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Delaware's Destiny Determined By Lewes

by
Randy J. Holland

MARYLAND

PENNSYLVANIA

Three Lower Counties

DELAWARE BAY

Cape May

Cape Cornelius

Cape Hinlopen

LEWES

DELAWARE'S DESTINY
DETERMINED BY LEWES

RANDY J. HOLLAND

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DEDICATION:

My wife, Dr. Ilona E. Holland

Our son, Ethan and his wife, Jennifer

Our granddaughters, Aurora (Rori) and Chloe

My brother, Dr. James C. Holland, II and his wife, Nancy

Our niece, Lily and our nephew, Stephen



DELAWARE'S ORIGINAL COLONIAL CHARTER

The Royal Charter from King Charles II of England to his brother James, Duke of York, dated 1683. Delaware's "Birth Certificate," the Royal Charter delineates the state's boundaries and is the basis for all land grants in the state. The Duke of York later granted these lands (now Delaware) to William Penn as an addition to the Province of Pennsylvania. In the upper left corner of this elaborate document is a portrait of King Charles II. The coats-of-arms of England, France, Scotland, Ireland, and the Rose of the House of York line the top and sides. Except for the portrait, which was hand engraved on copper plates and then printed, all the writing and decoration was done by hand with a quill pen on parchment. Courtesy of the Delaware Public Archives.

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Introduction

The Delaware Heritage Commission is delighted to have an opportunity to make this fascinating account of a crucial chapter in the history of the First State available to all Delawareans. The project had its origin in a conversation I had with Delaware Supreme Court Justice Randy J. Holland at the time of Lewes's 375th Anniversary commemoration in 2006. We spoke of our mutual fascination with the story of the long, drawn-out litigation in the English courts between William Penn and Lord Baltimore that provided the basis for Delaware's "independent" statehood.

In addition to being the senior member of Delaware's Supreme Court, Justice Holland is also one of Delaware's—and America's—most distinguished historians of the law. Over the years, he has done much to preserve and nurture the association between the American and British legal traditions. He is a past president of the American Inns of Court and was elected to be an Honorary Master of the Bench by Lincoln's Inn in London. One of his most interesting works is a book he co-authored with English Judge Eric Stockdale, *Middle Temple Lawyers and The American Revolution* (2006), which tells the story of the small but influential group of Americans who traveled to England in the years before the Revolution to take up the study of law at London's Middle Temple and returned home to play important roles in the establishment of American independence. Among their number were Delawareans John Dickinson and Thomas McKean, both of whom were among the first ten chief execu-

tives of the Delaware State, known as “presidents of Delaware,” before the title “governor” was adopted.

The Delaware Heritage Commission extends our sincere thanks to Justice Holland for undertaking this valuable addition to the body of Delaware historical writing. It is a true gift to the people of Delaware.

*Richard B. Carter, Chair
Delaware Heritage Commission
2013*

PREFACE

In 1631, the Dutch established a settlement at Swanendael (Lewes) along the west side of the Delaware Bay. Although that settlement did not become permanent, its brief existence was dispositive in “determining Delaware’s destiny” by preventing Delaware from being adjudicated to be a part of Maryland.

In 1632, King Charles I granted Cecilius Calvert, the second Lord Baltimore, an expansive territory that extended north from the Potomac River to the fortieth degree and east to the Delaware River. That grant would have included Delaware. However, the preamble in the 1632 Maryland Charter to Lord Baltimore limited the grant to land that was “hitherto uncultivated.” This term was known as the *hactenus inculta* clause. The clause was understood to exclude from the 1632 Maryland Charter any territory that had been previously inhabited and cultivated by Europeans, rather than by Indians.

In 1682, Delaware was deeded to William Penn by the Duke of York. In a 1685 trial in England, in a legal contest with Lord Baltimore, William Penn presented convincing evidence that the land at Swanendael (Lewes) had been inhabited and cultivated by the Dutch in 1631, one year before the 1632 charter for Maryland. Based upon Penn’s evidence, the English Privy Council ruled that the land along the Delaware River and Bay (Delaware) was excluded from King Charles I’s 1632 grant to Lord Baltimore.

In 1685, after its ruling, the Privy Council established Delaware's boundaries in accordance with the 1682 conveyances to William Penn by the Duke of York. William Penn and his heirs owned Delaware until the Revolutionary War. When Delaware was admitted to statehood under the United States Constitution, its boundaries were the same territory that the Duke of York deeded William Penn in 1682, with the borders that were established by the Privy Council in 1685.

Delaware now exists as a separate State with its present boundaries because of William Penn's prior ownership. Penn's ownership was completely dependent upon his ability to prove that Lewes was settled by the Dutch in 1631. That is why Delaware was excluded from the 1632 Maryland Charter.

This book is that story.

ACKNOWLEDGMENTS

I would like to acknowledge and thank the Delaware Heritage Commission for publishing this book; Richard Carter, a renowned Delaware historian and author, who inspired the writing of this book and for his masterful work in preparing the manuscript for printing and his insightful selection and arrangement of the illustrations; Richard K. Herrmann, a distinguished Delaware attorney, for his creativity and technological skill in designing the dust cover; Mary Katherine (Kris) Pritchett, for her word processing expertise; Eric J. Juray, Carolyn Aiken, Nathan E. Barnett and Selena E. Molina for proofreading the manuscript; and for the illustrations provided by the Delaware Historical Society, the University of Delaware, the Delaware Public Archives, the Lewes Historical Society, the Enoch Pratt Free Library of Baltimore and the Library of Congress.

*Randy J. Holland
Rehoboth Beach, Delaware
2013*

EARLY LEWES DUTCH EXPLORATIONS

Many historians have studied and tried to identify the various Indian tribes that lived on the Delaware Peninsula. The original inhabitants of what is now Lewes have been characterized as prehistoric Indians. Archaeological evidence reflects they lived there long before the arrival of any European settlers.

The first European explorers found several different Indian communities living on the Delmarva Peninsula. It is estimated that between thirty and forty separate Indian groups lived on both sides of the Delaware Bay and River. They were often named for the streams near where they lived, for example: the Narraticons, Ockanickon, Manter Sewapoo, and Siconese.

The tribal affiliation of the Indians in the Lewes area was an independent band of Lenape. The term Lenape, or “common people,” was the name used to collectively describe the autonomous groups of Indians living along the Delaware River and Bay. The Lenape were later referred to as Delaware Indians. They all spoke a dialect of the Algonkian language. The Lewes area was occupied by Siconese Indians, a Lenape tribe.

The earliest identification of these group designations appears on a 1629 Dutch map in the Library of Congress entitled *Caerte vande Sydyt River in Niew Nederland* (Map of the South [Delaware] River in New Netherland). The map reflects

Indian settlements on both sides of the Delaware [Godyns] Bay. Written on the map is a statement that “the nations on the South River [Delaware River] are Great Sironese [Siconese] on the Hoerenkil.” This refers to the Indians living in the Lewes area. The tribal groups on the New Jersey shore were called “Kleyne [small] Sironese.” The use of the Dutch word “kleyne” implies that the tribes on the Delaware shore were either larger or more important. The same map depicts an Indian village on the eastern shore of Virginia that is named Chiconessex, which may be a variation of the word Siconese.

Henry Hudson was an English seaman who had been hired by the Dutch East India Company to find a route to China. Hudson made his third voyage to the New World in 1609. During that third voyage, Hudson changed his route and sailed into the Delaware Bay. When news of Hudson's discovery reached Holland, several private Dutch groups began to focus on the commercial opportunities presented by the prospect of developing New Netherland. That term was used to describe the vast coastal area from Cape Cod to the Delaware Bay.

In 1614, the New Netherland Company was formed and given exclusive trading rights by the States-General. That Dutch merchant coalition hired several explorers to examine the areas discovered by Hudson. In 1614, one of them, Cornelius Jacobren Mey (May) sailed into the Delaware Bay. He anchored his ship between two capes – Cape May, New Jersey (named for him) and Cape Cornelius (later known as Cape Henlopen). In 1618, the New Netherland Company lost its exclusive trading rights when the States-General agreed to consider all petitions.

In 1621, the Dutch West India Company was formed and modeled after the Dutch East India Company. That same year, the States-General passed a resolution giving the Dutch West India Company the right to trade in the Delaware Bay and River. The resolution provided:

that the aforesaid petitioners, for the purpose aforesaid [i.e., trading] mayt accordingly send to the



A 1629 Dutch map in the Library of Congress entitled "Caerte vande Svydt River in Nieu Nederland" (Map of the South [Delaware] River in New Netherland).

above mentioned countries, coasts, and rivers, by them discovered, lying between Virginia and New France, in the latitude of forty to forty-five degrees, called New Netherland, also to the adjoining countries and a great river lying between latitude thirty-eight and forty degrees, two ships laden with all sorts of permitted merchandise; the one to the aforesaid New Netherland and the other to the aforesaid New River, lying in latitude between eight and thirty and forty degrees, and to the small rivers thereon depending, to trade away and dispose of their old stock which they have there, and afterwards to bring into this country, their goods, cargoes, clerks and seamen, on condition that they must be home with their ships and goods before the first of July, 1622.¹

The “New River” referred to (also called in the resolution “a Great River”) was the Delaware River, which the Dutch would later call the “South River.” Over the next several years, Dutch traders carried on profitable exchanges with Indians on the Delaware and Hudson Rivers.

DUTCH PURCHASE LEWES LAND

On March 28, 1628, the Dutch West India Company issued a directive known as the “Charter of Freedoms and Exemptions,” which provided for patroonships or grants to establish colonies in New Netherland. Samuel Godyn was the leader of the patrons who planned the first settlement in New Netherland. Peter Minuit had told Godyn that there were many whales in the Delaware Bay. Whale oil was used in Holland for fuel lamps and as a lubricant. Godyn’s interest in the Delaware Bay area, as a source for whale oil, led to thoughts of establishing a colony there.

The “Charter of Freedoms and Exemptions” provided that those who were interested in colonizing New Netherland could send “three or four persons to inspect the situation of the country.”² On January 13, 1629, Godyn and his patron colleagues advised the Dutch West India Company that they were sending two men to the Delaware Bay area “with the intention, in case they made a favorable report to their honors, of planting a colony there.”³ The two men were Gillis Houset (Hossitt) and Jacob Jansz Kuyper.

In June 1629, Hossitt purchased land from the Algonkian-speaking “Ciconccins,” who were Indians living in the area that is now Lewes, Delaware. The land was purchased for the founding of the Swanendael (Valley of the Swans) Colony. This is the first known Indian sale of land in what is now the State

of Delaware. The “greatness” of the Delaware Siconese, as indicated on the 1629 Dutch map of the area, is also reflected in another 1629 documentary account of the event. When the Dutch purchased land from the Indians for their colony of Swanendael – to be located on the west side of the Delaware Bay – a full council of “Ciconicins” were gathered along with “ye generation both young and old Inhabitants, out of their Villages compassed within ye Zouth corner of ye Baay of the Zouth river.”⁴

The contract of sale between Hossitt and the Indians refers to a map that is now missing. However, a contemporaneous map was prepared by Hendrick Geriatsen, who had seen the missing map. Geriatsen’s map shows the location of Indian tribes on the shores of Delaware and New Jersey. It identifies the land acquired from the Indians and reflects that the Dutch intended to establish settlements in what is now most of Delaware.

On June 19, 1629, while Hossitt was purchasing land for the Swanendael Colony from the Indians, Godyn was in Holland announcing “that he intended to plant a colony in New Netherland, . . . he agrees to occupy in the capacity of patron the bay of the South River [Delaware River].”⁵ About this same time, other patrons announced plans for other settlements. Four patrons entered into an agreement on October 1, 1630.

Those four patrons were Godyn, Samuel Blommaert, Kiliaen Van Rensselaer, and Coenraets Burgh. Blommaert was to locate his colony on the Connecticut River and Van Rensselaer on the Hudson River. Godyn and Burgh would locate on the South [Delaware] River. Godyn admitted other partners to his enterprise, including an accomplished seaman, Captain David Pietersen de Vries.

1631 LEWES SETTLEMENT SWANENDAEI

Godyn and his patron partners hired Captain Peter Heyes to master their ship, the Walvis (Whale). Gillis Hossitt had returned from New Netherland in 1630 and was engaged to be the agent in charge of the colony. According to accounts by de Vries, the primary purpose in establishing the Swanendael Colony was “to carry on the whale fishery in that region, and to plant a colony for the cultivation of all sorts of grain, for which the country is very well suited, and of tobacco.”⁶

On December 12, 1630, the Walvis set sail from Holland with eighty persons on board. It carried a cargo of horses, cows, bricks, tiles, lime, and other necessities. The Walvis arrived at Godyn’s Bay (Delaware Bay) in the spring of 1631. They landed on Blommaert’s Kill, a stream named by Hossitt during his earlier voyage. That stream was subsequently called Hoerenkil, Hoornkill, Whorekill, and eventually Lewes Creek.

The Swanendael settlers constructed housing and fortifications. The main residential building was a community house that was surrounded by “palisadoes” or posts. The posts were placed in the ground several feet apart and connected by horizontal planks. The community house was made of Dutch bezand Ijsselbrick (yellow brick) that had been brought over



"Landing of the DeVries Colony at Swaanendael, Lewes, Delaware 1631" by Delaware artist Stanley M. Arthurs. Courtesy of the permanent collection of the University of Delaware.

on the Walvis. The Swanendael settlers also cleared land for planting and prepared for the whaling season. That inhabitation and cultivation later became the dispositive evidence in the legal boundary dispute between William Penn and Lord Baltimore.

In September 1631, Captain Heyes and the Walvis departed for Amsterdam. Hossitt was left in charge of the Swanendael settlement. When Heyes arrived in Amsterdam, his report to the patrons was a disappointment because he had arrived after the December to March whaling season was over. As a result, Heyes only returned with a sample of oil from a dead whale that had been found on the beach. Nevertheless, Godyn urged his

investors to focus on the potential for long-term profits and to accept their short-term loss from this initial venture.

Godyn and his patron partners decided to send another ship and a small yacht to Swanendael in time for the whaling season. Those vessels would also carry additional settlers and supplies. The second expedition was to be lead by Captain de Vries. Hendrick de Forest was to go and relieve Hossitt as the agent in charge of Swanendael, because the "Charter of Freedoms and Exemptions" required that colonial agents be replaced every two years.

Captain de Vries was ready to set sail early in 1631. However, his departure was delayed when news was received in Holland that Swanendael had been destroyed by Indians. Captain de Vries finally left with fifty men on May 24, 1632 in the *Walvis* and was joined by the yacht *Teencoorntgen* (Little Squirrel). They reached the Delaware Bay on December 5, 1632, and went to the destroyed Swanendael settlement on December 8, 1632. The account of their arrival and what they learned about the events was written down by Captain de Vries in his journal, as follows:

The 5th the wind southwest, we weighed anchor, and sailed into the South Bay, and in the afternoon lay, with our yacht, in four fathoms water, and saw immediately a whale near the ship. Thought this would be royal work – the whales so numerous – and the land so fine for cultivation.

The 6th we went with the boat into the river, [the *Hoerenkill*], well armed, in order to see if we could speak with any Indians, but coming by our house, [the Swanendael settlement], which was destroyed, found it well beset with palisades in place of breastworks, but it was almost burnt up. Found lying here and there the skulls and bones of our people whom they had killed, and the heads of the horses and cows which they had brought with them, but perceived no

Indians and, without having accomplished anything, returned on board, and let the gunner fire a shot in order to see if we could find any trace of them the next day.

The 7th in the morning, we thought we saw some smoke near our destroyed house; we landed opposite the house, on the other side of the river, where there is a beach with some dunes. Coming to the beach, looked across the river towards the house where we had been the day before, and where we thought in the morning we had seen signs of smoke, but saw nothing. I had a cousin of mine with me from Rotterdam, named Heyndrick de Liefde, and as a flock of gulls was flying over our heads, I told him to shoot at it, as he had a fowling piece with him and he shot one on the wing and brought it down. With it came a shout from two or three Indians, who were lying in the brush on the other side of the river by the destroyed house. We called to them to come over to us. They answered that we must come into the river with our boat. We promised to do so in the morning, as the water was then low, and that we would then talk with them, and we went back to the ship. Going aboard, we resolved to sail in the river with the yacht, as otherwise in an open boat we might be in danger of their arrows.

The 8th of December, we sailed into the river before our destroyed house, well on our guard. The Indians came to the edge of the shore, near the yacht, but dared not come in. At length one ventured to come aboard the yacht, whom we presented with a cloth dress, and told him we desired to make peace. Then immediately more came running aboard, expecting to obtain a dress also, whom we presented with some trinkets, and told the one to whom we had given the cloth garment, that we had given it



DAVID PIETERSEN DE VRIES, 1593 – 1655

Portrait of de Vries by Claude W. Shreyler after two copper engravings of de Vries by Cornel Visscher made in 1653 and 1665. The painting is now on display in Legislative Hall, Dover, Delaware (Courtesy of the Delaware Division of Historical and Cultural Affairs).

to him because he had the most confidence in us – that he was the first one who came in the yacht, and should they come the next day with their chief called Sakimas, we would then make a firm peace, which they call rancontyn marenit. An Indian remained on board of the yacht at night, whom we asked why they had slain our people, and how it happened. He then showed us the place where our people had set up a column, to which was fastened a piece of tin,

whereon the arms of Holland were painted. One of their chiefs took this off for the purpose of making tobacco pipes, not knowing that he was doing amiss. Those in command at the house made such an ado about it, that the Indians, not knowing how it was, went away and slew the chief who had done it, and brought a token of the dead to the house to those in command, who told them that they wished they had not done it, that they should have brought him to them, as they wished to have forbidden him to do the like again. They then went away, and the friends of the murdered chief incited their friends – as they are a people like the Italians, who are very revengeful – to set about the work of vengeance. Observing our people out of the house, each one at his work, that there was not more than one inside, who was lying sick, and a large mastiff, who was chained – had he been loose they would not have dared to approach the house – and the man who had command, standing near the house, three of the bravest Indians, who were to do the deed, bringing a lot of beaver-skins with them to exchange, asked to enter the house. The man in charge went in with them to make the barter; which being done, he went down from the loft where the stores lay, and in descending the stairs, one of the Indians seized an axe and cleft the head of our agent who was in charge so that he fell down dead. They also relieved the sick man of life; and shot into the dog, who was chained fast, and whom they most feared, twenty-five arrows before they could dispatch him. They then proceeded towards the rest of the men, who were at their work, and going among them with pretensions of friendship, struck them down. Thus was our young colony destroyed, causing us serious loss.⁷

Today, a statue of de Vries is on top of the Swanendael Museum in Lewes.

An additional contemporary account was written by Van Rensselaer in a memorial presented to the Assembly of Nineteen of the Dutch West India Company on November 25, 1633, in which he stated: "With this aforesaid ship de Walvis, they [the Patroons] also in 1631 took possession of the bay of the South River in New Netherland, occupying the place of their colony with 28 persons engaged in whaling and farming, and made suitable fortifications, so that in July of the same year their cows calved and their lands were seeded and covered with a fine crop, until finally by error of their commis [Hossitt] all the people and the animals were lamentably killed."⁸

In March 1684 or 1685, the deposition testimony of Aron Dirkson Horn was taken as follows: "this depont. heard and was informed by persons then arriving here [New York] from Dellowarre River, that the sd. River was settled by the Dutch West India Company, who had sent a parcel of men there in order to whale fishing; and this deponant saith further that some short time after, to his best remembrance it was about one year, or one yeare and a halfe after, news came here at New Yorke from Dellowarre; that all the sd people in Dellowarre where cut off by the Indians."⁹

Captain de Vries and his men buried the bones of the dead Swanendael settlers. They remained in the area for a short time and then sailed up the Delaware River to Fort Nassau, arriving on January 5, 1633. They did not take any retaliatory action against the Indians who killed the Swanendael colonists. Godyn and his partners decided not to make any more attempts to colonize Swanendael. Even though there was no other settlement following the destruction of Swanendael, Dutch traders continued to visit the Delaware Bay area and established trading posts.

1632 MARYLAND CHARTER

George Calvert was a member of the Virginia Company that sponsored the settlement of Jamestown, Virginia in 1607. In 1621, Calvert sent Captain Edward Wynne to establish a new settlement in Newfoundland. Two years later, Calvert received a charter for that area which was called Avalon. In 1625, Calvert became a Roman Catholic, and was given peerage in Ireland—thereafter, he was known as Lord Baltimore.

Lord Baltimore travelled to Avalon in 1627. He later returned to Avalon with his family. Because the weather was harsh, Lord Baltimore and many other settlers returned to London. When Lord Baltimore returned to England, he filed a petition with King Charles I for territory in the area between the Chesapeake and Delaware Bays.

While the petition was pending, Lord Baltimore and his family sailed to Jamestown. However, since the Calverts were Roman Catholic, they were not allowed to settle in Jamestown. Therefore, Lord Baltimore returned to London and requested action on his petition for land on the Chesapeake Bay.

On April 15, 1632, King Charles I finally approved Lord Baltimore's petition for territory in the Chesapeake Bay area.

Unfortunately, Lord Baltimore died on that very same day. Therefore, the charter was given to Lord Baltimore's son, Cecil. The royal seal was affixed to the charter on June 20, 1632. The new colony was named Maryland in honor of King Charles I's wife, Henrietta Maria.

The 1632 grant began with a preamble. It stated that Lord Baltimore had asked the King to give him all of the territory between the Chesapeake and Delaware Bays. The preamble noted that Lord Baltimore intended to extend the Christian religion, as well as the English empire, "to certain parts of America, hitherto savage, and inhabited by people having no knowledge of the Divine Being."

The boundaries for the 1632 Maryland Charter were as follows: North, the land which "lieth" under the fortieth degree; East, the Delaware Bay and the Atlantic Ocean; South, the south bank of the "Potomack" and by a parallel through Watkins Point; West, a meridian through the source of the Potomac. The Charter provided for payment from Lord Baltimore to King Charles I consisting of "yielding therefore unto us, our heirs and successors, two Indian arrows of those parts, to be delivered to said Castle of Windsor, every year, on Tuesday in Easter-week; and also the fifth part of all Gold and Silver or, which shall happen from time to time, to be found within the aforesaid limits."

That charter also gave Lord Baltimore the right to collect taxes, make land grants, and establish churches. Since there was no restriction to the contrary, Lord Baltimore allowed Catholic churches to be established in Maryland. Most important, for the purposes of William Penn's later claims to Delaware, the 1632 Maryland Charter excluded any land that had been previously cultivated and inhabited by people who were not Indians – the *hactenus inculta* clause.

Lord Baltimore sent two ships of settlers to Maryland. On March 25, 1634, those ships arrived on St. Clements Island at the mouth of the Potomac River. St. Mary's settlement was established by them on the north shore of that river. Thereafter,



GEORGE CALVERT, 1ST LORD BALTIMORE (CA-. 1580-1632)

Portrait by Daniel Mytens, 1590-1648. Courtesy of the Enoch Pratt Free Library, Baltimore, MD, where the original hangs in the main hall of the central library.

Lord Baltimore focused his attention on this area of the territory in the 1632 charter.

Lord Baltimore's concentration on that area had two unintended consequences. First, he did not ascertain the exact location of his northern boundary at the fortieth degree. Second, he permitted the Dutch to continue with settlements along the Delaware River and Bay. The latter activity accrued to the benefit of William Penn when that area was later conquered by the Duke of York.

EARLY SWEDISH DELAWARE SETTLERS

On December 12, 1634, the charter of the Swedish West India Company was confirmed by the Deputies at Frankfort. The first Swedish settlers arrived in Delaware at the end of March or beginning of April, 1638. Their ships were named the *Kalmar Nyckel* and the *Fogel Grip* or "Bird Griffen." The expedition was under the leadership of Peter Minuit, who was previously connected with the Dutch West India Company and formerly Governor of New Netherland under the Dutch sovereignty.

Minuit sailed between Cape May and Cape Henlopen and first landed on the western side of the Delaware Bay, near Swanendael (Lewes), where the Dutch had settled in 1631. Minuit then sailed north to Minquas Creek, which he called Christina Kihl, in honor of the Swedish Queen. Christina is still its name today. When the Swedes' ships arrived, they were greeted by the Dutch inhabitants who operated trading posts in the area. Minuit met his visitors on the *Kalmar Nyckel* and was dressed in full battle armor, surrounded by Dutch and Swedish

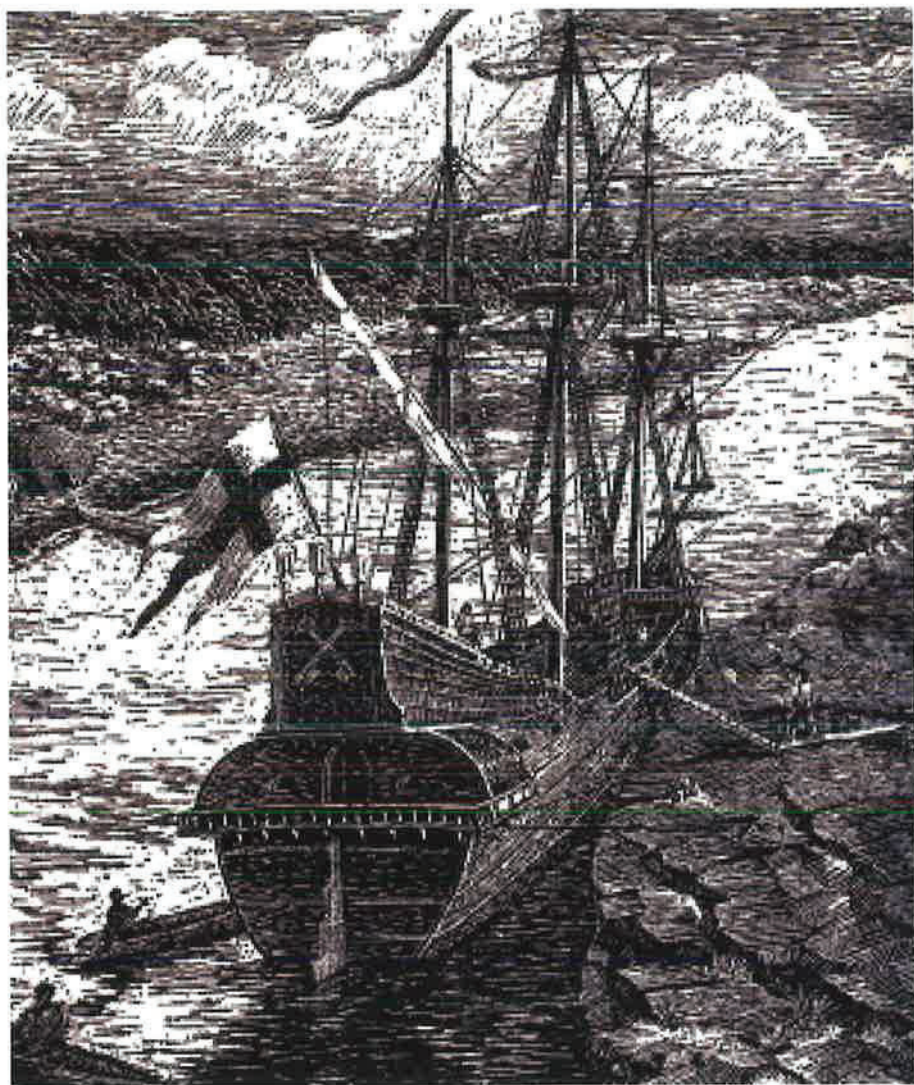


THE LANDING OF THE SWEDES, 1638

This painting by famed Delaware Artist Stanley M. Arthurs (1933) depicts colonist Peter Minuit greeting American Indians, with the immigrants' ship, the Kalmar Nyckel, in the background. It was used as the basis for a 1938 U.S. three-cent postage stamp commemorating the tercentenary of the landing of the Swedes and Finns in Delaware, courtesy of the University of Delaware.

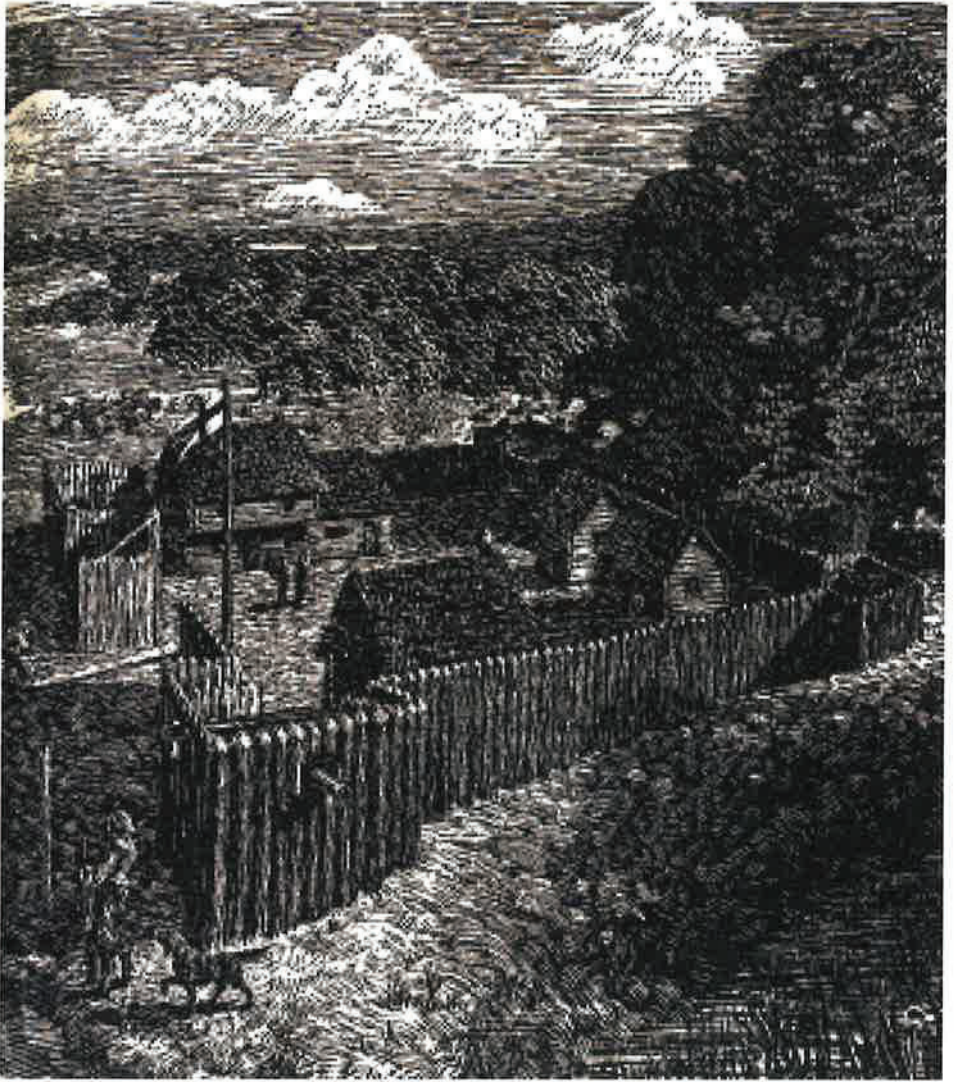
soldiers, with the blue and yellow flag of Sweden flying from the mainmast.

Minuit told the Dutch people who visited his vessels that he was only stopping for supplies. However, upon landing, he began to establish a Swedish settlement and started building a



THE KALMAR NYCKEL

This illustration is reproduced from Delaware—A Guide to the First State, compiled Delaware and published by the state in 1938. The original illustration from which this principal illustrator for the project, who later moved to Oxford, Maryland, and became



AT FORT CHRISTINA

by the Federal Writers Project of the Works Progress Administration for the State of Delaware. The image is taken is believed to be a woodcut. The artist is John B. Moll, Jr. (1909-1991), a well-known regional artist of Chesapeake Bay scenes.

fort. The Dutch protested and delivered the following letter to Minit:

I, William Kieft, Director-General of New-Netherland, residing on the Island of Manhattes and in Fort Amsterdam, under the authority of their High Mightinesses the Lords States-General of the United Netherlands and the Incorporated West-India Company, chamber at Amsterdam, make known to you Peter Minit, who style yourself Commander in the service of Her Royal Majesty of Sweden, that the whole Southriver of New-Netherland has been many years in our possession and secured by us above and below by forts and sealed with our blood, which even happened during your administration of New-Netherland and is well known to you. Now, as you intrude between our forts and begin to build a fort there to our disadvantage and prejudice, which shall never be suffered by us and we are very certain, that her Royal Majesty of Sweden has not given you any order to build fortresses on our rivers or along our coasts, Therefore, in case you proceed with the erection of fortifications and cultivation of the soil and trade in peltries or in any wise attempt to do us injury, We do hereby protest against all damages, expenses and losses, together with all mishaps, bloodsheds and disturbances, which may arise in future time therefrom and that we shall maintain our jurisdiction in such manner, as we shall deem most expedient.¹⁰

Minit disregarded the letter and completed the construction of Fort Christina. With that action, the Swedes established the basis for the first permanent European settlement in Delaware, as opposed to Dutch trading posts. They maintained control of Fort Christina for a period of about seventeen years, notwithstanding the efforts of subsequent Dutch and English



LINDSTROM'S MAP OF NEW SWEDEN

A facsimile of an early map by Peter Lindström (1654–1655) showing the Delaware Bay and the territories of New Sweden and Pennsylvania. This map is oriented with north to the left, and shows Cape May and Cape Henlopen on the Atlantic, Fort Casimir (Trefaldighets), Fort Christina (Wilmington), Upland, tributaries, and the Native lands along the Delaware River; (Reproduced from J. Thomas Scharf's History of Delaware, 1609-1688).

settlers to displace them. In 1655, the Swedes surrendered Fort Christina to the Dutch. The terms of surrender included the Swedes recognition of the Dutch sovereignty that was established at New Amsterdam (later New York).

The 1638 arrival of the Swedes in Delaware became significant during the 1685 trial between William Penn and Lord Baltimore because some older Swedes could attest to the fact that the Dutch were in Delaware several years prior to the Swedes' arrival.



PETER MINUIT

LATER DUTCH DELAWARE SETTLEMENTS

Two boats of Englishmen were shipwrecked in 1657 near the Hoernkill Creek (Lewes and Rehoboth Canal). They were captured by Indians and freed when a ransom was paid by the Dutch. The following year, the Dutch decided to take action



FORT CASIMIR

A view of the Dutch Fort Casimir at the present-day site of New Castle (reproduced from Scharf's History of Delaware).

to protect their land on the South River (Delaware River) and, in particular, at the Hoernkill. William Beekman, Alexander d'Hinoyorsa, and twenty soldiers were sent to purchase additional land from the Indians. On June 7, 1659, the Indians deeded to the Dutch all of the land between Cape Henlopen and Bombay Hook and that extended inland or westward about thirty miles.



PETER STUYVESANT
Governor of New Netherland
(from Scharf's History of Delaware,
1609-1688)

Following that Dutch acquisition, the Governor of New Netherland (Peter Stuyvesant) directed that the Hoernkill be fortified. The Dutch built several garrisons or blockhouses in the area. One of the concerns at the time was to protect the Hoernkill area against intruders from Maryland.

By 1659, the Dutch settlements were well established along the Delaware River and Bay. This gave Lord Baltimore concern. He decided to notify the Dutch that they were occupying land that was within his 1632 Maryland Charter. In 1659, Lord Baltimore sent Colonel Nathaniel Utie to New Amstel to deliver that message to the Dutch. Thereafter, Lord Baltimore asked King Charles II to confirm the 1632 charter. In 1661, King Charles II confirmed the 1632 Maryland Charter to Lord Baltimore from King Charles I.

DUKE OF YORK'S PATENT NEW NETHERLAND CONQUERED

On March 12, 1664, King Charles II granted a patent to his brother James Stuart, then the Duke of York and later King James II. The grant vested the Duke of York with proprietary rights to lands from the St. Croix River in Maine to the east side of the Delaware Bay and River. By the King's letters patent, the Duke of York was granted the territory to have and hold, "in free and common socage, and not in capite nor by knight service." In return for the charter, the Duke of York was to pay within ninety days after demand, in each year, forty beaver skins.

The Three Lower Counties (Delaware) were on the west side of the Delaware River and Bay, and therefore were not included in the grant to the Duke of York. Nevertheless, this patent later became important during the 1685 litigation between Lord Baltimore and William Penn because it was the only paper title the Duke of York had in 1782, when he executed the two deeds of feoffment and two leases for Delaware to William Penn. The Duke of York's patent from King Charles II was his



THE DUKE OF YORK

Conqueror of New Netherland, who became King James II upon the death of his older brother, King Charles II in 1685, portrait by Peter Lely, circa 1660-1670, courtesy of Wikimedia Commons.

authority for conquering the Dutch, not only in New Netherland but also in Delaware, which was governed by the Dutch from New Amsterdam as a part of New Netherland.

The territory granted by King Charles II to the Duke of York had been claimed by the British Crown for a long time even though those areas were possessed by the Dutch under the name New Netherland. This included New York, New Jersey, and Delaware. Since the grant to the Duke of York included most of New Netherland, King Charles II had to decide whether to recognize Dutch rights to that territory, as an exception to the grant, or risk a war with Holland. It was decided that the Dutch

were squatters. With the agreement of the Privy Council, King Charles II did not exclude the territory occupied by the Dutch (New Netherland) in the grant to the Duke of York. In doing so, King Charles II expected that the Duke of York would assert his claim to that territory by force and that the Dutch might declare war against England.

In May 1664, the Duke of York prepared a fleet to enforce his rights to New Netherland by capturing the Dutch settlements at New Amsterdam and elsewhere. He sent three armed ships to New Netherland under the command of Richard Nicholls, who was described as the "principal commissioner for his majesty in New England, governour general under his royal highness, James Duke of York and Albany and all of his territories in America and commander in chief of all the forces employed by his majesty to reduce the Dutch nation and all of their usurped lands and plantations under his majesty's obedience."¹¹

Colonel Nicholls and his fleet arrived at Long Island in the middle of August. He sent Governor Stuyvesant a message to surrender the City of New Amsterdam, as follows: "in his Majesties Name, I do demand the Towne, Scituate upon the Island commonly knowne by the Name of Manhatoes with all the Forts there unto belonging, to be rendered unto his Majesties obedience, and Protection into my hands."¹² The letter stated that King Charles II did not want "the effusion of Christian blood." The letter ended with an ultimatum that, if the Dutch did not surrender, they would incur "the miseryes of a War." In return for surrender, Colonel Nicholls' letter promised protection to all persons who would submit to his authority.

Governor Stuyvesant initially refused to surrender, despite being advised to the contrary. Governor Stuyvesant soon recognized, however, that his soldiers were no match for the forces under the command of Colonel Nicholls. On September 8, 1664, after several days of negotiation, the fort and the city were surrendered. Governor Stuyvesant led a procession out of the fort with drums beating and flags waving. The English

renamed the city New York and Fort Amsterdam was named Fort James.

A small group of English soldiers then entered the abandoned fort. Inside the fort, in the office of the colonial secretary, the soldiers found a complete set of Dutch records in: "rows of bulky leather-bound volumes, forty-eight in all, numbered consecutively on their spines, A to Z and then AA through PP. Wills, deeds, minutes, correspondence, complaints, petitions, confrontations, agreements."¹³ These records contained meticulous details on at least a year-by-year basis, and sometimes more often, of all Dutch settlements in America.

These records would prove to be invaluable to William Penn later in his litigation with Lord Baltimore. It was within those old Dutch records that William Penn's agents found the 1629 deed to the area around Lewes that was executed by the Indians in favor of the Dutch who settled Lewes in 1631. Other documents in those old Dutch records also supported William Penn's case against Lord Baltimore.

On September 3, 1664, Sir Robert Carre was commissioned by Colonel Nicholls and others to proceed to the Delaware Bay and defeat the Dutch. The original text of Carre's commission is as follows:

WHEREAS we are informed that the Dutch have Seated themselves at Delaware bay on his Maty of Great Brittain's Territories without his knowledge and consent and that they have Fortified themselves there and drawn a great Trade thither, and being assured that if they be permitted to go on, the gaining of this Place will be of small advantage to his Maty: WE his Maties Comissioners by vertue of his Maties Comission and Instrucons to us given have advised and determined to endeavour to bring that Place, and all Strangers thereabout in obedience to his Maty And by these do Order and appoint that his Maty's

Frygotts the Guiney and the William and Nicholas and all the Soldiers weh are not in the Fort shall with what speed they conveniently can go thither under the Comand of Sr Robert Carr to reduce the same, Willing and Commanding all Officers at Sea, and Land and all Soldiers to obey the sd Sr Robert Carr during their Expedition. GIVEN under our hands and Seals at the Fort in New York upon the Isle of Manhatans the 3d day of September 1664.

Signed by Maverick, Nicolls, and Cartwright.

Sir Robert Carre was further commanded:

You have commands to keep possession thereof for His Majesty's own behalf and right . . . and if my Lord Baltimore doth pretend right thereto by his Patent (which is a doubtful case) you are to say that you only keep possession till His Majesty is informed and satisfied otherwise.¹⁴

Pursuant to these orders, Sir Robert Carre, with two vessels and a large military force, set sail for Delaware. After "a long and troublesome passage" he arrived in the Delaware Bay, on the last day of September. He sailed past Fort New Amstel without provoking any hostile actions from the Dutch. A conference was held and the Dutch were asked to surrender.

Three days later, the Dutch Governor d'Hinoyorsa and the Dutch soldiers under his command, refused to surrender and prepared for the defense of the fort. Sir Robert Carre's ships fired two well directed broadsides that hit the fort and English soldiers were also deployed for a land assault. In response to both actions, the fort was surrendered. The short-lived battle was over "with an expenditure of two barrels of powder and twenty shot," by the English, and a loss, by the Dutch, of ten wounded and three killed.¹⁵

Sir Robert Carre immediately assumed command of

the settlements on the Delaware River and Bay. The seat of government was at New Castle (formerly New Amstel).

The following oath of allegiance was administered to the inhabitants of Delaware:

I do swear by the Almighty God, that I will bear Faith and Allegiance to his Ma^{tie} of Great Brittain, & ye I will obey all such commands as I shall receive from the Governt Depty Governt or other officers appointed by his Ma^{ties} Authority, so long as I live within these or any other his Ma^{ties} Territories. Given under my hand and Seal this 1st day of October in the year of our Ld God 1664.

The rule of Colonel Nicholls in Delaware terminated in May 1667, when he was succeeded by Colonel Francis Lovelace. The war between the English and the Dutch ended on or about July 31, 1667, when the Treaty of Breda was signed between the governments of King Charles II and the United Provinces of the Netherlands.

LORD BALTIMORE ATTACKS LEWES

In 1669, Lord Baltimore had a surveyor, James White, draw the County of Durham. That county was the area from the Whorekill (Lewes) north to the fortieth degree. White was also directed to draw two property manors of 6000 acres, each for Lord Baltimore on the “seaboard side” of the Whorekill.

In 1671, after the Dutch settlers in Delaware continued to disregard Lord Baltimore’s claim of ownership, he decided to establish his own settlements on what he called the “seaboard side” of Maryland. That territory included all of the land along the Delaware Bay that was south of New Castle. Lord Baltimore knew that the area around the Whorekill was sparsely settled and poorly defended. Therefore, Lord Baltimore decided to make the territory near the Whorekill the focus of his challenge to the Duke of York’s claim to the area based upon his conquest of the Dutch.

In support of that effort, Lord Baltimore sent three separate raiding parties to the Whorekill between 1671 and 1673. The first raid was in June 1671, when Lord Baltimore sent Captain Thomas Jones to plunder the area. The Whorekill settlers’ defense was led by Captain John Carr, who sought help from

the Duke of York's Governor in New York, Francis Lovelace. Governor Lovelace protested to Lord Baltimore and vowed to arrest Captain Jones. Lord Baltimore responded by sending Captain Jones back to the Whorekill in September with another raiding party.

The third and most destructive raid on the settlers in the Whorekill occurred in December 1673. Lord Baltimore directed Captain Thomas Howell to conduct a surprise attack and seize land on the Whorekill. In December 1673, Howell and his soldiers occupied Whorekill Town (Lewes) for two or three weeks. Howell confiscated the residents' weapons and then burned the entire town. This became known as the "Burning of the Whorekill." Only a single barn survived, where the defenseless residents retreated for the winter. After Howell departed, the Duke of York took steps to strengthen the Whorekill (Lewes) settlement.

The three raids upon the Whorekill between 1671 and 1673 were summarized by Helmanus Wiltbank, a survivor of all three events:

In the year of our Lord 1671 in the month of June Capt. Thomas Jones did come up in this place called Whorekill with 7 or 8 horsemen with force of arms, and came to the house of Helmanus Wiltbank and tyed him and rid to the rest of his neighbors and tyed them and kept a guard over them, and plundered the housing and carried the goods away and left us.

In the month of September following came up the said Capt. Jones with a troop of horse with forces of armies and made forcible entry in this place, and called a court of their own men, and made us come to their court and demanded the oath of allegiance wherein we were not willing, whereupon the court did commit us to prison and kept us until the next day without meat or drink, and threatened to carry us for Maryland and confiscate our estate, so that we

were forced to take the oath of allegiance to be true to my Lord Baltimore, and so we remained until the next year. 1672 in the month of August the Dutch recovering New York did send boat and men for to surrender this place, whereupon our Commissioner Francis Jenkins did take [to] them papers that were sent by the Dutch Governor and went to my Lord into Maryland and promised to bring speedy answer again which . . . [torn document] again for surrendering, if not w[e] should nothing except but fire and sword: So that the inhabitants for fear did surrender being the Commissioner was fled away, and my Lord in all this time never sent word nor answer nor protection.

In the month of December next following Capt. Howell did come with a troop of souldirs and demanded this place and we replied we had been my Lord's tenants before, we will not or can defend the place. Capt Howell answered we are come now to defend you, and if it cost the province of Maryland a million in tobacco we will protect you and marched in the place, and did eat and drinke with us eighteen days, and then set our housing upon fire Christmas eave. What was not spended they burned and marched away and left us in [an] unbearable condition, so that all ye inhabitants (except a few) were forced to leave the place for want of provisions and them that were left in [the] place could not goe because their wives were bigg with child, and some men were famished at ye murder creek in this Bay.¹⁶

DUTCH BRIEFLY RETAKE DELAWARE

In 1673, the Dutch seized the Delaware settlements for a brief time. On August 8, 1673, the Dutch captured New Castle from the English. Once again, Delaware was under Dutch control until February 19, 1674. The Dutch conquests of Delaware and other areas of the former New Netherland were part of larger problems between the two countries in Europe.

The Anglo-Dutch war ended in February 1674, with the Peace of Westminster. One of the terms was for the Dutch to once again relinquish all claims to New Netherland in America. All conquests made by either side were to be considered *null and void*, and all captured places were to be restored to that nation to which they belonged before capture. Consequently, New York and Delaware were returned to his Royal Highness, the Duke of York, and were once again under English rule.

There was a perceived need, however, to eliminate any argument that the Dutch conquest in 1673 had voided the 1664 grant to the Duke of York. On June 29, 1674, King Charles II gave the Duke of York a new grant that included the former New Netherland. The description of the land and territories in the “re-grant” was identical to the words in the March 12, 1664 grant, including the conspicuous absence of any reference to land on the west side of the Delaware River and Bay.

The English officials who had been ousted from office in 1673 by the Dutch resumed their positions in Delaware after the peace treaty was signed. Therefore, with the exception of a few months in 1673, the former Dutch settlements in New Netherland and Delaware were governed by the Duke of York's agents in New York from the time of his original conquest until the deeds for Delaware were executed from the Duke of York to William Penn in 1682.

The conquest of New Netherland and Delaware by the Duke of York later proved significant in William Penn's litigation with Lord Baltimore for two reasons. First, the Duke of York took actual possession of the Dutch settlements in New Netherland and Delaware and exercised sovereignty over them. Second, King Charles II recognized the legitimacy of that possession and sovereignty by the Duke of York, his brother.

WILLIAM PENN'S PENNSYLVANIA CHARTER

Penn was educated as a college student at Oxford (Christ's Church), as a lawyer at Lincoln's Inn in London, and furthered his education at the Huguenot school in Saumur, France. William Penn's father was an English admiral. His mother, Margaret Jasper, grew up in Ireland, the daughter of a Dutch merchant. When Penn was a student at Oxford, he attended meetings of Thomas Lee, a follower of the Quaker George Fox. In 1667, Penn became a Quaker, joining the Society of Friends.

In 1660, William Penn's father was also a member of Parliament. In that capacity, he traveled to Holland to escort King Charles II back to England from exile and restore him to the throne. The elder William Penn was knighted by King Charles II during the return trip. Although Admiral Penn had served England with distinction in the Spanish West Indies under Cromwell, after the restoration of King Charles II, he became a royalist.

Later, Sir William Penn was appointed by King Charles II to be commissioner of the English navy, where he worked



THE BIRTH OF PENNSYLVANIA, 1680

This work, by Jean Leon Gerome Ferris (1863-1930), is one of 78 paintings of American historical scenes from his "The Pageant of a Nation" series. William Penn, holding paper, standing and facing King Charles II, is shown in the King's breakfast chamber at Whitehall, receiving title to his Pennsylvania domains (reproduced from Wikipedia Commons).

closely with the Lord High Admiral, who was the King's brother, the Duke of York. In fact, Sir William Penn commanded the Duke of York's flagship during the Second Dutch War. In 1665, he received great fame after his heroic actions during the Battle of Lowertoft, when he attained a victory over the Dutch fleet commanded by Van Opdam.

When William Penn's father died in 1670, the Crown owed him a great deal of money, sixteen thousand pounds, as a result of services the elder Penn had rendered. On June 14, 1680, William Penn, as the admiral's heir, petitioned King Charles II for a grant of land in America in full or partial discharge of that large debt that was now due to him from the English Crown. Penn's request for land in America was inspired, in part, to



WILLIAM PENN

*Reproduced from History of the State of
Delaware (1908) by Henry C. Conrad*

provide a refuge for Quakers from persecution in England. Penn had been jailed in the Tower of London and three other prisons because of his writings about Quaker beliefs.

Penn was familiar with territory in the mid-Atlantic region, because he had served as an arbitrator when Quaker settlements in New Jersey became involved in a land dispute. Penn's experience in New Jersey caused him to realize that the area north of Maryland and west of the Delaware River was unappropriated. That is the land described in Penn's 1680 petition to King Charles II.

Penn's petition was referred to the Committee for Trade and Foreign Plantations, an advisory board to the Privy Council of the King. Since Penn's petitions sought land that bordered on the territory of Lord Baltimore and the Duke of York, copies were sent to both of their agents for comment.

Lord Baltimore's agents asked that any grant to Penn only be for land north of "Susquehanna Fort," with a horizontal line

running from that base to the Delaware River. Without stating it explicitly, Lord Baltimore's agents were asserting his claim to all of the lower settlements in Delaware on the Delaware River and Bay. Penn agreed to those boundaries with Maryland. It must be remembered, however, that these negotiations related solely to the boundaries for the grant Penn wanted from King Charles II for Pennsylvania.

After Penn agreed that the Susquehanna Fort would be his boundary with Maryland, the Lords on the Committee for Trade and Foreign Plantations sent a draft of the proposed grant to Sir John Werden, the agent for the Duke of York. The Committee knew that King Charles II recognized the jurisdiction of the Duke of York over the settlement at New Castle. Therefore, Sir John Werden, as representative of the Duke of York, was consulted with regard to Penn's petition for land that bordered on New Castle.

Werden advised the Lords on the Committee for Trade and Foreign Plantations that the Duke of York approved a grant to Penn that was north of New Castle at about the latitude of forty degrees. On November 20, 1680, Werden proposed specifically that the southern boundary of Penn's land should be a circle twenty or thirty miles north of New Castle. Penn expressed his concern that the boundaries proposed by Werden would not provide sufficient access to the Delaware River for the development of the territory in his petition.

On November 23, 1680, Werden and Penn agreed that the boundary of Penn's patent should be a circle twelve miles north of New Castle. This boundary was fixed by Lord Chief Justice North in the Committee for Trade and Foreign Plantations of the Privy Council, as follows:

bounded on the East by the Delaware River, from twelve miles distance, Northwarde of New Castle Towne unto the three and fortieth degree of Northern Latitude . . . the said lands to extend Westwards, five degrees in Longitude . . . and the said lands to bee

bounded on the North, by the beginning of the three and fortieth degree¹⁷ of Northern Latitude, and on the South, by a circle drawne at twelve miles distance from New Castle Northwards, and Westwards unto the beginning of the fortieth degree of Northern Latitude; and then by a streight line Westwards, to the limit of Longitude menconed¹⁸

This was the origin of the Twelve Mile Circle that still constitutes the northern boundary of Delaware today.

King Charles II asked Penn to name the new province. Penn suggested that it be called New Wales. When the King rejected that name, Penn tried "Sylvania." The King accepted this name, in part, and to the surprise and embarrassment of Penn, prefixed in his own handwriting "Penn" to "Sylvania." Penn was so chagrined that he petitioned the King to have his name removed. Penn offered twenty guineas to the secretary of the Privy Council to change the charter. That offer was declined. Penn later suggested in a letter that the King's addition of "Penn" to Sylvania was actually in honour of his father, the deceased war hero. That is a reasonable possibility, since the grant was being made in consideration for the King's debt to Penn's father.

The day after the Pennsylvania charter was published, March 5, 1681, William Penn wrote the following in a letter to his friend Robert Turner:

this day my country was confirmed to me under the Great Seal of England with large powers and privileges, by the name of Pennsylvania, a name the King (i.e. Charles II) would give it in honor to my father (i.e. Admiral Sir William Penn). I chose New-Wales, being as this a pretty hilly country, but Penn being Welsh for a head (i.e. pen), as Penmaenmawr in Wales and Penrith in Cumberland and Penn in Buckinghamshire, the highest land in England (this is not true), called this Pennsylvania which is

the high or head woodlands. For I proposed, when the secretary, a Welshman, refused to have it called New-Wales, Sylvania, and they added Penn to it; and though I much opposed it and went to the King to have it struck out and altered, he said it was passed and he would take it upon him. Nor could twenty guineas move the undersecretaries to vary the name, for I feared lest it should be looked on as a vanity to me and not as a respect in the King, as it truly was, to my father whom he often mentions with praise.¹⁹

On March 4, 1681, King Charles II granted William Penn a charter for 40,000 square miles in America that was called the new Province of Pennsylvania. This royal charter was published by King Charles II on April 2, 1681, in the following proclamation:

Charles R.

Whereas his Majesty, in consideration of the great merit and faithful Services of Sir William Penn deceased and for divers other good causes him thereunto moving hath been graciously pleased by Letters Patents bearing date the fourth day of March last, to give and grant unto William Penn Esquire Son and Heir of the Said Sir William Penn, All That tract of Land in America Called by the name of Pensilvania as the same is bounded on the East by Delaware River, from twelve miles distance Northwards of New Castle Towne, unto the three and fortieth degree of Northern Latitude, if the said River doth extend soe farr Northwards And if the said River shall not extend soe farr Northward, then by the said River so farr as it doth extend. And from the head of the said River, the Eastern Bounds to bee determined by a Meridian Line to bee drawn from the head of the said River, unto the said Three and Fortieth Degree; the said Province to extend Westward five

degrees in Longitude, to be Computed from the said Eastern bounds; and to bee 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 Northwards and Westwards unto the beginning of the Fortieth Degree of Northern Latitude and then by a streight Line Westwards, to the limits of Longitude above mentioned. Together with all Powers, Preheminences and Jurisdictions necessary for the Government of the Said Province, as by the Said Letters Patents reference being thereunto had, doth more at large appear. His Ma^{tie} doth therefore hereby publish and declare His Royal Will and Pleasure that all persons settled or inhabiting within the limits of the said Province doe yield all due obedience to the Said William Penn, his heirs and assignes, as absolute Proprietaries and Governors thereof; as also to the Deputy or Deputies, Agents or Liev-tenants lawfully Commissionated by him or them according to the powers and authorities granted by the Said Letters Patents. Wherewith his Ma^{tie} expects and requires a ready Compliance from all persons whom it may concern, as they tender his Ma^{ties} displeasure.

Given at the Court at Whitehall the Second day of April in the three and thirtieth year of His Ma^{ties} Reigne.²⁰

Penn's charter for Pennsylvania also marked the beginning of Delaware's demarcation as a separate entity.

PENNSYLVANIA AND MARYLAND NORTHERN BOUNDARY DISPUTE BEGINS

In 1681, Delaware was administered for the Duke of York as an appendage of New York. Delaware was unique among the Duke of York's territories because neither of the patents he received from King Charles II, in either 1664 or 1674, included land on the west side of the Delaware River. The Duke of York's legal claim to Delaware was recognized in 1681, as part of the boundary process for defining the border of the Pennsylvania charter that was granted to William Penn by King Charles II. This was the first time that the boundaries were established between the Three Lower Counties on the Delaware and Pennsylvania.

After receiving his charter for Pennsylvania, Penn immediately made plans for the settlement of his newly acquired territory. On April 10, 1681, Penn appointed his cousin, William Markham, to be Deputy Governor of the Province of Pennsylvania. Markham arrived at the Delaware River on July 1, 1681.

Although Penn's charter was completed on March 4, 1681, the details of the exact border with Maryland still needed to be

worked out with Lord Baltimore. Penn's charter did not mention the Susquehanna Fort, despite Penn's prior agreement to accept **that point as a boundary, and other ambiguous clauses required** interpretation. On April 2, 1681, King Charles II had written a letter to Lord Baltimore. That letter advised Lord Baltimore about Penn's charter for Pennsylvania and directed Lord Baltimore to meet with Penn's agents to establish the Pennsylvania boundary with Maryland by making "a true division and separation of the said Provinces of Maryland and Pennsylvania, according to the bounds and degree of Northern Latitude expressed in our said Letters Patents by settling and fixing certain Land Marks where they shall appear to border upon each other."²¹

Penn directed William Markham as his agent to negotiate with Lord Baltimore in America about the boundary between Maryland and Pennsylvania. On September 16, 1681, Penn complicated Markham's assignment by sending a letter to Augustine Herrnan and other residents in northeastern Maryland. Penn advised Herrnan to stop paying taxes and land notes to Lord Baltimore because when the boundaries were finalized for Pennsylvania, their land would no longer be in Maryland:

I am equally a stranger to you all, but your being represented men of substance and reputation in that part of the Bay (i.e. Chesapeake), which I presume falls within my patent. I think fit to caution you – if within my bounds, as I am ready to believe, but I desire no more than my own – that none of you pay any more taxes or assessments by any order or law of Maryland.²²

Needless to say, this infuriated Charles, the third Lord Baltimore.

WILLIAM PENN WANTS DELAWARE

After Penn received his grant for Pennsylvania, he focused his attention on the Three Lower Counties that were recognized by King Charles II as being under the jurisdiction of James, Duke of York. Penn sent a letter asking the Duke of York to give him Delaware. When Penn received no response, he sent a second letter to the Duke on June 30, 1681. Penn eventually initiated negotiations with the Duke of York's agent, John Werden. Penn did not want Pennsylvania to be landlocked. Although the Twelve Mile Circle provided him with a presence on the Delaware River, he wanted the Duke of York to give him what is now Delaware, so that Penn would have direct access to the Atlantic Ocean by way of the Delaware River and the Delaware Bay.

Since the Duke of York's territory was not a Royal possession, no formal records were kept. However, there is a July 1681 letter from Sir John Werden to William Penn, advising Penn "that the Duke was not yet disposed to grant the lands about New Castle."²³ Nevertheless, the negotiations between Penn and Werden, on behalf of the Duke of York, continued.

Penn's interest in acquiring Delaware from the Duke of York intensified when Markham sent word from Pennsylvania

that he was having difficulty reaching a border agreement with Lord Baltimore. Penn had instructed Markham to secure a border with Maryland that would provide access from Pennsylvania to the Chesapeake Bay. This was a difficult assignment, even without Penn's letter to Augustine Herrnan and others to withhold payments to Lord Baltimore, since Penn's charter for Pennsylvania provided for a border with Maryland at the fortieth degree as a boundary.

In the summer of 1682, Lord Baltimore sent his agents to New Castle for the purpose of determining its latitude. Those agents concluded that the northern boundary of Maryland, at the fortieth degree as set forth in Penn's charter for Pennsylvania, was twenty or thirty miles north of New Castle. When Lord Baltimore received this report, he went to personally meet with Penn's agent, Markham. At that time, Lord Baltimore made a public declaration of his right to all of Delaware and also to land around Chester, Pennsylvania.

It must be remembered that William Penn's father and the Duke of York were close friends and companions during times of both war and peace. There is no doubt that Penn was the beneficiary of the Duke of York's relationship with, and affection for Penn's father. On August 21, 1682, the Duke of York executed a quitclaim deed to Penn for any interest the Duke might have in territory on the west side of the Delaware River that lay within Penn's charter for Pennsylvania.

WILLIAM PENN ACQUIRES DELAWARE

The deed for Pennsylvania was obtained by Penn out of an abundance of caution, since the Duke of York never claimed any part of the Province of Pennsylvania. On the same day, James, the Duke of York, executed a lease to William Penn for the town of New Castle and for all land within the Twelve Mile Circle. The lease was for the term of ten thousand years. This lease was not effective, however, because it was not witnessed.

More importantly, three days later, the negotiations about Delaware between Penn and the Duke of York concluded. On August 24, 1682, four legal documents were executed for what is now Delaware. The first document was a valid lease for ten thousand years for New Castle and all of the land within the Twelve Mile Circle around it. The second document was an absolute deed or deed of feoffment for the same geographical area, as follows:

‘all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same,



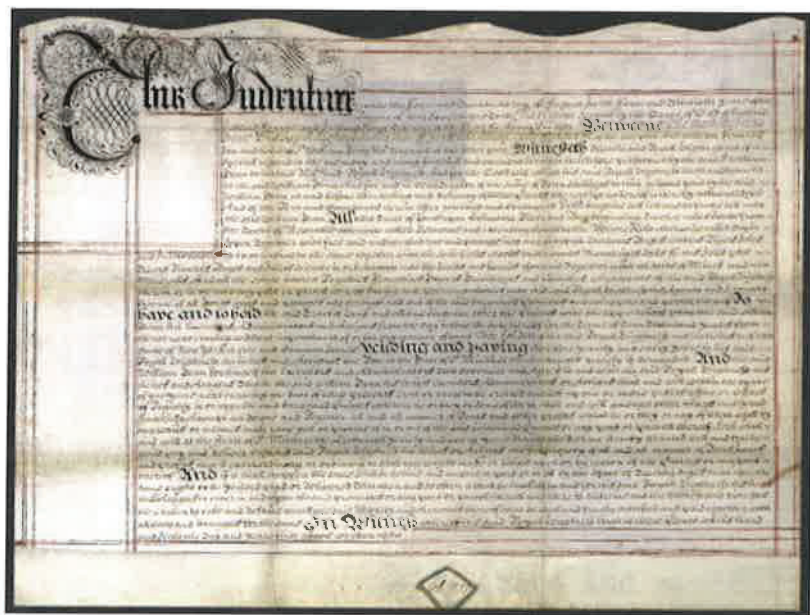
10,000 YEAR LEASE FOR NEW CASTLE

The legal document executed by James, Duke of York, and William Penn on August 24, 1682, conveying to Penn the town of New Castle and all the lands within a 12-mile circle surrounding the town (courtesy of the Delaware Public Archives).

situate, lying and being upon the river Delaware, in America; and all the islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises, duties, jurisdictions,' &c. &c. and all the estates, &c. 'to have and to hold the said town and circle of twelve miles of land about the same, islands, and all other the before mentioned,' &c. &c.²⁴

The third document was a lease for ten thousand years for land along the Delaware River and Bay south to "the Whorekilis otherwise called Cape Henlopen." The fourth document was a separate deed of feoffment for that same land, as follows:

all that tract of land upon Delaware river and bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware, and extending south to the Hoar Kills, otherwise called Cape



10,000 YEAR LEASE FOR KENT AND SUSSEX COUNTIES

The third of the legal documents executed by James, Duke of York, and William Penn on August 24, 1682, conveying to Penn all the lands south of the 12-mile circle around New Castle (courtesy of the Delaware Public Archives).

Henlopen, together with free and undisturbed use and passage into and out of all harbours, bays, waters, rivers, isles and inlets, belonging to or leading to the same; together with the soil, fields, woods, underwoods, mountains, hills, fens, isles, lakes, rivers, rivulets, bays and inlets situate in, or belonging unto the limits and bounds aforesaid, together with all sorts of minerals, and all the estate, interest, royalties, franchises, powers, privileges and immunities whatsoever of his said royal highness therein or in or unto any part or parcel thereof.²⁵

Both deeds of feoffment designated John Moll and Ephraim Herman, each of New Castle, as attorneys in fact for the Duke of

York, for the purpose of delivering actual possession to William Penn.

For the northern tract, Penn was to pay the Duke of York ten shillings immediately and five shillings each year. For the southern tract, Penn was to pay the Duke ten shillings immediately and a rose annually, upon demand, at the feast of Saint Michael. In addition, Penn was to pay one-half of all "rents, issues and profits" from the southern territory.

It is not clear why the Duke of York gave Penn both deeds of feoffment and leases of ten thousand years for the same properties. There is speculation that this action was taken due to **the uncertainty about the Duke of York's legal rights to Delaware.** It must be remembered that the Duke of York had no paper title for any of the Delaware land described in either of the deeds of feoffment. The Duke's original grant from King Charles II did not include Delaware because it was on the west side of the Delaware River and Bay. However, the Duke's conquest of the Dutch included Delaware and, thereafter, the Crown permitted the Duke to exercise complete authority over Delaware.

Although the Crown acquiesced in the Duke of York's control of Delaware, there is some thought that the leases to Penn would be an effective "back up" to the deeds of feoffment until the Duke of York could obtain a written legal title to Delaware. In fact, each of the deeds of feoffment to Penn from the Duke of York provided that, for a period of seven years, the Duke would take any steps that Penn requested (and paid for) to assure that Penn had clear, legal title to Delaware, the Three Lower Counties.

WILLIAM PENN ARRIVES TAKES POSSESSION OF DELAWARE

On October 27, 1682, Penn and approximately seventy colonists arrived at New Castle in a ship named *Welcome*. To William Penn, control of the Delaware River and its bay was vital to his future plans for Pennsylvania. He referred to the Delaware River as his “Ewe Lamb.” His very first act on landing in America was to produce the two deeds of feoffment to Delaware, given to him by the Duke of York, and to order, let “all Ships clear ab New Castle, ye River now being mine.”

On October 28, 1682, Penn took formal possession of New Castle and the territory within the Twelve Mile Circle. The ceremony was called “livery and seisin.” It began with a reading of the two deeds of feoffment to Penn from the Duke of York. Penn was then presented with the key to the New Castle fort. Penn entered the fort alone and locked himself inside. When he came out of the fort, Penn was presented with traditional symbols as evidence of his possession: a piece of sod with a twig on it and a porringer filled with river water and soil. On the next day, Penn went to Upland, which he renamed Chester, to take possession of Pennsylvania.



THE LANDING OF WILLIAM PENN

This circa 1920 work by the painter Jean Leon Gerome Ferris (1863-1930) purporting to show William Penn's arrival in New Castle, Delaware, was one of his series of idealized portrayals of famous moments from American history, but, like many Ferris works, it sacrificed historical accuracy for artistic license. The painting shows Penn being greeted at New Castle by American Indians who are clothed in the tradition of tribes from the Great Plains (re-produced from Wikipedia Commons).

On October 28, 1682, a certificate designated “that the possession and seisin was accordingly given by the said attorneys to the said William Penn, according to the usual form, by delivery of the fort of the said town, and leaving the said William Penn in quiet and peacable possession thereof, and also by the delivery of turf and twig, and water and soyle of the River Delaware,”²⁶ and the certificate was witnessed and signed by ten spectators.

A second certificate was signed that day by twelve inhabitants of the town of New Castle, who averred that they heard the indentures read and “having seen, by the said duke’s appointed attorneys, John Moll and Ephraim Harman, both of New Castle, possession given, and by our governor William

Penn, Esq., possession taken, whereby we are made subjects, under the king, to the said William Penn, Esq., we do hereby, in the presence of God, solemnly promise to yield to him all just obedience, and to live quietly and peaceably under his government.”²⁷

Also on October 28, 1682, Penn designated Captain William Markham as his attorney in fact to receive actual seisin and possession of that part of the grant of the Duke of York that lay south of the Twelve Mile Circle. This delivery was made on November 7, 1682. The ceremony took place at the home of Edmund Cantwell, several miles below New Castle, on the south side of Appoquinimink Creek. A certificate was drawn and signed by thirteen residents of the Three Lower Counties stating “that we whose names are hereunder written on the day of the date hereof have been present and seen that they the said John Moll and Ephraim Herman in pursuance of His Royal Highness’ Command and by virtue of the power given them . . . have given and delivered actual possession unto the sd Capt. William Markham to the sole use and behoof of the sd William Penn (of part in the name of the whole) of the land, soyle, and premises in the said Instrument of Indenture mentioned and according to the true intent and meaning of his Royal Highness mentioned in the same.”²⁸

The two deeds of feoffment to Penn from the Duke of York were taken to New York, the seat of the Duke’s government, for recording.

John Moll wrote an account of events over the days following William Penn’s arrival.

These are to certify all whom it may concern that William Penn Esqr Proprieter and Gov. of the Provinces of Pennsylvania and the Territories thereunto belonging at his first arrival from England by the Town of New Castle upon Delaware River in the Month of October anno 1682 did send then and there one messenger ashoar to give notice to

the Commissioners of his desire to speak with them aboard (I being then left the first in Commission by Sr Edmund Andross, Governour Gen under his Royal Highness James Duke of York, and Albany &c of all his Territorys in America) did go aboard with some more of the Commissioners att which time Esqr Penn did show me two sundry Indentures or Deeds of Infeoffment from under the hand and seal of his Royal Highness granted unto him, both bearing date the 28th, day of August anno 1682 the one for the county of New Castle with twelve miles distance north and south thereunto belonging and the other beginning twelve miles below New Castle and extending South unto Cape Hen Lopen together with the mills and waters of the said River, Bay, Rivulets and the Islands thereunto belong &c underneath both which sd Indentures or Deeds of Infeoffment were added His Royal Highness letters of attorney directed unto me and Ephraim Herman deceased with full power and authority for to give in his Royal highness name unto the sd William Penn Esqr quiet and peacable possession of all what was inserted in the sd Indentures as above briefly is specified. But the sd Eph Herman happened to be gone from home so that he was not at that time aboard with me the Sd Ship I therefore did desire from Esqr Penn four and twenty hours consideration for to communicate with the sd Herman and the rest of the Commissioners about the premises, In which Compass of time we did unanimously agree to comply with his Royal Highnesses orders Whereupon by virtue of the Power given unto us by the above mentioned Letters of Attorney we did give and surrender in the name of his Royal Highness until him the sd Wiliam Penn Esq actual and peacable possession of the fort of New Castle by giveing him the key thereof to lock

upon himself alone the door which being opened by him again, we did deliver allso unto him one turf with a twigg upon it a porringer with River water and soyle in part of all what was specified in the sd Indenture or deed of Infeoffment from his Royal Highness and according to the true intent and meaning thereof. And few days after that we went to the house of Capt Edmund Cantwell at the South side of Appoquinming Creek by computation above twelve miles distance from the Town of New Castle as being part of two Lower Countys hereabove mentioned and specified in his Royal Highnesses other Indenture or Deed of Infeoffment and after we had shown unto the Commissioners of those Countys the power and orders given unto us as aforesaid we asked them if they could show us any cause why and wherefore we should not proceed to act and do there as we had done at New Castle, And finding no manner of obstruction we made then and there in his Royal Highnesses name the same manner and form of Delivery as we had done at New Castle, which acting of us was fully accepted and well approved of by Anthony Brockhold then Commander in Chief and his Council att New York as appears by their Declaration bearing date the 21st of November A 1682 from which jurisdiction we had our dependence all along ever since the Conquest until we had made the above related delivery unto Governour William Penn by virtue of his Royal Highnesses orders and commands.

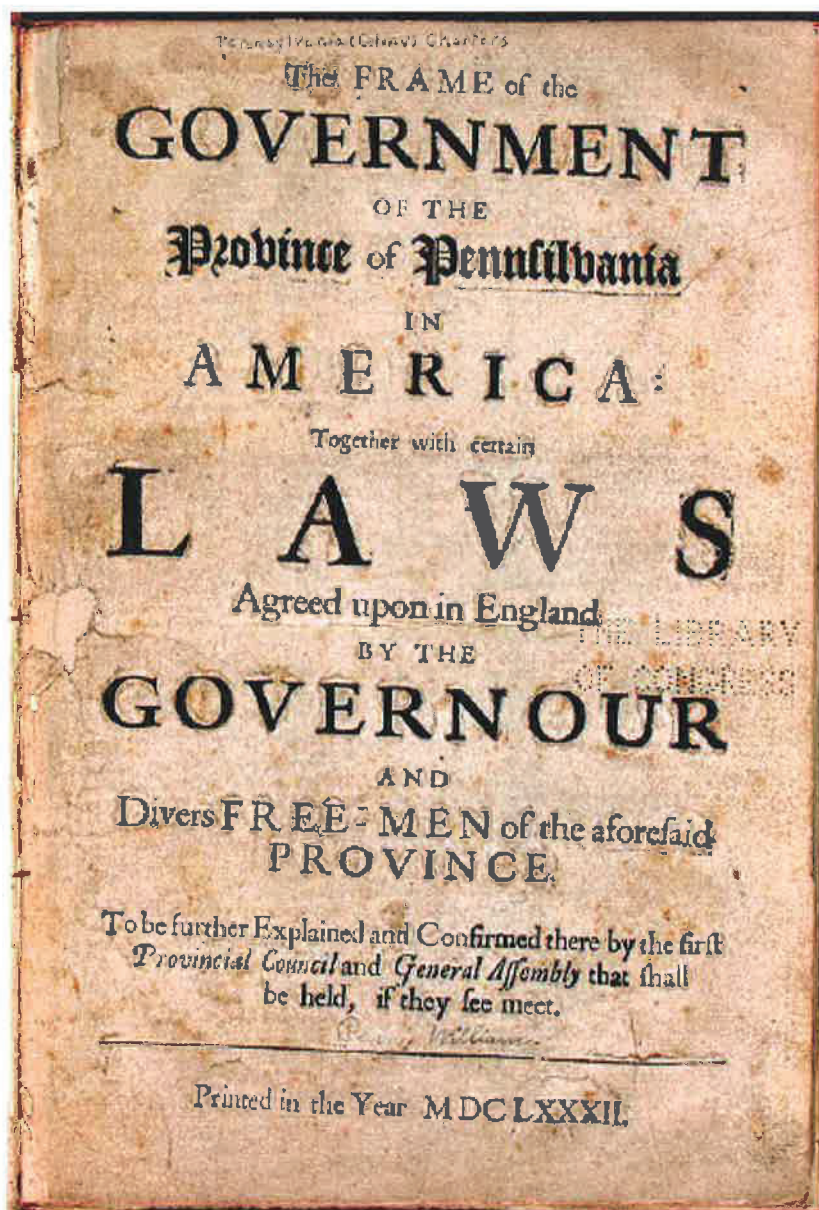
Jno Moll²⁹

ACT OF UNION

DELAWARE UNITES WITH PENNSYLVANIA

On November 2, 1682, Penn returned to New Castle for a meeting he had called with the justices from the Three Lower Counties. Because the meeting had been called on short notice, only the justices from New Castle met with Penn. Nevertheless, Penn proceeded to make an important announcement. He declared that the Three Lower Counties would have the exact same privileges as the inhabitants of Pennsylvania. He instructed them to continue to follow the Duke of York's laws on an interim basis. Penn stated that in the future, laws would be promulgated by an assembly of representatives elected by the people.

Several days after that meeting with the justices, Penn issued writs of election to the sheriffs in each of his six counties. Three of the counties were in Pennsylvania and the other three were in Delaware, which became known as the Three Lower Counties of Pennsylvania. Each of the six sheriffs was directed to convene their respective freeholders on November 20, 1682, and "elect out of themselves, seven persons of most note for wisdom, sobriety and integrity," to serve as delegates to an assembly that would meet in Chester on December 4, 1682.



Penn's Frame of Government, 1682

This document, printed in 1682, sets forth William Penn's concept of government for his new Province of Pennsylvania, soon to be joined together with the Three Lower Counties by his Act of Union (courtesy of the Library of Congress).

The writ of election was issued on November 8, 1682, one day after Penn received final recognition from the Three Lower Counties. No formal union existed at this time between the Three Lower Counties and the Province of Pennsylvania. Penn's charter and the "Laws agreed to in England" were effective only as to the Province of Pennsylvania since that charter had been issued before the two deeds of feoffment to Penn from the Duke of York.

Accordingly, no authority of any kind provided for an election in the Three Lower Counties. Nevertheless, the representatives of the Three Lower Counties had been elected and seated. Those representatives comprised one-half of the membership of the first Assembly. The first Assembly met in Chester on December 4, 1682. The initial order of business was to adopt rules of procedure. The charter and laws agreed to in England were also confirmed.

The Assembly then considered a petition from the Three Lower Counties to incorporate their territory into the Province of Pennsylvania. The petition was signed by nineteen freeholders, who were also delegates to the Assembly. There is no doubt that Penn had asked for the petition to be presented.

On December 6, 1682, the first Assembly unanimously adopted the Act of Union of the Three Lower Counties and the Province of Pennsylvania. The Act of Union annexed the Three Lower Counties to the Province of Pennsylvania. The Act of Union was taken immediately to Penn, as Governor, for his signature. The Act of Union was an effort by Penn to make his control of the Three Lower Counties impervious to future attempts by Lord Baltimore to exert any claim or authority over them.

The Act of Union was a carefully drafted statute. Perhaps Penn brought his legal training at Lincoln's Inn in London to bear upon its contents. The statute began with a detailed history of the Three Lower Counties that had been deeded to Penn by the Duke of York:

And as a beneficial and requisite addition to the territory of the said Proprietary and Governor, it hath also pleased the said James, Duke of York and Albany, c. for divers good considerations, to grant unto the said William Penn, and his heirs and assigns, all that tract of land, from twelve miles northward of New Castle, on the river Delaware, down to the forth-cape, commonly called Cape Henlope, and by the Proprietary and Governor now called Cape James, lying on the west side of the said river and bay, formerly possessed by the Dutch, and bought by them of the natives, and first surrendered upon articles of peace to the King's Lieutenant Governor, Colonel Nicholls, and a second time to Sir Edmund Andross, Lieutenant Governor to the said Duke, and hath been by him quietly possessed and enjoyed; as also the said river of Delaware, and soil thereof, and all islands therein, lately cast into three counties, called New-Castle, Jones's and Whorekills, alias New-Dale; together with all royalties, powers and jurisdictions thereunto belonging, as by two deeds of feoffment, bearing date the twenty-fourth of the sixth month called August, One Thousand Six Hundred and Eighty-two, doth more at large appear. . . .³⁰

The historical recitations in the Act of Union were very important to Penn. The Act of Union noted with particularity that the territory comprising the Three Lower Counties had been purchased from the Indians by the Dutch. Thereafter, the Dutch surrendered the Three Lower Counties, first to "the king's lieutenant governor, Colonel Nicholls" and later, after the Dutch reoccupation "to Sir Edmund Andross, lieutenant governor to the said [Duke of York]" who has "quietly possessed and enjoyed" it. The recounting of these events was intended to explain why both King Charles II's and the Duke's historic claims to the Three Lower Counties were superior to any claim by Lord Baltimore.

The next day, December 7, 1682, the first Assembly passed “the Great Law or Body of Laws of the Province of Pennsylvania.” It had sixty-one chapters. December 7 was a significant date for Delaware once again in 1787, when it became the first State to ratify the United States Constitution.

WILLIAM PENN AND LORD BALTIMORE DELAWARE OWNERSHIP DISPUTE BEGINS

William Penn met with Lord Baltimore in Maryland on December 12 and 13, 1682. Penn described his trip as a “long Journey . . . in a cold and unpleasant Season.” Lord Baltimore asked Penn about the two deeds of feoffment and two leases to Delaware that Penn had received from the Duke of York. At that first meeting, Penn indicated that he did not want to discuss his deeds or leases to Delaware. Penn said that he only wanted to negotiate with Lord Baltimore about the Pennsylvania border with northern Maryland and, in particular, wanted a border that included land on the Chesapeake Bay.

The meeting began with Penn reading a letter from King Charles II dated August 19, 1682. The letter suggested measuring the border two degrees north from Watkins Point (37° 55') at the rate of sixty miles to a degree. Lord Baltimore responded that the King's letter was in error since Lord Baltimore's 1632 Maryland Charter established its boundary line at the fortieth degree. Penn suggested that they disregard the King's letter and reach a compromise.

Penn wanted Lord Baltimore to agree to a border between

Maryland and Pennsylvania that was below the fortieth degree, as set forth in Penn's charter for Pennsylvania. Penn wanted a Pennsylvania border with access to the Chesapeake Bay that a border on the fortieth degree would not provide. However, Lord Baltimore refused to consider any borders except at the fortieth degree, as also set forth in his 1632 Charter for Maryland. One of Lord Baltimore's clerks took notes of the meeting in shorthand. The records that still exist are summaries made by Lord Baltimore. The following exchanges are excerpts from that meeting.

Wm. Pen. The King its true did command the laying out the line between us but if for a more ready way of accomodacon to us both he hath thought fitt to make other proposals I cannot tell why they may not be taken into consideracon but I shall concede and wave that letter wholly makeing this further offer. The Capes for several years have bin reputed to lye in the latitude of thirty seaven or between thirty seaven and five minutes or thereabouts and hath bin soe generally taken and approved on by all persons for some considerable space of years and by which calculation all ships and Vessels have proceeded on their Voyages before such time as either interest or prejudice could sway them on the one side or the other soe then if the Lord Baltemore please to take his comencement from the Capes which has been generally and of soe long continuance reputedly to lye in thirty seaven degrees and five minutes and from thence measure by line two degrees fifty five minutes will just reach to the fortieth degree.

Lord B. My Pattent gives me the fortieth degree of northern latitude for my northern bounds and there is noe way certaine to find that as by an observacon to be taken by a sextant of six of seaven foote radies and such an Instrument you have

belonging to Colonel Lewis Morris of New York besides your commencement by your Pattent is given at the fortieth degree of northern latitude.

Wm. Pen. Then I shall only say we will wave and wholly lay aside the King's letter at this time if the Lord Baltemore will begin at thirty seaven and a halfe instead of thirty eight he will indeed have more than was designed for him I therefore offer as a medium between us the more easily to accommodate this matter let the Lord Baltemore first begin at the antient [ancient] and generally reputed and knowne place of thirty seaven degrees and five minutes and thence with a direct line to forty what falls then within his bounds much good may it doe him I am contented and doubt not but he is soe worthy and soe much a Gentleman as not to endeavor to deprive me of anything shall appeare to be within by Grant. This I say I offer onely to lett the Baltemore know that altho' I am sensible the King's letter is grounded upon strong presumption and sound circumstance yet I am willing to wave that and accommodate the business between us a more equal way as I conceive viz. to commence at the common, generall and soe long reputed know place before either the Lord Baltemore or myselfe could challenge any interest in these parts of the world.

Lord B. It is other discourse that I expected to have heard from you at this time and well hoped I should have bin soe far favored by you as to have received some small advice from you before you had soe far proceeded upon that part of the Countrey which has bin always reputed and knowne to be justly claimed by me but to wave that I desire to be informed by you whither you have purchased the Dukes pretentions to Delaware.

Wm. Pen. Upon tearmes of the moiety of halfe the revenues thereof to be revenues thereof to be reserved for himselfe I hold it of his gift but this leads to other discourse I would willingly proceed first to the ascertainment of the bounds between us.

Lord B. The certaine bounds betwixt us must be the fortieth degree of northern latitude as I have already shewn you by my grant.

Wm. Pen. And to find out that I propose in my judgement the most equall way that I can be which is to begin at the Capes a place soe generally and soe long knowne and reputed to lye within the latitude of thirty seaven and five minutes by any observacon yet taken and soe from thence to measure two degrees fifty five minutes which will just make the fortieth degree.³¹

Lord Baltimore would not yield from his insistence that the northern border for Maryland with Pennsylvania was at the fortieth degree. Penn ended the conference with Lord Baltimore abruptly, ostensibly to attend a Quaker meeting. He later described his initial discussions with Lord Baltimore as “uneasy.”

On December 23, 1682, William Penn changed the name of Deale County to Sussex, and the name of St. Jones County to Kent. The name New Castle County was retained. Collectively, they became known as the Three Lower Counties of Pennsylvania.

On December 25, 1682, Penn sent a letter appointing William Darvall, Luke Watson, Norton Claypole, John Roades, Edward Southrin, Robert Hart, and John Kyphaven “to be Justices of the Peace in the Jurisdiction of the County of the Whorekills which my will and pleasure is shall from hence forth be Called by the name of Sussex” Changing the name of the town on the Whorekill was not mentioned in the letter. William

Penn is, however, credited with the changing of the name of the town to Lewes. The records of Sussex County reflect that the justices met on January 9, 1683, "At Lewes for the County of Sussex."

The tension between Penn and Lord Baltimore increased as each of them turned their focus to Delaware. On December 29, 1682, Penn publicly declared, "I have annexed the Lower counties (lately obtained) to the province." Lord Baltimore decided to use self-help in bolstering his own claims to the Three Lower Counties.

In March 1683, Lord Baltimore directed his cousin, Captain George Talbot to establish settlers on land along the west side of the Delaware River and the Delaware Bay up to the fortieth degree, especially "those parts of the Whore Kills." As an incentive, "persons of British or Irish descent" were offered up to five hundred acres on extremely reasonable terms. Talbot's efforts included establishing a small fort on the Christina River in what is now western New Castle County.

As a Quaker, Penn was opposed to violence. Nevertheless, he was determined to keep Delaware. In response to the aggression by Lord Baltimore in establishing forts and settlers in the Three Lower Counties, Penn sent agents to Thomas Dongan, the Governor of New York. Penn sought Dongan's help as the Duke of York's agent, since Penn's title to Delaware came from the two deeds of feoffment executed by the Duke.

Governor Dongan asked Lord Baltimore and Penn to abandon any new forts or buildings that either had established on the lands in dispute. Governor Dongan's peaceful overtures were disregarded by Lord Baltimore. In fact, the fort established by Talbot on the Christina River remained occupied by Maryland until 1687. As part of his Quaker penchant for non-violence, William Penn directed his magistrates to take legal action against any settlers in the Three Lower Counties who cooperated with Lord Baltimore. However, Penn also wrote, "I come a man of peace yet fear not war."

DUKE OF YORK'S DELAWARE PATENT

At the same time that Penn was exercising his possessory rights to the Three Lower Counties, he sought to strengthen his legal claims by having King Charles II formally recognize the Duke of York's ownership of Delaware. The two deeds of feoffment from the Duke of York to Penn each included a covenant for further assurances from the Duke of York of Penn's legal rights to the Three Lower Counties at any time within seven years:

The duke for himself, his heirs and assigns, then covenants and grants with and to Penn, his heirs and assigns, that he or they will, any time within seven years from the date of the deed, 'do, make, execute or cause to be made, done, executed, all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and assuring the said town and circle of twelve miles of land about the same, and islands and all other the premises with the appurtenances' to Penn in fee. . . .³²

Because of those assurances, Penn was the moving force behind the 1683 effort to obtain a specific grant from King Charles II to the Duke of York for the land known as Delaware,

from the Twelve Mile Circle south to Cape Henlopen.

On March 22, 1683, letters patent under the Great Seal of England were issued to the Duke of York. In those documents, King Charles II granted to his brother James, Duke of York, all of the land within the Twelve Mile Circle and all of the land below it to Cape Henlopen. These were the same lands and waters described in the two August 24, 1682 deeds of feoffment from the Duke of York to William Penn. The following is a summary of the description:

All that the Towne of Newcastle otherwise called Delaware and the fort therein or thereunto belonging scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of twelve miles about the said Towne And all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen. Powers of government and other proprietary and seigniorial rights were granted to the Duke along with ownership of the fee.³³

Since the Duke of York obtained this grant at William Penn's request and for Penn's benefit, the original March 23, 1683 documents were given to Penn by the Duke of York.

When Penn's advisors reviewed the March 22, 1683 grant, they requested modifications to the description of the boundaries. On April 13, 1683, the Attorney General of England approved a new grant with the changes requested by Penn to replace the earlier one. The boundaries in the replacement grant included all of Delaware and part of the land in Pennsylvania

that was claimed by Lord Baltimore. The northern boundary was described as the Schuylkill and there was no reference to the Twelve Mile Circle. With that revision, it appears that Penn's legal advisors were preparing to defend against Lord Baltimore's claim to land more than twelve miles to the north of New Castle. The southern boundary was described as "Cape Henlopen now called Cape James being the South part of Asia Warmet [Assawoman] Inlet." With this change, Penn was including not only Lewes, but a significant amount of territory to the south.

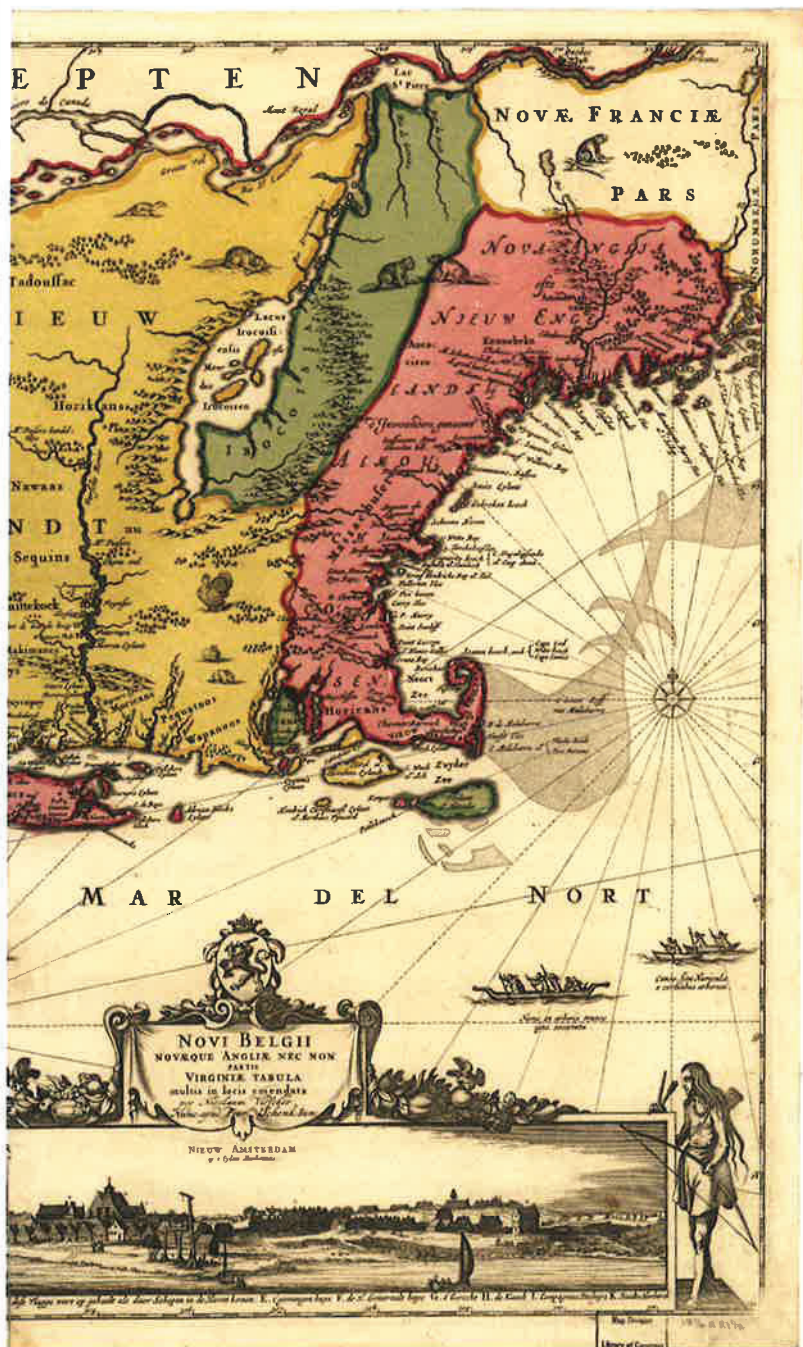
In support of the revision to the southern boundary, Penn relied upon an early Dutch map by Nicholas Visscher. That map mistakenly depicted the location of Cape Henlopen at what is now Fenwick Island. Since subsequent maps properly showed the location of Cape Henlopen at the mouth of the Delaware Bay, the Visscher map was important for Penn's claim to Lewes and the rest of Sussex County.

The modifications proposed by Penn were intended to make the King's grant to the Duke of York correspond with the Duke's deeds of feoffment to William Penn for the Three Lower Counties. However, before the substitute grant could be approved, Lord Baltimore injected himself into the process. Lord Baltimore's agent, Mr. Burke, asked that no action be taken on the replacement grant until Lord Baltimore had an opportunity to come to England and assert his claim to those lands. Lord Baltimore objected to the March 23, 1683, grant of the Three Lower Counties to the Duke of York by King Charles II, asserting that the territory had already been conveyed to his ancestors by King Charles I.



THE BASIS FOR PENN'S CLAIMS

Reproduced on the following two pages is Nicolas Visscher's 1655 map, entitled "Novi Belgii Novæque Angliæ: nec non partis Virginie tabula multis in locis emendata," which proved crucial in William Penn's lengthy litigation with Lord Baltimore, from an original in the Library of Congress.



Penn's lengthy litigation against Lord Baltimore because it supported his claim as to the location of Cape Henlopen. Reproduced courtesy of the Library of Congress.

WILLIAM PENN AND LORD BALTIMORE DELAWARE OWNERSHIP DISPUTE CONTINUES

In April 1683, William Penn and Deputy Governor Markham visited the courts in Kent and Sussex Counties. The records for a court session in Lewes on April 27-28, 1683, under the word "present" lists: "Will Penn, The Proprietary and Governor, William Markham, Deputy Governor." The names of six justices were also listed. The records also reflect that at least two cases were heard and several proclamations by Penn were docketed.

These were the publicly recorded aspects of Penn's visit. However, Penn stayed in Lewes for another week after the court session was adjourned. This has been called his "secret visit to Lewes" because Penn used that time to gather information about the 1631 Dutch settlement in Lewes that could be used in his legal dispute with Lord Baltimore.

William Penn and Lord Baltimore met again in May 1683. This meeting took place in New Castle. Lord Baltimore wanted their conference to be private. Although Penn agreed, he

asked for the negotiations to be recorded in writing. There was immediate acrimony between them. Lord Baltimore insisted that the Three Lower Counties were part of Maryland and that the Duke of York's grant of that territory to Penn was invalid.

Penn knew that the 1632 charter granted to Lord Baltimore by King Charles I included the territory of the Three Lower Counties. However, Penn also knew that there was an important provision that excluded any land that had been cultivated and inhabited by people other than Indians before the date of the grant.

William Penn reminded Lord Baltimore of this exception in the 1632 grant from King Charles I. Penn asserted that Delaware was excluded from the 1632 grant to Lord Baltimore's ancestors because Lewes had been settled by the Dutch before 1632. This was important because Penn's claim to Delaware was from the Duke of York, based upon the Duke of York's conquest of the Dutch in 1664. If Penn could establish that the Dutch had settled in Delaware prior to 1632, it would reinforce Penn's position against Lord Baltimore. Penn argued that Delaware was excluded from the 1632 Maryland Charter because the Dutch settled Lewes in 1631 and because the Duke of York acquired Delaware by conquering the original pre-1632 Dutch settlers.

Lord Baltimore opposed Penn's arguments. He denied that there was any Dutch settlement in Delaware prior to 1632. The two men were also unable to resolve their differences about Penn's desire to have a border with Maryland that provided access to the Chesapeake Bay and Lord Baltimore's claim to the Three Lower Counties.

WILLIAM PENN V. LORD BALTIMORE ENGLISH LITIGATION COMMENCES

Lord Baltimore decided to assert his claim to the Three Lower Counties in England. On February 8, 1683, Lord Baltimore sent a letter to Lord Halifax, the Lord Privy Seal of the Privy Council, and requested a hearing on “my Right to Delaware.” Lord Baltimore’s letter was presented to the Lords of the Privy Council on April 17, 1683. Present on that date were Lord Keeper, Lord President, Lord Privy Seal, Earl of Craven, Lord Viscount Fauconberg, Earl of Rochester, Bishop of London, and Mr. Secretary Jenkins.

Two documents were enclosed with Lord Baltimore’s letter. The first document was a written narrative of his meeting with William Penn. Lord Baltimore described it as “the sum and substance” of his meeting with Penn at New Castle in December 1682. This was undoubtedly a transcript produced from the shorthand notes taken by Lord Baltimore’s clerk. The second document was one of the letters that Penn had written directing the residents on the Maryland-Pennsylvania border not to pay taxes or assessments to Maryland until the exact boundaries

were resolved. In response to Penn's letter, it was reported that "the Inhabitants of Baltimore and Cecil County, having refused to pay their Levys, the Lord Baltimore and his Council had immediately issued out Orders to the Military Officers of those Counties, to assist their respective Sheriffs in the due Execution of their Office, which had been, with great Difficulty, effected."

Lord Baltimore also wrote that "if my unkind Neighbor William Penn, or his Agents are able to make out, that there were Dutch seated at Delaware afore my Pattent for Maryland was granted (wch will be some what hard to prove) I will then make it plainely appeare that such Dutch were usurpers and were utterly disowned by the States of Holland."³⁴

The Privy Council met again on April 27, 1683. Lord Baltimore's attorney was told that the concerns expressed in the February 8 letter should be put in the form of a formal petition to his Majesty in Council (Privy Council): "if he has any matter of complaint he may represent the same by petition to His Majesty and Council."³⁵ As directed, Richard Burke filed a petition on behalf of Lord Baltimore, alleging that the area of land (the Three Lower Counties) claimed by William Penn was within the boundaries of the 1632 Maryland Charter and that Lord Baltimore has always claimed that area.

The Privy Council reconvened on May 30, 1683. Attorneys for Lord Baltimore, William Penn, and his Royal Highness, the Duke of York, were present. William Penn was represented by Mr. Ford. His Royal Highness, the Duke of York, was represented by the Solicitor-General, Sir Edward Herbert. Lord Baltimore was represented by Richard Burke.

William Penn had the greatest interest in the outcome of the proceedings. The Duke of York's interest in the litigation was indirect since he had already deeded his interests in Delaware to William Penn in 1682. Penn welcomed the Duke of York's support, however, since he was the brother of King Charles II and heir to the English throne. As we shall see, by the time the litigation between Penn and Lord Baltimore concluded, the

Duke of York himself was the incumbent monarch, King James II.

At the May 30 meeting, in response to Lord Baltimore's petition, the attorneys for the Duke of York and William Penn submitted:

[T]hat this Territory was never possessed by my Lord Baltimore, but originally inhabited by Dutch and Swedes, and that the Grant to my Lord Baltimore was only of Lands not inhabited by Christians; so that, a Surrender having been made of the Country to his Majesty in 1664, the Lord Baltimore can have no rightful Claim thereunto; and that it having been, ever since, in the Possession of his Royal Highness, the Lord Baltimore can receive no Injury by the Grant that is desired. Upon the whole Matter, Mr. Penn's Agent undertaking to prove, within a short time, that this Country was possessed by the Dutch and Swedes in the Year 1609, or at least, before the Date of the Lord Baltimore's Patent.³⁶

The Privy Council met again the next day, May 31, with the attorneys for the Duke of York, Lord Baltimore, and Penn. It was ordered that the entire dispute be referred to a Committee of the Privy Council known as the Committee for Trade and Foreign Plantations. The Committee was comprised of Lords who were members of the Privy Council. The Privy Council directed that Committee to conduct a hearing and file a Report with their findings of fact and conclusions. The Privy Council stated that his Majesty would decide what to do next after the Report was received.

On June 12, 1683, the attorneys for his Royal Highness, the Duke of York, Lord Baltimore, and William Penn met with the Committee for Trade and Foreign Plantations. It was agreed that the question to be answered was whether, prior to 1632, the Dutch had settled and possessed the territory (Delaware)

claimed by William Penn, pursuant to his conveyances from the Duke of York. The Committee scheduled a hearing for later in the year.

On August 14, 1683, William Penn wrote a letter to the Committee for Trade and Foreign Plantations. Since Lord Baltimore's February 8, 1683 letter was already on record, Penn wanted to present his side of the story. What follows is a portion of Penn's letter:

Tho' it be a Duty I humbly own, to inform the Lords of the Committee of Plantations of what concerns his Majesty's interest in the Success of this Province, I thought myself equally obliged to be discreet and cautious in doing it: To write when there was need, and not trouble Persons, of their Honour and Business, with Things trivial, at least raw and unfinished for their View. This, hitherto, put me by, giving any Account of the State of our Affairs; To say nothing of the mighty Difficulties I have laboured under, in the Settlement of six and twenty Sail of People, to Content, within the Space of one Year, which makes my Case singular, and excusable above any other of the King's Plantations. But, because my Agent has informed me, that the Proprietor of Maryland, has been early in his account of our Conference, about the fixing of our Bounds, and made a Narrative of my Affairs, as well before, as at that Time, a little to my Disadvantage, and the rather, because my Silence might be interpreted Neglect, I am necessitated to make some Defence for myself, which, as it will not be hard to make, so I hope it will be received as just. I humbly say then first, that it seemed to me improper to trouble the Lords with my Transactions with this Proprietor, till we were come to some Result; which we were not, for we parted till Spring, and even then, were but to meet

about the Methods of our Proceeding. Next, this Narrative was taken, by this Lord's Order, without my Consent or Knowledge, in a Corner of a Room, by one of his own Attendants. And lastly when, upon Notice given of this Usage, I complained to him. he promised, upon his Word and Honour it should go no further, and that it was for his own Satisfaction he did it. I told him, that mitigated the Thing a little; but, if he should divulge it, before I saw and agreed the Copy, he must pardon me if I lookt upon it as a most unfair Practice: what that Lord has done, and what to call it, I leave to my Betters, but the Surprize and Indigestion of the whole, will I hope excuse me of Neglect or Disrespect; for tho' I am inceremonious, I would by no means act the rude or undutiful. This said, I humbly beg that I may give a brief Narrative of the Matter, as it then past, since has been, and now stands, without the Weakness and Tautology his Relation makes me guilty of.

So soon as I arrived, which was on the 24th of October last, I immediately dispatcht two Persons to the Lord Baltimore, Proprietary of Maryland, with my Respect, to ask of his Health, offer kind Neighbourhood, and agree a Time of meeting, the better to establish it. While they were gone in this Errand, I went to New-York, that I might pay my Duty to the Duke, in the Visit of his Government and Colony; at my Return, which was towards the End of November, I found the Messengers I had sent to Maryland newly arrived, and the Time fixed being the 19th of December, I prepared myself, in a few Days, for that Province; the 11th of that Month, I came to West River, where I met the Proprietor, attended, suitable to his Character; who took that Occasion, by his Civilities, to shew me the greatness of his Power; the next Day, we had a Conference, about

our Business of the Bounds, both at the same Table, with our respective Members of Council. The first, Thing I did, was, to present the King's Letter, which consisted of two Parts, one, that the Lord Baltimore had but two Degrees, and the other, that, beginning at Watkins's Point, he should admeasure his said Degrees, at 60 miles to a Degree. This, being read by him, first privately, then publickly, he told me that the King was greatly mistaken, and that he would not leave his Patent to follow the King's Letter, nor could a Letter void his Patent, and by that he would stand. This was the Substance of what he said from first to last, during the whole Conference. To this I answered, that the King might be misinformed, rather than mistaken, and that I was afraid the Mistake would fall of his Side; for, though his Patent begins at Watkins's Point, and goes to the 40th Degree of North Latitude, yet, it presumed that to lie in thirty-eight, else Virginia would be wronged, that should extend to that Degree; however, this I assured him, that when I petitioned the King for five Degrees North Latitude, and that Petition was referred to the Lords of the Committee of Plantations, at that time, it was urged by some present, that the Lord Baltimore had but two Degrees, upon which the Lord President turning his Head to me, at whose Chair I stood, said, Mr. Penn, will not three Degrees serve your turn? I answered, I submit both the what, and how, to the Honourable Board. To this, his Uncle and Chancellor returned, that, to convince me, his Father's Grant was not by Degrees, he had more of Virginia given him, but, being planted, and the Grant intending only Land not planted or possess but of Savages, Natives, he left it out, that it might not forfeit the rest, of which the Lord Baltimore takes no notice in his Narrative, that I remember; but, by that

Answer, he can pretend nothing to Delaware, that was, at and before, the passing of that Patent, bought and planted by the Dutch, and so could not be given; but, if it were, it was forfeited, for not reducing it during twenty Years, under the English Sovereignty, of which he held it; but was at last reduced by the King, and therefore, his to give as he please it.³⁷

Lord Baltimore asked the Committee to postpone the hearing from the end of 1683 so he could travel to England to present his case. The Committee granted Lord Baltimore's request for a continuance.

WILLIAM PENN GATHERS EVIDENCE

In the meantime, William Penn went to New York to secure proof that the Dutch had settled in Delaware prior to 1632. In July 1683, Penn wrote "Finding this place [Delaware] necessary to my Province [Pennsylvania], . . . I endeavored to gett it, and have it, and will keep it if I can." During the course of the ownership contest with Lord Baltimore that followed, Penn once wrote that it was "not the love or need of the land which interested him but the water," which would be his gateway to the sea.

While Penn was in New York, he met with Governor Thomas Dongan, who was sympathetic to Penn's position in the dispute with Lord Baltimore over the Three Lower Counties. Since New York had been part of New Netherland, Penn asked for a search of the records of the Dutch West India Company to find evidence of early settlements in Delaware prior to 1632. Penn's "secret" visit to Lewes convinced him that there should be some documentation of the 1631 Lewes settlement.

When Nicholas Bayard of New York heard about Penn's efforts, he wrote to him. "I have made it my business to speak with several of the old standers in the country, but the most

having been private persons and without public employ, can likewise give no account what right the Dutch formerly had in your parts of Delaware, only that they had possession and built forts there long before the year 1638; of which I can procure several testimonies if you desire the same."³⁸ Penn accepted Bayard's offer with great enthusiasm.

The search of the Dutch records in New York resulted in a spectacular discovery from Penn's point of view. In a letter dated April 16, 1684, from Nicholas Bayard, Penn was informed that the New York records included the deed of 1629-30 from the Indians in Delaware to the Dutch. The Indian deed reflected that the Dutch had purchased the area between the true and false capes, in other words the Lewes area and land to the south. Bayard was also able to obtain deposition testimony that the Dutch had actually settled in Lewes before 1632. The depositions arranged for by Bayard and transcripts of the 1629 Indian deed from the Dutch records in New York were gathered as evidence for Penn by his agent, Thomas Lloyd.

PENN LEAVES EVIDENCE BEHIND

In 1684, Lord Baltimore sailed for England. When William Penn learned that Lord Baltimore was going to England to assert his legal claim to the Three Lower Counties, Penn wrote to his patron, the Duke of York, "I am following him as fast as I can. . . I add no more, but to pray, that a perfect stop be put to all his proceedings till I come."³⁹ On September 30, 1684, the attorney for the Duke of York asked that any hearing be postponed until William Penn arrived in England. That request was granted.

On August 12, 1684, Penn departed for London on the ship known as the *Endeavor*. Penn's voyage to England took forty-six days. Penn arrived in England on October 24, 1684—about three months after Lord Baltimore. Penn had been in America for twenty-one months.

When Penn arrived in London, he was delighted to be reunited with his wife and family. Penn was devastated, however, when he unpacked his belongings. He sent a distraught letter to

Thomas Lloyd which described his dilemma:

comeing to search & sett to rights my papers, to my astonishment I finde not one of yr york ones, no affidavit before ye mayor about seating delaware River & Bay, the ground of my comeing & strength of all my cause the Council fixing the point there. The Duke has putt it off till December, & if I can gett it off till March, 'twill be all I can do. where fore instantly away to york, & gett affidavits of the 3 yt N. Byars says can speak to yt matter, both before the Mayor & the Governour under the seal of town & province, the Governour to be sure, for yt will be most authentick. all depends on this Philip Lemain can never while he lives repaire me this wrong by his supine neglect. so often did I speak to thee where are ye York papers, & to him, be sure I have ye York Papers yt T. Lloyd has putt up & he said they were & not a scrap of them to be seen. this is a trouble beyond measure to me.⁴⁰

Philip Theodore Lemain was William Penn's private secretary.

On the same day that he wrote to Lloyd, Penn also sent a letter to his steward in Pennsylvania:

Phil Lemain has most carelessly left behind ye york papers yt T. Lloyd brought & should have come as the ground & very strength of my coming so yt I am now here with my finger in my mouth. he could not have done me a worse injury nor balti[more] a greater service, if he had had ye bribe of 10000 to do it. wherefore lett him be quickned to send them by the first ship, that comes out of Maryland or Virginia; and lett him goe express away with it & search the first ship, & endorse on ye letter *to me for his Royall highness service speed speed & care* & then lett Tho:

Lloyd step to york & gett fresh affidavits of ye 3 men yt can swear the Dtuch possession of River & bay before Baltimore's Patent, in ye Governrs presence & under the seal of ye Province.⁴¹

While Penn was on his voyage to England, Lord Baltimore attempted to have the Lords of Trade hold a hearing on his claim to Delaware. However, an attorney for the Duke of York intervened on Penn's behalf and asked for a continuance on the basis that "the proofs in this case depend chiefly upon Mr. Pen's coming into England, where he is expected soon." The Lords of Trade agreed to put a hearing on Lord Baltimore's claim for two months. The hearing was postponed again, after Penn arrived in England and explained that he had left his evidence in America. The Lords of Trade scheduled a hearing for December 9, 1684. That hearing was postponed until 1685 at the request of Lord Baltimore. This gave Penn the time he needed to secure the evidence that he had left behind in America.

ENGLISH TRIAL BEGINS PENN'S EVIDENCE PRESENTED

On February 6, 1685, King Charles II died unexpectedly. This meant that his brother James, the Duke of York ascended to the throne, as King James II. Therefore, the issue to be decided by the Privy Council's Committee for Trade and Foreign Plantations took on an interesting perspective. The ultimate question to be decided was whether Lord Baltimore or King James II, as the incumbent monarch, owned the Three Lower Counties that he, while the Duke of York, had already deeded to William Penn in 1682.

On September 2, 1685, the long awaited hearing commenced before the Lords of the Committee for Trade and Foreign Plantations in their council chamber at Whitehall. Both William Penn and Lord Baltimore were in attendance and represented by counsel. The success of Penn's arguments depended upon the *hactenus inculta* clause in the 1632 Maryland Charter from King Charles I to Lord Baltimore.

The first issue that Penn's attorney addressed in presenting

Penn's case was whether the words "*hactenus inculta*," as used in Lord Baltimore's 1632 Maryland Charter, were only words of description or were a condition and limitation on the grant to Lord Baltimore. The Committee for Trade and Foreign Plantations was familiar with the early English colonial charters that had been issued for other territories in America and knew that each of those early charters excepted lands previously inhabited by or in possession of Christian peoples. For example, a royal charter issued to Sir Walter Raleigh in 1584 granted him the right to colonize "such remote, heathen and barbarous lands, countries, and territories, not actually possessed by any Christian Prince, nor inhabited by Christian People." The 1606 Virginia Charter granted lands "either appertaining unto us or which are not actually possessed by any *Christian* Prince or People." The 1620 New England Charter provided that "forasmuch as We have been certainly given to understand . . . that there is noe other the Subjects of any Christian King or State, by any Authority from their Soveraignes, Lords, or Princes, actually in Possession of any of the said Lands or Precincts, whereby any Right, Claim, Interest, or Title, may, might, or ought by that meanes accrue, belong, or appertaine unto them, or any of them . . . Wee therefore . . . have . . . graunted." Lastly, the 1629 Massachusetts Bay Charter, which was the last one granted before Lord Baltimore's 1632 Maryland Charter, stated: "PROVIDED always, that yf the said Landes Islandes, or any other the Premisses herein before menconed, and by this presents, intended and meant to be graunted, were at the tyme of the graunting of the said former Letters patents, . . . actuallie possessed or inhabited by any other Christian Prince or State. . . . That then this present Graunt shall not extend to any such partes or parcells thereof, soe formerly inhabited, . . . but as to those partes or parcells soe possessed or inhabited by such Christian Prince or State, . . . shal be utterlie voyd, theis presents or any Thing therein conteyned to the contrarie notwithstanding."⁴²

Using these other early charters as precedents, Penn's attorney could argue persuasively that the words *hactenus*

inculta in the preamble of the 1632 Maryland Charter were intended to be terms of condition and limitation. Based upon that argument, Penn's attorney contended that Lord Baltimore's charter rights were preempted by the Dutch settlement at Swanendael (Lewes) in 1631 prior to the granting of the 1632 Maryland Charter. According to the charter granted by King Charles I to Lord Baltimore in 1632, the Three Lower Counties lay within the territory of Lord Baltimore's grant, provided it had not been cultivated and occupied by people other than Indians. William Penn's attorney continued his presentation by stating they would prove that the Dutch owned and occupied the Three Lower Counties (Delaware) prior to the 1632 grant of Maryland to Lord Baltimore.

Since the territory comprising the Three Lower Counties was acquired by William Penn from the Duke of York, who held it by right of conquest from the Dutch, it was pertinent to know what lands the Dutch purchased from the Indians prior to 1632. Records in New York showed that on July 15, 1629, Dutch authorities purchased from three Indian chiefs, whose town was "scituate on the South Corner of the Bay of the South River [Delaware]," certain lands "on the south side of the said Bay, called by us the Bay of the South River, stretching, in length, from Cape Hinloop, to the mouth of the said South River, about eight large miles [leagues]."⁴³ Penn's attorney introduced this evidence to demonstrate that Cape Henlopen was eight leagues south of the mouth of the bay, and why all onetime Dutch territory should be contained in the Duke of York's 1682 grant to William Penn.

William Penn's attorney also introduced evidence from the New York records of the 1629 deed to the Dutch from the Indians living near Lewes. The deed reflected that in 1629, the Dutch purchased from the Indians the area between the true and false capes, meaning that the Dutch purchased land around Lewes and to the south because, at the time, the Dutch thought that was the location of Cape Henlopen. Only later did the mistaken designation of Cape Henlopen become known as the false cape.

After establishing the Dutch ownership in 1629, Penn's attorney introduced several sworn depositions into evidence to prove that Lewes was not only owned but also occupied by the Dutch prior to 1632. Those depositions related to the original Dutch exploratory visits to the Delaware River and Bay area and to the 1631 settlement at Lewes. These depositions, from three elderly New Yorkers, were obtained for Penn by Thomas Lloyd in 1685 with the assistance of Nicholas Bayard.

The original depositions are still in existence. Each is numbered as an exhibit in the order of its presentation to the Committee for Trade and Foreign Plantations and each deposition is endorsed to show that it is an original. The following depositions were used by Penn to establish the settlement at Lewes in 1631.

Original No. 2

New York February the 14th 1684/5

The Deposition of Catolina Trico aged fourscore years or thereabouts taken before the Right Honorable Coll: Thomas Dongan, Lieutenant, & Governor, under his Royall Highss, James Duke of York, & Albany & of New York & its dependencies in America, who saith, & declares in the presence of god, as followith.

that, she came to this province either in the year one thousand six hundred & twenty three, or twenty four to the best of her remembrance, &, that, four women came along with her in the same ship; in wch ship the Governor Hiran Jorison⁴⁴ came also over, which four women were married at sea; & that they & their husbands stayd about three weeks at this place; & then they with eight Seamen got[] with in a Vessell by order of the Dutch Governor to Delaware river, & there settled, this I certifie under my hand, & the seale of this province.

[This document bears the Great Seal of New York, and is endorsed with William Penn's initials and by various other hands. In Thomas Lloyd's writing are the words "The deposition of Cattonlena Tico," and in another hand "of ye Dutch Settlement on Delaware 1623 or 1624."]⁴⁵

Original No. 4

Pieter Lourenson Van Ysvestryn about sixty eight years deposeth and Saith; That in the Yeare of Lord God one thousand six hundred and thirty, this deponant made his first voyage from New Yorke, then called New Amsterdam, to Dellowarre Baay, and att this deponants arrival' there, the Dutch West India Companie had already seated sd: Dellowarre, in two severrall places, that is to say in the hoorekill on the West side of Dellowarre bay, where the sd West India Companie then had a Commander whose name was Gillis, together with 17 or 18 men more, and had built there a great dwelling house of Yellow hollande brick, together with a kooke howse alsoo of brick; and the other settlement was made on the Eastside of Dellowarre, at a place called the Arwamus, where they had erected a fort called Nassau, and in it about 13 or 14 men, in which condition this deponant left the sd places, and departed again for New Yorke in the begining of the sd yeare a° 1623. But not long after in the same yeare, this deponant being in the Service or employ of the West India Companie, made his second voyage towarde sd Hoorekill, in order to bring there for the sd Companie, five men and two horses, but being at Sea, another sloop of the West India Companie met the sloop where this deponant was in; and forewarned them not to go to sd Hoorekill, by reason al the Christians where cut of there' by the Indians, whereuppon they did not proceed, but returned bake againe for New Yorke,

and further saith not.

The marke of	Jurat XXIIII die February
Peter X Lourensen	1682 ⁴⁶
Van Yselfteyn	Wm Beekman
	Deputy Mayr

[Here follows a deposition by Edward Antill, dated November 7, 1684, that the above signature of William Beekman is authentic. On the reverse are several endorsements, including in Thomas Lloyd's hand, "The Deposition of Peter Lawrenison before Beekman Deputy Mayor," and in another writing, "To prove that ye hoorkill in Delaware Bay was settled by the Dutch before ye year 1630. 24 feb. 82."]⁴⁷

Original No. 5

Peter Lowrensen aged 67 yeares being deposed Saith that he came into this Province a Servant to the West India Company in the yeare 1628, and in the yeare 1630 by Order of the West India Company hee with 7 more were Sent in a Sloop with hoy Sayle to Delloware where the Company had a Trading house with 10 or 12 Servants belonging to it which the Deponant himselfe did see there Setled and he further Saith that at his Returne from Delloware River the said vessel' Stopt at the hoorekill where the deponant did also See a Settlement of a Brikhhouse belonging to the West India Company; and the deponant further Saith that uppon an Island neare the falls of that River and neare the west side thereof the said Company some 3 or 4 years afore had a Trading house where there were 3 or 4 familyes of Waalloons, the Place of there Settlement he saw, and that they had been Seated there, he was Informed by Some of the Said Waalloons themselves when they were returned from thence; and Further this deponant Saith not.

This deposition was Taken uppon oath before

mee, which I do Certify under the Seale of the Province this 24th of March A^o 1684/5 In N: Yorke.⁴⁸

Tho: Dongan⁴⁹

Original No. 6

The deposition of Arirn Dirksen Horn, aged about sixty five years, being deposed saith;

That he came in this Country of New Yorke formerly called the New Netherlands in the yeare one thousand six hundred & thirty—the 24th of May, with the Shipp Unity, John Brown Commander; and hath eversince continued here in this Country; And saith further that at the said time of his arrival here, this depont. heard and was informed by persons then arriving here from dellowarre River, that the sd. River was settled by the dutch West India Company, who had sent a parcel of men there in order to whale fishing; and this deponant saith further that some short time after, to his best remembrance it was about one yeare, or one yeare & a halfe after, news came here at New Yorke from dellowarre; that all the sd people in dellowarre where cut of by the Indians; And further this deponant saith nott.

Deposed by the said Aron Dirkson Horn before me ye 16th March 1684/5

Tho: Dongan

[This document bears the Great Seal of New York, and is endorsed with William Penn's initials and by various other hands. In Thomas Lloyd's writing are the words, "Affidavit from N. york agst Ld Balt. pretentions." In another hand are the words, "proving ye Dutch Settlemt on Delaware river befor 1630."]⁵⁰

Two additional depositions were also included in the

documentary evidence assembled by Penn. These depositions are each endorsed “WP” and described as a “Sweeds Certificate.”⁵¹ The first deposition states as follows:

These are to certifie whom it may concern,
That we ye Ancient Swedes, planted upon the River Delaware in America, do declare, That the First of our Nation, that came & Planted in this River & the Creeks thereunto belonging, did find the Dutch possest of ye said River, and that the Lord Baltimore in those dates made no Pretentions thereunto, and that since he had his Patent⁵² granted to him by his Majesty Charles ye First King of Great Britain, he hath never made any Claim to any part of the Land upon this River, that we know of, we are sure he hath made none to any that was, or is in the Swedes Possession from Christina Creek to ye Falls of the said River Delaware. And we do further certifie, that the Swedes did Anciently purchase of ye Natives the Lands lying from ye said Christina Creek to neer ye Falls of ye River Delaware & in Obedience to his Maj:[es]tys Letters Patents⁵³ & his declaration together with his Royal Hig:[h]n[es]s's release,⁵⁴ we have freely submitted our selves to William Penn Esq:[ui]r[e] as our Rightfull Proprietary & Govern:[ou]r under ye Kings Maj:[es]ty & do Joyfully so recognize & acknowledge[e] him, promising Faith & Allegiance to ye King of great Britain & his Successors as our Soveaign & Fideility & Obedience to our said Proprietary & Govern:[ou]r his Heirs & Assignes under ye King, which we are resolved by the help of God to maintaine to ye utmost of our Power. Signed by us underwritten, who have been here about Fifty Years, on the behalf of our selves & ye rest of ye Ancient Planters, yet Living, of ye Sweedish Nation, on this West side of ye River Delaware, as Wicoco⁵⁵ ye 11th day of ye Month called January 1683.⁵⁶

The second deposition is similar but more detailed. Specifically with regard to Swedish relations with the Indians, and the concerns of the Swedes about possible English occupancy of the western shore of the Delaware River and Bay:

The 25th of the Mon:[th] called June 1684, Peter Cock aged seveyt foure, Peter Ramb[o] seventy two & Hamce Monson [Hance Mansson] aged seventy two years or there abouts, appeared before us W[illia]m Welch, James Claypoole & Thomas Wynne three of the Kings Justices of the peace for the County of Philadelphia in the Privince of Pennsilvania, Who being solemnly attested, did severallie declare that what they have here respectively certified & subscribed is the truth & nothing but the truth, as God shall help them.

Wm Welch [seal]

James Claypoole [seal]

Tho Wynne [seal]

Pennsilvania & c: The Certificate and Deposition of Certain Antient Sweeds Living on the West side of Delaware

In the year 1638 Came into this Countrey from the Crown of SweedLand Governo[u]r Minivett [Peter Minuit], and in Case he should dye, Mounce Kling [Mans Kling] his deputy, with Henriques Hugon [Hendrick Huygen] Marchant for the Sweeds Company, with two shipps, Who anchored in Cristina Creek, & Lay there six weeks & three days, supplying themselves with wood & water only, Expecting that if any under the Crown of England had any just pretentions to the adjacent Lands, they might then have an Opportunity to Claime. At the expiration of the saids [*sic*] six weeks & three days & no body Claiming nor hindering they went a shoare & built a fort. Thereafter they agreed with the Susquahanna

Indians & bought from them as much of the Adjacent Lands as they could shoot over with a Cannon bullet from Cristina.⁵⁷

The 1632 Maryland Charter was issued six years before Peter Minuit's Swedish expedition arrived at the Delaware Bay in 1638. Accordingly, the Swedish settlements could not qualify as previous occupancy, and the *hactenus inculta* clause could not be invoked by Penn's attorney as being applicable to the Swedes. Nevertheless, the first Swedish deposition states that the Dutch occupied the Lewes area several years before the Swedes' arrival in 1638. Therefore, Penn's attorney proffered the Swedish depositions to corroborate the three earlier Dutch settlers' depositions.

Penn's attorney rested his case by emphasizing four points. First, that the Dutch purchased the land in Delaware from the Indians in 1629, obviously prior to the 1632 Maryland Charter. Second, that the Dutch West India Company approved the settlement in Lewes. Third, that the 1631 Lewes settlement by the Dutch took place before Lord Baltimore's 1632 charter for Maryland, and that those early Dutch settlers in Lewes were later massacred by Indians. Fourth, the *hactenus inculta* clause in the 1632 Maryland Charter was a term of limitation that excluded the Dutch territory from that grant because of the 1631 Lewes settlement. All of this combined evidence was critical to Penn's claim. Penn's subsequent correspondence, however, emphasizes the three Dutch depositions as the most important evidence in his case, because they established that the Dutch had settled in Lewes prior to 1632.

At the conclusion of Penn's presentation, the Committee for Trade and Foreign Plantations gave copies of Penn's evidence to Lord Baltimore. The Committee then directed Lord Baltimore to present his case at a later date. The proceedings were adjourned for approximately one month.

ENGLISH TRIAL CONTINUES LORD BALTIMORE'S EVIDENCE PRESENTED

On October 8, 1685, the hearing was reconvened. William Penn, Lord Baltimore, and their attorneys were all present. Lord Baltimore's attorney argued that even if the *hactenus inculta* clause was a limitation in the 1632 Maryland Charter, the small and temporary 1631 Dutch settlement in Lewes was insufficient to properly invoke that term. In support of that argument, Lord Baltimore relied upon what he alleged was a decision in 1638 involving the issue of whether Kent Island, Maryland was included in the 1632 Maryland Charter despite an earlier settlement there by William Clayborne.

According to Lord Baltimore's attorney, in that decision, Kent Island was held to be within the 1632 Maryland Charter. Lord Baltimore's attorney submitted that the basis for the decision was that "Claiborne's settlement had no prior right in English law and was not meant to be excluded" from the 1632

grant for Maryland from King Charles I to Lord Baltimore. Lord Baltimore's attorney argued that the same reasoning should apply to the 1631 Dutch settlement in Lewes.

As evidence of that decision, Lord Baltimore's attorney presented a draft of what was represented to be a report of the Commissioners of Foreign Plantations dated April 4, 1638. The report was described as "touching the Differences between the Lord Baltimore and Mr. Clayborne, about the Isle of Kent . . . shewing their Opinion touching the Lord Baltimore's Right to the Isle of Kent."⁵⁸ The draft report was on unauthentic blank paper. It was also unsigned and unsealed. Since the unsigned and unsealed draft was inadmissible as evidence, the Committee directed Lord Baltimore to produce either the original or an attested copy of the April 4, 1638, report for their review.

Lord Baltimore also presented the deposition of Van Sweringen, the former Dutch Secretary of New Castle, who had moved to Maryland and become friendly with Lord Baltimore. That deposition asserted facts to undermine William Penn's evidence about the 1631 Dutch settlement in Lewes. However, the deposition contained many inaccuracies and inconsistencies. Penn's attorney had no difficulty in arguing persuasively that the Van Sweringen deposition was not a credible document.

The hearing reconvened on October 17, 1685. Lord Baltimore and his attorney were unsuccessful in their efforts to procure an authentic copy of the report allegedly made on April 4, 1638. Accordingly, Lord Baltimore's attorneys advised the Committee that the original report, dated April 4, 1638, could not be located.

Penn's attorney also advised the Committee, that despite a careful search by Penn's agents, the original of such a report on April 4, 1638, could not be found. Penn's attorney noted that the original records of that very day were still in existence and that other original orders or decrees entered on that date were found. Penn's attorney introduced affidavits of three men who searched the records of the Council Registers.

Accordingly, Penn's attorney could argue that the copy of the April 4, 1638, report produced by Lord Baltimore was not only inadmissible, but that the representations about the early proceeding were not credible. When this issue was revisited decades later in the English Court of Chancery, Penn's attorney argued, "What adds to this proof is, that the pretended Order of the 4th *April* mentions a supposed prior *Reference of Clayborne's* Petition of that Committee. But there is no such *Reference* neither to be found, so that it's manifest the *whole* is an *Invention*."⁵⁹

Penn's attorney argued that Lord Baltimore had failed to produce any credible, admissible evidence in support of his arguments. Both Penn and Lord Baltimore stated they had no additional evidence to present. Their Lordships on the Committee for Trade and Foreign Plantations then stated that they would adjourn to confer and return to announce their decision.

PENN WINS ENGLISH LITIGATION 1631 LEWES SETTLEMENT KEY EVIDENCE

When the hearing reconvened, the Committee rendered an opinion that was unanimous. The members of the Committee all agreed, and it was not disputed by either William Penn or Lord Baltimore, that the 1632 Maryland Charter from King Charles I to Lord Baltimore was only for land that was uncultivated and uninhabited except by Indians. The Committee concluded that the *hactenus inculta* clause was a term of condition and limitation when King Charles I granted Lord Baltimore the 1632 Maryland Charter. Therefore, the question was whether any land within Lord Baltimore's 1632 Maryland Charter had been cultivated and inhabited prior to 1632 by persons other than Indians.

The Committee also all agreed that the evidence presented by William Penn clearly and convincingly established that the tract of land in dispute was inhabited and planted by the Dutch at the 1631 settlement in Lewes, which was before the date of the 1632 Maryland Charter to Lord Baltimore. Accordingly, the Committee held that the land in controversy did not belong to

Lord Baltimore. Moreover, since the land was excluded from the 1632 Maryland Charter granted by King Charles I, it belonged to "his Majesty," the incumbent monarch, King James II.

That decision did not end the proceedings, however, because the Committee then had to decide the boundaries of the territory that was excluded from the 1632 Maryland grant by King Charles I to Lord Baltimore. Accordingly, the Committee adjourned and directed Penn and Lord Baltimore to return at a later date to resolve the boundary dispute. The Committee concluded the hearing, as follows:

the Tract of Land, now in Dispute, does not belong to my Lord Baltimore; but, in as much as it yet remains doubtful, what are the true Boundaries of the Land called Delaware, which their Lordships now adjudge to belong to his Majesty, their Lordships will meet again for the Settlement of those Boundaries between his Majesty, and the Lord Baltimore; at which time his Lordship and Mr. Penn are to give their Attendance, and to come prepared for a final Decision therein.⁶⁰

When the Committee ruled that Delaware was not included in the 1632 Maryland Charter that was granted to Lord Baltimore by King Charles I, it meant that the English monarchy retained any original claim to Delaware, plus any additional claim that the monarchy had after the Duke of York's victory over the Dutch in Delaware.

ENGLISH LITIGATION REMEDY DELAWARE'S BOUNDARIES ESTABLISHED

On October 31, 1685, the Committee for Trade and Foreign Plantations met again. Lord Baltimore and Penn were present with their attorneys. The Committee “proposed that the whole Peninsula, or Tract of Land, called Delaware, from East to West, as far as Cape *Hinlopen*, Southward, may be divided into two equal Parts, between *his Majesty* and Lord Baltimore.” However, the Committee wanted to know where Cape Henlopen was located, since that was the southern designation on the two 1682 deeds of feoffment acquired by Penn from the former Duke of York, now King James II. It was also the same southern boundary in the 1683 patent for Delaware from King Charles II to the Duke of York, that the Duke of York had then delivered to William Penn.

The first maps of the Delaware River and Bay area had been made by the Dutch. By the mid-seventeenth century, a series of maps had been published by Nicholas Joannis Visscher. All of Visscher's maps showed Cape Cornelius at the mouth of



THE FALSE CAPE

Detail of the 1655 Visscher map, showing the portion of the map that supported Penn's boundary claims. The area in green is what is now known as the Delmarva Peninsula. The small, oval-shaped area to the right of the peninsula is the mouth of what was then known as the Zuydt (South) River, now the Delaware. Cape "Hinlopen" is shown at the point now known as Fenwick Island, while the modern-day Cape Henlopen is called "Cape Cornelius" (courtesy of the Library of Congress).

Delaware Bay, and south of it a well-defined headland named "Cape Hinlopen."

William Penn, not Lord Baltimore, produced a map. The map produced by Penn was a 1655 Visscher map. On that map, Cape Henlopen was shown at the southern location, although by 1685 that area was referred to as the false cape. Nevertheless, it was at the false cape (old Cape Hinlopen), as depicted on the 1655 Visscher map, that the Committee established Delaware's southern boundary. Even if William Penn knew of the false cape, it was logical for him to use a map that showed Cape Henlopen

in the place where the Dutch originally thought it was located, near Fenwick Island.

Lines were drawn on the 1655 Visscher map produced by Penn to designate the area that was to be excluded from the 1632 Maryland Charter – in other words, Delaware. After those lines were drawn, Penn endorsed his ink-lined map with the following inscription: “The Map by which the Privy Council 1685 Settled the the [*sic*] Bounds between the Lord Baltimore & I, & Maryland & Pennsylvania & Territorys or annexed Countys. W.P.”

There can be no doubt that when the Committee for Trade and Foreign Plantations framed the decree of 1685, it intended that the territory withheld from the 1632 Maryland Charter run south of the present Cape Henlopen to the false cape in the area that is now Fenwick Island. Lord Baltimore was given one week to file any objections. The week passed without any protest from Lord Baltimore to the boundaries drawn on Penn's 1655 Visscher map proposed by the Committee. Lord Baltimore's failure to either produce his own map or object to Penn's map was an indication of just how unfamiliar he was with Delaware. The result was the Committee's decision to include the territory between Lewes and Fenwick Island within the final decree in Penn's favor. Notwithstanding Lord Baltimore's lack of knowledge about Delaware, it is reasonable to conclude that when the Duke of York referred to Cape Henlopen in the 1682 deed of feoffment to William Penn, he was using the designation on the early Dutch maps.

KING JAMES II
APPROVES LITIGATION RESULT
PENN SEEKS FURTHER ASSURANCES

On November 7, 1685, the Committee for Trade and Foreign Plantations issued the following Report:

The Lords of the Committee for Trade and Plantations having, pursuant to his late Majesty's Order in Council of the 31st of May 1683, Examined the Matters in difference between the Lord Baltimore and William Penn Esq; in behalf of his present Majesty, concerning a Tract of Land, in America, called De la Ware, Their Lordships find that the Land, intended to be granted to the Lord Baltimore's Patent, was only Land uncultivated and inhabited by Savages and that this Tract of Land, now in Dispute, was inhabited and planted by Christians, at and before the Date of the Lord Baltimore's Patent, as it hath been, ever since, to this Time and contained as a district [distinct] Colony from that of Maryland;

So that their Lordships humbly offer their Opinion, that, for avoiding further Differences, The Tract of Land lying between the River and the Eastern Sea on the one side & Chesapeake Bay on the other be divided, into equal Parts, by a Line, from the Latitude of *Cape Hinlopen*, to the 40th Degree of Northern Latitude; and that one Half thereof, lying towards the Bay of Delaware and the Eastern Sea be adjudged to *belong to his Majesty*, and that the other Half remain to *the Lord Baltimore*, as comprised within his Charter.⁶¹

On November 13, 1685, the November 7 Report from the Right Honourable the Lords of the Committee for Trade and Foreign Plantations, was read to the Privy Council at Whitehall, in the presence of King James II. The records of that proceeding state:

His Majesty well approving of the said report, it was thereupon ordered by his Majesty in Council that the said land be forthwith divided accordingly, whereof the said Lord Baltimore and William Penn, Esq; together with their respective officers and all others whom it may concern are to take notice and give due and ready obedience thereunto.⁶²

Thus, the proceedings between William Penn and Lord Baltimore ended November 13, 1685, at a meeting of the Privy Council, at which King James II was present in person. It was ordered that a substantial portion of the Delmarva Peninsula was to be divided into two equal tracts: one of which belonged to Lord Baltimore and the other to King James II. Penn's heirs successfully argued decades later that the reference to William Penn in the Privy Council's November 13 degree clearly established that the ruling was intended for the benefit of Penn.

Notwithstanding the clarity of that language, William

Penn asked King James II for a confirmatory grant of Delaware almost immediately after the Privy Council entered its decree in 1685. There is no dispute that when King James II was the Duke of York, he had deeded the Three Lower Counties (Delaware) to William Penn. But when the Duke of York executed those two deeds of feoffment to Penn in 1682, the Duke's legal title to Delaware was uncertain and depended exclusively upon his conquest of that Dutch territory as a part of New Netherland. Now that the Privy Council had declared that King James II, the former Duke of York, had a clear legal title to Delaware, Penn, who was already the beneficial owner, wanted King James II to again grant him legal title to Delaware.

King James II was amenable to repeating his conveyances of Delaware to Penn and waiving the payments that William Penn had not made. Since 1682, Penn had not paid the Duke of York one-half of the revenue from the lands (Delaware) below the Twelve Mile Circle. Unfortunately, it took several years to complete the necessary confirmatory legal documents that William Penn had requested.

THE GLORIOUS REVOLUTION PENN'S AUTHORITY REVOKED

The years between 1685 and 1688 were a time of political and religious turmoil for King James II as a Catholic on the throne of England. The nadir was reached on November 5, 1688, when his son-in-law, Prince William of Orange, arrived from Holland on England's coast at Torbay with an invading army of twenty-one thousand men. Prince William was Dutch and married to King James II's oldest daughter, Mary.

Prince William explained why he had invaded England in a Declaration that recounted England's troubles under King James II and promised to restore domestic tranquility. Prince William's arrival was welcomed by many noblemen and ordinary English citizens. Some of King James II's army officers deserted and joined the invading Dutch forces. Even Princess Ann, King James II's younger daughter, joined Prince William's supporters. As dissention was mounting, King James II retreated from Salisbury to London, where he hoped to reach a negotiated settlement with Prince William.

In December 1688, during this time of domestic unrest and pending war, Sir William Williams, Solicitor General of England, drafted a handwritten charter to be signed by King James II. That charter granted to William Penn all of the land in the Three Lower Counties of Pennsylvania (Delaware). It recited the two leases for ten thousand years made in 1682, between the same parties (when King James II was the Duke of York), but for unknown reasons made no reference to the two deeds of feoffment. The proposed charter was lengthy and provided for the organization of a government in great detail. It also gave the territory the name "Lower Pennsylvania."

Accordingly, in December 1688, it appeared that William Penn's request for final "further assurances" from King James II would become a reality. The document prepared by the Solicitor General recited that this was the same land described in the November 7, 1685, "Report by the Committee for Trade and Foreign Plantations" as belonging to King James II. The document also relieved Penn of all past and any future obligation to share revenue with the King. It made Penn the sole proprietor of Delaware and gave Penn the option of combining it with Pennsylvania.

The draft of the charter for Lower Pennsylvania (Delaware) was completed and presented for review to King James II on December 10, 1688. That same day, however, King James II received Prince William of Orange's rejection of any attempt to avoid war through a negotiated settlement. At three o'clock, on the morning of December 11, King James II fled in a small boat to France and abdicated the throne of England, in what history characterizes as the Glorious Revolution. The draft charter for William Penn was left behind unsigned when King James II fled from England.

When the Glorious Revolution resulted in the overthrow of King James II, he was replaced by William of Orange and his wife, Mary, who as the daughter of King James II was the presumptive heir to the English throne. Mary's participation

undoubtedly enhanced the legitimacy of the new joint monarchy. The reign of King William III and Queen Mary II began in January 1689. The document drafted for William Penn by the Solicitor General was never executed by the new joint monarchs.

The accession of the new monarchs did not bode well for Penn. The friends of King James II fell out of favor with the government. In fact, Penn was arrested shortly after King James II fled from England. He was released on bail, but arrested twice more during the next two years.

On October 21, 1692, William and Mary removed William Penn from all authority over the governments of Pennsylvania and Delaware. William and Mary commissioned Benjamin Fletcher as Captain-General and Governor-in-Chief in and over “our province of Pennsilvania and Countrey of New Castle [Delaware], and all the tracts of land depending thereon in America.” Lord Baltimore thought this was an opportunity for him to obtain Delaware from the joint monarchs. However, his efforts were unsuccessful.

PENN'S AUTHORITY RESTORED 1685 ENGLISH LITIGATION RATIFIED

Penn filed a petition with the Privy Council asking for the restoration of his rights over Pennsylvania and Delaware. The Attorney General and Solicitor General made a report certifying that Penn was entitled to the powers of government granted by the 1682 charter he had received from King Charles II for the Province of Pennsylvania. In July 1694, the Committee for Trade and Foreign Plantations recommended the restoration of Penn's rights to Pennsylvania.

During these same restoration proceedings, Penn also presented the Attorney General and the Solicitor General with the two deeds of feoffment he had received from the Duke of York for the Three Lower Counties (Delaware) in 1682. The Attorney General reported to the Committee for Trade and Foreign Plantations that Penn asserted, pursuant to these two deeds of feoffment, he "had possessed and enjoyed the premises thereby conveyed as fully as he had possessed the Province of Pennsylvania."

On August 1 and 3, 1694, the Committee of Trade and Foreign Plantations recommended to the Privy Council that William Penn:

Be restored to the administration of the Government of the Province of Pensilvania and Countrey of New Castle [Delaware] and Territories and Tracts of Land depending thereon in America to be held and enjoyed by him in like manner as he held and enjoyed the same before the date of Colonel Fletcher's Commission.

On August 9, 1694, William Penn was formally restored "to the Administration of the Government of the said Province and Countrey." That same day, by Order of the Privy Council, Colonel Fletcher's commission was revoked insofar as it related to those governments. On August 20, 1694, under the Great Seal of England, letters patent were issued formally restoring Penn's rights to the administration of the governments of Pennsylvania and Delaware.

Nevertheless, Lord Baltimore persisted in his efforts to obtain Delaware. Lord Baltimore hoped for more favorable consideration from Queen Anne, the new English monarch, than he had received from William and Mary. In 1708, he petitioned the crown to give him possession of the entire peninsula between the Chesapeake and Delaware Bays, as he put it "according to the terms of his 1632 Maryland Charter." But to Lord Baltimore's chagrin, his petition was promptly denied.

Undaunted, in May 1709, Lord Baltimore again presented Queen Anne with a petition for Delaware. She ordered the matter to be presented to her, sitting in the Privy Council. The attorneys for both William Penn and Lord Baltimore made presentations to Queen Anne sitting in Council. Penn's attorney explained the 1685 Report and ruling that Delaware was excluded from the 1632 Maryland Charter because Lewes had been settled by the Dutch in 1631. The Privy Council agreed with Penn's argument that the 1685 ruling was a controlling, binding prior

legal adjudication against Lord Baltimore. It ordered that Lord Baltimore's petition be dismissed. It also ordered that the November 7, 1685, Report of the Committee for Trade and Foreign Plantations be confirmed in all respects and put into execution immediately.

PENN V. BALTIMORE PENN HEIRS WIN PRIVATE LITIGATION

In 1732, one hundred years after the issuance of the 1632 Maryland Charter, the incumbent Lord Baltimore met with the heirs of William Penn in an effort to reach a private agreement about the boundaries between Maryland and Delaware. At that meeting, Lord Baltimore produced his own map and insisted that the boundaries between Maryland and Delaware be the ones that were drawn on that map. The Penn heirs agreed. After further negotiations, and with the advice of attorneys for each side, an agreement was signed with Lord Baltimore's map attached as an exhibit. That original agreement, with Lord Baltimore's map attached, is at the Delaware Historical Society.

After executing the agreement, Lord Baltimore returned home and realized that the map he insisted on using for the agreement depicted the location of Cape Henlopen at the false cape. Consequently, just as his predecessor had done in 1685, Lord Baltimore had given away the land between Lewes and Fenwick Island. Therefore, Lord Baltimore refused to comply



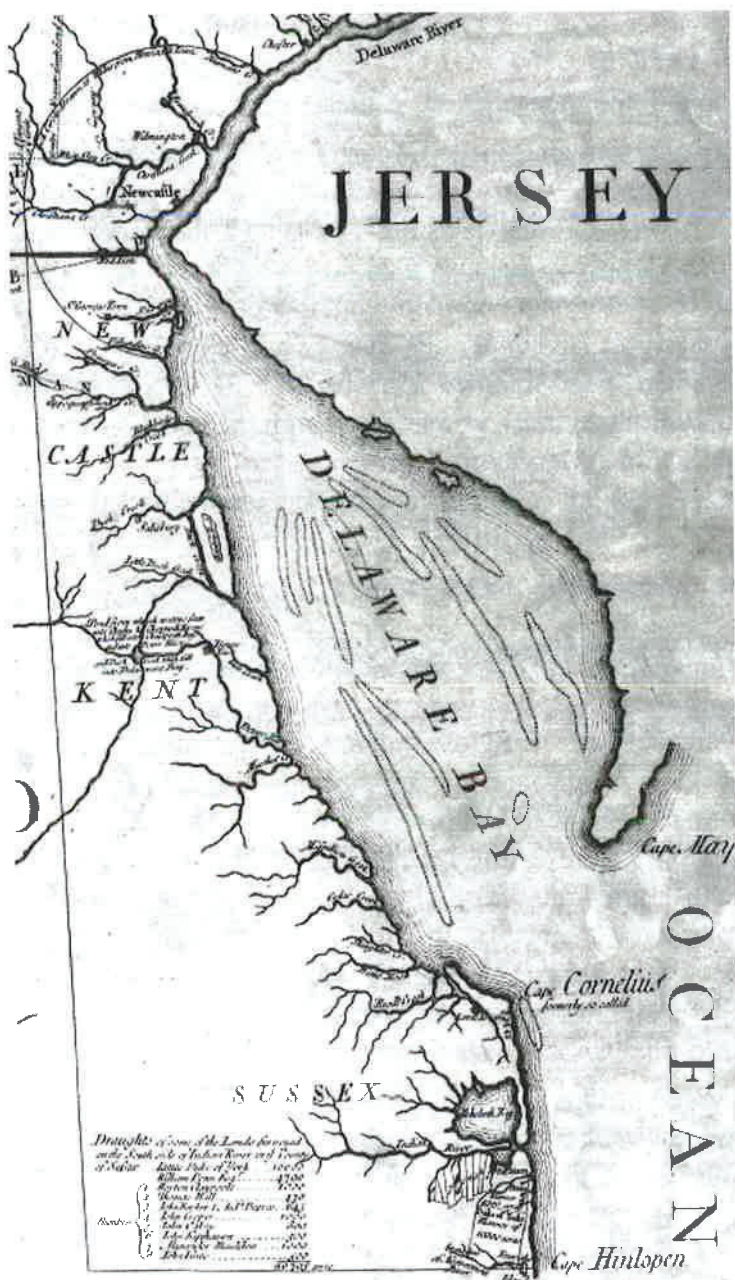
THE SENEX MAP OF 1738, FROM *Penn v. Calvert*,
courtesy of the Delaware Public Archives.

with the terms of the 1732 agreement that he had signed with William Penn's heirs.

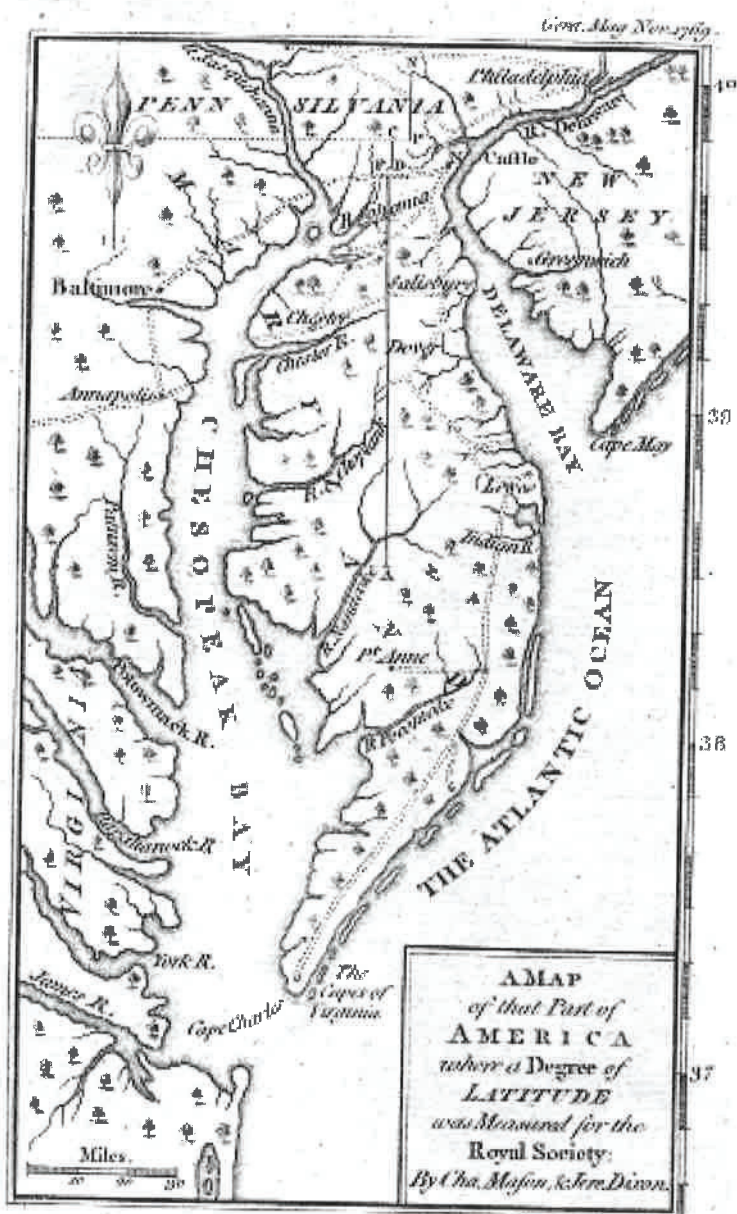
In 1735, the heirs of William Penn filed a lawsuit for specific performance in the English Court of Chancery to compel Lord Baltimore to carry out the terms of the 1732 agreement. In response to the Penns' lawsuit, Lord Baltimore argued that: the English Court of Chancery had no jurisdiction; the Penns had imposed a false map upon him; and that he "grossly mistook his original rights; and under that mistake and ignorance the articles [agreement] were founded and framed." During the litigation, Lord Baltimore tried to reargue his claim to Delaware based upon the 1632 Maryland Charter.

The Court of Chancery proceeding between William Penn's heirs and Lord Baltimore, that began in 1735, finally came to an end in 1750. Lord Chancellor Hardwicke ruled that the 1685 Report of the Committee for Trade and Foreign Plantations, and the Privy Council decree approving that Report, were properly decided in favor of King James II. Therefore, the Chancellor decided, as against Lord Baltimore, King James II's claim to Delaware prevailed because it had been excluded from the 1632 Maryland Charter as a consequence of the 1631 Lewes settlement by the Dutch. Chancellor Hardwicke further ruled that, although the claim to Delaware of King James II was good as against Lord Baltimore, it was, as against Penn, good only to the extent that he was a "royal trustee" for William Penn, who held all the beneficial proprietary interest in Delaware, as a result of the two 1682 deeds of feoffment.

William Penn's heirs and Lord Baltimore reached an agreement in 1760 to have a survey prepared of their respective boundaries. That agreement led to the appointment of a team of two Englishmen: Charles Mason, a mathematician and astronomer, and Jeremiah Dixon, a mathematician and a land surveyor. The results of their work included what is known as the Mason-Dixon Line.



THE Penn v. Calvert MAP OF 1740,
courtesy of the Delaware Public Archives.



THE MASON-DIXON SURVEY MAP OF 1769,
courtesy of the Delaware Public Archives.

UNITED STATES SUPREME COURT 1631 LEWES SETTLEMENT'S IMPORTANCE

Disputes regarding the State of Delaware's boundaries have been addressed by the United States Supreme Court at least three different times. Those cases, involving litigation between Delaware and New Jersey, were decided in 1877, 1934, and 2008. In each case, the validity of William Penn's ownership of Delaware was reviewed and affirmed.

In the 1934 case of *New Jersey v. Delaware*, the United States Supreme Court approved the Report of a Special Master, who had been appointed to make findings of fact and conclusions of law. The first factual finding set forth in the Special Master's Report acknowledges the importance of the 1631 Lewes settlement by the Dutch.

The territory now comprised within the State of Delaware was originally settled in the seventeenth century by the Dutch and Swedes, the first settlement

having been made at Swaanendael by the Dutch near the present town of Lewes, Sussex County, Delaware, in 1631. Subsequent settlements were made by the Dutch and Swedes within said territory prior to 1664.⁶³

June 15, 1776, is known as Separation Day in Delaware. On that date, the Delaware General Assembly undid the 1682 Act of Union with Pennsylvania. Since that time, Delaware has been a separate sovereign state and, as such, joined in the Declaration of Independence from England on July 4, 1776.

The 1934 United States Supreme Court opinion in *New Jersey v. Delaware* was written by Justice Benjamin Cardozo. That opinion approves the Special Master's conclusion that the State of Delaware established an unbroken chain of legal title from the two 1682 deeds of feoffment to William Penn from the Duke of York up to the American Revolutionary War.

From 1682 until the American Revolution, William Penn and his successors as proprietaries and governors, and the respective legislative assemblies above referred to, possessed and enjoyed the lands and waters within the boundaries of the colony of Delaware as fixed by said deeds of feoffment and leases and exercised full and exclusive control and dominion thereover.

By Orders in [the Privy] Council of November 13, 1685, and June 23, 1709, the claim of Lord Baltimore to the territory comprised within the three counties of Delaware was finally denied and said orders were never modified or reversed.

The said Order in [the Privy] Council of November 13, 1685, and the proceedings incident thereto recognized William Penn as the equitable owner of the Colony of Delaware.

By Order in [the Privy] Council of August 9,

1694, and by Letters Patent under the Great Seal of England of August 20, 1694, the title and possession of William Penn to the soil of the Colony of Delaware and the powers of government of William Penn thereover were duly and formally recognized, ratified and confirmed by the Crown of England.

By various and sundry acts of the Crown of England, its ministers and officers, from the year 1682 until the year 1776, the title and possession of William Penn to the soil of the Colony of Delaware, and the powers of government of the said William Penn, or his successors, and of the Delaware Assembly thereover were recognized and confirmed.⁶⁴

The 1934 United States Supreme Court opinion also approves the Special Master's conclusion that when Delaware was admitted to statehood under the Articles of Confederation, after the 1783 Treaty of Paris, and later under the United States Constitution, it succeeded to the title and boundaries of colonial Delaware that was owned by William Penn.

CONCLUSION

In 1685, based upon the Committee for Trade and Foreign Plantations' Report, the Privy Council ruled that Delaware was excluded from the 1632 Maryland grant to Lord Baltimore because the Committee was persuaded by Penn's evidence that the Dutch had established a settlement in Lewes in 1631. The boundary between Delaware and Maryland was established by the Committee and the Privy Council in the middle of the peninsula between the Delaware Bay and the Chesapeake Bay.

The western lands on the peninsula were the property of Lord Baltimore and the eastern territory belonged to King James II. The southern boundary was a horizontal line in the latitude of Cape Henlopen (at the false cape near Fenwick Island) with a vertical line extending to the fortieth degree on the north. Together, those boundaries formed a right angle.

The 1631 Dutch settlement in Lewes decided the location of those boundaries. It is appropriate that Delaware's southern and western boundaries form the shape of an "L." The "L" stands for Lewes. Although the 1631 Lewes settlement was

not permanent, its brief existence has withstood the test of time and litigation. The 1631 Lewes settlement by the Dutch has the enduring distinction of “determining Delaware’s destiny.”



WILLIAM PENN

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Most people know that Delaware is "the First State." But how it became a state at all, rather than a part of Maryland or Pennsylvania, is another story. It is a well known historical fact that Delaware was the first state to ratify the new U.S. Constitution in 1787. Less well known is the fact that it's very existence as an independent state and its present shape and size were the result of an epic legal battle in the English courts between William Penn, proprietor of Pennsylvania, and Lord Baltimore, proprietor of Maryland.



WILLIAM PENN

This fascinating book by Delaware's preeminent legal historian, Delaware Supreme Court Justice Randy J. Holland, tells the story of how Penn used the existence of the ill-fated and shortlived 1631 Dutch settlement at Swanendael, the present location of Lewes, to win his case. Though he did not know it, Penn's court victory led directly to the later establishment of an independent Delaware. Delaware's destiny was truly determined by Lewes.



Cartouche from a 1655 Dutch map that William Penn used to prove his case.

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