

# PENN VS. LORD BALTIMORE: A BRIEF FOR THE PENNS

## In Re Mason and Dixon Line

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THE controversy between the Penns and the successive Lords Baltimore over the boundary between Pennsylvania and Delaware, on the one hand, and Maryland on the other, was the most lengthy and embittered border dispute in American colonial history, resulting, after almost a century, in the running of that famous line by Charles Mason and Jeremiah Dixon in 1763-1767. As recently as 1934, the last phase of the legal disputes connected with the subject was finally disposed of by the United States Supreme Court,<sup>1</sup> confirming the former Penn title to Delaware and following the early historic chancery decision of *Penn vs. Lord Baltimore*, reversing the verdict of some able historians.

Now that a definite end has thus been reached to the whole long controversy, what more fitting time than the present is there to review its devious course, with its intensely human as well as historical and legal sides? Even yet the echoes of the bitter conflict have not subsided, as is shown by the intemperate epithets levelled at William Penn, mostly by authors of Maryland histories and textbooks. This founder of a great Commonwealth is charged with falsifications (Browne), dishonesty (McSherry), robbery (Mereness), dissimulation and deceit (M. P. Andrews), and trickery (Gambrill). Is it possible that this is the same man who was called the greatest historic figure of his age (Lord Acton), one of the greatest Englishmen of the seventeenth century (Edward Channing), and one who possessed purity of soul and almost child-like faith in the goodness of his fellowmen when removed from the corrupting influence of England (C. M. Andrews)? As between views so diametrically opposed where does the truth lie?

<sup>1</sup> *New Jersey vs. Delaware*, 291 United States Reports, pp. 361, 367, 370.

Is it not possible by this time to lay aside ultra partisanship in the effort to bring out certain seemingly indisputable facts which heretofore have received too little attention from both sides?

(1) The conclusive character of Lord Chancellor Hardwicke's decree of 1750 in the English High Court of Chancery, in this case of *Penn vs. Lord Baltimore*, after the fullest hearing, and unappealed. Every point raised was decided for the Penns. When the issue thus reached an impartial tribunal, not only was there found to be no imposition by the Penns as charged, but the chicanery was held to be on the other side.

(2) The total uncertainty, as also found by the Chancellor, of the location of latitudes at the date of the Maryland charter and their location on the then existing maps as more southerly than found later. Of the many astronomical observations taken by the Marylanders no two agreed. That elusive "fortieth degree," specified by both charters as the boundary, proved a sort of *ignis fatuus* or mirage, luring them on farther and farther north. Where and when were they to stop? With the inevitable improvement in instruments and methods, was not the future bound to bring more and more accuracy?

If these facts be admitted, as must be the case, was not Penn justified in his continued efforts to bring the whole matter down from the skies to earth—a result to which the descendants of the Proprietors were finally driven in their compromise agreement of 1732, enforced by the Chancellor, viz., by specifying actual landmarks and measurements on the earth, and agreeing to the present line, about midway between their extreme claims. Had the parties agreed to this originally, how many decades of trouble would have been spared!

Before that wise compromise was reached it may be conceded that there was room for argument on each side of this great controversy; but after that solemn compact, deliberately entered into, there could assuredly be no further ground for dispute or for the then Lord Baltimore's attempted repudiation of the agreement. The Chancellor so held, ordering the running of the boundary therein specified. This was the Mason and Dixon Line. In this momentous legal decision lies the main theme of this brief.

## WHY THE LEGAL VIEWPOINT?

The writer admits that he is both a Pennsylvanian and a Quaker, but he is at the same time a lawyer by vocation. It is especially from the legal viewpoint that he feels this great controversy has been inadequately treated. The propriety of this viewpoint is evident from the fact that the altercation finally reached a judicial hearing and decision in this *cause célèbre* of *Penn vs. Lord Baltimore*, before one of the ablest of jurists, Lord Chancellor Hardwicke, and recently approved, as already stated, by the United States Supreme Court as to Penn's title to Delaware.

The Chancellor's decision was wholly in favor of Penn's sons, yet most of the writers practically ignore this decisive adjudication; others, even on the Penn side, fail to accord to it its proper weight. So serious an oversight would assuredly seem to justify this plea from the historico-legal viewpoint—an apparently novel manner of approach to the question.

The form in which the issue reached the Lord Chancellor's court is especially significant. After fifty years of uncertainty and border troubles, Penn's sons and the then Lord Baltimore executed in 1732 with expert advice an elaborate written agreement for the running of the boundary. It was emphatically a *compromise*, each side yielding something in the interest of harmony and certainty, and agreeing upon the present line about half way between their extreme claims, viz., fifteen miles south of the latitude of Philadelphia. When, however, Lord Baltimore, apparently overpersuaded by his colonial adherents, persistently refused to carry out his solemn compact, the Chancellor, in the above decision, decreed the specific performance of the agreement, viz., ordered its due execution, resulting finally in the running of the present boundary.

The point is thus raised, how far the historian is justified in treating as still an open question a dispute that had reached final adjudication before a proper tribunal, and in attempting to reopen the case on its original merits, as has manifestly been the effort of a number of historical writers.

## THE AGREEMENT A COMPROMISE

All the more, in this case, should the decision be upheld and the original merits not be reopened, since the Chancellor by his decree

was enforcing, as above stated, a compromise agreement—the very essence of a compromise being that each side, for the sake of harmony and certainty, has *waived its original extreme rights*—all this providing the losing party was familiar with the surrounding circumstances and was in no way imposed upon in executing the agreement, both of which facts the Chancellor expressly found to be true in the case of Lord Baltimore. The Chancellor held:

The result of all the evidence, taking it in the most favourable light for the defendant, amounts to make the boundaries and rights of the parties doubtful; . . . and is therefore the most proper case for an agreement, which being entered into, the parties *could not resort back to the original rights between them; if so no agreements can stand.*<sup>2</sup>

Much was at stake in this great dispute. Had Lord Baltimore's full claim prevailed, a strip of land about twenty miles wide along the whole southern line of Pennsylvania, including Philadelphia, York, West Chester and Gettysburg, would be a part of Maryland today.<sup>3</sup> If on the other hand the full Penn claim had succeeded, a considerable slice of Maryland would be in Pennsylvania.

#### A REVIEW OF THE FACTS

The story of the Mason and Dixon Line is a fascinating one, leading the student into early voyages and discoveries, royal councils, chancery proceedings, border conflicts, surveys through the wilderness and dealings with the Indians, lasting in all nearly a century. Its chief historical significance (purely an incidental one) as once separating the North from the South, is now fortunately ended. The list of stirring incidents of this our

<sup>2</sup> The italics, as all through this article, are the writer's, to bring out vital points.

<sup>3</sup> "If this strip had been lost to Penn and to Pennsylvania the history of the Civil War and of other great events in the development of the Commonwealth and of the nation might have been vastly different. . . . The boundary disputes were far more important than they appeared when they commenced." G. P. Donehoo, *Pennsylvania, a History*, I (New York, 1926), 206.

borderland would furnish material for many a historical romance akin to those of Scott's famed border.<sup>4</sup>

### THE MARYLAND CHARTER

The grant of the Maryland Charter (1632) included:

*All that part of the Peninsula or Chersonese, lying in parts of America, between the ocean on the east and the Bay of Chesapeake on the west; divided from the residue thereof by a right line drawn from the promontory or headland called Watkins Point, situate upon the bay aforesaid, near the river Wighoo on the west unto the main ocean on the east, and between that boundary on the south unto that part of the Bay of Delaware on the north, which lieth under the fortieth degree of north latitude from the equinoctial, where New England is terminated; and all the tract of that land within the metes underwritten (that is to say), passing from the said bay, called Delaware Bay, in a right line, by the degree aforesaid, unto the true meridian of the first fountain of the River Pattowmack.*

As will at once be noted, the grant, as to the eastern portion, was of part of the "Peninsula," now known as Delmarva. Lord Baltimore's ultimate claim, however, ran clear up, to include Philadelphia, far above the head of that peninsula.

Again, the grant of that charter extended from Watkins Point on the Chesapeake, then shown on the maps as about the thirty-eighth parallel, to "*That part of the Bay of Delaware on the North which lieth under the fortieth degree of North latitude.*" As the Chancery Court later held, the maps then in existence, based mostly upon that of Captain John Smith, of 1608, showed the parallels of latitude as much more southerly than later found.

<sup>4</sup>It should be noted that the controversy and the Chancellor's decision covered not only the Pennsylvania-Maryland boundary but the western and southern lines of Delaware as well, since Penn then also claimed what is now Delaware. The northern circular boundary of Delaware, often supposed to be part of the Mason and Dixon Line, was not located by those surveyors (except about the tangent point) but was run as a mere inter-county boundary, between Chester and New Castle counties, in 1701. For the story of this unique line, apparently the only circular state boundary in the country, see J. Carroll Hayes, "The Delaware Curve," *Pennsylvania Magazine of History and Biography*, XLVII (July, 1923), 238.

According to those maps Maryland would extend to about the latitude of the head of the Delaware Bay near New Castle, a short distance south of the present boundary. Lord Baltimore's own map of 1635 showed the fortieth parallel as crossing just at the head of Chesapeake Bay.

Which was to prevail—the manifest intention of the king and Lord Baltimore at the time, as per these contemporary maps, or the purely imaginary line of the parallel as found many years later, viz., at the northern edge of Philadelphia, over twenty miles farther north? Had there been any idea of locating the boundary so far north, would the Delaware Bay ever have been specified?<sup>5</sup>

#### THE REAL INTENT OR THE STRICT LETTER OF THE CHARTER?

As was said by Dr. E. B. Mathews of Maryland, in the important *Pennsylvania Report on the Resurvey of Mason and Dixon Line, 1909* (also printed as a Maryland Report): "The Penns usually emphasized the supposed intent of the grantor, while the Baltimores leaned on the letter of the patent, as modified by later language."<sup>6</sup> Which was to prevail—the strict letter of the document or the apparent intention at the time? It was said of old that "the letter killeth but the spirit giveth life."

Dr. Charles M. Andrews, eminent authority on American colonial history, says:

In an age of conflicting land grants . . . we can hardly accept a plea based on nothing else than a literal interpretation of the terms of a charter. Were such a plea admitted as final, every colony would be more or less under

<sup>5</sup> Just where does the Delaware River become a bay? This was recently held to be some distance below New Castle, near Ship John Light. See map marking this junction of river and bay, printed in 55 *Supreme Court Reporter*, 909, illustrating the final decree of the Supreme Court in the case of *New Jersey vs. Delaware*, above. As to this, the court says: "Below the twelve mile circle there is a stretch of water about five miles long, not differing in its physical characteristics from the river above; and below this is another stretch of water forty-five miles long, where the river broadens into a bay." 291 *United States Reports*, p. 413.

<sup>6</sup> P. 107. The state report includes an able review of the whole lengthy controversy by Dr. Mathews. He however failed to recognize the importance of its legal aspects, chiefly from the compromise viewpoint. He has listed a great mass of source material, with brief abstracts.

indictment. . . . Had all of Baltimore's claims been allowed the value of Penn's grant would have been destroyed.<sup>7</sup>

In the interpretation of documents, the primary effort of the courts is to discover the real intentions of the parties at the time. Weight is to be given to the spirit of the document as opposed to the letter; and to all the surrounding circumstances, including any interpretation by the parties in the way of usage. As an instance of the latter, Isaac Sharpless writes: "Each party was practically exercising jurisdiction to about the latitude of New Castle, where the Crown evidently intended Penn's possessions to begin."<sup>8</sup> Another instance of this practical interpretation was the running of a line known as the Talbot or Lord Baltimore's Line, about 1683, by Colonel Talbot, a cousin, from the Susquehanna at the mouth of the Octorara Creek to the Delaware River at the mouth of Naaman's Creek. It passed just to the south of the present boundary. The running of this line proved a persuasive factor in inducing occupation by Penn settlers down to that line near Nottingham.

#### THE CLAIM TO DELAWARE

One of the sources of contention was the language of Baltimore's Charter, which, in the preamble, specified the land granted to him as *hactenus inculta* (hitherto unsettled). Unfortunately for him there had been a temporary settlement by the Dutch, the previous year, within the limits of his grant. This was at Swaanendael, near the present Lewes, Delaware.

The Dutch had purchased their lands from the Indians, and also made claim by virtue of Hudson's discoveries, and they later spread along the Delaware shore, consolidating their holdings into a colony. All this was without any effectual opposition from the Marylanders, who were attracted by the more accessible and inviting estuaries bordering the Chesapeake; and the Dutch occupation ripened into long possession—an important factor in all questions of title.

<sup>7</sup> C. M. Andrews, *Colonial Self-Government* (New York, 1905), pp. 173, 247.

<sup>8</sup> *Two Centuries of Pennsylvania History* (Philadelphia, 1900), p. 93.

These claims of the Dutch passed by conquest to the English under the Duke of York in 1664, the latter holding the territory as an "appendix" to his charter grant of the eastern side of the river. The Dutch in the meantime had (in 1655) acquired by conquest the holdings of the Swedes who had also been extending their settlements along the Delaware shore, claimed by Indian purchases.

Thus we have, on the one hand, the Maryland claim by charter, never effectually asserted, to these western shores of the Delaware—a so-called paper title; and on the other hand the Duke of York's claim to the same areas through the Dutch and Swedes, by right of discovery, conquest, prior settlement, long possession and Indian purchase; but with no formal charter or patent from the Crown.

#### PENN'S CHARTER

Now comes William Penn upon the scene. In 1681, in consideration of a debt due his father, Admiral Penn, Charles II agreed to grant the son a charter for the region lying north of Lord Baltimore's province.

In view of the previous troubles arising from vague and indefinite grants in the New World, the agents both of Lord Baltimore and of the Duke of York were notified by the Committee of Trade and Plantations, in order to ascertain how this proposed grant might comport with their claims. The Duke was willing that the grant be made, providing the newcomers be kept at least twenty or thirty miles from his capital, New Castle. Finally this distance was reduced to twelve miles. It is as though the Duke, with a truly princely gesture, were to swing a great arm in a semi-circle about New Castle, proclaiming that the territory for twelve miles on all sides was to remain his and that only thus far southward should the new province extend. Putting this into the language of a charter, Penn's grant was specified as:

Bounded on the East by Delaware River from twelve miles distance northward of New Castle Town, unto the three and fortieth degree of northern latitude . . . to extend westwards five degrees in longitude, . . . and to be bounded on the north by the beginning of the three and fortieth degree of northern latitude, and on the south



by a circle drawn at twelve miles distance from New Castle, northward and westwards unto the beginning of the 40th degree of northern latitude, and then by a straight line westward to the limits of longitude above mentioned.

#### MARYLAND PARTY ACQUIESCES IN PENN'S LIMITS

These charter limits were evidently regarded by all parties at the time as clearing the bounds of Baltimore's province. The Attorney General, to whom, with other high officials, the drawing of the charter was referred, reported he did "not find that such boundaries do intrench upon the Lord Baltimore's province."<sup>9</sup> We are further told that the agents of the Duke and Lord Baltimore attended the Chief Justice 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."<sup>10</sup>

The interesting course of negotiations touching the proposed charter limits is elaborated in *The Breviate*,<sup>11</sup> and in Hazard's authoritative *Annals of Pennsylvania*.<sup>12</sup> The latter closes with this entry: "After this long and vexatious attendance upon the committee of lords of trade and plantations, chief justice, attorney general, and *agents of Lord Baltimore*,<sup>13</sup> his majesty is this day

<sup>9</sup> *The Breviate*, p. 354. This was the legal brief for the Penns, including the very extensive pleadings and testimony in the Chancery case. It is published in *Pennsylvania Archives*, Second Series, XVI (Harrisburg, 1890).

<sup>10</sup> This is quoted by C. M. Andrews, in his *Colonial Self-Government*, p. 169, as from a letter of governmental instructions to the Duke of York's agent in New York, detailing the grant of the new province to the south, printed in *Pennsylvania Magazine of History and Biography*, VII (October, 1883), 480. Both proprietors had expressed, seven months earlier, a willingness to fix the line at a so-called Susquehanna Indian Fort, but they could not agree which fort was meant. For the supposed location of these various forts see article in *Proceedings of Lancaster County Historical Society*, XIV, 81, by D. H. Landis; and for conflicting testimony on this subject see *Pennsylvania Archives*, Second Series, XVI, 522-525, 709-712, 749.

In the proceedings of the Maryland Council (*Maryland Archives*, VIII, 518) is the significant entry, April 11, 1693, that Susquehanna Indians asked to settle at Susquehanna Fort, but "their Fort as they call it falling within the limits of another Government as Pennsylvania, this Government can take no cognizance thereof."

<sup>11</sup> *Pennsylvania Archives*, Second Series, XVI, 348 ff.

<sup>12</sup> *Annals of Pennsylvania*, pp. 483, 485, 486, 487.

<sup>13</sup> Matthew P. Andrews, in his *Founding of Maryland* (New York, 1933), p. 285, admits that Lord Baltimore's agents "bungled" in failing to state his claim clearly and specifically at the grant of Penn's charter.

[February 24, 1681, N.S.] pleased to sign the charter constituting William Penn proprietary of Pennsylvania."

It will be noted, the above language of Penn's charter, in which Lord Baltimore's agents thus acquiesced, *ties up the "fortieth degree" with the northwest end of the twelve mile circle; so that the boundary could not at the very farthest be over twelve miles north of the latitude of New Castle—nowhere near Philadelphia.*

Had the agents of Maryland at that time any idea or desire that their bounds might fall as far north as that city, would they not at once have protested against this language of Penn's Charter, as they were thus given an opportunity to do? Their acquiescence shows their real intent at that time.

#### DELAWARE CEDED TO PENN

When in October 1682 Penn arrived in his new province, he was greatly disappointed that it lay so far from the sea—a most important factor in that day. He accordingly entered into negotiations with the Duke of York for a transfer of his claims to the western shores of Delaware Bay. This was effected soon after by conveyances called feoffments.<sup>14</sup> At New Castle the old quaint feudal transfer by livery of seisin was made to Penn, being a delivery of turf and twig and a porringer of river water and soil.

Penn thus succeeded to the Duke's claim to the "Three Lower Counties," now Delaware, adding them to his other province. The inhabitants, almost entirely of Dutch and Swedish blood, remained under Penn's government, though later with growing restiveness they secured a separate assembly and at times a separate governor. This continued until the Revolution, when in the general zeal for independence Delaware was given the status of a new state.

#### THE PENN TITLE TO DELAWARE AFFIRMED BY THE SUPREME COURT

The question of the Penn title to Delaware is too involved to be treated fully in this brief article, which deals primarily with

<sup>14</sup> These feoffments and also the 1683 patent to the Duke of York (later delivered to Penn), are now on exhibition at the State House at Dover, valued as Delaware's most vital muniments of title.

the Pennsylvania-Maryland boundary. James II intended to grant Penn a formal charter for Delaware, but did not do so because of his flight.<sup>15</sup>

The United States Supreme Court has now put a definitive end to the doubt as to the Delaware title, in the case of *New Jersey vs. Delaware* (1934), confirming absolutely the Penn title, and deciding, in a lengthy opinion by Justice Cardozo, that the grant of the twelve mile circle extended to low-water mark on the New Jersey shore. In the record in that case (over twenty-five volumes) are printed the multitudinous documents and records relating to this abstruse Delaware title. The Supreme Court based its decision largely upon the authority of *Penn vs. Lord Baltimore*.

#### DRAMATIC CONFERENCE OF THE TWO PROPRIETORS

To return now to the Pennsylvania-Maryland boundary, the issue came to a definite head in December 1682 at the conference of the Proprietors at the mansion of Colonel Tailler in Anne Arundel county, full notes of which were taken unknown to Penn, by a hidden Maryland clerk.<sup>16</sup> This lengthy word combat, thus reported supposedly verbatim, was apparently unique in colonial history. Baltimore was attended by his council and Penn by some weighty adherents, and the conference was said to have been conducted with considerable heat. Here were two great heads of provinces bringing into play their keenest intellectual weapons, with the marshalling of arguments, the direct question and reply, and the keen rapier thrusts. They were playing for high stakes, and it ended in a drawn battle.

<sup>15</sup> It was actually engrossed and is now in the Archives of the Historical Society of Pennsylvania. It has been printed in the *Pennsylvania Magazine of History and Biography*, LIV (July, 1930), 241, in an article by B. A. Konkle, "Delaware a Grant Yet Not a Grant." On this question of title see further, in the same volume, p. 226, "Early Relations of Delaware and Pennsylvania," by Judge Richard Rodney; and also his "End of Penn's Claim to Delaware," *Pennsylvania Magazine of History and Biography*, LXI (April, 1937), 193, and C. M. Andrews, *Colonial Period of American History*, III, 295-296 and 323-326. The latter expresses the opinion that the Penn title to both the government and soil of Delaware always remained defective. He recently modified this criticism, however, to apply only to the governmental side, in a stimulating correspondence with the writer.

<sup>16</sup> These are printed in *Maryland Archives*, V (Baltimore, 1887), 382-390.

Upon a consideration of this important debate, and of the later one at New Castle, as also of the written arguments that followed, is it possible to reduce it all to a summary just to both sides? The issue, in the writer's view, resolved itself into an irreconcilable difference of method. Baltimore throughout clung unwaveringly to the strict letter of his fifty-year old charter granting to him an imaginary fortieth degree, while Penn strove to bring the whole matter down to actual landmarks and measurements on the earth.

The former was purely an astronomical problem, soluble only by expert scientists with accurate instruments—something not to be had in the New World at that early date. It meant observations of the stars, necessarily varying with the progressive improvement in instruments and methods. Who in the way of scientists were to make the observations? At what date? As of the date of the earlier charter, fifty years before? Or fifty years in future, when more precise accuracy would be attained? It all seemed up in the air, not only figuratively but literally as well—in the realm of the stars.

Penn's effort, on the other hand, was manifestly to bring the whole problem down to earth—to fix definite land-marks and measurements actually upon the ground. Looking back from our vantage point today, the latter method would assuredly seem the more practical, and it was the one to which their descendants fifty years later were at last forced to come, in their compromise agreement of 1732, resulting in the present boundary.

Pursuant to this practical method, Penn at this conference suggested that Maryland be measured from Watkin's Point (its southern bounds by the charter, then supposed to be about the thirty-eighth parallel) two degrees in width, producing a letter from the king to this effect which specified the measurement of the two degrees "according to ye usual computation of 60 English miles to a degree." This plan Lord Baltimore rejected, claiming the king had been misinformed.<sup>17</sup> Penn also pointed to the ref-

<sup>17</sup> Mr. W. B. Scaife, author of a valuable *History of Delaware* asks: "Was there any injustice in asking Baltimore to use sixty miles to a degree, as of old? His charter was fifty years before." Should he "*profit at the expense of another by the knowledge gained in half a century's advance in science?*" *Pennsylvania Magazine of History and Biography*, IX (July, 1885), 267. This article is one of the best reviews of the long controversy.

erence in the Maryland Charter to a "Peninsula" and to the two bays, Delaware and Chesapeake. He insisted moreover that the parties should abide by the results of "such skill and instruments as gave measures to the times in which Lord Baltimore's patent was granted."

When the two sides seemed to have reached an impasse, Penn made several offers of compromise, one being to purchase from Baltimore sufficient territory for a port at the head of the Chesapeake, almost all traffic being then water-borne.<sup>18</sup> The latter again refused, and the conference came to no practical result, except to add to the sad course of misunderstanding and recrimination that so long dogged the controversy.

#### THAT ELUSIVE FORTIETH DEGREE

Before Penn's arrival, his Deputy Governor Markham and Baltimore had already been conducting fruitless negotiations. The latter charged Markham with intentional delays. Certainly there were many postponements, largely due to illness, but some of these were attributable to Lord Baltimore himself. Markham did travel to New York to procure a "sextile" belonging to a Colonel Morris, the best instrument then known in America. It reached New Castle by sea before Markham was able to arrive, and the Marylanders "with much difficulty and many entreaties" secured it from the Dutch sea-captain and made an observation. This *ex parte* action on their part so greatly outraged Markham, who arrived the next day, that all negotiations were broken off. He wrote:

I never met the like—to dare to touch an instrument that was to be used by the contrary party and so privately that no friend of ours was by. . . . In my opinion they that don't take it for knavery will be mistaken.

Other observations for latitude were made at different points by the Marylanders, no two of which agreed; but all indicated

<sup>18</sup> Penn complained bitterly that Baltimore "hath two hundred miles upon both sides of the bravest bay in the world, while I have but one side of an inferior one."

the fortieth parallel was much farther north than as shown on the early maps. Judged by these one-sided observations, the elusive degree revealed a tendency decidedly ambulatory, or perhaps better described as peripatetic. The third Lord Baltimore, in executing the compromise agreement of 1732, admitted, in the preamble, that these observations "greatly varied and differed from each other."

What better result could be expected, at that early day, in a half-settled region? As indicating the great difficulties of determining latitudes even eighty-two years later, Mason and Dixon in fixing the latitude of the "Star Gazers' Stone,"<sup>19</sup> with much improved instruments and methods, made observations upon thirteen different stars.<sup>20</sup>

All of what has been stated goes to show how ill-founded was the Marylanders' reliance in that early day upon a purely imaginary line, which seemed ever on the move. In a case of so great uncertainty, what more equitable solution than to give weight, as did the Chancellor, to the manifest intention of the parties at the time, viz., to the latitude as appearing on the maps of that day?

#### THE FORTIETH DEGREE TIED DOWN TO THE CIRCLE

As showing how far from that real intention was the later Maryland theory, it is recorded that both parties were totally surprised when the subsequent Maryland observations moved the parallel towards Philadelphia. That city could not possibly be regarded as on the Delaware Bay, as specified in the Maryland charter; nor would it satisfy Penn's charter, by which his southern

<sup>19</sup> This stone, near Embreeville, Pa., was set by Mason and Dixon in their base line, thirty-one miles due west of Philadelphia. From it they measured fifteen miles south, for the agreed latitude of the boundary. See "The Star Gazers' Stone," by Dr. Thomas D. Cope, in *PENNSYLVANIA HISTORY*, VI (October, 1939), 205-220; also address on the same subject, by J. Carroll Hayes in 1929 *Bulletin of the Chester County Historical Society* (1929), p. 71. It was through being a boyhood neighbor of this stone of romantic name that the writer acquired a life-long interest in the whole subject.

<sup>20</sup> As showing this high degree of difficulty even today, the 1893 *Report of the United States Geodetic Survey*, Part II, p. 301, says: "A greater precision is necessary in locating state and national boundaries, while for the purpose of investigating the variations of latitude the greatest degree of precision that may be obtained by the employment of the most refined instrument and methods is required."

boundary was to be a twelve mile circle from New Castle extending "northward and westwards unto the beginning of the 40th degree." How could such a circle reach Philadelphia?

In other words, by this language of the Penn Charter *the boundary was restricted to a maximum northern limit of twelve miles from New Castle*. If, theretofore, the degree was peripatetic and elusive, it was now no longer so; it was *tied down to the Circle; and this with the acquiescence of the Maryland party*.<sup>21</sup>

#### ORDER OF 1685 DIVIDING THE PENINSULA

At length, in 1685, the controversy was referred by the king's Council to the Committee of Trade and Plantations, which after a number of hearings found that Baltimore's grant was only for unsettled territory, whereas the Dutch had settled there prior to his grant and had since spread and developed a separate colony. They accordingly gave their decision, splitting the difference between the Proprietors, and directing, in Solomon-like fashion, that the Peninsula "be divided into two equal parts by a line from the latitude of Cape Hinlopen, to the 40th degree of Northern latitude." This accounts for the present western and southern lines of Delaware; and it should be noted this is the very compromise which the Dutch had proposed to the Marylanders long before.

#### PENN'S FRIENDSHIP WITH JAMES II

The Maryland party made much of the fact that Penn was a friend of the Duke of York, and that the latter had become king (James II) by the time of the Council's decision dividing the Peninsula. They however usually failed to mention that, long after the death of James, this decision was re-affirmed (1709) and ordered to be carried into execution, by Queen Anne, with whom Penn had less influence; also that the compromise agreement of 1732 and the Chancery decision of 1750 in favor of the

<sup>21</sup> Another point of doubt was the use in both charters of the word degree, not parallel. A parallel of latitude is a line; a degree is the space between two parallels, now found to be almost sixty-nine miles wide. Was the boundary to be at the beginning or the end of this fortieth degree space? The expression "beginning" of the degree was twice used in Penn's charter.

Penns both occurred long after the House of Stuart itself had ceased to reign.

Whether Penn's friendly relations with the Duke had much influence upon the Council's decision may be a question.<sup>22</sup> The historian George Bancroft, however, considered there was no undue bias on their part; if there were suspicion of such, he thought the decision would have been reversed at the Revolution of 1688 which dethroned James II.

Moreover, it should be remembered that in all these colonial applications both parties are found playing for the favor of the royal court, and in this case Baltimore had his friends at court also, who were working in his interest. Many such written appeals from both are on record. To this it is replied, Baltimore was a Catholic and so was personally out of favor with the Council. Penn, however, was a member of the Quakers, a sect even less in favor. This period of the early 1680's witnessed the most severe persecutions of the Quakers. Penn himself had been imprisoned several times because of his faith, as also for debt—the latter, as he complained, incurred largely through his colonizing efforts. He was compelled even to mortgage his great province. So deep became his despair that he finally tried to sell the province to the Crown. It was on the very point of success, when "a lunacy" suddenly clouded his mind, and after several years of this condition there came to an end, in 1718, this long career of so many tragic vicissitudes.

#### CHARGES AGAINST PENN

It is not necessary here to defend the character of Penn against the imputations of Macaulay.<sup>23</sup> What influence he had with the

<sup>22</sup> There has been a definite effort by several recent writers to rehabilitate the reputation of James II. His memory, it is charged, was blackened by the "Whig oligarchs" because of the fear of a counter-revolution to restore the Stuarts, as also upon religious grounds. *The Encyclopaedia Britannica* (Fourteenth Ed.) says of him: "In general morality he was not below his age, and in his advocacy of toleration far in advance of it."

<sup>23</sup> See authorities reviewed in Fiske's *Dutch and Quaker Colonies*, II (Boston, 1899), 295, completely refuting the charges. Amends for this mistaken judgment of Macaulay's are made by the latter's great-nephew, George Macaulay Trevelyan, in his *England Under the Stuarts* (New York, 1904). He says: "James had at his side no good counsellor and only one good man, William Penn" (p. 436).



court was zealously used by him in the aid of his oppressed fellow-religionists—a motive that played a large part in the founding of his colony. The name of this great champion of civil and religious liberty and early advocate of a League of Nations and of an Intercolonial Union has stood too well the test of history to be sullied by any such unworthy imputations.<sup>24</sup>

#### SUCCESSIVE GRANTS, A "TRIMMING PROCESS"

In addition to the above considerations was Penn's reminder that Baltimore's province was cut out of Virginia, and was given out of mere grace and not in repayment of a debt, as with Pennsylvania. In the case of these royal grants of territory in the New World, the later ones were often at the expense of earlier and vaguer grants—necessarily so in view of the early ignorance of geography;<sup>25</sup> and if Maryland suffered at the hands of Pennsylvania Virginia had suffered in the same way at the hands of Maryland. Captain W. C. Hodgkins, of the United States Geodetic Survey, calls this a "trimming process" and said Lord Baltimore had little reason to complain of it, on grounds of equity.

#### THE COMPROMISE AGREEMENT OF 1732

Neither Penn or Lord Baltimore lived to see the end of the controversy. Finally in 1732, Penn's sons, John, Thomas and Richard, and the third Lord Baltimore, growing weary of the contest, like many a wise litigant when there are grounds for

<sup>24</sup> In 1905 a school textbook on Maryland history by J. H. Gambrill seriously reflected on the character of Penn in connection with the boundary dispute. In protest a Committee of the Baltimore Yearly Meeting of Friends, headed by John J. Cornell, issued a pamphlet in reply, quoting many historical authorities. As a result the author revised his work, meeting the objections of the Quakers.

<sup>25</sup> "The grants of different monarchs often conveyed a paper title to the same region. . . . The practical result was that possession gave title." W. B. Scaife, *Pennsylvania Magazine of History and Biography*, IX (July, 1885), 241. C. P. Keith cites the theory that treats "grants of the American wilderness, when greatly exceeding the needs or services of the recipients, as mere licenses to occupy with colonists, and as lapsing with non-user." *Chronicles of Pennsylvania* (Philadelphia, 1917), I, 12. Again he says: "The view was not unreasonable that, as astronomers could not come to an exact conclusion, the king could fix what should be taken as the parallel." *Ibid.*, I, 35.

argument upon each side, came, after nearly eleven months' deliberation and discussion, to a compromise agreement, both yielding considerably from their extreme positions. The trouble here was that the Maryland party later tried to repudiate this solemn compact, compelling its legal enforcement by the Court of Chancery.

The preamble to the agreement notes the lengthy disputes between the two parties, and that "the observations made by mathematicians and other skilful persons from time to time, in order to the fixing the place of the fortieth degree . . . *greatly varied and differed from each other*"; wherefore the parties had come to this definite agreement "for the putting a final and friendly end and accommodation to the said disputes and differences."

By this agreement, drawn with great care, with the aid of legal experts on both sides, a line was to be run across the Peninsula westward from Cape Henlopen (not the present Cape of that name but the one farther south bearing that name on some of the earlier maps, notably Visscher's, and on the one attached to the agreement). From the middle point on this line, the boundary was to run in a northerly direction until it should strike at a tangent a circle having a twelve mile radius from New Castle; thence to run due north until it reached the same latitude as fifteen miles south of the most southern part of Philadelphia. This point was to be the northeast corner of Maryland, and the boundary was thence to be run due westward by a parallel of latitude.

By the use of this definite language it will be noted the parties specified actual landmarks and measurements upon the ground (Penn's contention from the first), instead of unstable and imaginary degrees of latitude, which had caused so much trouble and disagreement. It was a most wise decision, and if adopted earlier would have saved a world of controversy and trouble.

#### THE AGREEMENT PROPOSED BY LORD BALTIMORE

Though the Maryland party tried afterwards to repudiate the solemn compact, it was Baltimore himself, as found by the Chancellor, who proposed the agreement. His notes, proved in the case by his own solicitor, John Sharpe, include *inter alia*:

- (1) A circle of twelve miles distance drawn from New Castle.
- (2) The Proprietors of Pa. shall be entitled to fifteen miles south of Philadelphia.
- (3) The Lord Baltimore to quit all pretensions to the three Lower Counties.<sup>26</sup>

These three points, it will be at once noted, cover the very gist and substance of the agreement. That Lord Baltimore should attempt to repudiate it, after having himself proposed it, seems on its face difficult to understand. Even Marylanders have criticized him for the attempt, once he had put his seal to it. Was it a case of another "mere scrap of paper?"

The explanation would appear to be, as intimated by the Chancellor, that he was over-persuaded by his interested adherents in America to repudiate it. Professor Mathews also says:

There seems to have been a half acknowledged desire on the part of the Marylanders that the attempts of the settlement should come to naught. The Penns in subsequent papers go so far as to accuse the commissioners of being interested in large tracts of land lying in the disputed zone and of being ready to re-imburse Lord Baltimore if a penalty should be incurred by any failure to carry out the agreement.<sup>27</sup>

John H. B. Latrobe, former president of the Maryland Historical Society, in an address before the Historical Society of Pennsylvania in 1854, was candid enough to admit:

And now Lord Baltimore did what neither improved his cause nor bettered his reputation. Treating his own deed as a nullity, he asked George II for a confirmatory grant according to his charter of 1632. It was very properly refused, and the parties were referred to the Court of Chancery. . . . If there was anything that could equal the faculty of the Marylanders in making trouble in this long lawsuit, it was the untiring perseverance with which the Penns devoted themselves to the contest and followed their opponents in all their dealings.

<sup>26</sup> *Pennsylvania Archives*, Second Series, XVI, 753-754.

<sup>27</sup> E. B. Mathews, *Report on the Resurvey*, p. 168.

On the other hand, as one among many from Maryland taking the opposite view,<sup>28</sup> W. H. Browne says:

By some unexplained means Penn obtained from Lord Baltimore in 1732 a written agreement by which he yielded all that they demanded, and presented them with two and a half million acres of territory to which they had not even the shadow of a claim.<sup>29</sup>

#### ATTEMPTS TO REACH A SETTLEMENT<sup>30</sup>

To be convinced of the length and gradual character of the negotiations by which the contending parties at last reached a settlement, one should read the testimony covering the subject, printed in the *Breviate*. This shows that these meetings, in London, which included also the solicitors of both sides, ran on from June 1731 till May 1732, and that Baltimore was far from being hurried or harried into a premature or ill-advised settlement. As found by the Chancellor, it was all a matter of the utmost deliberation.

Abraham Taylor, one of the subscribing witnesses to the agreement, testified that after its execution Lord Baltimore remarked he was very glad of the end to the long disputes and that he had received letters from his friends in Maryland advising him that he might have had better terms, but that he was perfectly satisfied with them.<sup>31</sup>

<sup>28</sup> So serious an official publication as the *Maryland Archives*, in the preface to Vol. XXVIII (Baltimore, 1908), ventures this sardonic historical judgment: "A matter so simple as the determining a parallel of latitude gave rise to a prodigious chancery suit where the whole issue was so tangled up with chicanery and its usual adjuncts that no man could foretell the issue!"

<sup>29</sup> *Maryland, the History of a Palatinate* (Boston, 1884), p. 212.

<sup>30</sup> In this brief account one can only hint at the troubles and violence during the many decades of uncertainty as to the boundary. Even armed force was at times needed to collect taxes. In the present York county blood was actually shed in what was called Cresap's War. In 1739, to stay the violence, the Proprietors ran, as ordered, a so-called Temporary Line. East of the Susquehanna, it was fixed at fifteen and one-fourth miles and west of it fourteen and three-fourths miles south of Philadelphia, so as not to recognize the fifteen miles named in the Agreement of 1732.

<sup>31</sup> *Pennsylvania Archives*, Second Edition, XVI, 572.

## THE AGREEMENT A FAIR COMPROMISE

Upon the very face of it, this compromise agreement would seem a fair and equitable one, as fixing the boundary about midway between the extremes of the two claims. The Maryland party, as we have seen, insisted it favored the Penns, and was secured by imposition. It will be observed, however, that the Penns finally secured much less than the three full degrees allowed in their charter, viz., only up to the forty-second parallel, the present northern bounds of Pennsylvania.

As to the alleged imposition, Chancellor Hardwicke held that the evidence was "clearly contrary thereto," that it was Lord Baltimore himself who originally proposed the agreement and produced the map annexed to it, and that there was "a great length of time taken for consideration and reducing it to form." As to the location of the fortieth degree he held that the uncertainty as to this and other topographical features was so great as fully to justify an agreement of compromise such as was executed here.

## THE CHANCERY COURT'S DECISION FOR THE PENNS

The case was begun in 1735 in the English High Court of Chancery,<sup>32</sup> following a suggestion of the Royal Council. The voluminous legal proceedings and taking of elaborate testimony in America and England ran through fifteen years, the decision being rendered in 1750. The final legal arguments occupied five days. Both parties had the ablest of counsel, one of those for the Penns being the later Lord Mansfield, England's great Chief Justice. The Crown was represented by the Attorney General.

The legal "brief" for the Penns (by courtesy so-called), containing this mass of pleadings and testimony, fills, as already stated,

<sup>32</sup> This is the same Court of Chancery which Dickens a century later lampooned in his book, *Bleak House*. He however dealt in caricature and exaggeration, and for his purpose chose an extreme case of alleged injustice as his model. The Chancellor's equitable jurisdiction grew out of the necessity of remedying the deficiencies and rigidity of the old Courts of Common Law, and was a vital step in advance in the history of jurisprudence, both in England and ancient Rome.

*The Encyclopaedia Britannica* (Fourteenth Ed.) in the article on Lord Chancellor Hardwicke, says his decisions helped establish "the great juridical system called Equity, which now not only in England and its colonies but over the whole extent of the United States regulates property and personal rights, more than the ancient Common Law."

an entire volume of the *Pennsylvania Archives*. It manifestly represents a veritable mountain of toil and furnishes material for almost indefinite study. A great number of original documents and copies connected with this important suit, many never published, are in the superb collections of Penn Papers and Cadwalader Papers in the Historical Society of Pennsylvania, and many may be found at the Maryland Historical Society and the Pratt Library, Baltimore.

As to these laborious pleadings Professor Mathews writes:

The papers prepared by the solicitors of the Penns and Lord Baltimore, as represented by the Bill and its answer, show considerable difference in the ability with which the case is handled. *The presentation of the Penns is plausible and in accord with the historical facts as they are now known to us, while that sworn to by Lord Baltimore appears to carry less weight and is less accurate.*

#### THE CHANCELLOR'S FINDINGS

That Chancellor Hardwicke appreciated in the fullest degree the significance of the questions at issue is apparent from the sonorous language with which he opens his Opinion. He refers to its "great importance and the great labour and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman Senate rather than a single judge: and my consolation is, that that if I should err in my judgment, there is a judicature equal in dignity to a Roman senate, that will correct it."

The Penns in their complaint, called a Bill in Equity—admitted to be a mine of information upon the entire controversy—sought a decree for the "specific performance," or compulsory execution, of the terms of the agreement signed by them and Lord Baltimore on May 10, 1732.

The Lord Chancellor held that this relief should be granted unless, among other things, the court lacked jurisdiction; or the rights of the Crown or the people would be infringed, or the time limit in the agreement had expired; or the defendant had been imposed upon or mistaken as to his original rights.

The Chancellor held that he had jurisdiction, since the agreement had been executed in England and both parties to it were before him. He could therefore enter a decree "in personam," which could be enforced by process of contempt and sequestration against the defendant personally, even though the subject of the controversy was in America. After reviewing the testimony the Chancellor said:

The result of all the evidence, taking it in the most favourable light for the defendant, amounts to make the boundaries of these countries and rights of the parties doubtful. Senex who was a good geographer says, that the degrees of latitude cannot be computed with the exactness of two or three miles; and another geographer says, that with the best instruments it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles; which is near the whole extent between the two capes. It is therefore doubtful; and the most proper case for an agreement, which being entered into, the parties *could not resort back to the original rights* between them; *for if so, no agreements can stand*; Whereas an agreement entered into fairly and without surprise, ought to be encouraged by a Court of justice.<sup>33</sup>

#### NO IMPOSITION

But was there any evidence of imposition by the Penns, as repeatedly urged by those favoring Maryland?<sup>34</sup> The Chancellor's answer is a sweeping one:

<sup>33</sup> 1 *Vesey Sr's English Chancery Reports*, 452.

<sup>34</sup> The Marylanders claimed that somehow a false map was imposed upon them; but, as noted by the Chancellor, no proof of imposition was produced at the trial. Dr. Mathews says: "In 1737, Lord Baltimore admitted there was no material difference between the map used in the agreement and that produced by him." He adds: "These facts are of interest in considering the charge subsequently made by the Baltimores that the map inserted in the agreement was false, and intentionally so, to the advantage of the Penns." E. B. Mathews, *Report on the Resurvey*, p. 164.

Dr. Mathews further says that the copy of the Visscher map used as the basis of the Council decision of 1685, contained an autograph note signed "W.P.," and that this copy should be acquired by some such authority as the Historical Society of Pennsylvania as being "*the means of disproving one of the most serious charges made against the Penns during the entire controversy.*" *Ibid.*, p. 165. And see Dr. Mathews' description of this map, and the language of Penn's autograph note. *Ibid.*, p. 219.

*As to any imposition or surprise, the evidence is clearly contrary thereto.* It would be unnecessary to enter into the particulars of that evidence; but it appears, the agreement was originally proposed by defendant himself; he himself produced the map or plan afterward annexed to the articles: he himself reduced the heads of it into writing, and was very well assisted in making it: and farther that there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, viz. the defect of evidence on the part of the defendant, which amounts to stronger negative evidence, than if it was by witnesses; for it was in his own power to have shewn it, if otherwise. . . .

The defendant and his ancestors were conversant in this dispute about fifty years, before this agreement was entered into, and had all opportunities; therefore no ignorance, want of information or mistake, are to be presumed; and in cases of this kind after an agreement, and plain mistake contrary to intent of parties not shewn, it is not necessary for the Court to resort to the original right of the parties; it is sufficient, if doubtful. . . . There is great foundation to say *the computations of latitude at the time of the grant vary much from what they are at present, and that they were set much lower anciently.*

Every point raised was decided in favor of the Penns. Moreover, the Penns were awarded the costs of the case, no doubt a very large sum. The reason given by the Chancellor for the latter award is especially significant, in view of the Maryland party's frequent charges of imposition and chicanery. The tables were turned; when the issue finally reached an impartial tribunal, not only was there found to be no imposition by the Penn side, but the chicanery was on the other side. The Chancellor stated:

*In America 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 viz. whether a diameter of two or of twelve miles; the endeavouring to take advantage of one of plaintiffs' commissioners coming too late, to make the plaintiffs' commission the penalty.<sup>35</sup> . . . The defendant has been misled by his commissioners and agents in America, to make their objections his defence; which brings it nearer to himself;

<sup>35</sup> A penalty of £5000 was provided by the agreement for failure to conform to its directions.



and though he would not at all have thought of it as from himself (so that I impute nothing in the least dishonourable to him), yet I must take it as his own act; and then should not do complete justice, if I did not give plaintiffs the costs of this suit to this time.<sup>36</sup>

At the conclusion of his opinion, the Chancellor decreed that the agreement of 1732 be carried into execution, that commissioners be named within three months who were to run the lines agreed upon, and that their work be completed by April 1752; after which the Proprietors were to execute deeds of release and conveyance where necessary to the settlers.

The victory for the Penns was thus a complete one and was unappealed; and yet, as above stated, the writers on both sides have manifestly failed to realize the full significance of the decision, especially from its compromise viewpoint. The whole of the Opinion should be read, to appreciate its judicial quality. Upon the legal side it has been ever since classed as a leading case; why not upon the historical side as well?

Again, was the case carried to the Chancery Court to determine the center of New Castle and also to decide as between horizontal and superficial measurement of the twelve mile radius. The Penns again won, for the horizontal method, otherwise no two radii would be the same length. Finally in 1760 the Proprietors came to another agreement like the other but expressed in the most meticulous detail. It covers many pages<sup>37</sup> and was said by Latrobe to be unsurpassed for technical accuracy, legal learning and historical interest.

#### FINAL RUNNING OF THE AGREED BOUNDARY

After vain attempts by American surveyors to run the agreed lines, the Proprietors decided to employ the best scientific talent, engaging Charles Mason, assistant astronomer at Greenwich Observatory, and Jeremiah Dixon, a surveyor from Durham. The difficult task required four years, 1764-1767, and even then they were prevented by the Indians from completing the long-disputed boundary. That is another story.

<sup>36</sup> 1 *Vesey Sr's English Chancery Reports*, 455.

<sup>37</sup> *Pennsylvania Archives*, First Series, IV, 2-36.

At last the ghost of controversy was laid.<sup>38</sup> James Veech, in his address thus suggested the human side of the long story:

Kings, lords and commoners, English, Swedes and Dutch, Quakers and Catholics, figure conspicuously in the narrative, with dramatic effect. Upon its disputed margins have been enacted scenes of riot, invasion and even murder; which want only the fanciful pen of a Scott or an Irving to develop their romantic interest. . . . In intricacy and interest if not in importance the subject is inferior to none in American history.

#### SUMMARY

The net result of the long controversy was the adoption of the parallel of the present Pennsylvania-Maryland boundary. By deliberate agreement of both parties this was finally substituted for the uncertain and elusive "fortieth degree" specified by the two charters. The agreement was a compromise, by which both parties waived their original claims. The Chancery Court held them to it.

The agreement substituted actual landmarks and measurements for imaginary latitudes and rendered the marking process definite and tangible. It followed the original intention of the two royal donors and of the two Proprietors, according to the maps of their day showing the parallels as much farther south than now.

It carried out the clear intent of the Penn Charter, which tied down the boundary to the twelve mile circle, with the acquiescence of the Maryland party. It confirmed a boundary already practically accepted for decades by the exercise of jurisdiction by both sides up to about its limits. It was the most equitable compromise in sight, as being nearly midway between the two extreme claims. It substituted a reasonable and practicable boundary for the totally impossible ones of the two charters.

Can such a solution of the almost century-long dispute be called unjust or inequitable? A Court of Equity, the highest in England, upheld it as just and valid. Should it not be accepted as such by the doubting historians?

<sup>38</sup> Though the Royal Council ratified the new line on January 11, 1769, it was apparently not acquiesced in by Maryland until April 8, 1775, when the final proclamation by the Penn government, extending its jurisdiction to the new line, was issued. *Pennsylvania Colonial Records*, X, 240-245; *Maryland Historical Magazine*, II (December, 1907), 305-307, and X (December, 1915), 369.