

## THE DOCTRINE OF THE THALWEG AS A RULE OF INTERNATIONAL LAW

In the recent case of *New Jersey v. Delaware*<sup>1</sup> the United States Supreme Court reaffirmed its holdings in various earlier cases that when a navigable river separates two States of the American Union, the boundary line between them follows the *thalweg* or center of the navigable channel, in the absence of special arrangements to the contrary or unless a different line is established as a result of the operation of prescription. This solution, the court added, is now an established rule of international law which governs the location of the boundary line in navigable rivers separating independent States. In this case the question at issue was as to the location of the boundary line at two different places in the Delaware River: first, its location in that part of the river within a twelve-mile circle about the town of New Castle in Delaware; second, its position within the river and bay below this circle. The matter had been a source of dispute between the two States almost from the establishment of the Union, but since the claims of neither party had ever been acquiesced in by the other, neither had acquired any title by prescription. On the basis of various early deeds and grants, Delaware claimed to be the owner of the entire bed of the river within the circle to the low water mark on the New Jersey side, whereas New Jersey claimed to the middle of the channel. On this point the court upheld the contention of Delaware. No principle of international law was involved in reaching a decision as to the position of the boundary line here, the matter being determined wholly by the municipal acts referred to above.

Concerning the location of the boundary line in that part of the river and bay below the circle, New Jersey claimed that the line followed the *thalweg*, while Delaware contended that it followed a line which should be drawn midway between the opposite banks or shores. Delaware did not deny the validity of the *thalweg* doctrine, provided the physical conditions of the river were such that there was a clearly defined *thalweg* or track of navigation, but she contended that within the bay, at least, there was no particular navigable channel, all parts being equally navigable. The boundary should in such circumstances follow a line drawn through the geographical center of the bay equidistant from the opposite shores. As to the section of the river between the bay and the circle where it was not denied that a well-defined track of navigation existed, the line should likewise be drawn on the same principle as a matter of convenience, since otherwise the boundary would suffer a sharp and sudden turn at the place where the river meets the bay. Relying upon the findings of the special master in the case that the contention of Delaware as to the lack of a well-defined navigable channel in the bay was not in accord with the facts and emphasizing considerations of equality and justice, the court rejected the contention of Delaware and upheld the claim of New Jersey that below the circle referred to above the

<sup>1</sup> (1934) 291 U. S. 361.

line should follow the main channel of navigation, which the court found to have a well-defined existence both in the river and in the bay. The court admitted that there was force in Delaware's argument based on inconvenience, but it pointed out that the inconvenience would be greater if the *thalweg* were not followed consistently through the river and the bay alike, because it would result in a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. On the contrary, if the line were located in the *thalweg*, it would "follow the course furrowed by the vessels of the world."

In a learned opinion Mr. Justice Cardozo reviewed the doctrine and the jurisprudence concerning the location of boundary lines in navigable rivers, and concluded that "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 centre, half way between the banks." He added: "The underlying rationale of the doctrine of the *thalweg* is one of equality and justice. 'A river,' in the words of Holmes, J. (*New Jersey v. New York*, 283 U. S. 342) 'is more than an amenity, it is a treasure.' If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other." Adverting to the development of the *thalweg* rule from an age when it lacked precision and fixity, he declared that there "has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. Through varying modes of speech the law has been groping for a formula that will achieve equality in substance, and not equality in name only. Unless prescription or convention has intrenched another rule, we are to utilize the formula that will make equality prevail." It was, he thought, the application of this formula which equality, justice and convenience required in the present case. It is not easy to see how the soundness of his reasoning could be successfully challenged.

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#### THE "GOLD CLAUSE" DECISION IN RELATION TO FOREIGN BONDHOLDERS

The decision of the Supreme Court of the United States in *Perry v. United States*, handed down on February 18, 1935, raises several interesting problems in international law. The issue before the court was the constitutionality of a joint resolution of Congress, adopted June 5, 1933, in accordance with which every provision contained in a contractual obligation which purported to give to the holder of the obligation a right to require payment in gold or in a particular kind of coin or currency was declared to be "against public policy," and such provisions were forbidden in future contracts. Further, every obligation, past or future, whether containing such a provision or not, should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public and