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A HISTORY OF CONNECTICUT'S LONG ISLAND SOUND BOUNDARY

By Raymond B. Marcin*

The Scene†

Long before remembered time, ice fields blanketed central India, discharging floes into a sea covering the Plains of Punjab. The Argentine Pampas lay frozen and still beneath a crush of ice. Ice sheets were carving their presence into the highest mountains of Hawaii and New Guinea. On the western land mass, ice gutted what was, in pre-glacial time, a stream valley near the northeastern shore. In this alien epoch, when woolly mammoth and caribou roamed the North American tundra, the ice began to melt. Receding glaciers left an inland lake where the primeval stream valley had been. For a time the waters of the lake reposed in boreal calm, until, with the melting of the polar cap, the level of the great salt ocean rose to the level of the lake. In instant metamorphosis, the glacial lake teemed with life and became a Sound.[1]

For millennia, generations of nameless, unremembered seacoast dwellers watched as the Sound waxed secure. Men later chronicled as Pequot, Mohawk, and Mohegan shared the bounty of the Sound. Adventurers challenged its buffeting caps. Then, some twelve thousand years after its birth, the Sound was mute witness to the systematic and organized occupation of its shores. With that, its legal history began.

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† For a discussion of the history of Connecticut's inland boundaries, see Bowen, The Boundary Disputes of Connecticut; James R. Osgood and Co., Boston, 1882; and Hooker, Boundaries of Connecticut; Connecticut Tercentenary Commission; Yale University Press, 1933.

[1] See Simpson, Ice Ages (1938 Annual Report to the Smithsonian Institution) at 289 et seq., and Flint, Glacial Geology of Connecticut (State Geological and Natural History Survey, 1930), at 34, 217, 218.

THE CONFLICTING PATENTS

The climate which gave the Sound its birth was no less chaotic than the legal climate which drifted to its shores in the early seventeenth century. The initial and obvious question as to the territorial rights of the native occupants of the coastal lands of the "New" World was settled summarily by European consensus:

> [A]ccording to principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.[2]

Territorial boundaries depended upon often conflicting letters patent, treaties, and land grants from various European Crowns, and, consequently, overlapped considerably. The coastal boundary of Connecticut seems to have been rooted in three separate documents: The Warwick Patent of 1631, the Charter of Connecticut of 1662, and the York Patent of 1664. The State of New York, however, has advanced two other patents as supportive of its claims with respect to Long Island Sound: A patent to the Earl of Sterling in 1614 and a York patent of 1674.[3] Further complicating the situation was the Treaty of Hartford of 1650 between the Colony of Connecticut and the States General of Holland, in which the Dutch gave Connecticut all of Long Island itself east of Oyster Bay.[4]

The Warwick Patent is dated March 19, 1631. Robert,

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[2] Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409 (1842).

[3] See Report of the New York Commissioners Appointed to Settle the Disputed Boundary Lines with the State of Connecticut, 1880 New York State Assembly Documents, vol. 3, no. 53, at 7.

[4] The treaty is mentioned in Keyser v. Coe, 14 Fed. Cas. 442, 445 (No. 7,750) (C.C.D. Conn. 1871). The Federal Circuit Court for the District of Connecticut, while not called upon to vindicate Connecticut's claims to Long Island itself, nevertheless observed that it was well known that long prior to the York Patent, Connecticut did in fact exercise jurisdiction over a large part of Long Island.

Earl of Warwick, derived his title to the patent lands from the Council of Plymouth by a grant made to him in 1630 and confirmed by a patent from Charles I. The Council of Plymouth, in turn, held the lands under the Great Patent of New England from James I, dated November 3, 1620. In relevant part, the lands granted by the Warwick Patent include:

> All that part of New England, in America which lies and extends itself from a river there called Narraganset river, the space of forty leagues, upon a straight line, near the sea shore, towards the southwest, west and by south, or west, as the coast lieth, towards Virginia, accounting three English miles to the league; and, also all and singular the lands and hereditaments whatsoever, lying and being within the lands aforesaid, north and south, in latitude and breadth, and length and longtitude, of and within all the breadth aforesaid, throughout the main lands there, from the Western Ocean to the South Sea, and all lands and grounds, place and places, soil, wood and woods, grounds, havens, ports, creeks and rivers, waters, fishings, and hereditaments whatsoever, lying within said space, and every part thereof; and, also, all islands lying in America aforesaid, in the said seas, or either of them, on the western or eastern coasts or parts of said tracts of lands by these presents mentioned to be given, granted. . . .[5]

So Warwick gave not only Long Island Sound, but also Long Island itself to Connecticut. Right? Not quite. Although the Great Patent of New England (out of which the Warwick Patent was carved) granted to the Council of Plymouth the whole region from the fortieth to the forty-eighth degrees of north latitude, "with all the seas, rivers, islands, creeks, inlets, ports, and havens within those degrees,"[6] and although the Charter of Connecticut of 1662 bounded the Colony "south by the sea" (ocean), another patent was in conflict.

On March 12, 1664, Charles II granted to his brother, the Duke of York,

[5] Quoted in Keyser v. Coe, *supra* n. 4, at 443.

[6] *Id.* at 445.

> . . . all that island or islands commonly called by the several name or names Matowacks or Long Island . . . together with all the lands, islands . . . harbors, . . . fishings, . . . to the said several islands, lands, and premises belonging and appertaining, with their and every of their appurtenances. . . .[7]

The double grant of Long Island was settled in November of 1664, when a royal commission (attended by Connecticut delegates, including the Colony's governor) decreed

> . . . that the southern boundary of his majestie's colony of Connecticut is the sea, and that Long Island is to be the government of his royal highness the Duke of York. . . .[8]

HIGH SEAS, TERRITORIAL WATERS, OR INLAND WATERWAY

From the settlement of 1664 to the latter part of the nineteenth century, the question as to whether Long Island Sound was (1) high seas and, therefore, the common property of all nations, (2) territorial waters and, therefore, subject to federal jurisdiction, or (3) an inland waterway owned by New York, Connecticut, or both was as unsettled as ever a question has been.

In 1765, in an action of trespass for cutting timber on Great Captain's Island in Long Island Sound, the Connecticut Superior Court found that the island in question was within the colony of Connecticut, and not New York.[9]

In 1810, a federal court in New York, drawing on the Charter of Connecticut of 1662 and the York Patent of 1664, found that the Sound belonged neither to Connecticut nor to New York, although it did not reach the question whether it was a territorial sea appertaining to the United States or a part of the high seas and common to all nations.[10]

In 1843, a federal district court in New York attempted

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[7] *Id.* at 444.

[8] *Id.* at 445.

[9] *Id.* at 447, discussing Bush v. Anderson, Connecticut Superior Court, February 23, 1765.

[10] The Sloop Elizabeth, 8 Fed. Cas. 468, 469 (No. 4,352) (C.C.D.N.Y. 1810).

to resolve the controversy when it ruled that Long Island Sound was an arm of the sea under the maritime jurisdiction of the United States:

> The Sound is an arm of the sea, within the common law acceptation of the term, being navigable tide-water (citations), and more specifically an arm of the sea than mere rivers, bays or inlets; because in addition to its tide-water and navigable quality, it is without the territorial limits of any county (citation). It more properly is a strait, or inland sea, having communication with the ocean at each end, and lying between a long extent of land on two sides of it. (Citation). But what imparts an unquestionable maritime jurisdiction to the United States courts over its waters, and renders it within our jurisprudence, the high seas, is, that it is not within the territory of any particular state of the union.[11]

It appeared for a time that the case of the *Martha Anne* had settled the question, when, in 1852, New York's highest state court underscored the federal court's earlier ruling:

> Long Island Sound is by well settled rules a part of the high seas, and no one of the states bordering upon it has the right by any statute or other act of sovereignty to extend her jurisdiction over it.[12]

The Sound's proud reign as a part of the fabled high seas was short lived, however, as the New York court, in 1866, retreated from the position it had taken in 1852:

> The rule is one of universal recognition, that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and admitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion. (Citations). . . . We entertain no doubt, therefore, that, to the extent we have indicated, the waters of Long Island Sound are within the jurisdiction of this state.[13]

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[11] The Sloop Martha Anne, 16 Fed. Cas. 868, 869, 870 (No. 9,146) (D.S.D.N.Y. 1843).

[12] Manley v. People, 7 N.Y. (3 Seld.) 295, 300 (1852).

[13] Mahler v. The Norwich and New York Transportation Company, 35 N.Y. 352, 355, 357 (1866). The court in *Mahler* relied to some extent on an unreported opinion of a lower federal court in New Jersey in the case of United States v. Jackalow.

In the case of *Jackalow,* who was indicted and tried in New Jersey for

In 1871, the federal circuit court in Connecticut buttressed the *Mahler* ruling to the advantage of Connecticut when it held that Goose Island, in Long Island Sound off the Norwalk coast, was in Connecticut territorial waters and that it was properly seized of jurisdiction over a nuisance complaint of a Norwalk citizen against a fish manure factory on the island.[14]

The Sound's last gasp as a part of the high seas occurred in 1882, when a federal court in Massachusetts ruled that:

> Long Island Sound is a part of the Atlantic ocean, and its navigation is in no sense inland navigation. . . .[15]

Finally, in 1926, the federal district court in Connecticut confirmed its earlier holding to the effect that the Sound was territorial water:

> I hold that the waters of Long Island Sound proper are territorial waters and that our municipal law reaches them.[16]

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a robbery on the waters of the (Long Island) sound, Judge Dickerson delivered an elaborate opinion, in which he held that the crime was not committed upon the "high seas;" that the sound was a mere arm of the sea, inclosed within *fauces terrae* at its eastern extremity, formed by headlands less than five miles apart; that it is the subject of territorial dominion; that this portion of the New York boundary, as declared in the Revised Statutes, is a line running directly through the waters of the sound from Fisher's Island to Lyon's Point. . . .
The Jackalow case was appealed to the United States Supreme Court, which remanded it without reaching the boundary question. United States v. Jackalow, 1 Black (66 U.S.) 484 (1861).

The *fauces terrae* argument in the Mahler case finds its physical basis in the fact that access from the Atlantic Ocean to the inner part of the Sound is impeded by a chain of small islands running from the eastern part of Long Island proper to just south of Fisher's Island. The only access to the Sound for normally large seagoing vessels is a narrow, easily controlled, five-mile strip or channel south of Fisher's Island called "the Race." Since New York was at that time exercising de facto government over both Fisher's Island and the small islands across the Race, it was in a position to control access to the Sound from both sides of the channel, and the Sound was, by principles of international law (*see* Vattel's Law of Nations (Classics of International Law ed. at 110), an inland, territorial sea.

[14] Keyser v. Coe, 14 Fed. Cas. 442 (No. 7,750) (C.C.D. Conn. 1871).

[15] Wallace v. Providence and Stonington Steam-Ship Co., 14 Fed. 56, 58 (C.C.D. Mass. 1882).

[16] United States v. 2802 Cases Scotch Whisky, etc., 14 F.2d 426, 427 (D. Conn. 1926).

THE SETTLED BOUNDARY

Credit for a final settlement of the Connecticut southern boundary question is due in large measure, and perhaps exclusively, to the industrious and imperturbable men of the shellfishing industry. For generations, both Connecticut and New York oystermen and shellfishermen had proudly and consistently insisted upon the right to ply their trade throughout the Sound. Consequently, men of the north coast, taking shellfish from waters abutting the south coast, and vice versa, often found themselves under arrest for trespass. As is often the case, the generations of persistence on the part of Connecticut shellfishermen had a sounder basis in law than mere prescriptive use. No less imposing a document than the Connecticut Charter of 1662 granted to residents of the Colony of Connecticut the right ". . . to continue and use the said trade of fishing upon the said coast, in any of the seas thereunto adjoining, or any arms of the seas or salt water rivers, where they have been accustomed to fish. . . ."

In 1874, New York's Attorney General advised its legislature on the possibility of an original suit in the United States Supreme Court between the States of New York and Connecticut to settle the shellfishing controversy.[17] Inaction followed, however, and the problem festered until 1878, when the State of Connecticut seized the initiative and filed such an action for settlement of the boundary line through the Sound. The United States Supreme Court, as fate would have it, never had to rule on Connecticut's complaint, for, in 1880, Connecticut and New York reached a settlement.[18]

By the 1880 agreement, the boundary line through the Sound begins at a point opposite Byram's Point (often called Lyon's Point in older documents) and runs substantially through the center of the Sound until it ap-

[17] See 1874 New York State Assembly Documents, vol. 2, No. 30 (January 21, 1874).

[18] Connecticut Special Laws 1880, p. 377. Laws of New York 1880, ch. 213, p. 329. Ratified by Congress, February 26, 1881; 21 Stat. L. 351.

proaches Fisher's Island, where it deflects northerly and then runs easterly through the channel between Fisher's Island and the coast of Connecticut. The agreement also contained a proviso to the effect that the fixing of the boundary line would not affect the rights of either state or its inhabitants to fishing, either for shell or floating fish, in the waters of the entire Sound, as those rights had theretofore existed, either by virtue of patents from the British Crown or otherwise.[19] Recalling the provision of the 1662 Charter granting fishing rights throughout the Sound to Connecticut residents should enable one to conclude that Connecticut's stalwart oystermen were vindicated and upheld by the 1880 agreement. Such was not the case, however.[20] But that is a different story.

The agreement was modified in 1913, so that the present boundary line through Long Island Sound is now described as follows:

> . . . angle No. 170 in latitude 40° 57′ 03″.228 and longitude 73° 36′ 46″.418, the first angle point in Long Island Sound described by the joint commissioners of New York and Connecticut by a memorandum of agreement dated December 8, 1879; thence in a straight line (the arc of a great circle) north 74° 32′ 32″ east 434,394 feet to a point (No. 171) in latitude 41° 15′ 31″.321 and longitude 72° 05′ 24″.685, four statute miles true south of New London lighthouse; thence north 58° 58′ 43″ east 22,604 feet to a point (No. 172) in latitude 41° 17′ 26″.341 and longitude 72° 01′ 10″.937 marked on the United States coast survey chart of Fisher's Island sound annexed to said memorandum, which point is 1,000 feet true north from the Hammock or North Dumpling light house, on the long, east three-quarters north sailing course drawn on said map; thence following said east three-quarters north sailing course north 73° 37′ 42″ east 25,717 feet to a point (No. 173) in latitude 41° 18′ 37″.835 and longitude 71° 55′ 47″.626 marked No. 2 on said map; thence

[19] *Id.* See also 1880 New York State Assembly Documents, vol. 3, No. 53, at 6.

[20] New York continued to enact repressive legislation to the disadvantage of Connecticut shellfishermen. See N.Y. Laws, 1908, ch. 130, 206; N.Y. Laws 1916, ch. 170; and NY Conservation Law, § 316.

> south 70° 07′ 26″ east 6,424 feet toward a point marked No. 3 on said map until said line intersects the westerly boundary of Rhode Island. . . .[21]

The final settlement of the Connecticut-New York Long Island Sound boundary is footnoted with irony. The filth and ravages of manufacturing progress have sent Connecticut's oyster, lobster, and shellfishing industry the way of the New England whaler, but the boundary agreement, as ratified by the United States Congress, meticulously preserves the ancient rights of access of fishermen of both states to all parts of the Sound:

> Nothing herein contained shall be construed to affect . . . rights which said states or either of them or which the citizens of either of said states may have by grant, letters-patent, or prescription of fishing, in the waters of said sound, whether for shell or floating fish, irrespective of the boundary line hereby established, it not being the purpose hereof to define, limit, or interfere with any such right, rights or privileges.[22]

[21] Connecticut Special Laws 1913, No. 365, pp. 1104, 1107. Laws of New York 1913, ch. 18, pp. 27, 30, 21. Approved by Congress, January 10, 1925; 43 Stat. 731.

[22] *Id.* at 1108. The Congressional text adds the clause "whatever the same may be." *Id.* at 738.