurisdiction, in which case it is a synonym for sovereignty.

The relation between the territorial limits of a state and its sovereignty is thus spoken of by Judge Cooley in the opening section of his work on Constitutional Limitations: "The sovereignty of a state commonly extends to all the subjects of government within the territorial limits occupied by the associated people who compose it; and, except upon the high seas, which belong equally to all men, like the air, and no part of which can rightfully be appropriated by any nation, the dividing line between sovereignties is usually a territorial line. In American constitutional law, however, there is a division of the powers of sovereignty between the national and state governments by subjects; the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the states and territories, while the states have the like complete power, within their respective territorial limits, over other subjects." Cooley on Constitutional Limitations, p. 2.

It is further a matter of common knowledge that in the creation of new states it is by the exact fixation of their territorial limits, and not by the precise enumeration of their governmental powers, that sovereignty arises and is exercised. Jurisdiction, as has been said, may mean governmental jurisdiction as distinguished from juridical, in which case it is the exact equivalent of sovereignty. Either term, therefore, "state boundary" or "state jurisdiction," may connote sovereignty; and under the one or the other of these heads the matter of sovereignty was unquestionably disposed of in the articles under consideration. Whatever divergency of view exists as to the force and effect of the compact in this respect must be ascribed to the elasticity of the term "jurisdiction." Regarded, however, as a synonym for "sovereignty"--which must be the contention here--the force of the word is greatly impaired in the present instance by the adjective "exclusive," as so flagrant a redundancy as "exclusive sovereignty" should not lightly be imputed to the framers of these articles.

The grounds for thinking that sovereignty is disposed of under the head of "Territorial Limits" rather than under that of "Jurisdiction" are several and various. In the first place, the legislative direction to each set of commissioners was to deal with both

territorial limits and jurisdiction, which was the merest tautology if the jurisdiction referred to was in itself sovereignty. In the next place, the commissioners did, in several instances, deal with jurisdiction in its juridical sense, a matter to which they were in no wise empowered if the term "jurisdiction", used in the statutes under which they were appointed was governmental. Furthermore, the facts that sovereignty was the main point at issue, that territorial limits preceded jurisdiction in the enumeration of the commissioners' authority, and that the first article dealt conclusively with the question of territorial limits, are all indications that in dealing with this power the commissioners were settling the main point at issue. More conclusive still is the circumstance that having, in article I, settled the matter of territorial limits, the jurisdiction with which the commissioners dealt was excepted from it, which is perfectly rational if the jurisdiction was juridical, and hence a mere incident of sovereignty; but was palpably irrational, not to say inconceivable, if jurisdiction was of itself that very sovereignty.

The significance of the title to the act confirming the agreement is to be noted, which, as well as the recitals, mentions jurisdiction as a distinct subject covered by the agreement. See prefatory note.

A further ground is the conclusive decision of the Court of Appeals of New York, adverse as it is to the claim now advanced on behalf of the sovereignty of that state, pronounced first in the case of People v. Central Railroad Company of N. J., already cited, in which the present prosecutor was the successful defendant, and later affirmed by the same court in the case of Ferguson v. Ross, 126 N. Y. 459, 27 N. E. 954. In the earlier case Justice Smith, announcing the reasoning of the court, said: "Whatever doubt may have existed before upon the subject, immediately upon the adoption and ratification of this convention or treaty the sovereignty and jurisdiction of the respective states extended and attached to that portion of the said river and other waters assigned to each state respectively by said article, up to the line of the boundary therein fixed and established;" and in the latter opinion Judge Andrews, who spoke for a unanimous court, said: "The purpose of vesting exclusive jurisdiction over these waters in the state of New York was to promote the interests of commerce and navigation, which would, as supposed, be best subserved by giving to this state the exclusive control and regulation of the waters of the bay and harbor of New York." Indubitably, therefore, the state of New York, through its highest

judicial tribunal, has expressly disowned any interpretation of the compact in question by which the sovereignty of New Jersey over the territorial limits granted by the compact of 1833 is to be in any wise impugned.

Lastly, due weight must be given to the statement of Judge Elmer, himself one of the commissioners, that what was conceded to the state of New York was "the exclusive jurisdiction over offenses in and upon the waters or the land covered by the waters outside of low-water mark." State v. Babcock, 30 N. J. Law, 29. Indeed, it is not difficult to read between the lines of this extrajudicial statement that, if the commissioners had not been empowered to deal with jurisdiction as distinct from sovereignty, and as a compensating factor for the concession New York was expected to make respecting territorial limits, it was in the highest degree improbable that any agreement whatsoever could have been reached. This suggestion, which is more than hinted at by Judge Elmer, explains much that is otherwise obscure, indicating, among other things, that the jurisdiction touching which the commissioners negotiated was neither sovereignty itself, nor even such jurisdiction alone as is incident to sovereignty, but that it was in great part extraterritorial jurisdiction, which was to be, and was in fact, conceded in return for reciprocal concessions. This obiter declaration of Judge Elmer, while not cited as authority for any position taken, is an added reason for holding that "jurisdiction," as that term was employed by the commissioners, was not the equivalent of "sovereignty," which is the precise point upon which the present litigation turns.

Opposed to these considerations stands the fact, already alluded to, that jurisdiction, in a proper context, may imply sovereignty. Enough has been said, I think, to indicate that that circumstance, as applied to the present juncture, is entirely insufficient to withstand the array of reasoning and authority to the contrary, and that the jurisdiction that was conceded to New York over the land and waters within the territorial limits of New Jersey was not governmental.

From these considerations the conclusions reached are that the agreement of 1833 between the commissioners representing the

states of New Jersey and New York, having been confirmed by their respective legislatures, and approved by the Congress of the United States, established the boundary line between this state and the state of New York in the middle of the Hudson river and of the Bay of New York; and that the sovereignty of the state of New Jersey is co-extensive with the territorial limits thus established, subject only to such extraterritorial jurisdiction of a juridical character as was, by the said compact, conceded to the state of New York, from which it results that the sovereign power of taxation over all the territory thus defined resides in the state of New Jersey.

At this point it should be noted that the distinction between territorial or boundary lines on the one hand and jurisdiction on the other is perpetuated in the compact of 1921, which was consented to by Congress on August 23, 1921 (42 Stat. 174, ch. 77), and by which the Port of New York Authority was created. Article 20 of that compact provides:

> ART. 20. 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.

When the Central Railroad case reached the Supreme Court (Central R.R. Co. of New Jersey v. Jersey City, 209 U.S. 473, 28 S. Ct. 592; 52 L.Ed. 896 (1908)) the opinion of the court was rendered by Mr. Justice Holmes, in which he said at 209 U.S. 478:

> Thus the land which has been taxed is on the New Jersey side of the boundary line but under the "exclusive jurisdiction" of New York, subject to the exclusive right of property in New Jersey and the limited jurisdiction and authority conferred by the paragraphs summed up. The question is which of these provisions governs the right to tax. It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. The boundary line is the line of sovereignty, and the establishment of it is not satisfied but is contradicted by the suggestion that the agreement simply gives the ownership of the land under water on the New Jersey side to that State as a private owner of land lying within the State of New York. On the contrary, the

> provision as to exclusive right of property in the compact between States is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim, which, for all that appears, may have been inconsistent with titles already accrued and which would lose significance the moment that New Jersey sold the land. We repeat that boundary means sovereignty, since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears.

The court concluded at 209 U. S. 480:

> Without going into all the details that have been mentioned in the careful and satisfactory discussion of the question in the state courts we are of opinion that the land in question is subject to the sovereignty of the State of New Jersey, and that the exclusive jurisdiction given to the State of New York does not exclude the right of the sovereign power to tax.

In the course of the opinion, Mr. Justice Holmes made an observation of particular importance in connection with a determination of the legal status of Ellis Island. He stated at 209 U. S. 479:

> Again, as was pointed out by the state court, the often expressed purpose of the appointment of the commissioner and of the agreement to settle the territorial limits and jurisdiction must mean by territorial limits sovereignty, and by jurisdiction something less. It is suggested that jurisdiction is used in a broader sense in the second article, and that may be true so far as concerns Bedlow's and Ellis Islands. But the provision there is that New York shall retain its "present" jurisdiction over them, and it would seem on its face simply to be intended to preserve the status quo ante, whatever it may be.

In the meantime, an action was brought in a New Jersey court to foreclose the equity of redemption in, and to direct the sale of, to pay a debt secured by a mortgage thereon, certain lands which "lie within the boundaries of the state of New Jersey, but within the harbor of the state of

New York, and are islands surrounded by the waters of the Hudson River and the bay of New York, shortly described as 'Robbin's Reef' and 'Oyster Island.'" Cook v. Weigley, 72 N.J. Eq. 221, 65 Atl. 196 (1906). The court pointed out the distinction between jurisdiction and sovereignty as brought out in Mr. Justice Garrison's opinion in Central R.R. Co. of New Jersey v. Jersey City, 70 N.J.L. 81, 56 Atl. 239 (1903), and further stated at 65 Atl. 197:

> It is difficult to conceive why, if the ceding of exclusive jurisdiction over waters included within the territorial limits ceded confers only an extraterritorial jurisdiction, and does not destroy such governmental powers as sovereignty implies, why the retention of exclusive jurisdiction over a part of the land declared to be within the limits of the State of New Jersey should have any greater force. By article 2 of the treaty the lands in question are declared to be within the boundary of the state of New Jersey, and subject to the sovereignty of that state, incumbered, however, with the right of New York to exercise jurisdiction over it. This in my opinion does not change the territorial location of the land, for the reservation of jurisdiction thereover did not have the effect of retaining the land as a part of the territory of the state of New York, and the jurisdiction which the state of New York retained, and may exercise, is no greater than the "exclusive jurisdiction" granted to New York over all the waters of the bay of New York, and does not have the effect here contended for, of depriving this court of the jurisdiction necessary to determine the legal status of these islands to the same extent that it may do with regard to all other lands within its boundaries.

The treatment in Cook v. Weigley of "Robbin's Reef" and "Oyster Island" is discussed further hereinafter.

The power of New Jersey to tax submerged lands in the western side of New York Harbor was reaffirmed in Leary v. Mayor & Aldermen of Jersey City, 208 Fed. 854 (C.C.A. 3, 1913), aff'd 248 U.S. 328 (1919), involving a suit to remove a cloud on title to submerged lands arising out

of tax liens asserted by Jersey City. The Circuit Court of Appeals said, at page 208 Fed. 857: "It is clear, therefore, that the territory of the state of New Jersey extends to the median line of New York Bay, and that incident to the ownership of such territory is the sovereign power to tax the same." The Supreme Court stated, at 248 U.S. 330, that the contention "that the lands, although within the territorial limits of the State of New Jersey, were, by the compact made in the year 1833 between that State and the State of New York, approved by Act of Congress of June 28, 1834, c. 126, 4 Stat. 708, made subject to the governmental jurisdiction of the State of New York, * * * has been decided adversely to appellant by this court in Central R. R. Co. v. Jersey City, 209 U.S. 473."

The uncertainty prior to the decision of the Supreme Court in Central R.R. Co. of New Jersey v. Jersey City, supra, of the right of New Jersey to tax submerged lands in the Hudson River had held up the enforcement of those taxes until after that decision. A suit brought seven months after that decision to reduce taxes assessed, but uncollected, for the years 1899-1907 was held not to have been barred by laches in Mayor and Aldermen of Jersey City v. Central R.R. Co. of New Jersey, 212 Fed. 76 (C.C.A. 3, 1914), the court stating at page 82:

> As to the fourth point above referred to, we do not find that defendant's charge, that the complainant was guilty of laches in bringing the present suit, is justified by the facts appearing of record. It appears that, after the assessment of 1899, complainant was advised that the lands, so far as they lay under the waters of the Hudson river, were not within the jurisdiction of the defendant corporation or of the state of New Jersey. It accordingly applied, as hereinbefore stated, to the New Jersey Supreme Court for a writ of certiorari, to review said assessments. The writ being allowed, the New Jersey Supreme Court sustained the authority of the city to tax this property. On a writ of error, the Court of Errors and Appeals of that state affirmed the judgment of the Supreme Court, and upon a writ of error sued [sic] out of the United States Supreme Court, the judgment of the New Jersey Court of Errors and Appeals was affirmed in June, 1908. Though subsequently to 1899 the defendant corporation annually assessed taxes against these properties, by common consent of the parties nothing was done toward the collection and enforcement of the

payment of these taxes until after the decision of the United States Supreme Court. The city then took the matter up and advertised the properties for sale for the arrears of taxes, and it was to restrain these sales that the bill in this case was filed.

Tennant v. State Board of Taxes and Assessments, 95 N.J.L. 465, 113 Atl. 254 (1921), was a proceeding involving a dispute over the right of Jersey City to tax a tug of a bankrupt firm. The tug had been ordinarily employed in and about the waters of New York Harbor but was brought into the tidewaters on the New Jersey side of the Harbor and moored there, apparently unused. After the state tax date it was sold by the plaintiff trustee and the U.S. Marshal to satisfy certain libels against it. A tax was levied by the defendant on the tug, the sale price of it being adopted as its fair value for tax purposes. The court, in upholding the tax, stated at 113 Atl. 255:

> As an active tug plying in the waters of New York Harbor it was taxable at the residence of the owners or the permanent situs of the property, it is immaterial which. American Mail Steamship Co. v. Crowell, 76 N.J. Law, 54, 68 Atl. 752; Shrewsbury v. Merchants' Steamboat Co., 76 N.J. Law, 407, 69 Atl. 958; West Shore R. Co. v. State Board, 82 N.J. Law, 37, 81 Atl. 351; Id., 84 N.J. Law, 768, 85 Atl. 826. But with the bankruptcy its condition became one of passivity; it was a mere chattel secured from drifting and awaiting a sale. Had it been drawn out on a ship railway or even tied up to a wharf on the Jersey City water front, its taxable situs would be indubitable. While the point does not seem to be definitely argued, we gather from the assertion that the tug was in the "tidewaters of New York Bay" that it is claimed to have been out of the taxing jurisdiction of New Jersey because of the interstate treaty limiting the "jurisdiction" of New Jersey on the waters of New York Bay and the Hudson river. C.S. p. 5358. But this jurisdiction has been held by the courts of both New York and New Jersey to be a jurisdiction simply for the exercise of the police power. People v. Central R.R. of N.J., 42 N.Y. 283; Central R.R. Co. v. Jersey City, 70 N.J. Law, 81, 56 Atl. 239; s.c., 209 U.S. 473, 28 Sup. Ct. 592, 52 L.Ed. 896. In the opinion of Mr. Justice Garrison in 70 N.J. Law at page 97,

56 Atl. at page 245, it is declared that "the sovereign power of taxation over all the territory thus defined (i. e., to the middle of the Hudson river) resides in the State of New Jersey." See Cook v. Weigley, 72 N. J. Eq. 221, 65 Atl. 196. A vessel more or less permanently moored within the territory is, in our opinion, personal property "found" within the taxing district, in the same manner as, e. g., coal on storage pending a sale and removal. Lehigh & Wilkes-Barre Coal Co. v. Junction, 75 N. J. Law, 922, 68 Atl. 806, 15 L. R. A. (N. S.) 514. It is pertinent to note, while on this subject, that the libels against this tug were filed in the United States District Court for the District of New Jersey, and the seizure was made by the marshal of that court, in conformity, as it seems to us, with the statutory provision that "the state of New Jersey shall constitute one judicial district" (Rev. Stat. U. S. §531; Comp. Stats. U. S. §1082) treated as meaning that the district extends to the middle of the river for all purposes of executing civil process out of that court.

The right of New Jersey to tax submerged land on the western side of the New York Bay and Hudson River was sustained, without extended discussion, in Mayor and Aldermen of Jersey City v. New York Bay R. Co., 13 F. (2d) 982 (C. C. A. 3, 1926) and Mayor and Aldermen of Jersey City v. Lehigh Valley Harbor Terminal Ry. Co., 13 F. (2d) 984 (C. C. A. 3, 1926).

New York Cent. R. Co. v. State Department of Taxation and Finance, 137 N. J. L. 288, 59 A. (2d) 859 (1948), aff'd, 63 A. (2d) 268, involved a review of tax assessments upon certain floating equipment, consisting of ferry boats, tugs, &lighters, of the New York Central Railroad Company and the Erie Railroad Company, which operated in the Hudson River and had New York as their home port. The Court apportioned the tax on the basis of the time the floating equipment was in New Jersey tidal waters based on a New Jersey statute which provided that "Tangible personal property which is used or kept but a part of the time in this State by any railroad shall be assessed such proportionate part of its value as the time it is used or kept in this State during the calendar year preceding bears to the whole year." Concerning the 1833 compact, the Court said at 59 A. (2d) 862:

We are urged to set aside the assessments on the grounds that New Jersey has surrendered its right to tax the property in question by reason of an agreement of 1833 between New Jersey and

New York, whereby the State of New Jersey ceded its sovereignty over the waters of New York harbor to the State of New York. We hold this contention to be without merit, and disposed of by the decisions in Central Railroad Company of New Jersey v. Jersey City, 70 N. J. L. 81, 56 A. 239, affirmed 72 N. J. L. 311, 61 A. 1118, and Tennant v. State Board of Taxes and Assessments, 95 N. J. L. 465, 113 A. 254. The import of these decisions is that such jurisdiction as may have been surrendered to New York was simply for the exercise of the police power, and did not affect the sovereign power of taxation vested in the State of New Jersey.

Other effects of the 1833 compact on the respective powers of New Jersey and New York on the western side of New York Harbor were considered in a variety of cases in both the New Jersey and New York courts.

Carlin v. New York Dock Co., 135 App. Div. 876, 120 N. Y. S. 261 (1909), motion to dismiss appeal granted for failure to stipulate for judgment absolute in the event of affirmance, 122 N. Y. 600, 91 N. E. 1080, involved a suit for damages for death arising out of a collision between two car floats in the Hudson or North River. The New York Court stated at 120 N. Y. S. 264:

> It is urged that the collision and death happened so far to the westward in the river that it was within the jurisdiction of the state of New Jersey. The state of New York had jurisdiction of the locus in quo, and the limitation that obtained in Devoe Manufacturing Co., 108 U. S. 401, 2 Sup. Ct. 894, 27 L. Ed. 764, did not obtain. In People v. Central R. Co. of N. J., 42 N. Y., at page 299, it is said:
>
> > "Confessedly, vessels afloat upon the waters of the bay or river are, and were intended to be, subject to the exclusive jurisdiction of New York."
>
> And I think it is undoubted that the municipal law of New York governs the case at bar. Ferguson v. Ross, 126 N. Y. 459, 463, 27 N. E. 954. If this state has jurisdiction of the waters for the purpose of commerce and navigation, its legislative power to create a cause of action in favor of the next of kin of one negligently killed by vessels navigating in such waters would follow.

However, in Clarke v. Ackerman, 243 App. Div. 446, 278 N. Y. S. 75 (1935), a suit was brought in the New York court for damages resulting from an accident between the plaintiff's motorcycle and defendant's automobile on the George Washington Bridge across the Hudson River about 800 feet west of the center of the bridge. Service was had on the defendant, a nonresident, under Section 52 of the New York Vehicle and Traffic Law, under which a nonresident operating a motor vehicle on a public highway in New York is deemed to have appointed the Secretary of State of New York as his attorney for service of process. After reciting the facts of the case, the Court said at 278 N. Y. S. 77:

> It thus appears that the tort alleged in the complaint occurred within the territorial confines of the state of New Jersey. In view of the phrasing of section 52, Vehicle and Traffic Law, it would seem that, regardless of any further questions of jurisdiction, the Legislature had not seen fit, even if it had the power, to permit substituted service of process in cases involving accidents on a highway that was not within the agreed territorial limits of New York state.

The Court then cited People v. Central Railroad Co. of New Jersey, Ferguson v. Ross, and Central Railroad Co. of New Jersey v. Jersey City, supra, as authority for saying that the jurisdiction of New York on the western side of the Hudson was limited to police jurisdiction on the river. The Court then continued at 278 N. Y. S. 79:

> We think, therefore, that article third [of the 1833 compact] has been so limited by judicial interpretation as to make the present claim of jurisdiction untenable.
>
> It is possible to consider this bridge as an "improvement" made to or on the shore of New Jersey under article third, subdivision 2, of the treaty. On the New Jersey shore the bridge is supported by one great pier placed upon the bed of the river east of the low-water mark. The floor of the bridge extending out to the center may be analogized to a wharf or pier. If such a comparison is just, then, under the specific

exceptions of the treaty, jurisdiction is retained by New Jersey to the center of the river.

Two statutes, chapter 146, Laws of New Jersey, 1932 (N.J. St. Annual 1932, §* 161-151(9) et seq.) and chapter 251, Laws of New York, 1934, incorporate a practical legislative construction of the treaty which is of some aid in interpreting the question. Section 2 of each of these acts provides for the punishment for violation of certain rules and regulations "within the state." Furthermore, there are other sections in the acts which indicate that ordinary territorial limitations of jurisdiction were to be observed in relation to offenses on any vehicular crossing. See, also, chapter 113, Laws of New Jersey, 1932 (N.J. St. Annual 1932, § * 161-151(8).

Aside from any precedent cited, 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. We hold, therefore, that the jurisdiction granted to New York state by article third of the treaty does not authorize the courts of this state to take jurisdiction of a nonresident under any powers granted by section 52 of the Vehicle and Traffic Law, and under the circumstances herein set forth.

The rights of New York state under articles sixth and seventh of the treaty and under article third in so far as jurisdiction is conferred on New York state "of and over all the waters" of the river and harbor are not passed on, except to the extent necessary to decide the particular question here presented. * * *

Although the Court avoided a determination of the extent of New York's jurisdiction, other than a strict "police" jurisdiction, over the waters on the western side of the Hudson River, an issue in that regard was squarely presented in Kowalskie v. Merchants & Miners Transp. Co., 76 N. Y. S. (2d) 699 (1947). That case was an action brought by stevedores for personal injuries sustained during the course of their employment while loading a vessel in the Hudson River at Pier 4, off the foot of 2nd Street, Hoboken, New Jersey. Suit was brought more than 2 years, but less than 3 years, after the injuries were suffered, and the question was squarely presented whether the two-year statute of limitations of New Jersey, or the 3-year

statute of limitations of New York, applied. The issue was discussed by the Court at 76 N. Y. S. (2d) 699f, as follows:

> Presumably, they admit that if their causes of action accrued while they were on the lighter tied at the end of a pier at Hoboken, New Jersey, the New Jersey statute would be applicable. It is their claim, however, that they did not suffer any injuries as the result of the explosion complained of until they had jumped off the burning lighter into the waters of the Hudson River, and that their causes of action did not accrue until that time. See Beale on Conflict of Laws, Vol. 2, §377.2; Restatement, Conflict of Laws, §377. In other words, the plaintiffs contend that their injuries were sustained in the waters of the river, and not while they were aboard the ship. This circumstance is dwelt upon by the plaintiffs to sustain their position that the accident occurred in New York, where the longer period of limitations is applicable to actions resulting from personal injuries.
>
> According to the plaintiffs, the waters of the Hudson River are within the jurisdiction of the State of New York by virtue of a treaty between the States of New York and New Jersey, State Law, §7.

The Court dismissed the plaintiffs' claim as being without merit. It cited People v. Central R. Co. of N. J., supra, as authority that New York's jurisdiction to the low water mark on the New Jersey side was merely a police jurisdiction, which, under the doctrine expressed by Mr. Justice Holmes in Central R. Co. of N. J. v. Jersey City, supra, "did not affect the sovereignty of New Jersey over those waters" and that the purpose of Article Third of the 1833 compact "was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1." It also cited Clarke v. Ackerman, supra, to the effect that "There was never any intention on the part of New Jersey to give up its prerogatives of sovereignty or any of the territory granted it by the treaty." The Court concluded at 76 N. Y. S. (2d) 701:

> It follows that even if the causes of action accrued after the plaintiffs jumped into the waters of the Hudson River

adjacent to the pier to which the lighter was tied, the New Jersey statute of limitations is applicable. Admittedly, the accident occurred within the geographical boundaries of the State of New Jersey, over which it retained sovereignty under the treaty referred to.

In Ross v. Mayor and Council of Borough of Edgewater, 115 N.J.L. 477, 180 Atl. 866 (1935), aff'd, 116 N.J.L. 433, 184 Atl. 810, cert. den., 299 U.S. 543, 57 S. Ct. 37, 81 L.Ed. 400, the prosecutor was the owner of lands in the borough of Edgewater bounded by the high water mark on the Hudson River and holder of a license issued by the State's Board of Commerce and Navigation to use a certain boat storage basin fronting his uplands. His complaint alleged that one Koch, in violation of the provisions of an ordinance of the Borough, "did store, moor and maintain a vessel commonly known as a barge on the flat lands of the Hudson River, between the high and low water marks of said river," without having first obtained a license therefor. The primary question before the Court was whether the jurisdiction of the Borough, in respect of the subject matter of the ordinance, extended to the lands lying between the high and low water marks of the river, a distance of approximately 500 feet. The Court, in upholding the validity of the ordinance, discussed the 1833 compact, which recognized the jurisdiction of the State of New Jersey over lands between the high water mark and low water mark on the New Jersey shore. The Court stated at 180 Atl. 869f:

> The borough, while not disputing that its easterly boundary is the Hudson river, maintains that, under the treaty negotiated between the states of New York and New Jersey in 1833, and ratified by the Congress on June 28, 1834 (4 Comp. St. 1910, p. 5358; 4 U.S. Stat. at Large, p. 708), the state's territorial boundary is the median line of the river, and that, "since it is the universal practice of the various states to subdivide their entire territory into counties and their counties into municipalities, the existence within a state of any portion of its territory without county or municipal relation is unheard of," and the jurisdiction of the borough is therefore not limited to the high-water mark, but is "coextensive with the jurisdiction of the State of New Jersey, in respect to the lands beneath the waters of the Hudson River adjacent to said borough," -- citing Leary v. Jersey City (C.C.A.) 208 F. 854, 859, affirmed Id., 248 U.S. 328, 39 S. Ct. 115, 63 L. Ed. 271.

While this treaty established the boundary between the two states at the median line of the river, the third article thereof grants to the state of New York "exclusive jurisdiction of and over all the waters of the bay of New York, and of and over all the waters of Hudson river, lying west of Manhattan island, and to the south of the mouth of Spuytenduyvel 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 New Jersey's "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"; and subject, also, to its "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"; and, as well, its "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." This plainly comprehends the exercise by the state of New York of a general police jurisdiction, for the promotion of the interests of commerce and navigation, over the waters of the bay and river to the low-water mark of the New Jersey shore, subject to this state's exclusive jurisdiction, with the exceptions noted, over the wharves, docks, and improvements on its shore, and vessels aground on the shore or fastened to any wharf or dock thereon. State v. Babcock, 30 N.J. Law, 29; Central R.R. Co. of Jersey City, 70 N.J. Law, 81, 56 A. 239; affirmed Id., 72 N.J. Law, 311, 61 A. 1118, affirmed Id., 209 U.S. 473, 28 S.Ct. 592; 52 L.Ed. 896; People v. Central Railroad Co. of New Jersey, 42 N.Y. 283; Hall v. DeVoe Manufacturing Co. (D.C.) 14 F. 183.

In re Gutkowski's Estate, 135 N.J. Eq. 93, 33 A.(2d) 361 (1943) involved a distribution of the assets of a decedent's estate. The decedent, an infant, was a passenger on a ferry crossing a portion of the navigable waters of the Hudson River lying within a tidewater basin in Jersey City known locally as "The Gap" when the ferry collided with a steam lighter throwing the decedent into the water where he drowned. Decedent resided

in Bayonne, New Jersey, and was survived by his father, mother, three brothers and five sisters. The father was appointed administrator ad prosequendum by the Surrogate of Hudson County, New Jersey, and brought a suit in the United States District Court for the Southern District of New York for the wrongful death of the decedent. The case was settled for $3950 of which there remained, after payment of fees and expenses, $2050 in the hands of the administrator ad prosequendum, who subsequently qualified as general administrator. A judgment was entered in another action against the father and mother, and, as a result, a receiver was appointed of their rights and credits. The receiver sought in this action to recover the $2050, contending that under the 1833 compact jurisdiction over the accident was vested in the State of New York and was, accordingly, governed by the New York Death Act, which provided for distribution of recoveries thereunder to the father and mother to the exclusion of the brothers and sisters. The administrator contended that distribution was governed by the New Jersey Death Act, which provided for distribution to the father and mother and brothers and sisters of the decedent, share and share alike. The Court held that under the law of conflicts the law of the place of wrong covers not only the right of action but the distribution of the recovery as well. The Court then reviewed earlier cases construing the 1833 compact and observed that Carlin v. New York Dock Co. 135 App. Div. 876, 120 N. Y. S. 261 (1909), holding that the New York Legislature had power to create a cause of action in favor of the next of kin of one negligently killed by vessels navigating in the water of New York Harbor, "does not seem to be in accord with the settled policy of the New York courts. The New York courts in the other cases have been reluctant to extend the extra-territorial jurisdiction beyond the apparent intention of the treaty as will appear by a study of the cases above cited, to wit, People v. Central R. Co. of New Jersey, supra; Ferguson v. Ross, supra, and Clarke v. Ackerman, supra." The Court concluded, at 33 A. (2d) 366, as follows:

> Upon a careful reading and consideration of the language of the treaty and the cases cited, I have reached the conclusion that the extra-territorial jurisdiction yielded to the State of New York by Article III of said treaty was nothing more than a police power under which that state could protect and advance the interests of its port. The operation of that extra-territorial right was intended

to be restricted to matters affecting health, commerce and safe navigation. I am unable to read into the treaty any intention on the part of New Jersey to give to the State of New York the right to create a cause of action for a tort which is committed west of the center line of the river; that is, the territorial limits of New Jersey defined by Article I, notwithstanding the language contained in Carlin v. New York Dock Co., supra. A proper interpretation of the language used in that case is that the court failed to appreciate the real purport of the decisions in People v. Central R. of New Jersey and Ferguson v. Ross, supra. I am of the opinion that the court was wrong when it said that the police power given to New York allowed the legislature of that state the right to create a cause of action for an act occurring in this state.

State v. Carlaftes, 24 N.J. 451, 132 A. (2d) 515 (1957), involved an indictment for violation of the gambling laws of New Jersey on board a ship moving in the waters of Sandy Hook Bay, south of the territorial boundary between the States of New York and New Jersey, and approximately one-half a mile off the New Jersey shoreline, seaward of the low-water mark. The Court discussed the 1833 compact and the earlier cases construing it, and continued at 132 A. (2d) 519:

> In brief, then, the Article III and Article V cessions of jurisdiction merely carved out a portion of that total governmental jurisdiction which the respective states would otherwise have exercised to their territorial boundaries as established in Article I, and envisioned a unilateral control and regulation in the interests of commerce and navigation within particular areas of the waters between the two states. Central R. Co. of New Jersey v. Jersey City, 209 U.S. 473, 479, 28 S. Ct. 592, 52 L. Ed. 896, 899 (1908); Ferguson v. Ross, 126 N.Y. 459, 27 N.E. 954 (Ct. App. 1891); Clarke v. Ackerman, 243 App. Div. 446, 278 N.Y.S. 75 (App. Div. 1935).
>
> We do not determine whether the Article III jurisdiction ceded to New York encompasses an exclusive control over all criminal offenses, and specifically the power to deal with gambling on the waters between the two states. State v. Babcock,

supra, and Ferguson v. Ross, supra, would indicate an exclusive criminal jurisdiction. The State has not argued otherwise, and we may assume the proposition for the purpose of deciding the point at issue.

However, the Court upheld the indictment covering an incident in the lower bay of New York, with the following statement at 132 A. (2d) 522:

> We conclude, then, that the Compact of 1834 treats the "bay of New York" as that body of water lying north of the Narrows; that the Article III jurisdiction of New York over the waters of the "bay of New York" is so confined; that in all the waters lying south of the Narrows between New York and New Jersey and easterly of a line from Princess Bay Lighthouse to Matawan Creek neither state enjoys an extra-territorial jurisdiction of the type provided for in Articles III and V. In this area boundary is total sovereignty.

The 1833 compact was dealt with by analogy in State v. Federanko, 26 N.J. 119, 139 A.(2d) 30 (1958), involving a charge of gambling in and upon the waters of the eastern half of the Delaware River. The jurisdiction of the State of New Jersey was attacked. A boundary compact had been entered into in 1905 between the States of New Jersey and Delaware and approved by Congress. Thereafter, a New Jersey Court had held, in State v. Cooper, 93 N.J.L. 13, 107 Atl. 149 (1919) that under the 1905 compact the jurisdiction of each state, both civil and criminal, extended to the middle line of the river. Still later, however, the Supreme Court of the United States in State of New Jersey v. State of Delaware, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847 (1934), had held that the State of Delaware had title to the river and the subaqueous soil thereof up to law water mark on the easterly or New Jersey side within a 12-mile circle from the town of New Castle. The Court upheld the conviction, stating that State v. Cooper had not been overruled by the Supreme Court in New Jersey v. Delaware. The Court said at 139 A. (2d) 33:

> It is true, of course, that prior to 1905 New Jersey claimed the bed of the river at the location involved here to the middle of the main channel, and that the adverse ruling of the Supreme Court declared the fee thereto to be in Delaware. But ownership

of subaqueous soil by one state does not stand in the way of an agreement with its neighbor on the other side for a sharing of the criminal jurisdiction over the river. State v. Cunningham, 102 Miss. 237, 59 So. 76 (Sup. Ct. 1912); People v. Central R. Co. of New Jersey, 42 N. Y. 283, 294 (Ct. App. 1870); State v. Davis, 25 N. J. L. 386 at page 388 (Sup. Ct. 1856). For example, the compact of 1834 between New Jersey and New York established ownership by this State of the land under the Hudson River between Manhattan Island and New Jersey to the middle of the river. L. 1834, p. 118; N. J. S. A. 52:28-4. By the same concord, New York was given "exclusive jurisdiction of and over all the waters of the bay of New York, and of and over all the waters of Hudson River, lying west of Manhattan Island, and to the south of the mouth of Spuyten Duyvel 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." This language was held to confer on New York exclusive criminal jurisdiction over the described waters of the river to the New Jersey low water mark. State v. Babcock, 30 N. J. L. 29 (Sup. Ct. 1862); People v. Central R. Co. of New Jersey, supra. It was a grant of police power, but not a grant of sovereignty so as to interfere with the incidence of taxation arising from the ownership of the bed to the thread of the stream. State v. Carlaftes, 24 N. J. 451, 457, 132 A. 2d 515 (1957); Tennant v. State Board of Taxes & Assessments, 95 N. J. L. 465, 113 A. 254 (E. & A. 1921); Central R. Co. of New Jersey v. Jersey City, 70 N. J. L. 81, 91, 56 A. 239 (Sup. Ct. 1903), affirmed 72 N. J. L. 311, 61 A. 1118 (E. & A. 1905), affirmed 209 U. S. 473, 28 S. Ct. 592, 52 L. Ed. 896 (1908). Defendant's first ground for reversal is therefore without merit.

Location of Ellis Island by State

The discussion above concerning the respective rights of New York and New Jersey under the 1833 compact has dealt primarily with Article Third thereof as an exception to the consequences that would otherwise flow from the establishment of the boundary line at the center of the River and Bay by Article First. Article Third provides as follows:

> ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel 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.

In dealing with Ellis Island, and with Liberty Island, we are concerned primarily with Article Second, which provides as follows:

ARTICLE SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's 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.

The difference between the effect of Article Third and Article Second was alluded to by Mr. Justice Holmes in Central R.R. Co. of N.J. v. Jersey City, 209 U.S. 473; 28 S. Ct. 592, 52 L. Ed. 896 (1908), in which he stated at 209 U.S. 479:

It is suggested that jurisdiction is used in a broader sense in the second article, and that may be true so far as concerns Bedlow's and Ellis islands. But the provision there is that New York shall retain its "present" jurisdiction over them, and it would seem on its face

simply to be intended to preserve the status quo ante, whatever it may be.

In other words, Article Third attempted of itself to define the nature of the exclusive jurisdiction of New York in the waters and land under water on the western side of the Bay of New York and Hudson River. As we have seen, the courts have construed the exclusive jurisdiction which the State of New York "shall have and enjoy" to be a qualified or limited one in the nature of a police jurisdiction, which the 1833 compact states is to be subject to the "rights of property and of jurisdiction" of New Jersey therein prescribed. On the other hand, the 1833 compact does not purport to define the jurisdiction which New York "shall have and enjoy" over Bedloe's Island and Ellis Island, but instead provides that New York "shall retain its present jurisdiction" of and over those islands. Article Second does not refer to any rights or jurisdiction of New Jersey as is provided for in Article Third or, with respect to New York, in Article Fifth, nor is the jurisdiction qualified as in Article Fourth. Moreover, New Jersey's right, under Article Sixth, to serve process does not extend to Bedlow's or Ellis Islands or to the other islands referred to in Article Second.

In order to determine the then "present jurisdiction" of New York over those islands it is necessary to examine into the nature of the jurisdiction which New York itself had theretofore asserted and exercised. The "present jurisdiction" of New York is not otherwise qualified by the provisions of the 1833 compact and, furthermore, is not qualified by the claims, if any, that may have theretofore been asserted by New Jersey except to the extent that they may explain and elaborate upon the jurisdiction theretofore asserted by New York.

Even the brief historical sketch of Ellis Island, and also of Liberty Island, that is set out above shows that New York asserted full dominion and sovereignty over the islands. Transfers of title were recorded in the land records of New York and prior to 1833 were declared by the statutes of New York to be a part of the County of New York: An Act of 1691, the Montgomerie Charter of 1730 (Gerard, Titles to Corporation in N. Y. C.), and Chap. 63, Laws of 1788; and First Ward of the City of New York: Laws of 1791 (Chap. 18), 1803 (Chap. 29), 1817 (Chap. 285), 1825 (Chap. 195), and the Revised Statutes of 1830, Part I, ch. II, title II, sec. 2, sub. 5. In 1800 jurisdiction over both islands was ceded to the United States. This constitutes an assertion, rather than a disclaimer, of sovereignty. It did not thereby cease to be a part of the State of New York. See Howard v. Commissioners, 344 U.S. 624 (1953). Moreover, prior to 1833 the State of New York had owned both islands.

In this connection, the bill in equity was filed by New Jersey against New York in the Supreme Court of the United States in 1829 concerning the boundary line. The text of that bill is paraphrased in the opinion of the Supreme Court in Devoe Manufacturing Co. 108 U.S. 401, 406 (1882), and the paraphrase is quoted above.

What purports to be, in part, the exact text of the prayer of the bill, rather than a paraphrase, is set out in State v. Carlaftes, 24 N.J. 451, 132 A. (2d) 515 (1957), in part, as follows, at page 516:

> "* * * the State of New Jersey is justly and lawfully entitled to the exclusive jurisdiction and property of and over the waters of the Hudson, from the forty first degree of latitude, to the bay of New York, to the filum aquae or midway of the said river; and to the midway or channel of the said bay of New York, and the whole of Staten-Island Sound, together with the land covered by the water of the said river, bay and sound in the like extent." (P. 22, Bill to Settle Boundary, etc., New Jersey Boundary Line Pamphlets, (State Library).)

A characterization of that bill in equity is, as set out above, contained in message on March 11, 1831, by the Governor of New York to the New York Legislature, relative to the boundary line between New York and New Jersey. The message read, in part, as follows:

> It seems to be a mere question of sovereignty over the waters, inasmuch as New Jersey admits in her bill of complaint, that whatever right she may have had to the islands, those rights have been lost by adverse possession and the lapse of time.

In Hill v. Joseph, 205 Misc. 441, 129 N.Y.S. (2d) 348 (1954), discussed below, the Court referred to the unsuccessful meetings of the commissioners for the two States in 1826 or 1827 and stated at 129 N.Y.S. (2d) 349f.

> The report of these last commissioners to the New York State Senate in 1828 shows that the New Jersey commissioners submitted as part of their own proposals on the boundary

settlement, "that the islands called Bedlow's Island, Ellis Island, Oyster Island and Robin's Reef, to low water mark of the same, be held to be and remain within the exclusive jurisdiction of the state of New York." It was only after negotiations had broken down that the New Jersey commissioners claimed for their state not only these islands but Staten Island as well.

The State of New Jersey then brought an action, in 1829, in the United States Supreme Court against the State of New York for fixation of the boundary line. State of New Jersey v. People of State of New York, 3 Pet. 461, 28 U.S. 461, 7 L. Ed. 741. The complaint makes interesting reading today. In it, New Jersey alleged that in colonial times New York had "wrongfully and forcibly possessed itself of the said island called Staten Island and the other small islands in the dividing waters between the two States" and that New Jersey was "a feeble colony, and under a proprietary government * * * (and) could oppose no effectual resistance to the said encroachment of the State of New York, which was then under royal patronage." According to New Jersey's complaint, New York had had possession of Bedloe's Island for such a long time that New Jersey, "for the sake of peace", would not seek to disturb that possession. The claim of New Jersey was only to rights in the dividing waters. It appears, therefore, that the petitioner is making a claim of sovereignty for the State of New Jersey which that state itself did not make.

The separate treatment of the islands in opposition to the land under water is accentuated when we consider Article Fifth of the 1833 compact. That Article provides as follows:

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Mattavan creek; subject to the following

rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, 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 Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters: Provided, That the navigation of the said waters be not obstructed or hindered.

Note that Article Fifth is the direct opposite of Article Third in relation to both the right of property and jurisdiction over the waters, although not in relation to jurisdiction over those lands under water as to which title is in the sister state. At the same time, Article Second, by its terms, covers the islands in the waters dealt with in Article Fifth, such as Pralls Island located in the waters (Arthur Kill) between Staten Island and New Jersey.

The foregoing provides an important part of the background to the agreement by the boundary commissioners entered into approximately two and one-half years after the message from the Governor of New York to the New York legislature, and seems to provide an explanation for the separate treatment of Ellis Island and Liberty Island in the 1833 compact. Note that the distinction between islands and lands under water is perpetuated in the agreement of December 23, 1889, between Commissioners on the part of New Jersey and Commissioners on the part of New York to locate and define the boundary line established by the 1833 compact. That agreement recites, in part, as follows:

WHEREAS, By an Act of the Legislature of the State of New Jersey, passed February 14, 1888, entitled, "A Joint

> Resolution authorizing the appointment of a commission to locate and mark out the boundary line between the State of New Jersey and the State of New York, in the lands under water in the Arthur Kill, Kill Von Kull, New York Bay and the Hudson River." (Underscoring added).

This agreement was preceded by a Report of February 1, 1865, to the New Jersey Legislature of Commissioners Appointed to Ascertain the Rights of the State and of Riparian Owners to the Lands Lying under Water. In connection with a discussion of Communipaw cove, that Report stated, in part, at page 14:

> Indeed no valuable purpose for the accommodation of commerce could be effected without carrying the limits of construction very far out into the cove. The eighteen feet curve lies outside of Bedloe's and Ellis Island. These islands, by the treaty between the two States, belong to New York. (Underscoring added.)

The effect of Article Second of the 1833 compact was discussed by the New York Court in People v. The Central Railroad Company of New Jersey, 42 N. Y. 283 (1870), writ of error dismissed, 79 U.S. 455, even though it did not directly bear on the issue before the Court, which involved certain erections placed in the harbor of New York and extending into said harbor and the Hudson River, about a mile from the New Jersey shore, as to which, the Court held, New York did not have jurisdiction under Article Third of the 1833 compact. The Court said, at page 294:

> This article [Article Second] fulfills the office on an exception, as it takes out something embraced in the general description, and which would otherwise be granted, and explains and gives point and force to this exception in article first. These islands are situate west of the boundary line fixed by the first article of the said convention, and would have passed to New Jersey without this exception. The first article simply fixes the boundary line between the states, and this exception takes from the territory thus assigned to New Jersey, these islands, and limits and restricts the boundary line, so far as the same would otherwise give them to New Jersey. * * * When these commissioners for the two States had thus fixed and established the boundary line between the two States, as

fixed and defined by the first and second articles of said treaty, they doubtless clearly saw that their work was unfinished.

The location, in respect of state boundaries, of Ellis Island was brought to issue early in the 20th Century. On April 1, 1903, the General Proprietors of the Eastern Division of New Jersey brought suit in the United States Circuit Court for the District of New Jersey against William Williams, the then Commissioner of Immigration at Ellis Island, to recover possession of a tract of land in New York bay embracing Ellis Island, and containing, the declaration averred, 1093.18 acres. The declaration described the land as situate, lying and being in the Bay or Harbor of New York in the County of Hudson and State of New Jersey. On the motion of the plaintiff an order was entered by the Court on June 25, 1903, discontinuing the suit. That order was made in pursuance of a rule obtained upon the plaintiff by the Assistant United States Attorney, who appeared on behalf of the defendant Williams, to show cause why the service of the summons issued should not be set aside on the ground that Ellis Island, on which the summons was served, was a part of the State of New York, and within the jurisdiction only of the State of New York and of the Circuit Court for the District of New York embracing Ellis Island, and was not a part of the State of New Jersey or within its jurisdiction or the jurisdiction of the Circuit Court for that district.

On June 24, 1903, the General Proprietors of the Eastern Division of New Jersey began a new action in the United States Circuit Court for the Southern District of New York against said William Williams. The latter action made no claim for the submerged land covered by the former action but sought to recover --

> All that certain island or tract of land known as Ellis Island, situate, lying and being in the harbor of New York and bounded on all sides by the waters of the Hudson River and containing about two acres of land, etc.

The affidavit dated May 18, 1904, of William Williams filed in the latter action, and asking for a bill of particulars, set forth the nature of the Government's claim to the Island and recited, among other matters:

That the said Ellis Island as deponent is informed and believes, was at the time of said acts, and said deeds hereinbefore recited, within the boundaries and subject to jurisdiction of the said State of New York, and to the said Court of Chancery.

The affidavit dated June 24, 1904, filed in that action on behalf of the plaintiff asserted title derived from grants in the years 1664 and 1674 from Charles II, King of England, to his brother, the Duke of York, the large territory of which embraces the State of New Jersey, and stated, in part:

Deponent further says that with reference to the statements made in the affidavits of the defendant herein, on which this motion for a bill of particulars is made, in reference to the ceding of jurisdiction over Ellis's or Oyster Island by the State of New York, and the conveyance by the Government of the State of New York to the United States, and the proceedings taken in the Court of Chancery of said State, that deponent is informed and believes that said cessions and conveyances and decrees of the Court of Chancery were without jurisdiction, for the reason that the premises covered thereby were not in the State of New York, and that the State of New York had no authority or right to convey the same, or to cede jurisdiction over it.

The case was called for trial on October 9, 1908, but no appearance was made on behalf of plaintiffs. Accordingly, the Court on January 18, 1909, dismissed the action without costs for want of prosecution.

Later, a habeas corpus action was filed in the District Court of the United States for the District of New Jersey against the then Commissioner of Immigration at the Port of New York, a resident of Ellis Island, alleging that relator, whom the Department of Labor had ordered deported, was unlawfully restrained of his liberty. The defendant entered a special appearance in the case and contested the service of the writ as being outside the jurisdiction of the District Court for the District of New Jersey. The Circuit Court of Appeals dismissed the action as not being under the jurisdiction of the Federal Court in New Jersey. United States ex rel. Belardi v. Day, 50 F. (2d) 816 (C.C.A. 3, 1931). The Court relied upon the provisions

of the Judicial Code of the United States prescribing the jurisdiction of the District Courts of the Southern and Eastern Districts of New York as embracing certain counties of New York "with the waters thereof." The Court continued, at page 817:

> This it would seem vested federal jurisdiction with respect to Ellis Island in the District Courts of the two named New York districts. But the relator, showing that by the Act of June 28, 1834 (4 Stat. 708) a boundary line between the states of New York and New Jersey had been run down to the sea, "submitted" that Ellis Island is on the westerly or New Jersey side of the harbor and therefore is in -- or "not entirely" outside -- the District of New Jersey and within at least "the concurrent jurisdiction of the District Court for the District of New Jersey and the District Courts for the Eastern and Southern Districts of New York." Jurisdiction is determined by statute, not by geography. The statute expressly, and therefore exclusively, placed federal jurisdiction of Ellis Island in the District Courts of the two named New York districts. The running of a boundary line in 1834 through the waters dividing the states of New York and New Jersey cannot disturb the statutory designation of jurisdiction in 1910.

The Court did not cite Devoe Manufacturing Company, 108 U.S. 401, 2 S. Ct. 894, 27 L. Ed. 764 (1882), which had discarded the basic assumption of the Court in the instant case as to the effect on the territory embraced by a Federal judicial district of a change in state boundaries. At the same time, United States v. Day did not distinguish between "the waters" of the New York Harbor and Hudson River, which are dealt with in Article Third of the 1833 compact, and Ellis Island, which is dealt with separately and specifically in Article Second of that compact.

In United States v. De Gregori, 39 F.S. 53 (D.C. S.D.N.Y., 1941) writs of habeas corpus were brought to review an order that defendants be removed from the United States Immigration Station on Ellis Island, in the New York Harbor, to which they had been removed from certain vessels berthed at the Port of Newark, New Jersey, for trial in the United States District Court for the District of New Jersey. The District Court for the Southern District of New York dismissed the writs but upheld its jurisdiction in the habeas corpus proceedings stating, merely,

at page 54:

> The defendants were removed from said vessels to the United States Immigration Station on Ellis Island, in the New York Harbor, which is within the jurisdiction of this court. United States ex rel. Belardi v. Day, 3 Cir., 50 F. 2d 816.

Hill v. Joseph, 205 Misc. 441, 129 N. Y. S. (2d) 348 (1954) involved a suit for refund of New York City sales and business taxes on the gross receipts of the plaintiff from the operation of a concession for the sale of souvenirs and food at the Statue of Liberty on Bedloe's (Liberty) Island. The Court stated that "Bedloe's Island is one of four islands (the others are Ellis, Oyster and Robin's Reef) lying in New York Bay. It has been in the possession of the Federal Government since 1800, under a grant of cession from the State of New York. Chapter 6, Laws of 1800; State Law, §22, subd. 3." The imposition of the local taxes was authorized by the Buck Act, of October 9, 1940 (54 Stat. 1059, 1060) and the Act of July 30, 1947 (61 Stat. 641). The Court discussed the 1833 compact, and like Mr. Justice Holmes in Central R. R. Co. of N. J. v. Jersey City, 209 U.S. 473, 479 (1908), stated at 129 N. Y. S. (2d) 350:

> The intention seems clearly expressed that New York should retain whatever interest it had in these islands prior to the agreement. * * *

In discussing the fact that, prior to 1833, New York had ceded its jurisdiction to the United States, retaining only the right to serve civil and criminal process, the Court said at 129 N. Y. S. (2d) 351:

> The interstate commissioners who drafted the 1833 agreement permitted the State of New York to retain exclusive jurisdiction over Bedloe's Island. They realized that Bedloe's and Ellis' Islands were then under Federal jurisdiction to some extent. The phrase "present jurisdiction", in my opinion, was used with that situation in mind rather than as a limitation on the State of New York by the State of New Jersey. This conclusion finds support not only in the

language of the agreement but in the fact that the State of New Jersey could not have intended limitations on the jurisdiction of the State of New York when no jurisdiction whatsoever was given to the State of New Jersey. The commissioners were describing a factual situation in terms understood by them at the time. They were not imposing restrictions.

The Court concluded, at 129 N. Y. S. (2d) 353:

> I hold, therefore, that Bedloe's Island is within the territorial boundaries of the City and State of New York and that the taxes were property collected.

In contrast to those decisions, the New Jersey Court in Cook v. Weigley, 72 N. J. Eq. 221, 65 Atl. 196 (1906), referred to above, ruled that the courts of New Jersey had jurisdiction to foreclose a mortgage on "Robbin's Reef" and "Oyster Island", which were alleged to be included among the "other islands" referred to in Article Second of the 1833 compact as lying in the waters referred to in Article First thereof "and now under the jurisdiction of [New York] State." The Court relied solely on Mr. Justice Garrison's opinion in Central R. R. Co. of New Jersey v. Jersey City, 70 N. J. L. 81, 56 Atl. 239 (1903), having been decided before that case was ruled on in 1908 by the United States Supreme Court. There, Mr. Justice Holmes intimated that "jurisdiction" was used in a broader sense in Article Second at least in relation to "Bedlow's and Ellis islands" than the term was used in Article Third. Perhaps a further distinction might be made in Article Second itself between New York's "present jurisdiction" in relation to Bedlow's and Ellis's Islands and the merely "exclusive jurisdiction" (which is the same term as that used in Article Third in describing a qualified or police jurisdiction) in relation to the other islands lying in the waters mentioned in Article First. Moreover, the Court might have ruled that whatever claim New York formerly had to the islands had been lost by their erosion and by their becoming submerged lands. An earlier decision in the same case (Cook v. Weigley, 67 N. J. Eq. 716, 57 Atl. 805 (1904)), stated that a discussion had been had on whether these "islands" were, indeed, upland. The Atlantic Coast Pilot, Boston to New York, 1880 describes Oyster Island at page 559:

> One mile and five-eighths to the northward of Robbin's Reef Light-house is a small low islet on the eastern edge of the flats called Oyster Island. It is formed, artificially, (after the

manner of Dix and Hoffman islands in the Lower Bay,) by the dumping of stones, earth and other debris from the harbor.

Similarly, Robbin's Reef is described therein at page 592:

> Robbin's Reef, on the northern side of the approach to Kill Van Kull, is the southeastern extremity of the Jersey Flats, has from five to ten feet of water upon it, and is sufficiently well marked by the light-house and also by a black nun-buoy (No. 17) placed about a quarter of a mile to the southward of the light-house in three fathoms.

Title and jurisdiction over Robbin's Reef Lighthouse was granted to the United States on February 14, 1880, by the State of New Jersey, through its Riparian Commissioners, under an act of March 16, 1875 (Riparian Laws, p. 30). This was done pursuant to an application dated January 6, 1880, on the basis that "the jurisdiction of New Jersey extends over the site occupied by the Robbin's Reef Lighthouse, in New York bay, according to the terms of the treaty concluded in 1833, between the States of New Jersey and New York." Annual Report of the Riparian Commissioners of the State of New Jersey for the year 1892.*

Thus, whatever claim New York may have had in 1833 to those "islands" under Article Second of the 1833 compact would seem to have been wiped out by their erosion into submerged lands, which are covered by Article Third. In any event, the decision in Cook v. Weigley did not deal directly with the first part of Article Second or the two islands specifically mentioned in that part of Article Second.

Administratively, Liberty Island has been formally treated as being in the State of New York. The Proclamation (No. 1713) of October 15, 1924, by President Coolidge refers to "FORT WOOD, NEW YORK", Fort Wood then occupying the whole of Bedloe's (Liberty) Island. Proclamation No. 2250, of September 7, 1937, by President Franklin D. Roosevelt refers to "Bedloe's Island, New York." Also Executive Order No. 6228 of July 28, 1933, refers to "Statue of Liberty, Fort Wood, New York." There do not appear to have been any Proclamations or Executive Orders describing Ellis Island as being in any particular state.

The foregoing discussion deals, of course, with Ellis Island as it existed in 1833. In the deed conveying the island to the United States

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* See also page 7 of Report of Riparian Commissioners for 1888.

in 1808 it is described as containing "to ordinary high water mark, two acres, three roods and thirty-five perches", or 1/32 of an acre less than 3 acres. As we have previously seen, the island was increased by certain docks and bulkheads prior to 1890 to about 3.3 acres and thereafter by fill to its present size of 27.5 acres. The sovereignty over the filled area, as well as the lands under water, is another story, discussed below.

As we have already seen, in 1880 the State of New York ceded title and jurisdiction over a certain area under water surrounding Ellis Island, much of which area is now covered by filled-in land. The total area so ceded, together with the land area above water, apparently totaled about 7.5 acres (although the metes and bounds description contains a significant error of closure), as compared to the present size of the land area above water, amounting to 27.5 acres.

However, Ellis Island proper was specifically dealt with in Article Second of the 1833 compact, and the lands under water on the western side of the bay and river were dealt with separately in Article Third, which expressly stated that title to those lands under water was in the State of New Jersey. In view of the provisions of Article Third of that compact it is difficult to see on what basis the State of New York asserted title over those submerged lands even though under that Article she did have "exclusive jurisdiction", although not title, over such lands. One possible reason is discussed later on in this memorandum. In any event, the Attorney General of the United States addressed a letter dated July 15, 1904, to the Riparian Commissioners of New Jersey relating to a grant of title to certain lands surrounding Ellis Island. In that letter he stated:

> Heretofore, it would seem, the General Government has proceeded upon the theory that the ownership of the lands under water around Ellis Island was in the State of New York. In 1800 New York ceded its jurisdiction over Ellis Island to the United States; in 1808 it condemned the island and sold it to the United States; and in 1880 it granted to the United States its title and jurisdiction to and over the lands under water around Ellis Island within certain limits.

> While there is no question as to the ownership and jurisdiction of New York of and over Ellis Island proper and its power to convey the same to the United States, it would seem from the boundary agreement between New York and New Jersey of September 16, 1833, that the ownership of the lands under water west of the middle of the Hudson River and of the Bay of New York is in the State of New Jersey.
>
> By the act of June 22, 1834, c. 126 (4 Stat. 708, 711), Congress consented to that agreement, upon the condition "there nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement."

In passing, it should be noted that in an opinion dated June 18, 1934, of the Attorney General of the United States to the Secretary of the Interior in response to the direct question "What is the present state of the title to the uplands and the marginal submerged lands of Bedlow's Island?" the Attorney General stated:

> It appears from the information furnished me that title to the uplands is dependent upon an Act of the Legislature of New York dated February 15, 1800 (Laws, 1800 c. 6), and that title to the submerged lands is dependent upon an Act of the Legislature of May 7, 1880 (Laws, 1880, c. 196), which read, in part, as follows: [quoting from the 1880 Act.]

That opinion is relevant because the laws therein cited deal with Ellis Island and submerged lands surrounding Ellis Island. The opinion reaches a conclusion that is not consistent with the conclusion reached in the 1904 letter. However, it was expressly based on "the information furnished me", which apparently did not include either the 1833 compact or the 1904 letter inasmuch as neither of them was referred to.

The deed dated November 30, 1904, from the State of New Jersey, by the Riparian Commissioners of said State, recited the application of the United States and conveyed to the United States certain lands in New York Bay surrounding Ellis Island. That deed covered not only the lands then submerged but also the previously filled in area, in referring to "that

parcel of land, all of which was formerly and part of which is now flowed by the tide waters of New York Bay, in the County of Hudson and State of New Jersey" therein described by metes and bounds, the gross area (including the original island) embraced by which amounted to approximately 48 acres. The deed recognizes the ownership by the United States of Ellis Island itself, which is described as being "in the Bay of New York, County of Hudson and State of New Jersey". Inasmuch as the title of the United States proper is derived from the State of New York, it is perhaps significant that the deed provides as follows:

> It is distinctly understood and agreed that by accepting the within grant The United States of America does not waive any rights or privileges which it would possess had not the same been accepted, and that no rights of the grantee of any kind whatsoever shall be prejudiced by such acceptance.

As to this grant, the Annual Report of the Riparian Commissioners of the State of New Jersey for the year 1904 stated at page 3:

> The most interesting and important question that came before the Commissioners during the year was involved in an application by the United States Government for ten acres of land under water around Ellis Island. The Government needed this land for the construction of a hospital in connection with the immigrant station. Ellis Island originally belonged to the State of New York, and was ceded by it to the Federal Government. Since acquiring the island, the Government has, from time to time, appropriated and filled in portions of the land under water contiguous thereto, until the entire area of the island has grown from three and one-half acres, when first acquired by the Government, to thirty-six (36) acres at the present time. It is still claimed by the Government to be inadequate for its purpose, and hence the application to the Riparian Commissioners this year for ten acres additional.
>
> The Government, in making the application, claimed that it had the right, under the Constitution, as expounded by the courts, to appropriate such part of the land under water belonging to the State of New Jersey as it needed for "purposes of commerce," without asking permission; but that it would forego this right and ask for a formal grant, in observance of the comity

which should exist between the general Government and the several States. It submitted, for the consideration of the Commission, through Mr. William R. Harr, of the Attorney General's department, a brief setting forth these views. . .

The final outcome was the agreement on the part of the Commissioners to make a grant of ten acres to the Government for the nominal consideration of $1000.

In the Engineer's Report, published with the Report of the Riparian Commissioners, appears the following at page 17:

ELLIS ISLAND

Under the act of 1891, the United States Government, on August 19th, 1904, made application to the Riparian Commission of the State of New Jersey for certain lands under water in New York Bay, adjacent to Ellis Island. Under an appropriation by Congress in 1902, nearly a million dollars were appropriated by the Government, and plans were prepared for filling in about three and one-half acres adjacent to Ellis Island, and the erection of buildings to be used in connection with the immigrant landing at Ellis Island.

The above application of the United States Government recognizes the rights of the State in these lands, and sets at rest forever the question of the State's title, and the right of the State to fix and receive consideration therefor.

In an earlier report, for 1892, the Riparian Commissioners discussed the Ellis Island matter at page 11 as follows:

The occupation of Ellis Island as an emigrant [sic] station by the United States Government raises some questions which deserve the consideration of this Board and of the State authorities.

The island was originally sold to the United States by the State of New York in 1808 under an act of Congress passed in 1794, which authorized the purchase of the property for fortification purposes. It is said that a new deed of the island was made in 1890,

when the new emigrant [sic] station was established there. The finding of the Boundary Line Commission has confirmed the contention of New Jersey that the island is in the territorial limits of this State.

When the United States acquired New York's title in 1808, the island contained only two and three-quarter acres of land. When the emigrant [sic] station was built two years ago, the Government proceeded to bulkhead and reclaim two and one-quarter acres of land under water. This land unquestionably belonged to the State of New Jersey, and the occupation of it by the United States was unauthorized. The acres thus taken are of great value, and proper compensation for the same should be expected from the National Government.

The Act of Congress referred to therein was apparently the Act approved March 20, 1794 (1 Stat. 345), entitled "An Act to provide for the Defence of certain Ports and Harbors in the United States," which specified the ports and harbors to be fortified under the direction of the President of the United States, including "New York," and authorized, in section 3, the President "to receive from any state (in behalf of the United States) a cession of the lands, on which any of the fortifications aforesaid, with the necessary buildings, may be erected, or intended to be erected; or where such cessions shall not be made, to purchase such lands, on behalf of the United States."

In the 1901 Report of the Riparian Commissioners of the State of New Jersey, the following comments are made, with respect to Ellis and Bedloe's islands, at page 31f:

There seems to be no question as to the status of Ellis and Bedloe's islands, with relation to the rights of the State of New Jersey.

By a treaty entered into between the States of New York and New Jersey, fixing the boundaries between the two States, which treaty was ratified by the New Jersey Legislature February 26th 1834, the following is the language of Article Two:

"The State of New York shall retain its present jurisdiction of and over Bedloe's and Ellis Islands, and shall also retain exclusive jurisdiction of and over the other lands [sic] lying in the waters above mentioned (Hudson River, New York bay and Raritan bay and the waters between New Jersey and Staten Island) and now under the jurisdiction of that State."

Article Three of the Treaty of 1834 says:

"The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the New York bay, and of and over all the waters of the Hudson river lying west of Manhattan island and to the south of the mouth of the Spuytenduyvel 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 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 said State, and of and over all vessels aground on said shore, or fastened to 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."

It will be seen by this that there can be no question as to the title of New Jersey in the land under water adjacent to Ellis Island. The only jurisdiction New York has west of the middle of the waters is police jurisdiction.

While Ellis Island was ceded to the United States Government by the State of New York, the Government must look to New Jersey for permission to enlarge the boundaries of the island.

The Boundary Commission which was appointed by the Legislature in 1888, and which filed its report on December 31st 1889, fixed definitely the boundary line as established by the treaty of 1834, and marked the same by monuments. This boundary line, as monumented, is the center of the Hudson river and of the channel of New York bay lying to the east of the reef on which Bedloe's and Ellis islands are situated, leaving no question as to the extent and location of the land under water in New York bay belonging to the State of New Jersey being all of the land under water to the west of the boundary line, which includes all of the land under water surrounding the above-mentioned islands.

While Ellis and Bedloe's islands were ceded to the United States Government by the State of New York, there seems to be no question that not only the title to the lands under water surrounding Ellis island, filled in and occupied by the United States Government, is the property of the State of New Jersey, but that no further reclamation can lawfully be made without securing the right from the State of New Jersey.

The original area of Ellis island was about three and one-half acres, while the area contemplated by the lines which were the subject of the action by the Secretary of War of July 1st 1901, will add about thirty-three acres.

While the Riparian Commission was definitely asserting title and sovereignty over the lands under water surrounding Ellis Island, its recognition that the United States acquired the Island by cession from the State of New York, coupled with its recognition of the provisions of Article Second of the 1833 compact under which New York retained its then "present jurisdiction" over the island, is in effect a recognition of the

claim of New York of sovereignty thereover. The fact that the deed of November 30, 1904, refers to Ellis Island in the Bay of New York, "County of Hudson and State of New Jersey," may be explained by the fact that the island had already been enlarged by the filling in of lands as to which New Jersey asserted both sovereignty and title. It is to be noted that the island then was of a size greater than the roughly seven and one-half acres embraced by the deed of May 26, 1880, executed pursuant to the Act of May 7, 1880, of the New York Legislature.

The reference to the island in the deed of June 30, 1808, from the Governor of New York, as containing "by estimation to ordinary high water mark two acres three roods and thirty-five perches" was merely a matter of description and was not a limitation on the area covered by the deed or, indeed, on the claim of sovereignty of the State of New York. From the standpoint of title, no problem arises inasmuch as the United States has title to submerged lands under subsequent deeds from both the State of New York and the State of New Jersey, even though the two deeds do not cover identical areas.

From the standpoint of sovereignty, New York's claim of sovereignty in respect of the submerged lands as of June 30, 1808, or even as of September 16, 1833, is not controlling. The present sovereignty over the submerged lands is governed by the treatment of the submerged lands in the 1833 compact. In that compact the provision as to the retention by New York of its "present jurisdiction" appears in Article Second, with respect to Bedlow's and Ellis Islands but does not apply to the treatment of submerged lands, which is covered in Article Third. Article Third defines the respective rights of New York and New Jersey therein without reference to the then "present jurisdiction" of either State.

Article Third gave New York jurisdiction over the waters specified therein and "over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof". Nowhere in the 1833 compact is there a reference to high water mark. Thus, in dealing with lands under water, the 1833 compact is clearly dealing with lands below the low water mark. It logically follows that, in dealing with Ellis Island,

the 1833 compact must be dealing with lands above the low water mark at that time, inasmuch as the lands below low water mark were separately treated in Article Third.

The Judge Advocate General of the Army in an opinion dated May 13, 1929 (JAG 680.41), held that the United States acquired title to submerged lands surrounding Bedloe's Island by virtue of the Act of February 15, 1800, of the State of New York. That opinion was adhered to in an opinion dated January 10, 1930 (JAG 680.44). Whether those opinions would apply to the title of the United States to submerged lands surrounding Ellis Island under the deed of June 30, 1808, is an academic question in view of the subsequent deeds to submerged lands from both New York and New Jersey. In any event, the matter of the Federal Government's title does not affect the state sovereignty, which, as stated above, is controlled by the terms of the 1833 compact, which by the terms of the approval of Congress is not "to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters". Moreover, the subsequent artificial enlargement of Ellis Island by means of piers and fill would not change the state sovereignty over the area, whatever might be its effect on the police jurisdiction of the State of New York over lands under water under the 1833 compact.

The jurisdiction ceded under the Act of May 7, 1880, of New York must have been the jurisdiction over the waters and the lands covered by

water that New York had under Article Third of the 1833 compact. The fact that New York purported at the same time to release and cede title to lands obviously outside the low water line very probably arose from the legal concept prevalent at that time and until it was discarded in Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 5 S. Ct. 995, 29 L. Ed. 264 (1885), that cessions of jurisdiction to the United States under Article 1, section 8, clause 17, of the Constitution could only be accomplished in connection with a transfer of title to the United States. This concept, now obsolete, was illustrated in the case of Middeton v. La Compagnie Generale Transatlantique, 100 Fed. 866 (C.C.A. 2, 1900), cert. den., 177 U.S. 694, 20 S. Ct. 1028, 33 L. Ed. 945, which held that lands off of Sandy Hook, "far on the Jersey side of the middle of Raritan Bay continued to the main sea," were within the territorial limits of the State of New Jersey. The Court referred to Fort Leavenworth R.R. v. Lowe, stating that it holds that Article 1, section 8, clause 17, of the Constitution "applies only to property purchased with the consent of the state, and that where lands are acquired in any other way, as by cession, the legislative power of the state over them will be as full and complete as over any other places, except that it shall not be so used as to destroy or impair the effective use of the forts, arsenals, or other public buildings which may be erected upon them." The Court ruled that, under the authority of Fort Leavenworth R.R. v. Lowe, the cession act of March 12, 1846, of New Jersey gave the United States "the right to exercise exclusive legislation only in so much of the state of New Jersey as was thereby transferred" and did not so operate with respect to any land below low-water mark, which the United States did not acquire. The court said, at page 869, that over such places within the limits of New Jersey --

> her legislative power remains as full and complete as it was before, except that it must be so exercised as not to destroy or impair the forts, arsenals, and other structures erected on the land transferred to the federal government for military or public purposes.

The Court then concluded that a New Jersey death statute passed in 1848 was operable in the area.

It is submitted that the Court in Middeton v. La Compagnie Generale Transatlantique misread Fort Leavenworth R.R. v. Lowe, which actually decided that the State's power of taxation did not extend to private property in an area over which exclusive jurisdiction was ceded to the United States

by a statute other than a consent statute. Indeed, the above quoted excerpt from the Court's opinion can be paraphrased as saying that when there is no transfer of property to the Federal Government the state retains its power over the land transferred to the Federal Government, a manifestly contradictory statement. In any event, the principle there enunciated has not been accepted. See Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II, A Text of the Law of Legislative Jurisdiction (G. P. O. 1957), at page 74f. The case does, however, illustrate the concept that had prevailed to the effect that the acquisition of title by the United States was necessary for any transfer of legislative jurisdiction to the United States.

U. S. Geological Survey Bulletin 817, Boundaries, Areas, Geographic Centers, and Altitudes of the United States and the Several States (Second Edition, 1932) states at page 111:

> Bedloes Island and Ellis Island, although on the New Jersey side of the boundary, are under the jurisdiction of the State of New York and a part of Greater New York City.

Ellis Island and Liberty Island are, for census purposes, treated as parts of the State of New York, being designated Tracts 1 and 3, respectively, of Manhattan Borough, New York City. U. S. Census of Housing: 1960, Series HC(3)-275, page 2 of map enclosed therewith.

On the basis of the foregoing, it is concluded that Ellis Island proper is a part of the State of New York, it, together with Liberty Island, constituting true exceptions to the boundary line as otherwise fixed by Article First of the 1833 compact between the States of New York and New Jersey. This conclusion is in accord with the conclusion reached in the memorandum dated June 21, 1961, from the American Law Division of the Legislative Reference Service of the Library of Congress to the Honorable Kenneth B. Keating, the junior Senator from New York. Under the conclusion reached in this memorandum, the term Ellis Island includes all the land to the low water mark around the island as of September 16, 1833. The submerged lands outside that low-water mark, including such areas as may have been filled in since the date of the compact, are deemed to be a part of the State of New Jersey, subject to such police jurisdiction thereover as is vested in the State of New York by Article Third of the 1833 compact. This conclusion accords with the position intimated, but not decided, by the Assistant Attorney General of the United States for the Lands Divsion, in a letter dated April 22, 1960, to the General Counsel of General Services Administration, wherein he referred to "a distinct possibility that the final decision [on a suit to determine the status of Ellis Island] would be to the effect that different parts of the island are subject to the sovereignty of different States (New York and New Jersey)".

In dealing with the matter of title to Ellis Island, we must treat separately the island above the low-water mark and the submerged lands.

As we have seen, the State of New York conveyed all the right, title and interest of the State of New York in Ellis Island, which the People of the State of New York had acquired by a decree of the Chancellor of the State of New York, to the United States, as well as ceded jurisdiction thereover. The rights of the State of New York in and to Ellis Island were, in effect, recognized and ratified by the State of New Jersey in the 1833 compact, and the title of the United States as derived from the State of New York has been repeatedly recognized administratively by the State of New Jersey. The United States has successfully defended its title, albeit from want of prosecution, against the General Proprietors of the Eastern Division of New Jersey.

Those facts, coupled with the assertion of title by, and long possession of, the United States, would seem to settle the title of the Federal Government but for one factor. The Act of March 18, 1808, c. 51 (Laws of N. Y. 1808, p. 278) was the statutory authority for the State of New York to acquire title to the Island and to convey it to the United States. Section IV of that Act provided:

> IV. And be it further enacted, That the said commissioners are hereby authorized and empowered to grant to the United States, for the purpose of providing for the defence and safety of the city and port aforesaid, the use of any of the lands and waters belonging to the people of this state in the said city and county of New-York, and also of the lands covered with water between Long and Staten-Islands and below the south bounds of the city and county of New-York; which lands shall be granted on the express condition of their reverting to the people of this state in case they are not applied to the purposes aforesaid.

It has been suggested that the title of the United States is defective because (1) the United States acquired only the "use" of the Island and (2) even that right of use was subject to reversion in case the lands are not applied to the defense and safety of the port of New York, which application has not occurred since 1890 when it was devoted to immigration purposes and more specifically after March 4, 1955, when it was determined to be surplus to the needs of all Federal agencies.

This contention overlooks the provisions of section V of that Act, which is the section dealing specifically with Ellis Island. That section

authorizes the State to acquire title to the Island through a writ ad quod damnum issued by the Chancellor of the State of New York, "and upon the title to the said lands and tenements being vested in the people of this state, as aforesaid, the person administering the government of this state is hereby required and empowered to convey and grant all the right, title and interest of this state to the United States, for the purposes in this act expressed". The Governor of New York, by deed dated June 30, 1808, recited the steps taken pursuant to that act and the fact that the United States had paid to the State of New York the amount of $10,000 assessed against the State of New York in the proceedings to acquire the Island and also the amount of $183.10, the costs in those proceedings, and granted and conveyed "all the right, title and interest of the State of New York in and to the lands, tenements and appurtenances above mentioned and described to the United States to have and hold the same for the purposes mentioned and expressed in the said above in part recited act."

Thus it is seen that the authority exercised by the Governor of New York was that contained in section V of the 1808 Act, which included all the right, title and interest of the State of New York, rather than section IV of that Act. Thus, while the grant was made for the purposes of the defense of the city and port of New York, it was not made subject to a reverter as provided for in section IV with respect to grants of use of lands and waters. Moreover, as can be seen from the history of the Island set out above, the Island was in fact devoted to such purposes for a considerable number of years, first as the site of an Army post, Fort Gibson, and as a naval magazine. That fact would seem to fulfill such a condition notwithstanding the fact that it is no longer devoted to such purposes. However, in order to remove any doubts that may remain as to the effect of that provision as a reverter clause that became operable when the Island was no longer devoted to the purposes of the defense of the city and port of New York, this matter is discussed in detail below.

Liberty Island is in a situation in many respects similar to Ellis Island. Jurisdiction over it, as well as Ellis Island, was ceded to the United States by the State of New York by the Act of February 15, 1800 (Laws of 1800, New York, ch. 6), and title and jurisdiction over submerged lands adjacent to both such islands were granted by the Act of May 7, 1880. However, while the title of the United States to Ellis Island was derived from the deed of June 30, 1808, executed pursuant to the Act of March 18, 1808, there is no statutory provision expressly ceding title to Liberty Island. The Act of February 15, 1800, deals specifically with jurisdiction and not with title. The Judge Advocate General of the

Army in an opinion dated January 15, 1925, (JAG 602.2) stated as follows:

> The uplands of Bedloe's Island on which Fort Wood is located, as well as the submerged lands contiguous thereto and which now comprise a part of Bedloe's Island, were acquired from the State of New York under the same acts and grants as those referring to Governor's Island.

That opinion further stated:

> Upon the abandonment of this island, for military purposes, the title thereto, insofar as the original island is concerned, will, in my opinion, revert to the State of New York.

Because of that opinion, which was reiterated in an opinion dated January 23, 1934 (JAG 602.3), the War Department opposed the transfer of that Island to the Department of the Interior, which had been directed by Executive Order No. 6228 of July 28, 1933.

An opinion of June 5, 1934, of the Acting Solicitor of the Department of the Interior, approved by the Assistant Secretary of the Interior (54 I.D. 492), disagreed with the position of the Judge Advocate General. The Acting Solicitor reviewed the New York statutes, particularly the Act of May 7, 1880, which stated that the cession thereby effected "should continue no longer than the United States shall own [emphasis added] both the uplands and the submerged lands of the said islands", and stated at page 494:

> The opinion of the War Department, that the United States must continue to use Bedloe's Island for military purposes, seems based solely upon the circumstance that the original act of cession was passed by the New York Legislature very soon after Congress had provided for Federal acquisition and construction of fortifications in the several States (1 Stat. 521; id. 554), and the further circumstance that the value and use of the islands at the time of their acquisition was military. The subsequent express enactments of the New York Legislature seem to countervail any such inferences, but there are additional interpretations of the cessions implicit in the conduct of the United States and the State of New York with respect to

Ellis and Bedloe's Islands.

The Acting Solicitor referred to 20 Ops. Atty. Gen. 379 and Ops. Atty. Gen. (N. Y. 1909) 929, both of which are discussed below, and concluded at page 495:

> Upon the whole case, it is my opinion that the United States has title to and jurisdiction over the uplands and the submerged lands of Bedloe's Island, subject only to the reservation to the State of New York of the right to serve process on the island, and a limitation that the submerged lands shall revert to New York whenever the United States shall cease to own the island. The proposed change in the use of the island and the proposed transfer of administrative jurisdiction from the War Department to the Department of the Interior would in no way affect the title or jurisdiction of the United States.

Parenthetically, the conclusion of the Acting Solicitor as to the limitation with respect to the Government's interest in Bedloe's Island is correctly stated only if it be construed as applying to jurisdiction and not to title. The limitation is expressed in a proviso to the Act of May 7, 1880, which reads as follows:

> provided that jurisdiction hereby ceded shall continue no longer than the United States shall own said lands at Governor's, Bedloe's, Ellis' and David's Islands, and at Forts Lafayette, Hamilton, Wadsworth and Schuyler, and the adjacent lands covered with water, herein described and hereby released; * * *.

The limitation contained in that proviso is clearly limited to jurisdiction and does not apply to title or ownership.

The same conclusion as that expressed by the Acting Solicitor with respect to the effect on the Government's title of the transfer of Bedloe's Island from the War Department to the Department of the Interior, was reached by the Attorney General of the United States in an opinion dated July 18, 1934, to the Secretary of the Interior. That opinion expressed

the view, on the basis of the information furnished to the Attorney General, that the Government's title to the uplands is dependent upon the Act of February 15, 1800, of New York and that title to the submerged lands is dependent upon the Act of May 7, 1880, also of New York.

The Attorney General stated:

> While the Act of February 15, 1800, did not expressly transfer title, as distinguished from jurisdiction, it appears that the State has subsequently attributed to it such effect. For example, the Act of May 7, 1880, above quoted, refers to the submerged lands as contiguous to the "lands of the United States."

He might also have referred to the proviso therein, which is quoted above and which limits the jurisdiction thereby ceded so as to continue "no longer than the United States shall own said lands at Governor's, Bedloe's Ellis' and David's Islands * * * and the adjacent lands covered with water, herein described and hereby released". He did refer also to sections 22 and 24 in v. 5, pp. 4100 and 4113, of the Consolidated Laws of 1909, which expressly stated that title and jurisdiction has been ceded to the United States over Bedloe's Island and over certain land under water contiguous thereto. The opinion further stated:

> The fact that the State had fortified the Island and the possibility that the Legislature, in transferring it to the United States, was motivated by the belief that it would be used for military purposes, do not bind the United States now to continue to use the Island for such purposes and certainly cannot be understood as requiring, or even contemplating, administrative control by a particular Department.
>
> The recital in the Act of May 7, 1880, concerning "the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances" applies only to the submerged lands and requires no particular consideration since it does not, in my opinion, impose a condition, nor even state a purpose, that the stated uses shall be only military in character.

For the foregoing reasons, it is my opinion that transfer of administrative control of Bedloe's Island, including both uplands and submerged lands, from the War Department to the Department of the Interior, for utilization in connection with the Statute of Liberty National Monument would not affect either the title or the jurisdiction of the United States.

The rationale of that opinion would apply equally to Ellis Island.

Whatever doubts may linger as to the legal effect of the Act of March 18, 1808, and the deed executed pursuant thereto, are met by the circumstance that that act was incorporated in Part I of Chapter I of the Revised Statutes of 1829, and the whole of Part I of Chapter I was expressly repealed by Chapter 678 of the Laws of 1892 of New York, approved May 18, 1892, which enacted Chapter 2 of the General Laws of the State of New York. Section 22 of that chapter, entitled "The State Law", which was enacted after Ellis Island had been transferred to the Secretary of the Treasury on May 24, 1890, and after it was formally opened as an immigrant station on January 1, 1892, provided:

> §22. Cession with reservation of right to serve process. - Title and jurisdiction to the following described tracts or parcels have been ceded to the United States by this state on condition the jurisdiction so ceded should not prevent the execution thereon of any process, civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States therein:
>
> * * *
>
> 3. Islands in New York harbor. - Three certain islands in and about the harbor of New York, viz.: Bedlow's island and Ellis or Oyster island, bounded on all sides by the waters of the East river and Hudson river.

Chapter 678 of the Laws of 1892 of New York also specifically repealed the aforesaid Act of May 7, 1880 (chap. 196 of the Laws of 1880, p. 315), and section 24 of the State Law contained in the 1892 Act provided as follows:

§ 24. Cession during ownership by the United States, with reservation of right to serve process. - Title and jurisdiction to the following tracts or parcels of land have been ceded to the United States by this state, on condition that the jurisdiction so ceded should not prevent the execution thereon of any process, civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States therein, and that such jurisdiction shall continue in the United States so long only as the land shall remain the property of the United States:

* * *

4. At Ellis's island. - A tract of land under water contiguous to the lands of the United States, described as follows: Beginning at a point fifty feet from the head of the east dock and on a line with the north face of said dock; running thence S. 18° 30' E. 605 feet; thence S. 71° 30' W. 202 feet; thence N. 81° 19' W. 313 feet; thence N. 32° 4' W. 178 feet, this line being parallel to the head of the west dock, and distant fifty feet from said dock; thence due north 577 feet; thence S. 70' 47' E. 424 feet to the point of beginning, acquired for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances.

The intended effect of the 1808 Act as to title may be seen from the unambiguous language in section 22 of the State Law, enacted by said Chapter 678 of 1892, when read in connection with section 37 of the same article of The State Law as contains section 22, which section 37 reads as follows:

§37. Saving clause. - The adoption of this article shall not be construed to cede to the United States any territory or jurisdiction over any territory not so ceded by the laws repealed by the revision of the general laws of the state of which this article is a part, or to change the terms or conditions upon which such cessions were originally made.

The Attorney General of the United States was called upon in 1892 for an opinion in connection with the expenditure of funds at Ellis Island for immigration purposes. In the course of his opinion of April 18, 1892,

approving such expenditures (20 Ops. Atty. Gen. 379) he stated at page 381:

> It is well known that Ellis Island is property of the United States, and that it has been practically dedicated to the uses of the immigration service.

The title of the United States was again recognized by New York long after the island had been fully devoted to immigration purposes. Chapter 678 of the Laws of 1892 was repealed by the Act of February 17, 1909 (chap. 59, Laws of 1909), and the above provisions were reenacted as sections 22 and 24, respectively, of chapter 57 (State Law) of the Consolidated Laws of New York. Sections 22 and 24 thereof are currently in effect, as part of Chapter 57 of McKinney's Consolidated Laws of New York.

Finally, the title of the United States to Ellis Island has been recognized by the Attorney General of New York. His opinion of December 13, 1909, to the Health Officer of the Port of New York (Report of the Attorney General of New York, 1909, page 929) dealt with the question whether the Health Officer of the Port of New York had the power to require the removal to quarantine from Ellis Island, with the consent of the United States Immigration authorities, of persons who had been landed there. The Attorney General of New York stated at page 930:

> Ellis Island is property of the United States, having been ceded to that government by the State. In section 22 of the State Law, however, it is provided,
>
> > "* * * The jurisdiction so ceded shall not prevent the execution thereon of any process, civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States therein."
>
> From an examination of the foregoing sections, it is my opinion that the power of the health officer under section 136 [of the Public Health Law, relating to removal of vessels, persons and things from the city of New York] would not extend to compelling the removal of any persons or vessels from Ellis Island to quarantine, even with the

consent of the United States. If, however, such persons can be brought within section 123 [of the Public Health Law] as violating any quarantine law or regulation, or obstructing the health officer in the performance of his duty, so that you could issue a warrant for the pursuit and arrest of such person, such warrant, by virtue of section 22 of the State Law, could be executed on Ellis Island, and under it, any person could be removed to quarantine as provided in section 123. In other words it is my opinion that you have no general authority extending over Ellis Island, but that your power of arrest and detention by means of a warrant applies to that island as much as to any other territory of the city of New York.

The title of the United States to the submerged lands around Ellis Island, including the areas that have already been filled in, is derived from the deed of November 30, 1904, from the State of New Jersey, by its Riparian Commissioners, which recites that the United States is "the owner of lands comprising what is known as Ellis Island in the Bay of New York, County of Hudson and State of New Jersey, which lie above high water mark and in front of which the lands under water hereinafter described are situated". That deed conveyed such land, therein described by metes and bounds, "all of which was formerly and a part of which is now flowed by the tide waters of New York Bay, in the County of Hudson and State of New Jersey".

The deed of May 26, 1880, from the State of New York, executed pursuant to the Act of May 7, 1880, of that State, must, under the provisions of the 1833 compact, be regarded as of no effect insofar as it purported to grant title, to as opposed to jurisdiction over, the lands around Ellis Island that were filled in or were then submerged.

Legislative Jurisdiction over Ellis Island

The legislative jurisdiction, like title and state sovereignty, must be treated separately for the original island and for the submerged lands surrounding the island on September 16, 1833.

As to the original island, legislative jurisdiction was ceded to the United States by the Act of February 15, 1800, of the State of New York.

However, the State of New York did not then have title to Ellis Island, alth it did have title to Liberty Island, which was also dealt with by that Act. Ti to Ellis Island was later acquired by New York and transferred to the Unite States by the deed of June 30, 1808, executed pursuant to the Act of March 1 1808. The Lea Act and the Buck Act (4 U.S.C. 104 - 110), would operate on that part of the island to permit the imposition of New York State gasoline, sales and income taxes. See Hill v. Joseph, 205 Misc. 441, 129 N.Y.S. (2d) 348 (1954), discussed above, which dealt with Liberty Island. Under the Assimilative Crimes Act, 18 U.S.C. 13, the criminal laws of New York would be applicable in the area as Federal law, and, under the international law rule, the preexisting law (as of February 15, 1800) of New York would continue to be operable as Federal law until superseded by Federal law in the same area. Under 40 U.S.C. 290, the Workmen's Compensation Act of New York would be operable in the area, and, under 16 U.S.C. 457, the New York death by wrongful act statute would also be applicable. That part of the island is, under the doctrine enunciated in Devoe Manufacturing Company, 108 U.S. 401, 2 S. Ct. 894, 27 L. Ed. 764 (1882), within the judicial district of the Southern District of New York.

The remainder of the island and the lands still submerged around Ellis Island, constituting a part of New Jersey, were not affected by the cession of jurisdiction by the Act of February 15, 1800, or the Act of March 18, 1808, of the State of New York. The Act of May 7, 1880, did operate to transfer such criminal jurisdiction as New York possessed by virtue of the provisions of Article Third of the 1833 compact between New York and New Jersey. However, the nature of that jurisdiction, which relates to the promotion of navigation, is such that it became inoperative when the lands were filled in and were no longer the "submerged lands" that are dealt with in the 1833 compact. The jurisdiction thereunder was a qualified and limited one which failed when the basis for it ceased to exist. The 1833 compact continues to be in effect as to lands still submerged and, to the extent that those submerged lands are dealt with in the Act of May 7, 1880, criminal (or police) jurisdiction thereover was ceded to the United States. At the same time, the submerged lands are a part of New Jersey and the assimilative crimes act would operate to apply the criminal law of New Jersey rather than New York even though

the criminal jurisdiction of the United States, which was obtained by cession, rather than by virtue of the Constitution itself, was obtained from the State of New York. This is true because the Assimilative Crimes Act (18 U.S.C. 13) applies the law of the State "in which such place is situated". Upon a disposal of Ellis Island by the United States, however, the criminal jurisdiction over the waters and submerged lands will, by the terms of the proviso to the first section of the Act of May 7, 1880, revert to the State of New York.

New Jersey did not have a general cession statute until 1907, and that act was not made applicable to lands theretofore acquired by the Federal Government. No special statute of New Jersey ceding jurisdiction with respect to Ellis Island can be found. The fact that the deed of November 30, 1904, by the Riparian Commissioners of the State of New Jersey, conveyed all the right, title and interest of the State of New Jersey did not operate to cede legislative jurisdiction to the United States inasmuch as the statute authorizing that conveyance did not cover the cession of legislative jurisdiction. Moreover, the Act of February 10, 1891, under whose authority that deed was executed, was not operable as a "consent" statute under Article 1, section 8, clause 17, of the Constitution inasmuch as the statute does not specifically refer to the United States. Accordingly, the United States did not acquire any legislative jurisdiction in relation to Ellis Island from the State of New Jersey.

Summary

The original Ellis Island, containing approximately 3 acres and located in the northern part of the Island, sometimes called Island No. 1, is a part of the State of New York. The United States has title and exclusive jurisdiction over that part of the Island, both being derived from the State of New York. The remainder of the Island, containing approximately 24.5 acres, and the submerged land surrounding the Island are a part of the State of New Jersey. The United States has title to that remainder of the Island and to approximately 20.5 acres of submerged lands surrounding the island, having derived it from the State of New Jersey. The United States has only a proprietorial interest in both such areas, except that it has a partial (criminal) jurisdiction over such part of the still submerged lands that are covered by the Act of May 7, 1880, of the State of New York, the

United States having been ceded the "exclusive jurisdiction" which was vested in the State of New York by Article Third of the 1833 compact between the States of New York and New Jersey, and which would now be described as partial jurisdiction or criminal jurisdiction.

Henry H. Pike
Special Assistant to the General
Counsel - GSA

Approved:

J. E. Moody
General Counsel -GSA

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