THE

CONSTITUTION, JURISDICTION AND PRACTICE

OF THE

COURTS OF PENNSYLVANIA

IN THE

SEVENTEENTH CENTURY.

BY

LAWRENCE LEWIS, Jr.

A PAPER READ BEFORE THE HISTORICAL SOCIETY OF PENNSYLVANIA,
MONDAY, MARCH 14, 1881.

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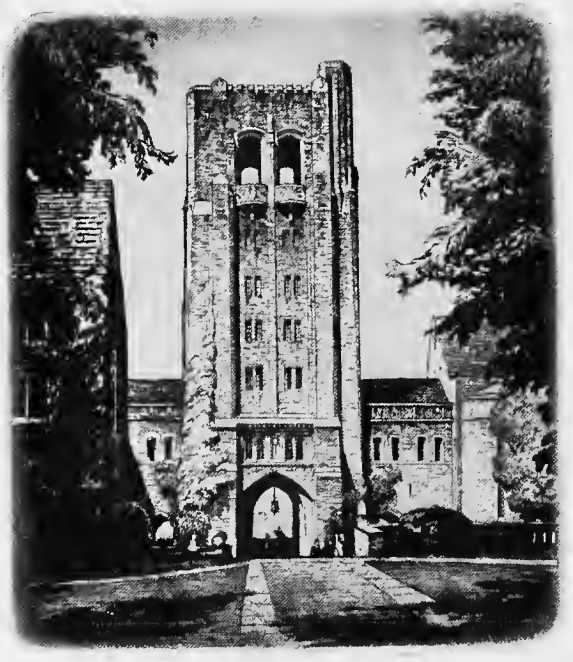

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THE COURTS OF PENNSYLVANIA IN THE SEVENTEENTH CENTURY.

The early judicial history of Pennsylvania necessarily presents striking features of interest to the minds of at least two classes in the community. To the professional lawyer it must always be a matter not only of curiosity but of importance, to study the first rude means devised to administer justice between man and man, to trace among the scanty records of the past that have descended to us the original of doctrines which constitute a distinctive part of modern jurisprudence, and to discern, among the transactions of those early times, the rise and development of institutions and practices which, moulded by changing circumstances and the lapse of time, have become familiar to him in the ordinary discharge of his professional duties.

To the student of history the subject affords a different kind of interest. Little attracted by the tedious accounts of routine practice or the fine distinctions between one jurisdiction and another, he finds gratification rather in contemplating the manners, customs, and modes of thought once prevalent in reference to judicial subjects. His eye looks to the accounts of the contentions of long ago with eagerness to glean from them some traces of the past life of the nation, to note upon what matters the interests of its people have been centred, what has been the nature of their industries, the extent of their commerce, the character of their education, the laxity or strictness of their morals, the depth or shallowness of their religious convictions. Nor does he scan those musty records less closely to aid him in forming a just estimate of the characters and dispositions of our forefathers. From no other source can he obtain a clearer knowledge of

their private foibles or their public merits. Whether judges, counsel, or parties, their natural dispositions, mental and moral training and the real extent of their talents are frequently laid bare to investigation, and if the voice of calumny is found sometimes to detract from the merits of those whose memory we would wish only to honor and esteem, ample compensation is afforded in the perusal of bygone transactions which serve as new instances of their virtues and abilities. A review of these considerations has induced me to attempt some slight account of the constitution, jurisdiction, and practice of the Courts of Pennsylvania in the Seventeenth Century. Peculiar facilities have been at length afforded for a thorough investigation of this subject. The late publication of all the Provincial Laws prior to 1700 has thrown new light upon much that was before obscure.[1] The origin of many distinctive features in our peculiar jurisprudence has been disclosed, the primitive constitution of the courts has been thoroughly explained, and the limits of their respective jurisdictions in early days for the first time clearly defined. I cannot but feel, therefore, that in the preparation of this sketch I have had notable advantages over those who have preceded me, and while despairing of success in attempting to do justice to so large and curious a subject, may perhaps venture to hope that even within the brief limits of this paper I shall be able to present its most striking and interesting features.

The power to erect courts of justice and to appoint all judicial officers in and for the Province of Pennsylvania, was by the express terms of the Charter conferred upon the Proprietary.[2] But, in deference to the wishes of the people,

[1] The title of this volume reads: Charters to William Penn and Laws of the Province of Pennsylvania, passed between the years 1682 and 1700, preceded by Duke of York's Laws in Force from the year 1676 to the year 1682, with an Appendix containing Laws relating to the organization of the Provincial Courts and Historical Matter. Published under the direction of John Blair Linn, Secretary of the Commonwealth, Harrisburg, 1879. It is better known as the Duke of York's Laws, and will be referred to as D. of Y. L.

[2] Charter of Pennsylvania.

Penn was willing to forego to some degree the exercise of this extraordinary right. By the Frame of Government[1] upon which he modelled his infant colony, he entrusted to the Governor and Council the erection of all necessary courts of justice, at such places and in such numbers as they should see fit, while he reserved to himself for the term of his life only, the exclusive right to nominate to judicial office. Practically neither of these provisions was very strictly carried out. When new courts were to be constituted in the Province, the concurrence of the Assembly was invariably required to the bill for their erection.[2] And as to the judiciary, though theoretically nominated by the Governor, they were at least during the Seventeenth Century usually selected by the Council, to whom during the absence of the Proprietary in England, the executive powers of government were frequently solely entrusted. The Council was elected annually by the people in accordance with the provisions of the Frame, so that generally the constitution of the Provincial Bench was at least to some degree within the popular control. All commissions to those in judicial office during the early periods of our history were issued in the name of the Proprietary, were signed by the Governor, Lieutenant-Governor, or President of the Council, and attested with the great seal of Pennsylvania.[3]

Having premised so much as to the common origin of all the provincial tribunals, it remains to point out in detail the characteristic features of each.

The County Courts of the Province first claim notice and attention. They had their origin in 1673, under the Government of James Duke of York, and were established in every county, "to decide all matters under twenty pounds without appeal," and to have exclusive jurisdiction in the administration of criminal justice, with an appeal, however,

[1] Frame of Government of 1682: D. of Y. L. 97.

[2] Laws May 10, 1685, c. 182, D. of Y. L. 177, etc. Laws March 10, 1685, c. 77, D. of Y. L. 131, etc.

[3] Introduction to Court Laws; D. of Y. L. 298.

in cases extending to "Life, Limbo and Banishment," to the Court of Assizes in New York.[1] They were originally composed each of five or six justices appointed by the Governor[2] and had a jurisdiction so vague and undefined that they can scarcely be said to have been bound by any positive law. The records that have come down to us, "are not satisfactory enough to justify any attempt at analyzing the conglomerate condition of law and justice . . . with the view of accurately making out the precise code and practice."[3] Some of these courts met quarterly, some monthly, no one learned in law presided on the bench, no attorney was allowed to practise for pay,[4] juries were only allowed to consist of six or seven men, except in cases of life and death, and in all save those instances, the conclusions of the majority were allowed to prevail.[5] In short those courts lacked almost every element of distinctively English procedure.

But, irregular as these tribunals were, they were continued by Penn upon his acquisition of Pennsylvania as well calculated to administer justice to the people. Justices of the Peace were from time to time commissioned, some for the whole Province, some for the particular county, upon whom the duty devolved of holding the County Courts.[6] Their number varied from time to time with the press of business or the caprice of the Executive. Their attendance at court was secured by the penalty of a fine.[7] But to relieve them as much as possible they were occasionally assisted in their labors by the Proprietary in person or by the members of the council and judges of the Provincial Court, all of whom were ex-officio justices of the peace. In each county one of the justices most esteemed for his age or ability was installed as President, though no particular honor or emolument seems to have been attached to the position.[8]

[1] 5 Penna. Archives, N. S. 631; 7 Penna. Archives, N. S. 738.
[2] 5 Penna. Arch., N. S. 718.
[3] Historical Notes; D. of Y. Laws, 414.
[4] Haz. Ann. Penn. 438.
[5] Book of Laws; D. of Y. L. 33, 34.
[6] John Hill Martin's Bench and Bar, Printed Slips in Hist. Soc. of Penna.
[7] Law May 10, 1685, c. 176; D. of Y. L. 176.
[8] John Hill Martin's Bench and Bar, Printed Slips in Hist. Soc. of Penna.

The County Courts thus constituted anew at first exercised a jurisdiction of a singularly indefinite chacter. Bound as yet by no strict rules of practice or precedent, they conformed for the most part to their former methods of procedure under the government of the Duke of York. Twelve jurymen were, however, now invariably empanneled, and the unanimous sense of the twelve was required to bring in a verdict. In 1683, the civil jurisdiction of the County Courts was first distinctly defined.[1] All actions of debt, account, or slander, and all actions of trespass were by an Act of Assembly declared to be originally cognizable solely by them. Cases relating to the title of real estate were also considered as within their jurisdiction, and, although in 1684,[2] on the establishment of the Provincial Court, this branch of business was assigned to it, it was restored to the County Courts by an Act passed during the ensuing year.[3] The Acts of 1690[4] and 1693[5] substantially confirmed this jurisdiction and settled the authority of the court on a surer basis. The ordinary subjects of litigation were actions of debt on bond, actions of slander, actions to recover the possession of land, actions of assault and battery, and actions of trespass either for cutting the plaintiff's timber or killing his "hoggs." Besides, however, the powers exercised by virtue of general statutory enactments, there were a variety of other civil matters of which the courts took cognizance either in consequence of express legislative sanction or the binding force of custom. The justices interfered to promote and defend the popular interests in all matters that were of public concern. In very early times they granted letters of administration. They superintended the laying out of roads, apportioned the town lots to responsible applicants, took acknowledgments of deeds and registered the private brands and marks of considerable owners of cattle. They exercised, too, a supervision over all

[1] Laws, March 10, 1683, c. 70; D. of Y. L. 129.
[2] Laws, May 10, 1684, c. 158; D. of Y. L. 168.
[3] Laws, May 10, 1685, c. 157; D. of Y. L. 171.
[4] Laws, May 10, 1690, c. 197; D. of Y. L. 186.
[5] Laws, May 15, and June 1, 1693, No. 3; D. of Y. L. 225.

bond servants, regulated the sale of their time, afforded summary relief if they were abused by their masters, punished them with stripes or the pillory if they attempted to escape, and took care that they were at liberty to purchase their freedom on reasonable terms. In addition, they frequently discharged other services eminently unjudicial in their nature. In certain contingencies, they levied the county taxes,[1] they entered into contracts for the erection of public buildings and paid from the county stock the standing reward offered for wolves' heads. Sometimes they were entrusted with special duties by the Council. Thus we find that in 1697–8,[2] the County Court of Philadelphia was ordered to cause "stocks and a cage to be provided," and was required "to suppress the noise & drunkenness of Indians, especially in the night, and to cause the Cryer to go to the extent of each street when hee has anything to cry, and to put a check to Horse racing."

The courts were for the administration of civil justice entrusted with distinct equity powers. "Each quarter sessions shall be as well a court of Equity as Law," says the Act of 1684,[3] and the provision was re-enacted in 1693.[4] What this equity was we have no distinct means of knowing. A high authority[5] has conjectured that it consisted of that "universal justice which corrects, mitigates, and supplies according to the popular rather than the technical notions of equity," and that "the suggestions of right reason" prevailed more than "the fixed principles of any established code." However this may be, it is certain that even in these very early times, the courts had a distinct equity side. The plaintiff here proceeded exactly as in chancery, by bill, and the defendant responded by answer. A decree was entered, not a judgment, and this was moulded to afford relief according to the require-

[1] Laws, May 15, and June 1, 1693, No. 17; D. of Y. L. 233. Chester Co. Records, 14, 8 mo. 1683.

[2] MM. Prov. Co., 12 Feb. 1697–8; 1 Col. Rec. 498.

[3] Laws, May 10, 1684, c. 156; D. of Y. L. 167.

[4] Laws, May 15, and June 1, 1693, No. 3; D. of Y. L. 225.

[5] P. McCall, Esq.'s, Address before Law Academy of Phila., 1838.

ments of the particular case. Costs were divided among the parties at the discretion of the court as the justice of the case required. Instances are extant in the early history of the Province where a court sitting as a court of equity is known to have reversed its own judgment previously entered while sitting as a court of law.[1] Such a course of proceeding, however, was eminently unsatisfactory to the people. The assembly, therefore, in 1687,[2] proposed a conference with the Council as to whether the courts were really entrusted with such powers. The Council answered that in their opinion the law as to Provincial Courts did "supply and answer all occasions of appeal and was a plainer rule to proceed by." As a consequence the practice was cut up by the roots and all attempts to alter or reverse judgments granted at law were thereafter made by an application to the Provincial Court.[3]

That strong distrust and dislike, however, of equitable powers, which afterward formed so prominent a feature in the Pennsylvania mind, will be found frequently cropping out to the surface even at that early day. In 1690,[4] a bill to strike out the word "equity" from the powers given to the courts passed first reading in the House, and though never actually enacted, doubtless represented the views of many in the Province. Again in 1694,[5] we find the assembly bitterly complaining that the justices had too great liberty to destroy or make void the verdicts of juries, and praying that they might be instructed "not to decree anything in equity" to the prejudice of "judgments before given in law."

The County Courts were vested with criminal jurisdiction in all save cases of heinous or enormous crimes.[6] Treason, murder, and manslaughter were always outside their cognizance, but until 1693, burglary and arson were triable before

[1] Hasting *v.* Yarnall, Records Chester Co. Ct. 3 d. 1 wk. 10 mo. 1686. 5 d. 1 wk. 10 mo. 1686.

[2] 1 Votes Ass. 41. Min. Prov. Co., 12, 3 mo. 1687, 1 Col. Rec. 157.

[3] See Min. Prov. Council, April 24, 1695, 1 Col. Rec. 441.

[4] 1 Votes Ass. 57.

[5] 1 Votes Ass. 79.

[6] Vide Acts, etc., supra.

them.[1] These criminal powers were vested in them without a special commission. This never was granted except in the time of Governor Fletcher. The justices had also sometimes entrusted to them powers of general gaol delivery.[2] The offences of which the county courts had frequently to take cognizance were indeed many of them sufficiently remarkable. Trials for larceny, swearing, laboring on the first day of the week, assault and battery, shooting or maiming the prosecutor's hogs, unduly encouraging drunkenness, selling rum to the Indians, and offences against public morality and decency, constituted the great bulk of the criminal business. Occasionally we find a man arrested and committed to prison on suspicion of piracy or smuggling, and it is pleasant to note that so loyal were the authorities of Chester County, that in 1685 they issued their warrant to apprehend one David Lewis because he was suspected of having taken part in "Monmouth's Rebellion in the West Country."[3] "Lying in conversation" was fined half a crown,[4] "drinking healths which may provoke people to unnecessary and excessive drinking"[5] was fined five shillings, while the sale of beer made of molasses at more than a penny a quart was visited with a like penalty of five shillings for every quart sold.[6] No person could "smoak tobacco in the streets of Philadelphia or New Castle, by day or by night," on penalty of a fine of twelve pence to be applied to the purchase of leather buckets and other instruments against fire.[7] Any person "convicted at playing of cards, dice, lotteries or other such like enticing, vain and evil sports and games," was to pay five shillings or be imprisoned five days at hard labor, while those who introduced or frequented "such rude and riotous sports and practices as prizes, stage plays, masques, revels,

[1] 1 Votes Ass. 91.
[2] Laws May 15, and June 1, 1693, No. 8, D. of Y. L. 227.
[3] Chester County Ct. Records: 13 day 2 week 10 mo. 1685.
[4] D. of Y. L., c. 36; D. of Y. L. 116.
[5] D. of Y. L., c. 14; D. of Y. L. c. 111.
[6] Laws May 10, 1684, c. 162, D. of Y. L. 169.
[7] Laws May 15 and June 1, 1693, No. 5, D. of Y. L. 260.

bull baitings, cock fightings and the like," were either to forfeit twenty shillings or be imprisoned at hard labor for ten days.[1] It is to be feared that if such laws should nowadays be re-enacted and enforced, hasty steps would have to be taken for the immediate enlargement of our work-houses and penitentiaries.

The course of practice in the County Courts, and particularly in those of Chester, Bucks, and Philadelphia Counties, was much more regular than has been generally supposed.[2] Although the justices were never men of any regular legal training, they were doubtless familiar by form books or from hearsay with the ordinary mode of conducting legal proceedings, and at any rate were invariably solicitous to maintain the dignity and propriety of their respective courts. Many amusing instances occur among the records of the various counties of the disturbances to which the justices were subject. Blasphemous and improper expressions of the grossest kind are chronicled at full length with the penalties imposed upon the various culprits. Smoking tobacco in the court-room seems in particular to have been esteemed a most heinous offence. Luke Watson, one of the justices of Sussex Co., in 1684 seriously offended the Court twice on the same day in this manner, and was severely fined by his brethren on the bench, the first time fifty pounds of tobacco, the second, one hundred.[3] At the opening of the same court at the June sessions 1687, there seems to have been particular difficulty in enforcing order. William Bradford was reprimanded for swearing in the presence of the justices, and Thomas Hasellum fined for singing and making a noise.[4] A few days after during the same term the court had occasion to require the presence of one Thomas Jones, who seems to have been a very hardened character and refused to obey their mandate. They accordingly sent the constable and two justices to fetch him into the court, whereupon he fell to cursing and banning at a horrible rate. Then, say the records,

[1] Great Law Dec. 7, 1682, c. c. 26 and 27, D. of Y. L. 114.
[2] McCall's Address before Law Academy of Phila., 1838.
[3] See Sussex County Records, MS. [4] Ibid.

"the said Jones being brought to the Court, the Court told him of his misdemeanour, and told him he should suffer for it; he told the Court he questioned their power, soe the Court ordered the Sherriff and Constable to secure him and they carryed & dragged him to y^e^ smith shop where they put irons upon him, but he quickly got the Irons off and Escaped, he having before wounded severall persons' legs with his spurs that strived with him, and when they was goeing to put him in the Stocks, before that they put him in Irons, he Kicked the Sherriff on the mouth and was very unruly and abusive, and soone got out of the Stocks."[1]

The distinction between the various kinds of civil actions seems to have been recognized and acted on in all these early courts. Case, Trover, Debt, Ejectment, Trespass, and Replevin occur from time to time and are usually appropriately employed. Sometimes, however, a serious error occurred. Case was for example occasionally substituted for ejectment. The plaintiff would declare for the "just, quiet, and peaceable possession of land," and would obtain relief equivalent in effect to a writ of "habere facias possessionem."[2] Even as late as 1705, so good a lawyer as David Lloyd expressed his conviction that a writ of ejectment would not lie in Pennsylvania "because, being founded on a fiction, it was inconsistent with the spirit of our laws."[3]

No matter what the form of action, the process was invariably the same.[4] The suit was begun by exhibiting the complaint in court fourteen days before the trial, and by the plaintiff asserting that he verily believed his cause to be just. The defendant was then brought in either by summons, arrest, or attachment. The summons was served at least ten days before the trial, and was accompanied by a copy of the complaint, both of these being in some cases left by the plaintiff himself at the defendant's dwelling house. No

[1] See Sussex County Records, MS.

[2] Sussex County Records, MS., 9, 10, 11, 11 mo. 1682–3.

[3] 2 Min. Prov. Co., 9, 11 mo. 1704–5.

[4] McCall's Address before the Law Academy, 1838. Laws, March 10, 1683, c. 66, D. of Y. L. 128

arrest was allowed unless the defendant was about to leave the county and would give no bail, or unless he had not goods sufficient to be attached.[1] In some instances an irregular practice obtained of beginning the suit by petition, in which case the defendant was brought in by an order of the court.

On the day fixed for the trial or hearing, the parties appeared in person, or, if unable, by their friends to assert or defend their rights. If the plaintiff had failed to serve his process or complaint, he was non-suited. If the defendant failed to appear, judgment was entered against him for default.[2] If both parties were present and ready to proceed, the defendant was called on for his answer. This at first was not always read, but subsequently became an essential part of every case. The papers already mentioned constituted all the processes and pleadings in the cause. They were all short and all in English as required by the fundamental law of the Province.[3] The answer could set up any defence, legal or equitable, to the plaintiff's claim. If a set-off existed, the defendant was to acknowledge the debt which the plaintiff demanded and defalk what the plaintiff owed to him on the like clearness.[4]

The answer being disposed of, the court now turned to the adjudication of the cause. The parties were sometimes, particularly in the lower counties, content to leave the question to the bench without the intervention of a jury, and in such cases the witnesses for both sides were called, affirmed, and examined, argument heard, and the sentence of the justices pronounced. These contentions were conducted with some regularity. No evidence was received either from a party to the cause or from any one else directly interested in the result. Two witnesses were required to established the plaintiff's case.[5] A rule of court provided[6]

[1] Laws, May 10, 1684, c. 167, D. of Y. L. 172.
[2] P. McCall, Esq.'s, Address before the Law Academy of Phila., 1838.
[3] Great Law, Dec. 7, 1682, c. 37, D. of Y. L. 117.
[4] Great Law, Dec. 7, 1682, c. 41; D. of Y. L. 118.
[5] Law, 7, 10 mo. 1682, c. 36, D. of Y. L. 116.
[6] McCall's Address before the Law Academy, 1838.

"That plaintiffs, defendants, and all other persons speak directly to the point in question . . . and that they forbear reflections and recriminations either on the court, jury, or on one another under penalty of a fine." In deciding the cause the justices were swayed almost entirely by their own convictions of right—*arbitrum viri boni.* Their sublime disregard of ordinary legal rules is patent on even a cursory perusal of their proceedings.

In most instances the parties were not content to submit the question to the court. A jury was therefore in these cases summond, a verdict duly returned, and judgment including costs of suit entered thereon.

The judgment of the court, in the lower counties, was in early times often pronounced in a very remarkable way. An Act of 1683[1] provided that whereas there was "a necessity for the sake of commerce in this infancy of things, that the growth and produce of this Province . . . should pass in lieu of money, that, therefore, all merchantable wheat, rye, indian corn, barley, oats, pork, beef, and tobacco should pass current at the market price." Of this provision the people availed themselves largely. They frequently gave bonds to each other acknowledging their debts in kind. Judgments were accordingly sometimes entered "for one hundred and seventy-two pounds of pork and two bushels of wheat, being the balance of an account brought into court,"[2] or for "32 shillings for a gun, and one hundred and fifty pounds of pork for a shirt,"[2] while, perhaps, the climax is reached in an entry of judgment for "one thousand of six-penny nails, and three bottles of rum."[2] Even when the amount was liquidated in money, it is sometimes found estimated in guilders and stivers instead of pounds, shillings, and pence.

When judgment was once pronounced, ten days had to intervene before execution issued,[3] and, although this practice

[1] Laws, 25, 8 mo. 1683, c. 144, D. of Y. L. 162.

[2] Sussex Co. Records, MS , 9, 10, 11, 11 mo. 1682–3.

[3] Min. Prov. Co., 1 and 2, 2 mo. 1686, 1 Col. Rec. 121–122.

was complained of by the Assembly as a grievance in 1687, it does not seem to have been substantially altered.[1]

Of the process of execution we know very little. The "shriefe," or in his absence the "crowner," always made specific returns to the court of the manner in which he performed this duty. Lands were at least to a limited degree liable to be seized and sold,[2] and, in some instances, the justices themselves exposed them to public vendue in the court-house.[3]

The tendency of all judicial proceedings was to discourage litigation as much as possible. If the plaintiff declared for more than five pounds, and his debt or damage proved less than that amount, he lost his suit and was mulcted for costs.[4] Cases too are very frequent where the courts advised the parties amicably to adjust their difficulty rather than undertake the trouble and expense of an adversary proceeding.

Another strong instance of this peaceable tendency is found in the establishment of the unprofessional but regular tribunal called the Peacemakers. By the Act of 1683[5] it was provided that in every precinct three persons should be yearly chosen as common peacemakers, whose arbitrations were to be as valid as the judgments of the courts of justice. These peacemakers were not elected by the people, but appointed annually by the County Court.[6] Frequent references of cases pending in the courts were by agreement made to them sometimes once only, occasionally twice, and in rare instances three or four times. The Provincial Council, too, was very apt to relegate questions brought before it to the adjudication of this tribunal.[7]

The following award filed in Chester County, in 1687, in

[1] Min. Prov. Co., 11, 3 mo. 1687, 1 Col. Rec. 158.

[2] Presbyterian Corporation *v.* Wallace *et al.*, 3 Rawle, 140.

[3] *Vide* Sussex Co. Rec., MS.

[4] Great Laws, March 10, 1683, c. 71, D. of Y. L. 130.

[5] Law, March 10, 1683, c. 65, D. of Y. L. 128.

[6] See Address of Hon. James T. Mitchell on Adjournment of District Court, 1875, pp. 4 and 5.

[7] Min. Prov. Co., 7. 9 mo. 1683, 1 Col. Rec. 34.

an action of an assault and battery by Samuel Baker against Samuel Rowland,[1] is a fair example of those usually made by this peace-loving body: "Samuel Rowland shall pay the lawful charges of this court, and give the said Samuel Baker a Hatt, and so Discharge each other of all manner of Differences from the Begining of the World to this Present day." The tribunal of the Peacemakers did not, however, very long survive. In May, 1692,[2] the question was put to the Assembly whether the law relating to Peacemakers was in practice, and the decision was in the negative. It made way for a similar practice, that of arbitration, always a favorite mode of decision in this State.[3]

Of the practice of the County Courts in criminal cases we do not know so much. Originally the prisoner seems to have been simply brought before the justices on their warrant, and tried without either indictment or plea. But in a short time this gave place to a more regular course of proceeding. A grand inquest was summoned in every county to bring in their presentment twice a year,[4] an indictment was regularly framed, and the prisoner usually admitted to bail, and given every fair opportunity of defending himself. The panel of jurymen was drawn in a highly primitive manner. "The names of the freemen were writ on small pieces of paper and put into a hat and shaken, forty-eight of whom were drawn by a child, and those so drawn stood for the sheriff's return."[5] The sentences of the court were not usually severe. Restitution or compensation to the party aggrieved was in almost all cases adjudged, and the whipping post, the pillory, and the imposition of fines were usually resorted to as punishments in preference to long terms of imprisonment. In fact the state of society was such as to make it extremely undesirable to deprive the community of the

[1] Baker *v.* Rowland, Chester Co. Records, 3 day, 1 wk. 8 mo. 1687.
[2] May 12, 1692, 1 Votes of Ass. 62.
[3] P. McCall Esq.'s Address before the Law Academy of Phila., 1838.
[4] Laws, March 10, 1683, D. of Y. L. 129, c. 68.
[5] Laws, March 10, 1683, D. of Y. L. 129, c. 69.

labor of an able-bodied culprit by shutting him up within a prison's walls.

Closely allied to the County Courts were the Orphans' Courts of the Province. These were first constituted by the Act of 1683, and were to "sitt twice in every year."[1] The justices were the same as those presiding in the County Courts.

Their province was declared to be "to inspect and take care of the estates, usage, and employment of orphans . . . that care may be taken for those that are not able to take care for themselves," but their jurisdiction was not confined within this narrow limit. They had control over the management and distribution of decedent's estates, and with the approbation of the Governor and Council could order a sale of his real property for the discharging of his debts.[2] They appointed too guardians of minors, and regulated their accounts, but obliged legatees to prosecute their claims in the regular courts of law. The duties imposed by them on an executor or administrator as to collection of the assets, filing of the inventory and distributing the estate were substantially the same which he now has to perform. But the primitive nature of the court's proceedings forms a striking contrast to the complications of Orphans' Court practice at the present day. A petition praying the appropriate relief was presented, and then the residue of the proceedings were moulded to fit the requirements of the case.[3] In the lower counties the court sometimes neglected to summon the defendant, but gave judgment for the plaintiff on his own showing, a practice which drew on them a sharp reproof from the council in 1685.

As a rule the conduct of the early Orphans' Courts was by no means satisfactory. Their jurisdiction was vague, their practice irregular, and consequently a large share of the duties which would have been more appropriately performed by them fell to the share of the Provincial Council.

[1] Law, March 10, 1683, c. 77, D. of Y. L. 131.
[2] Laws, May 3, 1688, c. 188, D. of Y. L. 180.
[3] Min. Prov. Co., 24, 7 mo. 1685, 1 Col. Rec. 107.

Prior to 1684 there existed in Pennsylvania no distinctive appellate tribunal. The County Courts were, it is true, liable to have their judgments modified or reversed on application to the council sitting at Philadelphia.[1] But this mode of relief, though reasonable enough in the extreme infancy of the colony, gradually began to impose too heavy a burden on the appellant. The spread of the settlements and the difficulties of travelling, often made it more tolerable in petty cases to suffer injustice than to obtain redress at the expense of the time, labor, and money involved in going to and returning from the capital town.

To remedy these inconveniences a court was constituted in 1684,[2] known as the Provincial Court, to be composed of five judges. Its powers were briefly to hear and determine all appeals and to try "all titles to land and all causes as well criminal as civil, both in law and in equity, not determinable by the respective County Courts." For the exercise of these powers, the court was to sit twice in every year at Philadelphia, and at least two of the justices were to go circuit into every other county in the spring and fall. The judges made use in going from place to place of one Edward Evaret's wherry boat, and the charges of their journeys were defrayed out of the public purse.

In 1685[3] the court was constituted anew. The number of its judges was now reduced to three, its criminal jurisdiction in cases of heinous and enormous crimes more distinctly defined, and its original cognizance of trials of title to land abolished. It was again remodeled by the Acts of 1690[4] and 1693,[5] and the number of its judges was restored to five. Its powers were not, however, by these provisions materially altered.

Of the judges of the Provincial Court one was always commissioned as chief, or prior justice, and was entitled by virtue

[1] Laws March 10, 1683, c. lxx., D. of Y. L. p. 129.
[2] Laws May 10, 1684, c. 158, D. of Y. L. 168.
[3] Laws May 10, 1685, c. 187, D. of Y. L. 177.
[4] Laws May 10, 1690, c. 197, D. of Y. L. 184.
[5] Laws of May 15 and June 1, 1693, c. 163, D. of Y. L. 225.

of his office to preside. One at least of the justices was always a citizen of the lower counties, and, according to some authorities, whenever the court sat in these counties, an inhabitant was authorized to preside as its chief. This practice necessitated the issuing of two separate commissions whenever a new bench was to be appointed, one nominating a chief justice from the upper, the other from the lower counties.[1]

The commission of 1690,[2] however, was not issued in the customary way. The council saw fit to appoint Arthur Cook, of Bucks County, Chief Justice for all the sessions of the court. This action provoked an indignant remonstrance on the part of the deputies from the lower counties. They insisted on their right "to have two commissions drawn to the judges that the Province might be accommodated and the Counties annexed with each one, *i. e.*, in one to have a judge from the territories first named, and in the other one from the Province."

Obtaining no redress from the Council for their alleged grievance, the malcontents resolved upon a most extraordinary action. Though only six in number and comprising, therefore, but one-third the Council, they met clandestinely in the council chamber, chose William Clark of Sussex to preside over their deliberations, censured severely the negligence and incapacity of the judges already chosen, and proceeded to elect a full new bench.

They further drew up two commissions in accordance with their views, in one of which Clark was nominated as Chief Justice of the lower counties, and proceeded to send the documents to Markham, Keeper of the Great Seal, with instructions to ask him to affix it to them.

Markham of course refused, and a meeting of the Council was hastily convened who entered a protest again the action of the six members as "undue and irregular," and "contrary

[1] Min. Prov. Co., 18, 6 mo. 1684, 1 Col. Rec. 66; Min. Prov. Co., 12, 7 mo. 1684, 1 Col. Rec. 68.

[2] Min. Prov. Co., 21 Oct. 1690, 1 Col. Rec. 304.

to the express letter of the laws." Their proceedings were therefore entirely disallowed and annulled, and a proclamation to that effect ordered to be issued.

The pretensions of the dissatisfied members found, however, ample support among their constituents. Complaints from the territories of their unjust treatment were frequent and universal. And from this trivial occurrence may be dated the beginning of the unhappy differences which thirteen years later occasioned the severance of the lower counties, now constituting the State of Delaware, from the Province of Pennsylvania.

For the first few years of the Provincial Court it was found almost impossible to sustain its dignity and character. The compensation given to the judges was very small and probably irregularly paid.[1] The terms of office were very short—never exceeding three years, and often extending only throughout one. The duties, too, were arduous and of such a character as involved frequent journeys from one part of the Province to the other. It is therefore scarcely to be wondered at that great difficulty was found in securing proper persons to place upon the bench, and that the records are full of instances where appointees begged to be excused from serving, and gladly declined the proffered but unwelcome honor.

In spite, however, of all these difficulties the early provincial judges of Pennsylvania were men of sterling integrity and notable abilities. There were found persons willing to serve, who, if not of the very foremost rank in talents and energy, were nevertheless sufficiently conspicuous for their public services and private merit. Most of them occupied at one period or another of their career a seat at the provincial council board, and some had taken part in the deliberations of the Assembly. Destitute of any regular legal training, they nevertheless possessed minds well calculated to administer such rude justice between man and man as the state of the country required. Little bound by the authority

[1] See Introduction to Court Laws, D. of Y. Laws, 298.

of precedents, and chiefly controlled by the rough notions of equity which nature had implanted in their hearts, they performed their duties in a manner which usually secured justice at least in the isolated case before them, and which, therefore, was satisfactory to the community in which they lived. No traces of their opinions have come down to us; and, judging from contemporary records, it seems highly probable that they were seldom required to pass upon a technical point of law. The conducting of routine business, the guarding of juries from extraneous and injurious influences and prejudices, the control and examination of witnesses, and the adjudication of simple matters of fact where the parties agreed to dispense with a jury must have made up the great bulk of their official labors.

The Proprietary as early as October 18, 1681, in his letter to his kinsman William Markham, says, "I have sent my cosen William Crispin . . . and it is my will and pleasure that he be as Chief Justice."[1] Crispin is supposed, however, to have died either before sailing for America or shortly after his arrival.[2] His commission at any rate never took effect. No memorial is preserved of his having ever presided in any court.

The honor, therefore, of first discharging the highest judicial office in Pennsylvania, is to be attributed to the man appointed by the Proprietary in pursuance of the Act of 1684—that man was Nicholas More. It is difficult, almost impossible, justly to estimate the abilities and character of More, from the sources of information which lie open to us. Educated according to the better opinion in the study of medicine, he in maturer years drifted away from the practice of his profession and in 1681 became the President of the Society of Free Traders and a large purchaser of land in the new Province of Pennsylvania.[3] He arrived in the colony with Penn in 1682, and though not a member of the Society

[1] Proud's History of Pennsylvania, 295.

[2] Westcott's History of Phila. c. 18.

[3] The History of Moreland, by William J. Buck, 6 Coll. Hist. Soc. of Penna. 189.

of Friends, so far won the confidence and regard of the people that he was returned as a member of the first Assembly at Chester, and even according to some accounts was elected speaker of that body.[1] He was returned as a member of the Assembly in the three succeeding years, and in 1684 was elected again its speaker.[2] In August of that same year he was commissioned by the Proprietary, Chief Justice, or prior judge as it was then called, of the Province, and at once entered upon the discharge of the functions of that office.[3]

But however estimable the qualities which entitled him to all these offices of trust and honor, his character was stained by faults which irritated and incensed those with whom he was brought in contact. A strong and energetic mind was in him joined to an haughty mien, a contentious spirit, and a harsh and ungoverned temper. The early records of the Province afford several instances where his impatient outbursts shocked the sense of his contemporaries. When in 1683 a Council and Assembly were returned less in numbers than required by the Frame of Government, who nevertheless proceeded to business as though invested with full legislative powers, More is reported as saying in public, "You have broken the Charter, and therefore all that you do will come to nothing. Hundreds in England will curse you, . . . and their children after them, and you may be impeached for treason for what you do."[4]

Again in 1684, on the passage of certain laws to which he was bitterly opposed, he denounced them openly in the House, as "cursed laws," and used still stronger language even better calculated to outrage the feelings of his fellow law-makers.[5] In addition to all this we find that repeatedly he entered his indignant and solitary protest upon the min-

[1] Gordon's Hist. of Penn. 87.
[2] Votes of Ass. pp. 1, 24.
[3] Min. Prov. Co., 12, 7 mo. 1684, 1 Col. Rec. 68.
[4] Min. Prov. Co., 2, 1 mo. 1683, 1 Col. Rec. 2.
[5] Min. Prov. Co., 17, 3 mo. 1684, 1 Col. Rec. 55.

utes of the Assembly against measures which seemed to his individual judgment, hasty or impolitic.[1]

The continuance of such practices joined no doubt to an overbearing and haughty spirit in the discharge of his judicial duties made More many enemies in all classes of the community. It is, therefore, with but little surprise that we read of a formal impeachment of him by the Assembly as early in his judicial career as 1685.[2]

On the morning of May 15 of that year a formal complaint was exhibited by a member of the House against him. More, who was sitting as a delegate in the House, was ordered to withdraw. The articles of accusation were read and successively approved. Managers to conduct the impeachment were appointed, and then the whole body adjourned to wait upon the President and Council and request them to remove the accused from all his offices of trust and power. The council received the accusers with grave civility, appointed seven o'clock on the following morning as a time for them to substantiate their complaints, and summoned the accused to answer to the charges preferred against him.[3]

Meanwhile More was by no means inclined gracefully to submit himself and his actions to the judgment of the Council. He took occasion to complain bitterly of the action of the Assembly, and accused Abraham Man, one of the managers of the impeachment, of being "a person of a seditious spirit."[4]

The next morning the House assembled, not, it may be conceived, in the best of tempers. More, they resolved, had, by his animadversions upon Man, "broke the order and privilege of the House." A committee was despatched to require his attendance to answer the accusations made against him, and he was warned that "if he did not submit himself as conscious of the said charge, that he should be ejected as an unprofitable member of the House."

The committee, however, met with little success in their

[1] Votes of Assembly, pp. 32 and 33.
[2] Votes of Assembly, p. 33.
[3] Min. Prov. Co., May 15, 1685, 1 Col. Rec. 83.
[4] Votes of Assembly, p. 34.

mission. They waited on the culprit, and informed him of what they wished. "In what capacity do you come?" said More. "That you may know when you come there," said they. "I will be voted into the House as I was voted out of the House before I will appear in the House," was the arrogant rejoinder, and with this report the committee was fain to return.

The Assembly now very prudently resolved to collect the testimony necessary to make good their charge. The possession of the records of the Provincial Court was almost a necessity, as they contained not only the strongest but in some cases the only existing evidence of More's misfeasances in office. It so chanced that Patrick Robinson, clerk of the Court, was present in the room where the House was assembled, a man little in sympathy with the impeachment and more disposed to shield the accused than furnish the evidence against him. He was called upon to produce the records, but this he declined to do, alleging at first that there were no records and afterwards insisting that they were "written some in Latin where one word stood for a sentence, and in unintelligible characters which no person could read but himself, no, not an angel from Heaven."

The House mildly but firmly insisted on compliance with their commands, but the utmost they could obtain from the clerk was a promise that he would consider it. "Delay will be taken as a denial," was the warning he received. "You may take it so if you will," was his reply, and with this closing insolence he withdrew. The House, justly indignant at his behavior, ordered their speaker's warrant to issue for his apprehension, and committed him to the custody of the sheriff till their pleasure should be known.

Nor was this the sum of Robinson's misdeeds. He was reported as having used the scandalous phrase in reference to the articles of impeachment that they were drawn up "hob nob at a venture." This was too much for the patience of the House. They voted him a public enemy and violator of their privileges, and declared themselves unable to proceed with public business until they should obtain satisfaction from

the Council. The House accordingly adjourned, and John White, the speaker, with two other members, went to wait upon the Council. Robinson had by this time apparently worked himself into a towering rage. Meeting White on the street going to the Council Chamber, he stopped him in a threatening manner, saying, "Well, John, have a care what you do; I'll have at you when you are out of the chair." The committee, however, were well received by the Council, and promised satisfaction for the insult. Robinson's expression was declared "indecent, unalowable and to be disowned," and More having failed to appear that morning, the afternoon of the next day but one was fixed by the Council for the hearing of the case.[1]

More all this time, secretly supported by the Governor and his friends in the Council, took no notice of the proceedings against him, and outwardly affected an ignorance of them and indifference to them which must have been feigned. Meeting John Briggs, a member of the House, at the Governor's, he asked him in a careless manner "what the Assembly was doing." Briggs replied what More very well knew, "They are proceeding on thy impeachment." "Either I myself or some of you will be hanged," said More, "and I advise you to enter your protest against it."[2]

On the morning of the eighteenth, the Assembly met after a long conference with the Council. They once more endeavored to extort the records from Robinson, who was brought into the house in the custody of the sheriff, but in vain. "He lying along upon the ground," say the Votes, "refused to make answer to the point, but told the Assembly that they acted arbitrarily and had no authority." The House therefore hastened to make an end of the business. They expelled More, resolved to ask that Robinson should be removed from office, hastily gathered together their evidence, and presented themselves before the Council.

More had again absented himself, but the evidence against him was sufficiently serious. He was proved to have acted

[1] Min. Prov. Co., 18, 3 mo. 1685, 1 Col. Rec. 86; 1 Votes of Ass. 35.
[2] 1 Votes of Assembly, 35.

in a summary and unlawful way in summoning juries, to have perverted the sense of testimony, to have unduly hectored and harassed a jury into finding an unjust verdict, to have improperly vacated a judgment and discharged the defendant who had been arrested for the debt, to have refused to go circuit in the lower counties where he could not preside as chief, and finally of having used "severall contemptuous and Derogatory expressions . . . of the Provincial Council and of the Present state of Governm't by calling the memb. thereof fooles & loggerheads," and by saying "it was well if all the laws had dropt and that it never would be good times as long as y^e^ Quakers had y^e^ administration."

The speaker then again requested that both More and Robinson be dismissed from office, and immediately after the Assembly withdrew.[1]

The Governor and council were sufficiently puzzled how to act. In the case of Robinson indeed they declined to meddle at all,[2] and he was continued in his office for more than a year, until his insolence to the Provincial Judges necessitated his dismissal.[3]

In the case of More there was greater difficulty to know how to conduct themselves. They had every disposition to treat him with favor, but the force of public opinion and his own extraordinary indifference to the proceedings against him at length forced them into depriving him of his office and dignities.[4] They would never consent, however, to the further prosecution of his impeachment, and, though repeatedly solicited by the Assembly, postponed the matter from month to month by trivial excuses[5] till more important matters took its place in the public mind. I have been thus particular in setting forth the prosecution of Nicholas More,

[1] Min. Prov. Co., 19, 3 mo. 1685, 1 Col. Rec. 88.
[2] Min. Prov. Co., 2, 4 mo. 1685, 1 Col. Rec. 90.
[3] Min. Prov. Co., 1, 8 mo. 1686, 1 Col. Rec. 144.
[4] Min. Prov. Co., 2, 4 mo. 1685, 1 Col. Rec. 90.
[5] 1 Votes of Assembly, p. 37; Min. Prov. Co., 28, 5 mo. 1685, 1 Col. Rec. 100; 29, 5 mo. 1685, 1 Col. Rec. 101; 16, 7 mo. 1685, 1 Col. Rec. 102.

not only because it constitutes an interesting episode in the history of the first legal dignitary of the Province, but because it affords an excellent idea of the manners and modes of thought prevalent in those early days. Too great care cannot however be taken to remember that the crimes laid at the judge's door were after all but the *ex parte* statements of his adversaries. He had some warm friends both in the Council and Assembly, and was so trusted and respected by the Proprietary, that in 1686 he was appointed one of a board of five to constitute the Executive of the Province.[1] For some unknown reason he never actually served.[2] But surely it is reasonable to conclude that he must have been possessed of some sterling qualities and considerable natural parts to warrant Penn in his appointment.[3] His dismissal from office ended his career as a public man. He died after a languishing illness in 1689.[4]

The remaining chief or prior justices of Pennsylvania during the Seventeenth Century were James Harrison and Arthur Cook of Bucks, John Symcocke of Chester, and Andrew Robeson of Philadelphia.[5] Though not perhaps so eminent as More, they were nevertheless all well fitted by temperament and reputation for the station which they filled. Their integrity was never disputed and their judgments seldom complained of. Among their brethren on the provincial bench we find such men as Turner, Claypoole, Clark, Growden, Wynne, and Shippen; names, which if not calculated to confer lustre, at least insured respectability to the court in which they sat.

Of the practice of the Provincial Court we know but little. Its records have perished, a fact not very wonderful if David Lloyd's assertion be true that in his time they were written on

[1] Gordon's Hist. of Penna. 90.

[2] Historical Notes, D. of Y. Laws, 513.

[3] See also letter from Dr. Nicholas More to William Penn, Sept. 13, 1686. Printed in 1687. Reprinted in 4 Penna. Mag. of Hist. and Biog. 445.

[4] 6 Coll. Hist. Soc. of Penna. 189.

[5] Vide John Hill Martin's Bench and Bar, Printed Slips in Hist. Soc. of Pennsylvania.

"a quire of paper."[1] The proceedings were, however, probably very similar to those of the County Courts. Eight days intervened between judgment and the award of execution,[2] and an appeal lay, in accordance with the provisions of the Charter, from all its decisions to the Privy Council in England.

The most conspicuous of the provincial tribunals and by far the best known to ordinary readers was the Provincial Council. This body was composed of the most influential and prominent men of the community, and, although chosen annually by the people, served usually to represent the more conservative and aristocratic element in society, and was well calculated to impose a check on the hasty and sometimes ill-advised actions of the Assembly. Its powers far transcended those of any body of men now entrusted with the government of the people. Its duties were at once executive, legislative, and judicial. The first were often sufficiently onerous owing to the prolonged absence of the Proprietary in England and the necessity of assuming some part of his functions and privileges. They were therefore called upon, among other duties, to appoint the judges both of the County and Provincial Courts, to supervise the subdivision of counties, to control the commerce with the savages, and to exercise a censorship over the press more stringent than is usually supposed ever to have been put in force in Pennsylvania. In 1685,[3] one Atkins issued an almanac from the press of Wm. Bradford in the "chronologie" in which he had the assurance to refer to the Proprietary as "Lord Penn." The title struck with horror upon the simple minds of the members of the Council. Atkins was admonished to blot out the objectionable words, and Bradford was warned to publish nothing save that for which he should obtain a license.[4] In 1689 Joseph Growden,

[1] Min. Prov. Co., 25, 12 mo. 1688–9, 1 Col. Rec. 202.
[2] Min. Prov. Co., 2, 2 mo. 1686, 1 Col. Rec. 122.
[3] Min. Prov. Co., 9, 11 mo. 1685, 1 Col. Rec. 115.
[4] Min. Prov. Co., 9, 2 mo. 1689, 1 Col. Rec. 235.

a most influential and well-known citizen, was openly censured for having presumed to print and circulate the Frame of Government, and it was publicly announced that the Proprietary had declared himself adverse to the use of the printing press. Nor did the authorities confine themselves to warnings merely. In 1692 Bradford's printing materials were by their order seized and taken from him in consequence of his having issued from his press some books of controversy.[1]

The orders of the Council were not limited to affairs of general interest merely. Municipal regulations also claimed their attention. How far the following proclamation of Council on July 11, 1693, would be applicable or advisable now, I leave to the candid judgment of my hearers. It is entitled an order against "the tumultous gatherings of the negroes of the towne of Philadelphia on the first dayes of the weeke." By its terms the constables are empowered to arrest all "negroes male or female whom they should find gadding abroad on the said first dayes of the week, without a tickett from their Mr. or Mrs. or not in their compa. and to carry them to goale, there to remain that night and that without meat or drink and to cause them to be publickly whipt next morning with thirty-nine lashes, well laid on, ou their bare backs . . . ."[2]

The legislative duties of the Council were besides very considerable. Upon them originally devolved the preparation of all legislative measures, and, even when in 1693 this right was assumed by the Assembly, the assent of the Council was required to every bill, as constituting a co-ordinate branch of the Government.[3]

The judicial functions discharged by them claim particularly in this place attention and classification. The amount of such business devolving upon the Council was very great. Its members were, it is true, *ex-officio* justices of the County

[1] Min. Prov. Co., 27 April 1693, 1 Col. Rec. 326.
[2] Min. Prov. Co., 11 July, 1693, 1 Col. Rec. 341.
[3] Introduction to Court Laws, D. of Y. L. 299.

Courts,[1] but were besides looked up to by all classes as the supreme judges of the land.[2] Much difficulty has been found in understanding the nature and extent of their jurisdiction. It is said by some to have been bounded by no very definite limits, to present a confused appearance, and to have conflicted with the jurisdiction of the other provincial tribunals.[3] A somewhat careful study of the reported cases adjudged by it during the Seventeenth Century, has induced me to think these remarks uncalled for.

It is true that in the very infancy of the Colony a few cases of fines imposed for drunkenness and ordinary actions of debt or account appear upon the minutes of the Council. But with these few exceptions the instances of the exercise of judicial power are easily grouped into a few leading classes.

First come the appeals from the County Courts, all prior to the establishment of the Provincial Court in 1684. These were expressly authorized by statutory enactment,[4] and although a number of like appeals were brought after the establishment of the Provincial Court, the petitioners were invariably relegated to the appropriate and lawful forum.

Next comes the jurisdiction to try great crimes, originally in the Duke of York's time devolving on the Court of Assizes. No such power was reposed in the County Courts, nor until 1685[5] was it conferred upon the Provincial Judges. For the first three years of the Colony, therefore, the Council of necessity assumed jurisdiction in such cases. Of these the most considerable were the trials of Pickering, Buckley, and Felton for debasing the coin, and of Margaret Mattson for witchcraft.

Pickering's case presents no very remarkable features.[6] He was indicted for "Quining of Spanish Bitts and Boston

[1] See John Hill Martin's Bench and Bar, Printed Slips in Hist. Soc. of Penna.

[2] Min. Prov. Co., 13, 1 mo. 1688–9. 1 Col. Rec. 217.

[3] McCall's Address before the Law Academy, 1838.

[4] Laws March 10, 1683, c. 70, D. of Y. L. p. 129.

[5] Laws May 10, 1685, c. 132, D. of Y. L. p. 177.

[6] Min. Prov. Co., 26, 8 mo. 1683, 1 Col. Rec. 32.

Money" (by which is meant, I suppose, Pine Tree, Oak Tree or New England shillings), of a value considerably less than the genuine articles. A true bill was found by the grand jury, and his trial took place before the Council on October 26, 1683. The Proprietary himself presided, a jury was duly empannelled, the offence clearly proven, and a verdict of guilty returned. The sentence was characteristic of the time. Pickering himself, the chief offender, was "to make full satisfaction in good and currant pay to every person that should within y^e^ space of one month, bring in any of this False, Base and Counterfeit Coyne . . . according to their respective proportions and the money brought in was to be melted into gross before being returned to him," and he was further fined £40, to be appropriated towards building a Court House.

Samuel Buckley being more "engenious" was fined £10, to be appropriated in the same way, and Fenton, being but a servant, was only condemned to be put in the stocks for an hour.

The case of Margaret Mattson[1] is of much greater and more general interest, both on account of the peculiarity of the accusation and the notoriety it has acquired as illustrating the temper of our ancestors. The trial took place on February 27, 1683–4 before the Proprietary himself. The evidence adduced against the prisoner was of a most trifling character, and such as now would be scouted from the witness box of a court of justice. Several witnesses declared that they had been told by others that the prisoner had bewitched their cattle. One man swore that while boiling the heart of a calf, which he supposed to have died by witchcraft, the prisoner came into his house and was visibly discomposed, making use of several strange and unseemly expressions relative to his employment. Another declared that a few nights before, his wife had waked him in a great fright, alleging that she had just seen a great light and an old woman with a knife in her hand at the "Bedd's feet." But the witness

[1] Min. Prov. Co., 27, 12 mo. 1683, 1 Col. Rec. 40.

failed even to identify the apparition as resembling the accused. The prisoner conducted her defence with great ability and presence of mind, denied the allegations of her accusers, and very discreetly pointed out that every particle of the evidence against her was but hearsay.

The Governor charged the jury, how we cannot know, but we can easily imagine, strongly in favor of the prisoner. The verdict at any rate was "guilty of having the common fame of a witch, but not guilty in manner and form as she stands indicted." The prisoner, therefore, having given security for her good behavior, was released.

However creditable the result of this matter was to the heads and hearts of the Governor and jury concerned, it will not do to allow the idea to be conveyed that a belief in witchcraft and in the freaks of the powers of darkness, did not exist in the colony. When such a short time before in England a judge of the learning, temper, and reputation of Sir Matthew Hale, had, by his vehement charge to a jury, sent two poor old women to the stake for practising magic arts,[1] when the Salem witchcrafts and the apparitions reported by Cotton Mather were such very recent events in the popular mind, no such broad and liberal spirit could be expected here. Accordingly, in 1695, we find one Robert Roman presented by the grand inquest of Chester County for practising geomancy according to Hidon, and divining by a stick.[2] He submitted himself to the bench and was fined £5, and his books, Hidon's Temple of Wisdom, Scott's Discovery of Witchcraft, and Cornelius Agrippa's Geomancy, were ordered to be taken from him and brought into court.

In 1701 a petition of Robert Guard and his wife was read before the Council, setting forth "That a certain Strange Woman lately arrived in this Town being seized with a very Sudden illness after she had been in their company on the 17th Instant, and Several Pins being taken out of her Breasts,

[1] Campbell's Lives of the Chief Justices of England. Life, Sir Matthew Hale, Am. Ed., vol. ii., p. 224, etc.

[2] Records Chester Co., MS. 1695. McCall's Address before Law Academy of Phila., 1838.

one John Richards Butcher and his Wife Ann, charged the Petr's with Witchcraft, and as being the Authors of the Said Mischief." They alleged that their trade and reputation had suffered in consequence, and asked that their accusers be cited to appear. A summons was issued accordingly but the matter, being judged trifling, was dismissed.[1] Even as late as 1719, we find that the commission to the justices of Chester County empowered them to inquire of all "witchcrafts, enchantments, sorceries, and magick arts."[2]

To return to the jurisdiction of the Provincial Council. Another class of cases constantly brought before them were those connected with admiralty matters. No power to deal with these was vested in the ordinary Courts of the Province, nor was there any distinctive Court of Vice-Admiralty erected until near the end of the century.

Hence we find the Council taking cognizance of numerous suits for mariners' wages,[3] and pilots fees,[4] of complaints of passengers and sailors against masters and mates for ill treatment,[5] insufficient victualling and the like. Instances too are frequent of the adjudication of ships and cargoes seized for a violation of the provisions of the navigation acts of 12 Charles II., and 7 and 8 Wm. III.[6] These were usually settled by the Council after hearing the necessary witnesses, but sometimes a special jury was summoned by whom the case was decided.[7] This jurisdiction terminated, as will shortly be seen, when a Vice-Admiralty Court was duly erected.

Another line of cases frequently brought before the Council were those which bore reference to the appointment of guardians and the administration and partition of decedents'

[1] Min. Prov. Co., 21, 3 mo. 1701, 2 Col. Rec. 20.

[2] D. of Y. L. 382.

[3] Min. Prov. Co., 20, 1 mo. 1683, 1 Col. Rec. 8; 25, 2 mo. 1685, 1 Col. Rec. 79.

[4] Min. Prov. Co., June 27, 1693, 1 Col. Rec. 340.

[5] Min. Prov. Co., 7 and 8, 7 mo. 1683, 1 Col. Rec. 23–24; 30, 2 mo. 1686, 1 Col. Rec. 126; 11, 4 mo. 1685, 1 Col. Rec. 91.

[6] Min. Prov. Council, 14, 8 mo. 1684, 1 Col. Rec. 69.

[7] Min. Prov. Council, April 23, 1695, 1 Col. Rec. 440.

estates.[1] Such matters fell of course more regularly under the domain of the Orphans' Courts. But from the somewhat vague nature of the powers of these Courts, and from other causes not now perfectly understood, it appears that they were unable to do justice in all cases. The Council therefore often assumed the duty of themselves, sometimes assigning as a reason the extraordinary nature of the case, and at other times proceeding in the matter as of course.[2] We can well believe, however, that except under peculiar circumstances such jurisdiction would not be assumed, and we are more particularly warranted in this belief by the number of causes relegated to their proper tribunal.[3] The power to order a sale of lands for payment of debts seems originally to have been reposed entirely in the Council.[4] Even by the Act of 1693,[5] its approval was required in cases where an order to that effect had been made by the justices of the inferior court.

The great bulk, however, of the judicial powers of the Council were largely executive in their nature, and have been aptly said to resemble those wielded by the Court of Star Chamber in its purest and best days.[6] It assumed to itself the control and direction of inferior courts in cases of extreme hardship or manifest irregularity of proceeding, and with an unsparing hand admonished or punished wrong-doers in judicial or shrieval positions by fines, imprisonment, and removal from office. A few instances will serve to explain the nature of these duties.

In 1683 the County Court at Philadelphia had given judgment concerning a title to land in Bucks County. The business was referred to the County Court where the lands

[1] Min. Prov. Council, 30, 8 mo. 1683; 24, 7 mo. 1685; 12, 2 mo. 1690; Sept. 21, 1686.

[2] Min. Prov. Co., July 30, 1693, 1 Col. Rec. 344.

[3] Min. Prov. Co., May 19, 1698, 1 Col. Rec. 504.

[4] Min. Prov. Co., 21 and 22 May, 1697, 1 Col. Rec. 477–478; May 15, 1699, 1 Col. Rec. 525; July 31, 1700, 1 Col. Rec. 556.

[5] Laws May 3, 1688, c. 188, D. of Y. L. 189.

[6] McCall's Address before the Law Academy, 1838.

lay and the County Court of Philadelphia fined forty pounds for giving judgment contrary to law.[1]

In 1685[2] a complaint was entered that the petitioners, having stolen a hog, had at the last Provincial Court been "ordered and sensured to pay tenn pounds seaven shillings for the same, though it was only valued at one pound three shillings," besides being whipped for their offence. This sentence was complained of as being too severe, and the Council accordingly held the matter over to confer with the Provincial Judges.

In 1686[3] "the petition of Widow Hilliard and John Hilliard, Jun., against Griffith Jones, was Read, setting forth yt the said Griff. Jones having obtained an Execution agt y^e^ Estate of John Hilliard, Deceased, would not execute y^e^ same on no other part of y^e^ said John Hilliard Estates than the Plantation on which shee, y^e^ widdow of y^e^ sd Hilliard, and her children lives on, tho' there be enough in other places to satisfy y^e^ execution of y^e^ effect of Deceased's estates." The Council granted the prayer of the petition, and warned the sheriff accordingly.

The same day the "Petition of Jacob Vandervere was Read setting forth y^e^ illegal and unchristian serving an execution on his goods and turning him, his wife and children out of y^e^ Doors, and not Leaving them anything to susteine nature."[4] The Council ordered the clerk of the court and sheriff to appear and answer the complaint, but nothing seems to have been done in the matter. Besides these, dozens of instances might be cited where petitions were filed and relief granted. Orders were made to oblige the County Court to admit an appeal,[5] to force the Provincial Court to allow an appeal to England,[6] to oblige a justice to set his hand to an

[1] Min. Prov. Co., 20, 4 mo. 1683, 1 Col. Rec. 20.

[2] Min. Prov. Council, 28, 2 mo. 1685, 1 Col. Rec. 79.

[3] Min. Prov. Co., 9, 2 mo. 1686, 1 Col. Rec. 124.

[4] Min. Prov. Co., 9, 2 mo. 1686, 1 Col. Rec. 125.

[5] Min. Prov. Co., 7, 6 mo. 1686, 1 Col. Rec. 141; 18, 3 mo. 1687, 1 Col. Rec. 161.

[6] Min. Prov. Co., 11, 5 mo. 1685, 1 Col. Rec. 95.

execution,[1] to secure a procedendo[2] and for numerous other purposes. The powers of the Council were plastic, and fitted themselves to the injury requiring their beneficent interference.

The practice of the Council in hearing and adjudging cases was uniform. After reading the complainants' petition, the nature of the case was considered. If it was not cognizable by them, the petitioner was relegated to his proper forum. If it was, and the nature of the case was such as entitled the other side to a hearing, they were duly summoned, a day set apart for a production of the evidence, and after due deliberation, either relief was afforded or the petition dismissed. If however the case was of such a nature as to need no summons to an opposite party, the matter was referred to a committee, and on their report and advice the action of the whole body was founded.

It is useless to conceal, however, despite the ordinarily beneficial influence of this controlling and directing power, that its exercise was little in accordance with the principles of English law, and very far from being suited to the tastes and disposition of the people.

Accordingly in 1701, the Assembly expressly petitioned the Proprietary "that no Person or Persons shall or may at any time hereafter be Lyable to answer any complaint, matter, or thing whatsoever relating to Property before the Gov^{r} or his Council or in any other place but the ordinary Courts of Justice."[3]

Penn replied, "I know of no person that has been obliged to answer before the Gov^{r} and Council in such cases."[4] He nevertheless inserted in the new Charter of Privileges a clause of similar purport to that prayed for,[5] and from that time the distinctively judicial duties of the Provincial Council may be fairly said to have ceased.

[1] Min. Prov. Co., 28, 5 mo. 1685, 1 Col. Rec. 98.
[2] Min. Prov. Co., April 23, 1685, 1 Col. Rec. 440.
[3] Min. Prov. Co., 20, 7 mo. 1701, 2 Col. Rec. 37.
[4] Min. Prov. Co., 29, 7 mo. 1701, 2 Col. Rec. 41.
[5] Min. Prov. Co., 28 Oct. 1701, 2 Col. Rec. p. 59, § 6.

The last three years of the Seventeenth Century, and particularly the time immediately preceding the Proprietary's second visit to his Province, were full of disorders and dangers to the Government. The Council and Assembly alike grew careless and apathetic, and although the magistrates tried to discharge their duties, they were wholly unable to cope with the increase of crime entailed by the growing population of the Province and by its rising importance as a commercial centre. Penn wrote in horror to the Council that he had heard of Philadelphia, that no place was more "overrun with wickedness; sins so very scandalous, openly comited in defiance of Law and Virtue; facts so foul, I am forbid by common modesty to relate them."[1] He accused the Government of being too slack in the suppression of these disorders, and even averred that he had been credibly informed that they did "not only wink att but embrace pirats, shipps and men," and openly countenanced the carrying on of an illicit trade.

The Council sturdily denied these imputations, and asserted that they had done their best to maintain law and order in the Colony. They admitted, however, that some few of the famous John Avery's men had been entertained in the town, and that when arrested by order of the Magistrates they had broken jail, and escaped to New York.[2]

The records of the time are so full of refereuces to pirates and their nefarious trade, that we can scarcely wonder that Pennsylvania was currently reported to have become "ye greatest Refuge and Shelter for Pirats and Rogues in America."[3] In September, 1698, a small "snug ship and sloop" sailed inside the Capes and landed a heavily armed crew of about fifty men, who thoroughly plundered and ransacked the town of Lewiston, breaking open almost every house in the place, and carrying off a vast deal of money, plate, goods, and merchandise. They killed, too, a considerable number of sheep and hogs to victual their ships, and capped

[1] Min. Prov. Co., Feb. 9, 1697-8, 1 Col. Rec. 494.
[2] Min. Prov. Co., Feb. 10, 1697-8, 1 Col. Rec. 495.
[3] Min. Prov. Co., May 19, 1698, 1 Col. Rec. 519.

their insolent outrage by compelling several of the chief men of the town to assist them in carrying their booty aboard.[1]

In September, 1699, we find Isaac Norris writing from Philadelphia to his friend Jonathan Dickinson: "We have four men in prison, taken up as Pirats, supposed to be Kidd's men. Shelley of York has brought to these parts scores of them; and there is sharp looking out to take them. We have various reports of their riches and money hid between this and the Capes."[2]

The same year two of these very men are reported to be wandering at large about the streets of Philadelphia. The Governor of the jail was sent for by the Council, and inquired of about the matter. His indignant response is remarkable as illustrating the lax nature of prison discipline in those primitive days. "They never go out without my leave and a keeper," said he, "which I think may be allowed in hot weather."[3] The prevalence of the dog days afforded to his mind sufficient excuse to exercise malefactors in the city streets.

In July, 1699, the famous Captain William Kidd himself was reported to be lying off Cape Henlopen, and to be carrying on a brisk trade with several noted citizens of the Lower Counties.[4] He was then in the third year of his piratical career, and in less than two years after paid the penalty of his crimes upon the scaffold.[5]

The presence of such dangerous visitors at length naturally induced the authorities to take what measures they could to insure the protection of the community. A watch was established on Cape Henlopen to give notice through the sheriffs from county to county of any suspicious vessels which might approach, in order to prevent a repetition of the Lewiston outrage.[6] The Assembly, too, passed several strin-

[1] Min. Prov. Co., Sept. 3, 1698, 1 Col. Rec. 507.
[2] Penn. and Logan Correspondence, Intr. p. lviii.
[3] Min. Prov. Co., Aug. 8, 1699, 1 Col. Rec. 531.
[4] Min. Prov. Co., April 12, 1700, 1 Col. Rec. 549.
[5] See 14 Howell's State Trials, p. 147 *et seq.*
[6] Gordon's Hist. of Penna. 111.

gent measures for the suppression of piracy and smuggling, and even went so far as to interdict trade with certain ports of particularly bad reputation. Among the bills of this character presented by the Council to the Assembly was one interdicting commerce with "Madagascar and Natoll." The House was, however, possessed of amusingly scanty geographical knowledge, and was far to wise to cut off dealings with a port which might be near at hand and afford an opening for a lucrative trade. A committee was accordingly appointed to find out from the Governor and Council in what part of the world "Natoll" might be, and on their somewhat vague report that it was in the parts adjacent to Madagascar, the proposed measure was readily acceded to.[1]

To deal with the frequent and aggravated cases of piracy and smuggling constantly arising, no distinctive tribunal had as yet been erected in the Province. The Proprietary was by his charter made personally liable to see to the enforcement of the Navigation Acts and the other complicated requirements of the British colonial trading system, and was further bound to see that fines and duties in accordance with these regulations were duly imposed, and that, when levied, they found their way into the hands of the proper authorities. These functions were, as has been seen, discharged by the Council in the first colonial days. But as early as 1693 we find that Governor Benjamin Fletcher was duly commissioned Vice Admiral of New York, the Jerseys, and Newcastle with its dependencies, and invested with all proper power to erect Vice Admiralty Courts within these limits.[2]

A short time after, a Vice Admiralty Court for Pennsylvania and its territories was regularly constituted, and a commission issued under the seal of the High Court of Admiralty of England to Colonel Robert Quarry to act as Judge.[3]

Quarry was a man little calculated to please or conciliate the people or authorities of Pennsylvania. He was at one

[1] Votes of Assembly, Feb. 6, 1699, p. 115.

[2] See Historical Notes, D. of Y. L., p. 539, etc.

[3] See Min. Prov. Council, Feb. 12, 1697-8, 1 Col. Rec. 500.

time Governor of South Carolina, and reputed a sort of government spy.[1] A member of the Church of England,[2] he had little sympathy with the religious complexion of the colony, while the cast of his mind was such as to make him very vain of the office which he filled, and fully resolved to sustain its dignity to the utmost. The powers with which he was invested were indeed sufficiently ample. The jurisdiction of his court in all maritime matters was almost as broad as that now exercised by the courts of the United States, if we may judge from the tenor of like commissions issued about the same time in other colonies. All cases of charter parties, bills of lading, marine policies of assurance, accounts, debts, etc., relating to freight, maritime loans, bottomry bonds, seamen's wages, and many of the crimes, trespasses, and injuries committed on the high seas or on tide waters, were included within its jurisdiction. All cases of penalties and forfeitures under the Revenue Act of 7 & 8 William III. belonged besides to its domain. And a general authority to apprehend and commit to prison persons accused or suspected of piracy, was included within its powers.[3] No jurisdiction, however, to try and execute prisoners indicted for murder on the high seas was at first given to Quarry.[4] From all his judgments an appeal lay to the High Court of Admiralty in England.

His commission once received, Quarry set vigorously to work to exercise his new powers and privileges. John Moore, a Church of England man like himself, was appointed advocate, and one Robert Webb duly commissioned as marshal. The people were, however, by no means disposed quietly to submit to the new order of things.[5] They found a Vice Admiralty Court established among them, invested with

[1] 1 Penn. & L. Corr., p. 78, note. [2] Gordon's Hist. of Penna. 126.

[3] Benedict's Admiralty, § 161; Duponceau on Jurisdiction, pp. 137, 138, 139, 140, etc.

[4] Chalmer's Colonial Opinions, 512, etc.; Min. Prov. Co., August 8, 1699, 1 Col. Rec. 531; Letter, James Logan to Wm. Penn, 3, 1 mo. 1702–3, 1 Penn. & Logan Corr. 175.

[5] See Min. Prov. Council, 24 Jan. 1699–1700, 1 Col. Rec. p. 545.

most extraordinary powers, far transcending those exercised by the Admiralty Judges of the mother country. They found these powers interfering with and seriously curtailing the administration of justice according to the forms of the common law. The most intelligent minds felt great indignation, and were not slow to protest against the infringement of their liberties. A test case soon arose which for a while set the question at rest.[1] John Adams, a merchant of some substance, imported in the summer of 1698 a large cargo of goods from New York to Pennsylvania. The vessel in which they were laden was unfortunately not provided with the certificate required by the laws of navigation and trade, and the goods were accordingly seized by the king's collector at Newcastle, and by him committed to the custody of Webb, marshal of the Vice Admiralty Court.

Adams made all haste to get his certificate, and a few days after, on receipt of it, demanded from Col. Quarry that his goods should be restored. This Quarry peremptorily declined to do, and Adams in despair petitioned the Governor for redress. But in this quarter too he met with no success. Markham prudently declined point blank to meddle with matters in the hands of his Majesty's officers. The petitioner was therefore fain to turn in another direction, and accordingly applied to the Justices at Philadelphia for a writ of replevin. This they were ready enough to grant. Anthony Morris, one of the most considerable of their number, set his hand to the document, and in pursuance of its directions the goods were forced from Webb, and returned to their owner. Quarry, intensely indignant at this violation of his rights, took an early opportunity to complain bitterly to the Governor and Council.[2] The County Court of Philadelphia was ordered to justify its action. It did so, though not with that straightforwardness which might have been hoped. "We look upon a replevin to be the right of the King's subjects to have and our duties to grant, where any goods . . . are taken or distrained," say they, and then in a more apolo-

[1] Min. Prov. Co., Sept, 24, 1698, 1 Col. Rec. 509.

[2] Min. Prov. Co., Sept. 26, 1698, 1 Col. Rec. 512.

getic tone add: "Wee att our Last Court, finding this matter to be weighty, tho' wee did not Knowe of any Court of Admiralty erected, nor p'sons qualified as we Know of to this day, to hold such Court, yet we forbore the triall of yc sd replevin . . . and wee should be glad to receive some advice yrin from you." This explanation did not, however, save them from a severe reprimand by the Council, who saw fit at the same time to tender an abject apology to the injured Quarry.[1]

Nor did the affair end here. David Lloyd, ever watchful and jealous of the public interests, strenuously advised Adams to seek reparation at the hands of the Courts, and an action was accordingly instituted against Webb, for seizing and detaining the goods. In the spring of 1700, the case came on to be heard. Lloyd appeared of course for the plaintiff, and John Moore, Advocate of the Admiralty, for the defendant. Webb, the marshal, made his appearance in court armed with the royal commission on which was a portrait of the King, and from which depended the seal of the Admiralty inclosed in a little tin box. This he produced as a full warrant and justification for his acts. "What is this?" cried Lloyd. "Do you think to scare us with a great box and a little Babie? 'Tis true fine pictures please children, but we are not to be frightened att such a rate." In spite, however, of Lloyd's talents and ridicule the case went against him and the justices pronounced in favor of the defendant.[2] So convinced was Lloyd of the justice of his cause that he begged Penn, when the latter arrived in the Province, to allow him an appeal to England, offering himself to argue the cause in Westminster Hall.[3] The Proprietary, however, was far too wise in his day and generation, to admit of any such action. However, he might be incensed at the infringement of his rights, his experience in 1693 warned him of his unstable position at court, and made him very unwilling to dis-

[1] Min. Prov. Co., Dec. 22, 1699, 1 Col. Rec. 535.

[2] Min. Prov. Co., May 14, 1700, 1 Col. Rec. 576.

[3] Letter, James Logan to Wm. Penn, Jr., 25, 7 mo. 1700, 1 Penn & Logan Corr. 18.

pute the extent of the royal prerogative. He accordingly dismissed Morris for a while from office, promised that the value of the goods should be restored to the Admiralty Court, and observed at least an outward show of courtesy towards Quarry.

A severe personal contest between them, however, was the outcome of the whole affair. Quarry wrote two bitter memorials to the Lords Commissioners of Trade and Foreign Plantations, accusing Penn of great irregularities in his government. To these Penn replied by just as bitter charges against his opponent, of incompetency, partiality, and misfeasance in office.[1]

Quarry is the "greatest of villains," he wrote to Logan, "and God will I believe confound him in this world for his lies, falsehood, and supreme knavery."[2] "I fancy" his "wings will be clipped in admiralty matters every day, upon the appeals from the colonies against admiralty judgments."[3]

At length upon the accession of Queen Anne, when Penn had regained some of his old court influence, he obtained Quarry's dismissal from office, and in 1703 secured the position for Roger Mompesson, a friend of the Proprietary administration.[4]

Of the practice of the Vice Admiralty Court during the short period we have to deal with it, we know nothing; its records have vanished and no trace remains of their contents.

The regularly constituted Courts of Pennsylvania have thus successively been passed in review. A few isolated instances occurred of the assumption of quasi judicial power upon the part of the Assembly. Its mandate upon one occasion served the purposes of a writ of habeas corpus in releasing a prisoner unduly committed to the county gaol.[5] Such instances are, however, extremely infrequent, and are to

[1] 1 Penn & Logan Corr. p. 24, etc.

[2] Letter, Wm. Penn to James Logan, 22, 11 mo. 1702, 1 Penn & L. Corr. p. 162.

[3] 1 Penn & Logan Corr. 170.

[4] Benedict's Admiralty, § 160, note.

[5] 1 Votes of Assembly, May 21, 1698, p. 104.

be attributed rather to the exigencies of the particular case than to the claim of any reasonable right to exercise judicial power.

A few words remain to be added in regard to the early history of the legal profession in Pennsylvania. What little we know may be comprised within very narrow limits. Almost all those engaged in the administration of justice in those primitive times were, as has been aptly said, "distinguished rather for their purity than their learning, for their high standing in the community, and their general capacity, more than for their legal attainments."[1]

Not one man who sat upon the bench prior to 1700, seems to have enjoyed the advantage of a regular legal education.

There was indeed but little opportunity for an exercise of the talents either of a skilled advocate or of a trained judge. The cases were mostly simple in principle, and very readily comprehended and disposed of. "Many Disputes and Differences are determined and composed by Arbitration," says Thomas in his account of Pennsylvania published in 1698,[2] "and all Causes are decided with great Care and Expedition, being concluded (generally) at furthest at the second Court, unless they be very Nice and Difficult Cases."

The greater part of the founders of the colony were imbued with a deep distrust of, and dislike for lawyers. They looked upon the profession as necessarily barratrous in its tendencies, and as being completely opposed to those views of peaceful good fellowship which their religion taught them to esteem so essential a part of the true Christian character.

In 1686 the Provincial Council actually passed a bill "for the avoyding of too frequent clamors and manifest inconveniences which usually attend mercenary pleadings in civil causes."[3] This enacted "that noe persons shall plead in any Civill Causes of another, in any Court whatsoever within this

[1] McCall's Address before the Law Academy, 1838.

[2] Gabriel Thomas's Historical Account of Pennsylvania, London, 1698.

[3] Min. Prov. Co., 2, 2 mo. 1686, 1 Col. Rec. 123.

Province and Territory, before he be Solemnlye attested in open Court that he neither directly nor Indirectly hath in any wise taken or received, or will take or receive to his use or benefit any reward whatsoever for his soe pleading, under y^e^ penalty of 5 lb, if the contrary be made appear." But the proposed measure was thrown out by the Assembly.[1] The same spirit again prompted the Council in 1690 to pass a similar bill, but it was again defeated by the action of the House.[2]

In the mean time a miniature bar had naturally and rapidly came into being. The provisions of the laws agreed upon in England permitted "all persons of all persuasions freely to 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."[3] "So it soon came about that the nimble tongued tradesman found it to his advantage to bring his dilatory customer into court, and by his own eloquence get a verdict. . . . The defendant, taken at a disadvantage, found after a few experiences that he must bring in some quicker witted or more plausible friend to his assistance. A few successes in this line turned the friend's attention, perchance his vanity, to this line of honor or of profit, and the 'advocate' was made. Advocates once made, professional training became a matter of course, and so the short round was quickly run."[4]

Among those who thus distinguished themselves as "lay lawyers," and whose names frequently are noted among the records as employed in asserting or defending the rights of their friends, may be counted some of the most considerable men in the community—Nicholas More, afterwards Chief Justice—Abraham Man, a prominent and well-known member of the Assembly—John White, some time Speaker of that

[1] 1 Votes of Assembly, May 11, 1686, p. 38.

[2] Min. Prov. Council, 5, 2 mo. 1690, 1 Col. Rec. 285; Historical Notes, D. of Y. L., p. 532; 1 Votes of Ass. 58.

[3] Duke of York's Laws, p. 100.

[4] Address by the Hon. James T. Mitchell, on adjournment of District Court, Jan. 4, 1875, p. 6.

body, and afterwards imprisoned by the arbitrary orders of Gov. Blackwell—Charles Pickering, who was convicted of coining base money in the very infancy of the Province—Samuel Hersent, who was appointed Attorney General as early as 1685[1]—Patrick Robinson, the same whose dogged obstinacy in the matter of More's impeachment has been already noted, and Samuel Jennings,[2] afterwards a Justice of the Peace for this county, the "impudent, presumptuous, and insolent" man, against whom Keith's and Budd's virulent attack was directed in their pamphlet entitled the "Plea of the Innocent."

It was still some time, however, before the practice of the law as a distinct profession came to be generally recognized.

Governor Fletcher, in his reply to the Petition of the Assembly in 1693,[3] says, "I do understand . . that Revenue of the Crown, the making of laws, the power of life and death, arming of the subject and waging warr, which were granted to Mr. Penn, are the Reglia of the Crown, and cannot be demised. . . . *If there be any lawyers among you* they can inform you King Charles' grant of these things might be good to you during his life. . . . But since his death they are become utterly void."

This remarkable proposition, in addition to the extraordinary doctrine it lays down, seems to imply considerable doubt as to the existence of any legal knowledge on the part of the chief men of the Province.

In 1698, Gabriel Thomas says, speaking of the various trades and professions practised in Pennsylvania, "Of Lawyers and Physicians I shall say nothing, because this Country is very Peaceable and Healty; long may it so continue and never have occasion for the Tongue of the one, or the Pen of the other, both equally destructive to men's Estates and Lives."[4]

A little later on, in 1700, Penn, in his answer to the charges of Colonel Quarry, defends himself and his officers from the imputation of failing to prosecute William Smith,

[1] Min. Prov. Council, 16, 11 mo. 1685, 1 Col. Rec. 117.

[2] Gordon's Hist. of Penna. 99.

[3] Min. Prov. Council, 17 May, 1693, 1 Col. Rec. 364.

[4] Gabriel Thomas's Historical Account of Pennsylvania, London, 1698.

Jr., for a heinous crime he had committed, by alleging that the defendant had subsequently "married y^e^ only material witness against him, which," adds he, "in the opinion of y^e^ two only lawyers of the place (and one of them y^e^ King's advocate of y^e^ Admiralty, and y^e^ attorney general of the county)" has rendered her incompetent to testify against him.[1]

But the growth of the profession was sure and steady. In 1699 Thomas Story[2] arrived in the Province, a man of such sterling merit and abilities that he at once rose to be a leading personage in the community. He had received all the advantages of a legal training, "but had laid that aside for the gospel."

Close after him came Judge Guest[3] who, in 1701, was promoted to the chief place in the Provincial Court, the first trained lawyer that ever sat upon the Pennsylvania bench. Following him came Roger Mompesson,[4] appointed Judge of the Admiralty in 1703, and seated on the Provincial Bench in 1706, a man of varied talents and great energy, said to have been thoroughly read in the learning of his profession.[5]

Soon a host of others followed in their footsteps. "Some considerable lawyers,"[6] says Logan to Penn in a letter of 1702, "pronounce that the corporation of Philadelphia is exceeding its powers in claiming too broad a jurisdiction for its municipal courts." A proposed court law of 1706 was, say the Votes of Assembly, "drawn up by some of the practitioners in the courts."[7] The law had begun to be esteemed as a necessary and honorable profession. And yet the actual number of those regularly admitted to practise at the bar was as yet very inconsiderable.

[1] 1 Penn & Logan Corr. p. 29. See Minutes Prov. Council, 19, 10 mo. 1700, 2 Col. Rec. 11.

[2] 1 Penn & Logan Corr. p. 21. note; 1 Proud's Hist. of Penn. 421, note.

[3] 1 Penn & Logan Corr. 19, 48.

[4] Benedict's Admiralty, § 169, note.

[5] McCall's Address before the Law Academy, 1838.

[6] Letter, James Logan to William Penn, 2, 8 mo. 1702, 1 Penn & Logan Corr. p. 138.

[7] 1 Votes of Assembly, Sept. 20, 1706, 216.

In 1708 one James Heaton of Philadelphia complained to the Council that he had been sued in trover by Jas. Growden and had taken a writ of error to the Supreme Court, but that Growden had arrested him and retained against him all the lawyers in the county that had leave to plead. Yet Growden's answer avers that he had retained no one as his counsel but John Moore, who, being unable to attend to the case, had secured the services of a brother attorney.[1]

In 1709 the well-known Francis Daniel Pastorius presented a similar petition against John Henry Sprogell and Daniel Falkner, alleging, *inter alia*, that the former had "by means of a Fictio Juris, as they term it (wherewith your petitioner is altogether unacquainted), Gott a writ of ejectment which it doth not effect your petitioner, yet the said Sprogell would have ejected him out of his own home," and then goes on to complain that "in order to finish his contrivance in the County Court to be held the third of the next month," Sprogell had "further fee'd or retain'd the four known Lawyers of the Province in order to deprive . . the petitioner . . of all advice in law, which," craftily adds Pastorius, "sufficiently argues his cause to be none of the best." The petitioner therefore, being too poor "to fetch lawyers from New York or remote places," prayed that Sprogell's proceedings might be enjoined and a proper chance given the petitioner for a hearing. The relief was accordingly granted, and James Logan being in the Council, the blame of the transaction was of course laid on the shoulders of David Lloyd as "principal agent and contriver of the whole."[2] How many members of the junior bar there are nowadays who might well wish for the sake of their own prospects that the ranks of the profession were still so sparsely filled.

Two men alone stood out prominently as regular legal practitioners during the period of which we have been speaking. These were John Moore and David Lloyd. Men more different in their careers and dispositions it would be almost impossible to find.

[1] Min. Prov. Council, April 2, 1708, 2 Col. Rec. 406.

[2] Minutes Prov. Council, March 1, 1708–9, 2 Col. Rec. 430.

Moore, a descendant of a titled stock, emigrated from South Carolina with his family some time prior to 1696, and settled in Pennsylvania to pursue the profession of the law.[1]

As early as 1698, we find him mentioned in the minutes of the Council as "a Practioner in Law in the Courts of this Province."[2] He was shortly afterwards appointed Advocate of the Admiralty under Colonel Quarry, and made himself prominent in his maintenance and defence of the jurisdiction of that Court.

His hostility, however, to the Proprietary Administration did not continue. "Having done all that can be by Quarry," says Logan, in a letter to Penn in 1701, "he is very willing I perceive, to live as quiet as possible, and keep on very friendly [terms] with the Governor when here."[3] He accordingly was employed as Attorney General in at least one criminal case of note,[4] and was subsequently promoted to the office of Register General.[5] In 1703 he was made Collector of the Port.[6] He was in his religious views attached to the doctrines of the Church of England, was a prominent member of Christ Church, and served as a Vestryman of that congregation until his death, which occurred somewhere about 1731.

David Lloyd, the first lawyer of Pennsylvania, claims a somewhat more extended notice. He was born in 1656 in the Parish of Marravon in the county of Montgomery, North Wales.[7] Having received the advantages of a regular legal training, he was in 1686 despatched by the Proprietary to Pennsylvania, with a commission to act as Attorney General of the Province.[8] His pleasing manners, persistent energy, and natural abilities served rapidly to raise him in the esteem

[1] Life of Dr. Wm. Smith, by Horace Wemyss Smith, vol. 2, p. 488.

[2] Min. Prov. Council, May 19, 1698, 1 Col. Rec. 519.

[3] James Logan to William Penn, 2, 10 mo. 1701, 1 Penn & Logan Corr. 66.

[4] Min. Prov. Council, 19, 10 mo. 1700, 2 Col. Rec. 11.

[5] See Min. Prov. Council, 3, 6 mo. 1703, 2 Col. Rec. 97.

[6] Min. Prov. Council, May 3, 1706, 2 Col. Rec. 240.

[7] 1 Penn & Logan Corr. 155, note; 1 Proud's Hist. of Penna. 459.

[8] Min. Prov. Co., 5, 6 mo. 1686, 1 Col. Rec. 140.

of all classes of the community, and he was quickly preferred to many considerable offices of trust and profit. He became successively clerk of the Philadelphia County Court, Deputy to the Master of the Rolls, and Clerk of the Provincial Court,[1] in which last position he stoutly and for a while successfully resisted the attempts of Governor Blackwell to extort from him the records with which he had been entrusted.[2]

In 1689 he became Clerk of the Assembly[3] and in 1693 and in 1694 was returned as a member of that body. Between this time and the end of the century, he served for four several years as a member of the Provincial Council, and during this period first developed that sincere attachment to the popular interests which formed so marked a feature of the residue of his career. He played a prominent part in procuring from Gov. Markham the new Charter of Privileges of 1696, and was the author of many legislative schemes for the security and improvement of the Province. Although active in his opposition to Col. Quarry's Court, his enmity was not persistent. When he found that its establishment was inevitable, he yielded perforce, became a friend and ally of Moore's, and even accepted in 1702 the office of deputy judge and advocate to the Admiralty.[4]

The limits of my subject forbid me to do more than briefly to advert to his subsequent career. The beginning of the Eighteenth Century saw him pitted against Logan and the Proprietary in defence of the popular rights. Persistent in his purposes, untiring in his energy, and unsparing in the violence with which he attacked his adversaries, he continued for years an object alike of fear and of hatred to the Pro-

[1] Historical Notes, Duke of York's Laws, 522–523; Minutes Prov. Council, 1, 8 mo. 1686, 1 Col. Rec. 145.

[2] Minutes Prov. Council, 25, 12 mo. 1688–9, 1 Col Rec. 202; 25, 12 mo. 1688–9, 1 Col. Rec. 206; 5, 1 mo. 1688–9, 1 Col. Rec. 211; 25, 1 mo. 1688–9, 1 Col. Rec. 222.

[3] Min. Prov. Council, 31 May, 1700, 1 Col. Rec. 582.

[4] Letter, James Logan to William Penn, 2, 8 mo. 1702, 1 Penn & Logan Corr. 139.

prietary party. No epithet was in their minds too harsh to be applied to him, and no motive too base to be attributed as the mainspring of his actions. But much of the odium which was thus cast upon him was without doubt undeserved. Neither the intensity of his partisan feelings, the rash and impetuous character of his actions, nor the repeated slanders and sneers of his enemies can avail to hide from the discriminating eye of the unprejudiced observer his abilities, his virtues, and his usefulness to the community.

Possessed of many warm and devoted friends, and trusted and respected by his adherents, he was again and again returned as a member of the Assembly, and again and again chosen as its Speaker. When not engaged in contest with his opponents, his active mind found ample employment in forming new schemes of judicial reform. Most of the important court laws passed up to the date of his death were the results of the labor of his pen, or at least were framed with the benefit of his council and advice.

In 1718 he was appointed to be Chief Justice of the Province, a dignity well deserved by his long and active career in the public service.[1] He ended a long, useful, memorable life in 1731.

Few of the early colonists of this Province deserve the thanks and remembrance of posterity more than David Lloyd. That he had faults of character, very serious faults, must candidly be admitted. He was at times selfish, and always impetuous and easily angered. If he was attached to his friends he was implacable to his enemies. Persistence in him frequently degenerated into obstinacy, and enthusiasm almost into fanaticism. His attachment to the popular interests and craving for popular applause laid him open, sometimes perhaps justly, to the charge of demagogism. "His political talents," says Proud, "seem to have been rather to divide than to unite; a policy that may suit the crafty politician but must ever be disclaimed by the Christian statesman."[2] "He is," says Logan in a letter to Wm. Penn,

[1] McCall's Address before the Law Academy of Phila., 1838.

[2] 1 Proud's Hist. of Penna, 459.

Jr., "a man very stiff in all his undertakings, of a sound judgment and a good lawyer, but extremely pertinacious and somewhat revengeful,"[1] and as this opinion was written prior to any open enmity between them, it is not unlikely that it was a very just estimate of his character and disposition.

At this time, however, it is more becoming to recall his great services to the Province than to harp upon his short comings. It is grateful to know that his declining years were marked by a peaceful repose which forms a striking contrast to the stormy scenes of his earlier life. Laying aside the bitter prejudices and rancorous feelings which years of strife had begotten and fostered, we find him in the evening of his days actively and heartily co-operating with his former adversaries in several measures calculated to promote the prosperity of the Province.[2] Even before his death the great bulk of the community had come to entertain feelings of respect and gratitude towards the first lawyer of Pennsylvania.

The purposes for which this paper was undertaken have now been accomplished. The increase of population, business, and commerce soon led to difficulties in the administration of justice which required for their unravelling a more artificial course of procedure and a more thoroughly trained bench and bar. The dictates of natural justice gave way to the authority of well considered precedents, the science of special pleading by insensible degrees obtained a foothold in the legal practice of the Province, and at length the sound of "oyers" and "imparlances" became almost as familiar to the ears of the Pennsylvania practitioner as to those of his bewigged and begowned brother in Westminster Hall. The days of primitive simplicity had been left behind and forever.

[1] Letter, James Logan to Wm. Penn, Jr., 25, 7 mo. 1718, 1 Penn & Logan Corr. 18.

[2] 1 Penn & Logan Corr. 155, note.