

license because of failure to deposit security only in instances where the State where the accident occurred is required to suspend its own resident's driver's license for failure to deposit security under the New Jersey Security Responsibility Law.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: JAMES T. KIRK
Deputy Attorney General

JTK/LL

NOVEMBER 16, 1956

MR. SALVATORE A. BONTEMPO
Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION, 1956—No. 22

DEAR MR. BONTEMPO:

You have requested what you term a clear-cut definition as to New Jersey's boundary in the Delaware Bay and the Delaware River and advise that it is imperative that you obtain our definition because of the current activity in dredging operations in the Delaware River and the Delaware Bay. The explanation that the request has reference to dredging operations indicates that you wish to be informed on the limited topic of the territorial limits and ownership of the State of New Jersey in the soil under both bodies of water mentioned. The two states occupying the shores opposite those of New Jersey along the Delaware River and Bay are Delaware and Pennsylvania. The case with Delaware will be discussed first in view of the fact that the boundary between that state and ours has been the subject of litigation and has been adjudicated. *State of New Jersey v. State of Delaware*, 291 U.S. 361, 54 S. Ct. 407 (1934).

The State of Delaware and the State of Pennsylvania have a common boundary at the point where both states border the Delaware River, and from that point Pennsylvania bounds the Delaware River northwardly, and Delaware southwardly to the sea. In the issues involved in the case of *New Jersey v. Delaware*, sometimes called the Delaware boundary case, the Court characterizes them as follows:

"The controversy divides itself into two branches, distinct from each other in respect of facts and law. The first branch has to do with the title to the bed or subaqueous soil of the Delaware river within a circle of twelve miles about the town of New Castle. Delaware claims to be the owner of the entire bed of the river within the limits of this circle up to low-water mark on the east or New Jersey side. New Jersey claims to be the owner up to the middle of the channel. The second branch of the controversy has to do with the boundary line between the two states in the river below the circle and in the bay below the river. In that territory as in the river above, New Jersey bounds her title by the Thalweg. Delaware makes the division at the geographical center, an irregular line midway between the banks or shores."
54 S. Ct. 408

AS TO THE TWELVE-MILE CIRCLE

The arc of the circle of twelve miles about the Town of New Castle which crosses the Delaware River to the north is at a point on the river where Delaware and Pennsylvania have a common boundary. Where the arc of the circle crosses the Delaware River to the south is a point on the Delaware shore at about Bay View Beach. We will consider the boundary question within the twelve-mile circle.

In the Delaware case, the Special Master appointed by the Court in January 1930 found that Delaware traced her title to the river bed within the circle through deeds going back two and one-half centuries and more.

In 1682 the Duke of York delivered to William Penn a deed conveying the Town of New Castle and all the land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the Delaware River, together with the river and the soil thereunder, lying north of the southernmost part of the circle of twelve miles about the town.

The Master in his filed report found that William Penn's title to the lands in question was good. The Court, at pages 411, 412, said that:

"The colony of Delaware as defined by this patent was the one that declared its independence in 1776 and that succeeded in 1783 to any fragment of ownership abiding in the Crown."

"Delaware's chain of title has now been followed from the feoffment of 1682 to the early days of statehood, and has been found to be unbroken."

The Court discussed the various claims made by the State of New Jersey to title to that area of the twelve-mile circle covered by water to the low-water mark and concluded that such claims had no foundation in law or fact and upheld the title of Delaware to the land within the Circle.

Accordingly, the Court confirmed the master's report as it applied to the twelve-mile circle and decreed that:

"Within the twelve-mile circle, the river and the subaqueous soil thereof up to low-water mark on the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905."

The Compact of 1905 gave the State of New Jersey no proprietary rights in the soil within the twelve-mile circle.

You are, therefore, advised that within the twelve-mile circle, the boundary between New Jersey and Delaware follows the low-water mark along the New Jersey shore.

AS TO THE RIVER AND BAY BELOW
THE TWELVE-MILE CIRCLE

The Delaware River extends about five miles below the twelve-mile circle and then broadens into the Delaware Bay.

With respect to the territorial limits of the State of New Jersey in the tidewaters of the Delaware River and Bay below that twelve-mile circle a different situation exists.

In *New Jersey v. Delaware*, supra, at page 413, it is stated:

"Below the twelve-mile circle there is a stretch of water about five miles long, not different in its physical characteristics from the river above, and below this is another stretch of water forty-five miles long where the river broadens into a bay.

The title to the soil of the lower river and the bay is unaffected by any to the Duke of York or others. The letters patent to James do not affect the ownership of the bed below the circle. Up to the time when New Jersey and Delaware became independent states, the title to the soil under the waters below the circle was still in the Crown of England. When independence was achieved, the precepts to be obeyed in the division of the waters were those of international law."

The Master found that neither party made any claim of title to the river or bay below the twelve-mile circle, except in succession to the rights of the Crown.

"In 1783, when the Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give to the boundary in bay and river below the circle a practical location, or to establish a prescriptive right.
New Jersey v. Delaware, supra, at page 415.

Having determined that there was no agreement between the parties with respect to the boundary line between the states and that neither party had by any act of possession or dominion established a prescriptive right in the soil under the waters of the Delaware River below the twelve-mile circle, the Court then outlined the principles of law which it felt were controlling, and the authorities relied on for justification. It said at page 413:

"International law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical center, halfway between the banks. It applies the same doctrine, now known as the doctrine of the 'Thalweg,' to estuaries and bays in which the dominant sailing channel can be followed to the sea. The 'Thalweg' or downway, is the track taken by boats in their course down the stream, which is that of the strongest current."

The doctrine of "thalweg" is the test applied in determining boundaries between states.

49 Am. Jur., Sec. 20, p. 241

"The general rule is that when a river is the boundary between two states, if the original property is in neither, and there is no special convention respecting it, long use equivalent thereto, or other controlling circumstances to the contrary, each state holds to the middle of the main channel of the stream. This is known as the doctrine of 'thalweg'. In the case of navigable rivers, the doctrine is ordinarily construed to mean that each state takes to the middle of the principal channel of navigation, not necessarily the deepest channel—and it does not, therefore, mean, with respect to navigable rivers, a line equidistant from each bank. The reason for this doctrine making the

middle of the channel of commerce the boundary line, or the doctrine of 'thalweg' as it is called, rather than the middle line between the shores of the river, lies in the right of each state to equal privileges in the navigation of the river. The channel is the bed of a stream of water, especially the deeper part of a river or bay where the main current flows. When employed in treating of subjects connected with the navigation of rivers, it indicates the line of deep water which vessels follow, the space within which vessels may and usually do pass."

The Master in his report indicates that he has followed the doctrine of "thalweg", and based on that doctrine made the following findings:

"Below the twelve-mile circle there is a portion of the river of about 8,500 yards measured along the center of the main ship channel on Exhibit 3, to the division line between the river and bay established by agreement of the parties in 1907 (Exhibit 161, pp. 44-5) as a line from Liston's Point to the mouth of Hope Creek. Between this area and the mouth of the bay there is a distance of 78,750 yards, more or less, to the overfalls light at the Atlantic Ocean. (Exhibits 3 and 4.)

The question is presented as to whether through these two areas the rule of geographical center is to be applied in the ascertainment of the boundary between the two States or the rule of the thalweg.

The plaintiff contends that the rule of the thalweg, that is to say, the main sailing ship channel, controls throughout the river and bay below the circle. Defendant, on the other hand, maintains that the rule of the thalweg cannot apply because, it says, there is no main sailing channel in the bay and river, the bay and river being equally navigable in all directions.

But the proof shows that as early as Fisher's Chart of the Delaware Bay 1756 (Exhibit 99) there has been a well-defined channel of navigation up and down the river and bay. This channel, since the Revolution, has been regularly marked by the government. In the United States Coast Pilot, Section C, published 1930 by the United States Coast and Geodetic Survey, it is stated (p. 44):

'Delaware Bay is, properly speaking, only an expansion of the lower part of the Delaware River. . . . The channel is well marked by lighthouses and buoys, but strangers in deep-draft vessels should not attempt to enter by night.' (Exhibit 102.)

'The channel is well marked by lighthouses and buoys to the entrance of the dredged channel and by lighted ranges and buoys above that point. The dredged channels are generally 800 feet wide in the straight reaches, 1,000 feet wide in the bends, and 1,200 feet wide in Bulkhead Bar Channel. The buoys marking the dredged channels are usually maintained on or close to the edge, and vessels on the ranges will usually pass them at a distance of 100 to 200 yards.'

'There is a channel along the western side of Delaware Bay which is marked by a line of perpendicularly striped buoys from off the mouth of St. Jones River southward to below Old Bare Shoal. It is used by most of the

vessels frequenting the tributaries on the western side of the bay. It is said to lead clear of dangers if the buoys are followed closely, but leads close to the shoals in places.'

Red sectors are established in the lighthouses to cover the dangers on both sides of the channel from Overfalls Lightship to the entrance of the dredged channel and should be observed closely if running at night.

There are many detached shoal spots with depths of 2 to 6 feet (0.6 to 11.8 m.) along the western side of Delaware Bay and Delaware Breakwater northward to Bombay Hook Point. They are generally unmarked, except in the vicinity of the main ship channel, and are subject to some change, both in depth and position. Strangers using any of the channels westward of the main ship channel should proceed with caution.

'Cape Henlopen, on the southwest side of the entrance to Delaware Bay, is a high white sand hill, bare of vegetation. The point of the cape, from a comparison of the surveys, is moving northward at a slow but uniform rate. Vessels should keep in the white sector of Delaware Breakwater light when passing north of the cape. A shoal with little depth, as shown on the chart, extends nearly $\frac{3}{8}$ mile eastward from the end of Cape Henlopen, and is marked at its easterly end by a black bell buoy.'

'Breakwater Harbor, on the west side of Cape Henlopen, southward of the inner breakwater, is easy of access both day and night and is a safe harbor for light-draft vessels in all but heavy northwesterly gales, and affords considerable protection even in such weather. Under the most favorable conditions a vessel of as much as 15 feet (4.5 m.) draft can select anchorage with sufficient swinging room in the easterly part of the harbor, but the harbor is generally crowded in heavy weather, and vessels of a greater draft than about 10 feet (3 m.) should preferably anchor westward or northwestward of the inner breakwater or in the Harbor of Refuge.'

Breakwater Harbor has depths of 10 to about 30 feet (3 to 9.1 m.) in its easterly part, eastward of a line joining the reporting station on the breakwater and the easternmost fish-oil works. The angle in the westerly part of the breakwater is shoal, depths of 9 to 10 feet (2.7 to 3 m.) extend nearly $\frac{3}{8}$ mile southsouthwestward from the westerly half of the breakwater, and depths of 12 to 13 feet (3.6 to 3.9 m.) extend to shore southwestward." (pp. 53-4.)

The Court observed the following in the Delaware boundary case:

"The findings of the special master, well supported by the evidence, overcome the argument thus drawn from physical conditions. He finds that 'as early as Fisher's Chart of Delaware Bay (1756) there has been a well-defined channel of navigation up and down the Bay and River,' in which the current of water attains its maximum velocity; that 'Delaware River and Bay, on account of shoals, are not equally navigable in all directions, but the main ship channel must be adhered to for safety in navigation'; that the Bay, according to the testimony, 'is only an expansion of the lower part of the Delaware River,' and that the fresh water of the river does not spread out uniformly when it drains into the bay, but maintains a continuing identity

through its course into the ocean. "The record shows the existence of a well-defined deep water sailing channel in Delaware River and Bay constituting a necessary track of navigation, and the boundary between the States of Delaware and New Jersey in said bay is the middle of said channel."

Concerning the date when the formula of the Thalweg is to be applied to the division between Delaware and New Jersey, the Court in the Delaware case held that it went back to the Peace of Paris as it had applied it in the boundary case between Illinois and Iowa. *Iowa v. Illinois*, 147 U.S. 1, 135 S. Ct. 239. The Court made the further observation that the difference in time between 1776 and 1783 would not affect the result in the Delaware case. The year 1776 is the one of independence for the American colonies. The year 1783 is the one in which the Treaty of Paris was signed by Great Britain and the American Colonies ending the War of Independence.

"* * * the several states which composed the Union, so far at least as regarded their municipal (internal affairs) regulations, became entitled, from the time when they declared themselves independent to all the rights and powers of sovereign states, and they did not derive them from concessions made by the British Crown. The treaty of peace contains a recognition of their independence, not a grant of it." *McIlwaine v. Cox's Lessee*, 8 U.S. 208. (definition within parentheses supplied)

"It is thus with the formula of the Thalweg in its application to the division between Delaware and New Jersey. We apply it to that boundary, which goes back to the Peace of Paris. * * * The line of division is to be the center of the main channel unless the physical conditions are of such a nature that a channel is unknown."

"Below the twelve-mile circle, the true boundary between the complainant and the defendant will be adjudged to be the middle of the main ship channel in Delaware River and bay."

Therefore, be advised that the true boundary between the States of New Jersey and Delaware below the twelve-mile circle is the center of the main ship channel in the river and bay.

GEOGRAPHIC LIMITS AS TO PENNSYLVANIA

As to Pennsylvania, the problem also divides itself into two branches distinct from each other in respect to facts and law.

THE DELAWARE RIVER ABOVE TRENTON

A portion of the Delaware River which lies between the States of New Jersey and Pennsylvania is tidal, a portion is above tide water. *Attorney General v. Delaware and Bound Brook RR Co.*, 27 N.J. Eq. 1, 8. In that case the Court quoted *Rundle v. Delaware and Raritan Canal Co.*, 1 Wall., Jr., 275, as follows:

"The river Delaware is the boundary between the States of Pennsylvania and New Jersey. The tide ebbs and flows to the part of the Trenton Falls where the Trenton bridge crosses the river; above that point it is a fresh water stream. * * *"

Under the established law in New Jersey the State is the owner of the soil under tidal streams to the high water mark. But in non-tidal waters the riparian owners held to the middle of the stream. The State holds no title to the lands under water in the Delaware River above Trenton.

8 *Am. Jur.*, Sec. 19, p. 757

"Under the English Common law, the bed of all rivers as far as the flow of the tide extends is in the Crown, but the bed of all fresh-water rivers above the ebb and flow of the tide is vested in the riparian owners, and this without regard to the navigability of the rivers."

8 *Am. Jur.*, Sec. 21, p. 759

"Under the rule of the common law which vests title to the bed of tidal rivers in the state where lands are described in a deed as bounded by a navigable river in which the tide ebbs and flows, the presumption is that the title extends merely to the waters edge and the boundaries of the tract should be drawn along the bank or shore at high watermark. Citing *Simmons v. Patterson*, 60 N.J. Eq., 385. *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N.J. Eq. 398, *Arnold v. Mundy*, 6 N.J.L. 1. The common law, however, limits this rule to tidal rivers."

The boundary between the States of New Jersey and Pennsylvania in the waters of the Delaware River above the falls at Trenton is the middle of the river. The legal title to the lands in question stems from the West Jersey proprietors and is in the riparian proprietors, and not in the State.

THE DELAWARE RIVER BELOW TRENTON

The only remaining problem is to advise you concerning the Delaware River as it runs between the falls at Trenton down to the boundary line between Pennsylvania and Delaware.

While the general rule as it applies to fixing the boundaries between states in tidal waters is expressed in the New Jersey-Delaware case above, that opinion does not consider certain variations to the general rule.

In the Delaware case the State of New Jersey did set up as its basis for claiming title to the soil in part of the twelve-mile circle through principles of law involving acquiescence, estoppel, usage and the effect of the Compact between the states. The claim did not concern itself with the effect of avulsion, accretion or the possibility that the old channel as it existed in 1783 may have been relocated through dredging an artificial channel. It is assumed that there was no proof of the existence of such happenings. If any of these factors would have any influence in fixing the main ship channel between New Jersey and Pennsylvania, please consider them in the light of the following:

49 *Am. Jur.*, Sec. 21, p. 242

"The effect upon boundaries of a state, where such boundaries are fixed by the middle of the main channel of a river, by changes in that channel through processes of accretion and avulsion is dependent upon the gradualness or suddenness of the change; when the course of the river and its channel changes gradually, the boundary follows the channel, but if the river suddenly

changes its course, or deserts its natural channel, the boundary remains where it was before, that is, the middle of the altered or deserted river bed."

56 Am. Jur., p. 893

"But where the change takes place suddenly and perceptibly either by reliction or avulsion, as where a stream from any cause suddenly abandons its old and seeks a new bed, such a change works no change of boundary or ownership."

Cunningham v. Prevow, 192 S.W. 2d 338, 29 Tenn. App. Co. 43, Tenn. Court of Appeals 1945.

"'Avulsion' is the sudden or violent action of the elements of the shore or bank of a river, the effect and extent of which is perceptible while the action is in progress."

McClure v. Couch, 188 S.W. 2d 550, 182 Tenn. 563, Tenn. Supreme Ct. 1945.

"Avulsion is a sudden change of channel or stream, and it does not change the boundary which remains as it was in the middle of old channel, though water no longer flows therein."

State of Arkansas v. State of Tennessee, 38 S. Ct. 557, 247 U.S. 461 (1908) :

"The true boundary line between the states of Arkansas and Tennessee, aside from the question of avulsion of 1876, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi River as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes."

Whiteside v. Norton, (CCA 8th) 205 F. 5. Appeal dismissed 36 S. Ct. 97.

"Nor does dredging of a new channel by the government in a river which forms the boundary between the two states change the state boundary from the middle of the former main navigable channel to the newly formed channel."

The boundary between the States of New Jersey and Pennsylvania between the falls at Trenton and the twelve-mile circle is the "thalweg" or "main sailing channel" as it existed in 1783, as changed only by natural and gradual processes.

SUMMARY

Summarizing the conclusions reached above we find that beginning at the most northerly point in New Jersey and continuing southwardly the boundary between Pennsylvania and New Jersey is the middle of the river to the falls of Trenton but that New Jersey is not the owner of the soil under those waters. From the falls of Trenton to the twelve-mile circle the boundary between New Jersey and Pennsylvania is the "thalweg" or "main sailing channel" to which point in the river the State of New Jersey is the owner of the soil beneath the river. In the twelve-mile circle the boundary between Delaware and New Jersey is the low-water mark along the New Jersey shore and New Jersey has no ownership in the soil offshore of said low-water mark. From the twelve-mile circle southwardly to

the sea the boundary between Delaware and New Jersey is the "thalweg" or "main sailing channel" and New Jersey owns the soil under the river and bay from its shore to said boundary.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: SIDNEY KAPLAN
Deputy Attorney General

SK:mp

DECEMBER 11, 1956

HONORABLE FREDERICK J. GASSERT, JR.
Director of the Division of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION, 1956—No. 23

DEAR DIRECTOR GASSERT:

You have requested our opinion concerning the applicability of R.S. 39:3-40 to a nonresident motor vehicle operator whose driver's license has been suspended or revoked or who has been prohibited from obtaining or has been refused a driver's license in his own State. For the reasons hereinafter stated, it is our opinion that R.S. 39:3-40 applies in such circumstances.

By R.S. 39:3-10 it is provided in part as follows:

"No person shall drive a motor vehicle on a public highway in this State unless licensed to do so in accordance with this article. No person under 17 years of age shall be licensed to drive motor vehicles, nor shall a person be licensed until he has passed a satisfactory examination as to his ability as an operator. . . ."

The penalties for violating this section are a fine not exceeding \$500 or imprisonment in the county jail for not more than 60 days.

By R.S. 39:3-17 this jurisdiction has extended the so-called "reciprocity privilege" to drive a New Jersey registered vehicle as well as one registered outside of New Jersey to any nonresident driver "who has complied with the law of his resident State, or country, with respect to the licensing of drivers. . ."

R.S. 39:3-17 also provides in pertinent part as follows:

"A nonresident shall, at all times while operating a motor vehicle in this State under his reciprocity provision, have in his possession the registration certificate of the car which he shall be then operating and his driver's license, and shall exhibit them to any motor vehicle inspector, police officer or magistrate who, in the performance of the duties of his office, shall request the same. Any person violating the provisions of this section shall be subject to a fine not exceeding five hundred dollars, or to imprisonment in the county jail for not more than sixty days."