

THE BOUNDS OF DELAWARE



by DUDLEY LUNT

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FOR
M. F. D. L.

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Foreword

IN THE hierarchy of American States, William Penn is renowned for his founding of Pennsylvania. An achievement quite different in kind but equally noteworthy in his many faceted career, was his creation by indirection of the State of Delaware. What Penn did was to set in motion a pattern of action which was destined to generate the Delaware State. His primary purpose was to gain for his province of Pennsylvania unimpeded access to the sea. His final success had results far beyond his original contemplation. In this little known activity there are evidenced traits of character not commonly associated with the celebrated Quaker. He became perforce a partisan and in that role he exhibited great subtlety of mind, an adroitness of approach and presentation and a steady adherence to his purpose until it was achieved,—all political qualities of a high degree and order.

The emergence of Delaware as a State in its present form has been marked by border warfare and by successive generations of litigation. The protagonists were Penn himself and Charles Calvert, third Lord Baltimore, noteworthy controversialists, and their many descendants and after the American Revolution, the States of Delaware and New Jersey. Bounds and title were threshed out twice in England in Colonial times and twice again in the Supreme Court of the United States, not to mention a private arbitration proceeding known by the fantastic name of the *Pea Patch Case*. This course of controversy down through four centuries impinges often upon the broader fields of American History. There is for example the struggle for the control of the shores of the Delaware River and Bay involving the Dutch, the Swedes and the English. Again there is the creation of the Mason and Dixon Line in consequence of the decree of the English Lord Chancellor

Hardwicke in *Penn vs. Lord Baltimore*. Here also is to be seen in microcosm the spontaneous generation of a local government whose only tie to the British Crown was a Governor in common with Pennsylvania. The royal prerogative in this anomalous arrangement was vested by such phrases as Pennsylvania and the Three Lower Counties upon Delaware River, or Pennsylvania and the Territories thereunto belonging. In such manner there was wedged in between Pennsylvania, Maryland and New Jersey, an unacknowledged colony—The Three Lower Counties—and from such stuff there was fashioned in 1776 by a Revolutionary Convention, the Delaware State.

These are the larger considerations which came to mind upon an examination of the records of these litigations in preparation for the recent boundary suit between New Jersey and Delaware, and which have impelled this relation of the bounds of Delaware. The chapter entitled *The Delaware State* was first published in *Delaware History* in March 1947. It is here presented with the permission of the editors to whom acknowledgment is justly due and is hereby made.

Brandywine Hundred
New Castle County
Delaware.

DUDLEY LUNT

William Penn
AND
The Delaware Country

MIDWAY between the falls and the sea there juts from the west bank of the Delaware River, a point. Upstream the river winds into the interior, opposite is the low lying Jersey shore, and below the vista widens giving upon the far reaches of Delaware Bay. Here in the year 1682 stood a group of some fifty houses, the bulk of them of wood. This was the town of New Castle, the seat of the scattered settlements upon the shores of the Delaware. In back stretched the forest broken here and there by an occasional plantation by the side of the streams that flowed through it.

On the twenty-seventh of October the little town was alive with excitement. A ship had been sighted in the Bay. Word passed quickly and the inhabitants, a motley mixture of Dutch, Swedes and English, gathered in groups on the sandy beach before the town. There she was beating up the river from shore to shore. What ship was she and from where did she hail?

A small boat came on ahead and neared the shore. A shout went out. Back across the water came the answer of Mordecai Howell who had hailed her in the Bay — she was the *Welcome* out of Deal in late August. He beached his boat and stepped ashore. At his words a shiver of apprehension went through the crowd. Smallpox had gutted passengers and crew. More than a third of them had died on the long voyage.

The *Welcome* came slowly on. Speculation died down and they watched in silence as she came to anchor and put off a small boat. As it beached a cry went up. Where were John Moll and Ephraim Herman? The latter was not to be found.

John Moll stepped forward. He was the first in commission under the Duke of York's government and the senior justice of the court at New Castle. The messenger announced that William Penn, the Proprietor of Pennsylvania, wished to confer with him aboard the *Welcome*.

Late into that night tall tales were told of the voyage and of the man Penn, whose arrival had been so long anticipated. He planned, it was said, to found a great city on the shores of the Delaware and great numbers were yet to come to people it. Already the government of his province had been settled and agreed upon in England. There were vague rumors of deeds which dovetailed with stories that had been current for months and were pregnant of great doings on the morrow.

The next morning the clanging of a bell summoned the inhabitants of New Castle to the market place. There in front of the blockhouse stood a group of some two dozen men. At the center was William Penn. Two decades before Mrs. Samuel Pepys had described him as "a most modish person, grown a fine gentleman", a description which stirred the jealousy of her spouse to the point of causing his record of the fact. At this time the famous Quaker was in the prime of life, just thirty-eight years of age, — a graceful figure of an athletic build.

With him were William Markham, his "kinsman and agent" who had been deputy governor of Pennsylvania pending his patron's arrival and Thomas Holme, his surveyor, who likewise had preceded him to America. John Moll was also there and Ephraim Herman who had put in appearance overnight. Among the crowd of curious onlookers were two young men, Joseph Wood and William Peterson who, together with Mordecai Howell, were destined to give under oath in *Penn vs. Lord Baltimore* more than half a century later their recollections of these events.

In his hand Penn held a document of parchment from which dangled a wax seal. It was read aloud. The inhabitants of New Castle listened quietly to the flow of quaint legal lan-

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WILLIAM PENN AT THE AGE OF TWENTY-TWO

Reproduced from a photograph of the portrait in the Historical Society of Pennsylvania.

guage which informed them that "James, Duke of York and Albany and Earle of Ulster etc" out of his regard for the eminent services of the late Admiral Penn and in view of the esteem in which he held his son William, not to mention the sum of "ten shillings in hand paid", and divers other considerations:

DOTH bargain sell enfeoffe and confirm unto the said William Penn his heirs and Assignes forever ALL THAT the Town of NewCastle otherwise called Delaware And all that tract of Land lying within the Compasse or Circle of Twelve miles about the same scituate lying and being upon ye River Delawarr in America And all Islands in the said River Delaware and the said River and soil thereof lying North of the Southernmost part of the said Circle of Twelve miles about the said Town . . .

The language rolled on interminably. Finally "John Moll of New Castle aforesaid Esqr and Ephraim Harman of New Castle aforesaid Gent" came in for mention. They were empowered in the Duke's name and stead to enter into possession of this tract of land and thereupon to deliver their possession to William Penn. With that the document wound up with the information that his Royal Highness had signed, sealed and delivered it on the twenty-fourth day of August last past in the presence of John Werden and George Mann.

As the sound of the reader's voice died away John Moll stepped up to William Penn and proclaiming in a loud voice that he acted in the name of the Duke of York, delivered to him a key. Penn turned and walked to the door of the blockhouse. The lock clicked and the door swung. He entered. The door swung after him and those present heard the key turn again in the lock.

A few moments later he unlocked the door and reappeared. Thereupon Ephraim Herman was ready for him. Penn took from his hands "one Turf, with a twig upon it (and) a Porringer with River water and Soil". Thereafter several of those present signed their names as witnesses to a memoran-

dum of the ceremony and twelve of the inhabitants of New Castle likewise signed an acknowledgement that they had thereby been made "subjects, under the King to the said William Penn Esq; and we do hereby in the presence of God, solemnly promise to yield to him all just obedience and to live quietly and peaceably under his Government."

There was another parchment of similar tenor which conveyed to William Penn and his heirs "All that Tract of Land upon Delaware River and Bay beginning twelve miles South from the Towne of Newcastle otherwise called Delaware and extending South to the Whore Kills otherwise called Cape Hin Lopen". Ten days later a similar investiture was performed below the twelve mile circle by Moll and Herman upon William Markham, whom Penn had appointed his deputy for the purpose.

Of such was the genesis of the Penn title to the Delaware country.

This quaint ceremony enacted by Penn and the Duke of York's commissioners was symbolic of the actual delivery of the land and river into Penn's possession. It is known to the lawyer as livery of seisin. Conceived in the obscurity of feudalism this mode of conveying real estate is as old as the common law itself. Indeed until within a few years of its use in *this instance* it had been effective without any writing at all to support it.

Yet something was wrong. All that Penn had received was possession coupled with a promise. And the reason why? It is because that is all that his Royal Highness could give — *his possession plus his promise* tucked away in a clause in the deeds of feoffment, that he would within seven years either give or procure for William Penn a more substantial right. Here the lawyer has another phrase — covenants for further assurance. But why could not the Duke do better by his protegee than that? The answer is that he had no title himself and thereby hangs a tale.

* * * * *

The settlement of the Delaware country had anticipated William Penn's arrival by half a century. The Dutch were the first on hand. In the spring of 1631 the minute colony of Zwaanendale was founded. It consisted of a fort and a house occupied by thirty-three men near the present town of Lewes, Delaware. In the following winter an expedition lead by one of its organizers, David de Vries came upon their bones scattered in white relief amid the blackened ruins of the fort. An obscure and tawdry dispute with the Indians had culminated in a general massacre.

De Vries remained for some months exploring the Bay and River and supervising an impermanent whale fishery. No further attempt at settlement occurred until 1638. During the hiatus there roamed throughout the Delaware country adventurers, marauders, traders and fugitives from justice. The Dutch sifted down from New Amsterdam and their settlements on the east shore of the river. The English came all the way from New England and Virginia. And during this period there likewise occurred a munificent gesture founded in parchment, inscribed in Latin and sealed with the Great Seal of England. In 1632 Charles the First granted to Caecilius Calvert, Lord Baltimore, the territory which now comprises Maryland and more. For its northern bound was described as "that Part of the Bay of Delaware on the North, which lieth under the Fortieth Degree of Northern Latitude from the Equinoctial, where New England is terminated. . . ." Thus did it come to be that both a Dutch and an English claim of title involved the Delaware country.

The next occupants were Swedes. Conceived in the reign of Gustavus Adolphus merely upon the assurance of great riches by "credible and experienced persons" among whom were some disaffected Dutchmen, New Sweden came into being in March, 1638 by the presence at Minquas Kill, now the Christiana River below Wilmington, of twenty-five odd men. They built a fort, named it and the Kill after Queen Christina and took title from the Indians.

This affront called forth from Wilhelmus Kieft, the Dutch governor at New Amsterdam a monstrous manifesto but naught else. Years of windy warfare were to follow before the Dutch and the Swedes came to final grips on the South River as the Delaware was then called. Meanwhile the new colony grew slowly aided by several slight increments from Sweden until it finally numbered about five hundred souls. In contrast to the Dutch whose wont it was to cluster in small towns and traffic with the Indians, these Swedes and Finns settled and improved the land in true frontier fashion. By the time of William Penn their farms and settlements were to be found scattered on the shore and islands all the way from Minquas Kill to above the mouth of the Schuylkill. At the height of their power under the leadership of Johan Printz, "a man of brave size, who weighed over 400 pounds", they controlled the River from both sides. The Dutch influence had all but disappeared.

It was Peter Stuyvesant of Knickerbocker fame who accomplished their downfall. In 1651 he constructed Fort Casimir where New Amstel, later New Castle, was to come into existence. Johan Printz made violent protests which his smaller numbers inhibited him from backing up and there was a considerable flourishing of Indian titles. Despite this ascendancy of the Dutch star, peaceful relations were maintained until May, 1654 when Johan Rising, the new Swedish governor arrived. On his way up the River he captured Fort Casimir under circumstances which would have smacked of complicity but for the fact that its defenders actually had no powder.

Measured in terms of his reprisal Peter Stuyvesant's wrath was great. The following year a fleet of six ships carrying a landing force of some 300 men appeared in Delaware Bay. First Fort Casimir was reduced and two weeks later Fort Christina capitulated. The whole affair was carried on in the best opera bouffe manner with a copious burning of gunpowder, an incredible number of parleys, the consumption of vast quantities of beer and brandy by friend and foe, separate-

ly and jointly, and without the loss of a single life, Swedish or Dutch.

Thereafter until the coming of the English the Dutch ruled on the Delaware. This decade of Dutch dominion was not particularly happy. This was largely due to an unfortunate division of authority over the settlements between the Dutch West India Company and the City of Amsterdam. Above the Minquas Kill the Swedes and Finns were left to fend more or less for themselves. With the acquiescence of the Dutch they organized a rudimentary form of self government. Below the Kill the town of New Amstel burgeoned out of Fort Casimir. Here the Dutch were perennially involved in domestic disputes and difficulties which led to dissension among them and ultimately to considerable desertion by the settlers. Despite this the colony expanded and a garrison was maintained at "the Horekill" far to the south as a threat to English pretensions from that quarter. This was a place destined for future contention.

It was during this period that "Lord Balthus Moor" made his first claim to the Delaware country. Hitherto his interests had centered on the shores of Chesapeake Bay. Now emboldened by desertions from the Dutch settlements he turned his eyes to the north. The course of the affair leaves little doubt as to the parlous condition of the South River Dutchman. Alarmed at vague rumors of an invasion of five hundred Englishmen Governor Jacob Alrichs in the spring of 1659 attempted to sound out the situation by a request directed to the Maryland authorities for the return of some soldiers who had deserted. In the summer came the response in the shape of a deputation of five men headed by one Colonel Nathaniel Utie. Without even proper credentials this gentleman swaggered about New Amstel threatening the citizens that they must submit to my Lord Baltimore or get out. Alrichs and his associates took this lying down. They did not even attempt to arrest Utie.

Not so Peter Stuyvesant when the news of this pusillanimous conduct reached his ears. He despatched a thunder of

denunciation to Alrichs, sent down two commissioned officers to take charge of the situation and commissioned Augustine Hermann and Resolved Waldron as his representatives to confer with the Marylanders. Thereupon in the fall of 1659 there ensued a conference at Patuxent which was strangely prophetic of the future course and ultimate settlement of the dispute.

The Englishmen relied on the discoveries of Sir Walter Raleigh (who probably had never seen the Delaware country). Since these outdated the voyage of Hendrick Hudson, Hermann went them one better and traced a devious (and dubious) course back to Christopher Columbus. Augustine Hermann was a man of parts. The ability with which he presented the case for the Dutch and the agility which he showed in seizing during the negotiations upon points to their advantage, were harbingers of misfortune for the Marylanders. The immediate result was a deadlock. The dispute was transferred first to New Amsterdam and then across the ocean and the conflicting claims were urged in Holland and England. The affair stirred Lord Baltimore to a more aggressive regard for his interests. Thereafter his records reflect several attempts to survey land in the Delaware country and to assert a measure of control over it.

Shortly thereafter occurred events which introduced a new protagonist. On the 15th of November, 1664 James, Duke of York who had "his long capable fingers . . . in every pie" relayed to his Royal brother Charles from Portsmouth news that had just been received from overseas. "Yesterday", he wrote, "Cap: Grove Cap of the Martin brought me an account from Nichols of his proceeding at Long Island, where all things are in a very good condition, he hath also reduced Orainge fort (at Albany) to your Ma: obedience and had sent Sir. R. Car with the Guinne frigatt and a hundred land men to reduce what the Dutch have in Delaware Bay".

Thus did his Majesty, Charles the Second learn that the dominion of the Dutch on the North American continent had been destroyed. The coup was the culmination of a plot conceived and executed in secrecy. The Dutch and the English

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were at peace. Dutch inroads upon English trade, smuggling in the American colonies in violation of the Navigation Acts, and a desire to assert the oft proclaimed right to the territory occupied by New Netherlands had been the moving causes. The preliminary step had been taken in the preceding March. Then, according to Washington Irving, Charles "in a fit of affection" made the princely grant to his brother James which included "all the land from the West side of Conectecutte River to the East side of De La Ware Bay". It should be noted that this stopped short of the Delaware country.

Within two months the expedition composed of four men of war carrying four hundred and fifty men set sail. Colonel Richard Nichols whom the Duke had appointed governor of his colony to be, predominated over three other royal commissioners. In August the Dutchmen at New Amsterdam were rubbing their eyes with surprise at the presence of an alien armed force off the Battery. Then followed the negotiations which do honour to the courtesy, forbearance and justice of Richard Nichols and equally demonstrate the courage and bitter spirit of Peter Stuyvesant. In September by a peaceable surrender New Amsterdam became New York.

Thereafter on the last day of September "the Guinne frigatt" sailed up past Fort Casimir by way of a gesture for the benefit of the Swedes. Then she returned and lay to off the Fort. A three day parley followed. As usual there was discord at New Amstel, the soldiery under the command of one Alexander d'Hinoysa, being at odds with the citizenry as to capitulation. Sir Robert Carr was a gentleman of a different kidney than his superior, Colonel Nichols. On a Sunday morning the "hundred land men" were put ashore, "the Guinne frigatt" moved "within muskett shott" and two broadsides thundered. From Fort Casimir there came three badly aimed volleys. The "landmen" stormed the Fort. Thirteen Dutchmen had been hit and three lay dying. On swept the "landmen" into the town where they looted the houses and plundered the inhabitants. In this debauch they were soon joined by the sailors.

Thus without the formality of a declaration of war and without even the loss of a single Englishman's life, New Netherlands collapsed and English succeeded to Dutch rule from the Delaware to the Connecticut. Five months later the war between the two nations came formally into existence. During its course Sir William Penn (the Admiral) was destined to exhibit "his conduct, courage and discretion under our dearest brother, James, Duke of York in that signal battle and victory fought and sustained against the Dutch fleet commanded by Heer Van Opdam in the year 1665". These "many faithfull and eminent services" were later to move the King and his "dearest brother James" to favor their Admiral's son with the beneficent grants of two future American States. The war was concluded in 1667 by the treaty of Breda.

During the five months following the English occupation of New Amstel Sir Robert Carr appeared to regard it as his own particular bailiwick. He attempted to make grants of land and claimed the plunder of the "land men" as good prize "being wonn by the sword". Nichols was disgusted. Orders issued from the commissioners recalling Carr and calling upon Nichols "to repaire to Delaware Bay and there to take speciall care for the good Government of the said place". Nevertheless Sir Robert Carr did not return until February and the settlements were long in severe straits.

The attitude of his Majesty's commissioners toward Lord Baltimore had been forcibly expressed in their instructions to Carr:

"To My Lord Baltimore's Soun you shall declare and all the English concerned in Maryland, that his Matie hath at his great expense Sent his Ships and Souldiers to reduce all Foraigners in these parts to his Maties Obedience, and to that purpose only are you Employed, but the Reduction of the Place being at his Maties Expencc you have Commands to keep possession thereof for his Maties own behoof and right, and you are to say that you only keep possession till his maties is informed and satisfied otherwise".

There ensued a struggle for the control of territory known generically as "the Worekill" which lay upon the Atlantic and within the curve of Cape Henlopen. Here had been the site of the massacred colony of Zwaanendale. In 1640 the Swedes had discussed seating a settlement there near the ruins of the fort but nothing came of it. Eleven years later the Dutch alarmed at rumors from Maryland, procured an Indian title, maintained a garrison there and a small settlement had come into being. It was the seat of considerable trade with the Indians and one of the earliest acts of the Duke or York's government was to license Peter Alrichs "to trade or trafficke with the Indians or any others, in and about Hoare Kills in Delaware Bay".

In the summer of 1669 the Marylanders got into action. Pursuant to directions from Lord Baltimore in England the Council proclaimed that but half the usual quit rents would be required of any who should settle in the Whorekill. The country from there north was erected into a county to be called Durham and the Surveyor General was ordered to survey the northern boundary of the Province. Soon assertions of my Lord Baltimore's right were heard at the Whorekill and in November his Surveyor Jerome White took his bearings at New Castle. He discovered it to be under the fortieth parallel. Thereupon he sat down and wrote a letter to Governor Lovelace apprising him of the fact and in the name of Lord Baltimore made a formal demand. In his zeal to settle the Delaware Country Lord Baltimore later offered to "persons of British or Irish discent" to take his quit rents upon credit.

The upshot of all this was to throw him into direct conflict with the Duke of York himself. In August, 1670 the King in Council took cognizance of the dispute. A day was set for a hearing. And:

"In the meantime it is ordered that his Royall Highness shall remain in quiet and full possession of Delaware Bay and River and all other places what soever acquired from ye Dutch West India Company or Burgomasters of Amsterdam in these

his Maty's territories, and hereof all persons concerned are to take notice and give obedience accordingly."

The hearing never came off. Lord Baltimore made his peace with the Duke but this order did not deter their contention for the Delaware country. In the winter and spring of 1671 the Duke's agents in America began to look to their Royal principal's interest "at the Whorekills and parts adjacent" which they had regarded as a dependancy upon New Castle. A surveyor was appointed. The deed from the Indians to the Dutch was ordered recorded. A census was taken. It revealed the presence of forty-seven persons, the great majority of them Dutch. In June, 1672 "it was ordered that what is passed and granted there be confirmed".

All was apparently quiet on the Worekill front. Yet there was a rift in the lute. In this census appeared the name James Weedon. This gentleman was a surveyor empowered to issue warrants for land. And he held his commission of "Charles Calvert Esqr. Lieutenant General & chief Governor of the Province of Maryland". Evidently Weedon worked quietly for no ill winds blew from that quarter for another year.

In the summer of 1672 reports of Maryland surveying began to reach New York. Richard Perrot who had come up from Virginia to settle at the Whorekill complained that so soon as Walter Wharton, the Duke's surveyor, had given him his patent, "the Mareland men have sarvaed it again". Later one Daniel Browne openly defied the authority of the Duke's magistrates. They apprehended him and sent him over to New York. There, after he had "exprest a great deal of sorrow" for his default, he was permitted to return under a heavy bond and ordered to "ask pardon of the Magistrates". A little later Thomas Jones went him one better. At the head of a band of thirty mounted men he rode into the Whorekill, bound up these worthies and plundered them of their goods. They asked him by what authority he acted. He answered "in noe other language but a Cockt Pistol to his Breast, wch if it had spoke, had forever silenced him".

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This called forth a strong protest from Governor Lovelace coupled with a demand for the punishment of Jones "cum Socys". "Such horrid Outrages", he thought "had been impossible in these portending, boysterious times, wherein all true hearted Englishmen are buckling on their Armor's". This was a reference to war between the English and the Dutch which had again broken out. Lovelace regarded Jones and company as freebooters and marauders.

In this he was mistaken as he was soon to learn when he attempted to communicate with the Whorekills. The Marylanders were in fact in control. Daniel Brown was "high Constable" of Worcester County which name had been given to the Whorekill and the country to the south, and Thomas Jones was Captain "of all the forces horse and Foot that are or shall be in the said County of Worcester". They had been commissioned by the Maryland authorities in July and this was September. At this point the record closes save for a single entry. In the following April it was ordered in New York:

"That a Commission be sent to ye Officers and Magistrates at Delaware to goe to ye Whorekill, there to keep a court in his Maties name, & make inquiry of all Irregular Proceedings, & settle the Government and Officers there as formerly under his Maties obedience & the protection of his Royall Highness".

It is a fair inference that Lord Baltimore having made the gesture and asserted his right by force withdrew. The record had been cleared at any rate.

The fortunes of war however were to give him another opportunity. In August, 1673 the Dutch again became the lords of New Netherlands and reestablished their authority at the Whorekill. In October a commission reciting this latter circumstance, was issued by Lord Baltimore to Captain Thomas Howells directing him "by force or otherwise to surprise and take and possesse the said place called the Horekeele". Howells appeared there in early December at the head of forty pressed men. On Christmas Eve there occurred a ghastly incident. Little if any notice was given the inhabitants. Then their homes were fired. The fugitives, Dutch and English ap-

peared at New Castle seeking relief and assistance. The Dutch governor Colve ordered it given them.

This second period of Dutch dominion was short, lasting little over a year. Early in the following summer the Duke of York's charter was confirmed, and thereafter on November 6th, 1674 orders went forth from Governor Andross in New York for retaking the outlying possessions "particularly at the Whorekill".

From that time until the advent of William Penn the Duke of York's possession of the Delaware country was unmolested by the Marylanders despite persistent rumors to the contrary which ranged from reports of armed forces actually en route to contrary statements that the Duke had surrendered the country to his rival. The second Lord Baltimore died in 1675. His son and successor, Charles Calvert bided his time. Under his orders Augustine Hermann prepared a remarkably accurate map of the country which clearly reflected the extent of his claim. This map was published and in 1678 a copy was furnished to the Lords of the Committee of Trade and Plantations to serve as an answer to their query as to the bounds of the province of Maryland.

According to Augustine Hermann's map the entrance to Delaware Bay was flanked, as it is today, by Cape May to the East and Cape Henlopen to the West. Within the Capes the Whorekill country stretched indeterminately to the South and West. It was little more than two decades since it had first been permanently settled by the Dutch yet a contemporary letter refers to it as "being the Anciantest place". It was the seat of justice for the southern part of the Delaware country, boasting of stocks and a whipping post. A courthouse and prison were contemplated if not actually under construction.

Up the Bay lay an area composed of marsh land and traversed by winding creeks which made transportation by land all but an impossibility. Beyond this lay St. Jones, now Kent County, a country rich in soil and so attractive to settlers as latterly to have been endowed with a court. In the upper

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reaches there entered into the Bay a stream known as the Appoquemini. Its headwaters lay near the source of the Bohemia River which emptied into Chesapeake Bay. Here a blazed trail dignified by the term road was a route for the passage of men and goods across the peninsula.

As the Bay narrows into the River the traveler in 1682 approached the precincts of New Castle. Here was the center of trade and customs. Here too a "road" lead to Augustine Hermann's plantation on the Eastern Shore. The town had been erected into a corporation. The old Dutch fort had rotted away and a blockhouse had been constructed for its defense. Moreover it was the seat of the high court where justice in accordance with "the Duke of York's laws" was meted out for all of the Delaware country. The magistrates there sometimes exercised jurisdiction over causes arising in Salem across the river, where John Fenwick, a Quaker held sway.

Beyond above the Minquas Kill, lay the country of the Swedes and the Finns, a rolling country in contrast to the flat expanse below. Here early in the game an incipient insurrection had been quashed. Generated by a wight who termed himself the son of General "Coninckmarke", he is known to the records as "the Long Finne". Many years had past since he had been whipped, branded with the letter R and sold down the Barbadoes. Upstream was Upland, a small village the name of which was changed to Chester by William Penn. Here a fourth court dispensed the Duke's justice. Beyond, the settlements lined the shore and the islands in the River to the Schuylkill and above there to the falls of the Delaware. The River and Bay formed the only satisfactory avenue of communication.

Under the dominion of the Duke of York's governors, Nichols, Lovelace and Andross, the Delaware country had begun to develop. The population scattered along the shore of the River and Bay may only be estimated. It was a heterogeneous mixture of Swedes, Finns, Dutch, French and English to a number probably slightly in excess of fifteen hundred persons. An indication of the increase in settlement is to be gath-

ered from the petition in 1680 praying for the establishment of the court at St. Jones, which lay between New Castle and the Whorekill. Sixty-five names are appended and it is stated that "about 100 tithabel" persons were located there. The difficult distance to the Whorekill was the chief complaint.

Of such was the "possession" of the Delaware country which below a twelve mile circle drawn upon New Castle, passed to William Penn by virtue of his deeds of feoffment from the Duke of York and the unique ceremony, livery of seisin.

The Delaware State

UPON ENTERING Delaware from Pennsylvania one crosses a line unique among the bounds of the States. A compound of different arcs today, it was originally conceived and is traditionally known as the twelve mile circle. The initial drawing of this circle with its center upon the ancient town of New Castle at the instance of William Penn, in the year 1680, gave rise to controversy which lasted for two and a half centuries. This struggle involved the Penns and their neighbors, the Calverts, unto the third and fourth generations, determined the emergence of the Delaware State at the time of the Revolution, remained to enliven its relations with and the local history of the neighboring States of Maryland, Pennsylvania and New Jersey and resulted ultimately in the determination of the bounds of the State of Delaware as substantially delineated by the pretensions and possessions of the celebrated Quaker, William Penn.¹

The origin of this curving boundary is peculiar and not a little obscure. When William Penn first sought from Charles II in June, 1680, his grant of Pennsylvania, he was thrown into conflict with the in turn conflicting claims of Lord

1. *The Resurvey of the Maryland-Pennsylvania Boundary* (Hereafter *Resurvey*) Parts 3 & 4, E. B. Mathews & E. L. Burchard, 105-293. Hodgkins, W. C. *An Historical Account of the Boundary between the states of Pennsylvania and Delaware; Detailed Account of the work on the Pennsylvania-Delaware Boundary Line*. Report of the Superintendent of the U. S. Coast and Geodetic Survey, June 30, 1893, (Hereafter *Hodgkins*) 177-215. Hayes, J. Carroll, *The Delaware Curve*, 12-15 (Hereafter *Hayes*). Worden to Blaythwayt, June 23, October 16, November 20, 23, 1680 Public Record Office (Hereafter PRO) C/O 1/45, Nos. 21, 23, 53, 57. Cf. *Record in New Jersey vs. Delaware* U. S. Supreme Court, 19, Original, October Term, 1929, Plaintiff's Exhibits, 1-500; 1000-1182; Defendant's Exhibits, 501-764 (Hereafter, Record) See Nos. 243, 245, 250, 251. Andrews, Charles M.—*Colonial Self Government*, 170 (Hereafter *Andrews Self Government*). Shepherd, William R. *History of Proprietary Government in Pennsylvania*, 117-446 (Hereafter, *Shepherd*). Andrews, Matthew P. *The Founding of Maryland*, 165-171; 230-232. (Hereafter *Andrews, Maryland*). *Proceedings of the Convention of the Delaware State held at New Castle on Tuesday the 27th of August, 1776*. Reprint, 1927. PRO Entry Books of Decrees and Orders (Chancery) 1761B, 222 dorse; Cf. Lunt, Dudley C.—*Calendar of Papers Procured in England in re New Jersey vs. Delaware (Boundary Suit)*, 1935 (Hereafter, *Lunt*) Nos. 2-193. The papers calendared are in the State Archives, Dover, Delaware. Decree in *New Jersey vs. Delaware*, 295 U. S. 694.

Baltimore and the Duke of York. An attempt was made to wedge the grant to the Quaker between the lands claimed by these two powerful proprietors. This attempt failed signally and the immediate result of that failure was to add the pretensions of the Quaker proprietor to the already disputed territory.²

For a generation the western shore of the Delaware River and Bay had been a bone of contention. The Dutch are credited with the first settlement in 1631, a venture which resulted within a few months in the tragedy of an Indian massacre. Thereafter for nearly a decade the record is a blank. Then came the Swedes and within a few years their sovereignty was eclipsed by Dutch dominion. In 1664 came the first English conquest. Later for a brief period Dutch rule again prevailed. By 1680 the inhabitants of the small and widely separated settlements and clearings ranging the shore from the Schukill to the sea and composed in chief of Swedes, Finns, Dutch and English, had acknowledged the British crown for a period of sixteen years aside from the single year during which the Dutch had returned.³

Herein was rooted the pretension of the Duke of York. The vast grant from his brother Charles had carried his bounds "to the East side of De la Ware Bay." Nevertheless the conquest of the Dutch had been under his surveillance at the Crown's expense and from thenceforth, with the exception of the brief interlude of Dutch sovereignty, the western shore of the River and Bay had been possessed and governed by him as an appendage to his colony at New York. The claim of Charles Calvert, third Lord Baltimore is simply stated. His bounds extended, in the words of the charter granted to his father by Charles I in 1632, "unto that Part of Delaware Bay

2. PRO-C. O. 391/3 p. 173; Record, 242, 519.

3. Johnson, Amundus. *The Swedish Settlements on the Delaware, 1638-1644*, 170-196; 581-616; 670. Ferris, Benjamin. *A History of the Original Settlements on The Delaware from its Discovery by Hudson to the Colonization under William Penn*, 1-23; 40-51; 81-98; 113-128 (Hereafter, Ferris). *Resurvey*, 112-124.

on the North which lyeth under the fortieth Degree of Northern Latitude."⁴

In pursuit of his claim Lord Baltimore's father had made several abortive attempts in the period of Dutch dominion to take possession of the Delaware shore and these were later repeated after its reduction by the Duke of York's forces. A decade preceding the appearance in the lists of William Penn, his dispute with the Duke of York had been twice set for a hearing before the Privy Council but no action had been taken. For his protection he had printed and later there was filed with the Board of Trade in 1678 a remarkably accurate map which clearly reflected the extent of his claim northward of New Castle to the fortieth parallel.⁵

Manifestly the problem was to dovetail the grant to William Penn with the borders of the neighboring colonies. In the negotiations which ensued the hand of Penn played a skilful and assiduous part. His motive, as later events and his own declarations were clearly to reveal, was to secure to his province a clear and certain access to the sea. In the undeveloped condition of the country this was indubitably the *sine qua non* to the success of his venture. The only adequate means of transportation and communication was the Delaware River and Bay.⁶

4. Record, 6. Andrews, Charles M. — *Guide to the Materials for American History to 1783 in the Public Record Office of Great Britain*, 1912 p. 287. (Hereafter, *Andrews guide*). PRO—P/c 2/62, 263, 304. Cf. Record, 241; Lunt, E-46. Werden to Blaythwayt, PRO—C. O. 1/45, No. 23. Cf. Record, 243, 518. *Duke of York Record—Original Land Titles in Delaware, Commonly known as the Duke of York Record*, 1646-1679, Reprint. *Maryland Archives* (Hereafter *Md. Arch.*) V. 3, 3-12 White to Lovelace, Nov. 26, 1669 *Md. Arch.* V. 5 p. 58. PRO—C. O. 1/53 No. 84; Cf. Record, 260. *Md. Arch.* Vol. 17 P. 236. *Breviate—Brief for the Plaintiff in Penn vs. Lord Baltimore* (Hereafter *Brev.*) Reprinted in *Pennsylvania Archives* (Hereafter *Pa. Arch.*) Series 2, Vol. 16, p. 39, 504.

5. *Resurvey*, 221-334 for citation and summary of original documents. *Andrews; Maryland*, 166-169. PRO—2/62, 263 et seq., 304; Cf. Record, 241 and Lunt, E-46, and see *Resurvey*, 232 under date of September 23, 1674. *Md. Arch.* Vol. 5, 264-269; See *Resurvey*, 150 for reproduction of map.

6. Werden to Blaythwayt, PRO—C. O. 1/46, No. 57; Record, 251 *Md. Arch.*, Vol. 5, 379-380, 388. *Pa. Arch.* Series 2 Vol. 5, 340-357, Hermann's Journal. *N. J. Arch.* Vol. 1, 415-421—Penn's instructions to commissioners June 11, 1683; Cf. Record, 52. Penn to Committee of Trade and Plantations, Record, 545, 5. Penn to Markham, Nov. 29, 1682—*Pennsylvania Magazine of History and Biography* (hereafter *Pa. Mag.*) Vol. 6, 466. *Ferris*, 130-131.

There was much delay. Penn's petition to the Crown was referred to a sub-committee of the Privy Council, "the Committee for Trade and Forreigne Plantac'ons" in June, 1680. At the outset he was thrown into contact with the bounds of Maryland and the pretensions of the Duke of York to the Delaware country. Lord Baltimore was in America. His agents, Barnaby Dunch and Richard Burk, announced that if the land sought by Penn should lie "North of Susquehanna Fort, and north of all Lands in a direct Line between the said Fort and Delaware River", there could be no conflict for, they wrote, "that Fort is the Boundary of Maryland, Northward". This fact was based upon fairly accurate observations and surveys and had been so presented on the map of Augustine Hermann, a copy of which Lord Baltimore had filed with the Committee two years before. To this division, Penn agreed.⁷

The Duke of York under a temporary banishment from his brother's court, was in Edinburgh. His secretary, Sir John Werden wrote the Committee commending Penn's desire but limiting it to land other than that controlled by the Duke on the west side of the Delaware River. Thereupon Penn was told that he "must apply himselfe to his Royal Highness for adjusting their respective pretensions". Penn applied himself to the Duke and by October he had made his point. James announces through Werden that he will be satisfied if Penn's "graunt of y't tract of land which lyes on the north of Newcastle Colony" is to begin "about the latitude of 40 degrees". Penn then comes up with a draft of his patent, and the Committee orders that Messrs Dunch and Burk, Sir John Werden and the Attorney General "have a sight of the draft."⁸

7. Andrews, Charles M. — *The Colonial Period of American History*, (hereafter, *Andrews, Col. Per.*) Vol. 3 pp 279 et seq. Idem—Vol. 2, P. 333. Record, 518, p. 5. A reproduction of the Hermann Map (1674) is to be found in *Resurvey*, Plate LXXVI, P 150-151 See also p. 231. Minute of Committee, June 25, 1680—Record, 244.

8. Bryant, Arthur—*King Charles II* (hereafter, *Bryant*), 294-299. Werden to Blaythwayt, June 23, 1680, Record, 243. Committee Minute, June 25, 1680, Record, 244. Werden to Blaythwayt, October 16, 1680, Record, 245. Minute, November 4, 1680, Record, 247. Blaythwayt to Werden, November 18, 1680, Record, 248. Letter to Attorney General, November 8, 1680, Record 518, p. 9. The documents referred to above are abstracted, in *Resurvey*, 234-238.

The record reveals no word from Lord Baltimore's agents. The Attorney General gave the draft his blessing. But Sir John Werden is troubled. He is uncertain as to the "lines of longitude (especially) & of latitude". However, if Penn is to be "20. or 30. miles beyond Newcastle . . . which extent northwards of Newcastle colony, we guesse may reach as far as the beginning of the 40th degree of latitude", all will be well. Three days later on November 23d he writes again. And again Penn has been at work . . . "he (Penn) seems to fear y't if his south limitts be strictly set at 20 or 30 miles north from New Castle Towne he shall have soe little of the river left as very much to prevent the hopes he hath of improving the rest within his pattent" Penn's figure was "12 English miles north of Newcastle".⁹

The Committee finally set the business down for hearing on Saturday afternoon, December 18 and gave notice to Werden and Lord Baltimore's agents. The next minute of the Committee touching this matter is the following significant entry on January 15th:¹⁰

The Boundaries of Mr. Pen's Patent setled by my Lord Chief Justice North with the alterations of Sir John Werden are read and approved.

Obviously the Lord Chief Justice had been called upon to mediate the dispute. The manuscript draft referred to in this minute has survived. This original delineation of the bounds of Pennsylvania only came to light in the recent boundary suit between Delaware and New Jersey. It is the key to an understanding of both branches of the Penn-Baltimore controversy which involves with respect to Maryland on the

9. Report of Attorney General, November 11, 1680, Record 518, p. 11. Werden to Blaythwayt, November 18, 1680, Record, 250. Werden to Blaythwayt, November 23, 1680, Record, 251.

10. Minute of Committee, December 16, 1680, Record, 252. Notice to Werden and Lord Baltimore's agents, Record, 518, pp. 17, 18. Minute of Committee, January 15, 1680/1, Record, 254.

one hand, her northern bound and on the other hand the northern and circular bound of Delaware.¹¹

The "alterations" inserted by Sir John Werden are the source of all difficulties. As originally penned by North the boundary is stated by metes and bounds in terms of degrees of latitude and longitude with the Delaware River on the East. Thereafter follows a clause excepting out of this grant "*all lands within twelve miles of the Towne of Newcastle now in the possession of his Royall Highness or his Tenants or Assigns that shall happen to lye within the said bounds*". This version would have been entirely innocuous. Werden's alterations come to this. This excepting clause is stricken through with strokes of a pen. Then its language has been lifted up and inserted into the body of the description. Thus as approved, it read, the troublesome inserted alterations appearing in italics:

As the same is bounded on the East by Delaware River *from 12 miles distance northwards of New Castle Towne*
 and on the South by a circle drawne at 12 miles distance from Newcastle Northwards and Westwards unto the beginning of the fortyeth degree of Northern Latitude & yn by a straight line Westwards to ye limit of Longitude above mentioned.

The hitch in this arrangement was this. You can draw all the twelve mile circles you want around the town of New Castle but you will never touch the fortieth parallel. This for the simple reason that it lies miles north of your circle. This gap, or more precisely, this possibility of a gap lying on the Delaware River between the present northern boundary of Delaware and the city of Philadelphia, due to the ambiguity of Sir John Werden's alterations, is the crux of the Penn-Baltimore controversy. All parties appear to have shared in a mistake of fact as to the location of the fortieth parallel.

11. A photostat copy of the manuscript draft with Sir John Werden's alterations is to be found in Record, 253A & B. PRO C. O. 1/46, No. 60. Professor Andrews in commenting upon the question of Pennsylvania's bounds, says: "After a number of amendments had been made and after nearly everyone had taken a hand in determining just how the boundaries should run—with the inevitable result of producing interminable controversies afterwards—the patent was started on its way through the seals" Col. Per. Vol. 3, p. 280.

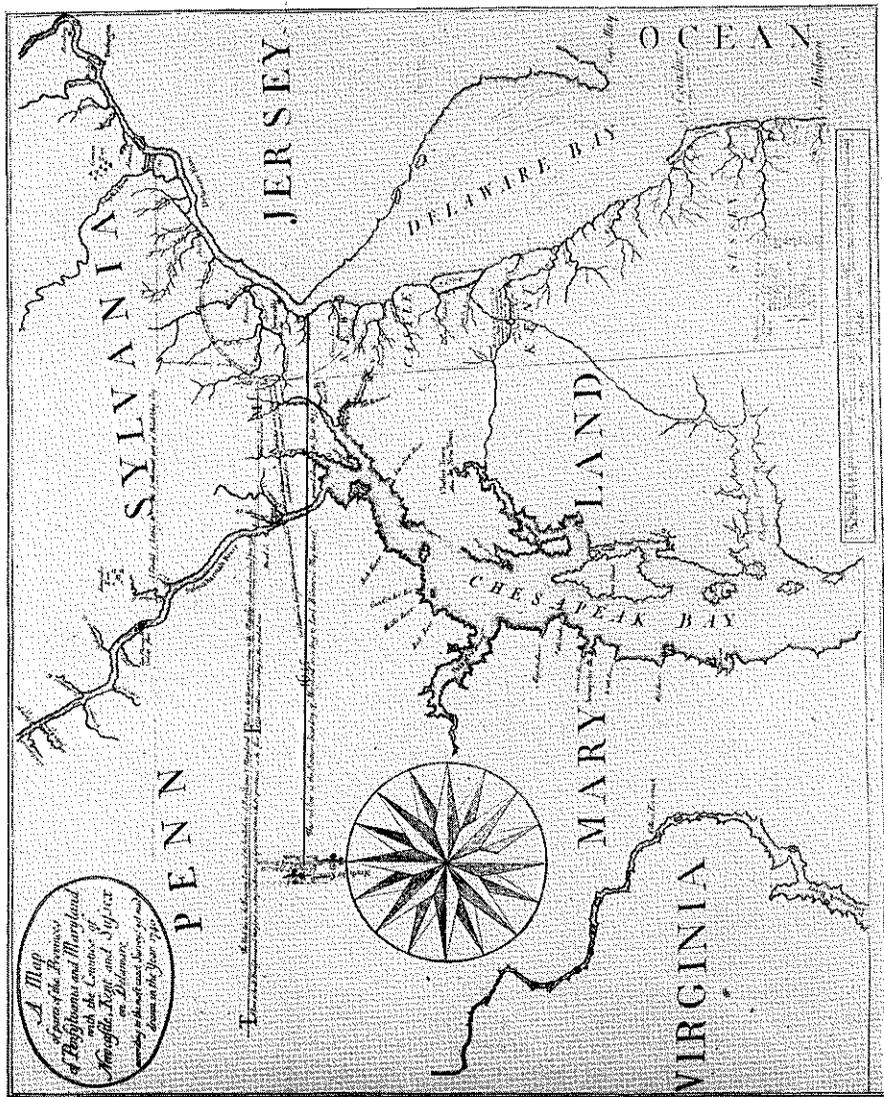


By the same is bounded on the East by Delaware River
 12 miles ^{at 12 miles from the head of the said River} northward of New Castle
 from the beginning of the fortieth degree of Northern
 Latitude unto the three and fortieth degree of Northern
 Latitude; if the said River shall extend so far
 Northward. But if the said River shall not extend
 to four Northward then by the said River so far as
 it doth extend & from the head of the said River, the
 Eastern bounds are to be determined by a Meridian
 line to be drawn from the head of the said River
 unto the said three and fortieth degree. The said
 Land do extend Westward five degrees in Latitude
 Longitude to be computed from the said Eastern bounding
 and the said Land are bounded on the North by the
 beginning of the three and fortieth degree of Northern
 Latitude ^{at 12 miles from the head of the said River} and from the south by the beginning of the fortieth
 degree of Northern Latitude ^{at 12 miles from the head of the said River} ^{to a point that is distant of}
 Longitude ^{about 12 miles}

~~Excepting all lands within twelve miles of
 Towns of New Castle that shall happen to be
 within the said boundary from in the possession of His
 Majesty's Highness or his Heirs~~

THE ORIGIN OF THE TWELVE MILE CIRCLE

The manuscript draft of the bounds of Pennsylvania by Lord Chief Justice North with the "alterations" of Sir John Werden, December, 1680. The original is in the Public Record Office in London. Reproduced from a photostatic copy in the Delaware State Archives at Dover.



A map drawn in the year 1740 and shown to witnesses on behalf of the Penns in Penn vs. Lord Baltimore.

Lord Baltimore's agents had seen Penn's bounds as set forth in his draft in November. They had been given notice of the hearing before the Committee. But was either of them present at the conference with Lord Chief Justice North? A contemporary manuscript addressed to "Mr. John Lewen at New York concern'g Mr. Pen's Patent" relates that

Sir John Werden and my Lord Baltimore's agent attended my Lord Chief Justice North at his chamber, and upon laying before his lordship their respective interests and both of them acquiescing in the bounds as they stand now described, they were presented to the committee and agreed upon by their lordships.¹²

Sir John Werden's purpose had been to protect the pretensions of the Duke of York around New Castle. It was he who in the preceding June had doubted the locations of the degrees of longitude and latitude. In November he guessed that twenty to thirty miles above New Castle would reach the fortieth parallel. Yet it was he who constructed at the conference with North the twelve mile circle drawn upon New Castle "Northwards and Westwards" to touch that degree of latitude.

This reduces the inquiry to William Penn. The references to him in Sir John Werden's correspondence with the Committee make it abundantly clear that he had persuaded the Duke and Werden as well to his views. The final answer must be sought in the information then available as to the location of the fortieth parallel. It in fact cuts through the city of Philadelphia.¹³

On none of the maps of that day was it accurately located. The earliest was John Smith's, *circa* 1608. In this map as well as one published by Lord Baltimore in 1635 in a tract entitled *A Relation of Maryland*, the fortieth parallel appears well to the South of its actual location. In 1655 a Dutch cartographer named Visscher ran it about through the present location of Marcus Hook. This was apparently followed by an English mapmaker named John Ogilby in 1671. In contrast the Au-

12. British Museum, Egerton Mss. 2395 ff 593, 594. Cf. *Andrews Col. Self Govt.*, 172.

13. *Resurvey*, 40.

A map drawn in the year 1740 and shown to witnesses on behalf of the Penns in Penn vs. Lord Baltimore.



gustine Hermann map published in London in 1674 ran the line well to the North and near to its actual location. The discrepancy between this map and that published by Lord Baltimore's father in 1635 is manifest. Penn may well have turned this circumstance to account for the twelve mile circle northward and westward of New Castle fits into the picture painted by Visscher.¹⁴

It is a fair inference that he persuaded all hands that the Dutch map was the one to be relied on. Thus did the Quaker make his point. It was his natural desire to get as far to the South as possible. Since his southern bound was now fixed with certainty at "12 miles distance from Newcastle Northwards" he could assert with assurance his control of the River above that point. Thereby he increased the accessibility of his province to the sea by the Delaware River. This then is the origin of the twelve mile circle and the southerly bound of Pennsylvania. How it came to be the northern bound of Delaware, later events were to determine.¹⁵

Despite his apparent success in extending his bounds on the River to within twelve miles of New Castle, Penn still had his doubts and with good reason. For a number of years previous burdensome duties had been levied at New Castle in the name and authority of the Duke of York upon all goods brought by settlers into the Quaker settlements in New Jersey. Penn, who had an interest in these settlements, had been instrumental in having this practice abandoned in the fall of 1680. And soon after his grant for Pennsylvania passed the Great Seal in the following spring he applied to the Duke of

14. For reproductions of the several maps, see *Resurvey*, viz: Smith, circ. 1612 Plate LXXIV pp. 118, 119, 210. Lord Baltimore, 1625 pp. 110, 215. Visscher, 1655, Plate LXXV, p. 142, 219. Ogilby, 1671, p. 230. Hermann, 1674, Plate LXXVL, p. 231. See also pp. 132-133 for comparative reproductions.

15. Cf. Penn's reliance on the Visscher map before the Privy Council in 1685. *Resurvey*, 165 n. Werden to Blaythwayt, Nov. 23, 1680, PRO C. O. 1/46, No. 57, Record, 251. *Andrews, Col. Self Govt.*, 169-172—"Penn," writes Professor Andrews "was seeking ports, not land".

York for the rest of what the latter possessed "in and about New Castle on Delaware River". The Duke put him off.¹⁶

Meanwhile Penn had sent his "Cosen and Deputy," one William Markham to America. In addition to his comprehensive commission this gentleman was armed with two letters. One was a neighborly letter from Penn introducing him to Lord Baltimore and the other a letter from Charles II adjuring the latter to "make a True division and separation of the said Provinces of Maryland and Pennsylvania according to the bounds and degree of North Latitude expressed in our said Letters Patents."¹⁷

The negotiations and correspondence between these two, William Markham and Charles Calvert, was begun shortly after Markham's arrival in the summer of 1681. Extraneous circumstances — the illness of Markham, the difficulties of transportation and communication with the consequent crossing of letters, the lack of an adequate sextant with which to take observations and even the weather — caused delays and soon combined with them to engender an atmosphere of mutual suspicion and mistrust which has ever since shrouded this whole question. Their efforts came to naught but an open quarrel just prior to Penn's arrival in the fall of 1682.

The interesting query is — when was the error as to the location of the fortieth parallel in Penn's charter discovered. The partisan accounts of their dealings left by the two participants fail to yield a satisfactory answer. Nevertheless when they are considered in the light of known events and other contemporary documents, it is a fair inference that the correct latitude of New Castle and the surrounding country was known to Penn's agents to be under the fortieth parallel some time

16. Hazard, Samuel—*Annals of Pennsylvania, 1609-1682*, (Hereafter, *Hazard*) pp. 380, 478, 479. Smith, Samuel — *History of the Colony of New Jersey, 1765* p. 116 et seq. Clement, *Pa. Mag.* Vol. 5, 322-326. Werden to Andross, May 12, 1681, *Documents relating to the Colonial History of the State of New York* (hereafter, *N. Y. Col. Docs.*) Vol. 3, 286-287. Werden to Penn, July 16, 1681, *N. Y. Col. Docs.* V-3, 290. Cf. Penn to Markham November 29, 1682, *Pa. Mag.* V. 6, 466. Proud, Robert — *The History of Pennsylvania* (hereafter *Proud*) 151.

17. Janney, Samuel M. — *The Life of William Penn* (hereafter, *Janney*) 169. *Hazard*, 503-504. Penn to Lord Baltimore, April 10, 1681 *Pa. Mag.* Vol. 6, 463. Charles II to Lord Baltimore, PRO C. O. 389/4; cf. Record, 256. *Md. Arch.* Vol. 5, 273.

in the winter of 1681-1682. The accounts agree that a substantially accurate observation was taken near there on June 27th, 1682.¹⁸

Just when William Penn came to realize the true situation is likewise not clear — possibly in the winter, probably in the spring and certainly by mid-summer in 1682. Throughout this period he had been doing, despite some doubt as to his title, a land office business in the sale of Pennsylvania lands and his departure for his province had been long delayed. It was finally arranged for the last of August, 1682.¹⁹

Within the preceding ten days he became possessed of a formidable array of legal documents which must have recalled to him his youthful days as a student of the law in Lincoln's Inn. First there was another letter in the nature of a command from the King to Lord Baltimore under date of August 19th. This one differed from that borne by Cosen Markham in that it was recommended "in a most particular manner" that the best way to determine his Lordship's northern bounds was by an "admeasurement" of sixty English miles to the degree from his southern bound. On the 21st the Duke signed, sealed and delivered a release of all of his right, title and interest etc. in and to any lands, islands and so forth within the bounds of Pennsylvania.²⁰

On August 24th the bounds of the "country of Delaware" began to take form. On that day there were delivered to Penn under the hand and seal of James, Duke of York and Albany,

18. *Md. Arch.* V. 5, 374-379, Lord Baltimore's Account. *Pa. Mag.* V. 6, 427-434, William Markham's Account. Baltimore to Blaythwaite, March 11, 1681/2, *Md. Arch.* V. 5, 348. Baltimore to Penn., Feb. —, 1681/2, *Md. Arch.* V. 5, 349. Baltimore to Blaythwaite, March 26, 1681/2, *Md. Arch.* V. 5 351. Report of Commissioners, *Md. Arch.* V. 5, 369. Penn to Markham, Oct. 18, 1681, *Pa. Mag.* V. 6, 464. Penn's Commission to Crispin, Haig, et al, *Hazard*, 637. Penn to Frisbie, et al, Sept. 16, 1681, *Pa. Arch.* S. 1, V. 1, 38-39; *Md. Arch.*, 285. E. Herman to Governor Broekholls, Dec. 1681, *N. Y. Col. Docs.* V. 12, 285 *Janney*, 177. Ashmead, Henry G. — *History of Delaware County*, 15 et seq.

19. Penn to James Frisbie et al, supra. Penn, "Some Account etc", Myers, Albert C. — *Narratives of Early Pennsylvania etc.* (Hereafter, *Myers*) 202. *Hazard*, 505, 516, 520-524, 534, 535, 539, 550, 575-7, 585, Appendix, 637-643. Penn's Commission to Holme, April 18, 1682, *Hazard*, 555-7, Proud, 191. Claypool, letter book, extracts from *Pa. Mag.* V. 10, 188 et seq. *Janney*, 197-204.

20. *Janney*, 26. *Md. Arch.* V. 5, 371-2. *Hazard*, 586-7. Record, 520.

Earl of Ulster etc., four documents technically known as two deeds of feoffment and two long term leases. The descriptions are their important aspect:

ALL THAT the Town of NewCastle otherwise called Delaware And all that Tract of Land lying within the Compasse or Circle of Twelve miles about the same lying and being upon ye River Delawarr in America And all Islands in the said River Delaware and the said River and soil thereof lying North of the Southernmost part of the said Circle of Twelve miles about the said Town.

All that Tract of Land upon the Delaware River and Bay beginning twelve Miles South from the Towne of New Castle otherwise called Delaware and extending South to the Whore Kills otherwise called Capin Lopen.

"Upon tearmes of the moiety of halfe the revenues thereof to be reserved for himself," said William Penn later in converse with Lord Baltimore, "I hold it of his gift." The reference was only to the southern tract. The circle encompassing New Castle was an outright gift. There the reservation was the nominal "Sum of ffive shillings of lawful mony of England at the feast of St. Michael the Archangell only." Thus armed, William Penn set sail for America.²¹

Directly upon his arrival Penn lost no time. He sent a messenger ashore and John Moll, the Duke's first Commissioner came on board. The documents were exhibited. Moll asked for twenty-four hours to consult with his fellow commissioners. And upon the following day there occurred in the little town of New Castle the picturesque ceremony known to the common law as livery of seisin.

First of all the deeds of feoffment were read aloud to the assembled inhabitants. Thereupon Moll and his fellow deputy, Ephraim Herman, delivered the key to the little fort into Penn's hands. Penn unlocked the door, entered and the lock turned again. In a moment he let himself out. Thereupon

21. Commission to Andross, *N. Y. Col. Docs. V. 3*, 537, Record, 549; cf. *Lunt*, E-71. P. R. O.—C. 66. 3308 No. 8 Deed of Feoffment for New Castle and Twelve Mile Circle, - Original in State Archives at Dover; Record, 521, Hazard, 588 Deed of Feoffment for southern tract,—Original missing; Record, 522, Hazard, 590. Lease of New Castle and Twelve Mile Circle,—Original in State Archives at Dover; Record, 523; Lease of Southern Tract, Original in State Archives at Dover; Record, 524; *Md. Arch. V. 5*, 385; Record, 544, 18. *Janney*, 204.

they presented to him "one Turf with a Twigg upon it" and "a porringer with River water and Soyle". It was all symbolic of the delivery of and taking possession. Later Penn when writing to William Markham, whom he had deputized to perform the same ceremony in November below the twelve mile circle, referred to "ye River now being mine."²²

Not until after he had made a visit to New York and erected the mechanics of his government in his newly acquired possessions, did Penn turn to the problem of his disputed bounds. To be sure he had sent a letter to my Lord Baltimore to offer "kind Neighborhood, and agree a Time of meeting." On December 13th they met across the conference table at Colonel Thomas Tailler's house in Ann Arundel County. This proceeding was more orderly but no more fruitful than the previous negotiations conducted with Markham. Penn produced his recent letter from the King to Lord Baltimore and urged a settlement by either reputed or actual observations at and then measurement at sixty miles to the degree from Baltimore's southern bounds. His purpose was avowed. Thereby he hoped to gain access to Chesapeake Bay.

My Lord Baltimore stands upon his charter, says that the King had been misinformed and insists upon observations in the neighborhood of the fortieth parallel as the most certain mode of its location. From beginning to end these respective positions are maintained. There was some reference to Penn's recent acquisitions in the Delaware country, Lord Baltimore's account insisting that Penn put this question aside whereas Penn has left another version which simply denies Lord Baltimore's right there. The contestants parted. Soon their contest would again be revived in England.²³

After furnishing Penn with a copy of the transcript of their conference, which he had caused to be taken in shorthand, Lord Baltimore proceeded to enclose a complete ac-

22. New Castle County Deed Record G, Vol. 1, 409-411; Record, 526-528. *Brev*, 368-9, 372; Affidavits of J. Wood and W. Peterson, 525-6. Penn to Markham, Nov. 29, 1682, *Pa. Mag.* V. 6, 466.

23. *Hazard*, 369 et seq. *Brev*, 395-399. *Md. Arch.* V. 5, 379-390; Record, 544. *Proud*, 267-274; Record, 545; cf. *Lunt*, E-61, P. R. O. Ref. C. O. 1/52, No. 49.

count of his negotiations with both Markham and Penn in a letter to the Marquis of Halifax. With it went a copy of a letter Penn had written nearly a year before his departure from England to certain persons settled within Lord Baltimore's bounds, intimating that they might be his tenants.

But Penn had forehanded him. In a letter written three days previous he calls Lord Hyde's attention to an important enclosure in a letter to the Duke of York already on its slow passage over the Atlantic and prays "thy Favour in its despatch". And there are gifts — "Beavers & Otters for Hatts & Muffs" for the King, the Duke and himself. Thus did this quarrel over colonial bounds become tinged with the factional strife which ever characterized the reign of Charles II, Penn seeking favor through one aligned with the Duke of York and Lord Baltimore with his rival.²⁴

While these letters were en route the bounds of Delaware were further delineated on parchment. Back in the preceding August there had been embodied in the deeds of feoffment the Duke of York's promise to make Penn's title good — in legal parlance, covenants for further assurance. On March 12th there was drawn up for Charles's signature the preliminary draft of a grant to the Duke. Almost word for word the description follows that of the prior deeds of feoffment. A slight addition reveals the hand of Penn. The additional verbiage describes a fort in the town of New Castle, which is stated to lie between Maryland and New Jersey.

On March 22nd the Great Seal of England was affixed to the letters patent. Thus did the bounds of "the country of Delaware" receive the royal imprimatur in this "instrument of government . . . which was to generate a state". Thereupon

24. Penn to Lord Baltimore, March 12, 1682/3, *Md. Arch.* V. 17, 472-3. Lord Baltimore to Marquis of Halifax, *Md. Arch.* V. 5, 391-2. Record, 544. Penn to Lord Hyde, Record, 736; cf. *Lunt*, E-49; Copied from Penn Mss. No. 15, Friends Reference Library, Euston Road, London, England, Dated February 5, 1682/3; and see *Jannet*, 226. *Bryant*, 291, 293, 299, 329, 341, 344, 347, 353.

with respect to its title the Duke stood in relation to Mr. Penn in a position akin to that of a modern trustee.²⁵

Yet shortly thereafter the Duke stands ready to surrender this grant and a greater and more beneficial document is prepared for the seals.²⁶

In this one the description varies considerably. The twelve mile circle disappears. As to the river it reads "all that river called Delaware and soyle thereof and all islands in the said river." Ashore the bounds begin at "Skoolkill Creeke" run from there to "Bombey's Hook" and from thence "unto Cape Henlopen now called Cape James". In shore in the north "backwards into the woods soc farr as the Minqua's

25. Record, 521, 522. Kings Bill dated March 12, 1682/3, P. R. O.—S. O. 7, Bdle 70; Record, 364; cf. *Lunt* E-51, P. R. O. Index, 6817. Writ of Privy Seal, March 21, 1682/3, P. R. O.—C. 82, 2567; Record, 365, cf. *Lunt*, E-52, P. R. O.—Index, 4228 fo. i., dorso, 58. Enrollment of Letters Patent of March 22, 1682/3, P. R. O.—35 Chas. 11, Part 1, No. 24; Exchequer, E. 371, No. 930; Record, 367, cf. *Lunt*, E-53, P. R. O.—Patent Roll, H. 33. Opinion of Lord Hardwicke in *Penn vs. Lord Baltimore*, 1 *Ves. Sen.* 444; 27 *Eng. Rep.* (Reprint) 1132. Opinion of Sergeant, Arbitrator in the *Pea Patch Island Case* Record, 676; 30 *Fed. Case* (#18311) 1123. Opinion of Cardozo, J. in *New Jersey vs. Delaware*, 291 *U. S.* 361. Letters Patent of March 22, 1682/3, Original in the State Archives in Dover; Photostat Copy, Record, 189. For evidence of the authenticity of this document see Record, 470, 486, 492, 532, 535, 536, 537, 541, 546, 730, 731, 733-735; cf. *Lunt*, E-1-34, pp. 13-15 and opinions cited supra. See also *Brev.* 380.

26. In 1936 there came to light among the papers of Thomas Cadwalader Esq., a Philadelphia lawyer and at one time an agent for the Penns, a contemporary document which had been prepared for use in connection with this proposed new and greater grant to the Duke of York. Upon the theory that this document, which recited a surrender of the letters patent of March 22, 1682/3, had effected one, an attempt was made to reopen the litigation in the Supreme Court of the United States between New Jersey and Delaware. 291 *U. S.* 361. Two applications for rehearing were denied. 304 *U. S.* 590; 305 *U. S.* 576.

Aside from the legal issue involved, references in contemporary documents subsequent in point of time to the date of the "surrender" document on April 10, unmistakably refer to the grant in question as still existing and hence unsurrendered or cancelled. There is for example the minute of the Committee of Trade and Plantations dated April 17, 1683 wherein their Lordships order the Lord Keeper to examine "the severall boundaries granted to the Lord Baltimore and Mr. Pen as alsoe to his *Royal Highness of New Castle*" P. R. O. Ref. C. O. 391/4, 138. Further this surrender was never enrolled upon any of the rolls where such a document would be found in the ancient English records. See Andrews 4, *The Colonial Period of American History*; English Commercial and Colonial Policy; comment upon the surrenders of the letters patent of the Jerseys, the Bahamas, the Carolinas and Georgia; 26 *Geo.* 2nd, June 20, 1752; pp. 394-401; *Lunt*, E99-103, 104 and Page 15; Master's Report and opinion of Mr. Justice Cardozo, 291 *U. S.* 361; Opinion of Sir Henry Churchill Maxwell-Lyte, Record 731, pp. 40-49.

country" and in the southern quarter "backwards into the woods three Indians dayes journeyes."²⁷

Manifestly a letter from Penn had arrived. The important enclosure mentioned in his letter to Lord Hyde as having already been sent to the Duke was "a natural Boundary for yt Tract of Land he so often pleased to promise a Patent for, & wch it is so much his own Interest to quicken Sr. J. Werden in." But these latter bounds were destined never to pass the Great Seal. For on April 17th the Marquis of Halifax reads aloud Lord Baltimore's letter of complaint about Penn to the Committee of Trade and Plantations. It was a close call for this new and greater grant was due to pass the Great Seal on that very day. Their Lordships ordered that the "several boundaries granted to the Lord Baltimore and Mr. Penn, as alsoe to his Royal Highness of New Castle" be examined and that the Duke be requested "not to pass any conveyance to Mr. Penn of those Parts, until the Bounds between the Lord Baltimore and him be settled."²⁸

Ten days later Lord Baltimore's agent waited on the Committee. He was informed that any complaint should be presented to the King in Council. And so late in May a petition was presented praying that "a grant (which is passing) from his Majesty to his Royal Highness the Duke of York, of the Town of Newcastle and the adjacent country on the confines of Maryland may not pass the Great Seal untill his Majesty shall be satisfied of the extent of letters Patent formerly granted to Cecile Lord Baltimore, wherein the said Town and adjacent Country is alleadged to be comprized." The whole matter was referred to the Committee. And there for two years and a half that matter pended.²⁹

27. King's Bill of April 13, 1683, P. R. O.—S. O. T. Bdle 70, Mem 1. Record, 368-370.

28. Penn to Lord Hyde, Feb. 5, 1682/3, supra. Minute of Committee of Trade and Plantations, P. R. O.—C. O. 891/4, 138; Record, 546, *Lunt*, E-54. Cf. King's Bill and Writ of Privy Seal in note 25. Record, 369; *Brev.* 390-393. For the several steps involved in passing the seals see: *Maxwell-Lyte*, Sir Henry Churchill, *Historical Notes on the Use of the Great Seal of England*, 90 et seq. *Andrews, Guide*, 268-273. *Pepys, Wheatley Ed.*, Entries of July 9th to 13th, inc. 1660.

29. Record, 758, 546; *Brev.* 393-4; *Md. Arch.* V. 5, 396.

The record of the first hearing is significant. Buttressing the agent for Mr. Penn "who solicits the passing of this grant" was "Counsel learned in behalf of his Royal Highness." Even more significant was their argument. It ran in this wise. In the preamble to Lord Baltimore's charter occurs the phrase — *hactenus inculta & barbaris nullam divini Numinis notitiam habentibus in partibus occupata* — which is to say (lands) hitherto uncultivated and occupied in part by savages having no knowledge of God. That charter passed the Great Seal on June 20, 1632. And the argument was that "this territory was never possessed by my Lord Baltimore but originally by Dutch and Swedes and that the Grant to my Lord Baltimore was only of lands not inhabited by Christians"³⁰

This contention was almost hoary with age. It had first been urged nearly a quarter of a century before by the Dutch commissioners, Augustine Herman and Resolved Waldron, who had been appointed to deal with Lord Baltimore's father in consequence of the latter's demands and attempts to gain possession of New Amstel (later New Castle) and the then South River. This question — "Whether, in the year 1632, the Dutch were possessed of the Lands claimed by Mr. Penn," — became the nub of the controversy.³¹

On the very same day in America Quaker and Catholic proprietors were again in conference at New Castle where a series of conciliatory letters had brought them together. At first there was a fruitless reargument over the former proposal that Lord Baltimore's northern bound be ascertained by a measurement from his southern limits. Then, according to their official accounts, Penn made an offer — that he would waive whatever advantage he thought he had by the King's second letter and join Baltimore in taking observations at the head of Chesapeake Bay provided Lord Baltimore would first "please to sett me a Gentleman's price, soe much p mile, in case I should have noe part of the Bay by Latitude." Lord

30. *Brev.* 89; *Md. Arch.* V. 3, 377-8. See citations under note 29.

31. *N. Y. Col. Docs.* V. 12, 243, 248-250, 252, 261. *Md. Arch.* V. 3, 365, 377-8. *Breviate*, 394-5.

Baltimore understood that Penn wanted an answer the following day and the two parted without having come to any agreement. Nor were they to meet again until they stood before the Lords of the Committee in England.³²

This latest proposition seems to have been the fruit of a suggestion first made by Lord Baltimore during a private conversation at the time of their first conference in the preceding December. For a time and despite a mutual misapprehension as to each other's intentions, it seems now that "all matters could Soone receive a friendly issue." Immediately it led to further correspondence revealing the temperamental differences in the two men. Directly after Baltimore's departure Penn despatches a letter after him warning him that if his proposals are not acceptable he intends "to embarque for England by the first Conveniency."

Lord Baltimore wrote his answer the following day and started off down Chesapeake Bay. No further word comes from Penn and in this state of affairs being apprehensive of his threatened departure for England, Baltimore forwards his account of the New Castle conference to William Blaythwayt, Secretary of the Committee. This he follows up with letters to Lord Halifax and Sir Leoline Jenkins asking for an opportunity to be heard in person at the Council Board in support of his claim "to that part of delaware within the fortieth degree Northern Latitude, wch Mr. Penn holds from me."³³

It now appears that the delivery of Lord Baltimore's answer to Penn's letter had been delayed for nearly a week. Its gist was an acceptance if the Quaker "will but resigne his (Lord Baltimore's) Intrest Upon Delaware." Penn had already sent off a conciliatory letter strongly urging a settlement

32. Penn to Lord Baltimore, March 12, 1682/3, *Md. Arch.* V. 17, 472. Penn to Lord Baltimore, April 23, 1683, *Lunt* E-55. Lord Baltimore to Penn, May 23, 1683, Penn Mss. Vol. 1, Off. Corr., 1683-1727, Hist. Soc. of Pa. Penn's Account of Conference, Brev. 397-8, cf. *Lunt*, E-61; *Md. Arch.* V. 17, 147-8. Baltimore's Account of Conference, *Md. Arch.* V. 5, 397-400; *Md. Arch.* V. 17, 161-2.

33. *Md. Arch.* V. 5, 399. Lord Baltimore to Penn, June 24, 1683, Penn Mss. Vol. 1, Off. Corr. 1683-1727. Penn to Lord Baltimore, May 30, 1783, *Md. Arch.* V. 17, 473-4, cf. 143, 151. Lord Baltimore to Penn, See letter of June 24, 1683 containing reference to B's of May 31, 1683. *Md. Arch.* V. 5, 397-401.

"th't if possible, we might be the last Arbitrators of our own affairs," again subtly renewing the proposal that he purchase an outlet into Chesapeake Bay, and finally softening his threat to return to England. He now rejoins that he cannot bargain with respect to the lower counties on the Bay on the ground that the Duke is entitled to one half the quit rents from that quarter.

Those two letters ultimately reached Lord Baltimore on the same day. The next day in a letter couched in the most friendly and conciliatory language he rejoined to Penn's objection that to deliver up his (Baltimore's) right upon Delaware would appear "some affront to the King and duke" by stating that he would be satisfied "if Mr. Penn will give assurances that when that business comes to a hearing before the King and Council, he will not (because he has the possession of my Right on delaware) use his endeavours to oppose me in it." To this Penn has left no recorded answer. For soon thereafter there occurred events which made a settlement a virtual impossibility.³⁴

Since the fall of 1682 Lord Baltimore had been confronted with two bald facts. Penn was in possession on the Delaware shore and he was not. Moreover no joint observation had been taken to locate the fortieth degree. Late in the winter he had caused an observation to be taken at the mouth of the Susquehannah River and found that it lay under the fortieth parallel. Shortly thereafter there had been mooted and approved by his Council several propositions to prevent encroachment within his bounds. No action had been taken however save that in May he had caused to be published a proclamation offering advantageous terms to settlers "on the Seaboard side or the whore kills."³⁵

Just when William Penn became aware of this is not clear for he himself has left conflicting accounts, in one asserting that he knew of its publication at the time of their conference

34. Lord Baltimore to Penn, June 24, 1683, supra. *Md. Arch.* v. 17, 151. Penn to Lord Baltimore, June 6, 1683, *Md. Arch.* v. 17, 474-5. *Md. Arch.* v. 17, 147.

35. *Md. Arch.* V. 5, 395. *Md. Arch.* V. 17, 220-224, 232-236.

at New Castle and in another his knowledge is stated to be "Soone after this meeting." However this may be, certain it is that he regarded it as a breach of faith. Having received letters "from two Judges of the two County Courts that such a Proclamation was abroad" he forthwith despatched three members of his Council to Maryland to confront Lord Baltimore with a copy. They reported his explanation to be that thereby he merely asserted his claim and likewise his refusal to recall it. This latter correspondence was apparently sulphurous for it is described by Penn as "of a very course style" and in Baltimore's account as "Course and foule enough". Thereafter Penn proceeded to broadcast his version of the controversy in England complaining of "ye most disingenuous, evasive and injurious Practices in ye World" and "cosen Markham" was again deputized and sent overseas to plead the cause.³⁶

Negotiations having broken down Lord Baltimore thereafter proceeded to carry into execution his other plans for taking possession. For this purpose he had commissioned his cousin, Colonel George Talbot. Upon the basis of the observations taken in the preceding spring and summer a rough East-West line was run by blazing the trees. In September Talbot appeared at Philadelphia and in Penn's absence, made a demand upon his deputy of "all the Land Lying on the West side of Delaware River and to the Southward of the fortieth degree of Northerly Latitude according to a line runn East from two observations the one taken the 10th day of June, 1682 and the other on the 27th of September, 1682" Later he constructed a log fort near New Castle which was garrisoned under his command with an army of four men and throughout the Delaware country the agents of my Lord Baltimore circulated to spread his gospel. The Quaker responded in his own manner — in large measure by letters. In the spring of 1684 he went so far as to issue a proclamation and even com-

36. *Brev.* 384-5, 398. *Md. Arch.* V. 17, 148, 161. *Md. Hist. Mag.* Vol. 3, No. 1 March, 1908, 21-32, 31. *Pa. Arch.* S. 1, v. 1, 72, 78-9, Penn to John Tucker, July 25, Penn to Rochester, June 14, 1683, *Lunt*, E-57. Penn to Rochester, July 24, 1683, *Lunt*, E-58. Penn to Sutherland, July 28, 1683, *Lunt*, E-59. Penn to Charles II, August 18, 1683, *Lunt*, E-60. *Breviate*, 395-399; cf. *Lunt*, E-61.

missioned one Welch to raise men to defeat the threatened invasion.³⁷

At this juncture Lord Baltimore having gathered proof as to the nebulous character of the early Dutch occupation of the Delaware shore, sailed for England. Albeit the issue had several times been called up before the Committee upon the insistence of York and Penn, his letters had ensured postponements until his arrival. And now the matter was again delayed upon the Committee's being informed by the Duke's solicitor "that the Proofs in this case depend chiefly upon Mr. Penn's coming into England."³⁸

Penn sailed on August 12th, 1684. Directly he arrived early in October, he despatched an amusing letter to James Harrison in Philadelphia:

Phil Lemain has most carelessly left behind the York papers that T. Lloyd brought and should have come as the ground and very strength of my coming so that I am now here with my finger in my mouth. He could not have done me a worse injury nor Baltimore a greater service if he had had the bribe of £10,000 to do it, — Wherefore let him be quickened to send them by the first ship that comes out of Maryland or Virginia and let him go express a way with it and search the first ship and endorse on the letter, *To me for his Royall Highness service, Speed, Speed & Care* and then lett T. Lloyd step to York & get fresh affidavits of the three men that can swear the Dutch possession of the River & Bay before Baltimore's patent in the Governor's presence & under the seal of the Province.³⁹

As might be supposed there was further delay. More than a year passed before a decision was had. Upon the death of Charles II in February, James ascended the throne and thereafter an attempt was made to reduce several of the proprietary governments in America to the Crown, among them Maryland. The matter was finally brought to a head by Penn's

37. *Md. Arch.* v. 17, 222-224; 230, 231, 232-236, 145. *Pa. Arch.* S. 2, v. 7, 3-5, 6, 7-9. *Mem. Pa. Hist. Soc.* V. 1, 413 et seq.; 418 et seq. *Liont.* E-62, E-63, E-64; cf. *Janney*, 253-4. *Pa. Arch.* s. 1 v. 1, 82, 84, 85, 86, 87, 88-91.

38. *Md. Arch.* v. 5, 411-420; *Pa. Arch.* s. 1, v. 1, 85 and see *Janney*, 253-4. *Brev.* 401 (Minute of July 23, 1684); *Md. Arch.* v. 5, 402-3, 405 and cf. *Brev.* 400 (Minute of Feb. 12, 1683/4). *Brev.* 401 (Minute of September 30, 1684).

39. Penn to James Harrison, October 7, 1684, *Janney*, 260-261.

petition that the question in issue was "about a Title of Land and not of Power."⁴⁰

Again as might be supposed, Penn's proofs prevailed. On the 13th of November, 1685 the erstwhile Duke of York approved the opinion of the Committee of Trade and Plantations that

for avoyding further differences, the Tract of Land, lying between the River and the Eastern Sea, on the one side, and Chesapeake Bay on the other, be divided into equall parts, by a line from the Latitude of Cape Hinlopen to the fortieth Degree of Northerne Latitude and that one half thereof lying Towards the Bay of Delaware be adjudged to belong to his Maty and that the other halfe remain to the Lord Baltimore, as comprised within his charter.⁴¹

My Lord Baltimore "was cast", as Penn wrote to a Friend in Philadelphia. The Quaker had fulfilled to perfection his prediction made to Colonel Thomas Tailleur, a member of Baltimore's Council just after the negotiations in America had broken down.⁴²

I, finding this place necessary to my Province and yt ye Presence of ye Ld. Balt. was agt Law, civil & common, I endeavored to gett it, & have it, & will keep it if I can.

This was a quaint issue to a curious dispute. In espousing the Quaker's contention which was based upon Dutch occupation prior to the date of Baltimore's charter, the Lords of the Committee eliminated from consideration and hence from the decision, the basic issue with respect to the Delaware country. The interesting question is, — where did Lord Baltimore's northern bound end. Let his letters patent speak for itself:

"That Part of a Peninsula" which lies "between the Ocean on the East, and the Bay of Chesapeake on the West", is first

40. *Breviate*, 401-406, minutes of September 30, 1684 to November 13, 1685; and see particularly minute of August 18, 1685, at page 402. *Lunt*, E-67, P. R. O., P. C. 2/71, 1.

41. *Breviate*, see preceding note. Order of November 13, 1685, see *Lunt* E-70, P. R. O., P. C. 2/71 and cf. *Breviate* 492-495.

42. Penn to James Harrison. October 25, 1685, *Janney*, 276. Penn to Col. T. Tailleur, July 31, 1683, *Pa. Arch.* S. 1, V. 1, 70-72.

carved out and then follows a description of the southern bound. The charter continues . . . "between that bound on the South, unto that Part of Delaware Bay on the North, which lyeth under the 40th Degree of Northern Latitude . . ." And thereafter there is more land carved out . . . "And all that Tract of Land, between the Bounds aforesaid, that is to say, passing from the aforesaid Bay called Delaware Bay, in a Right Line, by the degree aforesaid . . ." and so on around the bounds.⁴³

The manifest question narrows to this — Where was "That Part of Delaware Bay"? And the manifest answer is that it must have been the head of the bay since all of it lies under the fortieth parallel. But where the head of the Bay lies has never been judicially determined. William Penn urged this on only one occasion — in his answer to the Talbot demand. For he knew where he stood on his claim with regard to Delaware Bay but was uncertain as to whether or not by such a line he would come out in Chesapeake Bay. The Calverts have successfully left evidence of lines drawn upon this basis. It was the uncertain location of the fortieth parallel in fact and on parchment which gave rise to the dubious claims of each Proprietor to all the land which lay from the thirtieth to the fortieth degree.⁴⁴

A critical discussion of the actual decision in 1685 is a profitless venture. One is led through a maze of uncertainties into a realm of unreality. In reality it was but a cloak for possession — possession taken and perfected by others and so

43. *Md. Arch.* V. 3, 3-12. *Brev.* 3-4, 89, 505.

44. The dictum of Judge Cardozo, 291 U. S. 361, relative to Delaware Bay in *New Jersey vs. Delaware*, which is apparently to the contrary is predicated upon an agreement of doubtful validity between Delaware and New Jersey. See Masters Report 55 *Sup. Ct. Rep.* 984 at 959, and Record, 161. *Md. Arch.* v. 17, 149. *Resurvey*, 132, Fig. 5 (Baltimore Map) 136, Fig. 7, (Talbot line); cf. *Brev.* 231, 332. *Breviate*, 4-6, 13, 92-3

In connection with the view here expressed in the text as to the construction of Lord Baltimore's charter compare the opinions of three English lawyers upon a Case stated, *Breviate*, 507-8. Among these was P. Yorke, later Lord Hardwicke. It should be noted that in his opinion in *Penn vs. Lord Baltimore*, he left this question undecided. See 27 *Eng. Rep. (Reprint)* 1132 at page 1137 and twice affirmed by way of dicta his view that possession was, so to speak, the key to the land in dispute, ie the lower counties. See opinion, 1137, 1138. Cf. *Lunt* E-182, 183 for Lord Hardwicke's mss. notes and compare for the disregard of former crown grants, *Andrews, Col. Per.* Vol. 1, pp. 323, 354 et seq., 364-365.

there was lost to the Calverts their claim to approximately one half of what is now Delaware. It at once settled the right in the Crown from whence Penn derived his backhanded title and in ordering a division "by a line from the Latitude of Cape Hinlopen to the 40th Degree" it added another bound to the Delaware country.

Thus within three years William Penn had encompassed his pretensions on Delaware River and Bay successively by his charter for Pennsylvania, the deeds of feoffment, the Letters Patent of March 22, 1682/3 to the Duke of York and now this division line. Another quarter century was to pass before any of these bounds were run out on the land.

The twelve mile circle was the first. In the fall of 1701 an ambitious attempt was made to square the circle. This is literally true. The surveyors, Taylor and Pierson first ran a line twelve miles due North from "ye end of the Horse dyke next ye sd Town of New Castle" — Then they ran first East to the River and then West changing their course one degree to the South "at ye end of every 67 perches." In this manner they measured a total of one hundred and twenty chords which was two-thirds of a semicircle, in accordance with their warrant given under the hand of William Penn. The survey of a circle is a surveyor's nightmare as later more accurate attempts were amply to demonstrate.⁴⁵

The establishment of this division between the present Counties of Chester and Delaware on the one hand and New Castle County on the other was directly connected with the political development of the inhabitants of the Delaware country. It is a significant fact that Penn signed his warrant for this survey on the same day that the fourth and last of his famous Frames of Government was promulgated to the Assembly sitting in Philadelphia. And this was the last Assembly in which the members from below the circle joined in

45. Record, 265A, 265B, 295, 567, 568, 1133 #1. *Hodgkins*, 175-187. Puthy, J. S. and Cope, G.—*History of Chester County*, (Hereafter, *Puthy & Cope*) pp. 159-161. Originally all the land north and west of the 12 mile circle lay in Chester County. On Sept. 26, 1789 the Pennsylvania Legislature erected Delaware County out of the eastern part of Chester County, *idem*, 120.

legislation. Thereafter a separate Assembly came into being.⁴⁶

Nineteen years before, immediately after perfecting his possession by the livery of seisin, Penn had convened a General Court in New Castle "for the settling the Jurisdiction." Those who assembled were assured of their enjoyment of "the same privileges with those of the Province of Pennsylvania." On the day after the livery of the seisin of the land below the circle was achieved, he issued writs of election. An election was had and within a month after his possession had been perfected the Assembly met at Upland (Chester). The members from "Ye Three Counties of New Castle, Jones and New Deal alias Whorekill" signed a petition seeking "their incorporation in and with the Province of Pennsylvania in order to their enjoyment of all the rights and privileges of the aforesaid Province." The following day an "Act of Union" whereby the counties were "annexed unto the province of Pennsylvania" was given "under the hand and broad seal of William Penn, Proprietary and Governor of this province, and territories thereunto belonging."⁴⁷

Three weeks later Penn stated in a letter, — "I have annexed the Lower Counties (lately obtained) to the province." The swift sequence of the dates, the tenor of and the recitals in the documents, the names of the petitioners, — all of these tend to negative the voluntary color given to this act of usurpation resulting in a de facto government.⁴⁸

Within the next two decades the political consciousness of the inhabitants of the Lower Counties ripened and matured. The story is akin to the development of self government elsewhere. Though embraced as a virtue it took its rise as a necessity. And in this particular sectional dispute there are to be found deep differences in racial and religious backgrounds, the difficulties and expense imposed by distance, and commer-

46. Record, 567. *Shepherd*, 324, 334-338. Rodney, Hon. Richard S., *Early Relations of Delaware and Pennsylvania* 54 *Pa. Mag.* 209-245. (Hereafter, *Rodney*). *Futhey & Cope*, 159, 160.

47. Record, 515. *Rodney*, 218-233. Record, 566, 561. *Shepherd*, 322-4.

48. *Proud*, v. 1, 209. Cf. *Shepherd*, 324, and *Rodney*, 223.

cial rivalry between Philadelphia and New Castle. Disputes between the upper and lower counties ensued over the selection of judges, the mode of government, military protection and were fostered by personal and factional hostilities.⁴⁹

The dubious character of Penn's title to the land gave rise to a species of dual allegiance. The Herman family is a case in point. Augustine Herman first appears in the record as an emissary acting on behalf of the Dutch against Lord Baltimore. Later he became an adherent of the Calverts. His son, Ephraim stood high in the esteem of the Duke of York's government and made livery of seisin to William Penn. In turn he and others sought from Lord Baltimore confirmation of their titles to land located in the Lower Counties. The upshot was that the collection of quit-rents in the Lower Counties was a parlous problem. No accounting was ever made to the Crown for its share of the rents under the deed of feoffment of the land below the circle.⁵⁰

The final split between the Province and the Lower Counties occurred when it became apparent that the latter could no longer maintain their equality and that thereafter the political weight would be with the Province. Conference and compromise proving fruitless, Penn accepted the inevitable and inserted in his last Frame of Government by way of a post-script a proviso looking to separate assemblies. Shortly thereafter he returned for the last time to England and by 1704 separate assemblies were an accepted fact.⁵¹

The only tie remaining was the fact of a common governor. The existence of the de facto government under the Act of Union had been expressly recognized by the Crown. Its anomalous offspring in the three Lower Counties was tacit-

49. *Shepherd*, 324-334. *Rodney*, 227-230.

50. *Md. Arch.* v. 17, 484 et seq. *Shepherd*, 39, 40, 60, 132. *Record*, 558, 559, 789, 740, 741, 742. *Brev.* 445, 453, 487. *Rodney*, *The End of Penn's Claim to Delaware*, 61, *Pa. Mag.* 183.

51. *Shepherd*, 334-345; *Rodney*, 232-238. It should be borne in mind that in Penn's time and for a considerable period thereafter, the phrase 'the Three Lower Counties' (ie New Castle, Kent and Sussex) was used in contradistinction to the three upper counties of Bucks, Philadelphia and Chester then abutting on the Delaware. See Notes 15 and 45 supra.

ly accepted. Such was the government successively of "Pennsylvania and territories thereunto belonging"; "Pennsylvania and County of New Castle, and all the Tracts of Land depending thereon"; "Pennsylvania and the Three Lower Counties upon Delaware River"; "Counties of New Castle, Kent & Sussex on Delaware", until it became during the Revolution, The Delaware State.⁵²

The order of the King in Council in 1685 had provided "That the said Lands be forthwith Divided accordingly". The compliance with this peremptory command of a Stuart was finally achieved eighty-three years later when a Hanover approved the demarcation, the western portion of which was ultimately to be known as the Mason and Dixon Line. Before his death in 1715 Lord Baltimore made two unsuccessful attempts to have the order of 1685 reviewed. Three years later Penn, who had for some time been "seiz'd with a distemper in his head", followed him. The boundary dispute was left in the laps of their many and successive heirs.⁵³

It was the settlement of the back country that gave rise to attempts to settle the dispute and run the line. With each Proprietor making surveys and grants in the territory under dispute, the settlers were soon at loggerheads. The inevitable result was two-fold. Intermittent border warfare and bloodshed marked the long course of the controversy and neither party was secure in the collection of his quit-rents. In 1731 the fifth Lord Baltimore petitioned the Crown to order the Penns, John, Thomas and Richard, to join with him "in settling and ascertaining the said Boundaries."⁵⁴

Albeit no final order was entered the upshot was that on May 10, 1732 the parties entered into Articles of Agreement. On its face this document suggests a compromise. The line

52. Record, 561—Act of Union. Record, 552—Commission to Benjamin Fletcher. Record, 555—Revocation of Fletcher's Commission. Record, 557, 737, 752, 755. Record, 1051—Penn's acknowledgement of the Queen's Right. Record, 748, 749. Cf. *Breviate*, 2.

53. *Resurvey*, 353, 355. *Breviate*, 22-24, 113-114, 425-430; cf. *Lunt* E-119. *Resurvey*, 153, cf. *Lunt* E-132, E-146, E-154. *Breviate*, 87.

54. *Resurvey*, 157-60. *Breviate*, 30, 119, 445 and cf. *Lunt*, E-153, E-168.

of division was to run due West from Cape Henlopen to the exact middle of the Peninsula and thence Northerly until it made a tangent with a circle twelve miles distant from New Castle. From there it followed up the circle so far as should be requisite in order then to run due North from the tangent point to intersect an East and West line drawn fifteen miles South of the southerly edge of Philadelphia. Again from that point it ran due West to twenty-five miles beyond the Susquehannah. In a word, the Penns retained the Lower Counties and as to the fortieth parallel, the line lay between the extreme demands of each party and somewhat to the North of the anciently assumed position of that latitude.⁵⁵

Despite the apparent clarity of this agreement it contained the seeds of bitter controversy. The whole business was predicated upon a map which was printed on the margin. On that map Cape Henlopen appeared, not at its present location but somewhat to the South at the present location of Fenwick's Island. Again mutual reliance upon an inaccurate map apparently misled both parties to this ancient dispute. Blasts and counter-blasts ensued. Lord Baltimore claimed that he had been imposed upon that the Penns, as his counsel later argued before Lord Hardwicke, "might hook in twenty miles more territory." In rejoinder the Penns retorted that it was a reproduction of his own map and this appears to have been the case. The location on this map was ultimately determined to be binding.⁵⁶

So far as can now be ascertained the earlier map makers had placed Cape Henlopen at Fenwick's Island, denominating its present location Cape Cornelius. That this was the situation upon which the order of 1685 was based is clear from the language used in that order. The explanation seems to

55. Articles of Agreement, *Lunt*, E-184 (Photostat copy of the copies used by Lord Hardwicke). *Breviate*, 30-41; 120-132; 446, 449-460. *Resurvey*, 163-166, 282.

56. *Breviate*, 454 and see map inserted at fly page. *Lunt*, E-185 Photostat copy of copy used by Lord Hardwicke endorsed as "Lord B's map of Maryland, Pennsylvania etc. annexed to his agreement with Messrs. Penn in the year 1732." *Lunt*, E-180 Photostat copy of notes of Lord Hardwicke taken on the bench in *Penn vs. Lord Baltimore*. *Breviate*, 31, 122-3, 127. Opinion of Lord Hardwicke, 1 *Ves. Sen.* 444 at 451; 27 *Eng. Rep. (Reprint)* 1182 at 1187.

be that in the course of time usage had transposed the situation and pitched upon the present location of Cape Henlopen.⁵⁷

The Commissioners duly appointed to carry the Articles into execution fell afoul of two questions. Where was the center of New Castle and was the circle to be of a radius or circumference of twelve miles? After much maneuvering they agreed a month before the time limit expired, to disagree. Shortly after word of this reached England, Lord Baltimore sought by a shrewdly drafted petition to have the Crown confirm his charter "notwithstanding the said Words *hactenus inculta*". Richard, the youngest Penn thereupon got into action, his brothers being in America. In the course of the proceeding the Board of Trade recited an ancient Order in Council in which nearly half a century prior to 1685, a construction had been given the phrase, *hactenus inculta*, precisely contrary to that adopted by the King in Council in 1685. At that later date Lord Baltimore had been unable to find the original order. The upshot of the business was an order postponing it "that the said John, Thomas and Richard Penn may have an opportunity to proceed in a Court of Equity to obtain Relief upon the said Articles."⁵⁸

Thus we come to the celebrated case of *Penn vs. Lord Baltimore* which remained in the Court of Chancery for nearly a generation. In its course the entire controversy was reviewed from its roots in the early part of the Seventeenth Century. Parchment was consumed by the acre and there was a vast amount of evidence, much of it taken by deposition in America. On the whole showing the Penns made out the better case and were more ably advised. The cause came on for a final hearing before the Lord Chancellor in May, 1750 and the Penns had their decree that the Articles be specifically performed with a saving of the rights of the Crown.⁵⁹

57. *Resurvey*, 165-6 and see map facing page 142. Cf. Penn to Jenkins et al, *Pa. Arch.* s. 1, v. 1, 147.

58. *Lunt*, E-158, E-159, E-160; *Breviate*, 41-71, 132-165, 165-216, 461-496. *Resurvey*, 166-170.

59. *Lunt*, E-176, Record, July 1, 1735 to May 3, 1750. *Lunt*, E-177, Record, May 3, 1750 to May 11, 1750. *Lunt*, E-180, Lord Hardwicke's Bench Notes. *Lunt*, E-181, Memo for the decree. *Lunt*, E-189, Record, May 16, 1750 to July 7, 1756.

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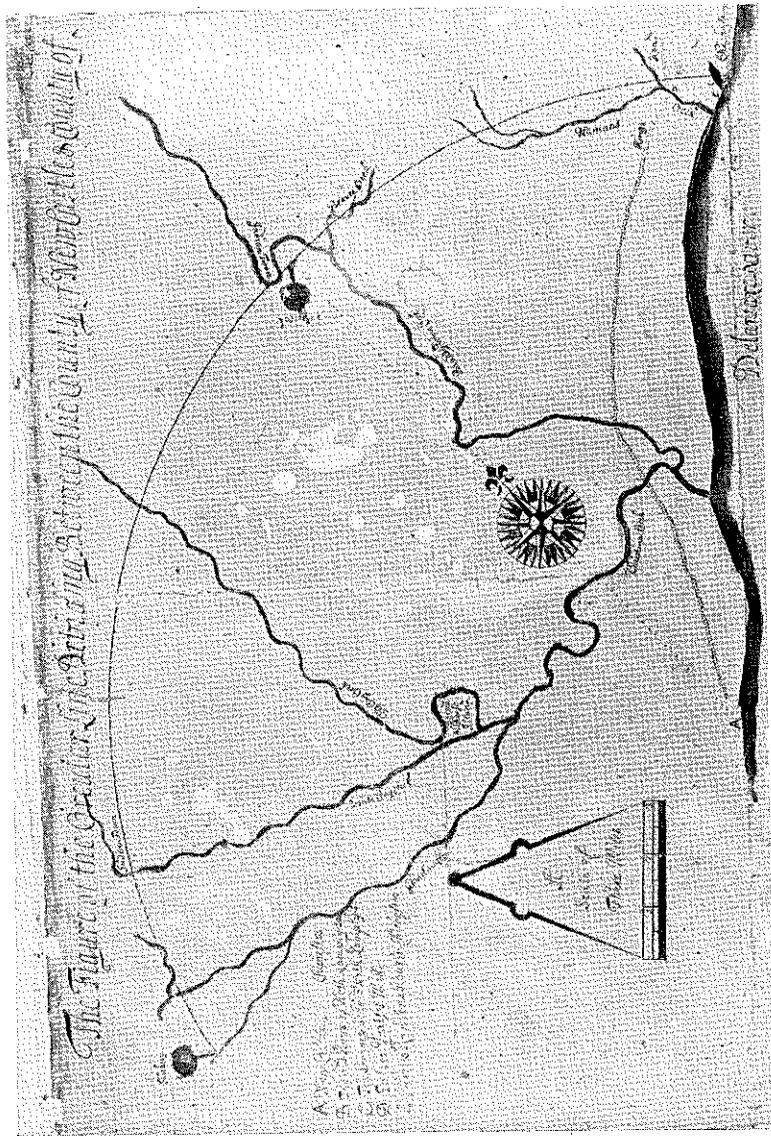
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MAP ACCOMPANYING THE RETURN OF ISAAC TAYLOR AND THOMAS PIERSON OF THEIR SURVEY OF THE 12 MILE CIRCLE IN 1701

Reproduced from a photograph of the original in the Historical Society of Pennsylvania.

X Both Propty in this Case have vast Merit of yt kind. but in this partic. Spot of ye possin & merit of Improvement has been with ye Penns.

Supd. Propt from t^o put to making a double title boundaries - The short title not to be entered into -

But what puts an end to this is - yt no part of ye 3 lower Cties is left to or to be conveyd to Lord B.; so nothing to be passed under.

Now I am upon this head of possession, I will say once for all -

That long possion & Enjoymt, Settling, Peopling, improving & Cultivating is one of ye best Evidens of ye title to lands or Districts in America.

This is not a new opinion of mine - have ever been of yt opinion thru all ye Capacities in which I have had ye honour to serve ye Crown.

My reason is yt these Grants are made in cons. of Settling & Improving -

great Merit
Great Services & advantage to ye Crown & A to ye Mother Country. Commerce - Navigation X

Just ground to support such possessions without a nice looking into Titles.

Just ground to support such possessions without a nice looking into Titles.

Just ground to support such possessions without a nice looking into Titles.

Excerpt from Lord Hardwicke's manuscript notes for his opinion in Penn vs. Lord Baltimore. The original is in the British Museum. Reproduced from a photostatic copy in the Delaware State Archives at Dover.

In his opinion Lord Hardwicke described the case as one "of a nature worthy the judicature of a *Roman* senate rather than of a single judge." His theory of this long standing controversy was that the original rights being in doubt it was "the most proper case for an agreement." Thus he eluded the decision of the points on those original rights but the tenor of his discussion of the respective arguments was in favor of the Penn contentions. "Now I am of opinion", said he, "that full and actual possession is sufficient title to maintain a suit for settling boundaries"; and again, "But now in cases of this kind, of two great territories held of the crown, I will say once for all, that long possession and enjoyment, peopling and cultivating countries, is one of the best evidences of title to lands, or districts of lands in America, that can be this regards the three lower counties, the strength of which is vastly on the side of the plaintiffs." His Lordship resolved all objections on the score of his jurisdiction, found that the Articles were not voluntary or uncertain, nor tainted with fraud, nor vitiated by mistake and remarking that "the defendant's commissioners behaved with great chicane in the point they insisted on, as the want of a center of a circle, and the extent of that circle", assessed the costs against Lord Baltimore.⁶⁰

Despite the decree the business dragged tediously. Soon after the task of running the line was commenced another dispute arose as to whether the radius of the circle should be run horizontally or following the contours of the land. Shortly after a decision directing a horizontal measure was had, Lord Baltimore died. And then to the discomfiture of the Penns it appeared that it was doubtful if his son and heir, a minor, was bound by the Articles as his father had been but a life tenant. More litigation ensued which was finally abandoned when at long length all matters were adjusted and new Articles of Agreement were entered into. The latest Calvert had been able to procure a release of the onerous costs. Apparently the Penns were at the point of exhaustion. In a letter to his counsel Thomas Penn had written:

60. Lord Hardwicke's opinion, *Penn vs. Lord Baltimore*, supra. *Lunt*, E-182, mss. notes for the opinion. *Lunt*, E-183, memorandum draft of the opinion.

We would for the sake of putting a short and clear end to this tedious contest, consent to waiving mentioning it, — (a collateral provision) — in Case all the other matters (particularly about costs and damages) are clearly and plainly express'd and settled immediately in terms most clear and simple.

Then he concludes :

I beg the continuance of your endeavors to extricate us, out of this Labyrinth.⁶¹

The business called for the formality of litigation and the decree was pronounced on March 6, 1762. Commissioners and surveyors had gone to work two years before in continuation of the work abandoned a decade before. Progress was slow and considerable difficulties were encountered. In 1763 the proprietors employed Charles Mason and Jeremiah Dixon, "two persons, who they have the greatest reason to believe are well-skilled in astronomy, mathmatics and surveying, of great integrity and totally unbiassed and unprejudiced on either side of the question" to complete the line of division between them.⁶²

As regards the Lower Counties the work of Mason and Dixon was to some extent predicated upon that of the local surveyors previously employed. The Articles of 1760 had accepted as final the East to West line already run from Fenwick's Island on the Atlantic to the "Middle Point" of the Peninsula, which had been in dispute. These later Articles had also provided for "the Court House in the said Town of New Castle" as the center of the twelve mile circle. Apparently from practical considerations the spire had been used and the "Tangent Point" had already been computed, measured and temporarily marked. Mason and Dixon ran out the so-called tangent (South - North) line up through the Peninsula joining the Middle and the Tangent Points in the

61. *Resurvey*, 175-178, 329. *Lunt*, E-190, notes for a letter, C. Yorke to T. Penn, May 29, 1759. *Lunt*, E-191, T. Penn to C. Yorke, May 31, 1759. *Pa. Rep.* 9-43, Articles of Agreement of 1760. *Lunt*, E-193, Record, Dec. 10, 1761 to March 6, 1762.

62. *Resurvey*, 184-190, 340, 341. *Hodgkins*, 190-194. *Report of the Secretary of Internal Affairs of The Commonwealth of Pennsylvania containing the Reports of the Surveys and Resurveys of the boundary lines of the Commonwealth* (Hereafter, *Pa. Rep.*) 61-281 (Mason & Dixons Field Notes) See P. 145.

summer and fall of 1764. In the following June they marked off the slight arc — a distance a bit over a mile — where the circle bulged toward Maryland, and from its point of "Intersection" with the meridian line due North to the junction of the East to West line, separating Maryland and Pennsylvania which is usually called the Mason and Dixon Line. Thus was completed the western division between the lands of the Penns and the Calverts and the present boundary between Delaware and Maryland.⁶³

This division was finally approved by George the Third early in 1769 and thus ended the famous Penn-Baltimore controversy over the Three Lower Counties. The Penns had not long to enjoy their domain for six years later the Declaration of Independence enunciated its existence as a free and sovereign State. At the first constitutional convention it adopted the title of The Delaware State. And its bounds were those fixed by Penn's deeds of feoffment and the letters patent of March 22, 1682/3 to the Duke of York in so far as they had been run out by Mason and Dixon, and by Taylor and Pierson in 1701.⁶⁴

From that time until the middle of the Nineteenth Century controversy over the bounds on land slumbered. In course of time the stone bearing the arms of Penn and Lord Baltimore which marked the junction of the Mason and Dixon Line with the due North or meridian line, disappeared. In 1849 Delaware, Maryland and Pennsylvania joined in a survey, known as the Graham Resurvey, to relocate this point. In this they were entirely successful but the venture produced a curious collateral result. It projected a controversy between Delaware and Pennsylvania which was not settled until 1921. This

63. *Pa. Rep.* 80-81, 118-143, 163-166, 240, 343, 345-347, 349-351, 366-369. *Resurvey*, 186-190. *Hodgkins*, 191-193. *Hayes*, 11. The slight curve toward Maryland is so minute that it is not reflected on any maps known to the writer save one drawn to a very large scale — four inches to the mile — published circ. 1850 and certified to by J. D. Graham in connection with his survey (*infra*) between November 16, 1849 and February 6, 1850. It should be noted that Graham's report states the Tangent Point at the foot of this arc to be 2.3 feet less than twelve miles from the spire of the court house in New Castle. The later and more accurate Hodgkins Survey and Report (*infra*) establishes this point at 108 feet more than the true twelve miles.

64. *Resurvey*, 355. *The Proceedings of the Convention of the Delaware State etc. New Jersey v. Delaware*, 291 U. S. 361 @ 370.

controversy was over a small area of land known as "The Wedge".⁶⁵

If one conceives a due North line barely slicing a circle the Wedge lies between that line and the upward curve. Tradition had placed the junction of the three States where the due North line intersected the Mason and Dixon Line. This threw the Wedge into Delaware. The commissioners reported that the point where the curve run out by Mason and Dixon hit the due North line was the real junction of the three States. This point was a little over three and a half miles due South of the traditional junction and hence the Wedge went to Pennsylvania.⁶⁶

Both points were in error. The true junction lay somewhere between the two on the due North line. The traditional junction seems to have no basis other than tradition. On the other hand the commissioners' error probably arose from the fact that the technical expert advising them — a Colonel Graham of the United States Engineer Corps — had relied entirely upon the records of Mason and Dixon and the Commissioners appointed by Penn and Lord Baltimore.⁶⁷

The point is that the old twelve mile circle run out by Taylor and Pierson in 1701 was completely disregarded. Colonel Graham's report speaks of "the circular boundary between Pennsylvania and Delaware *being yet unmarked.*" That ancient line had had no bearing in 1765 for then all lands east and north of the dividing line was Penn land. But with that land in turn divided between Pennsylvania and Delaware the line separating New Castle from Chester and Delaware Counties had become the boundary between the two States. And at its western end that ancient line was lost, the local assumption being that it hit the corner of Maryland.⁶⁸

65. *Pa. Rep.* 329-375. *Resurvey*, 197-199; 367-370. *Hodgkins*, 195-198, 214, 215. *Hayes*, 10-12.

66. *Pa. Rep.* 332, 335, 352-353, 373-374. *Hodgkins*, 195. *Hayes*, 11-12.

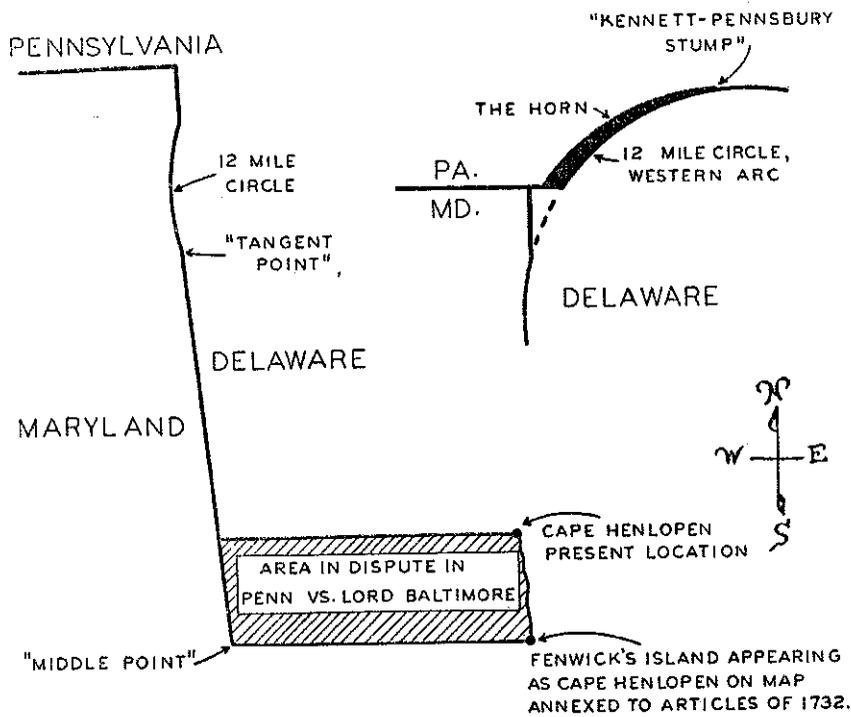
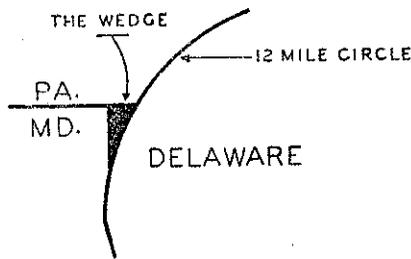
67. *Pa. Rep.* 339-351, 365-369. *Hodgkins*, 198-201. *Hayes*, 10.

68. *Pa. Rep.* 373. *Cope & Futhy*, 161. *Hodgkins*, 196-198.

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MASON AND DIXON SURVEY — FROM MIDDLE POINT NORTH AS INDICATED AND THENCE WEST TO FORM MARYLAND - PENNSYLVANIA LINE, THE SO-CALLED MASON AND DIXON LINE.

Illustrative sketches of the Mason and Dixon Line and the twelve mile circle reflecting in shaded portions the controversies in the settlement of Delaware's bounds of the Wedge and the Horn and likewise the dispute in Penn vs. Lord Baltimore resulting from the uncertain location of Cape Henlopen. These drawings are not accurate in scale being for the purpose of graphic presentation.

No final action was taken by either State upon the Graham Resurvey. Nevertheless its result appeared on the maps. Delaware continued to exercise its jurisdiction over the Wedge, the people resident therein voting and paying taxes in this State and even sending a representative to the Legislature. The area was a species of no man's land and there is tradition of cock and prize fights and fugitives from all three States eluding the minions of the law by taking a sort of benefit of clergy in the small area.⁶⁹

Late in the eighties another joint commission was undertaken to relocate the ancient line of Taylor and Pierson. This resulted in the so-called Hodgkins Survey which was by far the most intricate and difficult of all the surveys. This work commands the admiration of any one who takes the trouble to examine it with care.⁷⁰

The ancient circle had all but disappeared. But three points could be determined with certainty and these lay in the eastern half. For the western half the Commissioners finally decided to accept a point on the Mason and Dixon Line projected east exactly twelve miles distant from the spire of the court house in New Castle. It being impossible to run a circle through the four points, it was decided to construct an eastern and a western arc with a common tangent at their junction at the "Kennett-Pennsbury Stump". This was the most westerly of the three points believed to have been on the old Taylor and Pierson curve. Finally the Commission decided to throw the Wedge into Delaware.⁷¹

Two results of this survey may be noted. The assent of Delaware was delayed for a generation. And the reason was this. So far as can now be ascertained the old Taylor and Pierson curve cut the Mason and Dixon Line projected East about two thousand feet West of where the Western arc of the compound curve cuts it at the point arbitrarily pitched upon by the Commissioners. Thus with that two thousand feet as a

69. *Pa. Rep.* 337-338. *Hodgkins*, 195, 198, 199. *Hayes*, 11.

70. *Hodgkins*, 199, 177-222; 212-213. *Hayes*, 13, 15-16. *Resurvey*, 202-203.

71. *Hodgkins*, 185-187, 200-201, 204, 208. *Hayes*, 14.

base and traveling East along the western arc about eleven miles to the "Kennett-Pennsbury Stump", there is carved off a curving and tapering horn-shaped strip. Those resident therein protested. Believing themselves to be Delawareans they did not want to become Pennsylvanians. Again there was litigation — when taxes came due. It was successful on the ground that the Commission having been empowered to relocate the old line, had run a new one. At length the matter was concluded by a compact between the two States which was ratified by Congress in 1921. In the end Delaware got the Wedge and Pennsylvania, the horn.⁷²

The other result to be noted is this. There is no true twelve mile circle. Nor has there ever been one save on paper or parchment. The Hodgkins Survey showed that Taylor and Pierson overshot it considerably. Today the center of the eastern arc of the compound curve lies in the Delaware River eastwards of New Castle and the center of the western arc lies to the west of that place. Finally the surveyors upon whom Mason and Dixon relied for their radius overshot the mark by one hundred and eight feet. Each of the three arcs lies outside a true twelve mile circle having its center on the spire of the court house in New Castle and but a single point in one of them is at that distance.⁷³

Having commenced at Fenwick's Island and traversed the bounds of Delaware to the point where the twelve mile circle hits the Delaware River near Naaman's we have seen that the last controversy touching those bounds was terminated in 1921. What were the bounds in Delaware River and Bay was at that time still in dispute. And this last controversy was finally settled in June, 1935 by the decree of the Supreme Court of the United States in the case of *New Jersey vs. Delaware*. This was just over two hundred and fifty years after William Penn had received from the hands of the Duke of York's Commissioners, Herman and Moll, the "porringer with

72. *Hayes*, 15-17. 6 Pa. Dist. Rep. 184.

73. *Hodgkins*, 185, map facing 192, 202, 212-215. See sketch facing p. 222.

River water and Soyle", symbolic of the delivery of possession of the River within the twelve mile circle.

On this point the Quaker had no doubt. Writing to Cosen Markham as early as November 29, 1682 relative to exacting fees for the clearance of vessels at New Castle he refers to "Ye River now being mine." And in the following Spring just after the Duke of York had received the grant of March 22, 1682/3 for the bounds covered by the deeds of feoffment, William Penn is already insisting upon his rights in a controversy with the New Jersey proprietors. And so he instructs his commissioners:⁷⁴

Insist upon my Title to ye River, Soyl and Islands thereof according to Grant Whatever be ye Argument, they are bounded Westward by the River Delaware, yn they cannot go beyond low water mark for land. They have ye Liberty of ye River, but not ye Propriety.

In the following century his sons were able to withstand seven different attempts by outsiders to procure from the Crown grants of islands in the Delaware River. To this dispute the States of New Jersey and Delaware fell heirs. The record shows an inconsistency of claims almost from the outset and the two States have thrashed out the issues in three separate proceedings. The first of these goes under the name of the *Pea Patch Case* which was submitted to arbitration and decided in 1849.⁷⁵

The Pea Patch is an island lying approximately in the middle of the River about five miles southeasterly from New Castle. As an island it was a late arrival. One of the witnesses, Kensity Johns Sr., who had been both Chief Justice and Chancellor of Delaware, recollected having seen it in the late Eighteenth Century when "it appeared about the size of a man's hat." During the war of 1812 the United States acquired it from Delaware for the purpose of constructing a fort.

74. *New Jersey vs. Delaware*, 291 U. S. 361; decree 295 U. S. 694. *Pa. Arch.* s. 1, v. 1, 58-61. *Pa. Mag.* v. 6, 466.

75. Master's Report, *New Jersey vs. Delaware*, 55 *Sup. Ct. Rep.*, 934. Record, 676; 30 *Fed. Cas.* 1123 (#18311); Sen. Doc. No. 21 30th Congress, 221-251. Record, 693. *New Jersey vs. Delaware*, *supra*.

One James Humphrey also claimed it by virtue of a deed emanating from New Jersey. Thus the case stood upon a conflict of title and not of bounds.⁷⁶

Both States were represented by counsel to support their respective titles, and thus a century after the members of the English Bar had thrashed out the Penn title as against the Baltimore title before Lord Hardwicke, here Delaware and Jersey lawyers thrashed out the same Penn title as against the New Jersey title derived from the grants to the Duke of York in 1664 and 1674, before John Sergeant Esquire, who had been appointed arbitrator. The Delaware title was upheld but neither State being a party, the decision bound only the United States and the claimant Humphreys.⁷⁷

The next occasion of litigation did raise the question of the bounds between the States. This was caused by contention, *inter alia*, over the right to take the famous Delaware shad. In 1877 New Jersey sought an adjudication of the bounds in the Supreme Court of the United States and again another generation of lawyers dug into the ancient records. This suit, in the language of Mr. Justice Cardozo, "slumbered for many years" and was finally dismissed without prejudice in 1907. Two years previous the States had entered into a Compact which was designed to settle all their differences save the heart of the ancient controversy — the question of title and bounds.⁷⁸

It was difficulties over the oyster fisheries that gave rise to the suit which finally settled these questions. On this occasion the search for evidence extended to the ancient records deposited in the archives in London. The opinion by Mr. Justice Cardozo is a masterly summary of the many particulars of such ancient strife. The net effect of the decision was to carry the bounds of Delaware within the twelve mile circle to the low water mark on the New Jersey side, and in the River and Bay below the circle to establish the boundary to the Atlantic as the middle of the main ship channel, "the

76. Record, 676, pp. 57, 3, 4, 1.

77. Record, 181; 208-226; 673-676. Master's Report, *supra*.

78. Record, 689-719; 53. Master's Report, *supra*. *N. J. v. Del.*, *supra* @ 377.

course furrowed by the vessels of the world". The decision in decisive and unequivocal language sustained the State's and hence Penn's title within the ancient twelve mile circle.⁷⁹

In preparing for the decree a curious question arose. The Hodgkins Survey had established the end of the eastern arc of the compound curve about five-eighths of a mile northerly of a true twelve mile circle centered on the spire of the court house in New Castle. The decree accounts for this discrepancy, adding it at the North and subtracting an equal amount from the southern arc, and so the line is run, reaffirming the point that there is no true twelve mile circle.⁸⁰

The bounds of Delaware may now be described in the following fashion.

Beginning at a point on the shore of Fenwick's Island facing the sea, the line runs due west to the so-called Middle Point of the peninsula. This line connecting these two points was established by the Penn-Baltimore Articles of Agreement of July 4, 1760. Then pursuant to these Articles and under the skilled direction of Mason and Dixon, the boundary turns at slightly more than a right angle and proceeds by a straight line in a northerly direction to the so-called Tangent Point. This Tangent Point was established by local surveyors as being twelve miles from the spire of the court house in New Castle. Actually it is slightly in excess of that distance. From there the line bulges in a slight arc to the left until it contacts a due north line measured from the Tangent Point. From this point of contact the bound then proceeds *due north* to its intersection with the Maryland-Pennsylvania border.

Here ended the work of Mason and Dixon so far as Delaware is concerned. Their work remains to this day, the Graham Resurvey of 1849-50 being concerned merely with re-locating and remarking their line from the Tangent Point

79. *Lunt*, Introductory Note. *New Jersey vs. Delaware*, supra, 385, 378.

80. *Hodgkins*, 212. *Report of the U. S. Coast and Geodetic Survey to the States of New Jersey and Delaware on marking the Boundary Line*, 1934. *New Jersey v. Delaware*, decree, supra.

north to the present junction of the three states. From this latter point, the line now runs due East to a point which is precisely twelve miles from the now familiar spire of the court house in New Castle. Here is the start of the compound curve and thus we come to the modern twelve mile circle.

As run out on the land and across the Delaware River the circle today is composed of four arcs, each at varying distances from New Castle. First, there is the bulge of the circle toward Maryland just south of the Wedge. This was run out by Mason and Dixon and extends for about a mile and a half. Then there is the compound curve composed of a western and an eastern arc run out by the Hodgkins survey. This starts from a point exactly twelve miles from the spire of the Court-house in New Castle. This point is the terminus of the East-West Mason and Dixon line projected east from the corner of Maryland. This compound curve separates New Castle County from Chester and Delaware Counties in Pennsylvania and terminates at the mean low water mark on the New Jersey shore of the Delaware River. Each of these three arcs is slightly in excess of an exact admeasurement of twelve miles from New Castle.

From the northeast corner of Maryland and along the curve to the west shore of the Delaware River, the bound is the result of the Hodgkins survey as adopted by the compact of 1921 between Delaware and Pennsylvania. In the River and Bay the line results from the decree of the Supreme Court of the United States in *New Jersey vs. Delaware* in 1935, and was run out at the request of the two states by the U. S. Coast and Geodetic Survey. Starting at a point in the middle of the main ship channel of the Delaware River which lies in a continuation of the eastern arc of the compound curve the bound runs to the New Jersey shore and then turning downstream, follows the mean low water mark on that shore to the beginning of the arc in the southeastern sector of the circle. This fourth arc which runs westerly to the middle of the main ship channel in the Delaware River is *slightly less than 12 miles* from the Court House in New Castle. From this last point the bound then turns southwesterly and follows the middle of

the main ship channel by its several courses down the river and through the bay to the broad reaches of the Atlantic Ocean.

After two and a half centuries of almost constant contention the bounds of Delaware are at last fixed but on such a record it would be a bold prediction that the end of controversy has been achieved. Nevertheless on this same record it can with certainty be asserted that in form and substance the State of Delaware is the result of the pretentions and possessions of William Penn. But for the Quaker's persistent activity, his deeds, and the Letters Patent from the Crown to the Duke of York, most assuredly a large portion if not all of Kent and Sussex Counties would have become a part of the eastern shore of Maryland. William Penn seized upon an inchoate situation and fashioned it to his imperative need — access to the sea.

I finding this place necessary to my Province and yt ye Presence of ye Lord Balt. was agt Law, Civil & common, I endeavoured to gett it, & have it, & will keep it if I can.



Bibliography

The following tabulation is intended to outline the sources of the primary and secondary material upon the history of the several controversies which have attended the formation of the bounds of the State of Delaware.

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In the preparation for the litigation in *New Jersey vs. Delaware* the manuscript collections lodged in the Delaware State Archives at Dover, the Pennsylvania Historical Society and the Public Record Office, British Museum and other minor archives in England were extensively searched. A considerable number of original documents and papers were reproduced by transcription and photostats and are to be found in the bound volumes of the Record in that litigation, No. 19 Original, October Term, 1929, Supreme Court of the United States. A description of the copies of the manuscript sources procured in England in 1932 and now in the custody of the Delaware State Archives at Dover, is to be found in *Calendar of Papers Procured in England in re New Jersey vs. Delaware (Boundary Suit)*, Dudley C. Lunt, Wilmington, 1935.

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DUDLEY LUNT

The author of *The Bounds of Delaware* is a member of the bar of that state and of Maine from which state he originally came. In 1932 as a representative of the Attorney General of Delaware he went to London in a search for evidence for use in the boundary suit then pending in the Supreme Court of the United States between New Jersey and Delaware. In the course of this most fantastic title search, that of the Penn title to lands in America, he spent several months in an examination of the original grants, documents and manuscripts of record in the Public Record Office, the British Museum and other minor archives in London and elsewhere in England. Here also at first hand were the original records of the colonial administration of Delaware and Pennsylvania. A vast deal of this historical material was reproduced by photostat and otherwise and brought to this country and has been deposited in the Delaware State Archives.

With this and the records in the successive lawsuits which have checkered the course of this ancient boundary controversy down through four centuries as his background, Mr. Lunt has recounted for the general reader the story of the determination of the bounds of the Delaware country and the emergence of the Delaware State.

Mr. Lunt is the author of *The Road To The Law* and the *Calendar of Papers procured in England in re New Jersey vs. Delaware*, and is known for his articles and reviews in various periodicals.

The Bounds of Delaware

is on sale at and may be ordered by mail
from

The Greenwood Book Shop
Wilmington, Delaware.

Illustrated with half tone illustrations.

The Bounds of Delaware

It is certainly the most complete study of the intricate question of the Pennsylvania-Maryland-Delaware boundary line that we have.

Charles M. Andrews,
Farnum Professor of American
History, Emeritus, Yale University.

I found *The Bounds of Delaware* most enlightening. It is and probably will remain, the last word on this very interesting subject.

Honorable John Biggs Jr.,
Senior United States Circuit Judge,
Third Judicial Circuit.

This book gathers together for the general reader for the first time, so far as I am aware, all of the essential information on this subject. It should be of great value to any Delawarean interested in the history of his state.

Charles L. Reese Jr.,
Wilmington, Delaware.

The Bounds of Delaware is a delightful as well as a precise and penetrating venture into our colonial history. With a deftness of touch it makes vivid the quaint political setting of the ancient *Penn-Baltimore* boundary dispute which has survived in our own time in litigation between New Jersey and Delaware. And, in revealing in *charming fashion* the excitement that is to be experienced in delving into the records of former controversy, it sharply points up the persistence and historical acumen which have attended the peaceful settlement of this dispute between two sovereign states.

Charles O. Gregory,
Professor of Law, The University
of Chicago.

I have enjoyed reading *The Bounds of Delaware* and it has stimulated my deficient historical recollections of the settlement of our country . . . The difficulties encountered in determining the bounds of Delaware arose from both ambiguity in the original grants and lack of factual information. All this history impresses one with the perseverance and pertinacity of William Penn and the lack of those qualities in the Duke of York and Lord Baltimore.

Harry M. Verrill,
Portland, Maine.

The reproduction of the portrait of William Penn is from a photograph of the painting in the Historical Society of Pennsylvania.