Washington Law Review

Volume 4 | Number 2

5-1-1929

The Penn Cases

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WASHINGTON
LAW REVIEW

VOLUME IV MAY, 1929 NUMBER 2

THE PENN CASES

Upon the walls of Old Bailey, the home of the Central Criminal Courts of London, is a tablet containing the following inscription.

> "Near this site William Penn and William Mead were tried in 1670 for preaching to an unlawful assembly in Grace Church Street. This tablet commemorates the courage and endurance of the Jury, Thos. Vere, Edward Bushell and ten others who refused to give a verdict against them, although locked up without food for two nights, and were fined for their final verdict of Not Guilty
>
> "The case of these jurymen was reviewed on a Writ of Habeas Corpus, and Chief Justice Vaughan delivered the opinion of the Court which established 'The Right of Juries' to give their verdict according to their convictions."

This tablet commemorates the Penn cases, which are found in the reports under the titles. *Trial of William Penn and William Mead,* 22 Charles II, C. E. 1670, Cobbett's Collection of State Trials, published 1810, page 951, *Case of Edward Bushell,* Broom's Constitutional Law, 115-139, and *Hammond v. Howell,* Thomas, Leading Cases on Constitutional Law, 147. Although the facts are taken from an almost forgotten chapter of the life of William Penn, these cases are a part of the constitutional law of England. The records afford a glimpse into the long and painful struggles of our English and American forefathers out of which was wrought the Constitution of the United States.

The Penn cases came at the climax of one of the most vital periods of English history The Stuart kings had denied the people many of the liberties defined by the Magna Carta and the Common Law, and additional privileges won through the centuries. James II had used every effort to repress the independence of the bar and had in fact prostituted the independence of the bench to the

arbitrary prerogative of the king. Charles II was attempting to evade the provisions of the Petition of Right, wrung from his father through the efforts of Lord Coke and other eminent lawyers.[1] Parliament, under the control of the cavaliers, in an effort to regulate the religious thought and personal conduct of nonconformists, had enacted a series of odious acts, among which was the Conventicle Act of 1664,[2] and the people were fighting stubbornly to maintain their sacred constitutional rights. They were struggling for still greater power in the courts as well as in Parliament. Our debt to the period can be judged by the fact that it produced thirty per cent of the leading constitutional cases of England,[3] and gave us such imporant laws as the Habeas Corpus Act of 1679, the Bill of Rights of 1689, and the Act of Settlement of 1700-1701, all of which mark important developments in English and American constitutional history

Under these acts the Quakers had suffered greatly William Penn was a Quaker, but he did not belong to the class whose resistance, although firm, was passive, and whose suffering was borne in the spirit of martyrdom. Although not rebellious in spirit he adopted such means as would accomplish his desired end. He was expelled from Christ's Church, Oxford, for attacking fellow students because they wore gowns which he considered papistical. Before he was twenty-six years old he had been twice driven from his home by his father. Although he had enrolled as a student at Lincoln's Inn and had been promised an honorable career at the bar, he had abandoned his studies and had undertaken to preach the forbidden doctrines of the Society of Friends. His devotion to his religion caused his arrest no less than six times during his career. His impetuous nature may be measured by his warning to the judges on the title page of his own report of his trial.

> "Psalm XCIV—20. Shall the throne of iniquity have fellowship with thee, which frameth mischief by law "
>
> "Sic Volo, sic jubeo, stat pro ratione voluntas."

This introduction will give the setting in which William Penn found himself on September 1, 1670, when he faced Sam Starling,

[1] HISTORY OF ENGLAND, TREVELYAN (1926) 391-392.

[2] Other acts were: Corporation Act, 1661, Act of Uniformity, 1662; Five Mile Act, 1665, and the Test Acts of 1673 and 1678. These acts are of special interest to us as they belong to the same legal classification (regulating personal conduct) as the Eighteenth Amendment and the Volstead Act.

[3] LEADING CASES ON CONSTITUTIONAL LAW, THOMAS (5th ed.), 1924, Sweet & Maxwell, London.

Mayor, Thomas Howell, Recorder, and the other judges of Old Bailey upon an indictment charging him and William Mead with unlawful assembly It was a bitter contest, filled with sarcasm, serious wit and humor, and with attempts at coercion of the prisoners and of the jury by the Court. This case, and the others arising out of it, dramatize the spirit of the period. They reveal the attitude of the judges, under the domination of the king, toward accused persons and toward juries, the manner in which the accused requited and appealed to the juries and to the public, and the means employed by jurors to protect the rights which they claimed.

The trial began with the officers bringing Penn and Mead into the court room. They had removed their hats, but the mayor, knowing the objection of Quakers to such civility, ordered the officers to replace them. Then the Recorder, sitting with the mayor as one of the judges, promptly fined the prisoners forty marks. To this unwarranted treatment Penn protested.

> "I desire that it might be observed that we came into the court with our hats off (that is, taken off), and if they have been put on since, it was by order from the bench, and therefore not we, but the bench should be fined."

Mead protested in a similar manner and added.

> "O fear the Lord and dread His power, and yield to the guidance of the holy spirit, for He is not far from every one of you."

The formal procedure usual in English courts of the present time had not yet developed. In some respects the trial resembled that of a modern police court, in others it reminds one of the etiquette of a baseball game. The prisoners were not represented by counsel, and the court assumed the two roles of prosecutor and judge. The evidence was given by two officers, James Cook and Richard Read, and another person whose name or official position does not appear in the record. These witnesses testified in effect that three or four hundred people had gathered in Grace Church Street, London, that William Penn had been preaching to them, and that there was such noise and confusion that they could not hear what he said.

When the prisoners were called, Mead refused to testify Penn boldly asserted that it was their "indispensable" duty to meet, to

preach, to pray, and to worship God, and that no power on earth could prevent them from doing so. He then asked the court to explain under what law he was being prosecuted. Both the court and Penn knew that it was the Conventicle Act of 1664, which the Quakers had refused to recognize. The Recorder, however, apparently desiring to confuse Penn, replied that the prosecutions were based upon the common law, which had been the foundation of the people's liberties for centuries. Penn recognized the deception and the following interesting dialogue was enacted

> Penn Where is the common law?
>
> Rec. You must not think that I am able to run up so many years and over so many adjudged cases, which we call common law, to answer your curiosity
>
> Penn This answer I am sure is very short on my question, for if it be common, it should not be so hard to produce.
>
> Rec. Sir, will you plead to your indictment?
>
> Penn Shall I plead to an indictment that hath no foundation in law? If it contain the law you say I have broken, why should you decline to produce the law
>
> Rec. You are a saucy fellow, speak to the indictment.
>
> Pen The question is not whether I am guilty of this indictment, but whether this indictment is legal. It is too general and imperfect an answer to say it is the common law, unless we know where and what it is. For where there is no law, there is no transgression, and that law which is not in being is so far from being common that it is no law at all.
>
> Rec. You are an impertinent fellow Will you teach the court what the law is? It is "Lex non scripta," that which many have studied 30 or 40 years to know, and would you have me tell you in a moment?
>
> Penn Certainly, if the common law be so hard to be understood, it is far from being very common, but if Lord Coke in his Institutes be of any consideration, he tells us that Common-Law is common right, and that Common Right is the Great Charter-Privileges, confirmed 9 Hen. 3, 29, 25 Edw 1, 12 Ed. 3, 3 Coke Instit. 2 p. 56.

The Conventicle Act forbade more than five persons over sixteen years of age in addition to the household in which the services were being held, to meet for religious worship. The evidence against Penn and Mead was clearly insufficient to support an indictment under this law, and the common law did not forbid an assembly of this kind. Penn was, therefore, within his rights when, perhaps

somewhat contemptuously, he asked the court for a definition of the common law, of which apparently he had a better knowledge than the Recorder.

Penn's effort to quash the indictment aroused the wrath of the court, and the judges bore down upon him grievously throughout the trial. The indictment described him as a gentleman, but the court treated him as the meanest felon. Today no court would undertake to address the vilest criminal in the manner in which these judges repeatedly insulted Penn and Mead. Would you not be mortified to hear a modern court make any of the following speeches?

> Rec. Take him away My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do anything tonight.
>
> Mayor· Take him away ,take him away, turn him into the bale dock.
>
> Mayor You deserve to have your tongue cut out.
>
> Rec. I look upon you to be an enemy to the laws of England, which ought to be observed and kept, nor are you worthy of such privileges as others have.
>
> Rec. Pull that fellow down, pull him down.
>
> Rec. Stop that prating fellow's mouth, or put him out of court.
>
> Mayor· Stop his mouth, gaoler, bring fetters, and stake him to the ground.

These cases give us a glimpse of the manner in which the people defiantly fought for their rights in the years immediately preceding the Revolution of 1688, during which James II was dethroned, and his daughter, Mary, and his son-in-law, William of Orange, were placed upon the throne. The judges ignored the people, but the prisoners continued to appeal to them. The court room was always crowded. Undoubtedly many of the worshippers who had listened to Penn in Grace Church Street were there. In addition there must have been many other sympathizers who were watching keenly the exercise of autocratic power by the courts.

> Mead. I desire the jury and all the people to take notice of this injustice of the Recorder.
>
> Penn. I desire we may come more close to the point, and that silence may be commanded in the court.
>
> Penn. I affirm that I have broken no law, nor am I guilty of the indictment that is laid to my charge, and to

> the end the bench, the jury and myself, with these that hear us, may have a more direct understanding of the procedure, I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.

Penn again appealed to the people

> "I must be allowed to make the best of my case, it is hard, I say again, unless you show me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely voluntary"

> Penn You do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary design.

The growing power of the jury was recognized by the accused. The record reveals that Penn and Mead directed their efforts for acquittal solely to the good will of the jurors. Time and again they called upon the jury to observe some special act of prejudice or unfairness on the part of the judges. The result was that the jurors not only became convinced of the innocence of the accused, but were inspired to stand by their verdict of not guilty even to the point of being imprisoned. On one occasion the court, at the climax of a heated controversy, instructed the officers to take Penn to the bale-dock. In reply Penn turned to the jury and exclaimed

> "Must I therefore be taken away because I plead for the fundamental laws of England? However, this I have to your consciences who are of the jury (and my sole judges) that if these ancient fundamental laws which relate to liberty and property (and are not limited to particular persuasions in matters of religion) must not be indispensably maintained and observed, who can say that he hath the right to the coat upon his back? Certainly our liberties are openly to be invaded, our wives to be ravished, our children slaved, our families ruined, and our estates led away in triumph, by every sturdy beggar and malicious informer, as their trophies, but our (prettended) forfeits for conscience sake. The Lord of Heaven and Earth be judge between us in this matter."

In violation of the established law the court sent the prisoners to the bale-dock while it gave its charge to the jury In answer to this unlawful procedure, Penn, although a considerable distance from the jury, cried out in a loud voice

> "I appeal to the jury who are my judges and this great assembly, whether the proceedings of the court are not most arbitrary, and void of all law, in offering to give the jury their charge in the absence of the prisoners, I say it is directly opposite to, and destructive of the undoubted right of every English prisoner."

Later the court ordered the jury locked up without food and drink, and Penn made another dramatic appeal.

> "My jury, who are my judges," he said, "ought not to be thus menaced, their verdict should be free, and not compelled, the bench ought to wait upon them, but not forestall them. I do desire that justice may be done me, and that the arbitrary resolves of the bench may not be made the measure of my jury's verdict."

Just as the court was ready to adjourn, and to send Penn and Mead to jail and the jury to its chamber, Penn, fearing that it might be forced to a verdict of guilty, made his final appeal in the form of a challenge

> "The agreement of 12 men," he said, "is a verdict in law and such a one being given by the jury, I require the clerk of the peace to record it as he will answer it at his peril. And if the jury bring in another verdict contradictory to this, I affirm they are prejudiced men in law."

And then, looking upon the jury, he shouted.

> "You are Englishmen, mind your privilege, give not away your right."

The climax of the trial was reached when the jurors returned a verdict of Not Guilty five times. The court called upon them to change it to a verdict of guilty, and, when they refused to do so, sentenced them to jail. The record will bring a blush to every English-speaking person. The members of the court abused the jurors, threatened them with menacing language, and finally the Recorder insulted them with the following instructions:

> "Gentlemen, you shall not be dismissed till we have a verdict that the court will accept, and you shall be locked up, without meat, drink, fire and tobacco, you shall not think thus to abuse the court, we will have a verdict, by the help of God, or you shall starve for it."

One of the jurors pleaded an indisposition and asked to be dismissed, and the court replied.

> Mayor You are strong as any of them, starve them, and hold your principles.

Finally, after the jury had held out for two days without food or water the court became convinced that it could not coerce them into a verdict of guilty, and the Recorder addressed them

> "I am sorry, gentlemen, that you have followed your own judgments and opinions rather than the good and wholesome advice that was given you, God keep my life out of your hands, but for this the court fines you 40 marks a man, and imprisonment until paid."

The issues of the Penn case vitally concerned the rights of the English people. The Great Charter had provided that every freeman was entitled to a trial by jury of his peers.[4] In 1667 in the case of Judge Keeling, Parliament had resolved "That the precedents and practice of fining or imprisoning jurors for verdicts was illegal." The people were now to demand from the courts the recognition of the right of jurors to find verdicts in accordance with their convictions. Edward Bushell, whom the lower court accused of having "thrust" himself upon the jury, applied for and obtained a writ of *Habeas Corpus*. Justice Vaughan, of the Court of Common Pleas, who like Lord Coke was an ardent disciple of the common law, granted the writ.

The observations of the court upon the relation of the jury to the judge give us a picture of the jury system that we do not have today In its early development the jurors were selected because they had an independent knowledge of the facts. This practice still existed in a modified form in England in 1670, and as we shall see from the opinion of Justice Vaughan, it was one of the main arguments supporting the doctrine of the independence of the jury He said

> "But the reasons are, I conceive, most clear, that the judge could not, nor can fine and imprison the jury in such cases.
>
> "It is true that if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally

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[4] "No freeman shall be taken, nor imprisoned, nor disseized nor outlawed, nor exiled, nor destroyed in any manner· nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land," Magna Carta, Article XLIII.

as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

"But the evidence which the jury have of the fact is much other than that, for

"1. Being returned of the Vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger.

"2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court, is absolutely false, but to this the judge is a stranger, and he knows no more of the fact that he hath learnd in court, and perhaps the false depositions, and consequently knows nothing.

"3. The jury may know the witnesses to be stigmatized and infamous which may be unknown to the parties, and consequently to the court.

"4. In many cases the jury are to have a view necessarily in many by consent for their better information, and to this evidence likewise the judge is a stranger

"5. If they do follow his direction, they may be attainted[5] and the judgment reversed for doing that, which if they had not done, they should have been fined and imprisoned by the judge which is unreasonable.

"6. If they do not follow his direction and be therefore fined, yet they may be attainted and so doubly punished by distinct judicatures for the same offense, which the common law admits not.

"7. To what end is the jury to be returned out of Vicinage, when the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact that those of the Vicinage in general, to what end are they challenged so scrupulously to array and pole? To what end must they have such a certain freehold? And be proli et legales

[5] "A writ of attaint was a process by which the verdict of a jury in a civil cause might be reversed by a subsequent trial before twenty-four jurors. If the first verdict were set aside the jury who found it were punished by imprisonment and the forfeiture of all their property, or at a later date by a pecuniary fine. This proceeding had its origin in times when jurymen were considered as giving their verdict from their own pre-existing knowledge of the matter in dispute, rather than from the evidence of others given in their presence. If, therefore, they returned a perverse verdict, contrary to what was notorious in their neighborhood, they were looked upon as having committed wilful perjury and as deserving a severe punishment." THOMAS, LEADING CASES CONSTITUTIONAL LAW, Note p. 1444. The writ was used seldomly, if at all, after 1583.

> hominis, and not of affinity with the parties concerned? To what end must they have in many cases their view for their exacter information chiefly? To what end must they undergo the heavy punishment of the villainous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment when sworn to do it according to the best of their own knowledge.
>
> "A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning, and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are foresworn at least in foro conscientiae.
>
> "8. It is absurd a jury should be fined by the judge for going against their evidence when he who fineth knows not what it is
>
> "And it is as absurd to fine a jury for finding against their evidence when the judge knows but part of it, for the better and greater part of the evidence may be wholly unknown to him and this may happen in most cases, and often doth, as in Graves and Short cases."

The reasons of Judge Vaughan in paragraphs numbered 1, 2, part of 7 and 8 are no longer valid on account of the change in the theory of the jury system. The reasoning, however, in par agraphs 3, 4, 5, 6 and the most of 7, is just as sound today as it was in 1670. On this account the principle has lived. During the past two hundred fifty years in all the courts of Great Britain and of the United States the verdict of the jury upon the facts has been final.

The third case to arise out of Penn's assemblage in Grace Church Street was that of *Hammond v. Howell.* Thomas Howell was the Recorder, who had been so cruel to both the prisoners and the jury John Hammond, one of the jurors, brought suit against him, the mayor and the rest of the court at Old Bailey for false imprisonment. Justice Vaughan again spoke for the court of Common Pleas. He held that, although the judges of Old Bailey had erred in imprisoning the jury, the error was one of judgment and that "An action will not lie against a judge for what he doth judicially though erroneously "

The people were not satisfied with this decision. It was given in 1678. Seven years later came the atrocities of infamous Jeffreys and his "bloody Assize" in which hundreds of Englishmen were

condemned to death, maimed and imprisoned, or sold as slaves.[6] After these outrages, they wrote into the Act of Settlement of 1700-1701 the following provision. "That judges commissions be made quamdiu se bene gesserint,[7] and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them."[8]

Our interest in these cases is two-fold. (a) They have been selected from the rich field of precedents belonging to the period of English constitutional development immediately preceding our own acceptance of the Common Law and the adoption of the Constitution of the United States. They are examples of the struggles experienced by our English forefathers in the evolution of the principles of liberty and representative government, which were at the same time the sacred heritage[9] and the inspiration[10] of the American people. (b) They show how deeply the personality of William Penn has been impressed upon our laws as well as upon our history and government. We have long acknowledged his inestimable services in founding Pennsylvania, and in offering the first general plan of Union for the colonies,[11] but we have not been sufficiently aware of the fact that the principle establishing the independence of our judges had its origin in his cases 250 years ago. We have not generally known that his efforts, directed from his cell

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[6] When James II lost his throne in 1688, Jeffreys, disguised in the dress of a common sailor, attempted to flee. He was recognized and imprisoned in the Tower of London. He died there in 1689. He was the Chancellor and the chief of seven commissioners to whom was entrusted the government of the Church of England. In the trial of civil cases he was able and upright; in criminal cases he was influenced by political considerations, and was most unscrupulous.

[7] During good behavior.

[8] TASWELL-LANGMEAD, ENGLISH CONTITUTIONAL HISTORY (8th ed.), p. 656.

[9] "These hardy pioneers (American colonists) were the privileged heirs of the great political traditions of England. While the Constitution of the United States was very much more than an adaptation of the British Constitution, yet its underlying spirit was that of the English-speaking race and the common law. Behind the framers of the Constitution as they entered upon their momentous task were the mighty shades of Simon de Montfort, Coke, Sandys, Bacon, Eliot, Hampden, Lilburne, Milton, Shaftesbury and Locke." JAMES M. BECK, CONSTITUTION OF UNITED STATES, p. 20.

[10] "Americans, starting with an English-born political philosophy, developed, in a new environment, new ways of attaining the freedom at which that philosophy aimed. The British Empire, doomed to be broken asunder, was brought to that disaster by the insistent demand of Englishmen in America for the full enjoyment there of those liberties which England had fostered beyond any other country in the world." Prof. C. H. Van Tyne, speaking in the Moses Chamber of House of Lords, London (1927).

[11] Penn's Plan of Union, 1697. TAYLOR, ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION, p. 483.

in Newgate Prison, were responsible for the principle of law that the verdict of the jury upon the facts shall be final.

The permanent evaluation of the Penn cases in the United States came during the period when our statesmen were formulating our state and national constitutions. They were in the mind of George Mason of Virginia, when on June 12, 1776, he wrote section 8 of the first American Bill of Rights. They were in the possession of John Adams when in 1779 he wrote the famous and influential 29th article of the Massachusetts Constitution.[12] And finally when Congress and the states, upon the demand of John Hancock of Massachusetts, Thomas Jefferson of Virginia, and many other post-revolutionary leaders, seeking a better guarantee of our liberties, enacted a Bill of Rights in the form of the first ten amendments to the Constitution of the United States, they built into our federal constitutional structure, as one of its cornerstones, the principle for which Penn and his jury suffered in 1670.

"In suits at common law," the Seventh Amendment provides, "where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law "

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[12] CHANDLER, THE GENESIS AND BIRTH OF THE FEDERAL CONSTITUTION, pp. 215-216.

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