

**APPENDIX C — OPINION OF ARBITRATORS —
1877 OPINION REGARDING BOUNDARY LINE
BETWEEN VIRGINIA AND MARYLAND**

The undersigned are requested by the States of Virginia and Maryland to ascertain and determine the true line of boundary between them. Having consented to do this in the capacity of arbitrators, we are about to make our award.

To examine the voluminous evidence, historical, documentary, and oral; to hear with due attention the able and elaborate arguments of counsel on both sides, and to confer fully on the merits and demerits of this ancient controversy, required all the time we bestowed on it.

The death of Governor Graham in the midst of our labors was a great loss to the whole country; but to us it was a special misfortune, for it deprived us suddenly of the industry, the talent, the wise judgment, and the scrupulous integrity upon which we had relied so much. Though these high qualities were fully supplied by his distinguished successor, the vacancy occurring when it did, set back our proceedings nearly to the place of beginning and caused a delay of almost a year.

Our first intention was to make a naked award, without any statement of the grounds upon which it rested; but after more reflection it seemed that the weight of the cause, the dignity of the parties, and the wide differences of opinion, grown inveterate by centuries of hostile discussion, made some explanation of our judgment desirable, if not necessary.

The *charter* of Charles I to Cecilius, Baron of Baltimore, dated June 20th, 1632, gave to the grantee dominion over

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the territories described in it, and made him Governor of the colony afterwards planted there, with succession to his heirs at law. These rights, proprietary as well as political, became vested in the State of Maryland at the Revolution. Inasmuch as that State claims *under* the charter, she must claim *according* to it.

Virginia, by her first Constitution, as a free State (June 29th, 1776) disclaimed all rights of property, jurisdiction, and government over territories contained within the charters of Maryland and other adjoining colonies. The force of this solemn acknowledgment is not, in our opinion, diminished by the dissatisfaction which Maryland, as well as other States of the Confederation, afterwards expressed with Virginia's claim to a Northern and Western border, including all lands ceded by France to Great Britain at the pacification of 1763.

Insasmuch as both of the States are bound by the King's charter to Lord Baltimore, and both confess it to be the only original measure of their territory, it becomes a point of the first importance to ascertain what boundaries were assigned to Maryland by that instrument. By what lines was the colony of Maryland divided from those other possessions of the British Crown to which Virginia afterwards succeeded as a result of her independence?

The original patent delivered to Lord Baltimore by the King is irrecoverably lost, and it is denied — at least it is not admitted — that we have an accurate copy. It was registered in the High Court of Chancery when it passed the seal, and an attested transcript from the Rolls Office is produced. It is written in the law Latin of the period to which

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it belongs, and many of the words are abbreviated. Another copy nearly, if not exactly, like that from the Rolls, was deposited in the Colonial Office, and thence removed to the British Museum. The latter copy was changed long subsequent to the date of the charter by a person who added some words, and extended others by interlining omitted terminations. This is alleged to have been done for the purpose of making it correspond with the original, which, according to the same allegation, was borrowed from a member of the Calvert family for that purpose. We reject this whole story as apocryphal. The interlineations were unauthorized except by the judgment of the person who wrote them that he was supplying elipses or giving in full the true words meant by the contracted orthography. We are obliged to believe that the patent was enrolled with perfect accuracy. The conclusive presumption of law is that the high and responsible officers charged with that duty did see it performed with all due fidelity. No doubt of this can justly be raised upon the fact that abbreviated words are found in the registry. Why should not these be in the original? Nay, why should we expect them not to be there? That mode of writing was the universal custom of the time. It was used in all legal papers and records as long as the law spoke Latin. A deed in which these abbreviations occurred was not thereby vitiated. What was the harm of writing A.D. for *anno domini*, fi. fa. for *fieri facias*, or ca. sa. for *capias ad satisfaciendum*? *Hered. et assignat.* was as good as *heredibus et assignatus suis*, if all legists understood that one as well as the other was a limitation of the fee to heirs and assigns. Adjectives and substantives without terminations to indicate gender, number, or case did not lose their meaning, and the omission of the concluding syllable might be some advantage to a

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conveyancer who was rusty in his syntax. This habit of contracting words, pervades, not only the deeds, but the criminal pleadings of that time. A public accuser, doubtful if the offense he was prosecuting violated two acts of Parliament or only one, charged it as *contra formam statut.*, and read the last word *statuti* or *statutorum*, as the state of the case might require. The defendant's averment of his innocence was recorded as a plea of *non cul.* When the Attorney General reasserted the guilt of the accused and declared his readiness to prove it, he took one Latin and one Norman-French word, truncated them both, and said — *cul. prit.* Even the last and most tragical part of the record in a capital case, the judge's order to hang the prisoner by the neck, was curtly, but very intelligibly written — *sus. per col.*

We are satisfied that the office copy is true; that it is exactly like the original; and that the use of abbreviated words does not impair the validity of the instrument. Moreover, that part of the charter which defines the boundaries of the province speaks, not equivocally, but in terms so clear and apt that the intent is readily perceived. It remains to be seen whether we can apply the description to the subject-matter by laying the lines on the ground. To that end it is necessary to ascertain how the geography of the country was understood by the King and Lord Baltimore at the time when the charter was made.

In the great litigation between Penn and Lord Baltimore, a bill drawn up by Mr. Murray, (afterwards Lord Mansfield,) or by some equity pleader under his immediate direction, avers in substance that Charles I and the ministers whom he

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consulted on Lord Baltimore's application had the map of Capt. John Smith before them when the boundaries of the colony were agreed on. This was neither denied nor admitted in the answer of the defendant, who, being third in descent from the applicant, had no personal knowledge about it. But we take the fact to be certainly true, not only because we have the assertion of it by Penn and his very eminent counsel, but because it is well known that Smith's map was the only delineation then extant of that region, and his History of Virginia, to which the map was prefixed, had been before, and continued for a long time afterwards, to be the only source of information concerning its geography. Besides, a comparison of the map with the charter will show by the similarity of names, spelling, &c., that one must have been taken from the other.

The editions of Smith's History, published by himself in 1612 and 1629, have been produced, with the map thereto prefixed. Besides, we have one printed in 1819 by authority of Virginia from the same plate used by Smith himself two hundred years before, and found, by a curious accident, in a promiscuous heap of old metal which had been imported from England to some town in Pennsylvania.

With the charter in one hand and the map in the other it may seem an easy task to run these lines. But there are difficulties still. The map, though a marvellous production, considering how and when it was made, is not perfectly correct. Smith could not see and measure everything for himself, nor always depend upon the observations of others. With his defective instruments he could not get the latitude and longitude truly. He laid down some points and places in

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the wrong relation to each other, and some not unimportant to us he left out altogether. There are inaccuracies here and there in the configuration of a coast, the shape of an island, or the course of a river. Unfortunately the style of his *History* is so confused and obscure that it throws no light on the dark parts of the map. As a writer he had great ambition and small capacity. He could give some interest to a narrative of his own adventures, but any kind of description was too much for his powers. There is another trouble: scarcely any of the places marked on Smith's map are now popularly known by the names he gave them. Not only the names, but the places themselves have been much changed. Considerable islands are believed to have been washed away or divided by the force of the waters. Headlands which stretched far out into the bay have disappeared, and the shore is deeply indented where in former times the water line was straight, or curved in the other direction. Add to this a certain amount of human perversity with which the subject was handled in colonial days, and it is not surprising that representatives of the two States have, with the most upright intentions, failed to agree in their views of it. We are to reach, if possible, the truth and very right of the case.

The boundaries of Maryland are described in the charter as beginning at Watkins' Point and running due east to the sea, up the shore of the ocean and the Delaware Bay, to the fortieth degree of latitude; thence westward along that degree to the longitude of the headwater of the Potomac; thence southward to that river, and by it, or one of its banks, to Cinquack on the Chesapeake, and from Cinquack straight across the Bay to the place of beginning. With the eastern and western borders we have nothing to do. Our interest in

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the description of the Maryland line begins at the northwest angle, where her territory becomes contiguous to that of Virginia.

That line, on the western side, has been run and marked along its whole course, and at both termini, in a way which commands the acquiescence of both States. No question is raised here about the location of it. But it is necessary to look somewhat narrowly into the call for it which the charter makes, because that may influence our judgment on the lines which run from the head of the river to the sea, every inch of which is contested.

The State of Virginia, through her Commissioners and other public authorities, adhered for many years to her claim for a boundary on the left bank of the Potomac. But the gentlemen who represent her before us expressed with great candor their own opinion that a true interpretation of the King's concession would divide the river between the States by a line running in the middle of it. This latter view they urged upon us with all proper earnestness, and it was opposed with equal zeal by the counsel for Maryland, who contended that the whole river was within the limits of the grant to Lord Baltimore.

When a river is called for as a boundary between two adjacent territories, (whether private property or public domains,) the line runs along the middle thread of the water. A concession of lands *to* a stream does not stop at one bank or cross over to the other, but finds its limit mid-way between them. But a river may be included or excluded, if the parties choose to have it so. If the intent is expressed that the line

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shall be upon one bank or another, the mere force of construction cannot put it anywhere else. The natural interpretation is the legal and proper one.

This is too obviously just to need the support of authority. But it was well illustrated by the Supreme Court of the United States, in the case of *Ingersoll v. Howard*, (13 How., 381.) Alabama claimed to the middle of the Chatahoochee by virtue of a boundary described in a concession from Georgia thus: “Beginning *on the western bank* of the Chatahoochee river, where the same crosses the boundary line between the United States and Spain; running thence up the said river and *along the western bank* thereof,” &c. The court held that these words established the line of boundary upon the western bank. There is some resemblance between that case and the one under consideration.

The northern boundary of Maryland is by the charter to run westward to the true meridian of the first fountain of the Potomac. That point being ascertained, it shall turn at right angles and run towards (literally against) the south — “*vergendo versus meridiem*” — where? “*ad ulterioram predicti fluminis ripam*” — to the further bank of the aforesaid river. Approaching the river from the north, the further bank is the south bank of course. The description proceeds, without a pause, thus: “*et eam sequendo qua plaga occidentalis ad meridionalem spectat usque ad locum quendam appellatum Cinquack.*” Now, the words “*eam sequendo*” are a direction that something shall be followed in running the line between the point already fixed on the south bank of the Potomac, where it rises in the mountain and Cinquack, which is on the same side of the river, near to

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its mouth. What shall we follow? Clearly *eam ripam* and clearly not *id flumen*, if we take the grammatical sense of the phrase. Another consideration impresses us a good deal. Lawyers in the reign of Charles I wrote Latin in the idiom of the vernacular tongue. We would naturally expect to see the thought of these parties expressed by words arranged in the English order, thus: *ad ulterioram ripam predicti fluminis et sequendo eam*. The other and more classical collocation was not adopted for its euphony, but for the sake of precision. It brought *ripam* and *eam* into close juxtaposition, and made the antecession so immediate that it could not be mistaken. The interjected phrase, “*qua plaga occidentalis ad meridionalem spectat*,” has had its share of the minute verbal criticism bestowed upon the whole document; but we see nothing in it except an attempt (perhaps not very successful) to describe the aspect of the Western Shore, where it turns to the south. Certainly there is nothing there which requires the line to leave the river bank. Apart from all this, it looks utterly improbable that the two *termini* of this line should both have been fixed on the south side of the river without a purpose to put the line itself on the same side. The intent of the charter is manifest all through to include the whole river within Lord Baltimore’s grant. It seems to us a clearer case than that decided in *Ingersoll v. Howard*.

For these reasons we conclude that the charter line was on the right bank of the Potomac, where the high-water mark is impressed upon it, and that line follows the bank along the whole course of the river, from its first fountain to its mouth and “*usque ad locum quendam appellatum Cinquack*.”

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Where is the place called Cinquack? It must have had a certain degree of importance in Smith's time as a landing place, a village, or the residence of some aboriginal chief. But there is now no visible vestige of it. Even its name has perished from the memory of living men. Nevertheless, the place where it once was can be easily found. The charter describes it as "*prope fluminis ostium*" — near the mouth of the river; and Smith has marked it on his map about six miles south of the place where the river joins the bay. This point was no doubt chosen as the terminus of the long river line, because it was the only place near the mouth of the Potomac, on that side, to which Smith's map gave a name; and it furnishes one among many circumstantial proofs that no other map was consulted in drafting the charter. Having found this corner, it becomes our duty to trace the lines which lead us thence over the bay and across the eastern shore to the sea.

From Cinquack to the ocean the charter gives only two lines. One, starting at Cinquack, goes straight to Watkins' Point, the other runs from Watkins' Point due east to the sea shore. There will be no possible mistake about these lines if we can but find out the precise situation of Watkins' Point.

This point being the commencement and closing place of the boundary is twice named, and once its locality is given with reference to other objects. It is described as lying "*juxta sinum predictum prope flumen de Wighco;*" that is to say, on (or close to) the aforesaid bay (the Chesapeake) and near the river Wighco. Looking at Smith's map we find a cape extending southwestwardly from the mainland of the eastern shore. This cape is called Watkins' Point by Smith himself on his map, and he has marked the waters on one side

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Chesapeack Bay, and on the other *Wighco flumen*. Turning to the modern maps, and especially to those of the Coast Survey, where everything is measured with fractional accuracy, we find the same point of land laid down, not quite in the same latitude nor delineated with exactly the same shape, but bordered by the same waters, and with no variance which makes its identity at all doubtful. It is at present the extreme southwestern point of Somerset county in Maryland at Cedar Straits, *juxta* the Chesapeake and *prope* the Pocomoke, which is now the name for Wighco. Being the Watkins' Point of Smith's map, it is the Watkins' Point of the charter.

This conclusion appears to be inevitable from the premises stated; but it does not receive universal assent. We must therefore notice the principal grounds on which its correctness is impugned.

In the first place, the fundamental fact is denied that Smith by his own map affixed the name of *Watkins' Point* to the headland in question. In other words, it is alleged, that though the point is laid down and the name written in proximity to it, the one does not apply to the other. Let the map speak for itself. An inspection of it will show that all the names of such points are written in the same way. Nor is there any other point to which it can with reasonable propriety be referred.

The map has been uniformly read as we read it. Lord Baltimore showed how he understood it. In 1635, only three years after the date of his charter, he printed what he called a "Relation of Maryland," and prefixed to it a map on which

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Watkins' Point is laid down at Cedar Straits, with the beginning and closing lines of his boundary running from and to it. It is not likely that he could be mistaken, nor is it supposed that he fraudulently misstated the fact, and he was not contradicted by the ministers of the Crown or by anybody interested in the Virginia plantation.

In 1670 Augustin Herrman, the Bohemian, published a map fuller than the previous ones, and there we have Watkins' Point at Cedar Straits very conspicuously marked, and the two lines closing at its southern end. What makes this stronger is that in 1668 the line between the colonies had been marked east of the Pocomoke by Calvert and Scarborough on a latitude considerably higher than an eastern line from Watkins' Point; but Herrman considered Watkins' Point so definitely fixed, and the call for a straight eastern line thence to the ocean so over-ruling, that he assumed the coincidence of the Scarborough line with his own, and so laid it down.

In the map of Peter Jefferson and Joshua Fry, of which a French copy was engraved and printed at Paris in 1755 and a second English edition at London in 1775, dedicated by the publishers to the Lords Commissioners of Trade and Plantations, we find Watkins' Point unmistakably laid down at the mouth of the Pocomoke, with the Scarborough and Calvert line from the sea to the Pocomoke so drawn that a westward extension of it would strike exactly or very nearly that place.

Mr. Thomas Jefferson published his Notes on Virginia in 1787, with a map, on which the strongly-marked boundary

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runs to the ocean by an East line from Watkins' Point at Cedar Straits; and he, like Herrman and the others, took it for granted that this, and no other, was the line marked by Scarborough and Calvert.

Mitchell's map (1750-1755) bears similar testimony to the situation of Watkins' Point. So do several others of the last century and many of more recent times.

It is useless to particularize more authorities like these. Let it be enough to say that all geographers for two centuries and a half have understood Smith's map as calling what is now the Southern extremity of Somerset County Watkins' Point; nor is it known otherwise in the general speech of the country. Smith's designation has adhered to it through all changes. If that be not its true name, it never had any name at all.

But the fact rests on stronger proof than that. It is established by the uniform and universal consent of both States and all their people. Maryland steadily claimed it as her actual border, and Virginia never practically denied the claim by taking territory immediately above it. Eastward and Westward, where the lines were invisible, both parties made mistakes. But Watkins' Point or the territory near it was not debatable ground. All men, except perhaps Col. Scarborough, recognized and respected the great landmark when they came within sight of it.

But even that is not all. In 1785 some of the most eminent men of the two States came together at Mount Vernon to arrange the difficulties between them. Standing face to face,

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those commissioners concurred in saying that Watkins' Point was the boundary mark to which the line from the Western shore should run; and they described its situation very unequivocally when they spoke of it as "Watkins' Point, near the mouth of the Pocomoke river." Remembering that this compact was drawn up with most conscientious care, agreed to after cautious examination, ratified by the Legislatures of both States, rigidly adhered to by all parties ever since, and still regarded as of such sacred obligation that all power to touch it is withheld from us, we feel ourselves literally unable to fix the Watkins' Point of the charter anywhere else than at the place then referred to as the true one.

It is suggested that the charter could not have meant the point at Cedar Straits, because it is called a *promontory*, which implies high land, whereas this is a dead level, rising but slightly above the waters on either side. That argument is easily disposed of. The map did not indicate whether the land was high or low, and therefore care was taken to employ two alternative terms, of which one would surely fit the case if the other would not. The charter says that the beginning line shall run east to the ocean "*a promontorio SIVE CAPITE TERRE vocato Watkins' Point;*" from the promontory *or* headland. The same abundant caution is observed again when the point comes to be mentioned as the terminus of the closing line, which is required to run "*per lineam brevissimam usque ad predictum promontorium SIVE LOCUM vocatum Watkins' Point.*" Thus the controlling call of the charter is for Watkins' Point, by its given name, whether it be a high promontory or a low headland, or merely a *place* whose character is not properly signified by either word.

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We proceed to another objection. Smith, in his account of the explorations made by himself and others with him, says, in effect, that they landed at divers places mentioned, (among others Watkins' Point,) and at all those places marked trees with crosses, as "a notice to any, Englishmen had been there." Now there are not, and probably never were, trees capable of being so marked on the Watkins' Point which lies at Cedar Straits; therefore it is argued that Watkins' Point is not Watkins' Point. Those who think this deduction legitimate would remove the point in question from the place where Smith puts it on his map, where all geographers have placed it, where the charter describes it to be, and where by the general consent it is, rather than believe that Smith, in his confused way of writing, exaggerated the truth or committed an error about so unimportant a matter as that of marking trees at *all* points where he landed.

It is alleged that another place, higher up the shore and near to the mouth of the Annamessex, is the true Watkins' Point of the charter. There is (or rather there was) a point there of considerable magnitude and some elevation, which has now entirely disappeared. Smith noted it as a triangular extension of the mainland into the bay; in 1665 persons, who had then recently seen it, described it as "a small spiral point," whatever that may mean; and later evidence shows that there was a peach orchard upon it. In a sworn affidavit of Captain Jones, used in 1665 by Virginia, it is referred to as "a small point described on Capt. Smith's map without a name." Why should we suppose this to be the place called for in the charter as Watkins' Point? It was not so nominated on the map, or anywhere else. Smith, so far from ever speaking or writing about it as Watkins' Point, gave it another and a different

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name. Dr. Russell, who was with him when he made his explorations, says that it was called Point Ployer, “in honour of that most honorable house of Monsay, in Brittain, that in an extreme extremity once relieved our Captaine.” Can anything be more complete than the failure of this effort to substitute the place *called* Point Ployer for the place *called* Watkins Point?

But it said that Scarborough and Calvert agreed in 1668 that the line from the sea should run to the Annamessex, and not to the Pocomoke. That is not the point of the present question. We are now inquiring where the boundaries were originally fixed. A conventional arrangement of those Commissioners might bind their constituents for the after time, but it could not change the pre-existing facts of the case or make that a false, which before was a true, interpretation of the charter. Nor is any opinion or conclusion expressed or acted upon by them entitled to much consideration as evidence. If Philip Calvert *thought* that the charter limit was at Point Ployer, he was grossly deceived, and Col. Scarborough *knew* very well that it was *not* there, for he had previously declared on his corporal oath that the “small spiral point” near the Annamessex was South of the charter call “about as far as a man could see on a clear day.”

Some stress is laid upon another fact. In 1851 the *Fashion*, a vessel of which John Tyler, a Marylander, was owner and master, was arrested for dredging in Maryland waters. The justice of the peace before whom the proceeding was instituted condemned her, but on appeal to the County Court the judgment was reversed. The record does not show the grounds of the condemnation or the reasons of the

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reversal; but Tyler himself deposes from memory that he was finally cleared on the testimony of two old men, who swore to a State line running across Smith's Island about three-quarters of a mile above Horse Hammock, and over the Bay to the mouth of the Annamessex, which would throw the *locus in quo* of the offense within the jurisdiction of Virginia. If we assume that the issue, the evidence, and the legal reasons of the judgment, are correctly reported by an unlearned man a quarter of a century after the trial, the inference is a fair one that the court of Somerset county believed the line to be where the witnesses said it was, and not at Horse Hammock on one side of Tangier Sound, or at Watkins' Point on the other. But are we now bound to accept that evidence as infallibly true? If it were delivered before us in the pending cause by the witnesses themselves, we would take it at its worth. Its probative force is certainly not increased by being fished up from the oblivion of twenty-five years and produced to us at second hand. We do not understand that anybody supposes the judgment itself to be binding as a determination of the subject-matter between the two States. The traditionary line of Tyler's grandfather and old Mr. Lawson must stand or fall by the natural strength of the facts which support and oppose it. Now it is perfectly ascertained that Virginia in 1851 did not pretend to have any claim on Smith's Island above Horse Hammock, nor within the limits of Somerset county on the Bay shore above Watkins' Point. This record of the Fashion case, considered as evidence of a line at Annamessex, is illegal, insufficient, and unsatisfactory, while the proofs which show that in truth the line was at Watkins' Point are irresistible and overwhelming.

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If we are right thus far, it follows that the original line as fixed and agreed by the King and Lord Baltimore runs from Cinquack by a straight line to the extreme south-western part of Somerset county, Maryland, which we find to be the true Watkins' Point of the charter, and thence by a straight line to the Atlantic ocean. These lines will be seen on the accompanying map, marked and shaded in blue.

But this is not the present boundary. How firmly so-ever it may have been fixed originally, a compact could change it, and long occupation inconsistent with the charter is conclusive evidence of a concession which made it lawful.

Usucaption, prescription, or the acquisition of title founded on long possession, uninterrupted and undisputed, is made a rule of property between individuals by the law of nature and the municipal code of every civilized country. It ought to take place between independent States, and according to all authority it does. There is a supreme necessity for applying it to the dealings of nations with one another. Their safety, the tranquility of their peoples, and the general interests of the human race do not allow that their territorial rights should remain uncertain, subject to dispute, and forever ready to occasion bloody wars. (See Vattel, Book II, chap. 11, and Wheaton, Part II, chap. 4, sec. 4, citing Grotius Puffendorf and Rutherford.) The length of time which creates a right by prescription in a private party raises a presumption in favor of a State, that is to say, twenty years. (Knapp's Rep., 60 to 73.) It is scarcely necessary to add that the exercise of a privilege, the perception of a profit, or the enjoyment of what the common law calls an easement, has the same effect as the possession

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of corporeal property. It behooves us, then, to see whether the acts or omissions of these States have or have not materially changed their original rights and modified their boundaries, as described in the charter. We will look first at the Potomac.

The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water-mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved “the property of the Virginia shores or strands bordering on either of said rivers, (Potomac and Pocomoke,) and all improvements which have or will be made thereon.” By the compact of 1785, Maryland assented to this, and declared that “the citizens of each State respectively shall have full property on the shores of Potomac and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.” We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we cannot help being influenced by our conviction (Chancellor Bland notwithstanding) that it applies to the whole course of the river above the Great Falls as well as below. Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water-mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

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To that extent Virginia has shown her rights on the river so clearly as to make them indisputable. Her efforts to show that she acquired, or that Maryland lost, the islands or the bed of the river, in whole or in part, have been less successful.

To throw a cloud on the title of Maryland to the South half of the river, the fact is proved that in 1685 the King and Privy Council determined to issue a *Quo Warranto* against the Proprietary of Maryland, “whereby the powers of that charter and the government of that province might be seized into the King’s hands” for insisting on “a pretended right to the *whole* river of Potowmack” and for other misdemeanors. This was a formidable threat, considering what a court the King’s Bench was at that time; but it never was carried out, and we can infer from it only that the then Lord Baltimore was not in favor with the ministry of James II.

What is called the Hopton grant was confirmed to the Earl of St. Albans and others in 1667 by Charles II. It included all the land between the Rappahanock and the Potomac, *together with the islands within the banks of those rivers and the rivers themselves*. The rights of the original grantees became vested in Lord Fairfax and his heirs, who sold large portions of it, and as to the rest, the Commonwealth first took it by forfeiture and afterwards bought out the Fairfax title from the alienees of his heirs. It is not pretended that this grant could, *proprio vigore*, transfer the title of the Potomac islands from Lord Baltimore to the Earl of St. Albans; but it is argued that, as Lord Baltimore must have known of it, and did not protest or take any measure to have it cancelled, his silence, if not conclusive against him by way of equitable estoppel, was at least an admission that

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he did not own the islands or the bed of the river in which they lay. We answer that he had a right to be silent if he chose; his elder and better title, which was a public act, seen and known of all men, spoke for him loudly enough. Besides that, his subsequent possession of the islands was the most emphatic contradiction he could give to any adverse claim, or pretense of claim, under the Hopton grant.

But these conflicting grants of the islands increased the importance of knowing how and by whom they had been occupied. The exclusive possession of Maryland was affirmed and denied upon evidence so uncertain that we thought it right to postpone our determination for several weeks, so as to give time for the collection of proper proofs. When these came forth they showed satisfactorily that Maryland had granted all the islands, taxed the owners, and otherwise exercised proprietary and political dominion over them. Three Virginia grants were produced which purported to be for islands in the Potomac, but on examination of the surveys it appeared that they were not *in*, but *upon*, the river. One is in Nomini Bay, and the other two are called islands only because they lie with one side on the shore, while the other sides are bounded by inland creeks. All are on the Virginia side of the low water-mark, which we have said was the boundary between the States.

It being thus shown that there is nothing to deflect the line from the low-water mark, we are next to see whether its eastern terminus has been changed. That it certainly has. Cinquack was quietly ignored so long ago that no recollection, nor even tradition, exists of any claim by Maryland on the Bay Shore below the Potomac. When the

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Compact of 1785 was made, Smith's Point, precisely at the mouth of the river, on the south side, was assumed by both States to be the starting place of the line across the bay.

Nor does the line now run from Smith's Point, *per lineam brevissimam*, to Watkins' Point. It holds a course far north of that, so as to strike Sassafras Hammock, on the western shore of Smith's Island, and take in Virginia's old possession there. It reaches Watkins' Point, not by the one straight line called for in the charter, but by a broken line, or rather by several lines uniting at angles more or less sharp. Before we explain how this came about it is necessary to observe some facts in the general history of the eastern-shore boundary.

While the situation of Watkins' Point at the mouth of Pocomoke was not doubted, nobody knew where the lines running to and from it would go, or what natural objects they would touch in their course. East and west, wherever the solitary landmark could not be seen, a search for the boundary was mere guess-work, and some of the conjectures were amazingly wild. The people there seem to have had none of that ready perception of courses and distances which an Indian possesses intuitively, and which a pioneer of the present day acquires with so much facility.

Almost immediately after the planting of the Maryland colony, some of its officers claimed jurisdiction on the Eastern Shore, nearly twelve miles south of a true east line from Watkins' Point. Sir John Harvey, then Governor and Captain-General of Virginia, with the advice of the council, conceded the claim, and on the 14th of October, 1638, issued a proclamation, declaring the boundary to be on the

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Ananock, and commanding the inhabitants of his colony not to trade with the Indians north of that river. We discredit the allegation that this was a fraudulent collusion between the Governor of Virginia and the agents of the Maryland proprietary. It was a mutual mistake — a very gross one to be sure — and not long persisted in. It serves now only to show how loose were the notions of that time about these lines.

Soon after this (but the time is not ascertained) a similar blunder was made westward of Watkins' Point. This was not a claim by Maryland below the true line, but by Virginia above it. Smith's Island lies out in the Chesapeake Bay, quite north of any possible line called for by the charter. But the relative situation of that island being misapprehended, Virginia took quiet and unopposed possession upon it, and holds a large part of it to this day.

No willful transgression of the charter boundary took place before 1664. Then rose Col. Edmond Scarborough, the King's Surveyor General of Virginia. His remarkable ability and boldness made him a power in Virginia, and gave him great mental ascendancy wherever he went. He had no respect for Lord Baltimore's rights, and when he could not find an excuse for invading them, he did not scruple to make one. At the head of forty horsemen, "for pomp and safety," he made an irruption into the territory of Maryland, passing Watkins' Point and penetrating as far as Monoakin, where he arrested the officers of the Proprietary and harried the defenseless people.

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To justify this proceeding he referred to an act of the Grand Assembly of Virginia, (passed without doubt by his influence,) which declares Watkins' Point to be above Manoakin, authorizes the Surveyor General to make publication commanding all persons south of Watkins' Point to render obedience to His Majesty's Government of Virginia, and requiring Col. Scarborough, with Mr. John Catlett and Mr. John Lawrence, or one of them, to meet the Maryland authorities upon due notice, (if they were not fully convinced of their intrusions,) and debate and determine the matter with them. Scarborough did none of these things. His conduct throughout violated the act of the Virginia assembly as grossly as it violated the Maryland charter.

To vindicate the claim for a boundary as high up as Manoakin, he put in his own affidavit and that of seven others that the place described in Capt. Smith's map for Watkins' Point, was not at the Pocomoke nor at the Annamessex, but as far above the small spiral point at the mouth of the latter river as a man could see in a clear day, and that the Pocomoke was never called or known by the name of Wighco. This was sworn to in the very face of the map itself, where Watkins's Point was described as lying on the Pocomoke, and where the Pocomoke was distinctly named the Wighco.

In June, 1664, Charles Calvert, Lieutenant Governor of Maryland, sent Philip, the Chancellor, on a special mission to Sir William Berkeley, then Governor of Virginia, to demand justice upon Scarborough for entering the Province of Maryland in a hostile manner, for outraging the inhabitants of Annamessex and Manoakin by blows and imprisonment, for attempting to mark a boundary thirty miles north of

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Watkins' Point, and for publishing a proclamation at Manoakin wholly unauthorized. Col. Scarborough was too great a man to be punished, but his acts were repudiated, the claim for his spurious boundary was disavowed, Watkins' Point was again fully acknowledged to be where it always had been, and so the land had rest for a season.

But the quiet time did not last long. The very next year we find Colonel Scarborough on the east side of the Pocomoke, north of the boundary, cutting out a large body of Lord Baltimore's' land, and dividing it by surveys to himself and his friends. The necessity was manifest for having the true line traced and marked on the ground between Watkins' Point and the sea. To do this Colonel Scarborough was appointed a commissioner on one side, and Philip Calvert on the other. But, instead of closing the controversy as their respective constituents intended, their work was done so imperfectly that it has been a principal cause of error and misunderstanding ever since.

Their instructions, as recited by themselves, required them to "meet upon the place called Watkins' Point." That they did meet there does not appear, but they say that, "after a full and perfect view of the point of land made by the north side of Pocomoke Bay and the south side of Annamessex, we have and do conclude the same to be Watkins' Point, from which *said point, so called*, we have run an east line, agreeable with the extremest part of the western angle of said Watkins' Point, over the Pocomoke river, to the land near Robert Holston's, and there have marked certain trees which are continued by an east line to the sea," &c.; and they agreed that this should be received as the bounds of the

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two provinces “on the eastern shore of the Chesapeake Bay.” Whosoever shall try to get at the sense of this document, will find himself “perplexed in the extreme.” What was it that they concluded to be Watkins’ Point? Not the whole body of the territory between the Annamessex and the Pocomoke. Nobody understands it in that way. Not Point Ployer; for they both knew, and one of them swore, it was not there. Did they actually run any line west of the Pocomoke? If yes, they must have known with perfect certainty where the true line would cross the river; and in that case, what was the necessity for founding a mere conclusion about it upon the lay of the land between the two bays? If it was then ascertained by actual demonstration with the compass that a western extension of the marked line would strike Watkins’ Point, why does it not strike that point now, instead of terminating, where it does, far above, at the Annamessex? Again, why was it not marked? Why was it never recognized, acknowledged, or claimed by either party afterwards? Our rendering may seem a strain upon the words, but we infer from the paper and the known facts of the case, that the commissioners, instead of meeting at Watkins’ Point, came together on the east bank of the Pocomoke, from thence took a view of the country on the other side, and thereupon erroneously concluded that an east line running from Watkins’ Point would cross the Pocomoke at the place near Holston’s, where they marked certain trees. This being satisfactory to themselves, they proceeded, without further preliminary, to mark the eastern end of the line between the river and the sea.

Scarborough may have known that he was not on the true line, but if so, he kept his knowledge to himself. It is

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very certain that Calvert had full faith in the correctness of his work. No doubt he lived and died in the belief that the marks he assisted to make were on a due east line from the westernmost angle of Watkins' Point, properly so called. If any one thinks this a blunder too gross to be credited, let him remember by whom it was shared. Herrman and all subsequent mapmakers place the marks on the straight line where Calvert thought it was. All the public men of the colonies had the same opinion. The error was not discovered, nor even suspected, for more than a hundred years.

But it is argued that the call of the charter is for a straight line; that commissioners were appointed to ascertain where it ran; that they did ascertain it, and marked a part of it; that their judgment being conclusive, the whole line is established as certainly as if it had been marked. So far as this is a geometrical proposition, it is undoubtedly true. But mathematics cannot determine this case against law and equity.

Their own description of the line they agreed upon is inconsistent with itself. They call it an east line from Watkins' Point, and give it an outcome by a course corresponding with Holston's tree. If this be a straight line, how shall we find it? If we begin at Watkins' Point and run east to the sea, we go far below the marked line; if we begin at the marks and run west to the bay, we reach the Annamessex, which is equally wide of the fixed terminus at that end. Yet by one way as much as by the other, we follow the agreed line of the commissioners. We reconcile these contradictions, and carry out the whole agreement, if we run the east line from Watkins' Point until it begins to conflict

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with the marked line, and from there to the ocean let the marked line be taken for the exclusively true one.

Plainly, it never was intended by the commissioners, or anybody else, that the territory west of the Pocomoke should be divided by a line extending westward from Holston's to the mouth of the Annamessex. If that was the technical effect of the agreement it was instantly repudiated by the common consent of both provinces. Maryland had held before, and continued afterwards to hold and possess, all the territory between the Pocomoke and the Bay down to the latitude of Watkins' Point, granting the lands, taxing them in the hands of her grantees, and ruling all the inhabitants according to her laws and customs. Her jurisdiction was not intermitted, nor any of her rights suspended, for a moment. Virginia never expressed a suspicion that this possession of Maryland was inconsistent with any right of hers under the agreement. Scarborough himself acquiesced in it to the day of his death as a true construction of his covenants with Calvert.

Our conclusion is that Virginia, by the agreement and her undisturbed occupancy, has an undoubted title to the land east of the Pocomoke, as far north as the Scarborough and Calvert line, while Maryland, by the charter and by her continued possession under it, has a perfect right to the territory west of the Pocomoke and north of Watkins' Point.

We must now go back to Smith's Island. That island is clearly north of the charter line, and all the rights which Virginia has there must depend on the proofs which she is able to give of her possession. The commissioners, agents, and counsel on both sides have, with infinite labor, collected

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a great volume of evidence on this part of the case, and discussed it at much length.

In early times Virginia granted lands high up on the island; and Maryland, without expressly denying the right of Virginia, made grants of her own in the same region. The lines of these grants are so imperfectly defined by the surveys that it is not at all easy to tell where they are, and some of them are believed to lie afoul of others. The occupancy, like the titles, was mixed and doubtful. The inhabitants did not know which province they belonged to; at least that was a subject on which there were divers opinions.

A line running nearly across the middle of the island was at first claimed by Virginia as being the old boundary; but a subsequent personal examination and a more careful reconsideration of the evidence brought the counsel themselves to the opinion that a claim by that line could not be supported. They insisted, however, and do still insist, that another line, which runs about three-quarters of a mile above that from Sassafras Hammock to Horse Hammock was and is the true division. There is some evidence that this was once thought to be the boundary.

Two grants, one by Maryland and one by Virginia, each calling for the divisional line between the States, without describing where the divisional line was, were so located on the ground that they met on the line in question. It is inferred from this that a line had been previously run at that place, which was understood to be the division between the provinces or the States. But this argument *a priori* is all that supports the theory of a State line there. If it ever was actually

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run, it cannot now be told by whom, when, for what purpose, by what authority, or precisely where. All the evidence relating to it is very doubtful. It dates back to what may be called the prehistoric times of the island. Some witnesses affirm and others deny, on the authority of their forefathers, that this was the dividing line of the States. But none of them can give any substantial grounds for his belief.

Out of this contradictory evidence and above the obscurity of vague tradition there rises one clear and decisive fact, which is this: That for at least forty years last past Maryland has acknowledged the right of Virginia up to a line which, beginning at Sassafras Hammock, runs eastward across the island to Horse Hammock, and Virginia has claimed no higher. By that line alone both States have limited their occupancy for a time twice as long as the law requires to make title by prescription. By that line Maryland has bounded her election district and her county. North of it all the people vote and pay taxes in Maryland, obey her magistrates, and submit to the process of her courts. South of it lies, undisturbed and undisputed, the old dominion of Virginia. We have no doubt whatever that we are bound to regard that as being now the true boundary between the two States. There are not two adjoining farms in all the country whose limits are better settled by an occupancy of forty years, or whose owners have more carefully abstained from all intrusion upon one another within that time.

We have thus ascertained to our entire satisfaction the extent and situation of the territory which each State has held long enough to make a title by prescription, and the boundary now to be determined must conform to those

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possessions, no matter at what expense of change in the original lines. We know therefore how the land is to be divided. But how does prescriptive title to land affect the right of the parties in the adjacent waters?

It has been argued with great force and ingenuity that a title resulting merely from long possession can apply only to the ground which the claimant has had under his feet, together with its proper appurtenances; that a river, a lake, or a bay is land covered with water; that land cannot be appurtenant to land; that therefore title by prescription stops at the shore. But this is unsound, because the water in such a case is not claimed as *appurtenant* to the dry land, but as *part* of it. One who owns land to a river owns to the middle of the channel. Upon the same principle, if one State has the territory on both sides the whole river belongs to her. Nor does it make any difference how large or how small the body of water is. The Romans called the Mediterranean *Mare Nostrum*, because her territory surrounded it on all sides. This construction applies with equal certainty to every kind of title, whether it be acquired by express concession, by lawful conquest, or by the long continuance of a possession which, at first, may have been but a naked trespass. In the last case the silent dereliction of the previous proprietor implies a grant of his whole right as fully as if it had been given by solemn treaty.

A few observations upon the several sections of the broken line which we adopt in place of the straight line of the charter will suffice to apply the principles we have endeavored to set forth.

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We run to Sassafras Hammock and from that to Horse Hammock, because we cannot in any other possible way give Virginia the part of Smith's Island to which she shows her right by long possession.

We go thence to the middle of Tangier Sound and from thence downward we divide Tangier Sound equally between the two States, because the possession of Virginia to the shore is proof of a title whose proper boundary is the middle of the water. We give Maryland the other half of the sound for the same or exactly a similar reason, she being incontestably the owner of the dry land on the opposite shore.

The south line dividing the waters stops where it intersects the straight line from Smith's Point to Watkins' Point, because this latter is the charter line, as modified by the compact, and Maryland has no rights south of it.

From that point of intersection to Watkins' Point we follow the straight line from Smith's Point, there being no possession or agreement which has changed it since 1785.

At Watkins' Point the charter line has stood unchanged since 1632, and the call for a due east line from thence must be followed until it meets the middle thread of the Pocomoke. At the place last mentioned the boundary turns up the Pocomoke, keeping the middle of the river until it crosses the Calvert and Scarborough line. It divides the river that far because the territory on one side belongs to Maryland and on the other to Virginia.

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From the angle formed by the Scarborough and Calvert line with the line last described through the middle of the Pocomoke, the boundary follows the marked line of Scarborough and Calvert to the seashore.

It will be readily perceived that we have no faith in any straight-line theory which conflicts with the contracts of the parties, or gives to one what the other has peaceably and continuously occupied for a very long time. The broken line which we have adopted is vindicated by certain principles so simple, so plain, and so just, that we are compelled to adopt them. They are briefly as follows:

1. So far as the original charter boundary has been uniformly observed and the occupancy of both has conformed thereto, it must be recognized as the boundary still.

2. Wherever one State has gone over the charter line taken territory which originally belonged to the other and kept it, without let or hindrance, for more than twenty years, the boundary must now be so run as to include such territory within the State that has it.

3. Where any compact or agreement has changed the charter line at a particular place, so as to make a new division of the territory, such agreement is binding if it has been followed by a corresponding occupancy.

4. But no agreement to transfer territory or change boundaries can count for anything now, if the actual possession was never changed. Continued occupancy of the granting State for centuries is conclusive proof that the

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agreement was extinguished and the parties remitted to their original rights.

5. The waters are divided by the charter line where that line has been undisturbed by the subsequent acts of the parties; but where acquisitions have been made by one from the other of territory bounded by bays and rivers, such acquisitions extend constructively to the middle of the water.

Maryland is by this award confined everywhere within the original limits of her charter. She is allowed to go *to* it nowhere except on the short line running east from Watkins' Point to the middle of the Pocomoke. At that place Virginia never crossed the charter to make a claim. What territory we adjudge to Virginia north of the charter line she has acquired either by compacts fairly made or else by a long and undisturbed possession. Her right to this territory, so acquired, is as good as if the original charter had never cut it off to Lord Baltimore. We have nowhere given to one of these States anything which fairly or legally belongs to the other; but in dividing the land and the waters we have anxiously observed the Roman rule, *suum cuique tribuere*.

J.S. Black,
Pennsylvania.

Chas. J. Jenkins,
Georgia.

A.W. Graham,
Secretary.