

NJ'S SOVEREIGNTY OVER LIBERTY AND ELLIS ISLANDS

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New Jersey has been long-suffering in her attempts to maintain her territorial limits against encroachment from larger neighbors. Since the day that Governor Nicholls of New York first learned of the Duke of York's grant of the territory west of Manhattan and Long Islands to Berkeley and Carteret — and complained that the Duke had given away “the most improvable parts of his domain”—New York has campaigned against the sovereignty and territorial integrity of New Jersey. The bully tactics employed to enjoy extra-territorial rights at the expense of its smaller sister-state are poetically contrasted in an ongoing competition between the self-styled Empire State and Garden State.

The original deed of lease and release from James, Duke of York, to John, Lord Berkeley and Sir George Carteret, dated June 24, 1664, “for the Land adjacent to New England, lying and being to the west of Long Island and Manhitas Island, and bounded on the east, part by the main sea, and part by Hudson's River” has been variously interpreted. The wording indicates not only that the islands west of Manhattan and Long Island—obviously, including Staten Island—are included in the conveyance, but also that the entire bed of the Hudson River, being “land West of Long Island and Manhitas Island,” belonged to New Jersey. Unfortunately, New York has no equivalent description of its boundaries, since its territory remained those parts of North America conveyed by Charles II to the Duke of York on March 12, 1664, (encompassing “the land from the St. Croix River on the East, to the River Canada on the North and the Delaware River on the West and South”) that had not been alienated through deeds of conveyance by James to other parties. A long-standing source of irritation and dispute was New York's unsubstantiated claim, based solely upon the 1686 charter of New York City, to the whole of the Hudson River and Bay up to the low-water mark on the western or Jersey shore. The Ducal grant of New Jersey to John Berkeley and George Carteret in June 1664 remains the only Royal deed of conveyance to the territory in dispute. The Charter of the City of New York, issued by Thomas Dungan in 1686, has no legal force in regard to the disputed boundary between the States since it was issued not by the Crown, but only by one of the parties to the dispute. It not only dates twenty-two years subsequent to the Ducal grant of New Jersey, but it also coincides with a meeting between Governor Lawrie and his New York counterpart on July 1, 1686, to settle the boundary between their respective Provinces.

As early as November 17, 1719, Lewis Morris, President of the New Jersey Council, reported “that he had been Informed that Bloodshed & murders are Like to Ensue from the Quarrels Amongst Inhabitants on the Division Line betwixt this Province and the Province of New-York.” Resisting New Jersey's petition to the Royal Commissioners for Trade and Plantations to intervene and define the boundary between the two provinces in 1748, the Province of New York, supported its pretensions by disingenuously appealing to the Crown's self-interest by arguing that New Jersey “is a Propriety Province with respect to the Grant and Tenure of its Territory, and consequently as New York is not in that Predicament, the Determination of the Boundary in prejudice to that Province [i.e., New York] will affect the Interest of the Crown, with respect to the Tenure of such Lands as are concerned in this Question, it being evident that whatever Districts are supposed to be immediately held of the Crown in New York by being supposed to be included in the Limits of the Province of New Jersey, will immediately pass to the Proprietors of that Province [i.e., New Jersey] and be held of them, by which means the Crown will be deprived of its Escheats and the Quit Rents will pass into other hands..” The strategy employed by New York was clearly to resist settlement of the boundary question as long as possible and thus gain by adverse possession or compromise what the Duke had surrendered by his

conveyance to the Proprietors of New Jersey. James Alexander and Robert H. Morris addressed a letter to colonial agent, Ferdinand John Paris, on May 30, 1749, regarding the question of “Whether by the words of the Grants of New Jersey, Hudsons River be Granted, and Consequently that the bounds of New Jersey Extend to the East Side of Hudsons River?” Their argument, quite simply stated, was that it would have been a “very easy and rational thing” for the original grantor, James, Duke of York, to have expressly described the eastern boundary of New Jersey as either “the middle of the waters” or as “the west side of the Hudson River at high water mark,” if that had been his intention. Instead, he chose to describe New Jersey as land lying west of Manhattan and Long Islands. According to a petition addressed to the King by the East Jersey Proprietors, the issue of a boundary settlement was complicated because “both the provinces of New York and New Jersey afterwards became and for a Great Length of Time were under the Government of one and the same Governor And New York had the Greater Strength and Influence of the two, New Jersey hath never been able to get the said Boundary Settled altho every reasonable Endeavour hath been used in order thereto...” Instead, Governors of New York engaged in a policy of encroachment upon the territory of New Jersey. New York officials undermined every reasonable settlement of the boundary controversy, as evidenced by New York surveyor, Allan Jarrat, who decided, after one-third of the work was done, that the quadrant being used to locate the northern boundary of New Jersey was too small and that “a larger Instrument and the most exquisite Exactness & nicety” were needed.

Boundary commissions were empowered to determine the line between New York and New Jersey running through the Hudson River and New York Bay in 1807 and 1827, without result. The dispute over the boundary in the waters between New York and New Jersey was resolved, in principle, by a compact entered into on September 16, 1833, between boundary commissioners appointed by the two States that accepted a sovereign boundary in the middle of the waters dividing New Jersey and New York. This agreement was ratified by the legislatures of both States. The United States Congress also ratified it on June 28, 1834. The first Article of the agreement states “the *boundary line* between the two states of New York and New Jersey...shall be the middle of the said [Hudson] river, of the bay of New York, of the water between Staten Island and New Jersey, and of Raritan bay...” It should be noted that Article I does not mention, define, describe nor restrict this boundary “to lands underwater.” Consequently, the State of New York “relinquished in legal effect, whatever right or claim this [New York] State formerly had to the bed of the Hudson River between Manhattan and Staten Islands, and the low-water mark on the Jersey shore.”¹ Thus the boundary between the two States was established as “the middle of the said Hudson River, of the Bay of New York...to the main sea.” An important tag, however, qualified this first article: “except as hereinafter otherwise particularly mentioned.” The second article of the 1834 Compact allowed New York to “retain its present jurisdiction of and over Bedlow's [Liberty] and Ellis' Islands” and (quite differently stated) “exclusive jurisdiction of and over all the waters of the Bay of New York...and of and over all the waters of the Hudson River...to the low-water mark on the westerly or New Jersey side thereof,” subject to certain expressly reserved rights of property and jurisdiction of the State of New Jersey to “land underwater lying west of the middle of the Bay and Hudson River,” to “wharves, docks and improvements” and to “the right of regulating fisheries” west of the middle of the channel. In a similar clause, New Jersey was given “exclusive jurisdiction” over the waters between Staten Island and New Jersey, south of Woodbridge Creek, inclusive of Raritan Bay, to the mouth of Matawan Creek, subject to rights of property and jurisdiction of New York.” In both instances of extra-territorial jurisdiction, “wharves, docks and improvements” that extended the shoreline into the water were excluded. Article VI also extended the authority of New Jersey in matters of criminal and civil process “upon any of the said waters within the exclusive jurisdiction of the state of New York,” thus further limiting said “exclusive jurisdiction” and clearly making sovereignty co-extensive with

territory.” The important and subsequent legal interpretations of these qualifying clauses are crucial to understanding the case for New Jersey's sovereignty over all lands and domains lying west of the boundary line with New York. First of all, it is important to note that those articles allowing to exercise “jurisdiction” over the waters and islands in the Hudson River and New York Bay within the territorial limits of the State of New Jersey are understandable only within the context of the Compact when this boundary was “imaginary” and not known by actual survey and demarcation (a task not undertaken until 1889). In the absence of any specific boundary, every effort at law enforcement would have foundered over the issue of proper jurisdiction. A unity and uniformity of control over the harbor was in the best interests of both States.² Secondly, the inclusion of the qualifier “*present*” rather than “exclusive” in regard to “jurisdiction” over Bedloe's and Ellis Islands was hardly inadvertent or inconsequential. It stands in stark contrast to the phrase “exclusive jurisdiction” that is used to describe New York's authority over the other islands in the same waters. The reason for the variously qualified “jurisdictions” in the treaty can be found in the historical record. By an Act passed February 15, 1800, the State of New York had already ceded to the United States government its claimed “jurisdiction” over “All that certain island called Bedlow's Island, bounded on all sides by the waters of the Hudson River, and all that certain island called Oyster Island [later, Ellis Island] bounded on all sides by the waters of the Hudson River” and also to Governor's Island, reserving only the right to serve and execute civil and criminal process on these islands. Therefore, in 1834 when the Compact was enacted, New York's “present jurisdiction” over these islands was minimal or extinct. The clause was apparently inserted in the Compact to legitimate the Federal claim to jurisdiction over these islands — a claim only as substantial as New York's original claim to “jurisdiction” in a disputed territory or region. To clarify this particular wording, a provision was added to the Act of June 28, 1834, stating that nothing in the agreement between New Jersey and New York shall impair “any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement.” Thus amended, the 1834 Compact was ratified by Congress. Bedloe's and Ellis Islands remained under Federal jurisdiction within the sovereign boundaries of the State of New Jersey. At best, the second article of the 1834 agreement could be interpreted to mean that New York retains only a jurisdictional claim to serve and execute civil and criminal process on these islands.

The legal content of the term “jurisdiction” as frequently used in the 1834 Compact was the subject of dispute. It was defined by the New York Court of Appeals in 1870. The State of New York had filed suit to prevent the Central Railroad of New Jersey from filling in and occupying land underwater at Communipaw (Jersey City). The Company was acting under a grant from the Riparian Commission of New Jersey. The State of New York lost the case in its own highest Court of Appeals. In its final judgment, this Court insisted that the language of the first article of the 1834 Compact that established the middle of the channel as the true boundary between the two States was “very clear and explicit,” leaving no room for constructive doubt or misconstruction in regard to its meaning or effect.” As to lands lying west of this boundary line, the Court declared: “The right of absolute sovereignty, which includes all the power of government, all the authority, executive, judicial and legislative, which the several States possess and exercise, subject to the constitutional supremacy of the National government, doubtless belong to New Jersey over the domain and territories of the said State.” The Court then considered “how far, if at all, the State of New Jersey had made a binding provision by treaty for the cession and extinguishment of any of her territorial or governmental rights to the State of New York, over the waters or land referred to in said [1834] treaty.” It concluded that: “The remaining articles of the said [1834] agreement, all fairly considered, conduce to the same construction, and confirm the view that the jurisdiction conferred upon this [i.e., New York] State over the waters of said river and bay was a qualified and limited jurisdiction conferred for police and sanitary

practices, 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 and domains of New Jersey, or to give to this [i.e., New York] 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 ~

The New York Court of Appeals was, in effect, upholding the ancient principle that sovereignty is co-extensive with territory, whereas “a qualified and limited jurisdiction” may, by mutual agreement, overlap boundaries. If this Court issued a ruling so favorable to New Jersey based upon the “exclusive jurisdiction” clause regarding the waters of the river and bay, how much weaker must New York's claim to its non-existent “present jurisdiction” over the islands be? Based upon this favorable ruling, and inspired by a renewal of disputes, the New Jersey legislature passed a resolution creating a boundary commission in 1885, asking the State of New York to appoint a similar one to settle the boundary. New York responded in 1887. In 1888 and 1889, the jurisdiction of the commission was extended to cover the whole extent of the Hudson River between the States. The difficulty was in the division of New York Bay. According to a June 3, 1889 report by the New Jersey members of the Joint Boundary Commission, the New York Commissioners argued over what effect the presence of Bedloe's (Liberty) and Ellis' Islands had on the boundary line. The absence of any mention of these islands in the final agreement is therefore instructive: they clearly lie within the territorial limits of New Jersey. The six members of the Joint Boundary Commission signed the final agreement in Jersey City on December 23, 1889.³ The New York Legislature approved the pact in a law that took effect on February 17, 1909.

Thus the true line between the States of New Jersey and New York in the Hudson River and New York Bay was officially located, “marked and monumented.” It did not alter the imaginary line ratified by Congress in 1834, but merely gave it a geographical reality. It is noteworthy that this 1889 agreement locating the true line between the States in lands underwater contains no exceptions or qualifications. There were no lines or boundaries drawn in the middle of the waters between Bedloe's or Ellis Islands and mainland of the State of New Jersey, as New York had no viable claim to sovereignty over these islands. The question of even “a qualified and limited jurisdiction” by New York over these islands under the 1834 Compact was irrelevant as New York had long since ceded any claim to jurisdiction to the Federal government in 1800. The summary effect of the various legislative acts, compacts and boundary commissions between 1664 and 1889 affirm New Jersey's sovereignty over these islands, and indeed, to the middle of the waters between the States.

On April 2, 1890, the *New Jersey Herald*, published in Newton, New Jersey, added an important footnote to the history of Ellis and Bedloe's Islands. In an article entitled “Saved to Liberty,” the editor noted that Senator McPherson and Congressman McAdoo of New Jersey prevented “emigrant pens” from being built “on the very skirts of Miss Liberty's garments,” despite the order of Secretary Windom. Their efforts secured “the removal of the naval magazines from Ellis Island and its purchase as an emigrant station.” Senator McPherson presented the matter in the form of a joint resolution, which passed the Senate unanimously. The *Herald* article also noted “that by the report of the New Jersey and New York boundary commissioners, not long since, it was decided that Bedloe's Island belongs to New Jersey, thus making Bartholdi's statue a Jersey girl.”

¹People v. Central Railroad Co. of New Jersey, New York Court of Appeals Reports, 1870, Vol. 41-42-43-45.

²People v. Central Railroad Co. of New Jersey, New York Court of Appeals Reports, 1870, Vol. 41-42-43-45, pp. 292-293

³ New Jersey's Secretary of State, Henry C. Kelsey of Newton, New Jersey, filed it on December 31, 1889 and recorded in Liber A to Z, page 35.