

## THE END OF THE PENNS' CLAIM TO DELAWARE, 1789-1814

### *Some Forgotten Lawsuits*

THE effort of the heirs of William Penn to establish their rights to the entire area of Delaware—made many years after Delaware had become a sovereign and independent State—is not generally known. No history of the State mentions the devious litigation which this effort produced. The facts surrounding the ejectment suits brought by the heirs of Penn can be gathered only from official records and private papers, and it is the purpose of this paper to trace the underlying features of a claim to more than a million and a quarter acres.

A proper understanding of this claim requires a brief review of the origin of Penn's title to what was formerly called "The Three Lower Counties." This review will necessarily be restricted to the barest essentials, leaving the inquirer to apply to other sources where the details may be more fully set forth. On March 12, 1664, Charles II granted to his brother James, Duke of York, a patent for all the mainland from the river St. Croix to the east side of the Delaware River. It is apparent that these three counties, being on the west side of the Delaware River, were not embraced in this patent. A military expedition from New York subdued the Dutch forces at what is now New Castle and from this time the representatives of the Duke of York exercised jurisdiction over the Delaware Counties although he had then no paper or legal title from the Crown. After Penn had received from Charles II the patent for Pennsylvania, he applied to the Duke of York for the "Three Lower Counties." On August 24, 1682, the Duke of York executed a number of legal instruments to Penn—one set transferring to him the town of New Castle and all that part of the colony within a circle of 12 miles and the other transferring all the property below the twelve mile circle. And still the Duke of York had no legal or paper title. Penn entered into possession almost immediately. On March 22, 1682/3, Charles made a grant to the Duke of York for all the land embraced in the three counties but no subsequent deed or grant was made to Penn. These are substantially all the material facts and documents upon which the Penns held and controlled the Three Lower Counties until 1776.

I do not propose to consider here the interesting but very abstruse and difficult problem of the exact legal nature and character of Penn's title or of the character and nature of the titles derived from him and his heirs. The ablest legal minds of Pennsylvania have divided on the problem of whether Penn's title to that Province was by purely feudal tenure, and his title to Delaware soil is even more difficult.

Carefully avoiding, then, a discussion of the exact legal nature and character of Penn's title, it is obvious that, at the time of the Revolution, a title of some kind existed in certain representatives of the Penn family as to governmental rights, as to unsettled or vacant land, and as to those quit rents which had been reserved upon land taken up and settled. It is equally obvious that the Revolution, the Declaration of Independence, the formation and constitution of the new entity "The Delaware State," and the Treaty of Peace with Great Britain had made great and fundamental changes in sovereignty, government, and all political connections. What changes did these acts have on Penn's title to the ungranted lands?

Pennsylvania had given some consideration to a similar question as applying within its own boundaries and in 1779 had passed what is called the "Divesting Act."<sup>1</sup> By this Act all the manors and other private property which had been already patented were reserved to the Penn family; all quit rents were abolished except those on manor lands; the right, title, and interest to all that other vast expanse of land which the Proprietors held on July 4, 1776, was divested from them and vested in the State of Pennsylvania and £130,000 was appropriated as compensation. The State of Delaware passed no divesting or other material legislation during the Revolution. For a few years after the war no steps seem to have been taken to preserve or enforce any rights or interests that the Penn family had in Delaware.

In 1789 Edmund Physick was the agent for the late Proprietors, and he had been Keeper of the Great Seal and Receiver General of Pennsylvania. In the summer of 1789 Physick was in England, undoubtedly on Proprietary business, and in that year returned with some authority to treat of matters in Delaware. It seems quite clear

<sup>1</sup> James T. Mitchell and Henry Flanders, eds., *The Statutes at Large of Pennsylvania*, X. 33.

that the Penns and Physick desired and expected to bring to their aid the services of Thomas McKean in Pennsylvania and George Read in Delaware. They were successful as to McKean but did not succeed as to Read, and some of the circumstances relative to McKean's connections with the controversy seem to warrant a passing attention. In 1789 McKean was, and had been for many years, Chief Justice of Pennsylvania. That Mr. Physick immediately consulted McKean is apparent from his letter of October 27, 1789, wherein he says:<sup>2</sup>

I had the pleasure of seeing Judge McKean yesterday and had a pretty long conversation with him concerning the Proprietaries affairs in Delaware State. We shall soon have another meeting and I expect to be then acquainted with his sentiments and advice relative to an application to the Assembly of that State.

On October 30, 1789, Physick again wrote:<sup>3</sup>

I have had the satisfaction of a conference with Judge McKean concerning your affairs in the Delaware State and am much pleased to inform you that I have reason to expect we shall be assisted with his advice and abilities. I have not yet had the opportunity of delivering your cousins letter to Mr. Geo Read who, I am informed, is one of the Members of Congress and at New York and I am afraid will be too often absent to be of much use though the intimacy subsisting between Mr. McKean and him and the superior knowledge both these gentlemen have of your rights in the Delaware State make frequent conferences with them very desirable. . . .

McKean acted for the Penns from November, 1789, and in October, 1790, a power of attorney was executed conferring full authority on McKean and Physick. This instrument was somewhat defective in its reference to Delaware<sup>4</sup> and a new one was executed July 7, 1791, under which many subsequent proceedings were taken. After McKean had become openly and actively identified with the Proprietary interest a rumor was circulated that he was receiving £500 a year from the Penns and had ceased to have any regard for the public at large.<sup>5</sup> McKean, then, over his own signature and under date of September 3, 1793, published a long statement which has an appearance of being somewhat disingenuous. He states that his name was placed in the power of attorney without his knowledge, but he does not state that his name had been in the former power

<sup>2</sup> Edmund Physick to William Baker, October 27, 1789, Penn-Physick Papers (HSP).

<sup>3</sup> Physick to John Penn, October 30, 1789, Penn-Physick Papers.

<sup>4</sup> Physick to Penn, January 3, 1791, Penn-Physick Papers.

<sup>5</sup> *New Jersey-Delaware Boundary Case*, Exhibit No. 1174.

of attorney which had proved to be defective or that he had been acting for the Penns for upwards of four years. He said that he had not been paid or promised pay for his services and that he had not *hinted* to anyone that he expected pay. He does not say that he did not (as a fact) expect compensation or pay. He intimates that his action was inspired by the seeming confidence both sides had in him and his desire to amicably settle all matters. We must not assume anything unethical in McKean's conduct. Every activity of his life disputes it. He was an aggressive, forceful personality, and he had received and merited public confidence for many years. Moreover, his actions must be judged by the standards of his own day; yet it may be observed that today it would seem strange for a chief justice of one commonwealth to accept such an appointment and to advise about and foment litigation in another state.

Edmund Physick returned from Europe in the fall of 1789 armed with authority from the Penns. Almost immediately it became known that he was empowered to treat as to Delaware lands and the first application, on November 3, 1789, was from the Trustees of New Castle Common.<sup>6</sup> This Trust involved a tract of land of upwards of 1000 acres<sup>7</sup> which had been set apart as a Common for the inhabitants of New Castle from time immemorial and even before the grant of the Duke of York to Penn.<sup>8</sup> William Penn in 1701 had issued his warrant for a survey of the land, which was returned in 1704. In 1764, to prevent encroachments, the Proprietors incorporated the Trustees of New Castle Common and vested the tract in this new corporation.<sup>9</sup> This charter, however, restricted the use of the tract to that of a "Common" or else it reverted to the Proprietors and, as it was desired to place some of the tract in cultivation, it was deemed necessary to obtain a new deed from the Proprietors. On November 3, 1789, a committee of the Trustees wrote to Physick stating that they had heard of his powers and making application for this desired remedial action. Physick immediately referred the matter to Chief Justice McKean. Now, McKean had lived in New Castle prior to the Revolution, had been a Trustee of New Castle Common and he states it had

<sup>6</sup> George Read, Jr., Kensey Johns, Jacob Booth to Edmund Physick, November 3, 1789, Penn-Physick Papers.

<sup>7</sup> New Castle Warrants, 400, Recorder's Office, New Castle Co., Delaware.

<sup>8</sup> Thomas McKean to Edmund Physick, December 14, 1789, Penn-Physick Papers.

<sup>9</sup> New Castle County Deed Record "L," II. 394.

been on his application that the Charter of 1764 had been granted.<sup>10</sup> He was therefore favorable to the request in 1789, but he was very shrewd and he saw in this application an opportunity to lay the ground work for the claim by the Penns to all the ungranted lands and to the quit rents in Delaware. The Committee making the application from New Castle consisted of George Read, Jr., Kensey Johns, and James Booth. McKean saw in these an opportunity for help and so he added a postscript to his letter to Physick approving the application:

It may be proper that you should know Geo Read Jr is the Atty Gen of the District under Congress [meaning the U. S. District Attorney] and son of George Read, Esq Senator in Congress. Kensey Johns, Esq is a lawyer of reputation and a member of the present Assembly and James Booth Esq is Secretary of State, Clerk of the House of Assembly &c. This overture appears to me to open a door for a conversation respecting the other affairs of the Proprietaries and I think you ought not to neglect so favorable an opportunity but proceed to New Castle as soon as convenient.

Physick went immediately to New Castle<sup>11</sup> and had a most enjoyable and amicable time. He breakfasted with George Read and presented to him the letter from former Governor John Penn requesting Read to act for the Penn interests.<sup>12</sup> Pleading the pressure of other business, Read declined.

On April 5, 1790,<sup>13</sup> and again on July 5<sup>14</sup> Physick bitterly complained of the delay in the preparation of the papers from New Castle. In view of the fact that no direct benefit could accrue to the Proprietors from the deed I can only account for his interest in the matter by the suggestion that Physick saw in the grant of the deed some benefit as to his future negotiations in Delaware.

Eventually, in November, 1790,<sup>15</sup> the papers from New Castle arrived, but Physick retained them for some correction until May 2, 1791,<sup>16</sup> when he forwarded them to England for the signatures of the Proprietaries. The deed was signed very promptly in England on July 7, 1791, received back in America in September, 1791, and immediately forwarded to New Castle where, Physick wrote, "I am

<sup>10</sup> McKean to Physick, December 14, 1789, Penn-Physick Papers.

<sup>11</sup> Physick to the Proprietaries, February 2, 1790, Penn-Physick Papers.

<sup>12</sup> William T. Read, *Life and Correspondence of George Read*, 485; the original manuscript of John Penn's letter is in the possession of the author.

<sup>13</sup> Physick to the Proprietaries, April 5, 1790, Penn-Physick Papers.

<sup>14</sup> Physick to Penn, July 5, 1790, Penn-Physick Papers.

<sup>15</sup> *Idem*, November 29, 1790, Penn-Physick Papers.

<sup>16</sup> Physick to the Proprietaries, May 2, 1791, Penn-Physick Papers.

confident it will be gratefully accepted."<sup>17</sup> On the same day that the Proprietors executed the deed for the New Castle land they also signed the power of attorney, heretofore mentioned, giving Thomas McKean and Edmund Physick plenary powers for the settlement of their rents and lands in Delaware,<sup>18</sup> which marked the beginning of some 20 years of desultory litigation in Delaware.

When the power of attorney arrived in America Chief Justice McKean was riding the circuit on his judicial duties.<sup>19</sup> After his return and on December 22, 1791, McKean and Physick wrote the following letter to the then President of Delaware State, Joshua Clayton:<sup>20</sup>

Philadelphia, December 22d 1791

Sir,

The Honorable John Penn of Stoke Pogis in the County of Bucks Esquire and the Honorable John Penn of Wimpole Street in the Parish of Saint Marie Le Bon in the county of Middlesex Esquire, both in Kingdom of Great Britain, Proprietaries of the Delaware State, have constituted us their Attornies in fact; and, among other things, have fully empowered us to sell & absolutely dispose of the entirety of all their lands, tenements, rents, hereditaments and estate whatsoever, with their rights, members & appurtenances whatsoever, in fee-simple, either together or in parcels, by public sale or auction, or private contract, unto any person or persons, or bodies corporate or politic, who may be willing to become purchasers.

They have also, from the mutual respect, esteem & regard, which hath at all times heretofore subsisted as well between their honorable Ancestors as themselves and the good people of the former Three Lower Counties on Delaware and now Delaware State; (as they are pleased to express themselves) authorised us to remit & release all alienation fines, that were in arrear on the second day of September 1775, and to make composition & agreement respecting the Quit-rents and other rents, issues & profits, and the remaining alienation fines now due to them, or either of them, according to circumstances and our due discretion.

From the tenor of the whole of the powers to us intrusted, we infer, that it would be agreeable to our Constituents, and have no doubt it would be so to the Citizens of the Delaware State, that all the estate, right, title & interest of the Proprietaries should be first offered for sale to the Government.

Under this impression we have deemed it adviseable to make this communication to Your Excellency, previous to any overtures to individuals or others.

<sup>17</sup> Physick to Penn, September 30, 1791, Penn-Physick Papers.

<sup>18</sup> New Castle County Deed Record "I," II. 336; *New Jersey-Delaware Boundary Case*, Exhibit No. 1171.

<sup>19</sup> *Ibid.*, Exhibit No. 1175; Physick to the Proprietaries, June 29, 1792, Penn-Physick Papers.

<sup>20</sup> *New Jersey-Delaware Boundary Case*, Exhibit No. 666; the original manuscript is in the Delaware Archives Department at Dover.

If the Government shall be inclined to treat with us on this business, we shall expect the honor of a notification of it, as soon as circumstances will admit.

We are, Sir, with great regard,  
Your Excellency's most obedient  
and most humble servants

EDMUND PHYSICK  
THOS. MCKEAN

This letter was communicated to the legislature, which soon after adjourned without taking any action whatever upon it.<sup>21</sup>

Both Physick and McKean may be justly charged with lack of frankness. They would have it appear by the foregoing letter that the Proprietaries were most generous in remitting alienation fines prior to 1775 and in making composition of quit-rents. On February 28, 1791, Physick had written to John Penn that practically no quit rents had been paid since 1713 and that alienation fine "however it may have originated seems to be inconsistent with reason and I have heard it often exclaimed against in conversation as repugnant to the principles of justice." Of course alienation fines were relics of feudal days and represented payments to be made to the lord of the manor by the tenant whenever the land was transferred and a new tenant thereby substituted. Physick said it was equal to one year's rent. McKean and Physick subsequently wrote another letter, dated April 23, 1792,<sup>22</sup> which was laid before the Delaware legislature in May but it also was not acted upon. They then published in newspapers<sup>23</sup> the fact that they were prepared to treat with any individuals and make grants for vacant land and receive, compromise and adjust quit rents and alienation fines. They also prepared some 300 hand bills to this effect and spread them all through Delaware. The agents by these means meant to arouse action, for in a letter of June 29, 1792, they wrote:

By this proceeding the people will be fully notified, the attention of the Government aroused and we shall be better acquainted with the quantity of lands yet vacant and also with the public disposition. Interest and a mutual jealousy among the inhabitants will probably bring forward applications for small parcels of land not heretofore taken up tho occupied and concealed.

<sup>21</sup> *New Jersey-Delaware Boundary Case*, Exhibit No. 1175.

<sup>22</sup> *Ibid.*, Exhibit No. 667.

<sup>23</sup> *Ibid.*, Exhibit No. 1175; Physick to the Proprietaries, June 29, 1792, Penn-Physick Papers.

# Notice is hereby given,

THAT the subscribers, being fully authorized by the proprietaries, will grant and convey any lands, now vacant and unappropriated, in the state of Delaware, to any person or persons who shall apply for the same, reserving a preference to actual settlers, or to those who have lands adjoining, if such shall make application within three months from this date

THEY will also give deeds of confirmation to any person or persons, who have heretofore obtained warrants and surveys, or other equitable titles to lands in the said state under the proprietaries, on payment of the money which shall appear to be due.

THEY will moreover enter into a composition or agreement with every individual concerned for quit-rents and alienation fines now in arrear and belonging to the proprietaries, and on such terms, as, they flatter themselves, will be deemed not only conscionable but generous.

THOMAS M'KEAN,  
EDMUND PHYSICK.

Philadelphia, *June* 15th, 1792.

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P H I L A D E L P H I A :

Printed by FRANCIS BAILEY, at *Yorick's-Head*, No. 116, High-street.

BROADSIDE ISSUED BY MCKEAN AND PHYSICK



The agents were entirely correct in judging that interest would be aroused and action taken, but neither the action nor disposition of the people was such as could have been relished by Physick or McKean.

Shortly after the legislature met it received at least twelve petitions signed by upwards of 459 citizens requesting that some action be taken to clear the State of Delaware of "feudal claims & quit rents."<sup>24</sup> A few days later the legislature unanimously adopted three resolutions:<sup>25</sup>

1. That the issuance of any warrant for vacant land except by the State is an usurpation of the Sovereignty of the State.

2. That no surveyor ought to execute any warrant not authorized by the State.

3. That it be recommended to the Citizens to accept no patents or Deeds from the Penns, their agents or attorneys.

A few days later the legislature made it a criminal offense punishable with a fine of \$100 for anyone to accept or receive a deed for vacant land from anyone not acting under authority of the State, and at the same session opened a land office for the State.<sup>26</sup>

In September, 1793,<sup>27</sup> McKean and Physick issued a pamphlet of over thirty pages entitled *A Calm Appeal to the People of the State of Delaware*. In this pamphlet they quoted the letters they had written, the notices given, and the proceedings they had taken. They offered to enter an amicable action in the Supreme Court of the United States, and, on a case stated, submit the title to the ungranted lands to the opinion of the judges or to any five judges of other states or to five arbitrators. They suggested, in order to obtain an impartial adverse trial, bringing their proceedings in the federal court and obtaining their juries from a neighboring circuit or district. The avowed purpose of the *Calm Appeal* was that the citizens of Delaware should elect new and different representatives to the legislature who would "procure a repeal of the injurious Acts."

Some five months after this, the legislature amended the Land Office Act, and as a preamble denied that the Penns had ever had

<sup>24</sup> *New Jersey-Delaware Boundary Case*, Exhibit Nos. 1177, 1178, 1179; original manuscripts are in the Delaware Archives Department.

<sup>25</sup> *Ibid.*, Exhibit No. 1179.

<sup>26</sup> *Delaware Laws*, II. 1077.

<sup>27</sup> *New Jersey-Delaware Boundary Case*, Exhibit No. 1174.

any title to Delaware lands and stated that the right and title to the soil and land of the State had been claimed by the Crown of Great Britain and that by the Treaty of Peace such land had become vested in the State and further recited "that the claims of the late and former pretended Proprietaries of this State to the soil and lands contained within the same are not founded either in Law or Equity."<sup>28</sup> Of this statute some further notice must be taken later.

After 1794, then, it must have been quite apparent that a voluntary payment or settlement of the Proprietary claims could not have been reasonably expected. From that time, then, it is not unreasonable for us to look for some reasons which delayed the impending and the, now certain, litigation. We know that there were no individuals in the whole United States who were more in direct touch with political and constitutional matters than Thomas McKean and his legal advisers. It is inconceivable that they did not know of the case of *Chisolm v. Georgia*.<sup>29</sup> In that case a private citizen of South Carolina had brought suit in a federal court against the State of Georgia and recovered judgment. This judgment was affirmed by the Supreme Court on February 18, 1793.

This opinion fell like a thunderbolt upon the country and it is almost impossible to realize today the feeling it engendered. The excitement was not based upon political grounds nor confined to one political party, for nearly everyone was astounded to think that under this new Constitution and in a federal court a private individual could sue a sovereign State without its consent. The State of Georgia passed an Act inflicting the death penalty on anyone who served a writ in a suit by an individual against a State.<sup>30</sup> The question had been suggested before the adoption of the Constitution and Hamilton, Madison, and Marshall had all agreed that such action could not be had.<sup>31</sup> Two days after the decision an amendment was proposed to the Federal Constitution to negative and to undo the action of the Supreme Court. This amendment was subsequently adopted as the Eleventh Amendment, which Delaware ratified on January 22, 1795.<sup>32</sup>

McKean and his advisers knew that the Amendment would soon

<sup>28</sup> *Delaware Laws*, II. 1174.

<sup>29</sup> 2 Dallas, 419.

<sup>30</sup> David K. Watson, *Constitution of the United States*, II. 1537.

<sup>31</sup> *Ibid.*, II. 1537.

<sup>32</sup> *Delaware Laws*, II. 1199.

pass and would prohibit action by the late Proprietaries against the State of Delaware as such. It seems that there were two good causes for their delay in bringing suit to test the validity of the Penn claims, a delay otherwise difficult to understand.

First: It seems quite clear that there was a defect in the Penn title and that the Proprietaries and their agents and counsel were perfectly aware of the defect. They had in their possession the Deeds of Feoffment, dated August 24, 1682, from the Duke of York to Penn for the twelve mile circle and for the lands below the circle. They knew, however, that at the date of those two deeds the Duke of York had had no legal or paper title to the land. They knew that on March 22, 1683, Charles II had perfected the title of the Duke of York by a patent which therefore had made Penn the equitable owner of the land. McKean and Physick knew that Lord Hardwick had considered the effect of this patent in the Penn-Baltimore litigation<sup>33</sup> and McKean had a note of the document on his brief of title<sup>34</sup> but they could not find the document itself. Physick wrote to John Penn on July 5, 1790:<sup>35</sup> "[we] wish to have an Exemplification of King Charles' Grant to the Duke of York for it is very probable that this Deed may be found necessary."

On August 30, 1790, Physick again wrote:<sup>36</sup>

[I] wish to acquaint you that the present delay of the Delaware State Business is owing to a want of information whether you can furnish from any of the offices in England any Exemplification of a Deed from King Charles 2d to his Brother the Duke of York, whereby or from any other good Evidence it may appear that the Rights the Crown had to the Soil and Quitrents in the Lower Counties had been actually transferred to the Duke, for if any doubts should arise upon this point it would be very mortifying not to be able to confute them immediately.

And on January 3, 1791, Physick wrote:<sup>37</sup>

I have twice requested the favor of yourself and Cousin to Search for King Charles's Grants to his Brother the Duke of York of the Land in the above-mentioned Counties, and to transmit authenticated Copies of them as soon as possible, for Mr. McKean thinks they will certainly be wanted.

Mr. Physick made other references to the paper and his searches for it and June 29, 1792,<sup>38</sup> asked again for it, stating that they con-

<sup>33</sup> 1 *Vesey Reports*, 453.

<sup>34</sup> Physick to Penn, October 1, 1792, Penn-Physick Papers.

<sup>35</sup> *Idem*, July 5, 1790, Penn-Physick Papers.

<sup>36</sup> *Idem*, August 30, 1790, Penn-Physick Papers.

<sup>37</sup> *Idem*, January 3, 1791, Penn-Physick Papers.

<sup>38</sup> Physick to the Proprietaries, June 29, 1792, Penn-Physick Papers.

sidered it "useful but not essential." Physick said it had certainly been "laid before the Assembly of Pennsylvania in 1707." Shortly after this date a record of the charter was found in the Chapel of the Rolls and on September 19, 1794, Physick paid a Mr. Bond for obtaining a copy of the record. Who this Mr. Bond was and the circumstances of the copy of the grant will later appear.

This grant to the Duke of York was the important and key paper, and recognized as such, in the recent boundary case of *New Jersey v. Delaware*. Its importance and validity were vigorously and forcibly attacked by Duane E. Minard, Assistant Attorney General of New Jersey. Its validity was ably supported by Mr. Satterthwaite and Mr. Southerland for the State of Delaware and was sustained by the Master and eventually by the Supreme Court of the United States. That the lack of even a copy of this important paper in the early stages of the litigation caused considerable delay seems reasonably clear.

A second cause of delay was the fact that on February 9, 1795, John Penn, called John Penn of Wimpole Street or of Dover Street, former governor of the Province and one of the two Proprietors, died. He was entitled, under the family settlements, to a one-fourth interest in the Proprietary Estate, which on his death went to his brother, Richard Penn. The financial condition of Richard Penn caused additional delay in the institution of suits.

Thomas McKean, back in 1793, had intimated that litigation must be had in the federal courts. Just how he proposed, as he suggested, to draw the juries from outside the State is slightly beyond my understanding.

On February 5, 1798, Physick wrote:<sup>39</sup>

I have procured an office Copy of a Warr<sup>t</sup>. and Patent issued under authority of Delaware State for Vacant Land for the purpose of trying by Ejectment the superior efficiency of your Title. Mr Ingersoll & Mr Joseph McKean are to assist you in this business.

And so, at length, we see the stage is fully set and in the Circuit Court of the United States, at New Castle, an ejectment suit, being No. 13 June Term 1798,<sup>40</sup> was commenced by the Lessees of John and Richard Penn against Thomas Jackson. This particular case had a short life and on June 17, 1799, is an entry "ordered by the Court

<sup>39</sup> Physick to Penn, February 5, 1798, Penn-Physick Papers.

<sup>40</sup> Records of U. S. District Court at Wilmington.

that no more continuances be entered." A new and identical suit by the same plaintiff against the same defendant was then entered, being No. 2 October Term 1799.

In these and the succeeding suits the former Proprietaries of the Three Lower Counties were represented by a group of Pennsylvania lawyers of a class that has long established the title of "a Philadelphia Lawyer" as a synonym of professional excellence. Jared Ingersoll, Joseph B. McKean, Mr. Tilghman, and Moses Levy all stood in the very front rank of the Philadelphia bar. But in their opponents the Philadelphia lawyers found foemen worthy of their steel. By employment of the State of Delaware the defendants were represented by James A. Bayard, Caesar A. Rodney, Nicholas Van Dyke, and George Read. It was a brilliant array and it is doubtful whether four abler men could have ever been selected at one time from a single bar.

Now, under the federal judiciary Act of 1789 the jurisdiction of the Circuit Court of the United States, in which the suits were brought, was limited to \$500 in amount. On February 13, 1801, John Adams had passed the so-called "Federalist Judiciary Act" under which the famous "Midnight Judges" were appointed by President Adams a few hours before the inauguration of President Jefferson. By Section 11 of this Act the jurisdictional limit of \$500 was not required in any suit involving title to land. Shortly after the passing of this Act, and seemingly prompted by it, three more ejectment suits were brought against Abraham Vansandt, Isaac Allman, and James Pennington, being Nos. 28, 29 and 30 to October Term 1801.<sup>41</sup> These suits drifted along until 1803, when both sides began to gird themselves for the fray.

On November 8, 1803,<sup>42</sup> John R. Coates, who had succeeded Edmund Physick as representative of the Penns, wrote to Physick that he contemplated a trip to England and gave three reasons for the suggested trip. They were: (1) that the important cause in the Delaware State could be brought to a close sooner by procuring certain material papers on record in London (it seems quite probable that he was still referring to the important but missing grant from Charles II to James, Duke of York, of March 22, 1683); (2) that counsel unanimously urged him to set off; and (3) that the documents ought to be on hand by the June term of court.

<sup>41</sup> Records of U. S. District Court at Wilmington.

<sup>42</sup> John R. Coates to Physick, November 8, 1803, Penn-Physick Papers.

In January, 1804,<sup>43</sup> the legislature formally appointed James A. Bayard and Caesar A. Rodney to defend the suits and instructed Peter Caverly, the Auditor of Accounts, to assist in the preparation of the case. There is evidence that Van Dyke and Read also acted. On April 20 counsel informed Caverly that the defense would be two-fold: the weakness of the plaintiffs' title and the strength of the defendant's title and that he could assist only as to the latter. Counsel suggested to Caverly that "events may render it useful to examine the jury panel whether there be any persons on it who are exceptionable and generally to obtain information as to the sentiments and characters of the jurors."

On June 2 Caverly reported quite fully as to the defendants' title, and in order that he may be acquitted of any suspicion of jury tampering it is only fair to add that he reported that he had examined the panel and stated "I know of no persons on it who are exceptionable nor am I particularly acquainted with the sentiments of many of them."

The case of *Penn's lessees v. Pennington* came on for trial at New Castle on June 5, 1804, before Samuel Chase, Associate Justice of the Supreme Court of the United States, sitting as a Circuit Judge and Judge Gunning Bedford of the District Court and a jury was empaneled. The suits had been apparently started pursuant to the Judiciary Act of 1801, in which there was no jurisdictional limitation of \$500 when the litigation affected land. Within a year after Jefferson had become President, and on March 8, 1802, the Act of 1801 was entirely repealed.

Levy opened the case for the Penns and some witnesses were heard, including John R. Coates who testified that he had received certain documents from John Penn at Stoke Poges. It is not clear whether the title of the Penns was completely proved but at some point it appeared that the land in controversy was not worth \$500 and the question arose as to the jurisdiction of the court and the effect of the repealing statute of 1802. Judge Chase granted a nonsuit and I here give his opinion in full, as it is the first time that it has ever seen the light of day.<sup>44</sup>

The question is whether this Court now have a jurisdiction, not whether they have had. The question is very diffit. [different] whether Judicial power ex-

<sup>43</sup> *Delaware Laws*, III. 364.

<sup>44</sup> Manuscript in the possession of Mrs. W. S. Hilles, New Castle, Delaware.

tends to a particular case & whether the jurisdiction of a particular Court embraces the case. Congress has certainly power to vary a jurisdiction created by Statute—tho not by Constitution. The question here is whether there is a statutory jurisdiction. This is to be determined by the consideration whether we are to be governed by Stat. [Statute] in force or repealed. The Act of 1801 is repealed without a saving. This is not an *ex post facto* law—it is retrospective as to rights, I agree, but against no part of the Constitution. I know that in England construction has gone a great way in construction of the words of Statutes. This doctrine I explode. If the words of Statutes are clear, I am bound, tho' the provision be unjust. This I hold to be the duty of an American Judge. [A] Judge has in this Country only to say *Sic lex est scripta*.

Here is a Statute which gave a jurisdiction. It has been repealed. What are we to do. No power remains. The law repealed is dead & is as if it never existed. I have no recourse to the subsequent Statutes tho arguments might be drawn from them. I must decide on the old law—there is no other on which I can decide.

Upon this opinion the Penns were nonsuited, and that particular case was at an end.

It will be remembered that in 1794, when the legislature created the land office, and divested the Proprietaries of their interest, the General Assembly had denied that Penn had ever had any title and asserted that the title to the land of the Three Lower Counties had always been in the king of England. They called the heirs of Penn "the pretended Proprietaries." Much was made of this contention by the State of New Jersey in the recent boundary suit and it was argued for the State of New Jersey that Delaware having denied and renounced Penn's title could not afterwards rely upon it, as of course Delaware was compelled to do in the boundary suit to sustain its claim to the Delaware River. Counsel for Delaware argued that the Act of Assembly was possibly evidence of a legislative reaction to the claim for land but that it could, by no possibility, affect the pre-existing boundaries of the Province or the State, which question of boundaries was the only question then involved in the Supreme Court. Of this opinion was the Supreme Court.

It is of the greatest possible interest to me to see that in the ejectment suits the learned counsel did not place much reliance upon the ground taken by the legislature. It would, indeed, have been remarkable if they had. The contention was one which might have been made by a shifting lay membership of an Assembly but the law suits were defended by as eminent counsel as the country then afforded. They knew that the position taken by the legislature was unsound

in both fact and law. It was an untenable position from which they could easily be driven.

If the ejectment suits had not been determined on the question of jurisdiction by the granting of the nonsuit because the particular land did not have a value of \$500, the counsel for the defendants were prepared to argue thus: That Penn had received, not a grant of private land but a grant of a province, a palatinate, a seigniority on political principles; that there was included in this the right to participate in legislation, the right of escheat, the right to have all the ungranted lands exempt from taxation, the right to govern in America to a far greater extent than that enjoyed by the king in England.

In order to show the attributes of sovereignty the counsel were armed with authorities showing the long and historic struggle with the colonial Assembly relative to exemption of ungranted lands from taxation; the laws whereby, when a person died without known kindred, his property went—not to or for the use of the people—but to the Proprietaries alone: that all lands were holden of Penn alone, which act of subinfeudation could only have existed upon the theory of sovereignty. They might have added that the original Charter of New Castle in 1724, the first Borough Charter of Wilmington in 1739, and the Charter of the Trustees of New Castle Common in 1764, heretofore mentioned, were all granted by the Proprietors alone, and it was an established principle of the Common Law that the grant of corporate powers was always an attribute of sovereignty.

The counsel were prepared to argue that the king had a place in government and could hold land but that the lands held by the king, as such, were held *jure corone* [by right of the Crown] and it would have been argued that the same principle applied to the Proprietary relationship and that such holding of land was *jure proprietarii*.

Counsel would then have argued that the Revolution and the Declaration of Independence (to use their own language) "prostrated equally the Kingly and Proprietary Powers" and that the right of soil and seignory were inseparably commingled and fell together to the same extent as if the conquest had been made by France or any other nation and had not resulted from the Revolution. Of course counsel did not neglect any imperfections of the Penn title but as to this their principal reliance was that Penn's title was, at best, an equitable title and this, they contended, would not support an eject-



ment suit. Reliance was also had on the Statute of Limitations, for it was contended that Delaware had adversely held all ungranted lands since July 4, 1776, and that Penn's heirs had abandoned the lands at that time. The legal possibilities of the case are so interesting that one is tempted to wish that the case had not gone off on the question of jurisdiction but that the abilities of Judge Chase and Judge Bedford had been taxed with the unusual questions which would have been presented.

It is indeed strange what tricks Fate can sometimes play. Here in 1804 James A. Bayard had won an important law suit for his State—one loaded with potentialities. The direct cause of his success was the repeal of the Judiciary Act of 1801 by the Act of 1802. In addition to being a brilliant lawyer, Bayard was an eminent statesman and an uncompromising Federalist. He had been a most influential member of Congress when the 1801 Act was passed and had been a bitter opponent of the repealer in 1802. On the day of its passage, March 3, 1802, Bayard wrote "This day the constitution has numbered 13 years and in my opinion has rec'd. a mortal wound."<sup>45</sup> In 1804 by this "mortal wound" Bayard had just won his case.

Another instance of the whim of Fate may be found in the very date of trial. The trial either began or was ready to begin on June 4, 1804. On that very day in Philadelphia Edmund Physick died.<sup>46</sup> He had long represented the Penns. He had laid the plans for the litigation far back in 1788 in London and had engaged counsel and prepared the cases for trial during all the sixteen intervening years and had been the chief supporter of the Proprietary interest in America until age had stayed his hand. Here his life had ebbed out on the very day the case came on for trial.

The opinion of Judge Chase and the argument and contention of counsel have been made known to me from a packet of "trial notes" kept by James A. Bayard and furnished to me through the courtesy and kindness of his great granddaughter, Mrs. William S. Hilles. In addition to these items the trial notes make another interesting and startling disclosure. I have alluded to the fact that the Grant or Deed from Charles II to James, Duke of York, on March 22, 1682/3,

<sup>45</sup> Elizabeth Donnan, ed., "Papers of James A. Bayard, 1796-1815," *Annual Report of the American Historical Association* (1913), II. 150.

<sup>46</sup> *Mirror of the Times*, June 20, 1804.

was one of the most important links in the chain of Penn's title and to the great attention given to it in every suit in which Penn's title was involved and especially in the recent boundary case before the Supreme Court. In the trial notes is a certified copy of a deposition of Phineas Bond, Consul General of England to Philadelphia. Bond on March 10, 1804, says that there was then before him on five sheets of stamped paper a true and correct copy of the Grant from Charles to the Duke: that he, Bond, had compared the copy with the original record in the Chapel of the Rolls in Chancery Lane in London: that he had signed the copy which was certified by John Kipling, Clerk of the Records in the Chapel of the Rolls, and that he, Bond, on July 22, 1793, had sworn to the copy before Edward Shippen, Senior Justice of the Supreme Court of Pennsylvania. This, then, is undoubtedly the copy which Physick had mentioned back in 1794 as having been received from "a Mr. Bond."

But the trial notes show more. We have seen that John R. Coates had written in 1803 that he was then going to London to obtain material papers. Coates appeared as a witness in the ejectment suit and there testified that "he got the Deed he produced from John Penn from among his papers in England respecting lands in this Country."

Now the only original and material paper that he could have then secured was the Grant from Charles II to the Duke of York. That this was the deed seems reasonably clear. In these trial notes is a paper containing a list of documents produced at the trial (and as being then in a small trunk) and among these is listed "original Patent to the Duke of York March 22, 1683." To me it is quite clear that this original Grant from King Charles to the Duke of York and called in the boundary case, "The Dover Document," was brought to America early in 1804 for use in the ejectment suits. This is of particular interest because the facts surrounding the document have been so seriously questioned. Benjamin David testified in 1847 in the old Pea Patch Island case that Coates had obtained the Patent in London some 10 or 15 years before that date (1832-1837) and that he, David, thought that Coates had said that the Document had been given to him "because it would be interesting to him as an American."

This testimony was introduced in the recent boundary case<sup>47</sup> and its

<sup>47</sup> *New Jersey-Delaware Boundary Case*, Exhibit No. 675.

probability was seriously questioned both as to the date of bringing the paper to America and the reasons for its being brought. The testimony was strongly attacked both before the Master and in the Supreme Court of the United States. When the original Deeds were presented to the State of Delaware in 1909, at the elaborate ceremony then held, the statement, as made by David, was repeated—that the Charter had been given to Mr. Coates “because it would be interesting to him as an American”—but the date assigned was 1811.

I gather from the evidence before me that the Grant was brought to America early in 1804, not merely because it was a matter of interest but for the very specific purpose of supporting the Penn title in the ejectment suits then on trial, as to which title it was a most important link.

After the Pennington case had, on June 5, 1804, resulted in a nonsuit in the Circuit Court of the United States because the case did not involve the jurisdictional sum of \$500, the companion cases were either discontinued or abandoned. Almost immediately, however, three other cases were begun in the Court of Common Pleas in and for New Castle County, where the amount in controversy was not a material factor. These cases were Nos. 28, 29, and 30 to December Term 1804, in the last of which James Pennington was again the defendant. The cases dragged along until December 20, 1805, when, the record states, “the plaintiff being three times solemnly called and making default—non pros at Bar.” While these cases were dragging themselves along and before the actual default had been made, 18 more ejectment suits were filed in the Circuit Court of the United States, being Nos. 3 to 20 to October Term 1805.

Now it is quite apparent that in 1805 some members of the legislature of Delaware did not have entire confidence in the justice of its cause or in the ability or integrity of the federal courts. In 1804 the State of Kentucky had proposed a further Amendment to the Federal Constitution, the effect of which would be to prevent the federal courts having any jurisdiction of any suit where private citizens were involved. On January 18, 1806,<sup>48</sup> a motion was introduced in the Delaware House of Representatives to approve the Amendment and this reason was assigned: “the State of Delaware is deeply inter-

<sup>48</sup> *Journal of the House of Representatives of Delaware*, 1806, p. 36.

ested in the decision of certain claims to land within her territory and this decision can only be expected on true principles by confining the decision of these claims to the Courts within her own jurisdiction."

This resolution seems to imply either a lack of confidence in the federal courts or a thought that the Delaware courts would decide against the Penns and in favor of the State of Delaware without regard to either facts or law. It does not appear what "true principles" were involved which could only be sustained by a Delaware court and by no other. I readily concede the excellence of Delaware courts 130 years ago but I strongly suspect that excellence of character, independence of action, and entire impartiality of decision were not the "true principles" contemplated by the resolution. The resolution was defeated by a vote of 10 to 7 and there is some evidence that it was defeated by a Federalist party vote.

Two of the cases instituted in 1805 are marked discontinued June 18, 1807, "by order of John R. Coates" and the remainder are marked "non Pros at Bar" on June 3, 1808. On July 30, 1808, John R. Coates paid all the costs in 18 ejectment suits. After this, three more suits were instituted in 1811 and discontinued in 1812. The last official record I find concerning the matter is an Act of Assembly passed February 3, 1813,<sup>49</sup> authorizing a payment of \$100 to George Read "for a balance of fees due to him as counsel in suits brought by the pretended Proprietaries against certain Citizens of this State." Here, then, is the end of the litigation. In all there were twenty-nine ejectment suits and I have not found that the real, the substantial questions were ever actually decided and each passing year made future action increasingly impossible.

The lack of cordiality in the relations between England and the United States in the first decade of the 19th century, culminating in the War of 1812, was, of course, a potent factor in the postponement of the litigation herein discussed. After 1807 favorable action by a local jury could hardly have been reasonably anticipated by counsel for an English landlord, the former Proprietaries, unless the cause was one which was clear beyond any peradventure of doubt. That the heirs of Penn had not, in 1814, abandoned all hope of a settlement of the long standing claim is abundantly shown by the papers now in the possession of Hon. Thomas F. Bayard, of Delaware. In 1814

<sup>49</sup> *Delaware Laws*, IV. 664.

the heirs of Penn gave to Lord Gambier (one of the British Plenipotentiaries at the negotiation of the Treaty of Ghent) a full statement of the Penn claim. This was delivered by Lord Gambier to James A. Bayard (formerly the counsel for the State of Delaware, and one of the American Plenipotentiaries) "with a view to some arrangement being made in behalf of the State of Delaware." It is evident from the letter accompanying the statement that Bayard returned the original to Lord Gambier, not considering himself authorized to enter into any arrangement.

From this statement it is apparent that it was estimated that but about 3000 acres remained to the Proprietors and that this land had no value. Almost the entire claim of somewhat over £71,000 consisted in arrearages of quit rents (claim being made for 44 years from 1770), and in the case of the Welsh Tract of some 20,000 acres, claim was made for arrearages of quit rents and interest for 113 years. The claim also included 8 years advance payment for all rents.

As I close I cannot forbear to say a word about the seeming injustice of Delaware's action. Like most questions presented after a lapse of years—after time has erased many of the then burning reasons for action—it is difficult to state just where the truth, the morality, and the justice did lie.

Much can be said for the thought that Penn's title to the land was inextricably bound to his government. His right to govern, his authority in Provincial Council, his right of escheat, his sovereignty as shown by the grant of charters, the freedom of the ungranted and disputed land from taxation are powerful arguments to show that the real, the substantial title to this ungranted land was in the Proprietaries solely by reason of that relation and was in no proper sense held or to be considered as private land.

Penn, himself, had always assumed that his grant was of a vastly superior nature to any lords of manors of England or Scotland—he, himself, called it a seignior and spoke of himself as "Lord of the soil." In February 1699/1700 Penn had in custody two alleged pirates. One was named Evans and the other Captain Kidd's doctor—Robert Bradenham, by name. In Bradenham's possession, or found in the woods where he had placed it, was a considerable sum of money and some other property. This money and property were seized and Penn insisted upon his share of the prize money. On February 12, 1699/1700 Penn wrote to Secretary Vernon:

I confess, I think my Interest in these Cases ought not wholly to be over-

look'd, who as Lord of the Soil erected into a Seignewry, must needs have a Royalty and share in such Seizures, else I am in much meaner Circumstances than many Lords of Mannors upon the Sea Coasts of England, Ireland or Scotland, I think my Grant very much Superiour, and quite of another nature and privilege.

McKean was most caustic in his so-called *Calm Appeal* as to the honor of Delaware in refusing to pay the Proprietaries for the quit rents, alienation fines, and for the land. But McKean was attorney for the claimants. He was a leading citizen and Chief Justice of Pennsylvania when that State passed its Divesting Act. It is true that Pennsylvania had appropriated £130,000 as compensation and that this sum was actually received by the Proprietaries. There is no suggestion, however, that the amount itself was ever approved by the Penn heirs or even in any degree could be considered as a compromise. It was a mere gratuity and had no basis on value received. It has been estimated that the Divesting Act of Pennsylvania deprived the Proprietaries of almost 22 million acres of land. The State of Pennsylvania received in the ten years from 1779 to 1789, alone, some £825,000 from the sale of ungranted lands in that State. Some £16,000 were annually received by the Penns from quit rents, royalties, patronages, and appointments, and these were all abolished. John Penn estimated that the Divesting Act of Pennsylvania had deprived the Penn family of an estate of over a million and a half pounds sterling and only £130,00 pounds were paid.<sup>50</sup>

In Delaware the best of the land had been taken up long before the Revolution. The tracts of ungranted lands were small in area and the land was poor in quality and without great value. Delaware was compact and limited and had none of those great reaches of virgin forest land which later developed into the Commonwealth of Pennsylvania as we see it today. Truly the Divestment Act of Delaware can not be compared to that of Pennsylvania. This comparative statement may lose its force if we consider solely the claims of the Penns themselves, but it has application when we realize that forces behind the claims in their institution and prosecution were all from Pennsylvania—McKean, Physick, Coates, and their counsel.

*Supreme Court of the  
State of Delaware*

RICHARD S. RODNEY

<sup>50</sup> William Robert Shepherd, *History of Proprietary Government in Pennsylvania*; Howard M. Jenkins, "The Family of William Penn," *Pennsylvania Magazine of History and Biography*, XXI. 426.