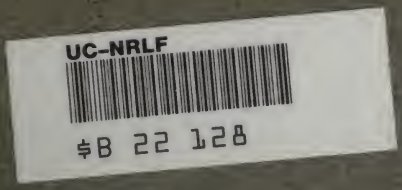

The Evolution of the Judiciary System of Pennsylvania

By

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An Address delivered at the Annual Meeting of the Association
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"Quaerere dat Sapere quae sunt legitima vere."

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The Evolution of the Judiciary System of Pennsylvania, 1626-1836

By BENAJMIN MATTHIAS NEAD[1]

IT was the forceful plea of a certain William Usselinxc, one time a merchant of Antwerp, adventurously inclined, which moved Gustavus Adolphus, the lion-hearted King of Sweden, to specifically grant, as part of his cherished plan to set "the Jewel of his Kingdom" upon the far-away shore of the South, or Delaware river in North America, a warrant, —the first warrant of the kind having reference to that particular locality,—for the establishment of a judicial tribunal, with jurisdiction over territory now included within the limits of Pennsylvania.

This warrant was contained among other and larger powers and privileges granted to the "Swedish West India Company," so called, a chartered institution, the jurisdiction of which, in trade, commerce and government, was, by original intent, to extend, not only over the rich domain in America, but to settlements in Australia and Africa as well.

The date of the grant was June 14, 1626. The warrant of judicial authority was in these words: "to constitute a council (tribunal), which, with its officers, shall attend to the administration of justice and preservation of good laws, . . . appoint judges, . . . accommodate differences between citizens of the country and the natives, as well as between directors or chambers (of the company), and finally preserve everything in good condition and under good order."[2]

The settlement on the Delaware, fostered by the Swedish

[1] An address, by the retiring president of the Dauphin County Bar Association, at the annual meeting, February 2, A. D., 1906.

[2] Hazzard's Annals of Pa., pp. 16–20. Col. and Prov. Laws of Pa., p. 420.

government, was of feeble growth. Not until nearly twenty years after the granting of the West India Company's charter, did its government assume definite form under the commissioned authority of Governor John Printz, by whom law and justice were first regularly administered within the present limits of Pennsylvania. He was instructed: "to decide all controversies according to the laws, customs and usages of Sweden." He was not given a special code of laws, or form of tribunal for the government of the colony and for the dispensing of justice, but according to the best authorities,[1] he was directed in his decisions, as Governor and Chief Magistrate, by a compilation of the laws, made in 1614, for the general government of the Swedish kingdom. His judgments, while subject to review by the Swedish West India Company, were doubtless rendered without the assistance of a jury, for, although Swedish writers assert that trial by jury is of Swedish origin, no instance is known of its application at this period in the colony on the Delaware.

When the Dutch Governor, Peter Stuyvesant, came down from New Amsterdam (afterwards New York) in 1655, and made a conquest of the Swedish settlement on the Delaware, the appointment of a vice-director for the district, by him, was immediately followed by the establishment of a Dutch form of government and the constitution, by degrees, of proper officers for the enforcement of law and the administration of justice under the authority of the Council of New Netherlands, which had jurisdiction in the determination of both civil and criminal cases.

There was full authority to allow the settlement on the Delaware its own courts. There was chosen for it also a "Fiscaal" or "Schout," which, being interpreted, means a chief prosecuting officer, with duties combining both those of a sheriff and a district attorney or attorney-general. The Delaware Colony was, at first, allowed but one schout, commissioned by the highest authority of the Dutch West India Company, and instructed, as was the custom, directly from old Amsterdam. A tribunal was created consisting of three

[1] Cf. Armstrong's Notes to Upland Court Records.

burgomasters to be appointed from the "honestest, fittist and richest." Seven schepens were chosen by the directors from a double number nominated by the officials of the Company. The duties of the schepens were of a judicial character, to give final judgment for all sums under one hundred guilders. In cases where the amount involved was over one hundred guilders, the party aggrieved was allowed the right of appeal to the director-general and council of New Netherlands. The schepens had authority also to pronounce sentence in all criminal cases, but a provisional appeal from their judgment was allowed.[1]

When the Dutch, in 1664, surrendered to the English their authority in the district of the Delaware river and bay, they had already established three courts of justice,—one, the Upland Court, erected upon the foundations laid by the Swedes; one at New Castle and one at the Whorekill.

These courts, James, Duke of York, the new English proprietory, continued by ordinance upon his final acquisition of the territory; weaving in the English with the existing Swedish and Dutch traditions of judicial administration, —forming the composite system of the first Pennsylvania Court as William Penn found it at Upland (now Chester).[2]

The records of the Upland Court dating back to 1676 have been preserved in the original. It is twenty-five years since I carefully scanned the yellow pages of this ancient time-marked record book with an interest as keen as that which, in company with the present president judge of our courts, I once turned over the leaves of the far more ancient Greater and Lesser Domesday Books, in their hiding place in the little chamber of the Old Rolls Court, in London.

With your kind indulgence, I wish to take just a brief time here to speak further of these little river courts,—it matters little which, for what is true of one is true of all.

They consisted of justices of the peace, whereof three made a quorum. They had the powers of a court of quarter

[1] Col. and Prov. Laws of Pa. Hist. Notes Chap. III, pp. 428, etc. O'Call. Hist. New Netherlands, Vol. 1, pp. 102, etc.

[2] Col. and Prov. Laws—Hist. Notes, pp. 455, etc.

sessions and, as well, the authority to decide all civil matters, under twenty pounds, without appeal. Where a larger amount was involved in a civil action, and in cases of capital crimes and banishment, an appeal lay to the assizes at New York. The right of trial by jury was guaranteed, but under the species of English law administered by the Duke of York and set forth in his Book of Laws, which somebody has characterized as nothing more or less than "a fancy of Lord Clarendon," no jury could exceed "the number seaven or be under six, except upon speciall causes, upon life and death the justices shall think fitt to appoint twelve." Except in cases of life and death the major part of the jury could give in a verdict, "the minor being concluded by the major without any allowance of any protest by any of them to the contrary."[1]

These courts also had a certain jurisdiction, in express terms granted, in matters of equity.

At Upland, court was held monthly, beginning the second Tuesday of the month.

The judges of the Upland Court, at the time of William Penn's arrival, were: Mr. Otto Ernst Cock, chief justice; Mr. Israel Helm, Mr. Henry Jones, Mr. Lacey Cock and Mr. George Brown, justices. The new proprietor manifested his confidence in the integrity and good judgment of this court by allowing the choice of its chief justice, Mr. Otto Ernst Cock, and one of the associate justices, Mr. Lacey Cock, as members of the Council of Nine, over which his own cousin, William Markham, presided, appointed by him to erect courts and take the other steps necessary to form the new government of Pennsylvania.[2]

The royal charter to the first proprietary guaranteed him the right to make laws and to administer justice in all its forms. In his "laws agreed upon in England," he fixed the fundamentals of the administration of justice, in the government which it was his purpose to set up, in terms the most positive, as follows, by sections:

[1] Col. and Prov. Laws of Pa., pp. 33, 34.
[2] Col. and Prov. Laws, Hist. Notes, p. 471.

"Fifth, That all courts shall be open and justice shall neither be sold, denied or delayed.

"Sixth, That in all courts, all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves, or, if unable, by their friends. . . .

"Seventh, That all pleadings, processes and records in courts shall be short, and in English, and in an ordinary and plain character, that they may be understood and justice speedily administered.

"Eighth, That all trials shall be by twelve men, and as near as may be peers or equals, and of the neighborhood, and men with just exception. In cases of life there shall be first twenty-four returned by the sheriff for a grand inquest, of whom twelve, at least, shall find the complaint to be true; and then the twelve men, or peers, to be likewise returned by the sheriff, shall have the final judgment. But reasonable challenges shall be always admitted against the said twelve men or any of them."[1]

His "Frame of Government" (Section 17), vested in the governor and council the privilege of nominating yearly a double number of judges and other officers, such as sheriffs, coroners, etc. In the assembly, also, was vested a similar right. From the number so nominated, the Governor or his deputy could make choice, and commission for each office the proper number of persons to serve for the ensuing year.[2]

These provisions of the law were immediately put into practice, the appointments made, the commissions issued and were in the name of "William Penn, Proprietary and Governor of Pensilvania." These commissions were signed from time to time by the Governor, the Deputy-governor or Lieutenant-governor, as the case might be.

It has been sometimes claimed that in early Pennsylvania all judicial officers and sheriffs, coroners, etc., received their commissions from the Crown, but this was not generally a fact. It is true, however, that when, under the provisions of

[1] Col. and Prov. Law, p. 100.

[2] Col. and Prov. Laws (Frame of Government), p. 97.

the Provincial Act of 1705, the offices of sheriff and coroner become elective the incumbents were construed to be officers of the Crown, and were accordingly commissioned by and required to give bond to the Queen then ruling.[1]

When William Penn arrived, in 1682, he recognized the authority of the Laws of James, Duke of York, which, as has been noted, had been promulgated for some time (September 22, 1676), throughout the territory which was now to be brought within the limits of the province of Penn. These laws continued in force and effect until the enactment of the new code by the first provincial assembly held at Chester in the first year of the government.[2]

The new code, naturally, worked imperfectly. One of the respects in which it failed was that it did not provide any method of appeal from the judgments of the courts of original jurisdiction. Under the Duke's laws there had been an appeal to the New York assizes, but that could not avail now. The new code made no provision for the trial of capital offenses. These defects were remedied the year following. Laws were passed regulating the procedure in criminal causes and allowing appeals from the judgments of the county courts to the Governor and Council. The county courts were not given jurisdiction in capital offenses, but original jurisdiction, in such cases, was reserved by the Governor and Council. This continued to be the case until the constitution of the first provincial court in 1684. But, frequently after that, the provincial court still being in commission, many causes cognizable by it, were frequently heard and determined by the Governor or Deputy-Governor and Council. This, advisedly, for the provincial court was ever a nondescript body, with ill-defined powers; the prey of the jealousy of locality; convulsed with selfish quarrels, out of which grew, *inter alia*, the bitter denunciation and impeachment of the first chief justice of the province, Nicholas More;[3] and withal, it was a tribunal exceedingly unpopular at all times.

[1] Cf. Col. and Prov. Laws (Court laws), pp. 297, etc.

[2] Ibid. pp. 107, 472.

[3] Col. and Prov. Laws, Hist. Notes, pp. 499–504.

The Governor and Council also took cognizance of cases in admiralty and matters relating to the orphans' courts, the status of which, at this early day, was not very well defined.

In justice to the Council, it must be said that it did not pose as an Aula Regis, but endeavored, always, to discourage the taking of appeals to and the bringing of suits before it as a court, but it was not until the passage of the act of 1701 that the provincial, as well as the other courts, were, to a degree, definitely established and their several functions and jurisdictions defined.[1]

Interesting as it is, I dare not, in this presentation of facts, attempt to follow in detail the story of the varying fortunes of the courts of Pennsylvania during the decade of unrest and dissension which preceded the death of the first proprietory of the province. The strife for the maintenance of the proprietory prerogative, the jealous regard of the Assembly for the rights of the people, the ambitious aims and subserviency of the Council were elements in the irrepressible conflict which, even at that early day, was on between the spirit of independence in the people, who were "inclined to make a Pennsylvania system of jurisprudence, rather than to introduce the English," and the representatives of kingly authority, whose aim was to preserve all the methods of government according to the English Constitution, and to remove them as far as possible from those of a republic.

It might be here remarked, in passing, that the "three peacemakers chosen by every county court in the nature of common arbitrators to hear and end differences between man and man" (a plan of the benign Quaker founder) do not seem to have been working over-time during this period.[2]

The royal reservation in the proprietory grant that all laws passed in this province should be submitted, within five years after their passage, through the English Board of Trade, to the Privy Council for approval or annulment, and the lesson which experience had taught the Assembly of

[1] Statutes-at-Large of Pa., Vol. II, p. 148.

[2] Col. and Prov. Laws, p. 128.

Pennsylvania, that every law passed and submitted which made for the conservation of the rights of, and the confirming of independent power in the people of Pennsylvania, was annulled, at sight, by the appellate tribunal of the Crown, were responsible for the otherwise incomprehensible series of enactments and repeals, re-enactments and counter repeals of the laws constituting the courts of Pennsylvania during that period; for the delay of justice and the consequent injury and distress of the people. Little blame was there to the assemblies that they withheld their laws from the English Council until the last day, in decency, it could be done, and that, immediately upon notice received of the annulment of the old law, they passed a new one, as nearly in conformity with the old one as they dared.

The death of the first proprietary in 1718, was an event which lent arms to the contending factions in Pennsylvania.

The most complete legislation for the establishment of courts, and the regulation of the practice therein, in Pennsylvania, up to this time had been the laws passed in 1715.[1]

Now, July 21, 1719, these met the fate of their predecessors and were repealed, in toto, by the English Crown, and Pennsylvania was again without any judiciary system or plan for the proper administration and execution of law. With the government devolved upon proprietaries, whose chief aim and ambition appeared to be to forward their own personal interests and to secure royal favor; with a hold-over lieutenant-governor (Sir William Keith), the most courtly and most dangerous exponent of the royal right and prerogative which the province knew since the days of Benjamin Fletcher; crafty and obsequious with the Assembly, ever ready, since the death of the first Penn, to take issue with the proprietaries in succession when necessary to advance his own policy; with the representatives of the people in the assembly discouraged at the apparent futile outcome of their endeavors, it is not strange that the purely English idea should be in the ascendancy, and that the English Privy Council should, for once, approve a Pennsylvania Act for

[1] Statutes-at-Large Vol. III, pp. 33, 65, 83.

the advancement of justice and the more certain administration thereof, the Act of May 31, 1718.[1]

Speaking of this act, Dallas says: "Its adoption opened a new era in the administration of penal justice, the rigor of the English penal law being fully established by it." This law continued in full force until the adoption of a revised penal code, after the Revolution.

Following the repeal of the general law of 1715, establishing courts of judicature in Pennsylvania, Lieutenant-Governor Keith continued the courts by proclamation and enabling writs, until the year 1722, when another law was passed.[2] It was this, the first general court law of Pennsylvania, which was not repealed by the Crown, but was continued in force until supplied by the new law of 1727.[3]

In 1726, Sir William Keith was succeeded as lieutenant-governor by Patrick Gordon, who, differing from Keith, was a man of direct and positive methods. When he learned that a movement was on foot to again invoke the ancient practice of the Crown in repealing the court laws of Pennsylvania—the Act of 1727—he called the attention of the Assembly to it; and when, among the rapidly increasing encroachments of the Crown, that catastrophe happened, Governor Gordon joined with the Assembly in recognizing the Act of 1722 as capable of being revived by legislative action and again being put in full force. It was under this revived statute that courts of justice, in Pennsylvania, were, in the main, conducted until the outbreak of the Revolution, when, with the adoption of the State Constitution of 1776, the old system, modified and necessarily changed, by that instrument was engrafted into the new government.

A COURT OF CHANCERY

The most notable triumph of the policy of Lieutenant-Governor Sir William Keith, at this period, was the establishment, with the consent of the Assembly, of a Court of

[1] Statutes-at-Large, Vol. III, p. 199.

[2] Col. and Prov. Laws, pp. 304, 382.

[3] Statutes-at-Large, Vol. IV, p. 84.

Chancery, or Equity (August 10, 1720), with himself as Chancellor.[1] This was a proposition which, hitherto, the Assembly had met with the most unyielding antagonism. The story of the establishment and maintenance, for nearly sixteen years, with much of the dignity of an English tribunal, of Keith's Court of Chancery, presents the most picturesque phase of the growth of a judiciary system in Pennsylvania. Because of its close affinity to and accord with English tradition, its broad exposition of the theory sought to be put into practice in certain of the other colonies, it stood high in royal favor and escaped the frequent chastenings of the appellate councils of the Crown, to which the other courts were constantly subjected.

But Keith, the creator and chancellor of this court, at length, after his court had been in existence some six years, was asked to lay down his authority as Lieutenant-Governor and Chancellor; this, perhaps, as a direct result of a quarrel he had with James Logan, who stood high in favor with the proprietary and had the confidence of the crown.

Under Patrick Gordon, the successor of Keith in the government, this court was continued for the entire period of the former's administration, but not without antagonism. The attitude of the Crown toward the other courts and its general encroachments were conducive of a close study of chartered rights by the people; and so it came about, near the close of Lieutenant-Governor Gordon's administration, in 1736, that the right of the equity court to exist and of the Lieutenant-Governor to preside as chancellor, were declared to be rights denied by the Pennsylvania charter when that instrument was properly construed.

Per contra, the practice in the other colonies was pleaded. This was declared irrelevant, unless it could be shown that the other colonies had charters identical with that of Pennsylvania. The Assembly was constrained to be jealous of the chartered rights of the people. There had been too much juggling with the laws. The latest royal instructions were most sinister in their character. It was a plain provision of

[1] Col. and Prov. Laws p. 386.

the charter which permitted all laws passed to take effect immediately, subject, of course, to review and disapproval by the Crown, within five years. But what was this new doctrine that no laws should be passed by the Pennsylvania Assembly, without the suspending clause (suspending their operation until they had received the royal sanction)? The people had submitted for years to the procedure ordained by their charter. When a law was passed in Pennsylvania it was first submitted to the Board of Trade in London. It was next submitted to the King's Solicitor for his opinion; then it came back to the Board of Trade and was considered and acted upon; thence to the King's Council, where it was, at length, approved or received its quietus,—usually the latter. It was a cumbersome practice, but it was in accord with the charter. Let the charter now be enforced!

The last three sessions of Assembly, before the death of Governor Gordon, in 1736, were strenuous ones, the fight for chartered rights being to the fore, but with the death of the Lieutenant-Governor the Court of Chancery died. There was no formal repeal of the law upon which it depended for its existence, but no chancellor ever sat again and, as Mr. Rawle, in his "Equity in Pennsylvania" (an exhaustive treatise on this subject, upon which I depend as authority), says: "Equity as a separate system (in Pennsylvania) slept for just one hundred years," a statement having reference, of course, to the defining of equity powers and the lodgment thereof in the Supreme and Common Pleas Courts of Pennsylvania by the civil code of 1836.

NOMENCLATURE OF COURTS

In reorganizing the courts during the Revolution, and after the adoption of the State Constitution of 1776, no radical change was made in their composition or form. The chief purpose of changes, evidently, was to make clear the disassociation of all the courts from any semblance of allegiance to the British government. The legislature distinctly declared "that the courts of justice should be held as here-

tofore." And thus, with little change, with the rehabilitation and recomposition of the old "High Court of Errors and Appeals," and the modifications made necessary by the adoption of the Federal Constitution, the old traditional courts of the province and early state glided gracefully into the grooves marked out for them under the Pennsylvania State Constitution of 1790. And, with many anomalous characteristics, the result of the long period of their growth, and of their composite nature, gradually disappearing, as time moved on, they came to be, at last, under the perfecting processes of the Civil Code of 1836, the much-admired and respected Pennsylvania System, as it remains substantially today.

Under the régime prior to the adoption of the State and Federal Constitutions, the Pennsylvania tribunals in which judicial power was from time to time vested, following closely the English nomenclature, were styled:

The General Quarter Sessions of the Peace,
The Courts of Oyer and Terminer and General Gaol Delivery,
The County Courts, or Courts of Common Pleas,
The Register's Courts and Orphan's Courts,
The Court for the Trial of Negroes (Special),
The Court of the Admiralty,
The Court of Chancery and Equity (Keith's), 1719–1736,
The Provincial Court, 1684,
The Provincial or Supreme Court, 1715,
The Supreme Court, 1722,
The High Court of Errors and Appeals, 1780.

Under the Constitutions: Federal authority abrogated the state admiralty courts. By state authority, judicial power was vested in:

A Supreme Court,
Courts of Oyer and Terminer and General Gaol Delivery,
Courts of Common Pleas,
Orphan's Courts and Register's Courts,
Courts of Quarter Sessions of the Peace,
Justices of the Peace.

And for the period from April 13, 1791, to February 24, 1806:

The High Court of Errors and Appeals.

In an address of this character it would not be feasible, nor in good taste, to attempt even a casual review of all these courts, so I have selected but two of the general courts, for a brief review at this time: the old Provincial Court, out of which grew the Supreme Court of the State, and the High Court of Errors and Appeals.

Before passing to this review, however, it may be interesting and perhaps instructive, as a commentary on the times, to take just a look at the powers conferred upon a special court, created with the sanction and under the administration of the benign Quaker founder of Pennsylvania. It was a special court for the trial and punishment of negroes alone, who were charged with capital offenses, among which were included rape, or attempted rape, upon white women.

This special court was established for each county. Two justices of the peace and six of the most substantial freeholders of the neighborhood constituted the court under the Governor's commission. If any negro within the government was convicted of committing "a rape or ravishment" upon any white woman or maid, or of murder, burglary or baggery, the punishment was death. For an attempted rape upon a white woman or maid the punishment was castration.

Nor were negroes, in those days, permitted to get into temptation by congregating together. They were permitted to assemble only to the number of four in company, particularly on First Days. Offending against this last provision of the law was punished by public whipping, thirty-nine lashes being the quota.[1]

THE PROVINCIAL COURT. THE PROVINCIAL OR SUPREME COURT. THE SUPREME COURT

The Supreme Court of Pennsylvania had its inception in, and was evolved from the provincial court of the early days of the government. This appellate court was first constituted

[1] Statutes-at-Large, Vol. II, pp. 77, 235.

in 1684, by act of Assembly, and by virtue of that statute and subsequent ones, up to the year 1722, held its jurisdiction and exercised its functions.[1]

This court consisted of five persons called provincial judges, appointed by the Governor, Deputy-Governor, or Lieutenant-Governor, for the time being, and duly commissioned under the great seal of the province. Three of these judges were competent to hold this court of appeal at Philadelphia, twice in each year. The provincial court, at first, had jurisdiction to hear and determine appeals from the county courts and to try, originally, titles of land and all causes, civil and criminal, not determinable by the county courts.

At least two of the judges thus commissioned were charged with the duty of riding the circuit of the several counties in the fall and spring of each year. The disposition of the decrees or sentences of the lower courts by the provincial court was not final, but the party aggrieved therewith had the right of appeal to the King.

By the Act of 1715 this court of appeals was styled the Supreme Court. The number of judges was fixed at four, and one was commissioned as the chief justice. The writs were issued, for the first time, in the name and style of the King, his heirs and successors, and bore teste in the name of the chief justice for the time being. The judges were forbidden to sit judicially in the lower courts in any matter, but were authorized "to hold plea" in equity, by bill, appeal, petition or suit brought by any person; or other matter relievable in equity.

The judges were paid by fees which were double the fees paid in county courts in like cases.

This was part of the judiciary system which, when the Crown had repealed the legislation creating it, Lieutenant-Governor Sir William Keith had kept in being and force by ordinance and writ until the passage of the Act of 1722, the important and effective ante-revolutionary judicial legislation.

[1] Col. and Prov. Laws pp. 168, 184, 225. Statutes-at-Large, Vol. II, pp. 134, 150, 201. Statutes-at-Large, Vol. III, pp. 66, 304.

Under this act but three judges were commissioned for the Supreme Court. Each, however, was invested with full power and authority to issue writs of habeas corpus, certiorari, error and all remedial and other writs and process returnable to that court. The court was also invested with the right to hear and determine all manner of pleas, plaints and causes which might be removed or brought from the respective quarter sessions of the peace and courts of common pleas of the counties; to examine and correct all and all manner of errors of the justices and magistrates of the province, in their judgments, processes and proceedings; as well as in all pleas of the Crown and in all pleas, real, personal and mixed; to reverse or affirm judgments in these matters; to examine, correct and punish contempts; to award process for levying fines, forfeitures and amercements, and generally to minister justice to all persons and to exercise the jurisdictions and powers granted, as fully and amply to all intents and purposes, whatsoever, as the Justices of the Court of Kings Bench, Common Pleas and Exchequer, at Westminster, or any of them may or can do; saving at all times a final appeal to His Majesty in Council, or to such courts or judges as by the Sovereign Lord, the King, his heirs or successors, had been appointed in Britain to receive, hear and judge of appeals from His Majesty's plantations.[1]

The practice of riding the circuit as the law commanded, when the Supreme Court sat for the trial of an issue of fact, having fallen into disuse and the practice being introduced of trying all issues of fact joined in all causes, irrespective of the county in which they arose at *nisi prius*[2] in Philadelphia, the Act of 1767 steps in and makes a very decided change in the composition of the Supreme Court.[3] It provided that four persons of known integrity and ability were to be commissioned by the Governor to be judges of the Supreme

[1] Statutes-at-Large, Vol. III, pp. 66, 302.

[2] *Nisi prius:* "Unless before." A judicial writ by which the sheriff is to bring a jury to Westminster, "unless before" that day, the Lord's Justices of the King go into his county to take assizes. From this writ the Philadelphia Court took its name.

[3] Statutes-at-Large, Vol. VII, pp. 108, 109.

Court, one to be distinguished as chief justice. The judges were given all the powers to be derived from existing laws and were required to ride the circuit twice in every year, if occasion required; their expenses in counties where no court was held to be paid by the province, but where court was held in a county the expenses were to be paid out of the county stock. No ethical question as to the propriety of passing free over the public ways vexed the judges in those days, for the law expressly provided that they, their clerks and their servants should pass and repass, and be conveyed by the ferrymen over all the several ferries within the province, without paying any ferriage fee or reward for the same.

By the provisions of this Act the removal of causes under fifty pounds, from the Courts of Common Pleas into the Supreme Court, was prohibited.

When the judiciary was organized under the revolutionary changes in the government, it was declared by legislative enactment, in general, that the courts of justice should be held as heretofore. Subsequent changes in the law, governing the Supreme Court, made before the adoption of the Constitution of 1790, Act of 1786, included a provision that the court should hold four terms annually. It was invested with original jurisdiction within the city and county of Philadelphia. No suit upon cause of action existing prior to the passage of the law granting this jurisdiction was cognizable, except suits of the Commonwealth and questions relating to land titles. The court was also empowered to make rules to regulate its practice. No suit was allowed to be removed from the common pleas by writ of certiorari issued by the plaintiff nor any writ of habeas corpus or certiorari after the same had been at issue two terms or more. In fact, no plaintiff was allowed to remove to the Supreme Court any action which could not have been originally instituted there. The Constitution of 1776 required that the judges of the Supreme Court should have fixed salaries. They were to be commissioned for seven years, but eligible to reappointment, and subject to removal, at any time, by the Assembly, for misbehavior. They were also prohibited from holding

other offices, which practice had been such a prolific source of trouble in the past, and neither fees or perquisites in addition to their salaries were allowed them. The powers of a court of chancery were also given, so far as the same related to the perpetuating of testimony; to obtaining evidence from places not within the limits of Pennsylvania and to the care of the persons and estates of those who were *non compos mentis*.

By the adoption of the Federal Constitution and the Judicial Act of 1789, the judical authority of the states was materially circumscribed, which condition of affairs was very apparent in the Pennsylvania Constitution of 1790 and the legislative inactments immediately following.[1] The Supreme Court was organized to hold three terms and courts of *nisi prius*, as formerly. All judges of courts, including the Supreme Court, were forbidden to practice in any court of this Commonwealth or elsewhere, another practice which was not uncommon in the early days of the province. On final judgments of the Supreme Court, a writ of error was provided for to the High Court of Errors and Appeals.[2] All judges were to hold their commissions during good behavior, removable by impeachment. Compensation could be fixed, but not diminished, during continuance in office. The jurisdiction of the court was extended over the state. In the year 1806, the right was denied the Supreme Court to try issues of fact, in banque, etc. The revolution did away with appeal to Great Britain. The review of the judgments of the Supreme Court which lay in a writ of error to the High Court of Errors and Appeals, died with the abolition of that court, and at the period when this review of the subject closes no writ of error lay from the final decisions of the Supreme Court to the Supreme Court of the United States, except in cases peculiarly within the jurisdiction of the last-mentioned court. The Act of 1834 organizing courts of justice declares the Supreme Court of Pennsylvania to consist of a chief justice and four associates, and the Act of

[1] Cf. Smith's Laws of Penna., Vol. I (notes), pp. 151–154.

[2] *Vide infra.*

1836—of the Civil Code—fully and clearly sets forth its limitations and jurisdictions, both generally and with respect to the city and county of Philadelphia.

THE HIGH COURT OF ERRORS AND APPEALS, "THE LOST COURT."

When the people of Pennsylvania had become fully imbued with the spirit of the Revolution, they awoke to the realization of a fact that was "gall and wormwood" to them. It was that the laws which, per force, they had continued in operation, touching them most closely as to their persons and property, the laws upholding the courts, gave them no tribunal of last resort, excepting the council of the hated King of Great Britain, or such tribunals as it was his royal pleasure to appoint for the final hearing of the appeals from the American plantations,—at best "a very expensive, difficult and precarious remedy." For nearly two years the people had smarted under this situation; then their representatives in Assembly came to the rescue. This body declared that the good people of the Commonwealth of Pennsylvania, by their happy deliverance from their late dependent condition and by becoming free and sovereign, had been released from a disgraceful badge of slavery and had acquired the transcendent benefit of having justice at home at a moderate cost and charge, and, having adopted the common law of England, had the right to enjoy the full benefit thereof by the erection of a competent jurisdiction within the state for the hearing, determining and judging in the last instance upon complaints of error at common law: and also a competent court of appeals for reviewing, reconsidering and correcting the sentences and decrees of the Court of Admiralty (other than in cases of capture upon the waters in time of war from the enemies of the United States of America) and likewise the decrees and sentences of the several registers of wills and for granting administrations. Upon this declaration and to this end the Assembly created, on the 28th day of February, 1780, the High Court of Errors and Appeals.[1]

[1] Statutes-at-Large, Vol. X, pp. 52, etc.

The law creating the court provided "that when any final judgment shall hereafter be given (in the Supreme Court) in any suit or action, real, personal or mixed, or when any final decree or sentence shall be pronounced in the Court of Admiralty of the Commonwealth (other than in the cases of capture made during war), or when any final decree or sentence shall be pronounced by any register of wills and for granting administrations," the party aggrieved was granted the right of appeal to the newly created court.

The president of the Supreme Executive Council, the judges of the Supreme Court, the judges of the Admiralty, for the time being, together with three persons of known integrity and ability, appointed and commissioned and removable from office, in the same manner as judges of the Supreme Court, were made to constitute the new court, which, as before stated, was styled "The High Court of Errors and Appeals."

No justices of the Supreme Court, or judge of the Admiralty, who had heard or determined, in the first instance, any of the causes appealed, was permitted to sit again, judicially, on the hearing of the same cause or controversy, in the Higher Appellate Court.

No writ of error or appeal was allowed until the party or parties in error, appellant, by himself or through his agent or attorney-in-fact, had filed an affidavit with the clerk of the Court of Errors and Appeals, attesting that the matter in controversy exceeded the value of "four hundred bushels of wheat," and had entered into a recognizance in double the value of the matter in dispute, to prosecute his appeal with effect.

Parties who had appealed any cause from the Supreme Court of the Province to the King of Great Britain in Council and upon which no judgment had been rendered, prior to the 4th day of July, 1776, were permitted to bring a new writ of error to the Court of Errors and Appeals, upon making the affidavit and giving the security prescribed, and the Appellate Court was enjoined to proceed in such causes as in others made cognizable in that court.

This court was required to sit, in Philadelphia, at least twice in every year in April and September. The judges and other persons who constituted this court were entitled, each, to receive as compensation, "the value of two bushels of wheat," for each day's attendance upon the business of the court.

Thus constituted, the High Court of Errors and Appeals continued until the adoption of the State Constitution of 1790, which rendered certain changes necessary, so by Act of Assembly,[1] the court was reorganized throughout. The president of the Supreme Executive Council, formerly a member of this court was now no longer an officer in being, nor was the judge of the Admiralty. The court was reconstituted by the appointment of the judges of the Supreme Court, the president judges of the several courts of common pleas in the five districts or circuits, then existing, and of three others, persons of known legal abilities, all of whom were commissioned during good behavior, in conformity with the theory of the new constitution, removable by impeachment.

Any five or more of the justices composing the court had authority to act, with jurisdiction to review on appeal all judgments of the Supreme Court, and of the registers' courts, in like manner and under like restrictions as the original Court of Errors and Appeals.

This court was required to sit in Philadelphia, at least once a year, on the second Monday of July.

The compensation allowed each member of the court, was six dollars for each day's attendance upon the business of the court.

All matters depending in the original Court of Errors and Appeals were held to be depending in the newly constituted court, "in the same state," and the justices were required to determine them.

Thus, finally constituted, the High Court of Errors and Appeals existed and did business as the court of last resort in Pennsylvania until the 24th of February in the year 1806,

[1] Act of April 13, 1791, Smith's Laws, Vol. III, p. 33.

when there went into effect the general Act of the Assembly of that year, "to alter the judiciary system of the Commonwealth." By the terms of this act, the jurisdiction of the Supreme Court was more fully and clearly determined; it was nominated as the court of last resort, and to this end it was enacted that the judges of the High Court of Errors and Appeals should sustain no new cause, but should have power continued to hold two terms, at which all the causes then before them should be determined, whereupon the said court was declared to be abolished and all its powers and duties to become vested in and be exercised by the Supreme Court of the Commonwealth. The records of the Court of Errors and Appeals were directed to be deposited in the office of the prothonotary of the Supreme Court for the Eastern District, which officer was authorized and required to receive the same. It was also made the duty of the prothonotary to furnish copies of these records, under the seal of his office, whenever required, upon payment of the usual fees. These copies were declared to be authentic evidence and as effectual in law, as if the Court of Errors and Appeals had not been abolished, and the copies had been certified by its own prothonotary.

This, in brief, is the history of the rise and fall of the highest Appellate Court ever known to Pennsylvania. It was constituted with enthusiastic and patriotic purpose. It took cognizance, from time to time, of matters of vital importance. Its mission passed and its usefulness departed in the short space of a quarter century. It is today nothing save a half-forgotten memory of the past.

As the county Youghiogany, which passed out of existence when the boundary disputes between, Pennsylvania upon the one hand and Maryland and Virginia upon the other were finally settled, was ever after known to historians as "The Lost County," so those who are familiar with the facts with respect to the former existence and the fate of "The High Court of Errors and Appeals," sometimes refer to it as "The Lost Court of Pennsylvania."

And now, my brothers, thanking you for your cheerfully granted attention and the interest you have shown, and with a due regard for the limits of your patience and your good nature, I must for the present, perhaps for all time, cut the thread of this narrative; trusting, nevertheless, that this which I have endeavored to gather, by a reasonable amount of diligence, and to present with some regard to method, may serve to lend an insight, however imperfect, into the story of the founding and the upbuilding of these important and honorable institutions of our Commonwealth and be an incentive for some one to pursue the inquiry further.