Frank M Eastman

COURTS AND LAWYERS

—OF—

PENNSYLVANIA

A HISTORY

1623-1923

By

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PREFACE

There is presented herewith a History of the Courts and Lawyers of Pennsylvania. Nothing is contained therein which has not previously appeared in print, except sketches of the lives of some recent judges. The writer has had access to practically no original sources of information. He has, however, gathered from a large number of publications, many of them now rare and not at all well known, a mass of information to which the reader could otherwise refer only after much research.

The limits of this work did not permit of giving biographical sketches of all the prominent lawyers who have flourished within the Commonwealth, and the writer has therefore confined himself to giving such sketches only of the early members of the bar, of a number of members of the Philadelphia bar of later dates whose memories have been preserved by eulogies written by such distinguished members of the profession as Rawle, Binney, Strong and Johnson, and of the judges of the several courts.

It is hoped that the sketches of the lives of the judges will be found reasonably complete, though brief. No sketches are given of a number of judges now upon the bench, but in all such cases applications to such judges for biographical data have been ignored and the writer has been unable to obtain the necessary information otherwise.

In a work of so much detail, minor errors are unavoidable. It is hoped, however, that such errors are not numerous, and none or very few would have occurred but for the fact that most of the members of the bars of the several districts to whom the writer has applied for information have ignored his letters. He feels that he has special cause to complain of the members of the Committee on Legal Biography of the State Bar Association, but three of whom out of a dozen or more to whom he applied for data concerning judges of their districts having replied to his inquiries.

The writer wishes to express his obligations to the members of his Advisory Committee, and to Luther E. Hewitt, Librarian of the Law Association of Philadelphia, Thomas L. Montgomery, D. L., State Librarian, and Hon. Adelbert C. Fanning, former President Judge of the Forty-second Judicial District, for invaluable aid in the preparation of this work.

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FRANK M. EASTMAN.

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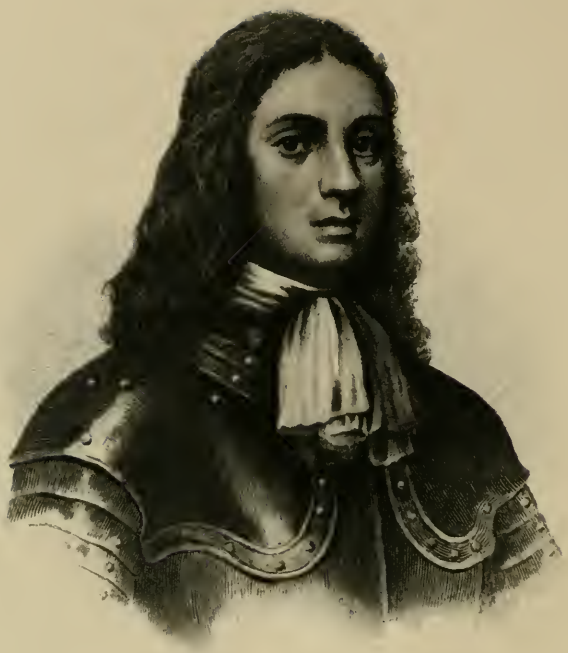

William Penn

CHAPTER I.

Early Settlements on the Delaware River.

Delaware Bay was discovered by Henry Hudson in 1609. Finding it obstructed by numerous shoals, he explored neither it nor the river, but immediately sailed northward, rediscovering the Hudson river and exploring the same. In 1614 Captain Cornelis Jacobson Mey in the ship *Fortune* visited it, and gave his name to the northern cape, while the south cape was called Hindlopen, after one of the towns in the Province of Friesland. In 1616 Captain Hendrickson in the yacht *Restless* visited the bay and explored the river as far as the Schuylkill.

The Dutch discoveries in North America having led to the organization of the Dutch West India Company, a charter was granted to that organization in 1621, and in 1623 the Province of New Netherland was established, its capital being New Amsterdam, on Manhattan Island, now the city of New York.

In the same year, Captain Mey, before referred to, explored the Delaware river, called by the Dutch the South river, and established Fort Nassau, in the vicinity of the present town of Gloucester, a few miles below Camden. This was the first settlement of Europeans on the Delaware. Although this fort may have been temporarily abandoned for a short time, it appears to have been maintained practically continuously until it was destroyed by the Dutch themselves in 1650 or 1651, it "being too high up and too much out of the way."[1]

In 1630, David Pieterszen De Vries and Samuel Godyn attempted to establish a colony or patroonship at the western mouth of Delaware Bay, at the site of the present town of Lewes, Delaware, but the colonists were killed by the Indians shortly after their landing, and no further attempt was made to establish the colony. The interests of the proprietors were purchased by the West India Company in 1635. In 1633 Fort Beversrede was erected near the mouth of the Schuykill. These appear to have been the only settlements made along the Delaware to that date, and remained so until the arrival of the Swedes in 1638.

The Swedish West India Company was chartered at the instance of William Usselincx, a Brabant merchant, who had been one of the promoters of the Dutch West India Company. At his instance the plan of the Swedish West India Company was confirmed in the Diet of 1627, but the charter was not finally granted until 1633. It empowered the company "to constitute a council, which, with its officers, should attend to the administration of justice, the preservation of good laws . . . should

[1]Hazard's "Annals of Pennsylvania," p. 15.

appoint governors, directors and judges . . . accommodate differences between the citizens of the country and the natives . . ." In April, 1638, a colony of fifty Swedes arrived at the Delaware under the direction of Peter Minuit, who had been Director-General of the Dutch West India Company at Manhattan, but who was now enlisted in the services of Sweden. He immediately built a fort and trading post on the site of the present city of Wilmington, Delaware, which he named Christina in compliment to the Queen of Sweden. This colony, known as "New Sweden," struggled for existence, and would have probably perished but for the arrival of a body of colonists from Guttenburg in the spring of 1640.

In the same year, the Swedish Queen granted a special charter to De Rehden and others, residents of the Province of Utrecht, to establish a colony on the South river, with privileges similar to those granted to patroons. The colonists were obliged to submit such statutes as they desired to the governor of Christina, who it appears had also some individual control over the affairs of the colony. No very precise bounds were assigned to the grant. As much land below Christina was allowed to be taken as was necessary for the project, provided the limits did not approach nearer than four or five German miles of that place.

In 1642 a larger number of colonists arrived at Christina, under the command of Lieutenant John Printz, commissioned as governor of New Sweden, superseding Minuit. He was instructed to "decide all controversies according to the laws, customs and usages of Sweden; and that as regarded police, government and justice, they were to be administered in the name of her Majesty and the Crown of Sweden." He was also ordered "to bring to obedience and order by necessary and convenient means, mutinous and refractory persons who will not live in peace, and he may punish great offenders, if he finds any, not only by imprisonment and other proportionate punishments *but even with death,* according to the crime, if he can seize the criminal; but not otherwise than according to the *ordinances and legal forms,* and after having sufficiently considered and examined the affairs with the most noted persons, such as the most prudent *assessors of justice* that he can find and consult in the country." It is stated that at least one man was condemned to death and executed by his orders.[2]

It is stated in Armstrong's "Introduction to Upland Court Records" that Printz was doubtless directed in the decisions which he was bound as governor and chief magistrate to make by a compilation of the laws of Sweden made in the year 1614, "for although Swedish writers assert that trial by jury is of Swedish origin, no instance is known of its application in the colony."

Printz established his government on the island of Tinnicum, some twelve miles below the present site of Philadelphia,—not the present Tinnicum Island, but a larger one which is now practically a part of the

[2]Pennypacker's "Pennsylvania, The Keystone State," p. 34.

main land,—where he built a fort which he named Fort Gottenburg, and further down the river at a point about three or four miles below Salem creek, on the Eastern shore, he built another stronghold named Fort Elsinburg, or Eltsborg. Later he built a post so near Fort Beversrede as to render the latter useless for trading with the Indians.

In 1651, Peter Stuyvesant, the Dutch Director-General at New Amsterdam, now the city of New York, built a fort near the present town of New Castle, which he called Fort Casimar.

At this time, therefore, in 1651, the Dutch were established at Fort Nassau, near the present site of Gloucester, at Fort Beversrede, at the mouth of the Schuylkill, and Fort Casimar, near the present site of New Castle, while the Swedes were established at Fort Gottenburg, and Fort Beversrede, not far from the present site of Philadelphia, Fort Elsinburg, or Eltsborg, near the mouth of Salem creek, and Fort Christina at the present site of Wilmington. The Swedes were very much the stronger numerically. The Dutch "forts" were merely trading posts, while there was a substantial settlement of Swedes at Fort Christina, and another below it of the colonists under the Utrecht grant.

Printz sailed for Sweden in 1653, leaving his son-in-law, John Pappegoya, in charge, who was succeeded in the early part of 1654 by the arrival of Governor Risingh. Up to this time there had been no other difficulties between the two nationalities than such as naturally arise between neighbors of different nationalities and conflicting interests. But Risingh, immediately upon his arrival, and contrary to his instructions, which counselled a spirit of forbearance and moderation, though it is said that he had private instructions to the contrary, took forcible possession of Fort Casimar. This led to the invasion in 1655 by Peter Stuyvesant, Director-General at New Amsterdam, of the Swedish possessions on the Delaware, and the downfall of the Swedish power in this country, at which time there were probably not more than five hundred Swedes and Finns on the river.

The number of Dutch colonists upon the Delaware up to this time had been so small that there is no reason to suppose that there were any courts established thereon. Such causes as could not be determined by the commanders at the forts were presumably sent directly to the court at New Amsterdam for determination without any intermediate hearing.

There is no record of the administration of justice under the Swedes. As above stated, Printz was instructed to decide all controversies according to the laws, customs and usages of Sweden, and we find him on one occasion complaining in a report to the West India Company that he had "several times solicited to obtain a learned and able man to administer justice and attend to the law business." Nothing further is known as to the administration of justice under the Swedes.

CHAPTER II.

ADMINISTRATION OF LAW UNDER THE DUTCH.

CHAPTER II.

Administration of Law Under the Dutch.

Having arrived at the time when the administration of law by the Dutch was finally established on the Delaware, we shall here consider how it was administered.

By the charter of the West India Company the Director-General and his Council were invested with all powers, judicial, legislative and executive—subject, some supposed, to an appeal to Holland; but the will of the company, expressed in their instructions or declared in marine or military ordinances, was to be the law in New Netherland, excepting in cases not specially provided for, when the Roman law, the Imperial Statutes of Charles V, the edicts, resolutions and customs of the Fatherland were to be received as the paramount rule of action.[1]

On extraordinary occasions it was customary to add to the board a few of the other inhabitants, when special questions were to be deliberated upon, or special cases tried, in which, perhaps, one or another of the ordinary members of the council might be interested. When criminal cases were tried, two capable persons from the district in which the crime was charged to have been committed were added.

The right to appeal to the States General in Holland does not appear to have been admitted on the part of the Director-General. Van Stuyvesant told Melyn that if he, the Director, had anticipated that Melyn would have brought his judgment before their High Mightinesses, he would have had him hanged on the highest tree in New Netherland, and afterward, when Van Hardenburg mentioned his intention to appeal, as curator to a vacant estate, the Director warned him "that if people thought of appealing during his administration he should make whomsoever did so a foot shorter."[2]

During the administration of Van Stuyvesant appeals from decisions of the Provincial Court were lodged by the Rev. Mr. Doughty and a Mr. Van Hardenbergh. The former was immediately fined twenty-five guilders, and imprisoned twenty-four hours for his presumption. The following sentence was pronounced against Van Hardenbergh:

Having seen the written demand of the Honorable Fiscaal Van der Huygens against Arnoldus van Hardenbergh, in the case of appeal from our sentence dated 28th April ult., as appears by the signature of the aforesaid A van Hardenbergh, from which sentence no appeal can lie, as is evident to him from the commission of their High Mightinesses the

[1] O'Callaghan's "History of New Netherland," vol. 1, p. 90.
[2] O'Callaghan's "History of New Netherland," vol. 1, p. 116.

Lords States General and His Highness of Orange; therefore, the noble Director-general and council of New Netherland, observing the dangerous consequences which tends to the injury of the supreme authority of the magistracy of this land, as an example to others, condemn the aforesaid Arnoldus van Hardenbergh to pay forthwith a fine of twenty-five guilders, or to go to jail until the said fine be paid.[3]

Appeals to the Directors in Holland were, however, occasionally taken to and heard and decided by that body, and we find Stuyvesant, in a letter addressed to the Directors on July 21, 1661, complaining of the reversing of a sentence pronounced against one Jan Gerritsen van Marcken.[4]

All prosecutions before the Director-general and his Council were instituted and conducted by an officer called a "schout-fiscaal," whose duties were equivalent to those performed among us by a sheriff and a district attorney. He was charged especially with enforcing and maintaining the placards, laws, ordinances, resolutions, and military regulations of their High Mightinesses the States General, and protecting the rights, domains, and jurisdiction of the company, and executing their orders, as well in as out of court, without favor or respect to individuals; he was bound to superintend all prosecutions and suits, but could not undertake any actions on behalf of the company except by order of the council; nor arraign nor arrest any person on a criminal charge, except on information previously received, or unless he caught him *in flagrante delictu*. In taking information, he was bound to note as well those points which made for the prisoner, as those which supported the charge against him, and, after trial, he was to see to the proper and faithful execution of the sentence pronounced by the judges, who, in indictments carrying with them loss of life and property, were not to be less than five in number. He was, moreover, specially obliged to attend to the commissaries arriving from the company's outposts, and to vessels arriving from or leaving for Holland, to inspect their papers, and superintend the loading and discharging of their cargoes, so that smuggling may be prevented, and all goods introduced, except in accordance to the company's regulations, were at once to be confiscated. He was to transmit to the directors in Holland copies of all informations taken by him, as well as of all sentences pronounced by the court; and no person was to be kept long in prison at the expense of the company, without special cause, but all were to be prosecuted as expeditiously as possible before the Director and Council.[5]

Notwithstanding the importance of the office of the schout-fiscaal, that officer did not always exercise his duties. It appears that Schout-Fiscaal Van Dyck, who was appointed at the same time as Van Stuyvesant, was excluded from the Council for over two years after his arrival in this colony. In the exercise of his office he was most commonly employed as a scrivener to copy legal papers, the drafts of which the Director-General

[3] *Ibid*, vol. 1, p. 395.
[4] Pennsylvania Archives (second series), p. 662.
[5] *Ibid*, vol. 1, pp. 101-102.

usually prepared; at other times he was "charged to look after the pigs and keep them out of the fort, a duty which a negro could very well perform." When Van Dyck happened to object, the Director "got as angry as if he would swallow him up;" or, if he presumed to disobey, "put him in confinement or bastinadoed him with his rattan."[6] Van Stuyvesant finally removed him from office, but on Van Dyck's return to Holland he made such representations as occasioned much trouble to the Director-General.

Director Van Twiller arraigned the Schout Van Dyck's discharge for opposing his regular conduct, condemned him to lose his wages, then three years in arrears, and ordered him to proceed to Holland to justify his conduct, thus virtually removing him from an office to which he had been appointed by the Amsterdam chamber. He also occasioned trouble by his representations to the States General.

Where local courts were established they were held by officers known as schepens. The office of schepen was first established in Holland in the year 1270. The city council assembled on the 28th of January in each year, and nominated fourteen citizens, whose names were forwarded by the burgomasters to the Stadtholder, after they had picked or designated such as they considered best qualified for the office. The selection having been made, the new schepens entered on their duties on the second of February, or Candlemas day. They constituted a court of criminal and civil jurisdiction. In the former case they could inflict, with the consent of the burgomaster, capital punishment. In the latter, their jurisdiction was almost unlimited; subject in certain cases to an appeal to the Supreme Court at The Hague. It was their privilege to appoint curators to vacant estates; to authorize the sale of minors' property; to issue interdicts; to provide for the burial of friendless strangers; and to permit the erection of "dangerous buildings" within the city. Bailbonds, conveyances, mortgages, and such-like instruments, were executed before them. They acted also in certain cases as arbitrators between citizen and citizen.[7] Each local court had its schout, who appears to have been aided in the performance of the executive portions of his duties by a "court-messenger."

From these local courts an appeal lay to the Director-General and Council where the sum in dispute exceeded $40, or where infamy might attach to the sentence; as well as from all judgments in criminal proceedings, where the same was allowed by the custom of Fatherland.[8]

In 1647, Van Stuyvesant issued a decree constituting a council of Nine Men. It seems that in the Low Countries there was a tribunal having separate civil and criminal jurisdiction, the first exercised by thirteen and the second by seven men. These courts were afterwards united, the bailiff of each district administering justice in both civil and criminal cases, with "Thirteen elected good Men." This system, so much like the

[6] *Ibid*, vol. 2, p. 181.
[7] *Ibid*, vol. 2, p. 212.
[8] *Ibid*, vol. 1, p. 220.

jury system, was, however, abolished before the founding of New Netherland.

The functions of the tribunal established by Van Stuyvesant, however, were principally confined to giving advice in the affairs of state, but the decree constituting it provided as follows:

III. Whereas, by increased population, the number of lawsuits and altercations unavoidably are multiplied, and many trifling questions may be terminated by arbitrators; otherwise, important affairs must be postponed to the great prejudice of this city and its inhabitants, and at the price of enormous expenses, loss of time and vexation of the contending parties; therefore, three out of the number now chosen shall once in each week, namely, on every Thursday, on the usual court day, be admitted to Our council, as long as civil cases are before the Court, to become acquainted with cases where parties might be referred to them as arbitrators; to-wit: one from the merchants; one from the citizens; and one from the farmers. This shall circulate in rotation among them every month, and in case any one cannot attend Court, by reason of sickness or otherwise, another member of the same class shall then take his place, when parties shall be referred by the Director to them as arbitrators, to whose decision parties shall be obliged to submit, or by unwillingness pay for the first time one pound Flemish, before the plaintiff can appeal or be admitted to Our Council.[9]

On the conquest of the Swedes on the Delaware by the Dutch in 1655, the Director-General and Council at New Amsterdam, "wanting, for the promotion of the interest of the company on South river an expert and well qualified person to command there in their absence and direct the affairs at that distance on the good reports and their own knowledge," appointed John Paul Jacquet as Vice-director and chief on that river, and conferred upon him, among other powers, authority to keep order, do justice, and administer it either in civil or military cases. A council was also constituted to consist of Andreas Hudde and the commissary of the company, appointed at the same time, and in purely civil cases between freemen and the company's servants, two most expert freemen. Hudde was the secretary of the court, and kept its minutes. These minutes extending from September, 1655, to March, 1657, have been preserved, and will be found in Volume 12, of New York Colonial Documents, beginning at page 133.[10] They contain little of interest. The cases tried were mainly for small debts, slander, selling liquor to Indians, and the like.

It appears that there was at least one local court held on the Delaware at Tinnekunck, but it is not known what other local courts were held until the second occupation of the Delaware by the Dutch, when in 1673 three judicial districts were organized, one for the inhabitants of Whorekill between Cape Henlopen and Bombay Hook, corresponding to the lower counties of the State of Delaware; another for New Amstel, from Bombay Hook to Kristina Kill, corresponding to New Castle county in the

[9] *Ibid*, vol. 2, pp. 38-39.
[10] Hazard's "Annals of Pennsylvania," p. 205.

State of Delaware; and another for Upland to Kristina Kill, "under the head of the river," covering so much of Pennsylvania as was then settled.[11]

The expulsion of the Swedes became a source of embarrassment to the West India Company, because of the moneys advanced to it by the city of Amsterdam to enable it to recover the South river. In order to pay this indebtedness and to strengthen the southern boundaries of New Netherland, the West India Company in 1656 transferred Fort Casimar, with all the country from the West side of Kristina Kill to the mouth of the Delaware Bay, to the city of Amsterdam, and the territory so ceded was erected into a colony of the first class under the title of New Amstel. By the conditions of the settlement the colonists were to have one schout or officer as head of justice, appointed in the name of their High Mightinesses and the West India Company by the deputies of Amsterdam, who for this purpose gave the Director a power of attorney. Five or seven schepens were to be appointed, for which purpose the body of burghers were to nominate a double number, the Director by his power of attorney to make an election from them. The schepens were to determine finally causes for all sums under one hundred guilders, but in all cases which involved more than that amount an appeal was to lie to the Director-General and Council of New Netherland. The schepens also were to pronounce sentence in all criminal cases, with an appeal therefrom.[12]

Jacob Alrich was appointed as Director of New Amstel, and assumed charge of his office on April 21, 1657. Shortly after the establishment of the municipal government of New Amstel, the government was reconstructed. A permanent council of seven members was elected by the burghers, and from this body three magistrates were chosen, who with the schout and secretary, constituted a court for the administration of justice.[13]

There were now, therefore, two separate jurisdictions on the Delaware—the new colony of New Amstel, with its seat at what had been Fort Casimar; and the West India Company's government, with its seat at Fort Christina, which was now known as Fort Altona, later as Wilmington.

Jacquet was removed from the vice-directorship of the company's colony and succeeded by William Beekman, who had been one of the schepens of New Amsterdam.

The new colony did not prosper, owing to sickness, failure of crops and other causes. Alrich died in 1659, leaving New Amstel "over head and ears in debt," having appointed Alexander D'Hinoyossa his successor. On March 21, 1661, the jurisdiction of the schepens at New Amstel was extended in civil cases to six hundred guilders, Holland currency, and the right of appeal in all criminal matters was taken away.

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[11]New York Colonial Record, p. 162; Hazard's "Annals of Pennsylvania," p. 407.

[12]O'Callaghan's "History of New Netherland," vol. 2, p. 329.

[13]*Ibid*, vol. 2, p. 373.

On March 1, 1660, Van Stuyvesant constituted a commission consisting of his Attorney General, William Beekman, Alexander D'Hinoyossa and some others, to inquire into the murder of a savage on the South river, which he states was probably done by "two so named Christians," for which they were apprehended. The instructions to these commissioners directed them as follows:

2. When inquiry is made, delinquents discovered, and by sufficient proofs and voluntary confession convicted, then prosecute them before the delegated judge, to make up his conclusion according to law, demand speedy and impartial justice, execute the pronounced judgment, and there on the spot, for others' example.

On April 28, 1660, Beekman asks for orders in the following case, from which it would appear that divorces were sometimes granted:

Among the Finns is a married couple who live together in a constant strife; the wife receives daily a severe drubbing and is often expelled from the house as a dog. This treatment she suffered a number of years; not a word is said in blame of the wife, whereas he, on the contrary, is an adulterer; on all which the priest, the neighbours, the sheriff, and the commissaries appealed to me, at the solicitation of man and wife, that a divorce might take place, and the small property and stock be divided between them.

There is no record of any reply to the foregoing, but on February 1, 1662, Beekman writes relative to another case:

The aforesaid Finnish priest [Laers Carels] solicited very circumstantially that the council would grant him a divorce for this breach of marriage contract by his wife, which he obtained on the 15th of December, under your approbation. Yesterday I was informed that he married himself again on Sunday, a transaction, in my opinion, under correction, entirely unlawful, and expect your honour's orders how to conduct myself in it.

It appears from the following that this second marriage was declared illegal, and that the divorce was informally granted:

On the day aforesaid, is communicated to aforesaid Rev. Laers Carels, by Vice-Director Beekman, that his marriage is declared null and void, as illegal, as he married himself, which is directly contrary to the orders sanctioned about marriage connections; that he before ought to have demanded and obtained from us the dissolution of his former marriage, by letters of divorce, agreeably to the laws of our fatherland, which ought to have been granted by the court of magistrates, and that by a further delay from his side, he shall be prosecuted.

Beekman and D'Hinoyossa were continually quarrelling over questions of conflicting jurisdiction. Beekman complains in a letter to Van

[14] "Hazard's "Annals of Pennsylvania," p. 304.
[15] *Ibid*, p. 310.
[16] *Ibid*, p. 330.

Stuyvesant that the latter conducts himself in a haughty and imperious manner, defaming and slandering the deceased director, disregarding mandamuses and injuring the property of the deceased, and that "he will not be commanded by your honor, as he does not acknowledge any person his superior, except his principals in fatherland."

The relations between Beekman and D'Hinoyossa became more and more strained until on December 3, 1661, a deed was executed by Van Stuyvesant conveying Fort Altona and the remainder of the river to the city of Amsterdam. D'Hinoyossa became director of the whole of the Delaware, and Beekman was transferred to another office.

In 1664 Charles II of England, though not yet at war with the Dutch, determined to dispossess them of the settlements they had made on what the English claimed as their territories, and thus put an end to the disputes that were continually occurring between the two nations. As a first step, he, on the 12th day of March, 1664, granted to his brother James, Duke of York, a patent embracing, roughly speaking, besides other extensive territories to the north and east, all the land from the west side of the Connecticut river to the east side of Delaware Bay, and including therefore what now constitutes the States of New York and New Jersey. Although the grant did not extend to the territory on the west bank of the Delaware river, it seems to have been construed to so extend, and the jurisdiction of the Duke of York was exercised in the settlements on the west side of the river. Subsequently the Duke of York obtained a separate conveyance of these territories from Charles II on March 22, 1683, but before this date he had conveyed them to Penn. Shortly after the issuing of the charter to the Duke of York in 1664, Charles II created a commission of which Colonel Richard Nicolls was a member, to whom authority to reduce the Dutch settlements was given, and to establish a government in the name of the duke. Accordingly an expedition set sail from Portsmouth, which first reduced New Amsterdam without bloodshed, and then proceeding to the Delaware took possession of the settlements on that river, thus ending the Dutch dominion in North America, except for a short period in 1673, when their old territories were reconquered by them, but shortly afterwards returned by virtue of the treaty of Westminster.

[17] *Ibid*, p. 332.
[18] *Ibid*, p. 319.

CHAPTER III.

GOVERNMENT UNDER THE DUKE OF YORK.

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Government Under the Duke of York.

After the reduction of the Dutch upon the Delaware, Sir Robert Carre, who was in command of the expedition which reduced them, took command of the territories on that river, with the seat of the government at New Amstel, or New Castle, as it was now called, and immediately entered into an agreement "on the behalf of his Majesty of Great Britain" with "the burgomasters, on behalf of themselves and all the Dutch and Swedes inhabitants on the Delaware Bay and Delaware River," for the government of the country.

An oath of allegiance was administered to the inhabitants. By the terms of the agreement referred to, it was provided, *inter alia,* "that the present magistrates shall be continued in their offices and jurisdictions to exercise their civil power as formerly," and "that the schout, the burgomaster, sheriff and other inferior magistrates shall use and exercise their customary power in administration of justice within their precincts for six months or until his Majesty's pleasure is further known."

Colonel Richard Nicolls assumed the control of the entire territories of the Duke of York by virtue of the Duke's commission to him as deputy. His rule terminated in May, 1667, when he was succeeded by Colonel Francis Lovelace, who, in turn was superseded by Edmond Andross, on July 11, 1674, after the restoration of the government of the Duke of York.

The government on the Delaware remained in charge of Sir Robert Carre, under the agreement above recited, until the 21st day of April, 1668, when certain important changes were made by Governor Lovelace, under Captain John Carre, as his deputy, and it was ordered:

That to prevent all abuses or oppositions in Civil magistrates, so often as complaint is made, the commissioned Officer Captain Carre shall call the Schout, with Hans Block, Israel Helme, Peter Rambo, Peter Cock, Peter Alrichs or any two of them as Councillors, to advise, hear and determine by the major vote, what is just, equitable and necessary in the case or cases in question.

That the Commissioned officer Captain Carre in the determination of the Chief Civil affairs, whereunto the temporary forementioned Councillors are ordained, shall have a casting voice where votes are equal.

That the fines for Praemunires and light offences be executed with moderation; though it is also necessary that all men be punished in exemplary manner.

That the laws of the government established by his Royal Highness

[12] Penna. Archives, vol. V, p. 544.

be showed and frequently communicated to the said Councillors and all others, to the end that being therewith acquainted, the practice of them may also in convenient time be established, which conduceth to the public welfare, and common justice.

That in all matters of difficulty and importance recourse must be had, by way of appeal, to the Governor and Council at New York.

By an ordinance for the government of the Delaware promulgated by the Governor and Council at New York on June 14, 1671, it was provided among other things:

That constables may be appointed to keep the King's peace, who shall have staves with the King's Arms upon them as practiced in the rest of his Royal Highness' dominions," and "that they may have the King's Arms to be set up in their Courts of Judicature, as well as on the staves, the which they will be at the charge of themselves.

By an ordinance similarly promulgated on the 17th of May, 1672, it was provided, as follows:

That for the better government of the town of New Castle for the future, the said town shall be erected into a corporation by the name of a bailawick, that is to say, it shall be governed by a Bailiff and six assistants, to be at first nominated by the Governor, and at the expiration of a year, four of the six to out, and four others to be chosen in their places, the Bailiff to continue for a year, and then two to be named to succeed, out of whom the Governor will elect one. He is to preside in all the courts of the town and have a double vote. A constable is likewise annually to be chosen by the bench.

The town court shall have power to try all causes of debt or damage to the value of ten pounds, without appeal.

That the English laws, according to the desire of the inhabitants be established both in the town and all plantations upon Delaware river.

That the office of Schout be converted into a sheriffalty and the High Sheriff's power extend both in the corporation and river and that he be annually chosen by two being presented to the Governor, of whom he will nominate and confirm one.

In the year 1672 war was declared by the allied powers of France and England against the United Belgic Provinces. While the position of the Dutch at home was in a critical position in 1673, their fleet after committing depredations at many other points appeared before New York on the 30th of July, and obtained its immediate surrender without the firing of a shot. The Dutch thus regained possession of the entire Province of New Netherland, and on August 12th Anthony Colve was commissioned Governor General of "New Netherland, with all its appendencies."

Peter Alrichs, Bailiff General of New Castle and the Delaware, promptly gave his adhesion to the new government, and as a reward was appointed sheriff or commandant of the South river by Colve on September 19th. Instructions were given to him and to the magistrates for the administration of the new government on the Delaware. As that

government lasted less than a year, these instructions are of no present importance, except so much thereof as provided that three courts of justice were to be established on the river, and the inhabitants were ordered to nominate by plurality of votes eight persons as magistrates for each of the courts, with the following jurisdictions.

One Court of Justice for New Amstel, to which provisionally shall resort the inhabitants dwelling on the east and west banks of Kristina kill unto Boomties Hook, with those of Apoquenamins kill inclusive.

One Court of Justice for the inhabitants of Upland, to which provisionally shall resort the inhabitants both on the east and west banks of Kristina kill and upwards unto the head of the river.

One Court of Justice for the inhabitants of the Whorekill, to which shall provisionally resort the inhabitants both on the east and west sides of Cape Hinloopen, unto Boomties Hook aforesaid.

On the 9th of February, 1674, a treaty of peace was signed at Westminster between England and Holland, by the terms of which all captured places were to be restored to that nation to which they belonged before capture, and as a result New York and the Delaware reverted to the possession of the Duke of York, and were restored to English rule. The Duke of York was confirmed in his former grant, and on the 11th of July, 1674, he commissioned Major Edmund Andross as his Lieutenant and Governor of New York and dependencies.

On the 2d day of November, the government on the Delaware was reorganized, and all the former officers and magistrates continued in office, excepting Peter Alrichs. Captain Edmund Cantwell was appointed sheriff, and William Tom, secretary. Five magistrates were appointed for New Castle, and five on the river. This government continued until September 23, 1676, when Captain John Collier was appointed as commander on the Delaware river and bay, and Ephriam Hermans as secretary. Six magistrates were appointed for New Castle, and six for the river. Shortly afterwards, on the 25th of September, 1676, the following ordinance was promulgated by Governor Andross:

Edmond Andross, Esqr., and Seigneur of Sausmarez, Lieutenant and Governor General under his Royal Highness James Duke of York and Albany, etc., of all the territories of America.

Whereas, The last year at my being at Delaware upon application of the inhabitants representing that my predecessor Governor Lovelace had begun to make a regulation for the due administration of justice according to the laws of this Government, pursuant to which I did appoint some magistrates and make some rules for their proceeding the year ensuing or until further order; in which having upon mature deliberation, by the advice of my Council made some alteration, they are to remain and be in force in form following:

1. That the books of Laws established by his Royall Highness and practiced in New York, Long Island and dependencies, be likewise in force and practice in this river, and precincts, except the Constable's Courts; County Rates, and some other things Peculiar to Long Island,

and the militia as now ordered to remain in the King; but that a Constable be yearly in each place chosen for the preservation of his Majesty's peace, with all other powers as directed by law;

2. That there be three courts held in the several parts of the river and bay as formerly, to wit: One in New Castle, one above at Uplands, another below at the Whorekill;

3. That the Courts consist of Justices of the Peace, whereof three to make a quorum and to have the power of a Court of Sessions and decide all matters under twenty pounds without appeal, in which Court the Eldest Justice to preside, unless otherwise agreed amongst themselves; above twenty pounds and for crime, extending to life, limb or banishment to admit appeal to the Court of Assizes.

4. That all small matters under the value of five pounds may be determined by the court without a jury, unless desired by the parties, as also matters of equity;

5. That the court for New Castle be held once a month to begin the first Tuesday in each month and the court for Upland and the Whorekill quarterly and to begin the second Tuesday of the month or oftener if occasion;

6. That all necessary By-laws or orders, not repugnant to the laws of the government, made by the said courts be of force and binding, for the space of one whole year, in the several places where made, they giving an account thereof to the Governor by the first opportunity, and that no fines be made or imposed but by order of court;

7. That the several courts have power to regulate the court and officers' fees, not to exceed the rates in the Book of Laws, nor to be under half of the value therein expressed.

8. That there be a high sheriff for the Town of New Castle, River and Bay; and that the said high sheriff have power to make an undersheriff or marshal, being a fit person, and for whom he will be responsible, to be approved by the court, but the sheriff, as in England, and according to the now practice on Long Island, to act as a principal officer for the execution of the laws, but not as a justice of peace or magistrate.

9. That there be fitting books provided for the Records in which all judicial proceedings, to be duly and fairly entered as also public orders from the Governor, and the names of the magistrates and officers authorized, with the time of their admission. The said Records to be kept in English, to which all persons concerned may have free recourse at due or seasonable times;

10. That a fit person for clarke (when vacant) be recommended by each court to the Governor for his approbation, in whose hands the said Records to be kept;

11. That all writs, warrants and proceedings at law shall be in his Majesty's name, it having been practiced in the Government ever since the first writing of the Law Book, and it being his Royal Highness's special pleasure and order.

12. That no rates be imposed or levys of money made within the Town of New Castle, River or Bay by any under what denomination soever without the approbation of the Governor unless upon extraordinary occasion in case of necessity of which the Governor to have present account sent him. That upon the levy of any rates there be a fair account

kept both of the receipts and disbursements, which account to be given in to the court there to be passed and then sent to the Governor for his allowance, until which not to be a sufficient discharge.

Whereas by this regulation there are no overseers appointed nor constables' courts, but all matters to be determined by the justices; I: do therefore recommend the composure or referring to arbitration of as many matters particularly under the value of five pounds as may properly be determined that way, provided it may be by the consent of parties;

That any person desiring land make application to the court in whose bounds it is who are required to sit once a month or oftener if there be occasion to give orders therein and certify to the Governor for any land not taken up and improved fit proportions, not exceeding fifty acres per head unless upon extraordinary occasions where they see good cause for it, which certificate to be a sufficient authority or warrant for the surveyors to survey the same and with the surveyor's return to be sent to New York for the Governor's approbation; that in the certificates be specified how much upland and meadow with due regard that each may have a proportionable share, according to the place they are in Landward; given under my hand and seal in New York, the 25th day of September in the 28th year of his Majesty's Reign, Anno Domini 1676.

E. Andross.

As we have seen, Governor Nicolls directed in 1668 that the Duke's Laws "be showed and frequently communicated," so as to be "enforced in convenient time." Later, in 1672, Governor Lovelace ordered that "ye English lawes be established both in ye towne and all plantations upon Delaware river," and finally by the foregoing order they were imperatively put in force in 1676. They could not, however, have been immediately administered, because as late as June 8th, 1677, we find the Court of New Castle writing to Governor Andross, "Wee lykewise humbly desier that the sending of the Lawe Booke may not bee forgott: there being great occasion for the same." On July 17, 1678, they request "the new corrected Law-booke and seal for ye office as heretofore promised."

[2]Record of Upland Court; also Records of the Court of New Castle, p. 5.

It will be noted that the courts established by this decree are located at the same places in which courts were established by the Dutch in 1673. It is probable that courts existed at one or more of these places prior to the English Conquest in 1664, but there is no record thereof:

It appears, from a reference on the New Castle Court Records, to "proceedings of a court held in New Castle, March 24, 1674," (1675) that courts were established here as early, or perhaps prior to this date. The records are at present not among those at New Castle, where the earliest that we have seen are October, 1676. We have seen no evidence of courts in the time of Lovelace, though there must, no doubt, have been some legal proceedings. Courts were held "at a place now called Troy or Jone's Creek, near Dover, for Jone's, now Kent, and at Whorekill, now Lewistown, for county of Deal, now Sussex county."

CHAPTER IV.

THE TRIAL OF THE "LONG FINNE."

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The Trial of the "Long Finne."

The following account of this early trial is taken from the able historical notes prepared by Benjamin M. Nead, Esquire, of the Dauphin County Bar, and attached to the work known as the "Duke of Yorke's Book of Laws," published by the Commonwealth of Pennsylvania in 1879:

Near the close of the year 1669, while the conduct of affairs on the Delaware still remained in charge of Captain John Carre, a disturbance, which some writers style "an attempt at rebellion," others, "an insurrection," arose. It was caused by the seditious utterances and doings of one Marcus Jacobson, alias John Binckson, etc., but better known to the people of his day, as the "Long Finne or Swede." Jacobson was an adventurer who imposed himself upon the Swedish community on the Delaware, pretending to be a son of Connigsmark, one of the King of Sweden's general officers.

This disturbance is mentioned thus particularly, not that it was itself of any real importance, either as to its object or its result, but because the civil authorities of the day, prompted by their own fears, and those of the inhabitants, magnified the importance of the movement, and inaugurated such formal proceedings in the premises as to furnish us with a fair record of the mode of enforcing law and of punishing evil doers in vogue at that early date, which record, fortunately, has been preserved.

If the "Long Finne" had any motive for the disturbance which he raised, outside of that which actuates the common vagabond and freebooter, it is likely that it was his intention to cause a general insurrection of the dissatisfied elements of the people with the ultimate design of overthrowing the English government on the Delaware and re-establishing that of the Swedes. The character of his associates gives color to this theory. His chief follower was Henry Coleman, a Finn, who, we are informed, was a person of consideration and property, all of which he sacrificed to engage in the wild enterprise of Jacobson. A certain clergyman, too, is said to have "played the Trumpeter to the disorder," and even the daughter of the former Swedish governor, Printz-Jeffro Armgart Pappegoya, had been indiscreet enough to intermeddle "in so unworthy a design."

Whether a rebellion for the overthrow of the entire government, or a temporary disturbance to the end that the spiteful intentions of a certain few individuals might be carried out, was aimed at, it matters little, for the movement was promptly nipped in the bud by the arrest and punish-

ment of the ring-leader, Jacobson, the "Long Finne," to a consideration of whose trial, and the matters connected therewith, the attention of the reader is invited.

Governor Lovelace, having been informed by letters from Captain Carre of the conduct of the "Long Finne" and his associates, issued on the 2d of August an order for his arrest, with instructions as to the manner in which his associates should be treated. In pursuance of this order the "Long Finne" was arrested and held in irons, to await further action on the part of the governor, and all other persons who had been implicated in the plot were bound over to answer for their misdemeanors and an account was taken of their estates.

This case was of so great magnitude as to require, before final action, the most careful consideration on the part of the governor. Uncertain how to act in the matter, he awaited the arrival of expected advices from England upon the general conduct of the government. His uncertainty is evinced in his letter to Captain Carre, of the 15th of September, when he writes that all business is waiting "upon that breath that must animate this little body politique of ours, so that what I do recommend unto you now must rather respect the stopping of the spreading of the contagion, that it grow not further, than by any way of amputating or cutting of any member to make the cure more perfect."

When the matter of the insurrection of the "Long Finne" came before the Governor and Council, a proceeding of such an unusual character at once attracted attention.

On the 18th of October, at a meeting of the Council, "upon serious and due consideration had of the insurrection, . . . it is adjudged that the Long Finne deserves to die for the same, yet in regard that many others being concerned with him, in that insurrection, might be involved in the same Premunire if the rigour of the law should be extended, and amongst them divers simple and ignorant people, it is thought fit and ordered that the said Long Finne shall be publicly and severely whipped and stigmatized or branded in the face with the letter R, with an inscription written in great letters and put upon his breast, that he receive that punishment for attempted rebellion, after which he be secured until he can be sent and sold to the Barbadoes or some other of those remoter plantations."

It will be observed that by this action of Council, which was both legislative and judicial, sentence is actually pronounced upon the criminal before he has had his trial, for it is not until the 22d of November that a commission was issued, under the hand of the Governor and seal of the colony, to Matthias Nicolls and certain other persons to go to the Delaware for the trial of the ring-leaders in the insurrection and on the 6th of December these commissioners held a court at New Castle on the Delaware, for the trial of the Long Finne, after the following form:

Upon the meeting of the Court let a proclamation be made by saying, O yes, O yes, O yes, Silence is commanded in the Court whilst his Majesty's Commission are sitting upon pain of imprisonment.

Let the Commission be read and the Commission called upon afterwards, if any shall be absent let their names be recorded.

Then let the proclamation be made again by O yes, as before, after which say: All manner of persons that have anything to doe at this special Court held by Commission from the Right Honorable Francis Lovelace, Esq., Governor Generall under his Royal Highness the Duke of York of all his Territories in America draw near to give your attendance, and if any one have any plaint to enter or suite to prosecute let them come forth and they shall be heard.

After this let a jury of twelve good men be empannelled.

Then let the Long Finne prisoner in the Fort be called for and brought to the Bar.

Upon which the jury is to be called over and numbered one, two, etc., and if the prisoner have no exception against either of them let them be sworne as directed in the Book of Laws for Trial of criminals, and bid to look upon the prisoner at the Bar.

The form of oath is as followeth: You do swear by the Everliving God that you will conscientiously try and deliver your verdict between our Sovereign Lord the King, and the prisoner at the Bar, according to evidence and the laws of the country, so help you God and the contents of this book. Then let the prisoner be again called upon and bid to hold up his right hand: viz. John Binckson alias Marcus Coningsmarke alias Coningsmarcus alias Matthew Hincks. . . . Then proceed with the indictment as follows: John Binckson, Thou standest here indicted by the name of John Binckson alias Coningsmarke alias Coningsmarcus alias Matthew Hincks alias, etc., for that having not the fear of God before thine eyes but being instigated by the devil upon or about the 28th day of August in the 21st year of the Reign of our Sovereign Lord Charles the 2d by the Grace of God of England, Scotland, France and Ireland, King, Defender of the Faith, etc. Annoque Domini 1669, at Christina and at several other times and places before thou didst most wickedly, traitorously, feloniously and maliciously conspire and attempt to invade by force of arms this Government settled under the allegiance and protection of his Majesty and also didst most traitorously solicit and entice divers and threaten others of his Majesty's good subjects to betray their allegiance to his Majesty the King of England, persuading them to revolt and adhere to a foreign prince, that is to say, to the King of Sweden. In prosecution whereof thou didst appoint and cause to be held Riotous, Routous and unlawful Assemblages, breaking the Peace of our Sovereign Lord the King, and the laws of this Government in such cases provided. John Binckson, etc., what hast thou to say for thyself, Art thou guilty of the felony and treason laid to thy charge or not guilty? If he says not guilty, then ask him, By whom wilt thou be tried? If he say by God and his country, say, God send thee a good deliverance.

Then call the witnesses and let them be sworn either to their testimony already given in, or to what they will then declare upon their oaths.

Upon which the Jury is to have their charge giving them directing them to find the matter of Fact according to the Evidence, and then let them be called over as they go out to consult upon their verdict in which they must all agree.

When the jury returns to deliver in their verdict to the Court let

them be called over again and then asked: Gents, Are you agreed upon your verdict in this case, in difference between your Sovereign Lord the King and the prisoner at the Bar? Upon their saying yes, ask who shall speak for you. Then the . . . bring in their verdict and the . . . Then read the verdict and say: Gentlemen, this is your verdict upon which you are all agreed: upon their saying yes, call that the prisoner be taken from the bar and secured.

Prejudged guilty, as the tenor of all the instruments connected with his trial proves, the "Long Finne" was, as a matter of course, convicted of the crime with which he stood charged. Whether his trial was a fair one or not, much of interest attaches to it. In it we have the first record of a cause tried on the Delaware under essentially English rules, with the prisoner formally indicted, and a jury of twelve men, subject to challenge on part of the prisoner, charged to find a verdict in accordance with the evidence.

The sentence, as above indicated, was passed upon the "Long Finne," and on the 25th of January following, he was placed on board the ship *Fort Albany,* to be transported and sold at the Barbadoes, in accordance therewith. The principal ones of his accomplices were sentenced to forfeit to his Majesty the King one half of their goods and chattels, while a small fine was imposed upon those of less note.

CHAPTER V.

THE DUKE OF YORK'S LAWS.

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The Duke of York's Laws.

LAWES.

Established by the Authority of his Majesties Letters patents, granted to his Royal Highnes James Duke of Yorke and Albany; Bearing Date the 12th Day of March in the Sixteenth year of the Raigne of our Soveraigne Lord Kinge Charles the Second.

Digested into one Volume for the publicke use of the Territoryes in America under the Government of his Royall Highnesse.

Collected out of the Severall Laws now in force in his Majesties American Colonyes and Plantations.

Published March the 1st Anno Domini 1664 at a general meeting at Hemsted upon Longe Island by virtue of a Commission from his Royall Highness James Duke of Yorke and Albany given to

Colonell Richard Nicolls Deputy Governeur, bearing date the Second day of April 1664.[1]

The above is the title under which the Duke of York's Laws were published. As appears therefrom, they were not drawn in England or made up from English statute or common law, but were taken from laws then in force in other English colonies in America. Some of the colonies had regular codes of law, not emanating from England, but enacted by themselves, comprehensive enough to cover the ordinary transaction of life and government and needing to be supplemented little, if at all, by the laws of the mother country.

The Duke of York's Laws are of great interest not only because they were in force in Pennsylvania for seventeen years and in New York for a very much greater period, but because they greatly influenced legislation after the establishment of the government of Penn, for which reasons they will be considered at some length in this chapter.

After the conquest of New Netherland, one of Governor Nicolls' first acts was to establish a Court of Assizes, which succeeded to the powers exercised by the former Governors-General and their Councils. This was the supreme tribunal of the Province of New York, having both common law and equity, as well as original and appellate jurisdiction. The Governor and his Councillors possessed the same powers that had formerly been exercised by the Dutch Director and his Council. Long Island was erected into the Shire of Yorkshire, which was divided into three districts or "rydings." The Governor and Council were to appoint a high

[1]The dates in this title are according to the old style. Nicolls' commission was issued in 1664, and the laws were published in 1665, according to the new style.

sheriff annually for the whole of Yorkshire, and justices of the peace in each of the ridings. These justices were to hold a court of sessions in each riding three times a year, at which the Governor or any of his councillors might preside. The high sheriff and these justices were to sit with the Governor and his Council in the Court of Assizes which was to meet in New York once a year on the last Thursday in September. This court was invested with "the supreme power of making, altering and abolishing any laws" in the Government of New York.[2]

This Court of Assizes, as yet consisting only of the Governor and his Council, proceeded to prepare a code of laws for the colony under the provisions of the patent granted to the Duke of York which empowered him to govern the inhabitants:

> According to such Laws, Ordinances, Orders, Directions, and Instruments as by our said Dearest Brother or his assigns shall be established, . . . So always as the said Statutes, Ordinances and Proceedings be not contrary to but as near conveniently may be agreeable to the Laws, Statutes and government of this Our Realm of England, and saving and reserving to us Our Heirs and Successors, the receiving and determining of the appeal and appeals of all or any person or persons . . . touching any judgment or sentence to be there made or given. . . . And also to make, ordain and establish all manner of Orders, Laws, directions, instructions, forms and ceremonies of government and magistracy fit and necessary for and concerning the government of the territories or Islands aforesaid, so always as the same be not contrary to the Laws and Statutes of this Our Realm of England, but as near as may be agreeable thereunto.[3]

Nicolls appears to have obtained copies of the codes of Massachusetts and New Haven, the latter of which had been printed in London in 1656. The Connecticut Code existed only in manuscript, and a transcript could not be obtained in time to be of use, though some of the provisions of Nicolls' Code seem to have been taken therefrom. The Massachusetts "Fundamentals" or "Body of Liberty," an elaborate code of ninety sections or sub-divisions enacted in 1641, appears to have been principally drawn upon. The new code having been prepared, Nicolls, on February 8, 1665, addressed a letter to each of the towns on Long Island inviting them to send delegates to a meeting to be held at Hempstead to give him "their best advice and information." The convention was held on the appointed day, and consisted of thirty-four delegates. The delegates found that instead of being popular representatives to make laws, they were merely agents to approve those already prepared, although Nicolls accepted a few amendments and promised that when any reasonable alterations should be afterwards offered by any town to the courts of sessions the justices should tender them at the next Assizes "and receive satisfaction thereon." Amendments and additions were made to the Laws in 1665, 1666, 1672 and 1675, by the said Court of Assizes. These laws were

[2] Brodhead's "History of New York," vol. 2, p. 63.
[3] 5 Penna. Archives, p. 496.

evidently generally applicable only to Long Island and its neighborhood, and no attempt was immediately made to enforce the greater part of them in any other portion of the province. As we shall see, Governor Nicolls in 1668 directed them "to be showed and freely communicated" on the Delaware, but not to be enforced until "a convenient time," and when their enforcement was finally ordered there the provisions relative to "the constables courts, county rates and some other things peculiar to Long Island and the militia as now ordered to remain in the King," were excepted. These Laws were arranged on something like the plan of a modern digest, the subjects beginning with "Absence" and ending with "Warrant," but the arrangement under the various headings is unscientific, and it is necessary to read practically the whole code to ascertain the law relative to any particular subject.

To recur to the Court of Assizes: This tribunal having been created prior to the publication of the Duke's Laws, was not provided for therein, though its appellate jurisdiction was set out and other references are made to it. It had exclusive jurisdiction in cases of capital offenses, but unless the annual session of the court happened within two months of the receipt of an information of the offense from a court of sessions, the Governor and Council issued a commission of oyer and terminer for the more speedy trial of the offender. Such commissions were also sometimes issued in serious offenses not capital. One was granted on February 21, 1675, to the courts of New Castle and Upland, authorizing their members or any seven or more of them, whereof three shall be of each court, to try one Lybrant Johnson for rape, and to put the judgment of the court into execution.[4] Under the terms of the patent to the Duke of York, an appeal lay to the King in Council from the judgments of the Court of Assizes.

It would seem that the membership of the court was not always confined to the Governor, members of Council, high sheriff and justices of the peace in Long Island, because in an appeal heard on October 6, 1680, the court consisted, in addition to these, of the mayor and aldermen of the city of New York, and the "two commissaries of Albany," besides others not officially designated, in all thirty-nine members, a formidable tribunal in numbers, at least. This was an appeal from a judgment of the court at the Whorekill, and involved the title to four hundred and thirteen acres of land, not therefore a case of the greatest importance. There are, however, records of other sessions of the court at which extremely important matters were passed upon, when no more than five or six persons, including the Governor and secretary, sat.

Besides its annual session, the Court of Assizes might be called at any time by a special warrant to hear and determine civil and criminal cases which required a speedy dispatch. Except in cases of appeal, the process issued for the trial of actions at this court was the Governor's special warrant. Twelve jurors were impanelled in all cases tried before the

[4] 5 Penna. Archives, p. 666.

court. All appeals to the Court of Assizes were made by a petition to the Governor and Council, and security was required in civil cases from the appellant for the prosecution of his appeal. In cases of a criminal nature, not capital, the party was required not only to give bail for his appearance, but also for his good behavior until the hearing. With the appeal and security the party appealing was required to file a brief statement in writing under his own or his attorney's hand of the grounds and reasons of his appeal eight days before the beginning of the court to which he appealed. On the filing of an appeal, a fee of ten shillings was exacted, besides two shillings six pence to the clerk. No summons, pleading, judgment, or any kind of proceedings in courts of justice were to be abated, arrested or reversed upon any kind of circumstantial errors or mistakes if the person and cause "be rightly understood & Intended by the Court."

By an amendment to the laws passed at a session of the court in September, 1665, it was provided:

Where the Original Point is matter of equity the proceedings shall be by way of Bill and delivered in answers upon Oath and by the examination of witnesses, in like manner as is used in the Court of Chancery in England, and due regard must be had that the Defendant have timely notice thereof, as is appointed at Common Law; which is eight dayes warning before the court shall sitt.[5]

Where the Laws made no provision for the disposition of a given case, it was provided as follows:

In regard it is almost impossible to provide Sufficient Lawes in all Cases, or proper Punishments for all Crimes the Court of Sessions shall not take further Cognizance of any Case or Crimes, whereof there is not provition made in some Lawes but to remit the Case or Crime, with the due Examination and proof to the Next Court of Assizes where matters of Equity shall be decided, or Punishment awarded according to the discretion of the Bench and not Contrary to the known Lawes of England.

No justice of the peace who had sat as a judge or voted in any inferior court in a case appealed from, was permitted to have any vote in the Superior Court appealed to, and in all cases of appeals the Appellate Court was required to judge the case according to former evidence and no other, unless some material witness was not then in the country or was necessarily hindered from giving evidence at the trial below the Appellate Court:

Only rectifying what is amiss therein, and where matter of fact is found to agree with the former Court and the Judgement according to Law; not to revoke Sentence or Judgment; but to abate or increase damages as shall be Judged Right.

The capital offenses of which the Court of Assizes had exclusive

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[5]Duke of York's Laws, p. 61.
[6]*Ibid*, p. 35.

jurisdiction, except when it delegated the same by commissions of oyer and terminer, were constituted by the following:

CAPITAL LAWES.

1. If any person within this Government shall by direct exprest, impious or presumptious ways, deny the true God and his Attributes, he shall be put to death.

2. If any person shall Commit any wilful and premeditated Murder he shall be put to Death.

3. If any person Slayeth another with Sword or Dagger who hath no weapon to defend himself; he shall be put to Death.

4. If any man shall slay, or Cause another to be Slain by lying in wait privily for him or by poisoning or any such wicked Conspiracy; he shall be put to Death.

5. If any man or woman shall lye with any Beast or Bruite Creature by Carnal Copulation they shall be put to Death, and the Beast shall be Burned.

6. If any man lyeth with mankind as he lyeth with a woman, they shall be put to Death, unless the one party were Forced or be under fourteen Years of age, in which Case he shall be punished at the Discretion of the Court of Assizes.

7. If any person forcibly Stealeth or carrieth away any mankind; He shall be put to death.

8. If any person shall bear false witness malliciously and on purpose to take away a mans life, He shall be put to Death.

9. If any man shall Traitorously deny his Majestyes right and titles to his Crownes and Dominions, or shall raise Armes to resist his Authority, he shall be put to Death.

10. If any man shall treacherously conspire or Publiquely attempt to invade or Surprise any Town or Towns, Fort or Forts, within this Government, He shall be put to Death.

11. If any Child or Children, above sixteen years of age and of Sufficient understanding, shall smite their Natural Father or Mother, unless thereunto provoked and forct for their selfe preservation from Death or Mayming, at the Complaint of the said Father and Mother, and not otherwise, they being Sufficient witnesses thereof, that Child or those Children so offending shall be put to Death.[1]

These provisions were principally taken, with modifications, from the Massachusetts "Body of Liberty," but the provisions of that code which established as capital offenses idolatry, witchcraft, adultery, rape and rebellious stubbornness in children were not followed.

In addition to the above mentioned offenses, the malicious setting fire of any dwelling-house, church, store-house, out-house, barn, stable or stack of hay, corn or wood, was punishable by death or the making of full satisfaction to the party damnified, according to the discretion of the court.

When it is considered that so late as the beginning of the Nineteenth Century there were something like two hundred offenses punishable in

[1] *Ibid*, pp. 14-15

England by death, the Duke's Laws seem to have been remarkably merciful. The law was not lenient, however, in other respects. Persons stealing hogs or boats or canoes were punished for the first offense by having one of their ears cut off, and for the next, more severe punishment as the court might direct. Burglars and highway robbers were to be branded upon the forehead for the first offense, again branded and severely whipped for the second offense, and put to death for the third. Larceny of goods to the value of ten shillings or over was punished by whipping and the exaction of a fine. Forgery, which was punishable by death in England as late as 1820, was punished by standing in the pillory three several court days, rendering double damages to the party wronged, and being disabled to give any evidence or verdict to any court or magistrate.

Next in authority to the Court of Assizes, and in fact the only other court except the town or constables' court, was the Court of Sessions. Each Riding had its court, consisting of justices of the peace who were appointed by the Governor and Council. The Laws do not prescribe the number of these justices. Sessions of these courts were held originally three times in each Riding, but afterwards by an amendment to the Laws, twice, in the year. These courts had civil jurisdiction in all cases wherein five or more pounds were involved, with the right of appeal to the Court of Assizes in cases involving more than twenty pounds. All cases involving more than twenty pounds might, however, be originally tried at the Court of Assizes by the Governor's special warrant. The Courts of Sessions also had criminal jurisdiction in all except capital cases. They exercised the jurisdiction of orphans' courts, and besides performed many functions of an executive character. No appeal lay from their judgments in civil cases involving twenty pounds or less, except "where there is a dubiousness in the expression of the Law." In all cases the plaintiff was required to file his declaration eight days before the day of hearing, and to enter into a recognizance to pay the cost of a jury for one day. Where the defendant lived at a distance from the court, he was to be served with the heads of the plaintiff's declaration as well as the summons at the place of his abode. The defendant was required to file an answer. If the judgment was for the plaintiff, it was required to be endorsed on the declaration; if for the defendant, on the answer. No answer seems to have been required, however, by the courts on the Delaware.

All original process was required to set out the name in which the party sued, whether in his own name or as an executor or administrator, etc. The justices or the high sheriff issued all writs or warrants, except in the case of special warrants from the Governor. The eldest justice of the peace, in the absence of the Governor, Deputy Governor or some one of the Council, pronounced the decrees or sentences of the court:

Except in case of Natural Imperfections, or agreement amongst the Justices themselves, it be otherwise determined to any other Person of them, In neither of which Cases the Justices shall refuse to do His Office, or enter his desent to the prejudice of the Court.

The clerk of the sessions certified to the sheriff, before the sitting of the court, what and how many cases were entered for trial thereat, whereupon the sheriff issued warrants to the constables of the several towns of the jurisdiction for jurymen, "Proportionable to the causes with regard to the equality of the number from each Town and according to the warrant." The constable then notified as many of the overseers of the several towns as might be required to attend as jurymen. Talesmen might be selected by the court from persons attending the court or inhabitants of the town where the session was held.

No jury was to exceed the number of seven nor be under six, "unless in special causes upon life and death, the Justices shall thinke fitt to appoint twelve." All juries were required to be sworn truly to try between party and party, and to find all matters of fact, with the damages and costs, according to the evidence, the justices directing the jury in points of law,

And if there bee matter of apparent equity upon the forfeiture of an Obligation, breach of Covenant without damage or the like, the Bench shall determine such matters of equity.

In all Cases wherein the Law is obscure, so as the Jury cannot be Sattisfied therein, they have Liberty to present a special verdict (viz) If the law be so in such a point, We find for the plaintiffs but if the Law be otherwise, We find for the Defendant, In which case the determination doth properly belong to the Court, And all Juryes shall have liberty in matter of fact, if they cannot finds the maine Issue, yet to find and present in their verdict so much as they Can.

The following is a curious provision said to have been taken from the Massachusetts "Fundamentals":

Whensoever any Jury or Jurores are not Clear in their Judgements concerning any Case, they shall have liberty in open Court (but not otherwise) to advice with any particular man upon the Bench, *or any other whom they shall think fitt* to Resolve and direct them before they give in their Verdict.

Except in cases of life and death, a majority of the jury might bring in a verdict, the minority being concluded by the majority without allowance of any protest by any of them to the contrary. Challenges were allowed to jurors on the ground of relationship, and the court is to judge of other just exceptions against jurors besides kindred. Any one revealing the dissenting votes of a jury or arbitration forfeited ten shillings for the first offense, and for further offenses of this nature such greater fine as the court should impose. Jurymen were allowed three shillings six pence per diem.

In all civil cases there was a docket fee ranging from two shillings six pence in cases under five pounds, to twenty shillings in cases involving from twenty to forty pounds, and two shillings six pence for every ten pounds above forty pounds, such fees to be devoted to the defraying of court charges. All causes were to be tried in the order in which they were entered.

No one was to be put to death without the testimony of two or more witnesses, the confession of the party, or other equivalent circumstances. Every witness in a civil action might require from the party at whose suit he appeared two shillings per diem, whether he gave his evidence voluntarily or was served with a subpoena, but unless served with a subpoena it was at his option whether he should appear or not.

In all actions, whether civil or criminal, the party losing the suit was required to pay all costs. The justices composing the courts received certain fees for the issue of process. Originally they received no compensation for their services upon the bench, but by an amendment to the Laws they were each allowed twenty pounds per annum, payable out of the public rates, for their services.

The proceedings of the Court of Sessions were characterized by a certain amount of ceremony:

And whereas there is great Respect due, and by all persons ought to be given to Courts which so nearly represents his Majesties sacred Person, and that such order, gravity and decorum, which doth manifest the Authority of a Court may be maintained. These rules and formes following are to be observed for beginning Continuing and proceeding in the said Court.

The Stile of the Court to be entered thus:

At a Court of Sessions held at the day of by his Majesties Authority in the Seventeenth year of the Raigne of our Soveraigne Lord Charles the Second by the grace of God of Great Brittaine, France and Ireland King; Defender of the Faith, etc.: And in the year of our Lord God 1664 present.

Insert the name of the Governoure. Silence Commanded Then let the Cryer or under Sheriffe make proclamation and Say O yes O yes O yes.

Silence is Commanded in the Court whilest his Majesties Governor Counsel and Justices are Sitting upon pain of Imprisonment.

After Silence is Commanded Lett the Cryer make Proclamation Saying; All manner of Persons that have any thing to do at this Court, draw near and give Attendance; and if any one have any Plaint to Enter, or Suit to procecute, Lett them come forth and they shall be heard.

When Silence is thus commanded, and Proclamation made upon Calling the Dockett, the Cryer shall Call for the plaintiffe.

Calling for the Plaintiffe.

A. B. come forth and prosecute the Action against C. D. or else thou wilt be non Suited. And the Plaintiffe putting in his Declaration, the Cryer shall Call for the Defendant.

Calling for the Defendant.

C. D. come forth and save thee and thy Bayle, or else thou wilt forfeit thy Recognizance.

For proceeding in the said Court.

Warrants to be Issued by the Clerk.

Whosoever shall speak in Derogation of the Sentence or Judgment of any Court, shall be fined at the Discretion of the next Court of Sessions or Assizes.

The proceedings in a court of Oyer and Terminer will be found in the preceding chapter on "The Trial of the 'Long Finne.' "

The lowest court was the constable's, or town court. It consisted of the constable and overseers of the town, although its membership is inferentially rather than expressly set out in the laws. There were originally eight, afterwards four, "men of good fame and life," chosen as overseers for each town by a majority of the freeholders, one-half of them retiring at the end of each year. As above mentioned, jurors were summoned from the number of overseers of the several towns. The constable was annually chosen from the number of the retiring overseers by the freeholders, and was to be confirmed by the justices at the next session. The constable and overseers had power to make local ordinances in the several towns and, as stated, constituted the town court. This court had jurisdiction over actions of debt or trespass between neighbors under the value of five pounds. In all such actions the arbitration of two indifferent persons of the neighborhood, to be nominated by the constable, was to be tendered before the case was brought before the town court:

If either or both parties shall refuse (upon any pretense) to stand to Arbitration then The Court shall Determine the Case. If above the value then the next Justice of the Peace upon the complaint of the party shall propound Arbitration to both Parties, and if they accept thereof the Justice is to nominate the Arbitrators, But if either Party refuse, then the Justice is to give forth his warrant as the action requires.

In town courts the constables and overseers gave their judgment by a major vote, and in cases where the court was equally divided the constable had a casting vote. These courts were held at stated times, but special courts might be called at the cost of the party desiring the same. Matters of equity under five pounds might also be tried by the town court. Justices of the court of sessions might preside at these courts.

These courts were evidently a concession to the residents of the English settlements on Long Island, which had been accustomed to such tribunals under the laws of Connecticut. As we have seen, they were not established on the Delaware.

The provisions relative to marriages were not illiberal. The Laws provided that the names and surnames of parties contemplating marriage should be read in the parish church on three successive Sundays. Where there was no church or meeting place, a publication in writing was required to be posted on the constable's door and on the doors of any two overseers of the parish, fourteen days before the marriage, unless the parties produced a license from the Governor. The parties were to purge themselves by oath before the minister or justice of the peace celebrating the marriage, that they were not under the bonds of matrimony to any other person living. If they committed perjury, they were to be punished by being bored through the tongue with a red hot iron, and moreover proceeded against as provided in cases of adultery. If a party were proved innocent and ignorant of the other's fraud, the innocent person might re-

cover damages against the nocent and be set at liberty as if no such marriage had been made.

Any man harboring, concealing or detaining any married woman, contrary to the consent of the husband, was required to pay a penalty of five shillings for every hour that such married woman remained under his roof, after demand made by her husband at the dwelling-house where the wife was harbored; but a woman flying from the cruelty of her husband to the house of the constable or one of the overseers might be protected by them in the same manner directed for servants in such cases.

A party to a marriage was free to marry again, if the other party should be convicted of having falsified to the oath above mentioned; or if a sufficient certificate was brought from a foreign country, setting out that the other party was dead, with the time, place and manner, certified under the hand and seal of some creditable person and known magistrate; or if the other party, absent on a voyage to some foreign parts, which voyage might be perfected in one year's time or less, should not be heard of after the expiration of five years. If, however, such party should return after the expiration of said period, bringing evidence that he had endeavored to communicate with his or her husband or wife, or that he was prevented by imprisonment or slavery with heathen people from so communicating, the person so returning might challenge the marriage of the other party and obtain an order for their cohabitating as formerly, but if neither party should sue for such an order, they might by mutual agreement enter a release to each other and both remain free from their former obligations, the father of the children in each case to provide for them as the Court of Assizes might adjudge.

The following provisions relate to conveyances of land:

That henceforth no Sale or alienation of Houses and Lands within this Government, shall be holden good in Law except the same be done by Deed in writing under hand and Seal and delivered and possession given upon part in the name of the whole by the Seller or his Attorney so Authorized under hand and seal, Unless the said Deed be Acknowledged and Recorded according to law.

That all Deeds and Conveyances of Houses and Lands within this Government wherein an Estate of Inheritance is to pass, it shall be expressed in these words: or to the Like effect (viz) To have and to hold the said houses and Lands Respectively to the party or grantee, his heirs and Assigns forever, Or if it be an Estate Entailed, then to have and to hold, etc.: to the party or grantee and to the Heirs of his body Lawfully begotten between him and such an one his Wife; or to have and to hold to the Grantee for terme of Life, or for so many years, Provided that this Law shall not include former Deeds and Conveyances, but leave them in the same Condition as they were, or shall be in before this Law shall take effect; which shall be from the publication thereof Provided also That this Law shall not extend to Houses or Lands given by will or Testament or to any Land granted or to be granted by the Inhabitance of a Town.

That no Conveyance Deed or Promise, whatsoever shall be of Val-

lidity if it be obtained by illegal violence imprisonment threatenings or any kind of forcible Compultion called Dures.

All Covenants or fraudulent Alienations or Conveyances of Lands Tenements or any hereditaments shall be of no force or validity to defeat any man from his due Debt or Legacies or from any just Tithe Claime or possession of that which is so fraudulently Conveyed.

That after the time aforesaid No Morgage Bargain Sale or Grant made of any Houses, Lands Rents or other Hereditaments where the Granter remains in Possession shall be of force against other Persons Except the Granter and his heirs unless the Same be acknowledge before some Justice of the peace or Superior Officer in the Government and Recorded as is hereafter expressed. And that no Such Bargain Sale or Grant already made in any way of morgage where the Granter remains in possession shall be in force against others; but the granter or his Heirs except the same shall be entred as is here expressed (that is to say) within one month after the date before mentioned if the party be within this Gouverment or else where within three Months after he shall returne, And if any such Granter shall refuse being required by the Grantee his Heirs or Assigns to make an acknowledgement of any grant, Sale, Bargain or Mortgage, by him made shall refuse so to do, It shall be in the power of any Justice of peace, to send for the party so refusing, and Commit him to prison without Bail or Mainprize, unless he shall Acknowledge the same, and the Grantee is to enter his Caution with the Clerk of the Court of Sessions and this shall save his Interest in the mean time, And if it be doubtful whether it be the Deed or Grant of the party he shall be bound with Sureties, to the next Court of Sessions, and the Cautient shall remain good as aforesaid.

And for the Recording of all such Grants, Sales, and Mortgages That every Clerk of every Court of Sessions shall enter all such Grants, Bargains, Sales, and Mortgages of Houses Lands, Rents and Heriditaments as aforesaid together with the estates of the Granter and Grantee; things and Estates granted, together with the Date thereof.[8]

Upon the death of any person, the constable with two overseers repaired to the house of the deceased to inquire after the manner of his death and for his will. If no will was found, it was assumed that the person died intestate, and thereupon the officers in the presence of the family made an inquiry as to the amount of the estate, and the constable was required within forty-eight hours to deliver a statement under oath of the amount of the same to the next justice of the peace, who was required to send out warrants for the taking of security against any disposal of the estate until the next quarter sessions.

The estates of persons dying intestate, leaving neither a wife, children, brothers or sisters, or the children of brothers or sisters, uncles or aunts, or their children, escheated to the King, but any such relation might make proof of his relationship within one year and six weeks. From this it would appear that in cases of intestacy and lack of other kindred the parents of the deceased took nothing.

No administration was granted until the third session after the death

[8] *Ibid*, pp. 23-24.

of the party, except to the widow or a child, in which case it was immediately granted on the filing of security. Where the widow or a child administered, the estate was appraised by four men appointed by the court under oath, and the appraisement was required to be presented at the next Court of Sessions. Where the deceased died without widow or child, the estate was sold by order of the court at public outcry, the purchasers giving security for the amount of their purchase, which was assigned by the court to the several creditors of the deceased, and the surplus was delivered to the next kinsman of the deceased, if he appeared within one year and six weeks. If he did not so appear, then the court gave an account of the surplus to the Governor.

Where the widow or a child administered, the surplus, after the payment of debts and funeral charges, was divided between the widow and children, one-third of the personal estate to the widow, and the other two-thirds amongst the children, the eldest son having a double portion. Where there were no sons, the daughters inherited as coparceners. If any child happened to die before coming of age, his portion was divided amongst the surviving children.

All persons having any chattels or lands in their possession belonging to orphans under age, were required to file an inventory of such estate, within three months after publication of the Laws, to the Court of Sessions, and a like inventory yearly. In case of a failure to do so, the matter was referred to the next Court of Assizes, where the offender was to be fined for neglect. If no improvements were made upon the estate, it might nevertheless be left in the hands of the person holding it on his giving better security; otherwise the court appointed another person to hold the same.

Elaborate provisions were made in these laws relative to military affairs, masters and servants, Indians, inn-keepers and ordinaries, the church, and so forth, but the foregoing is a sufficient resumé of so much as relates to the subject of this work.

CHAPTER VI.

THE COURTS AT NEW CASTLE AND UPLAND.

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The Courts at New Castle and Upland.

The records of the courts at New Castle and Upland have been preserved and published, those of the former court covering the period between October 10, 1676, and December 12, 1681, and those of the latter a shorter period. These records furnish a complete account of the proceedings of these courts during the periods covered by them, respectively. They are of sufficient interest to warrant the devotion of some space to a consideration thereof.

It must be remembered that these tribunals were much more than courts of justice. They exercised not only judicial functions, but legislative and executive functions as well. Their activities covered the whole field of government, and extended, further, to the supervision of all ecclesiastical matters. They granted lands, levied and expended taxes, ordered the construction and repair of roads, provided for the care of the poor and insane, paid bounties for the destruction of noxious animals, ordered the construction of "wolfe-pittes," took acknowledgments of transfers of real estate, regulated the maintenance of fences and the sale of the time of servants, registered the ear-marks of cattle and "hoghs," treated with the Indians, extradited criminals, provided for the public defense, and in short, performed every governmental function, subject, of course, to the orders of the Governor and Council at New York.

In their judicial capacity these courts exercised both criminal and civil jurisdictions. Their criminal jurisdiction was very much the same as that of our Courts of Quarter Sessions, with an appeal to the Court of Assizes in New York in cases of the more serious crimes. No right of appeal lay from judgments in civil suits where twenty pounds or less was involved. In cases involving larger amounts an appeal lay to the said Court of Assizes. Parties could demand a trial by a jury of not more than seven nor less than six jurors, but as a rule twelve jurors were impanelled. Except in capital cases, a majority of the jury could render a verdict, with no right in the minority to protest therefrom.

As provided in the foregoing ordinance of Governor Andross and in the Duke's Laws, all writs, warrants and proceedings at law were in the name of the King of England. A declaration was required to be filed at least one day before the court convened, which would not seem to have been altogether informal, because we find in one case the entry: "This action being wrongly stated, the Court ordered a non-suit against the plaintiff." Technical terms are frequently used in the captions of cases, such as "In an action on the case," "In an action of trover and conver-

sion," etc., but they are often improperly used, so-called actions on the case being brought to enforce contracts, recover lands and cattle, and for other purposes not involving any element of trespass. It is to be noted, however, that actions on the case at one time included actions in assumpsit, and in such cases the term may have been properly used.

There seems to have been no clearly drawn distinction between civil and criminal cases. In criminal cases the prosecuting witness usually appears as the plaintiff, though in the more serious cases the high sheriff prosecutes in the name of the King, sometimes in the name of the Duke. Once in a while a civil action results in the imposition of a fine on the defendant. A civil action brought for trover and conversion of a horse developed as a plain case of horse stealing, and the plaintiff recovered the animal while a heavy fine was imposed upon the defendant.

Although the Governor and Council at New York issued an order on May 19, 1677, that "pleading attorneys bee no longer allowed to practice in the government but for the depending causes," this order must have been subsequently rescinded or altogether disregarded, as we find attorneys appearing all through the records of these courts.

An order of the Upland Court provided that "no person be admitted to plead for any other person as an attorney in court without he first have his admittance of the court or have a warrant of attorney for his so doing from his client."

An order of the Court of New Castle made June 8, 1667, provides: "The cryer of the court is to have for every attorney that shall be admitted and sworn in court twelve gilders or half a beaver."

In 1667 the New Castle Court administered the following oath to an attorney upon his admission to practice:

Upon the Peticon of John Mathews desiering to bee admitted as an attorney in this Court, etc: The Court did admit the Peticonr as an attorney and was sworne accordingly: You doe sware by the Everliving God That you will according to Lawe truely plead & manadge all Cases wherein you shall bee imployed by yor Clyant that you will not exact in yor fees above what shall be allowed by the Governor & Court. That you will not in one and the same action take fees both of the Plt and deft That you will not take any apparent unjust Case in hand, but in all Respects behave yor selve as all attorneys are obliged to by the Lawes of this governmt.

It appears that the sheriff, constables and clerks of court sometimes acted as attorneys. The Duke's Laws provided as follows in this regard:

That no high Sheriffe, under Sheriffe high Constable petty Constable or Clarke of the Court shall be permitted to plead as an Attorney in any Persons behalfe in the Court where he Officiates, provided always that if any poore person not able to plead his own Case shall request the Court to Assign him the High Sheriffe under Sheriffe high Constable petty Constable or Clark to plead for him it shall be Lawful for the Court to grant it; And for the person to plead accordingly, But the person so pleading the poor mans Case, is not to give Judgment provided also that

any high Sheriffe under Sheriffe high Constable petty Constable or Clark Acting as general Attorneys for any person, absent out of the Country, and Negotiating their Affaires, and so Lyable to be sued for their Employers such Persons shall have liberty also to plead and prosecute in any Cause that shall any way Concerne their said Employers.[1]

In the case of Carolus *vs.* Pietersen, decided by the Court at New Castle on April 4, 1677, it appears from the record that:

The defendant being an illiterate person did humbly desire that Captain Cantwell (the High Sheriff) speak for him, *there being no other attorney but what the plaintiff employs,* which the court grants.

It seems that the high sheriff, like his predecessors the schouts, performed not only the duties of a sheriff, but also those of a prosecutor. He drew up the so-called indictments, which were in fact informations, there being no provision for grand juries in the Duke's Laws. The following is an amusing example of such an information taken from the Records of the Court at New Castle:

Edmund Cantwell High Sheriffe in the behalfe of our Soueraigne Lord the Kingh. Indytes Justa Andries and Aeltie his wyfe for that they the said Justa and Aeltie, not haueing the feare of God before their eyes and forgetting all Civility and the Respect due unto the Court and Justices, who so nearly Represent the person of our soueraigne Lord the King, haue on the 28th of June Laest past in a most slanderous absurd threathning and menacing manner by their ill dirty Language slaundered this Court and their officers, saying God dam the Court they bee all Cheating Rogues. Should I bee tryed by such Rogues as John Moll and a theef and hogh stealer as Gerret otto they haue Given away a Cowe from mee I am sure to Loose all as Comes to the Court. I will beat and make them fly all to the Devill Iff I come to the Court in Earnest, saying further that hee would an other bout for the Cowe and hee would arrest Robberd Morton againe to ye Court and that then hee would see whether they meaning the Court had the hart to give away the Cowe with a great many more dirty scandalous words and Expressions against the Court and their officers, and on the same day Aeltie the wyfe of the said Justa Andries fell Lykewyse a Raling Cursing and swearing against the Court and their officers in these and the like words—God dam that Moll they are all a Lyke Cheating Rogues, God dam the Sherrifes & Clarkes, etc.: All which above said words were used & spoken to the undersherrife of this Towne of New Castle which so amazed the said under-sherrife that he departed with fear not haueing Executed his office moreouer they the said Justa and Aeltie his wyfe pursuing & following the evill Intent and Imagination of their harts on the first day of July Laest past att which tyme the Constable of this Towne came att their house in Christina with a warrant of Justice Alrichs in Search of the boy servant to Emilius de Ring, the son in Lawe to the said Justa hath in the presence of Justice John Moll who hepned to bee thereatt that same tyme with force and armes & foull menacing words & expressions opposed Rebuked hindered & as-

[1]Duke of York's Laws, p. 11.

saulted the said Constable Refusing to obey the said warrant, and Justice John Moll then fairly Intreating the said Justa to obey authority, using many Civill arguments to Induce him thereunto, all which not auaiing with him the said Justa Andries, The said Justice Moll was forced to Command the standerss by in his Mayties name to be aiding & assisting to the Constable in the doing of his duty att which hee the said Justa Andries Grew so Inraged that he tooks up a Cleft stike of wood and stepping with itt up to the said Mr. Moll lifted itt up threathning therewith to strike him the said Justice Moll and a small tyme after, Justice Moll and the Constable departing with feare and being come on this syde of Christina Creeke going humwards, hee the said Justa Andries and aeltie his wyfe still following the Evill Intent of their harts amongst other his foull slaunderous words and menacing speeches to Justice Moll and the Constable, spake and acted as followeth Are you a Justice of the Peace you are a devill and not worthy to sitt upon the bench you haue sworne to Ruine mee & myne and Mr. Moll keeping his pace being on horsbake going humwards Justa Andries said in a fury now will I: haue & take your hors from you, and with that Run so furiously to ketch the said horse which forced both him and the said Justice Moll and the Constable to fly for their safety in which said actions aeltie the wyfe of the said Justa was alsoe acting yeelding and with foull words part taking with her husband all which premises are directly Contrary to the Lawes and statutes of England as well as of this Government, and are alsoe of a bad Consequence and an Extreame ill president to others, Insomuch that itt is a derision of the Kings Mayties authority and noe well Settled Government can bee Established and maintayned where such notorious offences are past by and the offenders thereof not severly punnisht and an Example made to others; of which Contempt of Authority Slaunder assault & breach of the Peace are you both guilty or noe: To wich above said Indytment Justa Andries and aeltie his wyfe pleaded not guilty but after the hereafter menconed wittnesses were all sworne and examined in Court: They the said Justa & Aeltie said that they would not stand out upon their vindication, but humbly threw themselves upon the mercy of the Court which being taken into Consideration:

The Court (haueing Regard to their submission Doe order an Sentence as followeth That they the said Justa Andries and Aeltie his wyfe, doe both upon their knees in Court aske forgiveness for their said offences and that Justa Andries bee of the good behauior (and give security for the same during the Courts pleasure, and Laestly that they pay a fyne of six hundred Gilders and give security for the payment thereof together with the Costs.[2]

These courts had a very summary and sensible method of disposing of suits for slander and defamation, many of which appear on the records. In the case of Cram *vs.* Pietersen, in the Upland Court: "The defendant not being able to prove what hee hath said or any part thereof the court ordered that *ye defendant openly shall declare himselfe a lyar;* and that hee shall further declare ye plaintiff to bee an honest man and pay twenty gilders to ye plaintiff for his losse of tyme, together with costs of suite."

[2]Records of the Court of New Castle, pp. 226-228.

In another case, in the Court of New Castle: "The deft not makeing good his words, The Cort ordered the deft to aske forgiveness upon his knees from ye Plt for his slaunder wch was in Cort openly by the deft prformed, and ye deft to pay Costs."

Justice Coch, of the Court of Upland, appears as plaintiff in "an action of slaunder & defamat" against one Staecket, complaining that the defendant called him a "hogh theef," and "desires that the deft (if hee or any others can: will proove ye same, or otherways that hee be punisht according to Lawe." The defendant was found guilty, and ordered to declare publicly in open court that "he has wrongly, falsly and maliciously slaundered and blamed the plt," and pay a fine of one thousand guilders, with costs. Upon the intercession of the plaintiff the fine was remitted.

The following letter from the Governor to the Court at New Castle, taken from the records of that court, is interesting as showing that benefit of clergy was allowed at that time:

New Yorke May 19th 1679

Gentlemen

The Governor hath Received yours of the 23rd April past touching Robberd hutchinsons thievish miscarriage in breaking open & taking out of Adam Wales his Chest Left by him att ye said hutchinsons house some monny Plate and seurall goods the perticulars whereof are therein incerted, whereupon haueing secured his person & what things could bee found upon search made in his house, you desire orders & directions how to proceed in ye matter; By his Excellencies Commands in answer thereunto, I: am to acquaint you that the matter of fact committed by the said Robberd hutchinson would not Reach his Lyfe by the strictest Law (according to our comprehension here) if itt were in England, and the Dukes Lawes are mutch more favorable, where if you will turne to the Capitall Lawes, you may be further sattisfyed, Besydes the Chest (with what was therein) being Left at his house by the Party Itts but a breatch of Trust thoug the thing is agrauated by his haueing broaken open or picking the Lock of ye Chest, & takeing out those things to Convert them to his owne use may bee Lookt on as Larceny or thievery & hee Acted as a great knaue & Cheate, but whether itt will reach to the Criminall part so farr as to burne him in ye hand which is Commonly inflicted on a person that deserves death yet haueing the benefit of the Clergy saues his Lyfe by reading though hee forfeits all his goods and Chattles and Liberty for a yeare, its a question, however, (the Proofe being so Cleare) I: suppose hee may at least deserve Corporall punnishment, or a Considerable fyne and such further Penalty by Banishment or the like, the which his Excellency doth wholly leaue to your Court to adjudge and determine before whome hee is to haue his tryall and whatsoever your sentence shall bee you are to put the same in Execution.[3]

The sentence of the Court was:

That hee ye said Robberd hutchinson for Example to others bee brought to the forte gate within this Towne of New Castle, and there publicqly whipt therety & nine stroakes or Lashes, that hee pay and make

[3]Records of the Court of New Castle, p. 323.

good unto Adam Wallis the Remainder of ye goods stoalen out of ye Chest and not yett found, together with all the Charges and fees of this action and doe further for Ever Banish ye said Robberd hutchinson out of this River of delowar & partes adjacent hee to depart within Three dayes now next Ensuing with Leaue to Chuse and appoint any person as his attorney to Receive & pay his debts: God Saue the King.[4]

On July 12, 1676, the Court at New Castle authorized Justice Moll, Sheriff Cantwell and Clerk Herman to represent the Court at New York, as well in defence of the court's orders and sentences as to humbly request privileges and the removal of grievances.

Court fees were fixed at New Castle by the following order:

The Court do grant to the High Sheriffe for the Regulation of his fees untill further order, so much as Sheriffes at New Yorke usually have allowed them, of wich a coppy is hereunder annexed vizt:

Arrest (Serving a warrant.....£0:18:) In all
(takeing security ..... 0:2:6:)
(Returneing ye Warrant ..... 0:0:10:) 0:5:0

Jury (Impauneling a Jury £0:2:6
(Every Verdict and Judgemt, each..... 0:1:0

Execution Every Execution £0:5:0 besydes allowance in the Law wch is 12d in ye

Prsoners (Every dayes Imprizonmt 12d pr day for dyet.
(Imprizoning fees 18d.

for every summons before a Magistrate £0:2:6:

By an order of Governor Andross made on October 4, 1680, other fees at New Castle and Upland were fixed as follows:

To the Petty Constable One Shilling High Constable Six Pence and the Sherr: Six Pence in all Two Shillings Per Pound according to the Directions in the Law which he is to have accordingly and no more Notwithstanding any grater Latitude formerly given upon information contrary to Law. (5 Pa. Archives 723-4).

These courts were supposed to exercise a jurisdiction in equity, though it is evident that by equity was meant the doing of substantial justice between the parties without regard to forms of law, and not at all what is technically known as equity. This sufficiently appears from the following taken from the Court of New Castle Record:

William Tom Plt
Henry Johnson Deft
11 decd 1676 Execution
issued out signed by
Mr. moll

The Case being Referred by his Honor the Governor to this Court to bee heard and determined in Equity and the Co't thereuppon having examined the evidences & heard the debates of both prtees, do determine &

[4] *Ibid*, p. 328.

order, The deft to pay for killing the Plts horses, the sume of six hundred gilders: and if the deft can make appeare that his owne fences att that tyme were sufficient, hee may have his Remedy by course of Law against the Plt for his Pretended damages, and the deft to pay Costs.[5]

A letter from the Governor to this court states: "As to penal bonds or such like cases of equity it is the custom and practice of the courts here to hear and judge thereof according to equity which you may also observe as allowed by law."

On June 4, 1676, Governor Andross grants an injunction, upon a petition in equity presented to him, to stay execution on a judgment obtained at law, on the Court of New Castle by William Tom against Hendrick Jansen, on Jansen's giving security to make good his complaint, all proceedings, writings and proofs to be transmitted to New York for a final determination in equity.

On February 8, 1676-77, the Court at New Castle petitioned Governor Andross:

That yor Honor will bee pleased soe far to Impower the Commander Capt John Colier or the Court that wills may bee proved before them and Letters of administracon granted accordingly wth ye fees for the estates of the most part of the People in these parts, are so Inconciderable, that otherwyse the Charges & Expenses of going to yor honor att New Yorke for to obtaine the same may Proove mutch to the hinderance of such Estates.[6]

And on April 6, 1677, the Governor authorizes the courts on the Delaware: "To take proofs and security and grant administration of wills, but if above twenty pounds to remit the same here secretary's office to be recorded."[7]

The more one examines these records the more he is impressed with the good sense of the justices and the simple dignity which characterized their proceedings. They were doubtless illiterate men, but their clerks and the high sheriff would seem to have been persons of some learning. The causes of action and matters of defense are, as a rule, concisely and accurately stated in good English. The following is an example:

Capt. Thom: De Lauall Plt
Mr. William Tom Deft.

Jury (Names of Jurors)

The Plt demands of ye deft ye sume of foure thousand one hundred & twenty gilders due to this Plt by a bill under the hand & seale of the deft bearing date 27th of April 1672: payable in good and merchandable winter wheat at 5 gilders or in peltery after ye first of december then following together wth ye Costs, Interest & damages. The deft disowning the bill Mr. Walter Wharton one of the wittnesses to the Same was Sworne & declared

[5] *Ibid*, p. 43.
[6] Records of the Court of New Castle, p. 66.
[7] Hazard's "Annals of Penna.," p. 424.

that he to the best of his knowledge was prsent and did see the sd bill signed sealed & delivered. The Court haveing heard the debates of both partees did Refer the Case to a Jury whoe brought in their Verdict & find for the Plt according to the Contents of this defts obligation and that the deft for non payment According to the Contents of his bond shall pay fyve pr Cento pr annum and the deft to pay Costs of suite. The Court ordered Judgment according to ye verdict.

June 16th, 1677, Execution Issued out agst the boddy of the deft.[8]

Occasionally, however, we strike entries like the following, which prompt a smile:

Jury Names of jurors.)

John Johnson being Indyted by the High Sherrife in the behalfe of our Soveraigne Lord the King . . .

The said John Johnson pleading not Guilty The examination thereupon was Read and Severall witnesses sworne.

The Court did give the said Charge to the Jury, whoe brought in their verdict viz *That the prizoner is Guilty of the fact . . . wee find not: but by the Evidence & whole Circumstances wee find his Intent to bee very evill.*

The Court Conciedering uppon the whole matter & Circumstances and weighing the Prisoners former ill behavior; Did order that the said John Johnson bee whipt twenty and one strokes or Lashes; and afterward bee bound & give security for his good behaviour. Paying the Charges of his Imprizonment etc.

This Judgement Executed the
7th of June att New Castle.

In the Upland Court:
Neeles Baersen Pltf
John Test Def

The Pltf Complains that this deft *hath been Troublesome to his son about a Knyf, desiers to know the Reason of the same.*

The Court haueing heard the debates of both partees; and finding the buisnesse and difference of noe vallue, did order the partees to be friends and forgive one the other; to wch the partees agreed Neeles Ingaging to pay the Clercq and sherifs fees.[9]

In two other cases:

Aert Johnson is to make good the olde stocke of six cowes or the vallue thereof, to be vallued by indifferent persons as *also the half of a cowe which is dead.*

Agnieta Hendriks being heretofore presented for haueing had three Bastard Children *one after another,* The Court doe therefore thinks fitt to order & sentence that shee the said Agnieta hendriks bee publicqly whipt twenty seven Lashes & pay all Costs, which above said sentence was accordingly Executed ye 3rd of Aprill 1679 att ye forte gate In New Castle.

[8] *Ibid,* p. 88.
[9] Records of Upland Court, pp. 69-70.

One cannot help wondering what the sentence would have been had the three children been born simultaneously instead of "one after another."

A case at New Castle is captioned "An attachmt laid by ye Plt *upon the one third of a mare* belonging to ye deft for debt 62½ gild."

The order in which debts should be paid is set out in a letter from the Council in New York to the Court, as follows: "The Council thinke itt reasonable that the said Estate belonging to Mr. Tom bee sold for ye payment of his debts, but are not willing to alter the Course of the Law, which gives directions how debts should be paid, That is statutes & Judgements first, then bonds & speciallys, after that booke debts and other claymes."

Deeds and sometimes wills were acknowledged in open court, and at Upland the conveyances were frequently spread upon the minutes of the court. At New Castle the acknowledgment is recorded and reference made to the recording of the deed in a separate Book of Conveyances.

Captain Thom. DeIauall asked the Court of New Castle for execution against the goods of William Tom, deceased, upon a judgment given by said court. It appeared that DeLauall had taken out execution on said judgment against the body of Tom, who died while in custody. The court is of opinion that since they have already signed one execution against the body of Tom, it is improper for them to grant any other execution, and refer the matter to the Governor and Council at New York. The Council write the court that they:

Think itt verry unreasonable to Exclude Captn Delauall from his Judgemt because Mr. Tom did itt in his will, unlesse Errors can bee prooved in itt, or that itt was illegally obtayned. The strict nicety of his Boddy being taken in Execution being not thought sufficient to debarre the Creditor of his Just due debt where effects can bee found to make sattisfaction neither hath itt ben ever practized in these parts, though in England itt may, where Restraint of prisoners is much more strict and of another manner then Mr. Tom's ever was who in a manner had as much Liberty after as before the Execution Laid on him.

The following relative to a deodand is of interest. It does not appear why the horse was not forfeited to the Crown instead of being killed.

Att a Councill held in New Yorke the 24th day of sept 1680
Prsent
The governor & Councell.

Whereas ye daughter in Lawe of Ambros Baker of delowar was Lately killed by a horse, wch is by Lawe forfeited & Excheated to his Maytie & taken into Custodie by ye Sherrife as apears by the Peticon of ye sd Ambros, but noe accompt or further proceedings thereon given by ye Sherrife. Ordered that ye sd hors bee forthwith killed and ye sherrife to haue noe fees in this matter for his neglect therein.

By ordr in Councell (was signed)
John West Clr. Com. E. Andross.[10]

Governor Pennypacker in his "Pennsylvania Colonial Cases," cites at page 70 another case involving a deodand, which, he states, is the only in-

[10]Records of Court of New Castle, p. 320.

stance of the application in Pennsylvania of the principle of deodands of which he is aware.

In 1680 the Upland Court, which had theretofore been held at Upland Creek, was transferred to the "town of Kinsesse on the Schuylkill for the greater ease of the people."[11]

In his instructions to James Logan given by Penn on sailing for England in 1701, Logan is desired to "look carefully after all fines, forfeitures, escheats, *deodands,*" etc.[12]

The administration of these little courts was not always free from scandal. Walter Wharton, one of the justices of the court at New Castle, afterwards surveyor on the Delaware, was presented by the minister, reader and the church warden: "for marrying himselfe or being married directly Contrary to the Knowne Lawes of England and alsoe Contrary to ye Lawes & Customes of this place & Province." He was also fined in the sum of ten pounds, with costs, for not attending at court for five months to attend to the business thereof, during which time he was out of the precincts of the river and bay. No action appears to have been taken in the matter of his performing his own marriage ceremony, and he appears to have died shortly afterwards.[13]

At a session of the New Castle Court held on the 1st and 2d days of March, 1680-81: "Abram Man of his owne accord in open Court declared & Impeached Justice John Moll saying that hee ye sd John Moll was nott fitt to sitt as a Judge in Court and tendered to proove what hee sayed, wch Justice John Moll desiered to bee recorded and thereupon withdrew himselfe from ye bench." Abram Man was a former Justice of the Court of New Castle.

This matter appears to have been referred to the Court of Assizes at New York as appears from the following entry:

Att a Generall Court of Assizes holden in the Citty of New Yorke by his mayties Authority the 5th & 6th Dayes of october in the 33th year of the Reigne of or Souerigne Lord Charles the second by the Grace of God of England Scotland ffrance and Ireland King Defender of the ffaith etc: and in the yeare of our Lord 1681.

Mr. John Moll Justice of the Peace and prsident of the Court att New Castle Being Called to answer to an Indictment Exhibited against him by one Abraham Man for seuerall words and Expressions by him said to be uttered and spoken in Court and att other tymes, To which the said John Moll pleaded not guilty and a Jury being Impannelled and Sworne with seuerall Euidences they Brought in their verdict and found him Guilty of speaking the words menconed in the first and Second Articles and of Denying Execution when demanded menconed in the fourth article and for the Rest not Guilty the which the Court takeing into Consideracon Doe adjudge the said Indictmt to bee Illegal and vexatious and that the said John Moll by what found against him is not Guilty of any Cryme or Breach of any Knowne Law therefore Doe acquett the said John Moll

[11]Records of the Court of New Castle, p. 437.
[12]Hazard's "Annals of Pa.," p. 473.
[13]Penn and Logan Correspondence, vol. 1, p. 59.

from the same and order the said Abraham Mann to pay the Costs of Court, the said Mann moued for an appeale for England which is granted he giueing sufficient security to the value of 1000 lb to prosecute the same and pay Damage to the party If Cast.

By order of the Generall Cort of Azzyses

(was signed)

JOHN WEST Clr.

After this order, Man transmitted the following paper to the New Castle Court:

This is to sattisfy all whome this may Concerne that John Moll of ye Towne of New Castle was by a Jury att New Yorke att the Court of Azzyses found Gilty, of the Indyctment prosecuted by Abram Man in ye behalfe of or soueraigne Lord King Charles wich may bee prooved by the hands of the Jury yett after the verdict past against ye said Moll, part of Justices of the Court did say they would Cleare ye sd Moll and that I: should take care to pay ye Charge theirfor for that unlawfull proceedings and actings I: did apeale from their Lawlesse Judgment to King and Councill, then after there was an appeale granted, they tould me that I: should putt in a thousand pound Sterling security to prosecute wch security I: did tender provyded they could shew mee Lawe I was bound to doe itt, they could shew mee noe Lawe but the bearre order of part of ye Justices of Court, soe that the said Moll is not Cleared by Lawe as yett. Therefore I: am now bound for England wth gods Leaue to prosecute ye sd Indictment against Moll, I: shall bee going by the first shipping therefore this is to desire all people that hath any accompts to make up that they would send them as soon as they can and ye Latter end of this next month they shall haue their Just due Requiering all that oweth to him they may doe the same as wittniss my hand this 31th of october 1681.

(was signed)

ABRAHAM MAN.

For so doing, he was brought before the Court at New Castle on December 12, 1681, to be examined "upon his Abusive & slanderous paper," and after a hearing it was ordered that "ye sd Ab Man should Give,"—and here the Records of the Court of New Castle end, so that it will probably never be known what punishment was meted out to the contumacious Man. Despite these petty scandals, we conclude the reading of these records with a feeling of sincere respect for these early administrators of justice.

It appears that the Upland Court records were mutilated by the cutting out of two leaves before they were discovered and printed. From what follows the hiatus, it is apparent that the missing pages contained the record of a trial whereat some person or persons were sentenced to be punished by *whipping,* the only known instance where that punishment was inflicted by that court.[14]. This destruction of the record, either by the criminal himself or a descendant, is calculated, in the uncertainty as to his identity, to cast a dark suspicion upon the family histories of all descendants of early residents of Upland.

[14]Smith's "Hist. of Del. Co.," p. 127.

CHAPTER VII.

MANORIAL COURTS.

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Manorial Courts.

This chapter might be as brief as the celebrated Chapter on Snakes in Ireland, inasmuch as no manorial courts were ever established in Pennsylvania, but, as such tribunals were contemplated, an account of the proposed courts may be of interest.

Several attempts were made in the early history of this country to engraft various features of feudal tenures upon our provincial institutions. On June 7, 1629, the West India Company granted concessions to members of the company to plant colonies within a certain time upon territories not to exceed sixteen English miles upon one side of a navigable river, or eight miles on each side thereof. Such members were to be known as Patroons of New Netherland.

Invested as well by the Roman law, as by the charter, with the chief command and lower jurisdiction, the Patroon became empowered to administer civil and criminal justice, in person, or by deputy, within his colonie; to appoint local officers and magistrates; to erect courts, and to take cognizance of all crimes committed within his limits; to keep a gallows, if such were required, for the execution of malefactors, subject, however, to the restriction that if such gallows happened, by any accident, to fall, pending an execution, a new one could not be erected, unless for the purpose of hanging another criminal. The right to inflict punishments of minor severity was necessarily included in that which authorized capital convictions, and accordingly we find various instances, throughout the record of the local court, of persons who had, by breaking the law, rendered themselves dangerous to society, or obnoxious to the authorities, having been banished from the colonie, or condemned to corporal chastisement, fine, or imprisonment, according to the grade of their offences.

In civil cases, all disputes between man and man; whether relating to contracts, titles, possessions, or boundaries, injuries to property, person, or character; claims for rents, and all other demands between the Patroon and his tenants, were also investigated and decided by these courts; from the judgment of which, in matters affecting life and limb, and in suits where the sum in litigation exceeded twenty dollars, appeals lay to the Director-general and council at Fort Amsterdam. But the local authorities, it must be added, were so jealous of this privilege that they obliged the colonists, on settling within their jurisdiction, to promise not to appeal from any sentence of the local tribunal.[1]

One such colony or patroonship known as Zwanendal, or Valley of Swans, was established on the west side of the Delaware river, at its

[1] O'Callaghan's "History of New Netherlands," vol. 1, p. 320.

mouth, but the colonists thereat were killed by the Indians shortly after their landing, and the colony was abandoned, although the West India Company purchased the rights of the proprietors in 1635, after which it was not again established as a patroonship, nor was any other patroonship established on the Delaware. The best known of these patroonships was that of Rensselaerswyck, located in the vicinity of the present city of Albany, the jurisdiction of which, as it conflicted with the jurisdiction of the province, occasioned numerous difficulties.

It is generally known that the constitution prepared by Locke for the Colony of North Carolina provided elaborately for a system almost wholly feudal in its character.

Another instance of the authorization of a feudal jurisdiction in Pennsylvania was afforded by the charter issued by Queen Christina of Sweden to certain emigrants from Holland in 1640. By said charter these emigrants were authorized to establish a colony on the north side of the South river, at least four or five German miles below Fort Christina. Among the powers conferred are:

> The right of exercising in their district high and low justice, of founding the cities, villages and communities with a certain police, statutes and ordinances, to appoint magistrates and officers, to take the title and arms of their colony or province, "it being understood that they and their descendants shall receive of us and our successors that jurisdiction and these royal rights as an heriditary fief, and that they must conform themselves in this case, to all which concerns the ordinary justice of fiefs."[2]

The statutes and ordinances which they intended to establish were to be communicated to the governor for his approbation and confirmation. This colony appears to have been intended to be independent of the other Swedish colony on the Delaware. It is not known that this *imperium in imperio* was ever established, or, if established, exactly where.[3]

Among other powers conferred upon Penn by his charter was the right to erect manors and hold courts-baron, courts-leet and views of frankpledge in connection therewith.

> And by these presents Wee give and grant license unto the said William Penn and his heirs . . . to erect any parcells of land within the province aforesaid, into Mannors, by and with the license to be first had and obtained for that purpose under the hand and seale of the said William Penn, or his heirs, and in every of the said Mannors, to have and to hold a court-baron, with all thinges whatsoever, which to a court-baron do belong; and to have and to hold view of frankpledge, for the conservation of the peace and the better government of those partes by themselves or their stewards, or by the lords for the time being of other Mannors to be deputed when they shall be erected, and in the same to use all things belonging to view of frankpledge; And Wee doe further grant license and authoritie that every such person and persons, who shall erect any such Manor or Mannors as aforesaid, shall or may grant all or any parte of

[2] Hazard's "Annals of Pennsylvania," p. 51.
[3] "Introduction to Records of Upland Court," p. 16.

his said Lands to any person or persons, in ffee simple or any other estate of inheritance, to be held of the said Mannors respectively.

Under the authority thus conferred, Penn, on April 3, 1682, in the charter to the Free Society of Traders in Pennsylvania, constituted the Manor of Frank. After reciting that the proprietor had conveyed twenty thousand acres of land in Pennsylvania to certain parties in trust for the said society when incorporated, he constitutes the said lands a manor by the name of the Manor of Frank, with the following privileges, among others:

And I do also, according to the said powers given by the said letters-patent, grant unto the Free Society of Traders in Pennsylvania, and their successors that they, by themselves, or by the justices and keeps of the peace hereinafter mentioned, may from henceforth hold two sessions and jail deliveries yearly, at such times as they shall think best, who may hear and determine all pleas and controversies, as well civil as criminal, which shall arise within the said Manor of Frank, and corporation aforesaid, wherein no other justices or other officers of the said province shall intermeddle, and that they, by themselves, or by their stewards may forever hold a Court-Baron within the said Manor, and may do and execute all such matters and things as are belonging and incident unto, are used and accustomed to be done in a Court-Baron. I do likewise grant unto the Free Society of Traders, and their successors, that they, by themselves, or by their stewards, may forever hold a court-leet and view of frank-pledge, for all the inhabitants and residents in and upon the said Manor of Frank.

The inhabitants of the manor are not to be impleaded without the manor for any plea arising within it.

And I do further grant them, according to that authority given me, acquittal of murder within the said manor; and that none of the said Free Society or of their successors or of the said manor, *be compelled to wage battle,* and that they may discharge themselves of the pleas belonging to the province according to what laws and customs shall be justly established in the said Free Society.

The officers and agents of the society are constituted justices and "keeps of the peace," and the said justices or any three of them, of which the president or deputy president, and the treasurer of the society shall be two, shall

Inquire of all manner of felonies, trespasses, forestallers and of all and singular other misdeeds and offenses of which the provincial justices of the peace may and ought lawfully to inquire . . . done or attempted within the liberties, franchises and places of the manor aforesaid, and also of all other who within the same franchises, liberties and places, go or ride tumultuously or riotously or with armed force against the peace, and to the terror and disturbance of the people; and also of those who lie in wait to kill the people, or hereafter shall presume to lay in wait . . . so always that the said Free Society of Traders and their successors, may have and hold all and singular their privileges, free, whole and unhurt

and that neither a keeper of the peace or justice, or other officers or ministers of the province whatsoever shall intermeddle in the same manner, nor call the freemen of the said Free Society, or other persons inhabiting within the said Manor to an account for any of the felonies and other offenses aforesaid found therein, or to be found, or for deodands, nor for anything relating to felonies, fugitives or their lands, goods or chattels within the said Manor usually seized for the king, but the said Free Society and their successors shall enjoy them fully and convert them to their own proper use.[4]

It will be observed that the jurisdiction thus conferred upon the manorial court was greater than that exercised by such courts at the common law, which were confined to real actions concerning property in the manor, and debts or trespasses under forty shillings, and the conservation of the peace and the punishment of minor offences.

It does not appear that the said Manor of Frank was ever organized, and the lands of the Free Society of Traders were vested by Act of Assembly in 1721 in trustees to be sold for the payment of its debts.[5]

Another manorial grant was made in 1685 to Eneas MacPherson, of Scotland, who was given five thousand acres with all the customary privileges in fee and common socage as of the signiory of Windsor, with power to erect the same into the Barony of Inversie, with power to hold a court baron, view of frankpledge and court leet by himself or stewards.[6] Like the Manor of Frank this barony does not seem to have been organized.

Penn also granted about forty thousand acres to Welsh purchasers of Pennsylvania lands, to be held as a barony. These lands were afterwards known as the Welsh Tract, but no barony was ever established.[7] The "Barony of Nazareth" had the privilege from Penn of holding a court baron and views of frankpledge for the conservation of the peace, but never exercised the same.[8]

The early writs for the convening of the Sessions of the Provincial Court required the sheriffs to summon "all Lords of Mannors," as well as all justices of a county, to appear at such sessions.[9]

At a session of the Council held on the 29th of May, 1700, Penn presented to that body a "Bill about a Court Baron," which does not appear to have become a law. As late as 1705 it was enacted that nothing should be done to abridge the rights of the proprietor to erect manorial courts.[10]

Sergeant states that Penn on his last visit gave to Martin Zeal a paper written and signed by him agreeing to let him have fifty acres in his Manor of Pennsbury "holding of the said manor and under the regula-

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[4]Hazard's "Annals of Penna.," p. 541.
[5]Votes in Assembly, vol. 2, pp. 290, 306.
[6]"Proprietary Government in Pennsylvania," p. 46.
[7]Smith's "Hist. of Delaware County," p. 164.
[8]"Scraps of Bucks County before 1750," by Dr. John W. Jordan, in vol. 1 Publications Bucks Co. Hist. Soc'y.
[9]Col. Rec., vol. 1, pp. 139-41.
[10]Vol. Rec. Vol. 2, p. 255.

tions of the court thereof when erected," and that shortly afterwards by a separate commission to his commissioners of property, he gave them power to erect manors, with jurisdiction annexed, as fully as he could do by charter. This power, however, the commissioners declined to exercise.

What were known as proprietary manors were merely reservations by the proprietaries of lands which they appropriated to their own use. The earliest of these was the Manor of Pennsbury, on the Delaware, above Bristol. These manors were reserved to the proprietaries by the Act of 1779, by which the other lands of the proprietaries were taken over by the State.[11] No manors in the proper feudal sense were ever erected, the proprietary tenths or reservations being only nominally manors.[12] Other large tracts of land purchased and kept more or less intact by private individuals were also sometimes called manors. No special jurisdiction, however, was conferred upon either the proprietary or other manors.

[11]Sergeant's "Land Laws of Pennsylvania," p. 196.
[12]Sharswood's "Common Law of Pennsylvania," Reps. Pa. State Bar Assn., vol. 1, p. 338.

CHAPTER VIII.

THE FOUNDING OF PENNSYLVANIA.

CHAPTER VIII.

The Founding of Pennsylvania.

On the fourth day of March, 1681, Charles II issued letters patent to William Penn granting unto him, his heirs and assigns:

All that Tract or parte of land in America, with all the Islands therein conteyned, as the same is bounded on the East by Delaware River, from twelve miles distance, Northwarde of New Castle Towne vnto the three and fortieth degree of Northerne Latitude if the said River doeth extend soe farre Northwards; But if the said River shall not extend soe farre Northward, then by the said River soe farr as it doth extend, and from the head of the said River the Easterne Bounds are to bee determined by a Meridian Line, to bee drawne from the head of the said River vnto the said three and fortieth degree, The said lands to extend westwards, five degrees in longitude, to bee computed from the said Eastern Bounds, and the said lands to bee bounded on the North, by the beginning of the three and fortieth degree of Northern Latitude, and on the South, by a Circle drawne at twelve miles, distance from New Castle Northwards, and Westwards vnto the beginning of the fortieth degree of Northerne Latitude; and then by a streight Line westwards, to the Limitt of Londitude above menconed.

It was soon ascertained that by a geographical error the southern boundary of Penn's grant ran about sixteen miles north of the present site of Philadelphia, where he had contemplated fixing his capital city. This error was afterwards corrected by securing from the Duke of York a deed, dated August 24, 1682, conveying the town of New Castle and the territory to the north and west of it to Penn, and another deed conveying to him the territory south of New Castle as far as Cape Henlopen. As we have seen, however, the original patent to the Duke of York did not include this territory, and the Duke did not obtain a special grant for the west side of Delaware until March 22, 1683. The almost interminable dispute between Penn and Lord Baltimore as to the title of these territories, which was not finally settled until the laying out of Mason's and Dixon's Line, is not within the province of this work.

As is generally known, the grant of Pennsylvania was made to Penn in satisfaction of a debt due by Charles II to Admiral Sir William Penn, Penn's father, partly for arrears of pay and partly for moneys loaned. Penn was familiar with the territory granted him and with the conditions which obtained in its vicinity, having been interested as a trustee for the proprietor in the organization of the Colony of West Jersey, and having been one of the grantees of East Jersey under the will of Sir George Carteret. As trustee for the proprietor of West Jersey, Penn had prepared a

constitution for that colony, which was the most liberal code that had up to that time ever been prepared. The charter conferred upon Penn, his heirs and his and their deputies and lieutenants, the power:

1. To publish laws of whatsoever nature consonant to reason and not repugnant, but as near as conveniently may be agreeable, to the laws, statutes and rights of England "by and with the advice, assent and approbacon of the free men of the said country or the greater parte of them, or of their Delegates or Deputies, whom for the enacting of the said Laws, when and as often as need shall require wee will that the said William Penn and his heires shall assemble in such sort and forme as to him and them shall seem best, and the same Lawes duely to execute. . . ."

The laws for regulating and governing property, the descent and enjoyment of lands, the enjoyment and succession of goods and chattels, and the laws as to felonies, were to continue as they then were "by the general course of the Law in our Kingdom of England," until they should be altered by Penn and the freemen of the province, or their delegates.

A transcript of all laws was required to be published within the province and, within five years after the enactment thereof, to be transmitted to the privy council in England, which might disapprove of any law within six months after its delivery; unless so disapproved, the laws to remain in force. The practice in submitting a law for approval in England was as follows: The law was first submitted to the Lords Commissioners of Trade and Plantations, by whom it was submitted to the King's Attorney General for his opinion. Then it came back to the Lords Commissioners, by whom it was considered and acted upon, whence it went to the King's Council, where it was finally approved or disapproved.

2. To appoint and establish judges, justices, magistrates and officers whatsoever for the probate of wills and for the granting of administrations in such form as they should deem most convenient.

3. To pardon, either before judgment or afterwards, all crimes and offenses against the laws, except treason and malicious murder, and in those cases to grant reprieves until the King's pleasure should be known.

4. To doe all and every other thing and things which unto the compleate establishment of justice unto the Courts, Tribunalls, formes of Judicature and manner of proceedings doe belong, although in these presents expresse mencon bee not made thereof; and by Judges by them delegated to award processe, hold please and determine in all the said Courts and Tribunalls, all accons, Suits and Causes whatsoever, as well Criminall as Civill, personall, reall and mixt. . . . Saveing and reserving to us Our Heires and successors, the receiving, hearing and determining of the Appeale and Appeales of all or any person or persons of, in or belonging to the territories aforesaid or touching any judgment to bee there made or given.

5. To make ordinances for the preservation of the peace and the better government of the people, not extending to bind, charge or take away the right of any person or persons for or in their life, members, freehold, goods or chattels.

6. To divide the territory into towns, hundreds and counties, and to incorporate towns into boroughs and boroughs into cities, and to establish fairs and markets therein.

7. To constitute seaports, harbors, havens, etc., for the discharge and unladening of goods and merchandise out of ships, with such rights and privileges as they might deem most expedient, enjoying the customs and subsidies exacted thereat to be reasonably assessed by themselves and "the people there as aforesaid to be assembled" and "saveing unto us our heires and Successors such imposicons and customes as by Act of Parliament will and shall be provided."

8. But it is covenanted by the Crown:—That Wee, our heires and Successors shall at no time wherever sett or make or cause to be sett any imposicon custome or other taxacon, rate or contribucon whatsoever, in and upon the dwellers and inhabitants of the aforesaid province for their lands, tenements, goods or chattels within the said province or in and uppon any goods or merchandize within the said province, or to be ladened or unladened within the ports or harbors of the said province, unless the same be with the consent of the proprietary or chiefe Governor and assembly or by Act of parliament in England.

9. To levy troops and wage defensive war.

10. To erect manors.

11. To dispose of lands, to be held directly of the proprietor, notwithstanding the statute *Quia Emptores*.

Penn's charter was prepared from a draft drawn by him which was revised by Chief Justice North and the Attorney General, Sir William Jones. The only material change which they made was to insert the provision for defense, and the reservation of the right to tax the inhabitants by act of Parliament. The latter provision was inserted because of the well known opposition of the Quakers to warfare, whether offensive or defensive, so that, if the colonists would not defend their territory, Parliament might exact taxes from which to pay troops which should fight for them.

When Doctor Franklin was Colonial Agent in London, just before the Revolution, Lord Shelburne jocosely told him that Pennsylvania had not the same grievance as the other colonies alleged, because the right of Parliament to tax Pennsylvania was expressly reserved in the charter. Franklin replied that "the relations between England and her American colonies had got beyond the scope of a Quaker meeting."[1]

It will be noted that the laws for regulating and governing property, the descent and enjoyment of lands, the enjoyment and succession of goods and chattels, and the laws as to felonies, were to continue as they then were in England until they should be altered by Penn and the freemen of the province. Referring to this provision of the Patent, Chief Justice Sharswood says:—

The sixth section of that instrument cannot be considered as the rule for determining what was or was not the extent of the English laws adopted here. As far as I am informed, it has never been so considered.

[1]Buell's "William Penn" p. 113.

It provided merely, "that the laws for the regulating and governing of property within the said province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, shall be and continue the same as they shall be for the time being, by the general course of the law in our kingdom of England, until altered." Much that was unquestionably recognized and adopted cannot be brought within the limits of this language; and it includes much that was excluded. It appears accordingly to have been entirely disregarded. . . . The first case on the first page of First Dallas—without a name—but said to have been decided in 1754, confirmed what had no doubt long before been well settled. "Adjudged by the Court, that the statute of Frauds and perjuries does not extend to this province, though made before Wm. Penn's charter; the Governor of New York having exercised a jurisdiction here before the making of that statute, by virtues of the word *territories* in the grant to the Duke of York, of New York and New Jersey."[2]

The Act of May 31, 1718, 3 Statutes at Large, page 199, in its preamble recites the above mentioned provision in the charter to Penn, and states further:

And Whereas, it is a settled point that if the common law is the birthright of English subjects, so it ought to be their rule in British dominions. But acts of Parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts, now for asmuch as some persons have been encouraged to trangress certain statutes against capital crimes and other enormities, because those statutes have not been hitherto fully extended to this province; therefore, etc.

On April 10, 1681, Penn commissioned his cousin William Markham to be Deputy Governor of the province, who was instructed:

1st. To call a Council, and that to consist of nine, he presiding.
2nd. That he does there read my letter to the inhabitants and the King's declaration of subjection; then (or there) take the inhabitants' acknowledgements of my authority and propriety.
3rd. To settle bounds between me and my neighbors; to survey, set out, rent, or sell lands, according to [my] instructions bearing date the 8th of the month called April 1681.
4th. To erect courts, make sheriffs, justices of the peace, and other requisite inferior officers, that right may be done, the peace kept, and all vice punished, without partiality, according to the good laws of England.
5th. To call to his aid, and command the assistance of any of the inhabitants of those provinces, for the legal suppression of tumults or riots, and conviction of the offenders, according to law, and to make or ordain any ordinances and to do any thing or things that to the peace and safety of the said province he may lawfully do, by the power granted to me in the letters-patent, calling assemblies to make laws only excepted.

On April 25, 1682, Penn prepared, with the assistance and advice of several friends, a Frame of Government for his new colony, which was

[2]Sharswood's Common Law of Penna., 1 Pa. State Bar Assn.'s Reps., p. 336.

in the nature of what are now known as constitutions. It was modified before its acceptance, and immediately succeeded by a new instrument which will appear later in this chapter. For an interesting account of several drafts of the Frame of Government prepared before the final draft was agreed upon, see Shepherd's "Proprietary Government in Pennsylvania," page 225.

Later, on May 3, 1682, Penn "and divers freemen of the aforesaid province" prepared a code known as "Laws agreed upon in England," which consisted of forty sections, and these were also not to be altered without the consent of the Governor and six-sevenths of the freemen in Council and General Assembly.

On July 11, 1681, Penn issued "Certain Conditions and Concessions" which had mostly to do with sales of real estate and the intercourse of the colonists with the Indians, but it is further provided therein:

Fourteenthly. That all differences between the Planters and the natives shall be ended by Twelve men, that is, by Six Planters and Six natives, so that we may live friendly together as much as in us lieth, preventing all occasions of Heartburnings and mischief. . . .

Sixteenthly. That the laws as to Slanders, Drunkenness, Swearing, Cursing, Pride in apparel, trespasses, distresses, replevins, weights and measures, shall be the same as in England, till altered by law in this province.

Seventeenthly. That all shall mark their hogs, sheep and other cattle, and what are not marked within three months after it is in their possession, be it young or old, shall be forfeited to the Governor, so that people may be compelled to avoid the occasions of much strife between Planters. . . .

Twentiethly. That no person leave the province without publication being made thereof, in the market-place, three weeks before, and a certificate from some justice of the peace, of his clearness with his neighbours, and those he has dealt withal, so far as such an assurance can be attained and given; and if any master of a ship shall, contrary hereunto, receive and carry away any person that hath not given him that public notice, the said master shall be liable to all debts owing by the said person so secretly transported from the province.

Markham arrived in New York about June 21, 1681, and at the Delaware on July 1st. He took the oath of office on August 3rd, and immediately called a council of nine persons, consisting of two Swedes and seven English settlers. The proceedings of the council at its first session were kept secret, but it is known that they established the capital of the new province at Upland. Markham appointed twelve justices members of a court having the same territorial jurisdiction as the old Upland Court, nine of whom held a session on September 13th. Another session was held November 30th, Markham presiding, at which all the justices were present. The cases considered at these sittings were all criminal, and the proceedings were similar to those in the old river courts.

On October 10, 1681, Penn appointed four commissioners to locate,

in conjunction with Markham, a "Great town," and to otherwise arrange for the settlement of his province. Three of them arrived on the Delaware in the spring of 1682, and seem to have selected the site of Philadelphia shortly after their arrival.

Penn arrived at New Castle on October 27th, 1682. On the next day the commissioners appointed by the Duke of York for that purpose made formal delivery of the town and surrounding territory for twelve miles by "delivery of the fort of said town, and leaving the said William Penn in quiet and peaceable possession thereof, and also by the delivery of turf and twig and water and soil of the River Delaware." Delivery of the territory south of New Castle was made by the same commissioners to Markham, on November 7th, "at the house of Captain Edward Cantwell on Appoquinimy Creek." Penn proceeded to Upland on 29th of October. Then or not long after, he changed the name of that town to Chester.

On November 7th, Penn commissioned six justices of a court for the town of New Castle, upon the Delaware, and twelve miles north and west of the same to the north side of Duck creek. On November 12, 1682, a session of this court was held at which Penn presided. In a public speech, directed to the inhabitants in general, he stated among other things:

Fourthly. In regard that for want of a present assembly, there are not as yet fitting laws, regulations, orders, and by-laws for the country provided, he, the proprietary, therefore recommended the magistrates, in the interim, to follow and take the laws of his royal highness, provided for the province of New York, for their guide, so far forth as they are consistent, and not repugnant to the laws of England, assuring the inhabitants of this and the other two counties downwards, that they should have and enjoy, full and equal, the same privileges with those of the province of Pennsylvania, and that for the future they should be governed by such laws and orders as they themselves, by their deputies and representatives, should consent to, and that he would call an assembly for the purpose, as soon as conveniently might be, &c.[3]

On November 8th, Penn issued writs for an election to be held on November 20th, of members of a General Assembly to be held at Upland on December 6th.

It appears from these writs that the territory now embraced in Delaware had already been divided into the counties of New Castle, St. Jones, and Whorekill or New Deal, the names of the last two counties being afterwards changed to Kent and Sussex respectively. The three original counties in Pennsylvania of Chester, Philadelphia and Bucks must have been established at about the same time. The writs to the sheriffs of the "territories," as the lower counties were called to distinguish them from the province, called for the return of seven persons from each county to represent them in a general assembly, and it is altogether probable that the writs to the sheriffs of the other counties provided similarly. We thus

[3]Hazard's "Annals of Penna.," p. 601.

find that at the very beginning, the Frame of Government was departed from. No members of Council appear to have been directed to be elected at this election, and instead of two hundred members of the General Assembly there were but forty-two elected.

The General Assembly convened at Chester on the 4th day of December, 1682, and adopted an elaborate series of rules for its procedure. At the beginning of the session, we find the contumacious Abraham Man, who, as we have seen, impeached Justice Moll of the New Castle Court, ousted as a member and his old enemy Moll installed in his place.

An act was passed uniting the Delaware counties with the Province and providing for the naturalization of their citizens. It will be noted that while Penn had grants from the Duke of York of the territory covered by these counties, his patent from the Crown conferred upon him no power to govern them, so that while the inhabitants thereof might be estopped from denying his authority because of their acceptance by their delegates to the General Assembly of the "Act of Settlement," to be hereafter referred to, he plainly had no authority at all defensible if the Crown chose to question it. This point was afterwards raised by the inhabitants of the territories.

On the third day of the session, the Assembly received from the Proprietary copies of the "Printed Laws," which were the "Laws agreed upon in England," and of the "Written Laws or Constitutions," which consisted of ninety bills prepared by Penn, from which the sixty-one chapters of the "Great Body of the Laws" were made up, the printed laws to receive the first consideration.[4] It is stated in the Charter and Laws that "both the printed and written laws were subsequently considered and undoubtedly passed, the printed laws, at least, substantially as they came from the Governor." If the "Laws agreed upon in England" were passed it is extraordinary that some twenty, or one-half, of them are re-enacted in the "Body of the Laws," sometimes with some small alterations, but usually in the same language. As the printed and the written laws were prepared by the same hand, and as the written laws were passed with insignificant changes or amendments, this seems strange.

It appears in "Votes in Assembly," Volume I, page 4, that the printed constitutions and laws were read by consent of the House on December 6th, and informally debated, and it was voted that so much of chapter 39, as required six parts in seven of the freemen to agree to any change thereof should be omitted, and two members of the House were appointed to confer with the Governor about the thirty-first article or chapter, but the further consideration of the laws agreed upon in England appears to have been then dropped, and the Assembly proceeded to vote upon and adopt the "articles of the written constitutions." No further reference to the printed laws appear in the "Votes" of that session.

It seems that of the written laws, seventy-two were passed, but for some reason not now understood but sixty-one of them were afterwards

[4]Charter and Laws, p. 478.

recognized and embodied in the "Body of the Laws," leaving ten unrecorded and unaccounted for. Among these laws are the following relative to the courts and matters of law.

That all courts shall be open, and justice shall neither be sold, denied or delayed.[5]

That in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves, or if unable, by their friends. And the first process shall be the exhibition of the complaint in court, fourteen days before the trial; and that the party complained against may be fitted for the same, he or she shall be summoned no less than ten days before, and a copy of the complaint delivered him or her, at his or her dwelling house. But before the complaint of any person be received, he shall solemnly declare in court, that he believes in his conscience his cause is just.[6]

That all pleadings, processes, and records in courts, shall be short, and in English, and in an ordinary and plain character, that they may be understood, and justice speedily administered.[7]

That all trials shall be by twelve men, and as near as may be peers, or equals, and of the neighborhood, and men without just exception. In cases of life, there shall be first twenty-four returned by the sheriff for a grand inquest of whom twelve at least shall find the complaint to be true; and then the twelve men or peers, to be likewise returned by the sheriff, shall have the final judgment. But reasonable challenges shall be always admitted against the said twelve men or any of them.[8]

There shall be Two credible witnesses in all Cases, in order to judgement, And all witnesses coming or called to testify their knowledge in or to any matter or thing in any Court, or before any lawful Authority within the said Province, and territories thereunto annexed, Shall there give & Deliver in their Evidence or testimony, By solemnly promising to speak the truth, the whole truth, and nothing but the truth, to the matter or thing in Question. And in case any Person so called to evidence, shall afterwards be Convicted of Willfull falsehood, such person shall suffer and undergo such Damage or penalty, as the person, or persons, against whom hee or shee bore false witness, did or should undergo, and shall also make Satisfaction to the party Wronged, and be publicly exposed for a false witness, never to be Credited again in any Court, or before any Magistrate in the said Province &c.

And whosoever shall be Convicted of lying in conversation, shall for every such offence, pay half a crown, or suffer three days' imprisonment in the house of Correction, at hard labour.[9]

For avoiding Numerous Suits, if two men Dealing together, be indebted to each other, upon Bonds, Bills, Bargains, or the Like, Provided they be of equal clearness and truth, The Defendant shall, in his Answer, acknowledge the debt which the Plaintiff Demandeth, and defaulk what the Plaintiff oweth to him upon the like Clearness.[10]

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[5] *Ibid*, p. 100.
[6] *Ibid*, p. 100.
[7] *Ibid*, p. 100.
[8] *Ibid*, p. 100.
[9] *Ibid*, p. 116.
[10] *Ibid*, p. 118.

To Prevent Frauds and Vexatious Suits, within the said Province and territories thereunto annexed, all Charters, Gifts, Grants, and Conveyances of land (except Leases for one year or under) And all Bills, Bonds, and Specialties above five pounds, and not under three months, made in the said Province, shall be Enrolled or Registered in the publick Enrollment Office of the said Province, within the space of two months next after the making thereof, Else to be void in law.

And all Deeds, Grants, and Conveyances, of Land (except as aforesaid) within the said Province, and made out of the said Province, shall be Enrolled or Registered as aforesaid within six months next after the making thereof, and settling and Constituting an Enrollment office or Registry within the said Province; Else to be void in law against all persons whatsoever. And in case the Deeds of Purchase in England made of lands in this Province, should be Lost by the way, and so cannot be Registered, Copies of the Deeds, attested by a publick Notary, shall be of equal force therein.[11]

All Wills in writing attested by two sufficient witnesses, shall be of the same force as to Land, as to other Conveyances, being legally proved within forty days either within or without the said Province.[12]

All Lands and goods shall be Lyable to pay debts; Except where there be legal Issue, And then all the goods, and one half of the land only, in case the land was bought before the debts were Contracted.[13]

All persons shall be Bailable by sufficient Sureties, unless for Capital Offences, where the proof is evident, or the presumption great; And every quarter of a year, there shall be a goal Delivery in every County, where imprisonment is not the punishment.[14]

The Laws of this Province, from time to time, shall be publisht and printed, that every person may have the knowledge thereof; And they shall be one of the Books taught in the Schooles of this Province, and territorys thereof.[15]

It seems extraordinary that the General Assembly did not at its first session accept the Frame of Government. The Frame itself states that it is to be "further explained and continued there by the first Provincial Council that shall be held, if they see meet. The Frame was the real charter of Pennsylvania, the so-called charter from Charles II being merely a patent to William Penn. Without it, the freemen of the province had no other function than that of approving or rejecting such laws as Penn might propose to them. The General Assembly had no legal status, but existed merely by his sufferance.

Hazard in his "Annals of Pennsylvania" says that the first "Act of Settlement" is without date, but is generally considered as of the same date as the Act of Union. In the appendix to "Notes in Assembly" printed by Franklin in 1752, the act is printed with the marginal note "made at Chester, tenth month, 1682," and Proud says it was passed then,[16]

[11] *Ibid*, p. 118.
[12] *Ibid*, p. 117.
[13] *Ibid*, p. 120.
[14] *Ibid*, p. 120.
[15] *Ibid*, p. 123.
[16] Proud's "History of Penn.," vol. 1, p. 206.

but the votes at the session of 1683 show it to have passed on March 19th of that year and the Minutes of Council agree. This settlement accepts the Frame of Government with the following modifications, besides some other changes of less moment, that is, that twelve persons be summoned from each county, three of whom shall serve as members of Council, and nine as members of the General Assembly, and that the Provincial Council shall consist of three persons, and the Assembly of six persons, from each county.

Notwithstanding the acceptance of the old Frame of Government at the session of the Assembly held in March, 1683, a desire for a new charter seems to have been felt by the Assembly and accordingly such a charter was prepared by a joint committee of Council and Assembly, and, apparently without having been passed as a law by the General Assembly, was executed by being signed by the proprietor, twelve members of the Council, and fifty-three members of the Assembly and four citizens of Philadelphia on April 2, 1683, with the following ceremonies:

At the time appointed, [April 2d], the House waited upon the Governor and Council, in the Council-House. The Clerk of the Council, by order of the Governor, read the charter of the Province, fairly engrossed in Parchment; which done, the Governor solemnly testifies to the General Assembly, that what was inserted in that charter, was solely by him intended for the good and benefit of the freemen of the Province, and prosecuted with much earnestness in his spirit toward God at the time of its composure. This done, he sealed and signed the said charter, and delivered it to the Speaker of the House, (Thomas Winn,) and two other members, who received it in the name of all the freemen of the Province, by signifying an acknowledgment of the Governor's kindness in granting them that charter of (more than was expected) liberty. This done, the said charter was attested by endorsement of the members of Provincial Council and Assembly, subscribing their names, as also the Governor, Secretary, Clerk of the Council, and Clerk of the Assembly, with such of the inhabitants of Philadelphia as were then present. This done, its keeping was recommended to such person, or persons, as were thought most fit to be intrusted with a matter of so great concernment.[17]

Without the execution and acceptance of this and the preceding Frame of Government, Penn could have governed his province absolutely, merely calling the people together at such times and in such manner as he might see fit, to approve or disapprove of such laws as he might propose to them. The rights of the people to participate in the government, therefore, rested almost wholly on the granting and acceptance of this charter, which is of sufficient importance to warrant the principal provisions thereof to be here given in full:

Government to consist of Council and Assembly.—The Government of this Province and Territories thereof, shall from time to time according to the powers of the Patent and deeds of feofment aforesaid, Consist of the Proprietarie and Governour and freemen of the said Province and

[17]Votes in Assembly, vol. 1, p. 21.

Territories thereof in form of a Provinciall Councill and General Assemblie, which Provinciall Councill shall consist of eighteen persons being three out of each countie, and which Assemblie shall consist of thirty-six persons, being six out of each countie, men of most note for virtue, wisdome and ability, by whom all Laws shall be made, officers chosen and publick affairs transacted, as is hereafter limited and declared.

Election and Terms of Members of Council.—There being three persons already chosen for every respective countie of this Province and Territories thereof to serve in the Provinciall Council, one of them for three years; one for two years, and one for one yeare, and one of them being to goe off yearlie in every countie; That on the tenth day of the first month yearly for ever after, the freemen of the said Province and Territories thereof shall meet together in the most convenient place in everie countie of this Province and Territories thereof, and then and there to choose one person qualified as aforesaid in every countie, being one-third of the number to serve in Provincial Council for Three years; It being intended that one-third of the whole Provinciall Council, consisting and to consist of eighteen persons, falling off yearlie, It shall be yearlie supplyed by such new yearlie elections as aforesaid; and that no one person shall Continue in Longer than three yeares, and in Case anie member shall decease before the last election during his time, That then att the next election ensuing his decease, another shall be chosen to supply his place for the Remaining Time he was to have served, and no longer.

After the first Seven years everie one of the said third parts that goeth yearlie off, shall be uncapable of being chosen again for one whole year following; That so, all that are Capable and Qualified as aforesaid may be fitted for government, and have a share of the care and burthen of it. . . .

Preparation and Promulgation of Bills—That the Governour and Provincial Councill shall have the power of preparing and proposing to the Assemblie hereafter mentioned, all Bills which they shall see needful, and that shall att anie time be past into Laws within the said Province and Territories thereof, which Bills shall be published and affixed to the most noted place in everie countie of this Province and Territories thereof, Twentie days before the meeting of the Assemblie in order to the passing of the same into Laws. . . .

Election of Members of Assembly—Procedure on Passage of Bills—And to the end that all Bills prepared and agreed by the Governour and Provinciall Council as aforesaid, may yet have the more full Concurrence of the freemen of the Province and Territories thereof; It is declared, granted and confirmed that att the time and place in everie countie for the choice of one person to serve in Provinciall Council as aforesaid, The respective Members thereof att their said meetting shall yearlie choose outt of themselves six persons of note for virtue, wisdom and abilities to serve in Assemblie as their Representatives, who shall yearlie meet on the Tenth day of the third month in the capitall towne or citie of the said Province, unlesse the Governour and Provinciall Council shall think fitt to appoynt another place to meet in, where during eight dayes, the several members may freelie confer with one another; and if anie of them see fit meet with a committee of the Provinciall Council which shall be at

that time purposelie appointed to Receive from anie of them proposalls for the alteration or amendment of anie of the said proposed and promulgated bills, and on the ninth day from their so meeting, The said Assemblie after the reading over the proposed Bills by the Clarke of the Provinciall Councill, and the occasions and motives for them being opened by the Governour his Deputie, shall upon the Question by him putt, give their affirmative or negative, which to them seemeth best, in such manner as is hereafter expressed: But not less than Two-thirds shall make a Quorum in the passing of all Bills and choice of such officers, as are by them to be chosen. . . .

Increase of Representatives—And that the representatives of the people in Provinciall Council and Assemblie, May in after ages bear some proportion with the increase and multiplying of the people; The numbers of such representatives of the people may be from time to time increased and enlarged so as at no time the number exceed seventie-two for the Provincial Council and two hundred for the Assembly; The appoyntment and proportioning of which number as also the laying and methodizing of the choice of such representatives in future times most equallie to the division of the country or number of the inhabitants, is left to the Governour and Provincial Council to propose, and to the Assembly to resolve; So that the order of rotation be strictlie observed both in choice of the Council and the respective committees thereof, That is to say, one-third to goe off, and come in yearlie.

Erection of Courts—Judges and Court Officers—That from and after the death of this present Governour, the Provinciall Councill shall together with the succeeding Governour erect from time to time standing Courts of Justice in such places and number as they shall judge convenient for the good government of the said Province and territories thereof; And that the provinciall Council shall on the thirteenth day of the second month then next ensuing elect and present to the Governour and his deputie a double number of persons to serve for Judges, treasurers and masters of rolls within the said Province and territories, to continue so long as they shall well behave themselves in those capacities respectively. And the freemen of the said Province in Assemblie mett shall on the thirteenth day of the third month yearlie elect and then present to the Governour or his deputie a double number of persons to serve for Sheriffs, Justices of the peace and Coroners for the yeare next ensuing; out of which respective elections and presentments the Governour his deputie shall nominate and commissionate the proper number for each office, the third day after the said respective presentments, or else the first named in such presentment for each office as aforesaid shall stand and serve in that office the time before respectively limited; And in case of death or default such vacancie shall be supplied by the Governour and provincial Council in manner aforesaid.

Sessions of Assembly—That the Assemblie shall continue so long as may be needful to Impeach criminals, fitt to be there impeached, To pass such Bills into Laws as are proposed to them, which they shall think fitt to pass into laws, and till such time as the Governour and provinciall Councill shall declare, That they have nothing further to propose unto them for their assent and approbation, and that declaration shall be a dismiss to the Assembly for that time, which Assembly shall be notwith-

standing capable of assembling together upon the summons of the Governour and Provinciall Councill, att anie time during that yeare, if the Governour and Provincial Council shall see occation for their so assembling.

Elections of Members of Council and Assembly—Votes on Bills—That all the elections of members or representatives of the people, to serve in Provincial Council and Assembly and all questions to be determined by both or either of them that relate to choice of officers, and all or anie other personall matters shall be resolved or determined by the Ballot, and all things relating to the preparing and passing of Bills into Laws, shall be openlie declared and resolved by the vote. . . .

Alteration of Charter—That no Act, Law or Ordinance whatsoever shall att anie Time hereafter be made or done by the Proprietarie and Governour of this Province and Territories thereunto belonging, his heirs or assigns, or by the freemen in Provinciall Council or Assemblie, To Alter, Change or Diminish the forme or effect of this Charter or anie part or Clause thereof; or contrary to the true intent and meaning thereof, without the consent of the Proprietarie and Governour his heirs or assigns and Six parts of Seven of the said freemen in Provinciall Councill and Assemblie mett.

The two charters differed in the following principal respects:

By the latter, the Council was to consist of eighteen members and the Assembly of not less than thirty-six nor more than two hundred; by the former, the Council was to consist of eighteen members, not to be enlarged at any time beyond seventy-two members, and the Assembly of thirty-six members, not to be enlarged beyond five hundred members. The latter charter fixed the annual meeting on May 10th instead of April 20th, abolished the Governor's treble vote in Council, provided for the publication of proposed bills twenty instead of thirty days before the meeting of the Assembly, abolished the four standing committees of Council, and provided that the Council and Assembly should constitute the General Assembly, instead of the Assembly alone.

New provisions were inserted as follows: Relative to the guardian of a minor governor; estates of aliens to descend to heirs as if the alien had been naturalized; hunting and fishing permitted in all waters to the inhabitants; and full and quiet possession of lands to which any had lawful or equitable claims guaranteed, subject to such rents and services as are or ought to be reserved to the governor, his heirs or assigns.

Notwithstanding the passage at the session held in December, 1682, of a law providing that the laws of the province should be published and printed from time to time that every person might have the knowledge thereof, and that they should be taught in the schools of the province and territories, the Council on May 23, 1683, decided that they should not be printed, but that an attested copy thereof under the hand of the secretary should be transmitted to the president and clerk of each county court, and that copies might be obtained from them attested by two justices.[18]

[18]Col. Rec., vol. 1, p. 74. It was the practice, in Chester County at least, to read the newly enacted laws in court immediately after the grand jury was called: Smith's Hist. of Del. Co., p. 199.

On April 2, 1683, the Assembly passed an act providing that "all laws should be passed under the great seal of the province; and thus endorsed by the clerk of the Council (passed in the Council) his name being subscribed thereto, as also by the speaker of the House (passed in the Assembly) the speaker's name being subscribed and then recommended to the great seal." This act was passed at the request of the Governor, who, being present at the meeting of the Assembly, read the article in his letters patent requiring all laws to be published under his seal or the seal of his deputies, or lieutenants, or those of his heirs or assigns. Both the great and lesser seal were, in fact, not the seals of the province, but his own, each bearing on the obverse the legend "William Penn, Proprietor & Governor of Pensilvania."

Notwithstanding this plain requirement of Penn's patent and of the above act, the laws for many years were not so published, with very serious results, as we shall see later. On November 18th, 1701, however, it was resolved in Council that all the laws then in force should be printed, and that the master of the rolls should print all future laws "at his own charge."[19]

Penn's controversy with Lord Baltimore relative to the title to the lands comprised within the three lower counties had assumed such proportions in 1684 as to imperatively require the presence of Penn in England to attend to the prosecution of his claim therefor at court. He presided in Council for the last time before his departure on the 14th of August of that year, and appears to have sailed on that day for England, where he was destined to remain for the next sixteen years. He left a commission empowering the Provincial Council to act in the government in his stead, Thomas Lloyd to be president of the same, and also to be keeper of the great seal.[20]

At the session of the General Assembly held in March, 1682, eighty additional laws were passed, among them the following:

No Freemen within this Province of Pennsylvania or territories thereof, shall be taken or imprisoned, or Dispossessed of his freeholds, or liberties, or be Outlawed, or Exiled, or any other wise hurt, Damnified, or Destroyed, nor shall hee be tryed or Condemned but by the lawful Judgment of his equalls, or by the Laws of this Province and territories thereof.[21]

In every precinct three persons shall be yearly chosen, as Common peacemakers in that precinct, And their Arbitration may be as Valid as the judgements of the Courts of Justice, Let the parties differing Sign a Reference, and Submission of their matters in Controversie to men so chosen as aforesaid; Which Reference being satisfyed by the County Court, the Judgement of the peacemakers, shall be as Conclusive, as a Sentence given by the County Court, And such Conclusions to be registered in the County Courts as other Judgments are.[22]

[19] *Ibid*, vol. 2, p. 64.
[20] Votes in Assembly, vol. 1, p. 21.
[21] Charter and Laws of Pa., p. 127.
[22] *Ibid*, p. 128.

Whereas great Respect is due from all persons, and ought always to be yeelded in Courts of Justice, whose institution is the peace and benefit of the publick, And that such gravity, and reverence which manifest the authority of a Court, may at all times appear; These following Rules shall be observed in the holding thereof: By the King's authority and in the name of the Proprietary and Governour, silence is commanded, Let the cryer make proclamation, and say, O yes, O yes, O yes, Silence is commanded in the Court, While the Justices are sitting, upon pain of imprisonment. After silence is Commanded, The cryer shall make a proclamation saying; All manner of persons that have anything to doe, at this Court, Draw Nigh and give your attendance, and if any person shall have any Complaint to enter, or suit to prosecute, Let them Draw near, and they shall be heard; When Silence is thus commanded and proclamation made, Upon calling the Docket, The cryer shall call, A, B., plaintiff come forth and prosecute thy suit, against, C. D., or else thou wilt be Non-Suited; The plaintiff appearing, The cryer shall call for the Defendant, C. D., come forth and save thee and thy Bail, or else judgment will pass against thee.[23]

In every County within this Province and territories thereof, A Grand Inquest shall give their attendance, and bring in their Presentment twice a year, in every respective County Court.[24]

And that all possible Care and tenderness may be shown about the life of men, and to prevent Corruption, . . . By the authority aforesaid, Be it enacted, That in all Causes Capital, and Criminal, The freemen of the County shall be summoned by the Sheriffs, and the names of the freemen shall be writ in small pieces of paper, and put into a hat and shaken; forty-eight of whom shall be drawn by a Child, and those so drawn, shall stand for the Sheriffs Returns; And the first twelve, not reasonably excepted against, shall Stand and Serve for the tryal, (viz, chap. 38.)[25]

All actions of debt, Accompt, or Slander, and all actions of Trespass, shall be henceforth first tryed by there respective County Court, where the Cause of action did arise.

And if any person shall think himself aggrieved with the Judgement of the County Court, That then, such person may Appeal to have the same tryed before the Governour and Council; Provided always that the same be above twelve lbs. And that the person appealing, do put in good, and sufficient Security, to pay all Costs and Damages, if hee shall be cast as also to pay the Cost and Charges of the first Suit.[26]

All persons of known estates, refusing to pay their just Debts, if arrested and imprisoned, shall be kept at their own charge, Until Security be given or satisfaction made; Provided that no person shall be kept in prison for debt or fine longer than the second Day of the next Sessions, after his or her committment, unless the Plaintiff shall make it appear, that the person imprisoned hath some Estate that hee will not produce; In which case, the Court shall Examine all persons Suspected to be given in the Concealing such estate, But if no Estate can be found, That the

[23] *Ibid*, p. 128.
[24] *Ibid*, p. 129.
[25] *Ibid*, p. 129.
[26] *Ibid*, p. 129.

Debtor shall Satisfy the debt by Servitude, as the County Court shall order, if desired by the Creditor.[27]

For Speedy Justice to the poor, and in small matters, Be it Enacted &c., That all matters of Debt or Dues under forty shillings, shall be heard and Determined upon Sufficient Evidence, by any two Justices of the peace, of that County, where the Cause arises; And that such Justices shall report their judgment to the next County Court and the same shall be Recorded, by the clark of the County Court, as good, and binding, if the Court approves the same.[28]

The Justices of each respective County Court, shall sitt twice every year, to inspect and take Care of the Estates, usage, and Employment of Orphans, which shall be called The Orphans Court, and sitt the first third day of ye week, in the first and eighth month yearly; That Care may be taken for those, that are not able to take care for themselves.[29]

For avoiding long and tedious Conveyances, and the many Contentions which may arise about the Variety of Estates: All grants of Estates shall be either of the inheritance, or for life or lives, or for years, any number not exceeding fifty years; Which Grants shall be thus contracted in these words: A. B., the &c., day of, &c., in the year according to the English accompt 168-&c., from him, and his heirs, and assigns, Grants to his &c. (describe the bounds with all its appurtenances), lying in the County of &c., Containing &c., acres, or thereabouts, to C. D., and his heirs (if in fee) or to E. F. if for his life: (if for lives); or to G. H. for one hundred years (if J. K. L. M. N. O. shall so long live); or to P. Q., for fifty years, for the consideration of &c., pounds in money paid, and of yearly rent to be paid to A. B. and his heirs and assigns, upon the &c., day of &c.; In witness whereof hee setts his hand and seal,—seal, Sealed and Delivered in the presence of R. S. T. Acknowledged in open Court, and certified under the Clerk's hand and Court Seal, the &c, day of &c,—168—&c.; and Registered the &c., day of &c., 168—&c.[30]

All deeds of sale, Mortgages, Settlements, Conveyances, (except leases for a year), shall be declared and acknowledged in open Court. And the form of possession in transferring of titles, shall be, By the party, or his Attorney Delivering the said deed of gift in open Court, into the hands of him or his Attorney to whom it is made, and that to stand good to all intents and purposes.[31]

Seven years quiet possession of Lands within this Province or territories thereof, shall forever hereafter give am Unquestionable title; Except in Cases of Infants, Marryed Women, Lunatics or persons beyond the Seas.[32]

Whatsoever Estate any person hath in this Province and territories thereof, att the time of his death; Unless it appear than an equal provision be made elsewhere, shall be thus Disposed of, That is to say, One third to the wife of the party deceased, One third to the Children equally, and the other third as he pleaseth; And in case his wife be Deceased be-

[27] *Ibid*, p. 130.
[28] *Ibid*, p. 131.
[29] *Ibid*, p. 131.
[30] *Ibid*, p. 131.
[31] *Ibid*, p. 132.
[32] *Ibid*, p. 132.

fore him, two thirds shall go to the children equally, and the other third disposed of, as hee shall think fit, his debts being first payd.[33]

All Bills and other Specialties that Shall be assigned under the hand of the Creditor, and Seal of the County, The same shall be as good in Law to all intents and purposes to the Assignee, as it was before to the Assignor.[34]

Whereas in all Governments, there are some laws more essentially requisite to the Well being thereof, Upon a Serious Consideration of those laws which have bin made in this Province, since the arrival of the Proprietary and Governour, It is in a more Especial manner thought fitt that it be Enacted And it is Enacted by the Proprietary and Governor, with the advice, and Unanimous Consent of the freemen of this Province and territories thereof, in Provincial Council, and Assembly mett, that these following Laws, that is to say,

Liberty of Conscience.
A Freeman.
Liberty and Property.
Naturalization.
Election of Representatives.
Taxes for a year.
Open Courts, and freedom of plea therein.
Giving of Evidence.
Returning of Inquests, &c.
Judgment by Inquest, &c.
Bail, or Liberty of person.
Registry.
Marriage.
For Speedy Justice.
That the Laws be in English.

. . . . . .

shall be Reputed and held, and are hereby Reputed and held, for Fundamentall in the government of this Province and territories thereof; And that this, nor any of those Laws aforesaid, shall be Altered, Diminished or Repealed in whole or part, without the Consent of the Governour his heirs or Assigns and six parts of seven of the freemen of this province, or territories thereof, in Provincial Council, and Assembly met.[35]

At the session of the General Assembly held in October 1683, it was enacted that the sheriff of each county should summon a sufficient number of freemen, ten days before the sitting of the ordinary court of justice, to attend the said court for the service of the county, under a penalty for neglect so to do of double damages to any party aggrieved thereby; also that no member of a court of justice should sit in a case in which he was interested, nor to sit in the Provincial Council on an appeal from the judgment in such a case.

At the session held in May, 1684, the following laws, among others, were passed: That monthly and quarterly sessions should be held in each

[33] *Ibid*, p. 141.
[34] *Ibid*, p. 146.
[35] *Ibid*, p. 154.

county by the respective justices, each quarter sessions to be a court of equity as well as of law, "concerning any judgment given in cases by law capable of trial in the respective county sessions and courts," and an act constituting a Provincial Court consisting of five justices to hear all appeals and to have original jurisdiction in cases involving titles of lands and all trials civil or criminal, at law or in equity, not determinable by the county courts, which act was superseded by an act passed at the session of 1685, which was as follows:

Chap. CLXXXII. The President and Provinciall Councill and freemen in Assemblie mett taking into their Serious Consideration the inconvenience, trouble and expense which the Provinciall Judges and inhabitants of the severall Counties are exposed to, by Continueing and attending the Provinciall Courts, and further Considering, how that generallie the Concerns and affairs of each Countie may be heard and determined by the Justices in commission for that Countie, who may be well presumed to be more particularlie knowing in reference to what action or Complaint shall occur to be Cognizable there.

It is hereby Enacted That all trialls of titles of land, All actions of Debt, accompt or slander, actions personall, and all actions Civill or Criminall whatsoever, (excepting treason, Murder, Manslaughter, and other heinous and enormous Crimes) shall be first heard and Determined in the proper Counties, by the respective Justices which Countie Courts shall be held and keept Quarterlie in everie Countie of this Province and Territories, and oftener, if occasion be: And in Case either Plaintiff or Defendant apprehend themselves aggrieved, with the Judgment of such Courts; Then upon any just Cause of greivance, Error or Complaint alledged, being allowed of by the Justices on the bench, Either of them may appeal to have the same Cause or Complaint heard over and Determined by three Judges or anie two of them, speciallie to be commissionated by the Governor and Councill, who shall hold Courts att Philadelphia the twenty-fourth of the next seventh month and the tenth of the second month following. Which Judges also are hereby authorized and impowered to heare and Determine all (treason, murder, manslaughter, and other heinous and enormous Crimes) in the respective Countie Courts, where the said Crimes were Committed, Anie thing contained in the one hundred and sixty first law, or anie other Law of this Province and territories, to the contrarie in anie wise notwithstanding.[36]

It was the practice of these early assemblies to enact that the laws passed at the preceding session and those enacted at the session then sitting, should be in force until the end of the next session and no longer, unless before repealed or amended. The cause for this is not apparent. It would seem that an act should naturally remain in force until repealed.

By the patent to Penn, all laws were required to be submitted to the King's Council within five years from their enactment. If not disapproved within six months from their submission, they continued to be of full force and effect, otherwise they became void.

During Fletcher's administration in 1693 new laws were passed to

[36] *Ibid*, p. 177.

take the place of most of the foregoing acts, and they and all other laws passed prior to that year were then abrogated by William and Mary. Most, if not all, of the new laws then enacted were superseded by similar acts passed in 1700, and these in turn were mostly disapproved in 1705 and similarly superseded. The history of the legislation of the province was made up of the enactment of laws which remained in force for a few years, their disallowance in England, their re-enactment in the same or an altered form, their disapproval in turn, and so on indefinitely. The labors of the legislative Sisyphus were never ended.

The provincials finally learned the art of holding their laws as long as possible within the five years limit, before presenting them to the King's Council for approval, thus keeping them in force for a certain time before they could be disallowed.

CHAPTER IX.

THE JUDICIARY IN 1685.

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We find Pennsylvania well established in 1685, with a charter or constitution, certain fundamental laws in the nature of a bill of rights, a legislative body, a code of laws and a judiciary, with laws established for legal proceedings. At the head of the Judiciary was the Provincial Council. Its duties were executive, legislative and judicial, but we have here to do only with its judicial duties and with such executive functions as relate to the appointment of judges and court officers, and the regulation of the courts.

Under the commission from Penn, left with it on his departure for England, authorizing it to perform all acts of government in his place, the Council had power, agreeably to his charter to the province, to erect from time to time standing courts of justice, and to appoint judges and court officers, under the power conferred by the patent to Penn. It does not appear that either Penn or his Council ever exercised the right of constituting courts, except at the beginning of his government, but all courts were constituted and their jurisdictions defined by acts of the General Assembly. All sheriffs, county attorneys and other officers were, however, appointed by Council as Penn's representatives.

The Council not only appointed judges but exercised a supervision over the inferior courts. The county court of Philadelphia having rendered a judgment in a cause concerning a title of land in Bucks county, the Council holds that:

Ye Law saith That Causes shall be first Tryed where they arise, It is ye Opinion of this board that ye apeal Lyes not Legally nor regularly before us, and therefore doe refer ye Business to the proper County Court, and doe fine ye County Court of Philadelphia forty pounds for giving ye said Judgment against Law.[1]

It having been reported to Council by a member thereof that Francis Carnewell, a magistrate of Sussex county, was a "person of Ill fame," he was ordered to be suspended by the Sussex court until he appear at Council to clear himself of what is laid to his charge.[2]

On the petition of a widow against Griffith Jones, setting forth that Jones, having obtained an execution against the estate of her deceased husband, insisted on having execution on the plantation on which she resided with her children, though there was sufficient in other places to satisfy the execution, Council sent for the sheriff of Kent county and in-

[1]Col. Rec., vol. 1, p. 76.
[2]*Ibid*, vol. 1, p. 186.

structed him that if there were other effects to satisfy the execution it ought not to be served on the plantation of the widow.[3]

On September 21, 1686, "the humble Lamentation of Jann Van Cullen" was read in Council, "setting forth the abuses of Charles Ashcome." It appears from a later entry that the sheriff of Chester county had taken from him two milch cows, "which was all he and his wife & seaven small children had to live upon, himselfe being sixty and six years of age, and past his Labour to work for more." It was ordered that his cattle be returned and the difference between him and Charles Ashcome, the execution creditor, be valued by four men, and that if they cannot agree that it be left to be decided by the Governor. But this order was not carried out, because we find him petitioning again on April 4, 1687, when it is ordered that the sheriff of Chester county appear before Council to answer the complaint and to stay execution meanwhile, and if the cattle had been taken away that they be returned or carefully looked after. He is also required to make a return of the former order. On April 11th, the sheriff appears and says "as to this ordr my return is, I doe abide by my Lawfull serving of the Execution upon the Milch cattle of Jno Vanculin in the case of Charles Ashcome." And here the matter seems to have been allowed to drop.[4]

On the same day Jacob Vandevere complained of the "illegal and un-Christian" serving of an execution on his goods and turning him and his family out of doors, not leaving them anything to "susteine nature," whereupon a copy of his petition was ordered sent to the sheriff and another to the clerk of New Castle county requiring them to appear before the Council to answer the same.[5]

On September 24, 1685, the petition of Peter Gronendike was read stating that several persons had obtained judgments in the Sussex county courts against the estate of Peter Verhoof, deceased, without summoning the petitioner, who was the executor of Verhoof. "The Council considering the complaint do charge the proceedings a grievance, and not justifiable by our laws, though it hath been the practice of the lower counties to grant judgments against the estates of deceased persons without precedent summons, only the parties petitioning the court and proving their debt was sufficient."[6]

On April 22, 1685, the master of the ship *Wrenn* presented a petition alleging that certain seamen belonging to his ship charged with stealing a hog had been sentenced by the New Castle court to pay ten pounds seven shillings and, in addition, two of them to be whipped. He asks that execution be suspended, the sentence of the court being severe and contrary to law. Sentence was ordered to be suspended until the Provincial Judges should return to Philadelphia, and the Council has had an opporunity to confer with them.[7] Afterwards, on July 4th, the fine was reduced to twen-

[3] *Ibid*, vol. 1, p. 173.
[4] *Ibid*, vol. 1, pp. 191, 200, 201.
[5] *Ibid*, vol. 1, p. 173.
[6] *Ibid*, vol. 1, p. 157.
[7] *Ibid*, vol. 1, p. 132.

ty-three shillings, and the sentence of imprisonment against three of the sailors was remitted, the master having evidently been misinformed as to the judgment of the Provincial Court.[8]

On October 25, 1684, the Provincial Council passed the following resolution:

A Provll Court being by Law and under the great Seale by ye Propor & Govr Established, it was Judged advisable and Expedient that for the future the Provll Councill may draw up and Endeavour to ascertaine the Legall Bounds and Jurisdictions of the Respective Courts of Judicature in this Province & Territories, Least through the Inadvertency, Indiscretion or unskillfulness of any Persons Judicially Commissionated, in the Discharge of their Duty, they, or any of them may act Eregularly, to the Disatisfaction of ye Govermt, Disreputation to themselves, to ye Vacuating and Insecurity of such acts & Judgment of ye said Courts, & Consequently by the Intrenching of one Court upon ye Matters Cognisable by another Judicature, Annimositys, Disrespect and Confusion may be introduced.[9]

It does not appear what action was taken as the result of the passage of this resolution.

On April 4, 1685, the Council ordered William Clark, one of its members, to prepare forms of indictments and summons.[10]

After the establishment of the Provincial Court the Council frequently allowed appeals to it in cases where the same had been denied by the lower courts or not entertained by the Appellate Court.

On April 11, 1688, Abraham Man complained of the severe and irregular proceedings of the court of New Castle county which gave a judgment against him in his absence from the Province, he being ignorant of the institution of the suit. The court below granted him an appeal to the Provincial Court, but the judges of that tribunal refused to entertain it, thinking it came irregularly before them. Ordered, that the same cause of action be heard over and determined according to law at the next Provincial Court to be held in Philadelphia.[11]

An instance of the law's delay appears in the case of Dirck Johnson *alias* Clanson, whose petition to Council sets out that he, his wife and sister, stand committed in close prison upon suspicion of murder, where they had continued twelve months without the benefit of being brought to trial. It was ordered that a commission of oyer and terminer do issue for the trial of the petitioners.[12] This commission tried Johnson and promptly convicted him, whereupon he was hanged.[13]

On April 12, 1700, the petition of Luke Manlow was read, setting forth that he was presented in Kent county for feloniously taking a heifer and was committed and tried without his evidence, denied an imparlance

[8] *Ibid,* vol. 1, p. 145.
[9] *Ibid,* vol. 1, p. 124.
[10] *Ibid,* vol. 1, p. 128.
[11] *Ibid,* vol. 1, p. 220.
[12] *Ibid,* vol. 1, p. 367.
[13] *Ibid,* vol. 1, pp. 378-382.

to the next court and cast as a felon; that he honestly purchased the heifer and now has evidence to prove it, and requests a stay of execution and that the case be given a rehearing in Kent county, which was granted.[14]

The sheriff of New Castle county arrested one Thomas Collins at the suit of William Houston and took a bond for the appearance of Collins at court. Collins did not appear, and Houston had judgment against him. By order of court the bail bond was assigned to Houston, who brought suit on it against George Lamb, one of the sureties. The court held that the bond was void because of certain erasures and interlineations. Houston then sued the sheriff and lost both below and above, whereupon he petitioned the Council for relief. They gave it as their opinion that he might sue the surety again on said bond, "the same not being legally vacted by the said judgment." He did sue the bail again, who pleaded the former suit in bar; Houston lost again, and an appeal to the Provincial Court was refused him. He then asked that Council grant him such an appeal, "also setting forth yt as forasmuch as it appears not by the record whether the razures wer befor or after the sealing and deliverie of the bond, nor whether it was razed or interlined in anie essential part, neither was the razure tried by a Jurie as ye per. is advised it ought to have been, and inasmuch as the same justices that allowed the assignment of the bail bond did vacate the same and afterwards discontinued the ptrs. action and refused him an appeal qrby hee is Left remedie less." It was ordered that the petitioner might de novo enter his action upon the bail bond against George Lamb, and that the validity or invalidity of the bond as to the razures or interlineations be tried by a jury in the county of New Castle.[15]

The Council not only looked after the reputations of the county courts, but after that of its own members as well, and even of those of the General Assembly. On one occasion, Luke Watson, a member of Council, was suspended until he cleared him of a charge of immorality on account of which he had been bound over to keep the peace. On another occasion they refused to seat Major William Dyer[16] as a member, because he had not administered the office of King's Collector of Customs with faithfulness and a good report.[17]

On May 15, 1684, Council appointed a committee to communicate with the Assembly with instructions to reprove Henry Stretcher, a member of that body, with having been "disordered in drink."[18]

March 31, 1790: "President Lloyd informing ye board that he had Received a letter from a very Credible person, a justice of ye peace in Sussex County, which gave an account of the Deboachery of sd Clifton [a member of Council elect] and in particular yt ye sd Clifton in his Dis-

[14] *Ibid*, vol. 1, p. 579.
[15] *Ibid*, vol. 1, p. 577.
[16] *Ibid*, vol. 1, p. 176.
[17] *Ibid*, vol. 1, pp. 197-198.
[18] *Ibid*, vol. 1, p. 108.

course should use this Expression: that he was not for Yea and Nay, but God Damn You; ye which words ye said Clifton Denying, ye Board Debated ye matter, but haveing only paper evidence, Resolved that He be admitted at present, but upon further proof made of ye ffact Immediately dismissed; and he was admitted accordingly."[19]

Until the passage of the Act of 1684, constituting the Provincial Court, the Council had exclusive original jurisdiction of murder, manslaughter, and other heinous and enormous crimes. That act gave the new court original jurisdiction of all criminal actions which the county courts could not determine. The Act of 1685, reorganizing said court, expressly gives it exclusive jurisdiction of treason, murder, manslaughter, and other heinous and enormous crimes. Where the Council exercised jurisdiction in such cases, it impanelled a grand jury and proceeded by indictment, the Attorney General prosecuting. Sometimes, however, it issued commissions in the nature of commissions of oyer and terminer, for the trial of such causes.

On the 10th of March, 1685, five persons were appointed a special commission to hear and determine all heinous and enormous crimes that should be brought before them in the county of Bucks in a court there to be held on the 10th instant by them. The commission was appointed on information that David Davis, of Bucks county, was under suspicion of killing his servant.[20] A commission was also constituted on July 9, 1685, to try John Curtis, a justice of the peace of Kent county, accused of treason.[21] In this case a deputy attorney general appears to have been commissioned to prosecute, instead of the county attorney.[22]

But two of these heinous offenses appear to have been tried before the Council. One was the case of Margaret Matson, who was indicted for witchcraft, tried on February 27, 1683. The proceedings in this case were as follows:

Henry Drystreet attested, Saith he was tould 20 years agoe, that the prisoner at the Barr was a witch, & that severall Cows were bewitcht by her; also, that James Sauderling's mother tould him that she bewitcht her cow, but afterwards said it was a mistake, and that her Cow should doe well againe, for it was not her Cow but an Other Person's that should dye.

Charles Ashcom attested, saith that Anthony's Wife being asked why she sould her Cattle; was because her mother had Bewitchy them, having taken the Witchcraft of Hendrick's Cattle, and put it on their Oxon; she myght Keep but noe Other Cattle, and also that one night the Daughter of ye Prisoner called him up hastely, and when he came she sayd there was a great Light but Just before, and an Old woman with a Knife in her hand at ye Bedd's feet, and therefore shee cryed out and desired Jno. Symcock to take away his Calves, or Else she would send them to Hell.

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[19] *Ibid,* vol. 1, p. 323.
[20] *Ibid,* vol. 1, p. 164.
[21] *Ibid,* vol. 1, p. 161.
[22] *Ibid,* vol. 1, pp. 163-164.

James Claypoole attested Interpritor betwixt the Propor and the Prisoner.

The affidavid of Jno. Vanculin read, Charles Ashcom being a Witness to it.

Annakey Coolin attested, saith her husband tooke the Heart of a Calfe that Dyed, as they thought, by Witchcraft, and Boyled it, whereupon the Prisoner at ye Barr came in and asked them what they were doing; they said boyling of flesh; she said they had better they had Boyled the Bones, with severall other unseemly Expressions.

Margaret Mattson saith that she Vallues not Drystreet's Evidence; but if Sanderlin's mother had come, she would have answered her; also denyeth Charles Ashcom's Attestation at her Soul, and Saith where is my Daughter; let her come and say so.

Annakey Cooling's attestation concerning the Gees, she denyeth, saying she was never out of her Conoo, and also that she never said any sich things Concerning the Calve's heart.

Jno. Cock attested, sayth he Knows nothing of the matter.

Tho: Balding's attestation was read, and Tho: Bracy attested, saith it is a True coppy.

The Prisoner denyeth all things, and saith that ye Witnesses speake only by hear say.

After wch ye Govr gave the jury their Charge concerning ye Prisoner at ye Barr.

The jury went forth, and upon their Returne Brought her in Guilty of haveing the Common fame of a witch, but not guilty in manner and forme as Shee stands Indicted.

Neels Mattson and Antho. Neelson Enters into a Recognizance of fifty pounds apiece, for the good behavior of Margaret Matson for six month. (1 Col. Ree, p. 95.)

Margaret Matson lived near the mouth of Crum Creek in Chester county, was in good circumstances and for aught that is known to the contrary was quite as respectable as her accusers.[23]

The reader is not to infer from the acquittal of Margaret Matson that witchcraft was not believed in in Pennsylvania at this time. Pennsylvanians have a smug way of referring to the "burning of the witches" at Salem—they *will* have it that the so-called witches were burned and not hung[24]—as something that could not have happened among enlightened people like their ancestors. It would be absurd to suppose that the Pennsylvanians were free from a delusion which existed universally at that time. If Sir William Blackstone could write in 1765 "To deny the possibility, nay, actual existence of witchcraft and sorcery is at once flatly to contradict the revealed Word of God in various passages both of the old and new testament," illiterate persons could not be expected to be free from a belief in witchcraft eighty years before that date. As a matter of

[23] Smith's "History of Delaware County," p. 152.

[24] While this work was in preparation, the district attorney of a large eastern county, in a burst of impassioned eloquence, cried:—"Under such license as he preaches, women were burned at Salem's stakes. Oh, religion, what crimes are committed in thy name!"

fact, hexing and powwowing, which are akin to witchcraft, are still very sincerely believed in by many inhabitants of some of the eastern counties. Thirty-three years after the trial of Margaret Matson, and thirty years after the beginning of the Salem Witchcraft horror, the belief in Pennsylvania in witchcraft was evidenced by the passage of legislation on the subject.

The Act of May 31, 1718, Statutes at Large, Volume 3, page 203, provided by its eighth section as follows: "That another statute made in the first year of the reign of King James the First, chapter 12, entitled 'An act against conjuration, witchcraft and dealing with evil and wicked spirits, shall be duly put in execution in this province with entire force and effect as if the same were here repeated and enacted." The said Statute of 1 James I, chapter 12, repeals the statute 5 Eliz., c. 16, relating to the same subject, and enacts as follows:

And for the better restraining the said offences and more severe punishing the same, be it further enacted by the authority aforesaid that if any person or persons after the Feast of Saint Michael the Archangel next coming shall use, practice or exercise any invocation or conjuration of any evil and wicked spirit; (2) or shall consult, covenant with, entertain, employ, feed or reward any evil and wicked spirit, to or for any intent or purpose; (3) or take up any dead man, woman or child, out of her or his grave or any other place where the dead body resteth, or the skin, bone or any other part of any dead person, to be employed or used in any manner of witchcraft, sorcery, charm or enchantment; (4) or shall use, practice, or exercise any witchcraft, enchantment, charm or sorcery; (5) whereby any person shall be killed, destroyed, wasted, consumed, pined or lamed in his or her body or any part thereof; (6) that then every such offender or offenders, their aides, abettors and counsellors, being of any of the said offenses duly and lawfully convicted and attainted shall suffer pains of death as a felon or felons; (7) and shall lose the benefit and privilege of clergy and sanctuary.

The Act of May 31, 1718, stood upon the statute books until repealed by the Act of September 23, 1791, 14 Statutes at Large, page 133. In the year following the passage of this act, the commission and instructions issued by Governor Keith to the justices of Chester county on November 24, 1719, required the justices to inquire, among other offenses, of "Witchcrafts, Inchantments, Sorceries, Magicks Arts."[25]

Two other cases of witchcraft are of record.

John Roman and two of his sons, residing at Chichester, were reported to the monthly meeting of Friends, on December 9, 1695, to be students of astrology and other forbidden arts. Two Friends were appointed to wait upon them and bid them to attend the next monthly meeting. They said they would desist from their investigations if it could be shown wherein they were wrong. The matter came before the Concord Meeting several times and, finally, before the Chester Quarterly Meeting, where they were charged with practicing rhabdomacy, or con-

[25]Charter and Laws, p. 382.

sulting with a staff and similar things. At last the grand jury presented Robert Roman, one of the sons, for that offense, and also "Hidon's Temple of Wisdom," which teaches geomancy, and Scot's "Discovery of Witchcraft," and Cornelius Aggrippa's "Necromancy," books supposed to have been used by the Romans. The justices ordered that as many of these as could be found should be brought to court. It does not appear whether any of the books were so delivered, but Robert Roman was fined five pounds and costs, and, on his promising that he would never more practice such arts, he was discharged.[26]

The following is from the Minutes of Council of May 21st, 1701:

A Petition of Robt. Guard amd his Wife being read, 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, One John Richards, Butcher, and his Wife Ann, charged the Petitrs with Witchcraft, & as being the Authors of the Said Mischief; and therefore, Desire their Accusers might be sent for, in Order either to prove their Charge, or that they might be acquitted, they Suffering much in their Reputation, & by that means in their Trade.

Ordered, that the said John & Ann Richards be sent for; who appearing, the matter was inquiring into, & being found trifling, was Dismissed.[27]

The other such case tried by the Colonial Council was that of Charles Pickering and others, for coining "Spanish bitts and Boston money," alloyed with too large a proportion of copper. They were found guilty, and Pickering, being the principal in the fraud, was sentenced by the court to make full satisfaction, in good and current money, to every person that should, within a month, bring in any of this base and counterfeit coin, which was to be called in by proclamation, and the money brought in, melted down and given to him. He was fined £40 towards building a court house, and required to find security for his "good abearance." His accomplices having confessed their guilt, one of them was fined £10, and the other, a servant, was sentenced to sit an hour in the stocks.[28]

It must be remembered that the offence of the defendants did not come within the English statute against coining. Until a comparatively recent date there was no statute punishing the counterfeiting of the moneys of foreign states. In 1691, however, Charles Butler was convicted of making and passing counterfeit pieces of eight and sentenced to have all his goods forfeited and to be imprisoned for life.[29]

The Council also exercised original jurisdiction in all cases of Admiralty and of the enforcement of the Navigation Laws, until the appointment of Governor Fletcher, in 1693, who was vested by his commission with the powers of a Vice-Admiral and authority to constitute Courts

[26] Ashmead's "Hist. of Del. Co.," p. 230; Smith's "Hist. of Del. Co.," p. 192.
[27] Col. Rec., vol. 2, p. 20.
[28] *Ibid*, vol. 1, pp. 85, 87.
[29] *Ibid*, vol. 1, pp. 386.

of Admiralty for the Province of Pennsylvania and "New Castle County." Under said authority he commissioned William Markham, vice-admiral.[30] His jurisdiction in admiralty was superseded in turn by the constitution of a Court of Admiralty by the Crown in 1697.

Many cases of Admiralty appear in the minutes of Council. On October 14, 1684, the ship *Harp* from London was forfeited under the Navigation Laws as "an unfree ship." Her master produced a "past," whatever that may have been, under the hands of the Commissioners of Navigation of London and the seal of the Custom House, but could not produce a clearance from the Admiralty Office at Darby House, the same having been refused by that office. Accordingly the ship was forfeited, and the same day her tackle, apparel and ammunition having been appraised by commissioners appointed for that purpose, she was sold "by the Inch of Candle" for fifty-nine pounds ten shillings and six pence, which must have been a low price for a fully equipped ocean-going ship, even in those days.[31]

Another case of the condemnation of an "unfree ship" occurred on November 21, 1683. "A Certaine Ship called the Marry of Southampton," appeared from the "Goulden Breif" produced by one of the owners, and from the "Ingenious acknowledgment of the Master and some of ye Owners," not to be the "Marry of Southampton" at all, but the "Alexander of Inverness," of the Kingdom of Scotland, "a Scottish Bottom and noe ways made ffree to trade to any of his Majesty's Plantations in America and so under ye forfeiture Expressed in the Laws of Navigation," wherefore she was condemned to be forfeited. What kind of a document was a "Goulden Breif?"[32]

A number of the crew of the ship *Friends Adventure,* on March 20, 1683, complained that the master of the ship refused to pay the wages agreed upon. After hearing, it was ordered that the seamen have six months' pay amd five pounds in adddition.[33]

We get some idea of the brutality of the masters of vessels in those days from the case of James Kilner, master of the *Levee of Liverpool,* who was complained of for ill treatment of the passengers and crew of his ship. It appeared that he had beaten up four of the crew, kicking one of them in the side and "run his fingers up his nose." He had not even spared the chambermaid, but had kicked her also. His conduct was evidently not considered at all unusual, though perhaps not commendable, as he was dismissed with a reprimand and told "to make up the business" with the passengers.[34]

Notwithstanding the constitution of Orphans Courts, the Council appears to have frequently exercised original jurisdiction over such matters as came within the jurisdiction of such courts. Sometimes the extraor-

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[30] *Ibid,* vol. 1, p. 352.
[31] *Ibid,* vol. 1, p. 122.
[32] *Ibid,* vol. 1, pp. 90, 91.
[33] *Ibid,* vol. 1, pp. 64, 73.
[34] *Ibid,* vol. 1, pp. 79-80.

dinary nature of a case is given as the excuse for taking jurisdiction of it, but ordinarily not. Such cases appear frequently in Council minutes.

We now come to the appellate jurisdiction of the Council. By the Act of 1684, Chapter 58, being the first act constituting a Provincial Court, that court was given jurisdiction to hear and determine all appeals from inferior courts. No appeal was given from the Provincial Court to Council, but, as we have seen, the Council sometimes entertained such appeals. With the passage of the act constituting said court, therefore, the appellate jurisdiction proper of the Council ceased. But even after the taking away of the appellate power of the Council by the constitution of the Provincial Court, they resumed the hearing of such appeals for a time, as appears from the following from the minutes of a meeting held on the twenty-second of September, 1685:

Whereas, James Harrison, James Claypoole & Arthur Cook, were nominated by ye Council ye 14th Inst, to be Provll Judges, & Orders given to prepare a Commission to Authorize them to act thereby on ye 24th Inst., and ye 24th of ye next second month, but James Harrison, & Arthur Cook being informed thereof, Desired Ernestly to be Excused therein, and declared their utter Indisposedness thereunto; and James Claypoole being prevented by great Illness from serving therein, ye Councill, upon further consideration have, in Order to answer ye due Expectation of such persons who are concerned in appeals, Unanimously agreed to show their Readiness & Willingness in Receiving such appeals wch are to be brought into ye Secretary's Office, & to give their further attendance in Councill to Deside differences wch are to be determined ye 24th Inst, being ye day the Provll Court was appointed to Sitt.[36]

No other judges of the Provincial Court appear to have been commissioned until the 31st day of March, 1686, the Council hearing and determining meanwhile all appeals which should properly have come before said court. Some of these appeals appear to have been heard and determined by agreement of the parties, but it does not so appear in a number of cases, and process was issued as if the jurisdiction of that body were unquestioned. It is not known why other judges were not appointed on the failure of the persons appointed on September 22, 1685, to accept their commissions.

An appeal lay from the judgments of Council, and afterwards from the judgments of the Provincial Court, to the King in Council. By the King's patent to Penn it was provided that there should be reserved to the Crown: "The receiving, hearing and determining of the appeal and appeals of all or any person or persons, of, in or belonging to the territories aforesaid or touching any judgment to be there made or given."[37] The expense of such appeals was, however, so great that few were taken, or, if taken, perfected.

An appeal to the King in Council was allowed by the Provincial

[36] *Ibid*, vol. 1, pp. 83, 94.
[37] *Ibid*, vol. 1, p. 156.
[38] Charter and Laws of Pennsylvania, p. 84.

Court in the case of Samuel Carpenter against the Society of Free Traders and James Claypoole, upon security given, which security not having been given, execution was issued against the defendants. Claypoole desired the Council to take the security, but that body refused on the ground that it should be given out of the court the action was tried in.[38]

The commission given to Governor Fletcher provided:

And Whereas, wee judge it necessary that all our Subjects may have Liberty to appeale to our Royall person in Civill Causes that may deserve the same, Wee have thereby further signified our pleasure, that if either party shall not rest Satisfied with the judgment or Sentence of the Superior Courts of our said province, They may then appeale unto us in Our privy Councill, provided the matter in difference exceed the reall value and Sum of three hundred pounds Sterling, and that such appeale be made within one ffortnight after sentence, and that security be Likewise duely given by the appellant, to answer such charges as shall be awarded in Case the first sentence shall be confirmed: And provided also, that execution be not suspended by reason of any such appeale unto us.[39]

In a report of the Lords Commissioners of Trade and Plantations to the House of Commons made on March 27, 1701, they say, referring to the proprietary colonies in America:

That divers of them have denied appeals to his Majesty in Council, by which not only the inhabitants of those colonies, but others his Majesty's subjects are deprived of that benefit enjoyed in the plantations under his Majesty's immediate government, and the parties aggrieved without remedy from the illegal proceedings of their courts.[40]

The Judiciary Act of 1701[41] provided for an appeal to the King, to be prosecuted within twelve months after the filing of the appeal, on giving bond for double the amount involved. There was no restriction as to the amount in controversy.

The first Provincial Court was created by the aforesaid Act of 1684, with five provincial judges to be appointed by the Governor, to sit twice every year in the town of Philadelphia, two judges at least in each fall and spring to go into each county and hold a Provincial Court. The court had jurisdiction to hear and determine all appeals from inferior courts, and, besides its appellate power, to try all cases involving titles of land and all causes either criminal or civil both in law or equity not determinable by the respective county courts. On August 4, 1684, the following judges were commissioned: Nicholas Moore, William Welch, William Wood, Robert Turner, John Eckley.[42]

Penn had intended that his cousin, William Crispin, should be Chief Justice, but Crispin appears to have died either before sailing from Eng-

[38]Col. Rec., vol. 1, p. 146.
[39]*Ibid*, vol. 1, p. 354.
[40]Penn and Logan Correspondence, vol. 2, p. 379.
[41]Col. Rec., vol. 1, p. 314.
[42]Col. Rec., vol. 1, p. 174.

land or shortly after his arrival. At any rate his commission, if any were ever issued to him, never took effect.[43]

In the next year, 1685, the court was reconstituted, with three instead of five judges, and its exclusive jurisdiction in cases involving the titles of land was taken away. All actions civil or criminal whatsoever excepting treason, murder, manslaughter, and other heinous and enormous crimes, were to be tried in the respective county courts, which were required to be held quarterly and oftener if necessary. From the judgments in such cases, appeals might be allowed by the justices to the Provincial Court to be held in Philadelphia, the judges of which are to hear and determine all of the heinous crimes above enumerated in the respective county courts where the said crimes were committed. The original jurisdiction of the Provincial Court was therefore now confined to the trial of such heinous crimes. The court went upon circuit only to try such crimes. The first judges were Arthur Cooke, William Clarke and John Cann, commissioned on March 31, 1686.[44]

The Provincial Court languished at its inception. The compensation awarded the judges was totally inadequate to the dignity of the court.[45] The term of office was frequently short, sometimes limited to a single session,[46] and the attendance upon circuits must have been expensive and irksome. We have already seen that in one instance all three of the persons nominated for judges declined the office, and similar instances of the kind occurred later on. In 1690 the justices but recently appointed were superseded because of their neglect and unwillingness to do their duties in the several counties.[47] Of the proceedings of this court, nothing is known. When we consider that the records of the little river courts at Upland and New Castle have come down to us, it is almost incomprehensible that the records of this important tribunal should have been utterly lost, but such is the case.

Court records seem to have been shamefully neglected down to a comparatively recent time. It appears from Brown's "Forum" that as late as about the middle of the nineteenth century many of the early records of the Philadelphia courts, both civil and criminal, were delivered over by the county commissioners to the janitor of the public buildings, who finding them useful to kindle the fires in his court room, applied most of them to that purpose. Luckily a member of the bar happening to hear of the work of this modern Omar, succeeded in rescuing a few of them which were bound in a volume, and are now in possession of the Historical Society of Pennsylvania.

During the administration of Governor Blackwell, on February 21, 1689, David Lloyd, clerk of the Provincial Court and also deputy to the Master of the Rolls and clerk of the County Court of Philadelphia, was

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[43] Lewis' "Courts of Penna.," 1 Rep. Pa. St. Bar Assn., p. 371.
[44] Col. Rec., vol. 1, p. 169.
[45] Charter and Laws, p. 298.
[46] Col. Rec., vol. 1, p. 331.
[47] *Ibid*, vol. 1, p. 344.

required to attend Council and to bring with him the original records of the proceedings of the Provincial Court. Having appeared and being asked to produce the original records, he asked "In what case?" The Governor told him, "all that had happened since his having that Imployment of Clark of the Provll Court; he answered, they were not recorded otherwise than in a quire of paper." He was desired to produce them, in whatever form they were, which he refused to do, for which he was deposed from office.[48]

Those proceedings were, however, probably similar to those of the county courts. Eight days intervened between judgment and the award of execution, and an appeal lay in accordance with the provisions of the patent to Penn from all decisions to the Privy Council in England.[49]

We now come to the county courts. As we have seen, Penn at first continued the courts which had existed during the administration of the Duke of York, with the same jurisdiction which those courts had exercised. Soon after, when the several counties were erected, he must have constituted a court in each county, which at first administered the Duke's Laws, and afterwards, until 1683, those laws except as they were superseded by the acts passed at the session of the Assembly in December, 1682, but no act was passed at that session conferring any jurisdiction upon any court.

At the next session, in 1683, the county courts are first mentioned. By Chapter LXVIII it was provided that a grand inquest should be held twice in every respective county court. By Chapter LXX it was provided that all actions of debt, account, slander and trespass should be tried by the county courts, with an appeal to the Governor and Council in all cases involving more than twelve pounds. Apparently their civil jurisdiction was confined by this act to actions of the kind named. For their criminal jurisdiction we must hark back to the Duke of York's Laws, which conferred upon the predecessors of these courts jurisdiction in all criminal cases, except capital offenses, of which the Council now took original jurisdiction.

When the Provincial Court was constituted by Chapter CLVIII of the Acts of 1684, it was given original jurisdiction of trials of titles of land "and all causes as well Criminall as Civill, both in Law and Equity, not determinable by the respective County Courts." It would appear from this that the county courts had been strictly limited in their jurisdiction to the determination of only civil actions of the nature above named, and that up to that time the Council had exercised jurisdiction in all other civil actions.

When the Provincial Court was reorganized, however, by Chapter CLXXXII of the laws of 1685, it was provided that all civil actions of whatsoever nature, and all criminal actions, except treason, murder, manslaughter, and other heinous and enormous crimes, should be tried in

[48] *Ibid*, vol. 1, p. 245.
[49] Lewis' "Courts of Penna.," 1 Rep. Penna. Bar. Assn., p. 378.

the first instance in the respective county courts. By this act appeals lay to the Provincial Court without regard to the amount involved. That court was then left with original jurisdiction only in the case of heinous crimes.

By Chapter LXXVII of the Acts of 1683, the judges of the several county courts were constituted an Orphans' Court to sit twice every year 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."[50] But their jurisdiction was not confined within that limit. They had control over the management and distribution of decedents' estates, and could order a sale of their real property for the discharging of their debts, with the approval of the Governor and Council. They appointed guardians of minors and regulated their accounts, but legatees were relegated for the prosecution of their claims to the courts of law. The duties imposed by them on executors and administrators as to the collection of assets, filing of the inventory and distributing estates were much the same as an executor and administrator now has to perform. A petition praying for appropriate relief was presented, and the remainder of the proceedings were adapted to the requirements of the case.[51] The early administration of this court was not satisfactory, and as we have seen the Provincial Council took jurisdiction in many cases which should have been determined by the Orphans' Courts.

The number of the justices of the county courts was not fixed, and differed at the whim of the Council. Sometimes justices of the peace were commissioned for the whole province and territories.[52] The Proprietary and the members of Council and Judges of the Provincial Court were all ex-officio justices of the peace, and some of them sometimes sat in the county courts. One of the justices officiated as president of each court, but was not commissioned for that office. None of these justices was learned in the law, nor were the members of the Provincial Court. Not until many years afterwards were lawyers appointed to the bench.

By Chapter CLVI of the Laws of 1684 it was provided that "each quarter sessions be as well a Court of Equity as Law, concerning any Judgment given in Cases by Law Capable of Triall In the respective County Sessions and Courts." Mr. Lewis, in his "Courts of Pennsylvania," states:

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 requirements 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

[50]Charter and Laws, p. 131. The first Orphans' Court to be held *under that name* in Chester County, sat in October, 1687: Smith's "Hist. of Del. Co.," p. 164.

[51]Lewis' Courts of Penna., 1 Pa. Bar Assn. Rep., p. 364.

[52]William Welch was given a "General Commission of the Peace for the Province and Territories," May 29, 1684, Col. Rec., Vol. 1, p. 112. William Salway was afterwards similarly commissioned: Col. Rec., vol. 1, p. 370.

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. Such a course of proceedings, however, was eminently unsatisfactory to the people. The assembly, therefore, in 1687, 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.[53]

On April 3, 1685, Council ordered a bill to be drawn up providing that the word "equity" be left out in the law relative to county courts,[54] but the bill did not pass the House. A similar bill passed first reading in that body in 1690,[55] but got no further.

At the Session of 1694 the Assembly presented a remonstrance to the Lieutenant Governor and Council in which it protested:

That the late Law for Appeals, which gives Liberty to appeal both in Law and Equity, whereby Judges and Justices have too great Liberty to destroy or make void the Verdicts of Juries, without due Care be taken; wherefore we desire the Judges and Justices may receive Instructions and Caution from you not a decree anything in Equity that may make void the Verdict of Juries or Judgments before given in Law in the same Cause.[56]

Attorneys for Kent and Sussex counties were appointed on April 14, 1686.[57] It does not appear what their duties were, nor whether attorneys were appointed for other counties. They were not presumably attorneys at law, but probably, like most of the attorneys in those days, were attorneys-in-fact.

Sometimes the county courts refused to allow appeals from their judgments to the Provincial Court. In such cases the practice was to petition the Council for an order requiring the court below to grant the appeal.[58]

An Act of 1684, Chapter CIXVIII, provided that every county court should appoint at least three discreet persons to be appraisers "in cases where there shall be need," who were to receive two-pence in the pound of the goods appraised, no goods to be sold upon execution before an appraisement made by them or any two of them, nor before the expiration of seven days after such appraisement, sales to be made openly in a public

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[53]Lewis' "Courts of Penna.," 1 Pa. Bar Assn. Rep., pp. 358-359.
In the record of a sitting of a court of equity in Chester County in 1686, the justices are styled "commissioners": Smith's "Hist. of Del. Co.," p. 161.

[54]Col. Rec., vol. 1, p. 127.

[55]Votes in Assembly, vol. 1, p. 57.

[56]*Ibid*, vol. 1, p. 77.

[57]Col. Rec., vol. 1, p. 174. The first appearance of an attorney general for the County of Chester was in 1709, although prior to that time an attorney had occasionally represented the town in a particular case: Smith's "Hist. of Del. Co.," p. 217.

[58]*Ibid*, vol. 1, pp. 207, 228.

way, the surplus to be returned by the officer to the owner, if there were any.

On April 2nd, 1686, Council ordered that there should be ten days' respite between judgment given in the county courts in all civil causes and the signing of execution therefor, and that in the Provincial Court execution shall not be served until eight days after judgment given.[59] The House ask this order to be revoked because of divers inconveniences having accrued thereby[60] to which the Council reply that they refer the same to the former practice and the discretion of the judges and justices of the several courts.[61]

The House also inquired, on the same date, May 11, 1687, whether the laws relating to goods taken by execution are to be construed that the creditor shall be obliged to take the goods at the rate appraised, if they will not advance higher at the public sale, and whether the appraisers are by law intended to be appraisers in other matters. To this the Council reply that if the goods do not advance higher in the public sale, they shall be paid to the creditor according to the appraisement.[62]

Besides their judicial functions, the county courts performed, like the old River Courts on the Delaware, many executive duties. They superintended the laying out of roads, registered the brands and marks of owners of cattle, exercised supervision over bond servants, levied the county taxes, entered into contracts for the erection of public buildings, supervised the erection of party fences and paid bounties on wolves' heads from the county funds.

By proclamation of the Governor and Council issued on February 12, 1698, it was ordered that after the ensuing first of March, the justices of the peace of the several counties should nominate as many ordinary keepers and innholders within the respective counties as they are assured will keep order and discourage vice, the Governor promising to commission only those so approved by the justices,[63] and such courts and their successors had control over the licensing of liquor dealers continuously thereafter.

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[59] *Ibid*, vol. 1, p. 171.
[60] Votes in Assembly, vol. 1, p. 40.
[61] Col. Rec., vol. 1, p. 204.
[62] Votes in Assembly, vol. 1, p. 41.
[63] Proud's "History of Penna.," vol. 1, p. 419.

CHAPTER X.

PRACTICE IN THE EARLY COURTS—ATTORNEYS.

CHAPTER X.

Practice in the Early Courts—Attorneys.

There is no reason to presume that the practice of these courts, except as provided for by statute, varied in many respects from that which obtained in the courts which existed during the administration of the Duke of York, which the county courts had so recently superseded, except that there were now grand juries in criminal cases, and that trial juries consisted uniformly of twelve men, the agreement of all of whom was necessary to a verdict. The nature of the causes probably varied little if at all. Some of the former justices continued for a time to hold commissions in the county courts. Doubtless the names of the different kinds of civil actions were employed with more accuracy than they were used in the old courts at Upland and New Castle, but otherwise the proceedings must at first have been much the same.

The practice was regulated to a certain extent by the laws given in the preceding chapters. Two credible witnesses were necessary to judgment in all cases.[1] Witnesses, instead of being sworn, solemnly promised to speak the truth, the whole truth and nothing but the truth about the matter or thing in evidence[2] and so on. All pleadings and processes were required to be short and in English, and in an ordinary and plain character.[3] All trials were to be by twelve men. In criminal cases a grand jury of twenty-four was empanelled, of whom twelve must agree to the finding of a true bill.[4] Defendants were permitted to defalk debts due them by plaintiffs.[5] Real estate and goods were liable for the payment of debts, except where there was legal issue, and then all goods and one-half of the lands only, in case the lands were bought before the debts were contracted.[6]

Any person might appear in any court in his own way and either personally plead his cause or have it pleaded by some friend, if he were unable. The complaint was required to be filed fourteen days before trial, and the summons and a copy of the complaint to be served upon the defendant ten days before. Before any complaint was received, the complainant was required to solemnly declare in open court that he believed his cause to be just. If the defendant refused to appear, judgment was given by default.[7] Trial jurors were selected in the following manner: the sheriff wrote the names of all the freemen of the county upon small slips of paper which were then put in a hat and well shaken. A child then drew forty-eight slips out of the hat, the names upon which constituted the panel, and the first twelve not reasonably excepted to were impanelled as jurors.[8]

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[1]Charter and Laws, Chap. 36. [2]*Ibid*, Chap. 36. [3]*Ibid*, Chap. 37. [4]*Ibid*, Chap. 38. [5]*Ibid*, Chap. 41. [6]*Ibid*, Chap. 51. [7]*Ibid*, Chap. 56. [8]*Ibid*, Chap. 69.

The provision for mixed juries of white men and Indians, which, as we have seen, was contained in the "Concessions" issued by Penn in 1681, appears again in the laws enacted by the first Assembly, but it is not known that any such jury was ever impanelled.

Judges were not to sit in causes in which they were interested, nor in Council on the appeal, if the judge happened to be a member of that body.[9] Every county court might appoint at least three appraisers, and no goods were to be sold on execution unless these officers, or any two of them, had appraised them, and then the sale might not take place until seven days after the appraisement.[10] Justices were fineable not to exceed thirty shillings for failure to attend sessions,[11] and jurors ten shillings for not attending when summoned.[12]

All matters of debt or dues under forty shillings might be tried by any two justices of the county in which the cause arose, whose judgment was binding if approved by the county court.[13] Later, one justice might hear and determine such cases.[13*]

In every county three "peacemakers" were to be chosen, whose arbitrations were to be as valid as the judgments of the county courts.[14] It will be remembered that a similar board of official arbitrators was constituted by Van Stuyvesant in 1647. This institution did not last long. On May 10, 1692, the Assembly voted that the law relative to it was no longer in force.[15]

The following rules of the Court of Quarter Sessions of Philadelphia County are taken from Governor Pennypacker's "Pennsylvania Colonial Cases":

Ordered by this Court that it stand a continuing rule for this Court & the Courts succeeding that no person or persons whatsoever presume to speake in or Interrupt the said Court without Leave first asked and then given by the bench, and that whoever does in the Contrarie shall be fined, or otherwise punished, att the discretion of ye bench, from time to time.[16]

Whereas many disorders have hitherto been Committed in the Courts of this County, partlie through the ignorance and partlie through the negligence of otherwise (we hope) well meaning persons, which if Continued in wtout remedy may be a means to bring Magistracie (wch is God's ordinance) & Courts of Justice into Scorne and Contempte:

The Court of Justices have therefore thought fitt, for prevention of ye like for the future, to make these Rules of Court following as additional rules to ye former order of Counsell viz:

1. That the high sheriff, or his lawfull & approved of deputy, Clarke of ye Court, & Cryer, and at Least one of the Towne Constables (by turns) doe Constantlie attend ye Court att the precise hours of sitting, and yt they dept not the Court wtout Leave under penalty of a fine.

2. That no pson that is not Immediatlie Conserned in the busines in agitation presume to speake wtout Leave under peine of a fine.

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[9]Charter and Laws, Chap. 73. [10]*Ibid,* Chap. 73. [11]*Ibid,* Chap. 147. [12]*Ibid,* Chap. 177. [13] *Ibid,* Chap. 200. [14]*Ibid,* Chap. 65. [15]Votes in Assembly, 62.

[16]March 3, 1686. Pennypacker's "Penna. Colonial Cases," p. 90.

3. That plfs, defts, & all other psons speake directly to the point in question, & yt they put in their pleas in writing, (this being a Court of record) & that they forbeare reflections & recriminaons either on the Court, Juries, or on one another under penalty of a fine.

4. That all fines imposed upon any pson for totall absence, or untimely coming to Court, or for breach of these or tother rules of Court hereafter to be made, shall be leavied on ye pties goods & chattells by way of distres, & yt ye execution therefor be signed in open Court before the Rysing of such Court yt Imposed the fine: & yt thes & other orders, made or to be made, be hung up in a Table evry Court Day.[17]

In February, 1683, the following form of attestation to be taken by jurors was prescribed by Penn to the court at New Castle, at a session at which he was present in person:

You solemnly promis in ye presence of God & this Cort that you will justly try & deliver in yor verdict in all cases depending that shall be brought before you during this session of Court according to evidence and ye laws of this government, to ye best of yor understanding.[18]

This is interesting, because, as we shall see, the Quakers afterwards objected strenuously to the use of the name of God in the form of affirmation prescribed by act of Parliament.

Swearing by the name of God, Christ or Jesus was punished by a fine of five shillings or five days imprisonment at hard labor, the delinquent to be fed on bread and water only;[19] other swearing, by a fine of half a crown, or three days similar imprisonment.[20] Any one cursing himself or another or anything belonging to himself or another was fined five shillings or five days imprisonment.[21] For drunkenness the same penalty was imposed, doubled for the second offense. Drinking of healths was punished by a fine of five shillings.[22] Persons clamorous, scolding and railing with their tongue got three days at hard labor.[23] Later, this offence was more severely punished: "To the end that Exorbitancy of the tongue may be bridled and Rebuked, Be it &c. that every person Convicted before any Court or Magistrate for Rayling or Scolding Shall Stand one whole hour in the most public place where Such offence was Committed with a Gagg in their mouth or pay five shillings."[24]

Persons who were drunk, or cursed, swore or spoke profanely, might be convicted by a single magistrate if the offence took place in the presence of a magistrate or other officer, or if the person confessed, or on the evidence of two credible persons. Justices and other officers so offending were to receive a double penalty and be removed from office.[25] Persons frequenting stage-plays, masques, revels, bull-baiting and cock-fights got sentences of at least ten days at hard labor, or a fine of twenty shillings. For lying in conversation the penalty was half a crown or three days at

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[17]Apr. 2, 1686 *ibid*, pp. 98-100.

[18]Smith's "Hist. of Del. Co.," p. 143

[19]Charter and Laws, Colonial Records, p. 108. [20]*Ibid*, p. 109. [21]*Ibid*, p. 109. [22]*Ibid*, p. 111. [23]*Ibid*, p. 111. [24]*Ibid*, p. 116. [25]*Ibid*, p. 145.

hard labor.[26] Those who played cards, dice, lotteries "or such like enticing, vain and evil Sports and Games" were punished by a fine of five shillings or five days' imprisonment.[27] For the prevention of fires, persons smoking tobacco in the streets of Philadelphia or those of New Castle, either by day or night, forfeited twelve pence for each offence, to be employed in the purchase of leather fire-buckets and similar apparatus.[28]

A less number of grand jurors composed the grand jury than at the present time, usually about fifteen, and frequently no more than twelve traverse jurors attended at the court.[29]

Contempts of court were sometimes rigorously punished. The record of a case at Chester in 1685 shows that the defendant "being lawfully convicted for abusing and menacing the magistracy of this county, was ordered 21 lashes att the publick whipping post on his beare backe, well laid on, and 14 days' imprisonment at hard labour in the house of Correction." At the same time another person was fined forty shillings for contempt of court in not appearing when lawfully summoned, and for abusing the officers of the court.[30]

In 1723, Justice Assheton, Judge of the Court of Admiralty, sentenced a man charged with speaking of George as "the Pretender," and with disobeying and publicly affronting magistrates, to stand in the pillory in the market place for two hours on two market days, and afterwards to be tied to the tail of a cart and be drawn around two of the city squares, and then to be whipped on the bare back with forty-one lashes, and be imprisoned until he had paid the charges of prosecution.[31] Justice Assheton died at the age of thirty-three. Had he lived longer it is quite possible that he might have developed into a reasonably severe magistrate!

Sometimes, however, such offences were not so severely punished. In 1692 a person was indicted for abusing two of the justices at Chester by calling them a pack of rogues. "The Jury was called & the said M— did then, in open Court, affirm that the said partys was two of the greatest rogues that ever came to America. Whereupon the Court gave judgment that he pay a fine of five pounds & costs of suits &c."[32]

An amusing case of a contempt of court occurred in Sussex county in 1687, when one Thomas Jones refused to obey a summons to attend court, and cursed a constable and two justices who were sent to fetch him.

> The said Jones being brought to the Court, the Court told him of his misdemeanor, and told him he should suffer for it; he told the Court he questioned their power, soe the Court ordered the Sheriff and Constable to secure him and they carryed & dragged him to ye smith shop where they put irons upon him, but he quickly got the Irons off and escaped, he

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[26] *Ibid*, p. 116. Mary M— was fined five shillings in Chester County in 1694 "for her lying": Smith's "Hist. of Del. Co.," p. 189.
[27] *Ibid*, p. 114.
[28] *Ibid*, p. 260.
[29] Smith's "Hist. of Del. Co.," pp. 185, 226.
[30] *Ibid*, p. 157.
[31] "The Forum," vol. 1, p. 264.
[32] Smith's "Hist. of Del. Co.," p. 183.

having before wounded several 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 Sheriff on the mouth and was very unruly and abusive, and soone got out of the Stocks.[33]

It appears from Pennypacker's "Colonial Cases," page 116, that Justice James Claypoole was presented by the grand jury of Philadelphia county in 1686 for endeavoring to influence Judge Moore in the disposition of a case tried before him in the Provincial Court, which was looked upon as being "of a dangerous consequence," and also for menacing and abusing the jurors in the trial of a certain case in "which was an infringement of ye rights and property of ye people."

The judges themselves did not always have a proper respect for their own tribunals. Luke Watson, one of the justices of Sussex county, offended the dignity of his associate justices twice on the same day in 1684 by smoking in court, and was fined by his brethren fifty pounds of tobacco for the first offense and one hundred pounds for the second.[34] This is the Luke Watson who was suspended from Council in 1686, being charged with immorality. He was afterwards re-elected, and having cleared himself of the charge was admitted to that body.[35]

An act of 1683 provided that as there was a necessity for the sake of commerce "in this infancy of things" that the produce of the province and territories should pass in lieu of money, therefore all merchantable wheat, rye, Indian-corn, barley, oats, pork, beef and tobacco should be accounted current pay at the market price.[36] As the result of this statute, the amounts of judgments were sometimes expressed in produce, and Mr. Lewis cites a judgment for "one thousand six-penny nails and three bottles of rum."

The gaols at this time were so small and miserably kept that the condition of the prisoners moved the pity even of their jailers. In one instance we find the jailer in Philadelphia permitting two persons charged with piracy to wander about the streets with a keeper, he thinking that such liberty was permissible in view of the hot weather.[37] In another case the sheriff of the county of Sussex was charged with permitting a convicted prisoner to go entirely at large.[38] It was in this case that David Lloyd refused to produce the records of the Provincial Court on the demand of Council. On February 21, 1689, a prisoner for debt, who had petitioned Council for release, on being remanded to jail, complained that he had no bed to lie on, whereupon the sheriff "acquainted the board he might bring in his bedds to ye prison if he pleased, and Should have them out with him upon his discharge. The board adjudged they saw no just Cause of Complaint."[39]

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[33] Lewis' "Courts of Pa.," 1 Pa. Bar Assn. Reps., p. 361.
[34] *Ibid,* p. 61.
[35] Col. Rec., vol. 1, p. 222.
[36] Charter and Laws, p. 162.
[37] Col. Rec., vol. 1, p. 562.
[38] *Ibid,* vol. 1, pp. 242-244.
[39] *Ibid,* vol. 1, p. 243.

The custom obtained in Chester county of ordering as a part of a sentence for theft that the convict should wear a Roman T not less than four inches long each way and one in breadth, of a blue color, for a certain period. This practice, which was prescribed by the Acts of November 27, 1700,[40] and January 12, 1706, and reminds one of the Scarlet Letter of Hawthorne's romance, ceased about 1720.[41]

In 1722, William Battin, convicted "of divers horrid complicated crimes," was sentenced to be executed and "hung in Irons in the most public place, at such time as the Governor shall appoint."[42]

From 1714 to 1759 most of the sentences in Chester county embraced whipping as one of the punishments, which usually consisted of twenty-one lashes on the bare back, well laid on.[43] Items like the following appear in the county commissioners' books: "Allowed Isaac Lea an order on the treasurer for the sum of 8 shillings, being for 2 new whips and mending the old one for the county's service."[44]

For sedition, Owen Oberlacker was sentenced at Chester, as late as 1753, to stand in the pillory one hour, with a placard affixed to his back bearing the inscription in a large hand, "I stand here for speaking seditious words against the best of Kings," and to receive twenty-one lashes upon his bare back to be inflicted upon the same day.[45]

A person convicted of stealing fourteen dressed deer skins was sentenced at Chester in 1690 to be whipped with thirty-nine lashes, well laid on his bare back at the cart's tail, and to be sold for eight years for his fine and costs, and to repay the losses occasioned by a former larceny.[46]

The gold brick industry appears to have existed in those days. A party was indicted in Chester county for fraudulently exposing "peces of lead and potshards unto John Stubbs of this county for current silver of the Province."[47]

In 1717, the grand jury of Philadelphia earnestly presented the necessity of a ducking school and house of correction for the just punishment of scolding drunken women, and other profligate and unruly persons, the necessity for which had often been presented by former grand juries. They urged that such "public conveniences" might not be longer delayed, but speedily provided. Three instances of women being sentenced to be ducked occur in the records. The sentences were not carried out in two instances, and it is not certain whether the sentence was carried out in the

[40] Statutes at Large, Vol. II, pp. 9, 174.

[41] Smith's "Hist. of Del. Co.," pp. 242, 268. By the Act of January 12, 1706, 2 Statutes at Large, p. 180, a third conviction of adultery was punished by twenty-one lashes, imprisonment for seven years, and branding on the forehead with the letter A. This act was allowed to become a law, not having been acted upon in England.

[42] Smith's "Hist. of Del. Co.," p. 232.

[43] *Ibid*, p. 268.

[44] *Ibid*, p. 255.

[45] *Ibid*, p. 262. A man was similarly punished and placarded for a similar offense in Philadelphia in 1729: Brown's "The Forum," vol. 1, p. 233.

[46] *Ibid*, p. 179.

[47] *Ibid*, p. 201.

other. It was held in James vs. Commonwealth, 12 S. & R. 221 (1824) that the ducking school was not the punishment for a common scold in Pennsylvania.[48]

The following early indictments are taken from David Paul Brown's "Forum":

Philadelphia, the 26th day of the 7th month, 1702.

We, the Grand Inquest for this Corporation, do present George Robinson, butcher, for being a parson of evill fame as a common swarer, and a common drunker, & particularly upon the twenty-third day of this instant, for swaring three oths in the market-place, & also for utering two very bad curses the twenty-sixth day of this instant. Signed in behalf of self & fellows, by

JNO. PONS, ferman.

Submits, and puts himself in mercy of the Court.

George Robinson, fined XXX s. for the oaths and curses.

The 3d of the 12th Mon: 1702.

We of the Grand Jury for the Citty of Philadelphia, do psent John Satell for passing of bad counterfeit Coine to Anne Simes, on the 2nd of January Last past in her husbands house, now Living in Philadelphia, & Also finding the mettal in his pocket, which we think the Money was made withall.

Signed in behalf of the Rest,

ABRA: HOOPER, foreman.

"It is interesting to observe," says Mr. Brown, "that the prisoner being found guilty, the record states that 'Mr. Clark moves the court that the Judgment may be arrested and the Presentment quashed for Incertainty and Insufficiency, which was granted.'"

The 4 of ye 12 month, 1702.

We, ye Grand Jury of ye City of Philadelphia, present Sarah Stivee, wife of John Stivee, of this city, for being dressed in man's cloathes, contrary to the nature of her sects, and in such disguises walked through the streets of city, & from house to house, on or about the 26th of 10th month, to the grate disturbance of well minded persons, & incoridging of vice in this place; for this & other like enormities, we pray this honorable Bench to supress.

Signed in the behalf of the rest,

ABRAHAM HOOPER, foreman.

The foregoing indictment and a number of others were the result of a masquerade party which had been held about this time.

Philadelphia, ye 4th of the 12th mon., 1702.

We, of ye Grand Jury for the Citty of philadelphia, Do psent John Joyse, for having of to wifes at once, which is boath against the law of God and man.

Signed in behalf of the rest,

ABRA. HOOPER, foreman.

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[48] Loyd's "Early Courts in Pennsylvania," p. 89 and note.

Philadelphia, ye 6th of the 3rd month, 1703.

We, of the Grand Jury for this city, Doe present Alexander Paxton & his wife, for letting a house to John Lovet, he being a Stranger, & have not Given security for The In Demnifying of this Corporation.

Signed in behalf of the rest,

Abra. Hooper, foreman.

Philadelphia, this third day of November, 1703.

We doe also present Jon Furni & Thomas McCarty & Thomas Anderson & henery Flower, barbers, for triming people on first days of the weeks, commonly called sunday, contrary to the law in that case made & provided.

Signed in behalf of the rest of the Jurors,

John Redman, foreman.

Philadelphia, ye 4: 12: 1703-4.

We, the Grand Inquest for this corporation, do present Anne Symes, ye wife of John Symes, Inn-keeper, for forestalling the market, contrary to law, on the 29th 11 mo. last past.

pr. Wm. Bevon, Foreman.

Benefit of clergy was allowed before the passage of any provincial statute providing for the same. James Logan wrote to Penn on June 24, 1703, that "one young man was burnt in the hand for manslaughter, pleading the benefit of his clergy.[49] The Act of May 31, 1718, 3 Statutes at Large, page 306, provided as follows:

And Be It further Enacted by the Authority aforesd, That if any person be convicted of any such felony as is hereby made capital, for which he ought by the laws of Great Britain to have the benefit of his Clergy, and shall pray to have the benefit of this Act, he shall not be required to Read, but without any reading shall be allowed, taken and reputed to be and punished as a Clerk Convict, and Burnt, if for Murder, with an M upon the brawn of the left thumb; and if for any other felony, with a T in the same place of the thumb: Which Marks are to be made by the gaoler in open Court, as is usual in Great Britain; which shall be Effectual to all intents and purposes, and be as advantageous to him as if he had read as a Clerk; any Law or usage to the contrary notwithstanding.

Various subsequent acts provided that the benefit of clergy should not be allowed in the case of certain crimes, especially the forging of bills of credit of the province. It seems to have been wholly abolished by the ninth section of the Act of April 22, 1794, 15 Statutes at Large, page 177.

Contrary to the practice in the courts on the Delaware under the administration of the Duke of York, no party in interest was permitted to give evidence. In the case of Proprietor *vs.* Keith, Pennypacker's Pa. Colonial Cases, page 123, the defendant asked for permission to speak, but it was objected by counsel that he was not *"rectus in curia."* The court, however, allowed him to argue in his own defense, but it does not appear that he gave any testimony. In view of the plain provision in the

[49]Penn and Logan Correspondence, vol. 1, p. 195.

laws agreed upon in England that all persons might freely appear in their own way and according to their own manner, and there personally plead their own cause, this practice seems a little strange, involving a technical construction of the word "plead," and shows how early the English practice was adopted in Pennsylvania.

Apparently husband and wife could not testify against each other. Penn states in his answers to the "Abstract of Complaints against Proceedings in Pennsylvania": "As to the rape, the man challenged by the woman married her, and in the opinion of the two only lawyers of the place, and one of them the king's advocate of the Admiralty, and the attorney-general of the country, her evidence was thereby enervated."[50] The two lawyers were John Moore, Attorney General, and David Lloyd, attorney for the prisoner, who was admitted to bail in the sum of five hundred pounds.[51]

It would appear that presentments were not made in indictments by the grand juries, but by private prosecutors in behalf of the King, as appears from the following:

In the Countie of Philadelphia:

Peter Cock of Kiphah, in the countie of philadelphia, in behalf of our Soveraign Lord the king and proprietarie and Governor of this province &c in his own right, & Bridgett his daughter indicteth thee John Rambo, by the name of John Rambo of Passyanck in the countie aforesaid, for that thou having not the feare of God before thy eyes, but in contempt of our Soveraign Lord the king and Governor, did break the laws by them established in this province, viz, the 17th and 120th Chapter of the great bodie of Laws, etc.[52]

Some rather nice points of law were raised in those days. In the case of Proprietor *vs.* Wilkins, in the Court of Quarter Sessions of Philadelphia county in 1686, the defendant was indicted for fornication, pleaded guilty, and when asked by whom she would be tried answered, "by the Bench of Justices without a petit jury," whereupon Samuel Hersent, attorney for King, Governor and Prosecutor, contended that it was contrary to law to try the prisoner without a petit jury; that her pleading guilty was but in lieu of witnesses, she being a witness herself, and that pleading guilty was but her conviction, and not her trial. He therefore requested that she might be tried by a petit jury, the bill having been found by a grand jury, especially considering that every criminal must be found guilty by two juries at least. The court over-ruled this point and tried and sentenced her themselves. Fine points of law were evidently wasted on these lay judges.[53]

In the case of James Claypoole *vs.* William Guest, in the Philadelphia Quarter Sessions, an action of slander and defamation, the plaintiff alleged that the defendant had publicly said "that he, the said plaintiff was

[50] *Ibid*, vol. 1, p. 29.
[51] Col. Rec., vol. 2, p. 11.
[52] Pennypacker's "Pa. Col. Cases," p. 79.
[53] *Ibid*, p. 188.

a knave and a rogue, and he would prove it," and claimed damages to the value of one hundred pounds. The defendant, who was indicted as a yeoman, but who calls himself a justice of the peace, pleaded as follows:

And ye said William Guest, of ye sd Countie of New Castle, Justice of ye peace, for plea saith yt hee hath not slandered or defamed ye pltfe to ye damage of 100 pounds, as ye pltff falselie declares, And saith yt hee knows no Credible psons yt either would or could hear or report such words as are in ye declaraon, for in all actns ythers Civill or Criminall, pretended to be matter of words only the whole discourse ought faithfully to be Collected, otherwise ye most Innocent may be accused by sly Informers of speaking treason &c.

And further ye deft saith yt plfs declaraon is too generall, for it names not ye ptended Credible psons. Since ye laws of this governmt allow ten days for ye deft to ppare for his triall, & to consider of ye declaraon, and since ye whole weight of ye ptended Complaint lyes in ye Credibility of ye witnesses, how can ye defendant make his defence since hee knows not his accusers, whom had hee known hee might in ten days time by good enquirie have Legalie proved Incredible.

And ye deft further saith that he reflects on no mans honestie, for ye witnesses being to him unknown, hee saith hee is deprived of ye benefit of ye law in yt case provided.

And quas ye pltff saith by wch slanders hee is damnified in his good name, trade, reputacon & Credit, to ye value of 100 pounds, ye deft saith much is falselie alleged but not proved, for if ye said ptended words were spoken & ye pltfe slaundered, (wch ye deft denies) yet ye said words could not so deeply affect yt pltf in his trade or Credit in so short a time as less yn half a day, ye deft having had his declaraon ye same day as ye words are ptended to be spoken, yfore as proofe of ye pltfss ptended damage let him prove who of his Crs arrested him, or who refuse to trust him in the time betwixt ye ptended slander & ye deliverie of ye declaraon—. But if it be false yt ye pltff is damnified 100 pounds, as its Impossible it shold be true, yn it will appeare ye pltfe hath malitiouslie and wtout caus vexed ye deft, for ye deft can make it appeare in due time and place yt ye pltff having no business or Jurisdiction, at Last provinciall court att philad. did falselie, wtout anie cause and provacaon given, Insinuate matters agt ye deft who yn had a triall depending yrfor by endeavouring to render the pson & Caus of ye present deft odious to the yn Judges & Jury, & ye pltf doth still continue his malice by traducing in open Court ye deft, who stands as fair in his reputacon as ye pltffe, to ye greife and scandall of diverse good people both of ye Counties of philadelphia and New Castle—Therefore ye deft beggs to be dismissed from this vexatious sute wth his costs and damages.[54]

This answer, as Governor Pennypacker says, combines all the merits of a plea, a demurrer and an argument. The case having been tried before a jury, verdict for the defendant.

On January 19, 1705, the case of Revel *vs* Growdon was considered in the Council. The petition of the plaintiff set out that he began an action of ejectment against the defendant in Bucks county, which had been

[54] *Ibid*, pp. 100-102.

continued from time to time for three years, and asks that some effectual means may be ordered to bring the matter to a trial. The attorneys for both parties were ordered to attend at the next meeting, when David Lloyd "in behalf of the Defft. argues that that method of Trial being fictitious was Inconsistent with our Laws and offered other methods."[55] The defendant appearing at the next meeting, argued similarly, "declaring himself willing to come to a Trial by any Method agreeable to our laws, which he conceives to be by a Declaration."[56] The parties were ordered to appear before Council on several subsequent dates, but there is no record of the determination of the mattr.[57]

Another case of a delay of justice: James Logan writes on March 3, 1703: "But David's [Lloyd's] conscience was tough enough last Philadelphia Court to plead *non est factum testoris* against James Claypoole's bond which I put into suit and has now been there for five courts past, and will be quashed, I doubt, at last, for want of the *factum.*"[58]

In the case of Proprietor *vs.* George Keith *et al,* tried in the Philadelphia Quarter Sessions in December, 1692, it was held for the first time in America that in a suit for sedition or libel, evidence of the truth of the alleged seditious or libelous statements might be offered and admitted, and the jury left to decide whether or not the statements were seditious or libelous. This case antedated by many years the well-known trial of Zenger in New York in 1735, in which Andrew Hamilton of the Philadelphia Bar figured so prominently, and which is usually referred to as the first case in America wherein this doctrine was involved. In his interesting address on David Lloyd, delivered before the Pennsylvania Bar Association in 1910, Mr. Eshlemen rather curiously claims for Lloyd credit for this ruling *because he argued against it.*

A case of fornication and bastardy was called in the Court of Quarter Sessions of Chester county on the 27th day of August, 1689. The parties pleading guilty, the woman claimed that she was *enceinte,* and therefore not capable of receiving physical punishment, whereupon a jury of matrons was impanelled to report upon her condition, who reported that they could not find that the defendant was pregnant, "neither be sure that she was not." Later the result showed that the punishment was properly delayed.[59] In Ashmead's "History of Delaware County" it is stated, that but one other case of a jury *de ventre inspiciendo* had occurred since that time in this country.

A bill passed Council in 1686 providing that no persons should plead in any civil causes for another in any court whatsover before he had solemnly attested in open court that he had neither directly or indirectly taken or would take any reward whatsoever for so pleading, under a penalty of five pounds. This measure was thrown out by the House.[60]

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[55]Col. Rec., vol. 2, pp. 179, 180.
[56]*Ibid,* vol. 2, p. 181.
[57]Penn and Logan Cor., vol. 1, p. 176, 222, *note.*
[58]*Ibid,* vol. 1, p. 176.
[59]Smith's "Hist. of Del. Co.," p. 174.
[60]Votes in Assembly, vol. 1, p. 38.

A similar bill was passed in Council in 1690 and reached first reading in the House, but got no further.[61]

At a meeting of Council held on the first day of April, 1686, it was ordered that no sheriff should be an attorney in the court of the county in which he is sheriff, and that no clerk of any court should be allowed to plead as an attorney in any cause in the court of which he was clerk.[62]

It appears from the petition of Francis Daniel Pastorius in the case of Heather *vs.* Frankfort Company, that in 1709 there were but four known lawyers of the province. Governor Pennypacker says that these four were David Lloyd, George Lowther, Thomas Clark and Thomas Mac Namara.[63] But Pastorius must have been in error in this statement. Governor Pennypacker elsewhere gives a list of the lawyers whose cases appear prior to 1700. Among these, besides those mentioned, are Samuel Hersent, John Moore, Charles Pickering, Patrick Robinson and John White. Some, if not all of these, were certainly alive and in practice in 1709. Many persons, such as Nicholas Moore, Abraham Mann, Samuel Jennings and others appear as attorneys in the old records, but most of them were attorneys-in-fact, and not attorneys-at-law. The law permitting any one to appear in his own cause or by his friend resulted in the establishment of a quite numerous lay bar.

We have seen that attorneys at law were regularly admitted to practice at the courts of Upland and New Castle, under the administration of the Duke of York, but when any one might practice before the courts there were naturally no such admissions and they were apparently not provided for before the passage of the act of February 28, 1716, which provided that: "The said Justices and Mayor and Recorder, respectively, may admit any attorney or attornies to plead in any of the said courts, respectively, and upon the misbehaviour of such attorney or attornies to suspend or prohibit their pleading in any of the said respective courts."[64]

According to Pastorius, in his pamphlet *"Exemplum Sine Exemplo,"* Thomas Mac Namara received for a fee in the case of Heather *vs.* Frankfort Company "a couple of Periwigs" worth ten pounds. In the same case it is alleged that Thomas Clark, the Queen's Attorney, "was gently pulled down by the sleeve, and promised forty shillings to be quiet, when he had nothing to offer." It must be remembered, however, that this is a statement of the losing party. It is further claimed that Clark did not receive this amount, and was retained by the other side for the sum of ten pounds. Lloyd, however, was alleged to have received in the same case "a thousand acres of Benjamin Farley's land."[65]

A bill about attorney's fees was defeated on first reading in the House on November 13, 1700. We have no means of knowing what the provisions of this bill were.[66] On June 2, 1694, an appropriation was

[61] *Ibid*, vol. 1, part 1, p. 58.
[62] Col. Rec., vol. 1, part 1, p. 170.
[63] Pennypacker's "Pa. Colonial Cases," p. 167.
[64] Charter and Laws, p. 344.
[65] Pennypacker's "Pa. Colonial Cases," pp. 168-170, 176.
[66] Votes in Assembly, vol. 1, p. 136.

made by the Assembly jointly to David Lloyd and William Markham of one hundred pounds each for services as Deputy Attorneys General, before the arrival of Governor Fletcher.[67] On February 22, 1706, David Lloyd was allowed sixty-nine pounds five shillings and four pence "due for services done for the Assembly" by that body.[68] On December 28, 1706, he was allowed by the same body eighteen pounds "for his drawing bills and other writings for the immediate service of the Assembly."[69] Again, on June 11, 1707, he was ordered paid ten pounds and two shillings, which was probably in payment for similar services.[70] John Moore received thirty pounds per year as Penn's attorney general.[71]

The Act of November 27, 1700, entitled "An act directing the attests of several officers and ministers," provides for the following form of attest to be taken by "lawyers, attorneys and solicitors":

Wilt thou perform thy office of a lawyer, attorney or solicitor at law with faithfulness and diligence to the best of thy skill, according to the laws of this government; wilt thou behave thyself with reverence and duty to the proprietary and governor, and with respect to the council and all the courts of justice within this province and territories; wilt thou not take more fees nor oftener, nor plead otherwise than is by the laws allowed, nor take any fee or gratuity of both sides, nor commit barratry, champerty or maintenance, nor advise, countenance or plead for any litigious, false or vexatious person or cause; or anyway counsel, aid, abet or conceal any disaffected, seditious or turbulent person against the proprietary and governor, or his heirs, or their rights, dignity or authority, or his or their government, courts, magistracy or officers; but will to the utmost of thy skill and power support, defend and maintain the same without any equivocation or mental reservation, according to the true intent and meaning of the laws of this province and counties annexed, and to the true and genuine sense of the words and engagements aforesaid.[72]

The foregoing form of attestation would seem to indicate that there was at this time a distinction between lawyers, attorneys and solicitors. Some of the early members of the bar designated themselves "barristers-at-law" on their book-plates and elsewhere, but it does not appear that these distinctions ever existed officially.

"It is not peculiar to Pennsylvania," said William Rawle in an address to the associated members of the Bar of Philadelphia, delivered in 1824, "but is the general habit throughout the United States to combine the two capacities of counsel and attorney. The Supreme Court of the United States, the State of Massachusetts and its former adjunct Maine, New York and New Jersey, form the only exceptions within my knowledge." He then goes on to compare the English system of barristers,

[67] *Ibid*, vol. 1, p. 86.
[68] *Ibid*, vol. 1, Part 2, p. 84.
[69] *Ibid*, vol. 1, Part 2, p. 125.
[70] *Ibid*, vol. 1, Part 2, p. 186.
[71] Penn and Logan Correspondence, vol. 1, p. 60.
[72] 2 Statutes at Large, p. 41.

counsellors and attorneys with the American practice, and advocates the latter.

Another form of attestation for solicitors or attorneys at law, from the Act of January 12, 1706, entitled "An act directing the qualifications of all magistrates and officers, as also the manner of giving evidence":

Thou shalt do no falsehood nor deceit nor consent to any to be done in this or any other court within this province; and if thou knowest of any to be done thou shalt give knowledge thereof to the judges or justices respectively, that it may be reformed; thou shalt delay no man for lucre or malice; thou shalt increase no fees, but be contented with such fees which are or shall be allowed by the laws of this province; thou shalt plead no foreign plea nor sue any foreign suits unlawfully to hurt any man, but such as shall stand with the order of the law and thy conscience; thou shalt not wittingly nor willingly sue or procure to be sued any false suit, nor give aid or consent to the same, on pain of being expulsed from the court forever. And further thou shalt use and demean thyself in the office of an attorney within the court according to thy learning and discretion.[73]

The Act of May 22, 1722, provided that a competent number of persons of an honest disposition and learned in the law might be admitted to practice by the justices of the said respective courts:

Who shall behave themselves justly and faithfully in the practice, and if they misbehave themselves therein they shall suffer such penalties and suspensions as Attornies-at-Law in Great Britain are liable to in such Cases; by which Attorneys Actions may be entered and Writs, process, declarations, and other pleadings and Records in all such Actions and Suits as they shall respectively be concerned to prosecute or defend from Time to Time may be drawn, and with their Names and proper Hands signed; Which said Attorneys so admitted may practice in all the Courts of this Province, without any further or other license or admittance; And that the Attorneys for the plaintiff in every Action shall file his warrant of Attorney in the Prothonotary's Office the same Court he declares: And the Attorney for the Defendant shall file his warrant of Attorney, the same Court he appears; And if they neglect so to do, they shall have no Fee allowed them in the Bill of Costs, nor be suffered to speak in the Cause until they file their warrants respectively.[74]

The Act of August 27, 1727, contained a similar provision and in addition provided that attorneys shall take the following qualification:

Thou shalt behave thyself in the Office of Attorney within the Court According to the best of thy learning and ability, and with all good Fidelity as well to the Court as to the Client; thou shalt use no falshood nor delay any Person's Cause for Lucre or Malice.[75]

The provisions of the Act of May 28, 1715, relative to Attorney's

[73] 2 Statutes at Large, 270.
[74] Charter and Laws of Pennsylvania, p. 394.
[75] Charter and Laws of Pennsylvania, p. 403, 4 Statutes at Large, p. 95.

fees are given elsewhere. The Act of August 22, 1752, 5 Statutes at Large, page 172, provides:

That the fees belonging to the Attorneys-at-Law in this province shall be as follows, viz:

For every replevin, if drawn by the attorney, three shillings.
For all actions they shall undertake for plaintiff or defendant, with declaration, twelve shillings.
For attending every writ of inquiry, four shillings.
For every action brought to judgment, twelve shillings.
For writing every writ of inquiry, scire facias, venditioni exponas or execution, three shillings.
For drawing the recognizance for prosecuting a writ of error or certiorari in the supreme court, two shillings and six pence.
For every writ of execution in that court, six shillings.
For drawing every warrant of attorney, six pence.

By the same act it is provided that attorneys, in common with other persons whose fees are fixed by the same, shall set up in their offices tables of the fees fixed by the act, and they are forbidden to demand a fee without giving the party of whom the same is demanded a bill of particulars. By the Act of March 26, 1778, 9 Statutes At Large, page 229, the fees fixed by the said Act of 1752 were doubled.

By the Act of November 27, 1779, 10 Statutes At Large, page 40, the fees of attorneys-at-law, as they were regulated before the first day of July, 1776, are required to be estimated and paid according to the price of good merchantable wheat, accounting and allowing that a bushel of such wheat weighing at least sixty pounds was formerly sold in times of war and difficulty for ten shillings.

The Act of April 10, 1792, 14 Statutes At Large, page 329, entitled "An act to require of the officers in the different departments of the state an account of the fees they severally charge in their offices," requires attorneys-at-law, among others, to transmit to the Governor a particular statement of the several services for which they are entitled to demand and receive fees.

The Act of April 20, 1795, 15 Statutes At Large, page 359, provides, that the fees of attorneys-at-law shall be as follows:

For issuing praecipe for the commencement of any suit, entering an appearance on the prothonotary's docket, and filing warrant of attorney, if required, if the suit is ended before or during the sitting of the first court, one dollar and sixty-seven cents; every suit ended after the first court and before judgment, discontinuance or non-pros, the further sum of one dollar and sixty-six cents; every suit prosecutted to judgment, discontinuance or non-pros, four dollars; on appeals from the judgment of the justices of the peace in every suit where an attorney is employed, if settled before or during the sitting of the first court, he shall be entitled to receive one dollar and thirty-three cents; if settled after the first court and before judgment, two dollars; if judgment rendered, nonsuit or discontinuance is obtained, three dollars. The fees to be received by the at-

torneys at law in the supreme court shall be double the amount of those in the court of common pleas.

By the Act of September 25, 1786, 12 Statutes At Large, page 308, the justices of the Supreme Court are directed to make and establish such laws for regulating the practice of the said court and expediting the declaration of suits as they shall judge necessary.

CHAPTER XI.

IMPEACHMENT OF CHIEF JUSTICE MORE.

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Impeachment of Chief Justice More.

Hardly had the Provincial Court been established before the House proceeded to impeach its chief justice, Nicholas More. More seems to have been educated as a physician, but he first appears in Pennsylvania as the President of the Society of Free Traders, and a large purchaser of lands within the Province. He arrived with Penn in 1682. He was elected a member of the Assembly from Philadelphia in 1682, was re-elected in 1684 and 1685, being elected Speaker in 1685, and was appointed Secretary of the Council in 1683.[1] He is said to have been Speaker of the first Asseembly, but it does not so appear from either the Votes in Assembly or the Minutes of Council. He was evidently a man of great force of character, but haughty, arrogant, imperious and of an ungovernable temper.

We find him called before the Council as early as March 1st, 1683, charged with saying in company at a public house, apropos of the Council and Assembly having been returned with a less number of members than the first Frame of Government required, that the Governor, Council and Assembly had "broken the charter, and therefore all that you do will come to nothing & that hundreds in England will curse you for what you have done & their children after them, and that you may hereafter be impeacht for Treason for what you do." On appearing and being so charged, he said that "he spoke rather by query than assertion, and if he had said as it was represented, he had been to blame indeed, but he said that he spake not with such intent." He was exhorted to prevent the like in the future.[2]

But he did not prevent the like in the future. He was evidently extremely overbearing, and altogether regardless of the opinion of others. At a meeting of Council on May 17, 1684, "John Songhurst and Jno. Hart declare that they heard the Speaker say that the Proposed Laws were Curst Laws. Jos. Growdon and ffran. ffincher also were present at Jno. White's when the Laws were read over and he said hang it, Damn them all."[3]

He was, as we have seen, appointed Chief, or Prior, Justice of the Provincial Court on its establishment, but was, notwithstanding, elected a member of the Assembly in 1685, the two offices evidently not being incompatible. In that body he had a way of protesting against measures, even such as were passed by six parts of seven of the House, such as "I do protest against the fines expressed in the Bill relating to Justices, N.

[1] Col. Rec., vol. 1, p. 73.
[2] *Ibid*, vol. 1, p. 58.
[3] *Ibid*, vol. 1, p. 109.

More;" "I am protesting against this Bill, N. More;" "I do protest against the Bill relating to the Alteration of Courts, N. More;"[4] which did not have a tendency to make him popular with his fellow members.

His conduct upon the bench appears to have been just as arrogant. He was evidently a master of "the gentle art of making enemies." Finally, on May 15, 1685, the following articles of impeachment were presented in the House against him, and it was ordered that he should withdraw from the House pending the trial of the same:

The Assembly's Declaration against Nich. Moore, presented May 15th, 1685, to the President and Provll Councill in the Councill Chamber, by the Speaker and Members of the Assembly:

For the Speedy redress of divers Evils & Mischiefs which this Province and Territories now Labour under, & for the preventing the farther growth and Increase of the same, & to the honour and Safety of the Govr and Governmt of this Province & Territoris, and by good & Welfare of the People thereof, the freemen in Assembly now mett, doe by this their bill, shew & Declare against Nich. Moore, Pryor Judg and member of Assembly of the Province of Pennsilvania, &c. The Misdemeanors, Offence and Crimes and Other Matters Comprized in the Articles following; and him, the said Nich Moore, doe accuse of the said Misdemeanors, Offences & Crimes.

1st. The said Nich. Moore Assumeing to himselfe an unlimited & Arbitrary Power beyond the Prescription or Laws of this Governmt, hath presumed of his own Authority, to send Unlawful Writts to the Sheriffs, and to ascertain and appoint the Time of the Provincial Cirquits without the Direction & Concurrence of the Provll Councill, whereby the time of their Sessions has been Antisipated, the Several Countyes being Surprized by the Shortness of their Warning, and thereby being Impossible to give due Sumons according to Law, either of Jurys, Witnesses or persons Concerned, whereby some Persons have been forced to Irregular Tryalls and Others absolutely denyed Justice.

2dly. The said Nich Moore, Judge, having that high Trust Lodged in him for the Equall Distribution of Justice, without respect of Persons, the said Judge sitting in Judgment at New Castle, hath presumed to cast out a person from being a Jury, after the said Person was lawfully attested to the True Tryall of the Cause, thereby tending an Innocent & Lawful Person Infamous in the face of the County, by rejecting his attestation after Lawfully Taken and depriving the plaintiff of his Just Right.

3rdly. The said Nich Moore, Sitting in Judgmt, did in the towne of New Castle, refuse a Verdict brought in by a Lawfull Jury, and by Divers threats & Menaces and threatening the Jury with the fame of perjury and crim of their Estates, forced the said Jury to goe out so often, until they had brought a Direct Contrary Verdict to the first, Thereby preventing Justice and wounding the Libertyes of the free people of this Province and Territories in the Tenderest Point of their Privilege, and violently Usurping over the Consciences of the Jury.

4thly. The said Nich Moore, although there was noe Lawfull sum-

[4] Votes in Assembly, vol. 1, pp. 32-33.

mons according to Law for partys concerned to make preparation, did Arbitrarily reject & Cast out the Complaint of Jno Wooters, in New Castle Court, hereby not only Delaying but Denying Justice to him, coming in a Lawfull way to Demand it.

5thly. The said Nich Moore, assuming unto himselfe an Unlimited and unlawful Power, did, sitting in Judgmt at the aforesaid towne of New Castle, wherein two persons stood Charged in a Civil Action, it being in its own Nature only Trover & Convertion, and the pretended Indictmt raised it no higher, notwithstanding the said Moore did give the Judgmt of fellony, commanding the Defendant to be Publickly Whipt, and each to be Fined to pay three fould, thereby Tyrannizeing over the persons, Estates and reputations of the peoples of this Province and Territories and Contrary to Law and Reason.

6thly. The said Nich. More, Commanding a Witness to be Examined, did by overawing & greatly Perverting the Sence of the Witnesses, charge and Condamne the said Witness to be guilty of Perjury, and to suffer the paines in that Case provided, & by proclamation to be for Ever rendered uncapable of being rectus in Curia in this Governmt, and also fined him, Contrary to Law.

7thly. And, Whereas, the Wisdome of the General Assembly did Conceive the Circular Courts would be their best Expedient for Ending all kinds of Differences whatsoever, the said Nich. More, at the said Towne of New Castle, Commanding the records of the former Circular Courts to be produced, which the said More reading he did in the Open Court, Censure the Judgmt of the preceding Judges, by saying their judgmt was not right, thereby Distracting the people betwixt divers and Contrary Judgmts, and perpetuating Endless & Vexatious Suits.

8thly. The said Nich. More, Sitting in judgmt at Chester, did in a most Ambitious, Insulting and Arbitrary way, reverse and Impeach the judgmt of the Justices of the said County Court, and Publickly affronting the members thereof, although the matter came not regularly before the said Circuit Court, thereby drawing the Magistrates into the Contempt of the people and Weakening their hands in the administration of justice.

9thly. The said Nich. More, being chosen as aforesaid to be Judg of the Circular Court according to law, which obliges the said Judges both spring and fall to goe their Cirquits; and the said Nich. More assuming to himself the power of appointing the Times, as he is the pretended Chief Judg in the Province and the Territories thereof, hath notwithstanding Declined the Two Lower Circuits, to the great Delay of Justice and Breach of his Trust and Mischief and Inconvenience of the free people of the said Lower Countys.

10thly. The said Judg More resolving to put no bounds to his Violence, Ambition and Oppression hath, to the Dishonour of the Govr and Contempt of the Governmt, Declared that neither he nor his Actions are accountable to the Presidt and Provll Council, by Despiseing and Conteining their Orders & precepts, and Questionning and Denying their Authority, thereby Shrowding and Protecting himselfe in all the aforesaid Violences, to the rendring the Miserys of the Oppressed Intollerable & perpetual to the Subversion of the most Excellent frame of this Governmt and the raising himselfe above the reach of justice.

The articles having been read, it was voted that the Speaker and five

members should present Nicholas More before the Council in the way of impeachment, and that the whole House should repair to and request the Governor and Council to remove him from his great offices of trust.[5] On the same day the Speaker and House waited on the Council and presented the articles, whereupon a committee of four members of that body was appointed to acquaint Judge More of the proceeding and to request him to appear at a meeting of the Council to be held the next day.[6] He did not appear at this meeting, but the Speaker and House "againe desired that the Declaration against Nich. Moore, Pryar Judge, might be again read; which was done without direction to the Councill nor subscribed by the Speaker or any of the Assembly, nor noe place mentioned therein."[7]

Abraham Man, a member of the House, before mentioned in connection with his impeachment of Justice Moll, complained to that body that More had called him a "person of seditious spirit," whereupon it was voted that More "had broke the Order and Privilege of the House," and that he be sent for to answer the said charge, and that if he did not appear he should be ejected as an unprofitable member.[8] More not appearing, a committee was appointed to secure his attendance." The said members requiring his appearance, he asked, *In what capacity?* The members answer, *that he might know when he came there;* then *Nicholas More* said that *he would be voted into the House* (*as he was voted out of the House*) *before he would appear in the House.*"[9]

The next day, May 18th, John Briggs, a member of the House, reported that "being at the Givernor's house, More asked, *What the Assembly was doing?* Who made answer *That they were proceeding on his Impeachment*: The said *Nicholas More* replied *either I myself or some of you will be hanged,* and therefore advised the said *John Briggs* to enter his *protest* against the Impeachment." More failing to appear, was expelled from the House.

The same day the Speaker and Assembly attended Council "to make good their Allegations against Nich. More." This does not appear to have been a trial, More not being present, but rather a preliminary hearing for the purpose of convincing the Council that the Assembly had a *prima facie* case against More:

> In proof of the first Article, Especially the first Branch thereof, Vizt: That is persciving to Send unlawfull Writts to the Sheriffs, etc.
>
> The Speaker, by Consent and in behalfe of the Assembly, ascertains that Judg Moore his Writt for holding a Provll Court at New Castle, came to the Sheriff's hand but six days before the prefixt day for holding the Court, and by his Writt he Comands the Sheriff to summons all Lords of Mannors and Justices to attend the Provll Judges, and forty Eight freemen for a grand Jury & twenty-four for a Petty Jury; Jno. Cann declared

[5] Votes in Assembly, vol. 1, p. 34.
[6] Col. Rec., vol. 1, p. 135.
[7] *Ibid,* vol. 1, p. 138.
[8] Votes in Assembly, vol. 1, p. 33.
[9] *Ibid,* vol. 1, p. 33.

the same; Tho. Usher declares that the Sheriff of Chester County had no time but five days before the Court was held.

for proof of the Second Article:

They Desire the Benefit of James Reads' Testimony, formerly given in.

Jno. Cann, a Memb. of Councill, declares to the best of his knowledge, that upon the Objections of the Defendts, the Court Yielded that before the said James Reads was attested, he should be layd by, but notwithstanding, through some Omission, after he was attested he was laid by.

for proof of the third Article:

John Cann further declares that he was in Court upon this Tryall when the Jury came in, who being asked by Judge Moore whether they were all agreed, he thinks they sayd they were all agreed, he is not certaine; and the Jury being asked what was their Verdict, they said Eight pounds: the Judg asked them what they meant by it; they said they found Eight pounds for the plaintiff; Judge More urges thereupon, what is Eight pounds in Comparison of five hundred pounds alleged in the declaration, and further said to the Jury, this is noe Verdict, you must goe out and finde according to Evidence, or Else you are all perjured Persons:

Whereupon they went out and brought in their Verdict the next morning for the Defendant, with costs of suit. (Votes in Assembly, Vol. I, p. 35.)

Jno. White, Speaker, Declares fully with Jno. Cann, but further Saith that the Jury being asked by Judg Moore, whether they were all and Every One agreed, and being thrice asked, they did declare they were Every One agreed, and notwithstanding he said they must bring in an Other Verdict.

Edwd. Green, a Memb. of Councill, declares that he was in Court also when the Verdict upon the Tryall of Abram. Man, Plaintiff, and Edwd. Cantwell defendant, and upon the Jury's giving in their Verdict of Eight pounds; whereupon Judg Moore said it was no Verdict, but they must find the Verdict according to Law and Evidence, soe he Sent them out, and they came into Court next morning, and after the Judge had admonished them, he asked if they were all agreed, and they said not; and he sent them back againe, requiring them to bring in their Verdict according to Law and Evidence: they went out againe and brought in for the Deft with Costs of Suit: Whereas, it is omitted in the first part of this Evidence upon the Jury's first coming in the Judge asked if they were all agreed, and they said they were all agreed, and they finding Eight pounds for the plant, the Judge asked them who they found Eight pounds for, they said for the Plaintif.

The Council continued the proceedings on the next day, May 19th:

The Presidt & Councill having reced from the Managers nominated by the Assembly, what proof they thought well to offer to the three first Articles, which Managers are the Speaker, Abram. Man, Tho. Usher, Jno. Blumstone, Wm. Berry and Samll Gray, these persons were continued Managers for the proof of the whole Exhibited Articles by their Own Order.

As to the fourth Article, being not so Intelligably Worded to the ap-

prehension of the Councill, the Assembly requested by their managers that a further Explainter Sence might be admitted.

As to the fifth Article, they urge a Record from under the Clarke of the Circular Courts hand, and in the whole says, that the proof of the Intended Indictmt was false.

As to the sixth Article, Jno. Cann declared that Judg Moore Seeming by a Threatning word, called Jno. Harrison, to be an evidence against Tho. Pringler & Geo. Ambler, he demanded of Harrison to declare what he knew Concerning the hogg in Question, the said Harrison Declared he knew nothing of the taking of the Hogg for he was at Philadelphia at the same time; upon several other questions asked him whether he had seen or Eat any of it, he Declared he had both seen and Eat; upon that the Jury had this in charge the Judge telling them it was perjury, they accordingly found the Person Guilty of Perjury.

As to the seaventh Article, wherein Judg Moore was accused of judging of the proceeding of the foregoing Court Circular.

As to the eighth Article, Jno. Blunstone, Tho. Usher and Geo. Maries, justices of the Peace for the County of Chester, declared That sitting in Judicature in Chester county Court, upon an action, Dennis Rochford being Plant. and Jno. Hickman Deft, that after judgment regularly obtained in that Court by the aforesaid Plaintiff against the Deffendt, and Execution was granted and the Deft. Taken thereby; Yet notwithstanding the said Nich Moore, upon a Bare Petition of the said Defendt., he Vacated the judgmt and discharged the prisoner; also the said Judg Moore did arbitrarily take Upon him merely by a Petition, to Reverse a Judgmt. Duly Obtained in the County Court of Chester, by Tho. Withers, plaintiff, Wm. Taylor, Defendt; this was done by the said Judg Moore the 18th, 2nd Mo., 1685 Last.

As to the ninth Article, Samll Grey and Jno. Hill allege it is apparent that Nich Moore was bound in Duty to goe to the Lower Counties to Keep the Spring Provll Court, yet notwithstanding Declined his Duty, to the Manifest Rewin & Disappointmt of Severall ffreemen.

As to the tenth Article, Whereby they suggest severall Contemptuous & Derogatory Expressions Spoken by Judg Moore of the Provll Councill and of the present State of Government by calling the Memb. thereof fooles and Loggerheads, and said it were well if all the Laws had Dropt, and that it would never be good Times as Long as the Quakers had the Administration.

Wm. Carter and Robert Clifton and Samll Grey declared that Nich Moore advisedt them to proteste against the Last Promulgated Bills.

Upon the Reading Over the Declaration before the Provinciall Councill by the Assembly against Nich. Moore, and their Allegations for proof of their Article being received by the Clarke of the Councill, the Assembly moved that the said Nich. Moore might be removed from all places of Trust and power.

The Speaker being asked if they came as an Assembly or a Committee, they said they came as an Assembly.

Upon the peruseing of the allegations and Testimonys given in by the Memb. of Assembly, with some of the Councill, in Order to prove and to make aparent the charge exhibited in the articles against Nich. Moore, one of the Provll Judges.

The Councill unanimously agreed and Ordered that Express notice shall be given, with all dispacht, be sent to him to signify the sence of this board, and that he make his appearance before the Prest and Provll Councill in the Councill Chamber at three of the clock this afternoone; being the 19 Instant.[10]

He did not appear. On the second day of June, Council notified him to desist from acting in any judicial capacity until the articles of impeachment presented against him had been tried.[11] Meanwhile the Assembly had adjourned, having appointed Abraham Man and John Blunston to prosecute the impeachment and having addressed the following letter to Penn, evidently to forestall any unfavorable representations which might be made to him by More's friends:

Most Excellent Governor: We the Freemen of the Province of Pennsylvania and Territories do with unfeigned Love to your Person and Government, with all due Respect acquaint you, That we have this last day of our Sessions, pass'd all such Bills as we judg'd meet to pass into Laws:—and impeached Nicholas More, a Member of the Assembly, of ten Articles, containing divers high Crimes and Misdemeanors and in the Presence of the President and Provincial Council made very clear Proof of the said Articles. . . .

Dear and honour'd Sir, the Honour of God, the Love of your Person, and the Preservation of the Peace and Welfare of the Government, were, we hope, the only Center to which all our Actions did tend. And although the Wisdom of the Assembly thought fit to humble that aspiring and corrupt Minister of State, Nicholas More; yet, to you, dear Sir, and to the happy Success of your Affairs, our Hearts are open and our Hands ready at all Times to subscribe ourselves, in the name of ourselves, and of all the Freemen we do represent.

Your Obedient and faithful Freemen, John White, Speaker. P. S. Honour'd Sir, We know your Wisdom and Goodness will make a candid Construction of all our Actions, and that it shall be out of the Power of malicious Tongues to separate betwixt our Governor and his Freemen, who extreamly long for your Presence and speedy Arrival of our Person.[12]

At a meeting of Council held on July 28th, "stepd in Abraham Man and John Blunstone. Abraham Man began thus: We are come in the name of the free people to know whether you have not forgot yourselves in not bringing Judg Moore to Tryall. The Secretary asked him for his petition. Abraham Man made answer that they did look upon themselves obliged to come by way of Petition, considering whom they represent; After some Sharpe reprimands from the Councill they withdrew," and the Council adjourned without taking any action.[13]

On September 16th, John Blunstone and George Maris appeared before Council upon a similar errand. They were told that they would re-

[10] Col. Rec., vol. 1, pp. 139-141.
[11] *Ibid*, vol. 1, p. 142.
[12] Votes in Assembly, vol. 1, pp. 45-6.
[13] Col. Rec., vol. 1, p. 151.

ceive an answer as soon as President Lloyd returned from New York, and ordered this answer to be recorded, "That Nich Moore being at this time under a Week and Languishing Condition, and not under promising hopes of a Speedy Recovery, so that at present they Cannot give any Certaine or deffinitive answer."[14]

In the following year, 1686, the Speaker of the new Assembly desired to know why the impeachment was suspended, and was informed by the President that it would be taken up after the promulgated bills were disposed of, but it never was. Council had leaned towards More throughout these proceedings, and, having suspended him from office and a new Chief Justice having been appointed in his place on the reorganization of the Provincial Court under the Act of 1685, they evaded further proceedings against him.

It must be remembered that the proceedings against More were wholly *ex parte,* and that, if he had not been too haughty to appear and make a defence, most of the charges against him could have been disproved or satisfactorily explained. His impeachment did not impair his standing in the good graces of Penn, who appointed him in 1687 one of the five Commissioners of State to whom the executive functions theretofore exercised by the President and Council were transferred in that year. He did not serve in that capacity. As he was ill in September, 1685, with no hope of a speedy recovery, and died of a lingering illness in 1689, it is quite probable that his health did not permit of it. Had he served, it is quite probable that he would have given further proof of his arrogance.

Incidental to the impeachment of More was the contumacy of Patrick Robinson, clerk of the Provincial Court, who refused to produce the records of his court which were needed by the House in the prosecution of the impeachment. On his refusal a warrant was issued for his arrest, the House voting that "it was the undoubted Privilege of this Assembly to send for all such persons into Custody, as shall refuse to obey the just and lawful Orders of the Assembly." He was voted "a public enemy to the Province of Pennsylvania and a Violator of the Privileges of the freemen in Assembly met." It was further voted that Robinson having said in the presence of the Council that the articles of impeachment presented against More were drawn "Hob Nob at a Venture," the House could not proceed in any public business until they had received satisfaction for that high breach of privilege.[15]

The Speaker and two members were appointed to wait upon the Council to inform it of the action of the Assembly in this regard. On their way thither they met Robinson on the street who said to the Speaker in a threatening manner: *"Well,* John, *have a Care what you do, I'll have at you when you are out of the Chair."* The Council promised satisfaction, but did nothing more than to declare that Robinson's words were "undecent, unalowable & to be disowned."[16] Returning to its chamber,

[14] *Ibid,* vol. 1, p. 153.
[15] Votes in Assembly, vol. 1, p. 34.
[16] Votes in Council, vol. 1, p. 34; Col. Rec., vol. 1, p. 138.

the House remarked, "That upon their first desiring of said records to be produced the said Patrick Robinson answered, That *there was no Records;* and after some excuses he said that *his Minutes of the Proceedings of the said Courts, were written, some in Latin, where one Word stood for a Sentence; and in untelligible Characters, which no Person could read but himself; no, not an Angel* from Heaven, or words to that purpose; whereupon the Assembly desiring him to produce the said Minutes, told him, that he himself should be allowed to read them in the Assembly, and that the Assembly would put the most favorable construction upon them they could, and that they did not in the least seek any occasion against him; whereupon he making several evasions, and withdrawing himself towards the door of the Assembly House, told them that he would *consider of it;* but the Members of Assembly telling him that his Delaying would be taken as a Denial; he answered, *They might take it so if they would.*"[17]

Robinson, being now brought into the Assembly by the sheriff and demanded to produce the records, refused to do so and told the Assembly they acted arbitrarily and without authority, whereupon it was voted that the President and Council should be moved and desired that he be made incapable of holding any public office in the Province. The Council, however, concluded that he could not be regularly removed from his office until he was legally convicted of the crimes alleged against him.[18] And so the matter rested for a time, but on the first of October, 1686, the Council found a way of removing him from office without a legal conviction, by summarily deposing him at the request of the Provincial Judges.[19] On May 13, 1686, the House had inquired why Robinson had not been removed according to promise[20] to which Council replied that the inquiry was not proper nor reasonable to be answered, nor was it signed by any of the Assembly.[21] Robinson was afterwards appointed Secretary of the Province.[22]

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[17]Votes in Assembly, vol. 1, p. 35.
[18]Col. Rec., vol. 1, p. 138.
[19]Col. Rec., vol. 1, p. 192.
[20]Votes in Assembly, vol. 1, p. 38.
[21]Col. Rec., vol. 1, p. 181.
[22]Charter and Laws of Penna., p. 260.

CHAPTER XII.

EARLY PUBLICATION IN PHILADELPHIA OF MAGNA CHARTA.

CHAPTER XII.

Early Publication in Philadelphia of Magna Charta.

We may here refer to an event of interest to the legal profession which took place in 1687. In that year was published at Philadelphia by William Bradford, a pamphlet entitled "The Excellent Privilege of Liberty and Property being the Birth-Right of Free-Born Subjects of England," which was prepared by William Penn and published at his instance. This little work was reprinted in 1897 by the Philobiblon Club of Philadelphia from the only copy then known to exist. The reprint was limited to an edition of one hundred and fifty copies, distributed to the members of that organization.

This publication begins with a "Letter to the Reader" followed by a brief introduction. Then follows in order Magna Charta, (which is not the charter granted by John, but that granted by his son, Henry III, in the ninth year of his reign, and confirmed by Edward I, in the thirty-first year of the latter's reign), a comment on the charter, the statute *De Tallageo non Concedendo,* an abstract of the patent of Charles II to Penn, and, finally, the "Frame of Government" or "Act of Settlement" agreed to in 1683, given in full in the last chapter, to which the preceding contents lead up. In the introduction to the Philobiblon Club reprint it is stated: "That the people should understand the true basis of their liberties he [Penn] deposited in the archives of his Colony a copy of Magna Charta 'certified by the Keeper and other officers of the Cottonian Library, illuminated and ornamented as in the original' and there it remained for a century." The "Letter to the Reader," the introduction and Penn's comments upon Magna Charta, not being otherwise accessible to the public, are presented herewith.

TO THE READER

It may reasonably be supposed that we shall find in this part of the world, many men, both old and young, that are strangers, in a great measure, to the true understanding of that inestimable inheritance that every Free-born Subject of England is heir unto by Birth-right, I mean that unparalleled privilege of Liberty and Property, beyond all the Nations in the world beside; and it is to be wished that all men did rightly understand their own happiness therein; in pursuance of which I do here present thee with that ancient Garland, the Fundamental Laws of England, bedecked with many precious privileges of Liberty and Property, by which every man that is a Subject to the Crown of England, may understand what is his right, and how to preserve it from unjust and unreasonable men: whereby appears the eminent care, wisdom and industry of our progenitors in providing for themselves and posterity so good a fortress that is able to repel the lust, pride and power of the Noble, as well as ig-

The Excellent Priviledge of

LIBERTY & PROPERTY

BEING THE

BIRTH-RIGHT

Of the Free-born Subjects of *England.*

CONTAINING

I. *Magna Charta*, with a learned Comment upon it.

II. The Confirmation of the Charters of the Liberties of *England* and of the Forreſt, made in the 35th year of *Edward* the Firſt.

III. A Statute made the 34 *Edw.* 1. commonly called *De Tallagio non Concedendo*; wherein all Fundamental Laws, Liberties and Cuſtoms are confirmed. With a Comment upon it.

IV. An abſtract of the Pattent granted by the King to *William Penn* and his Heirs and Aſſigns for the Province of *Pennſilvania.*

V. And *Laſtly*, The Charter of Liberties granted by the ſaid *William Penn* to the Free-men and Inhabitants of the Province of *Pennſilvania* and Territories thereunto annexed, In *America.*

Major Hæreditas venit unicuq; noſtrum a Jure & Legibus, quam a Parentibus.

Fac-simile of title page of a pamphlet published in Philadelphia in 1687, containing the Great Charter.

norance of the Ignoble; it being that excellent and discreet balance that gives every man his even proportion, which cannot be taken from him, nor be dispossessed of his life, liberty or estate, but by the trial and judgment of twelve of his equals, or Law of the Land, upon the penalty of the bitter curses of the whole people; so great was the zeal of our predecessors for the preservation of these Fundamental Liberties (contained in these Charters) from encroachment, that they employed all their policy and religious obligations to secure them entire and inviolable, albeit the contrary hath often been endeavored, yet Providence hitherto hath preserved them as a blessing to the English Subjects.

The chief end of the publication hereof is for the information and understanding (what is their native right and inheritance) of such who may not have leisure from their Plantations to read large volumes; and beside, I know this Country is not furnished with Law-Books, and this being the root from whence all our wholesome English Laws spring, and indeed the line by which they must be squared, I have ventured to make it public, hoping it may be of use and service to many Freemen, Planters and Inhabitants in this Country, to whom it is sent and recommended, wishing it may raise up noble resolution in all the Freeholders in these new Colonies, not to give away anything of Liberty and Property that at present they do, (or of right as loyal English Subjects, ought to) enjoy, but take up the good example of our ancestors, and understand, that it is easy to part with or give away great privileges, but hard to be gained, if once lost. And therefore all depends upon our prudent care and actings to preserve and lay sure foundations for ourselves and the posterity of our loins.

PHILOPOLITES.

INTRODUCTION

In France, and other nations, the mere will of the Prince is Law, his word takes off any man's head, imposeth taxes, or seizes any man's estate, when, how and as often as he lists; and if one be accused, or but so much as suspected of any crime, he may either presently execute him, or banish, or imprison him at pleasure; or if he will be so gracious as to proceed by form of their laws, if any two villains will but swear against the poor party, his life is gone; nay, if there be no witness, yet he may be put on the rack, the tortures whereof make many an innocent person confess himself guilty, and then, with seeming justice, is executed. But,

In England the Law is both the measure and the bound of every Subject's duty and allegiance, each man having a fixed Fundamental Right born with him, as to freedom of his person and property in his estate, which he cannot be deprived of, but either by his consent, or some crime, for (1) all our Kings take a solemn oath at their Coronation to observe and cause the laws to be kept: which the law has imposed such a penalty or forfeiture. For (2) all our Judges take an oath wherein among other points they swear, to do equal Law and Right to all the King's Subjects, rich and poor, and not to delay any person of Common Right for the Letters of the King, or of any other Person, or for any other cause: Therefore saith Fortescue (who was first Chief Justice, and afterwards Lord Chancellor to King Henry the Sixth), in his Book De Laudibus Legum Angliae, cap. 9, Non potest Rex Angliae, etc., the King of England cannot alter nor change the laws of his realm at his pleasure; For why, he governeth his people by power not only royal, but also politic: If his pow-

er over them were only regal, then he might change the laws of his realm, and charge his Subjects with Tallage and other Burthens, without their consent; but from this much differeth the power of a King whose government is politic; for he can neither change laws without the consent of his Subjects, nor yet charge them with impositions against their wills. With which accords Bracton, a learned Judge and Law-Author, in the Reign of King Henry the Third, saying, Rex in Regno suo superiores habet Deum et Legem; i. e., The King in his Realm hath two superiors, God and the Law; for he is under the directive though not coercive Power of the Law.

'Tis true, the Law itself affirms, the King can do no wrong, which proceeds not only from a presumption, that so excellent a Person will do none but also because he acts nothing but by Ministers, which (from the lowest to the highest) are answerable for their doings; so that if a King in passion should command A. to kill B. without process of law, A. may yet be prosecuted by Indictment or upon an Appeal (where no royal pardon is allowable) and must for the same be executed, such command notwithstanding.

This original happy Frame of Government is truly and properly called an Englishman's Liberty, a Privilege not exempt from the law, but to be freed in person and estate from arbitrary violence and oppression. A greater inheritance (saith Judge Coke) is derived to every one of us from our laws then from our parents. For without the former, what would the latter signify? And this Birth-right of Englishmen shines most conspicuously in two things: 1. Parliaments. 2. Juries.

By the First the Subject has a share by his chosen Representatives in the Legislative (or law-making) Power; for no new laws bind the people of England, but such as are by common consent agreed on in that great Council.

By the Second, he has a share in the executive part of the law, no causes being tried, nor any man adjudged to lose life, member or estate, but upon the verdict of his Peers or Equals his neighbours, and of his own condition: These two grand pillars of English liberty, are the Fundamental Vital Privileges, whereby we have been, and are preserved more free and happy than any other people in the world, and (we trust) shall ever continue so: For whoever shall design to impair, pervert or undermine either of them, do strike at the very Constitution of our Government, and ought to be prosecuted and punished with the utmost zeal and rigour. To cut down the banks and let in the sea, or to poison all the springs and rivers in the kingdom, could not be a greater mischief; for this would only affect the present age, but the other will ruin and enslave all our posterity.

But beside these paramount privileges which the English are estated in by the original Constitution of their Government, there are others more particularly declared and expressed in divers Acts of Parliament too large to be inserted in this place.

THE COMMENT ON MAGNA CHARTA

This excellent Law holds the first place in our Statute Books, for though there were, no doubt, many Acts of Parliament long before this, yet they are not now extant; it is called Magna Charta, or the Great Charter, not in respect of its bulk, but in regard of the great importance and weight of the matters therein contained; it is also stiled, Charta Libertatum Regni, The Charter of the Liberties of the Kingdom; and upon great rea-

son (saith Cook in his Proem) is so called, from the effect, quia Liberos facit, because it makes and preserves the People free. Though it run in the stile of the King, as a Charter, yet (as my Lord Cook well observes on the thirty-eighth chapter) it appears to have passed in Parliament; for there was then a fifteenth granted to the King by the Bishops, Earls, Barons, Free Tenants and People, which could not be, but in Parliament, nor was it unusual in those times to have Acts of Parliament in a form of a Charter, as you may read in the Princes Case, Cook's Reports, liber 8.

Likewise, though it be said here, that the King hath given and granted these Liberties, yet they must not be understood as mere emanations of royal favour, or new bounties granted, which the People could not justly challenge, or had not a right unto before; for the Lord Cook in divers places asserts, and all lawyers know, that this Charter is for the most part only declaratory of the principal ground of the fundamental laws and liberties of England. No new freedom is hereby granted, but a restitution of such as lawfully they had before, and to free them of what had been usurped and encroached upon them by any Power whatsoever, and therefore you may see this Charter often mentions sua jura, their rights and liberties, which shows they had them before, and that the same now were confirmed.

As to the occasion of this Charter, it must be noted, that our ancestors, the Saxons, had with a most equal poise and temperament, very wisely contrived their government, and made excellent provisions for their liberties, and to preserve the people from oppression; and when William, the Norman, made himself master of the land, though he be commonly called the Conqueror, yet in truth he was not so, and I have known several Judges that would reprehend any gentleman at the Bar that casually gave him that title; for though he killed Harold the usurper, and routed his army, yet he pretended a right to the Kingdom, and was admitted by compact, and did take an oath to observe the laws and customs.

But the truth is, he did not perform that Oath so as he ought to have done, and his successors William Rufus, King Stephen, Henry the First and Richard likewise made frequent encroachments upon the liberties of their people; but especially King John made use of so many illegal devices to drain them of money, that wearied with intolerable oppressions, they resolved to oblige the King to grant them their liberties, and promise the same should be observed, which King John did in Runnymede between Staines and Windsor, by two charters, one called Charta Libertatum, The Charter of Liberties (the form of which you may read in Matthew Paris, Fol. 246, and is in effect the same with this here recited) the other, The Charter of the Forest, copies of which he sent into every County, and commandeth the Sheriff, &c., to see them fulfilled.

But by ill counsel he quickly after began to violate them as much as ever, whereupon disturbances and great miseries arose, both to himself and to the Realm. The son and successor of this King John, was Henry the Third, who in the ninth year of his reign, renewed and confirmed the said Charters; but within two years after, cancelled them by the pernicious advice of his Favourites, particularly Hubert de Burgh, whom he had made Lord Chief Justice; one that in former times had been a great lover of his Country, and a well-deserving patriot, as well as learned in the Laws, but now to make this a step to his ambition (which ever rideth without reins) persuaded and humored the King, that he might avoid the

Charters of his Father King John, by duress, and his own Great Charter, and Charta de Foresta also, for that he was within age when he granted the same; whereupon the King in the eleventh year of his reign, being then of full age, got one of the Great Charters, and of the Forest into his hands, and by the counsel principally of this Hubert his Chief Justice, at a Council holden at Oxford, unjustly cancelled both the said Charters, (notwithstanding the said Hubert de Burgh was the primary witness of all temporal Lords to both the said Charters) whereupon he became in high favour with the King, insomuch that he was soon after (namely the tenth of December, in the thirteenth year of that King) created (to the highest dignity that in those times a Subject had) to be an Earl, namely, of Kent: But soon after (for flatterers and humorists have no sure foundation) he fell into the king's heavy indignation, and after many fearful and miserable troubles, he was justly, and according to law, sentenced by his peers in an open Parliament, and justly degraded of that dignity, which he unjustly had obtained by his counsel, for cancelling of Magna Charta, and Charta de Foresta.

In the ninth chapter of this Great Charter, all the ancient liberties and customs of London are confirmed and preserved, which is likewise done by divers other Statutes, as 14 Edward III, chap. 2, &c.

The twenty-ninth chapter, NO FREEMAN SHALL BE TAKEN, &c. deserves to be written in letters of gold; and I have often wondered the words thereof are not inscribed in capitals on all our Courts of Judicature, Town-Halls, and most publick edifices; they are the elixir of our English freedoms, the store-house of all our liberties; and because my Lord Cook in the second part of his Institutes, hath many excellent observations, his very words I shall here recite.

This chapter containeth nine several branches.

1. That no man be taken or imprisoned, but per legem terrae, that is, by the Common Law, Statute Law, or Custom of England; for these words, per legem terrae, being towards the end of this chapter, do refer to all the precedent matters in this chapter, and this hath the first place, because the liberty of a man's person is more precious to him, than all the rest that follow, and therefore it is great reason, that he should by Law be relieved therein, if he be wronged, as hereafter shall be shewed.

2. No man shall be disseised, that is, put out of seisin, or dispossessed of his free-hold (that is) lands or livelihood, or of his liberties, or free customs, that is, of such franchises and freedoms, and free customs, as belong to him by his free Birth-right, unless it be by the lawful judgment, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by the due course and process of law.

3. No man shall be outlawed, made an ex lex, put out of the law, that is, deprived of the benefit of the law, unless he be outlawed according to the law of the land.

4. No man shall be exiled or banished out of his Country, that is, nemo perdet patriam, no man shall lose his Country, unless he be exiled according to the law of the land.

5. No man shall in any sort be destroyed, (destruere, id est, quod prius structum, et factum fuit, penitus evertere et diruere) unless it be by the verdict of his equals, or according to the law of the land.

6. No man shall be condemned at the King's Suit, either before the

King in his Bench, where the pleas are Coram Rege (and so are the words, nec super eum ibimus, to be understood) nor before any other commissioner or judge whatsoever, and so are the words, nec super eum mittemus, to be understood, but by the judgment of his peers, that is, equals, or according to the law of the land.

7. We shall sell to no man justice or right.

8. We shall deny to no man justice or right.

9. We shall defer to no man justice or right.

Each of these we shall briefly explain.

1. No man shall be taken (that is) restrained of liberty by petition, or suggestion to the King or his Council, unless it be by indictment, or presentment of good and lawful men, where such deeds be done. This branch, and divers other parts of this Act have been notably explained and construed by divers Acts of Parliament.

2. No man shall be disseised, &c. Hereby is intended that lands, tenements, goods, and chattels shall not be seized into the King's hands, contrary to this Great Charter, and the law of the land; nor any man shall be disseised of his lands, or tenements, or dispossessed of his goods, or chattels, contrary to the law of the land.

A custom was alledged in the town of C. that if a tenant cease by two years, that the Lord should enter into the freehold of the tenant, and hold the same until he were satisfied of the arrearages, and it was adjudged a custom against the law of the land, to enter into a man's freehold in that case, without action or answer.

King Henry the Sixth granted to the Corporation of Dyers within London, power to search, &c., and if they found any cloth dyed with log-wood, that the cloth should be forfeit; and it was adjudged, that this Charter concerning the forfeiture, was against the law of the land, and this Statute: for no forfeiture can grow by letters patents.

No man ought to be put from his livelihood, without answer.

3. No man out-lawed, that is, barred to have the benefit of the law. Vide, for the word, the first part of the Institutes.

Note to this word utlagetur, [outlawed], these words, nisi per legem terrae, [unless by the law of the land] do refer.

De libertatibus. This word libertates, or liberties, hath three significations:

First, as it hath been said, it signifieth the laws of the Realm, in which respect this Charter is called Charta Libertatum as aforesaid.

2. It signifieth the Freedoms, that the Subjects of England have; for example, the Company of Merchant Taylors of England, having power by their charter to make ordinances, made an ordinance, that every brother of the same Society should put the one-half of his clothes to be dressed by some cloth-worker free of the same Company, upon pain to forfeit ten shillings, &c., and it was adjudged that this ordinance was against Law, because it was against the liberty of the Subject, for every Subject hath freedom to put his clothes to be dressed by whom he will, et sic de similibus: and so it is, if such, or the like grant had been made by the letters patents.

3. Liberties, signifieth the franchises and privileges, which the Subjects have of the gift of the King, as the goods, and chattels of felons, outlaws, and the like, or which the Subjects claim by prescription, as wreck, waif, stray, and the like.

So likewise, and for the same reason, if a grant be made to any man,

to have the sole making of cards, or the sole dealing with any other trade, that grant is against the liberty and freedom of the Subject, that before did, or lawfully might have used that trade, and consequently against this Great Charter.

Generally all monopolies are against this Great Charter, because they are against the liberty and freedom of the subject, and against the law of the land.

4. No man exiled, that is, banished, or forced to depart, or stay out of England, without his consent, or by the law of the land: no man can be exiled, or banished out of his native Country, but either by authority of Parliament, or in case of abjuration for felony, by the Common Law: and so when our Books, or any Records speak of exile or banishment, other than in case of abjuration, it is to be intended to be done by authority of Parliament: as Belknap and other Judges, &c., banished into Ireland in the reign of Richard the Second.

This is a beneficial law, and is construed benignly, and therefore the King cannot send any Subject of England against his will to serve him out of the Realm, for that should be an exile, and he should perdere patriam: no, he cannot be sent against his will into Ireland, to serve the King, as his Deputy there, because it is out of the realm of England: for if the King might send him out of his Realm to any place, then under pretence of service, as Ambassador, or the like, he might send him into the furthest parts of the world, which being an exile, is prohibited by this Act.

5. No man destroyed, &c., that is, forejudged of life or limb, or put to torture, or death. Every oppression against law, by colour of any usurped authority, is a kind of destruction, and the words, aliquo modo, any otherwise, are added to the verb destruatur, and to no other verb in this chapter, and therefore all things, by any manner of means tending to destruction, are prohibited: as if a man be accused, or indicted of treason or felony, his lands or goods cannot be granted to any, no not so much as by promise, nor any of his lands or goods seized into the King's hands, before he is attainted; for when a Subject obtaineth a promise of the forfeiture, many times undue means and more violent prosecution is used for private lucre, tending to destruction, than the quiet and just proceeding of law would permit, and the party ought to live of his own until attainder.

6. By lawful judgment of his peers, that is, by his equals, men of his own rank and condition. The general division of persons, by the law of England, is, either one that is Noble, and in respect of his nobility of the Lords House of Parliament, or one of the Commons, and in respect thereof the House of Commons in Parliament: and as there be divers degrees of nobility, as Dukes, Marquesses, Earls, Viscounts and Barons, and yet all of them are comprehended under this word (pares) peers, and are Peers of the Realm, so of the Commons, they be Knights, Esquires, Gentlemen, Citizens and Yeomen, and yet all of them of the Commons of the Realm, and as every of the Nobles is one a peer to another, though he be of a several degree, so it is of the Commons; and as it hath been said of men so doth it hold of noble women, either by birth or marriage.

And forasmuch as this judgment by peers is called lawful, it shews the antiquity of this manner of trial: it was the antient accustomed legal course long before this Charter.

7. Or by the law of the land, that is, by due process of law, for so words are expressly expounded by the Statute of 37 Edward the Third,

chap. 8, and these words are especially to be referred to those fore-going, to whom they relate; as, None shall be condemned without a lawful trial by his peers, so, None shall be taken, or imprisoned, or put out of his freehold, without due process of the law, that is, by the indictment or presentment of good and lawful men of the place, in due manner, or by writ original of the Common Law.

Now seeing that no man can be taken, arrested, attached, or imprisoned, but by due process of law, and according to the law of the land, these conclusions hereupon do follow:—

1. That the person or persons which commit, must have lawful authority.

2. It is necessary that the warrant or mittimus be lawful, and that must be in writing under his hand and seal.

3. The cause must be contained in the warrant, as for treason, felony, &c., or for suspicion of treason or felony, or the like particular crime; for if it do not thus specify the cause, if the prisoner bring his Habeas Corpus he must be discharged, because no crime appears on the return, nor is it in such case any offence at all if the prisoner make his escape; whereas if the mittimus contain the cause, the escape would respectively be treason or felony, though in truth he were not guilty of the first offence, and this mentioning the cause, is agreeable to Scripture, Acts 5.

The warrant or mittimus, containing a lawful cause, ought to have a lawful conclusion, viz., and him safely to keep, until he be delivered by Law, &c., and not until the party committing shall further order.

If a man by colour of any authority, where he hath not any in that particular case, shall presume to arrest or imprison any man, or cause him to be arrested or imprisoned, this is against this Act, and it is most hateful, when it is done by countenance of justice.

King Edward the Sixth did incorporate the town of St. Albans, and granted to them to make ordinances, &c., they made a by-law upon pain of imprisonment, and it was adjudged to be against this Statute of Magna Charta; so it had been, if such an ordinance had been contained in the Patent itself.

8. We will sell to no man, deny to no man, &c. This is spoken in the person of the King, who in judgment of Law in all his Courts of Justice is present.

And, therefore, every Subject of this Realm, for injury done to him in bonis, terris, vel persona, in person, lands, or goods, by any other Subject, ecclesiastical or temporal whatever he be, without exception, may take his remedy by the course of the law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay; for justice must have three qualities, it must be libera, free, for nothing is more odious than justice set to sale; plena, full, for justice ought not to limp, or be granted piecemeal; and celeris, speedily, quia dilatio est quaedam negatio, delay is a kind of denial: And when all these meet, it is both JUSTICE and RIGHT.

9. We will not deny or delay any man, &c. These words have been excellently expounded by latter Acts of Parliament, that by no means Common Right or Common Law should be disturbed, or delayed, no though it be commanded under the Great Seal, or Privy Seal, Order, Writ, Letters, Message, or Commandment whatsoever, either from the King, or any other, and that the Justices shall proceed, as if no such Writs, Letters, Order, Message, or other Commandment were come to them. All our

Judges swear to this for it is part of their oaths, so that if any shall be found wresting the Law to serve a Court's turn, they are perjured, as well as unjust. The common laws of the Realm should by no means be delayed, for the Law is the surest sanctuary that a man can take, and the strongest fortress to protect the weakest of all; Lex est tutissima cassis, the Law is a most safe head-piece, and sub clypeo Legis nemo decipitur, no man is deceived whilst the Law is his buckler; but the King may stay his own suit, as a capias pro fine, for he may respite his fine, and the like.

All protections that are not legal, which appear not in the register, nor warranted by our Books, are expressly against this branch, nulli differemus, we will not delay any man; as a protection under the Great Seal granted to any man, directly to the Sheriff, &c., and commanding them, that they shall not arrest him, during a certain time at any other man's suit, which hath words in it, per praerogativam nostram, quam nolumus esse arguendam, by Our Prerogative, which we will not have disputed; yet such protections have been argued by the Judges, according to their oath and duty, and adjudged to be void; as Mich. 11, Henry VII, Rot. 124, a protection granted to Holmes a vintner of London, his factors, servants and deputies, &c., resolved to be against law; Pasch. 7 Henry VIII, Rot. 66, such a protection disallowed, and the Sheriff amerced for not executing the writ; Mich. 13 and 14 Elizabeth, in Hitchcock's Case, and many other of latter time: and there is a notable Record of ancient time in 22 Elizabeth I. John de Marshall's case; Non pertinet ad vicecomitem de protectione Regis judicare, imo ad Curiam.

Justice or Right, We shall not sell, deny or delay Justice and Right, neither the end, which is Justice, nor the mean whereby we may attain to the end, and that is the Law.

Right is taken here for Law, in the same sense that Justice often is called.

1. Because it is the right line, whereby justice distributive is guided and directed, and therefore all the Commissioners of Oyer and Terminer, of Goal-delivery, of the Peace, &c. have this clause, facturi quod ad justiatiam pertinet, secundum legem et consuetudinem Angliae, that is, to do justice and right, according to the rule of the law and custom of England; and that which is called Common Right in 2 Edward the Third is called Common Law in 14 Elizabeth, 3 &c., and in this sense it is taken, where it is said, Ita quod stet Recto in Curia, id est Legi in Curia.

2. The law is called Rectum, because it discovereth that which is tort, crooked or wrong, for as Right signifieth Law, so tort, crooked or wrong, signifieth injury, and injuria est contra jus, injury is against right: recta linea est index sui et obliqui, a right line is both declaratory of itself and the oblique, hereby the crooked cord of that which is called discretion appeareth to be unlawful, unless you take it, as it ought to be, discretio est discernere per Legem, quid sit justum, discretion is to discern by the Law what is just.

3. It is called Right, because it is the best Birthright the Subject hath, for thereby his goods, lands, wife and children, his body, life, honour and estimation are protected from injury and wrong: major hoereditas venit unicuique nostrum a jure et legibus, quam a parentibus, a greater inheritance descends to us from the laws, than from our progenitors.

Thus far the very words of that oracle of our law, the sage and learned Cook; which so fully and excellently explains this incomparable Law, that it will be superfluous to add any thing further thereunto.

CHAPTER XIII.

1685—1700.

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1685-1700.

The laws were not effectively administered under the judicial system thus established. Penn wrote to the Council complaining that the laws were not enforced, and as a result that body, on April 2, 1687,[1] agreed:

That the board of Justices of Each County be writ unto by a public Instrument to incourage, quicken and require the Due Execution of all such Laws more Especially, which being to frequently, publicqly and notoriously transgressed, God's blessed truth, comes thereby grieved, His Name profaned, the province, governmt and professors of His Holy way, and scandalized thereby.

It does not appear whether the administration of justice was improved thereby, or not. In the reply of a Committee of Council to a remonstrance of the Assembly, submitted on May 26, 1693, during the administration of Governor Fletcher, the committee say:

And whereas, they say that they "apprehend the reasons for the Superseding the proprietor's governancie are founded on misinformations, for that the Courts of Justice wer open in all the counties of this governmt & Justice duly executed." Wee do say that we can instance in severall particulars where justice was delayed, if not denyed, & therefor not dulie executed.[2]

Governor Blackwell (1687-1689) contended that the Provincial Court Act of 1685 was in contravention of the charter or frame of government, which required all officers to be appointed by the Governor, whereas that act provided that the Provincial Judges should be appointed by the Governor and Council. Council agreed thereupon that judges should be appointed under the Act of 1684, and a commission was drawn accordingly, but Thomas Lloyd, keeper of the great seal, refused to attach the great seal thereto, contending that the commission was:

In no wise proper for the said seale, and as to the Draught of the Commission it selfe it seems to be more moulded by ffancy, than fformed by law, the style insecure, the powers unwarrantable, and the Duration not consonant to the continuance of the Laws upon wch it Should be grounded. . . .[3]

The commission was therefore issued under the lesser seal, providing for five justices as the Act of 1684 required.[4]

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[1] Col. Rec., vol. 1, p. 198.
[2] *Ibid*, vol. 1, p. 423.
[3] *Ibid*, vol. 1, p. 249.
[4] *Ibid*, vol. 1, p. 248.

It appears, however, that the Provincial Court Act of 1685, was, later, considered to be in force, because on April 2, 1690, we find the Council agreeing to commission Arthur Cook, William Clark and Joseph Growdon Provincial Judges for the next Provincial Court, whereas the Act of 1684 provided for the appointment of five judges.[5]

It appeared in 1689, during the administration of Governor Blackwell, that none of the laws had been passed under the great seal, and that only the laws passed at the Session of 1682 had been enrolled in a proper manner. The patent to Penn merely required the laws to be published under his seal or that of his heirs, but by his commission to the keeper of the great seal all laws were to be passed under that seal.[6]

It was therefore discussed whether or not the laws passed after 1682 were in force. Finally the Governor and Council issued a declaration that all laws passed before the departure of Penn in 1684 should be considered in force, with the proviso that "the Governor may issue out commissions for Provincial Judges under the Proprietor's lesser seal."[7]

It appears that the laws passed after the departure of Penn in 1684 had not been submitted to him, as we find him writing to Council on September 25, 1689, requesting that body among other things to "collect the Laws that are in Being and send them over to me in a stitcht book by the very first opportunity which I have so often and so much in vaine desired."[8]

The Provincial Court Act of 1685, Chapter 182, was superseded by the Act of 1690, Chapter 197. This Act restored the number of the Provincial Judges to five, to be appointed by the Governor under the great seal of the Province, gave the county courts jurisdiction in cases of equity under ten pounds, allowed appeals only where the judgment appealed from amounted to ten pounds or more, and required that security should first be given to prosecute the appeal and to pay all costs and damages. It further provided that the five judges or any three of them should constitute a Provincial Court, to sit twice in every year in the City of Philadelphia on certain dates; also that at least two of the judges should go on circuit every fall and spring, and hold sittings at places and on dates fixed by the Act. These circular courts were to hear and determine all appeals from the county courts both in law and in equity, and also try all cases of treason, murder and manslaughter, and other heinous and enormous crimes in the respective counties.[9]

At the Session of 1690 was passed an act reciting that the former act, relating to suits involving under forty shillings, had not served the purpose intended, and enacting that one justice of the peace, instead of two, as in the former act, might hear and determine any case involving debt or due under forty shillings, and in case the party complained against would

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[5] *Ibid*, vol. 1, p. 324.
[6] *Ibid*, vol. 1, p. 276.
[7] *Ibid*, vol. 1, p. 297.
[8] *Ibid*, vol. 1, p. 318.
[9] Charter and Laws of Pennsylvania, p. 184.

not satisfy the judgment, the justice should report the same to the next county court where it should be recorded and be good and binding, if the county court approved the same.[10]

Prior to 1690 it was the practice to issue one commission to the judges of the Provincial Court, jointly, in which a resident of the Province was first named, who sat as chief justice in the Province, and another commission in which a resident of the territories was first named, who sat as chief justice therein.

But one commission was issued in 1690, however, in which Arthur Cook, of Bucks county, was appointed chief justice for all the sessions of the court. The members of the Council from the lower counties insisted that the former practice should be followed. Their remonstrance being without effect, they held a clandestine meeting in the council chamber, though they constituted but one-third of the numbers of the Council, at which they proceeded to elect a full new bench, drawing up two commissions, in one of which William Clark, of Sussex county, was nominated as chief justice for the lower counties, and sent the documents to the keeper of the great seal directing him to affix it to them. This was naturally refused, their proceedings were entirely disallowed and annulled, and a proclamation to that effect was ordered to be issued. This caused great dissatisfaction in the lower counties, and ultimately led to the secession of those counties from the Province in 1704.

On the abrogation of Penn's government in 1693 by the appointment of Governor Fletcher, all the laws theretofore passed fell with the authority of the Proprietor, but eighty-six of the former laws, embraced in a so-called Petition of Right, were re-enacted and approved by the Governor "until their Majesties' pleasure should be further known." Besides these, twenty-nine new bills were passed, among them a new Act relative to the Provincial Court, which superseded the Provincial Court Act of 1690, and which added to the crimes of which the court had original exclusive jurisdiction, rape, sodomy, buggery, burglary and burning of houses, and omitted "other heinous and enormous crimes." It provided that the charges of the judges when on circuits should be defrayed by the several counties at the rate of ten shillings each per day. The Governor was to appoint the five judges, but there is no provision as to the great seal. In other respects it was the same as the earlier acts[11] This act is said to have been prepared by a committee of which David Lloyd, James Fox, Samuel Richardson, Thomas Pemberton and Edward Blake were members.

The various courts remained as so constituted until the passage of the Act of October 28, 1701, entitled "An act for establishing Courts of Judicature in this Province and counties annexed," which was the first of a series of elaborate acts providing for the establishment of the courts of the province, a discussion of which is deferred to another chapter.[12]

The Frame of Government or Act of Settlement agreed upon in 1683

[10] *Ibid*, p. 186.
[11] *Ibid*, p. 225.
[12] *Ibid*, p. 311.

remained in force, except during the administration of Governor Fletcher, until the Session of 1696, when a new act was passed[13] making important changes in the plan of government. Under it both the Council and the Assembly had the power of proposing bills, each for the consideration of the other, and such bills as the Governor gave his consent to became laws, duplicates of which were to be transmitted to the King's Council. The Assembly was given the right of sitting on its own adjournments, continuing its preparation of bills, redressing all grievances and impeaching criminals till dismissed by the Governor and Council, who might summon the Assembly at any time. The Governor or his deputy was to preside in Council, but was prohibited from performing any public act of state, relating to justice, the treasury or trade, without the advice and consent of the Council or a majority of those present. The act was to continue and be in force until the Proprietary signified his pleasure to the contrary by some instrument under his hand and seal.[14]

[13] *Ibid*, p. 245.
[14] *Ibid*, p. 568.

CHAPTER XIV.

THE COMMON LAW OF PENNSYLVANIA.

CHAPTER XIV.

The Common Law of Pennsylvania.

How far the laws of the Province were considered by the early courts as supplemented by the Common Law of England is an interesting question. The following is taken from a paper by Chief Justice Sharswood read before the Law Academy of Philadelphia in 1855, and reprinted in the first volume of the "Reports of the Meetings of the Pennsylvania State Bar Association," at page 333:

Sir William Blackstone fell into an error, when he asserted that the American plantations were to be classed as ceded or conquered countries; and that therefore the common law had no allowance or authority there. On the contrary, the claim of England to the soil was made by her in virture of discovery, not conquest or cession. The Aborigines were considered but as mere occupants, not sovereign proprietors; and the argument for the justice of taking possession and driving out the natives, was rested upon the ground that a few wandering hordes of savages had no right to the exclusive possession and enjoyment of the vast and fertile regions, which were laid open for the improvement and progress of civilized man by the discovery of the new world. Hence the true principle is, that which is recognized as the rule of new settlements: "that if an uninhabited country be discovered, and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force"! (1 Bl. Com. 108).

The Common Law of England thus in force as the substratum of our jurisprudence, has undoubtedly received important modifications in its adoption in this State. "It is one of the noblest properties of this common law, that instead of moulding the habits, the manners, and the transactions of mankind to inflexible rules, it adapts itself to the business and circumstances of the times, and keeps pace with the improvements of the age." (C. J. Gibson, in Lyle v. Richards, 9 S. & R. 351).

There grew up among the early settlers, by general consent, certain usages or general customs, to be distinguished carefully from local and particular customs, which were never allowed. They were founded, in

the first instance, upon the general sense of their convenience, and a tacit understanding that they should be regarded as the law, and from time to time have been recognized and confirmed by the Courts. A few cases will best illustrate this position. Thus, the right of the tenant of a term certain after the expiration of his lease to the way going crop was first set up in opposition to the English law of emblements, by the evidence of witnesses that it was the custom of the country. (Diffendorffer v. Jones, in 1782, cited in Stultz v. Dickey, 5 Binn. 289.) Being not a local or particular but a general custom, this course was not accordant with principle: it ought to have been judicially noticed. It is at present so regarded; and the Supreme Court have expressly decided, that it is not now competent to submit to a jury, upon the testimony of witnesses as to the custom, any question as to its extent and application; as for example, whether the straw is a constituent part of the way going crop (Craig v. Dale, 1 W. & S. 509; Iddinger v. Nagle, 2 W. & S. 22); and they have held as a matter of law, that it does not apply to spring grain. (Demi v. Bossler, 1 P. R. 224.) In regard to the question, whether there were markets overt, it was acknowledged that their efficacy in passing a title to lost or stolen property was part of the common law of England; but it was said that in this government we had no such ancient law or custom. On the contrary, the uniform determination of courts of justice had rejected such an usage, whenever it had been relied on, and great inconveniences would have arisen from adopting it. (Hosack v. Weaver, 1 Yeates, 479). A similar instance arising at a very early day, is the judicial recognition of the usage to bar the wife's dower or convey her estate by a simple deed, with or without an acknowledgment and separate examination of the wife. (Davey v. Turner, 1 Dall. 11; Lloyd v. Taylor, 1 Dall. 17.) A still more remarkable case, was the introduction of slavery into the province, and that, too, with curious modifications. It appears that there were in Pennsylvania two species of slavery derived from birth; the one being a slavery for life, the other for thirty-one years. The latter took place where a child was born of a white mother by a black father. The usage in such case was to hold the issue in slavery till the age of thirty-one years, in consequence of its base birth. (Respublica v. Negro Betsy, 1 Dall. 469). In like manner, the right of an executor to a reasonable compensation, and the important consequence that independently of legislative enactment, he has always been a trustee for the next of kin, as to all the personal property of the testator undisposed of by will, was rested upon an uninterrupted usage as far back as the testamentary law could be traced. (Wilson v. Wilson, 3 Binn. 557.) So a widow was held to be entitled to dower of a trust estate, the anomalous doctrine of the English Courts upon that subject never having been adopted in usage. (Shoemaker v. Walker, 2 S. & R. 554.) And upon the same grounds, it was judicially recognized that the common law doctrine, that fresh water rivers, in which the tide does not ebb and flow, belong to the owners of the banks, has never been applied to the Susquehanna, and other large rivers in Pennsylvania. (Carson v. Blazer, 2 Binn. 475.)

Many British statutes, of a date prior to the first settlement of the country, have been silently repudiated; others adopted only partially; while some few, enacted long after the date of the settlement, have been substantially, though not formally received and acted on. Thus, as an

example of the first class, the statutes of maintenance may be mentioned; though to some extent they were but in affirmance of the common law. From the equality of condition of persons in this country, there was no danger of maintenance from the interference of powerful individuals, and the abundance and cheapness of land, rendered it necessary to admit of its transfer with almost the same facility as personal property. Hence it was never an objection to a conveyance of land in Pennsylvania, that the grantor was out of possession at the time. (Stoever, Lessee of Witman, 6 Binn. 416). In the second class is the statute of charitable uses, 43 Eliz. c. 4, which empowers the Lord Chancellor to issue commissions to inquire into and to decree the execution of such uses. As we were without a Court of Chancery, this statute could not be literally in force; yet the principles adopted by the English Courts of Equity, in the construction of the statute were considered as obtaining here, not by force of the statute, but as part of our common law. (Witman v. Lex. 17 S. & R. 88.) Yet this adoption has not extended to all the rules and principles upon which charities are administered by the Chancellor. The doctrine of *cy pres,* by which, if the intention of the donor could not be actually or legally carried into execution, the discretion was exercised of appropriating the property to some other charity supposed to be as near as possible to his intention, has been expressly repudiated. "No court here," says C. J. Gibson, in the Methodist Church v. Remington (1 Watts, 226), "possesses the specific power necessary to give effect to the principle of *cy pres,* even were the principle itself not too grossly revolting to the public sense of justice, to be tolerated in a country where there is no ecclesiastical establishment." Of the last class, cases of statutes subsequent in date to the colonial settlement, several are to be found in the report of the judges upon that subject. The statute of 9 Anne, c. 20, as to Writs of Mandamus, and informations in the nature of Quo Warranto, may be mentioned as illustrative of the class. "That statute," says C. J. Gibson, "was not extended to Pennsylvania by adoption, and ratified by our act to name the laws in force at the Revolution, but the substance of it has been adopted as a part of our common law." (Commonwealth v. Burrell, 7 Barr. 35.)

There are cases, also, in which the general spirit of our institutions has been considered as modifying the common law. Thus the punishment of the ducking stool, affixed by the law of England to the offence of being a common scold, was held to have been silently abrogated. It was rejected as not accommodated to the circumstances of the country, and against all the notions of punishment entertained by this primitive and humane community; and though they adopted the common law doctrines as to inferior offences, yet they did not follow their punishments. (James v. The Commonwealth, 12 S. & R. 220.) Perhaps no more instructive illustration of the power thus exercised by the silent legislation of the people, can be presented, than is afforded by the case of The Guardians of the Poor v. Greene (5 Binn. 554), in which it was held, that a clergyman who officiates as such, is not bound to serve as a Guardian of the Poor. "Every country," says C. J. Tilghman, "has its common law. Ours is composed partly of the common law of England, and partly of our own usages. When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation

in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the Revolution, we had formed a system of our own, founded in general on the English constitution, but not without considerable variations. In nothing was this variation greater than on the subject of religious establishments. The minds of William Penn and his followers would have revolted at the idea of an established church. Liberty to all, preference to none: this has been our principle, and this our practice. But although we had no established church, yet we have not been wanting in that respect, nor niggars of those privileges, which seem proper for the clergy of all denominations. It has not been our custom to require the services of clergymen in the offices of constables, overseers of the highways or of the poor, jurors, or others of a similar nature. Not that this exemption is founded on any Act of Assembly, but on a universal tacit consent."

A very large and most important branch of our jurisprudence is yet to be mentioned, which must be referred for its origin to the same source,—tacit adoption by the courts and people. Equity is part of the common law of Pennsylvania. (Pollard v. Shaffer, 1 Dall. 211.) It may perhaps be traced in the first instance, to acts of the Provincial Assembly, investing the courts with power to hear and determine all cases in Equity, which, though repealed from time to time by the Crown, remained in force according to the provisions of the charter, until so repealed. But in spite of such repeal, the Courts went on to exercise such powers, adapting with admirable skill the comparatively cumbrous process of the common law courts, to attain the purposes of a bill and decree in Equity. An historical examination of the cases would show how gradually this system proceeded without legislative interposition, until it arrived at a point which left little to be desired, and which, though it naturally prepared the way for the subsequent introduction of chancery forms and proceedings, may well induce the doubt whether the heterogeneous concurrence of the two systems has really been any improvement. By recurring to the principles of Equity, as rules of decision in the ordinary common law actions—especially the allpervading one, that whatever a chancellor would decree to be done, a court of law in Pennsylvania will consider as actually done—by permitting equitable grounds of relief to be made the subject of a special declaration—by recognizing the same principles in pleas and defences, especially regarding the plea of payment, with leave to give special matter in evidence, as in effect a bill by defendant for relief, and a prayer for an injunction—and lastly, by so moulding the verdict, and controlling the execution, as to accomplish the ends of a decree, and especially by the employment for this purpose of conditional verdicts to enforce the specific execution of contracts, it is difficult to see what really valuable objects of separate chancery jurisdiction were not substantially attained. Yet this whole system grew up—stone by stone—by what Mr. Bentham would term "judge-made law,"—yet it was really nothing else but the natural and legitimate growth and expansion of principles early adopted by the people themselves, and carried out by the courts, as the rightful expositors of this common law or general understanding. A few acts of assembly, conceiv-

ed in the spirit of the same system, to extend the powers of the courts in some cases in which the common law process was inefficient, would have completed a structure of which Pennsylvania might have been justly proud. The general introduction of chancery forms and jurisdiction—in other words, constituting a distinct equity side to the courts—has not affected the equitable powers of the tribunals, previously exercised through common law forms. . . .

CHAPTER XV.

COURT OF ADMIRALTY.

CHAPTER XV.

Court of Admiralty.

As we have already seen, the Provincial Council acted as a court of admiralty down to the administration of Governor Fletcher in 1693, when that officer was authorized by his commission as governor to erect one or more courts or courts admiral within the province and territories, and to execute all powers belonging to the place of Vice-Admiral.[1]

On June 26, 1697, a commission was issued by the Crown to Francis Nicholson, governor of Maryland, giving him authority to appoint judges, registers, marshals and advocates for the Admiralty Courts of Maryland, Pennsylvania and West Jersey.[2] He seems to have commissioned Colonel Robert Quarry a judge of such a court for Pennsylvania, at least it does not appear that Quarry was commissioned by the Crown.[3] Prior to Quarry's appointment Judge Mompesson had been Judge of the Vice Admiralty for all of the New England Colonies and New York, the Jerseys and Pennsylvania. (Martin's Bench and Bar of Phila., p. 6. *Note*).

Colonel Robert Quarry was Governor of South Carolina for a short period in 1684, but the Proprietaries having, as it was alleged, intelligence of the encouragement given by him to pirates, dismissed him from office in 1685, whereupon he became secretary of the province. He was, however, again appointed governor in 1690. He was afterwards judge of the Admiralty in New York and Pennsylvania, and a sort of government spy in this country. He was a member of the Council of five governments at one time, viz: New York, New Jersey, Pennsylvania, Maryland and Virginia, and died about the year 1713.[4] In the complaints made against him by Penn, it is stated that "he is the greatest merchant or factor in the province."[5]

While Quarry was actively opposing Penn, the latter denounced him in the most unmeasured terms, but they afterwards became reconciled, and Logan, who had been equally bitter against him, afterwards became on very good terms with him, and even leased Penn's Manor of Pennsbury to him for a term of years. He was a Church of England man, and hence not acceptable to the Quakers. He seems to have stood up

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[1]Col. Rec., vol. 1, p. 361.

[2]*Ibid*, vol. 1, p. 533.

[3]"The judge [Mompesson] is . . . some what incensed at the unaccountable commission that arrived about ten days ago, constituting Colonel Quary judge of the admiralty for this province and West Jersey, dated in November last and supersedes that part of R. Mompesson's: how it was obtained startles us to think." Penn and Logan Correspondence, vol. 1, p. 281.

[4]Penn and Logan Correspondence, vol. 2, p. 78.

[5]*Ibid*, vol. 2, p. 35.

valiantly for the jurisdiction and privileges of his court, and to have therefore opposed for a time the interests of the Proprietor.

About this time it was claimed that the province was a rendezvous for pirates. On September 5, 1697, Penn wrote to Council that it is alleged:

That you wink at Scotch trade and a Dutch one to, receiving European goods from the latter, as well as suffering yours, agt the Law & English interest to goe to the other; also that you doe not onlie wink att but Imbrace pirats, shipps and men.[6]

The Council reply:

Secondly. As to Imbracing of pirats, &c. Wee know of none that has been entertained here, unless Chinton & Lassell, with some others of Avery's crew, that happened for a smal time to sojourn in this place, as they did in some of the neighbouring governments; but as soon as the magistrats in Philadelphia had received but a Copie of the Lords Justice's proclamation, gott all that were here apprehended, & would have taken the Care & Charge of securing ym, untill a Legall Court had been erected for their trial, or an opportunity had presented to send ym to England; but before that Could be effected, they broke goale & made their escape to New Yorke, where Hues & Crys wer sent after ym, And as to pirats' shipps, wee know of none Harboured or ever came in here, much Less encouraged by the Gor or people, who as it is well known, are generally sober & industrious, & never advanced yr estates by forbidden trade, piracie, or other ill ways, notwithstanding what is suggested by our enemies to the contrary.[7]

In 1698 Markham stated in Council that information had been sent to England "That Pennsilvania is become the greatest refuge & shelter for pirats & rogues in America. The Gor giving ym Commissions."[8]

A letter from the justices of the peace of Sussex county to the lieutenant-governor was read in Council on September 3, 1698, announcing that on the preceding Friday "a small snug-ship and a sloop" came within the capes and landed about eighty well armed men who plundered almost every house in the town, taking away not only gold and plate but all manner of merchandise, as well, leaving scarce anything in the place to cover or wear. They took eleven of the principal men prisoners, but released all but one of them after requiring them to help them on board with their plunder.[9]

Penn convened a special session of the Assembly on January 25, 1700, for the purpose of passing acts punishing piracy and enforcing the laws of navigation and trade, which had been recommended by the Lords Justices of England, which acts were accordingly passed.[10] At this session James Brown, a son-in-law of William Markham and a member of As-

[6] Colonial Records, vol. 1, p. 527.
[7] *Ibid*, vol. 1, p. 528.
[8] *Ibid*, vol. 1, p. 551.
[9] *Ibid*, vol. 1, pp. 539-540, 563.
[10] *Ibid*, vol. 1, p. 590; 1 Votes in Assembly, pp. 112-117.

sembly, was expelled from the House on a suspicion of piracy, though he protested his innocence and claimed that he had been cleared of the charge in Boston. It appeared that he had given a bond in the sum of three hundred pounds on his return to the province to answer any charge which might be made against him. The charge seems to have stuck to him, as Logan later refers to him familiarly as "Brown, the pirate."

The records of this period are full of accounts of pirates. It will be remembered that these were the times of Captain Kidd, who was reported in July, 1699, to be lying off the capes and carrying on trade with inhabitants of the territories:

The pror. & Gor acquainted ye Council yt hee had Late Intelligence yt Wm. Orr, Geo. Thompson, peter Lewis, Henry Stretcher & Diggerie Tenny, inhabitants of ye town of Lewis, in Sussex Countie, had gone on board Capt. kidd, ye privateer, (who in Julie last Lay some days before Cape Henlopen), and had Corresponded wt him, & received from him & his crew some musalins, Calicoes, monies had brought ym on shore, hid, sold & Given away most of ym, wtout acquainting ye govrmt or ye king's Collr of ye port of Lewis wt ye same, wch hee Look't upon to be, if not piraciem at Lest Confederating wt ym, & accessories & promoters of illegal trade, & yrfor desiring ye Councill's advice yrin.[11]

Kidd was executed some two years afterwards.

As late as March 27, 1701, the Lord's Commissioners of Trade and Plantations in a report to the House of Commons said, referring to the proprietary colonies in America that:

These colonies continue to be the refuge and retreat of pirates and illegal traders, and the receptacle of goods imported thither from foreign parts, contrary to the law, no return of which commodities, those (obliterated) all of which is encouraged by their not admitting of appeals as aforesaid.[12]

The jurisdiction of Quarry's Court was about the same as that of a United States District Court in matters of Admiralty, and had further the enforcement of the laws of navigation and trade. It seems, however, that the court had no jurisdiction of murder committed on the high seas.[13] An appeal lay from all the judgments to the High Court of Admiralty in England.

The court was naturally unpopular. The laws relative to navigation and trade were severe, unreasonable and unjust, and it is probable that they had been evaded to a great extent. The inhabitants of the province, and those of the lower counties especially, did not look with favor upon a tribunal by which those laws would probably be strictly enforced. If

[11] *Ibid*, vol. 1, p. 579.

[12] Penn and Logan Correspondence, vol. 2, p. 380.

[13] *Ibid*, vol. 1, p. 175. Quarry stated to Council on August 8, 1699, that "Hee had Consulted his Commission of ye Judge of ye admiraltie and found . . . he had not power yrby of trying piracy. . . ." Col. Rec., vol. 1, p. 562. On January 20, 1703, the Council deliberate how trials for murders on the high seas should be conducted by the courts of the province: Col. Rec., vol. 2, p. 86.

Quarry had permitted them to be violated while Governor of South Carolina, he seems to have executed them in Pennsylvania.

Hardly had the Court of Admiralty been organized by the appointment of John Moore as advocate and Robert Webb as marshal, before its jurisdiction clashed with that of the Pennsylvania courts. In the summer of 1698 John Adams, a merchant of some substance, imported a cargo of merchandise from New York, in a ship which was not provided with a sufficient certificate under the laws of navigation and trade, whereupon the goods were seized by the collector at New Castle and delivered to Webb, the marshal of the new court. A proper certificate was at once procured and tendered to Quarry with a demand for the restoration of the goods, which was peremptorily refused by him. Thereupon Adams, the importer, applied to Markham, the Lieutenant Governor, for a replevin, who "made answer that he would not meddle with anything that lay before the Court of Admiralty." Failing in that direction, Adams made a similar application to the Court of Philadelphia County, and obtained from Anthony Morris, one of its justices, a writ of replevin by virtue of which the merchandise was taken from Webb's custody by the sheriff, and, on the giving of a bond, delivered to the importer.[14] As soon as the lieutenant-governor learned of this action he ordered the sheriff to retake the goods and hold them until further order or that they be brought to trial in such court as the informer might see fit.[15] It would appear from the subsequent proceedings that the sheriff was unable to carry this order into effect.

Great and not unnatural was the wrath of Quarry at these proceedings, whereof he complained bitterly to Council, but not without first having sent an account of the same to his superiors in England. On September 26, 1699, three of the justices of the Philadelphia Courts appeared before Council and presented a paper as follows:

May it please the Gor & Council, Wee, the Justices of the County Court of philadelphia, understanding that some complaints have been made to you agt or proceedings in a replevin Latelie granted by one of us to John Adams, mert, returnable to or last Court, do humbly offer this following answer for or vindicaon. First, that wee look upon a replevin to be the right of the king's subjects to have, & or duties to grant, where any goods or Cattle ar taken or distrained. 2dly, That such writts have been granted by the Justices, & no other in this governt, the p'ties giving bond with Sureties, to the Sheriff, for redeliverie of such goods in case ye pltf. In the replevin be cast, according as is usual in England in such cases. 3dly, That since wee understood how the goods in Question wer Seized & secured in ye king's store house, wee might have just grounds to conceive that the Sheriff might be as proper to secure the same to be forth coming in Specie, as by the replevin hee is Commanded, as that they should remain in the hands of Robt. Webb, who is no proper officer as wee know of, to keep the same, nor hath given any Security or Caution to this govermt to ansr the king and His people in that respect, as wee can under-

[14] Col. Rec., vol. 1, pp. 541-543.
[15] *Ibid*, vol. 1, p. 543.

stand. Lastly, That wee att or Last Court, finding this matter to be weighty, tho wee did not know of any Court of admiralty erected, nor psons Qualified as wee know of this day, to hold such Court, yet wee forbore the triall of ye sd replevin, & Continued it untill wee further advised & so the pties are to come before us again att next Court, where wee should be glad to receive some advice yrin from you; And rest yor Loving friend, Anthony Morris, Samll Richardson, James ffox, philad. ye 27th of ye 7th mo., 1698.[16]

On December 22, 1699, Anthony Morris, the justice who had issued the writ of replevin, appeared before Council, where he resigned his commission, saying "that he granted and issued the said replevin in pursuance as he thought of his duty, believing that he was in the right, and that he was induced thereto by those that he thought were well skilled in the law, who told him it was the privilege of a subject, and further said that he had no interest in the owner nor goods nor no self by (sic) nor sinister end in so doing.[17] He at the same time delivered the invoices of the goods, the appraisement thereof and the bond given to the sheriff, which were delivered to Quarry.

On January 24, 1700, Quarry appeared before Council, and stated that the security on the bond given to the sheriff refused to pay and that the sheriff was no longer in office; that it was unreasonable that the King should be put to a suit to recover the value of the goods, and he therefore demanded that Morris be required to make good the value of the merchandise, and that he be prosecuted for his contempt of court. Morris, who was present, humbly excused himself, and the Governor promising that the value of the goods should be secured to the king, Quarry expressed himself as satisfied, saying he had no personal animosity against Morris and was satisfied with his submission.

This, however, was not the end of the matter. David Lloyd saw in it a means of exploiting himself and perhaps of injuring the government in the eyes of the Crown. He accordingly instigated Adams to bring suit against Marshal Webb for seizing and detaining his goods. The suit was tried in the spring of 1700, Lloyd appearing as Adam's counsel. The following is from Quarry's complaint to Council:

Where ye Marshal being called to defend the sute, here produced in his own Justificaon His maties. Lres pats, undr ye broad seal of ye High Court of Admiraltie, with the Judges warrt for ye seizure aforesaid, which sd patent having in the frontis piece his most sacred maties effigies stampt, with the sd seal adpendant, the sd david Lloyd, in a most insolent & disloyal manner, taking the sd Commission in his hand & exposing it to ye people, did utter & publish these scurilous & reflecting words following, viz:—what is this? do you think to scare us wt a great box (meaning ye seal in a tin box) and a little Babie; (meaning ye picture or effigies aforesaid;) 'tis true, said hee, fine pictures please children; but wee are not to be frightened att such a rate; & many more gross & reflect-

[16] *Ibid,* vol. 1, p. 545.
[17] *Ibid,* vol. 1, pp. 465-466.

ing expressions on his matie to ye like effect. That att another time, att a Court of admiraltie, held in this town of philad, hee ye sd David Lloyd, in open Court, with a design to incense & irritate the people & expose ye king's officers to their furie, did publicklie say, that yt Court did not sitt there by anie Commission from ye king. That ye sd David Lloyd, att a Council held in this town (in Contempt of his maties authoritie Lodged in the sd Court of admiraltie,) did declare yt whoever wer Instrumental or aniewise aiding in erecting & encouraging a Court of admiraltie in this province, were greater enemies to the Liberties & privileges of ye people then those yt established & promoted ship monie in king Charles the first's time, or to that effect.[18]

For these contempts Lloyd was suspended from membership in the Council.[19] The court decided adversely to Adams in this suit, whereupon Lloyd wished to take an appeal to England, which Penn very wisely would not permit.

Lloyd's action in this case has been compared with that of Patrick Henry in opposing the enforcement of the Stamp Act, but it is difficult to see any resemblance between the two. Penn had been granted no jurisdiction in matters of admiralty. No right of the colonists was infringed by the establishment of a court having special jurisdiction thereof. In the one case Henry was opposing the exercise of a power never before exercised, the legality of which was disputed; in the other, Lloyd opposed the exercise of a right which had been resorted to in all English colonies without opposition, to the legality of which there could have been no serious objection. The Court of Admiralty was either a legally constituted tribunal or it was not. If it was not, then Lloyd afterwards became the official advocate of a tribunal for which there was no authority in law, knowing it to be illegally constituted. If Henry, after his celebrated speech, had accepted office as a distributer of stamps, the acts of the two men would have been more similar. No records of this court remain and nothing is known of its practice.

Quarry was succeeded as judge of the Admiralty in 1704 by John Moore, who was deputy for Governor Seymour of Maryland, and appears to have held office until 1718, when he was succeeded by William Assheton, who died in 1723. Assheton was succeeded by Josiah Rolfe, who served only a portion of the year 1724, and was succeeded by Joseph Brown, who held office until 1735, when he was succeeded by Charles Reed. Reed was succeeded by Andrew Hamilton in 1737, and Hamilton by Thomas Hopkinson, the father of Francis Hopkinson, afterwards judge of the Admiralty, under the Commonwealth of Pennsylvania, in 1741.

[18] *Ibid*, vol. 1, pp. 603-604.
[19] *Ibid*, vol. 1, p. 604.

CHAPTER XVI.

COURT FOR TRIAL OF NEGROES.

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Court for Trial of Negroes.

An Act passed November 27, 1700, 2 Statutes at Large, page 77, constituted a court in each county for the trial of negroes charged or accused of committing any murder, manslaughter, buggery, burglary, rapes or attempts of rapes, or any other high or heinous offenses, consisting of two justices of the peace particularly "commissionated" by the Proprietary and Governor for that service, and six of the most substantial freeholders of the neighborhood, the said freeholders to be summoned by warrants under the hands and seals of the said justices of the peace. This act was repealed by the Queen in Council, February 7, 1705-6. It provided, *inter alia,* "if any negro shall attempt a rape or ravishment on any white woman or maid they shall be tried in manner aforesaid and shall be punished by *castration.*" This act was substantially reenacted by the Act of January 12, 1705-6, 2 Statutes At Large, page 233, the preamble whereof is as follows:

Whereas some difficulties have arisen within this province about the manner of trial and punishment of negroes committing murder, manslaughter, buggery, burglary, rapes, attempts of rapes and other high and heinous enormities and capital offenses; for remedy thereof, and for the speedy trial and condign punishment of such negro or negroes offending as aforesaid.

This act provided that two justices of the peace might be commissioned by the Governor in each county, who, with six freeholders of the neighborhood, should try and determine all such offences committed by any negro or negroes, the said freeholders to be summoned by the proper constable and attested to well and truly give judgment in such cases, sentences to be given by the justices and freeholders, and a warrant by them directed to the high sheriff of the county for the execution of the same. By the fourth, fifth and sixth sections it was provided:

That if any negro or negroes within this province shall comit a rape or ravishment upon any white woman or maid, or shall commit murder, buggery or burglary, they shall be tried as aforesaid, and shall be punished by death. And for an attempt of rape or ravishment on any white woman or maid, and for robbing, stealing, or fraudulently taking and carrying away any goods living or dead, above the value of five pounds, every negro, upon conviction of any of the said crimes, shall be whipped with thirty-nine lashes, and branded on the forehead with the letter R or T, and exported out of this province by the master or owner within six months after conviction, never to return into the same, upon pain of death; and shall be kept in prison till exportation, at their master's or owner's or their own charge. And for robbing or stealing any goods as

aforesaid, under the value of five pounds, every negro, upon conviction thereof, shall be whipped at the discretion of the justices with any number of lashes not exceeding thirty-nine; and the master or owner of such negro shall make satisfaction to the party wronged for the value, and pay all costs; to be levied by distress and sale of the said master's or owner's goods, if he or they refuse or delay to answer it otherwise.

That if any negro shall presume to carry any guns, sword, pistol, fowling piece, clubs or other arms or weapons whatsoever without his master's special license for the same, and be convicted thereof before a magistrate, he shall be whipped with twenty-one lashes on his bare back.

That for the preventing negroes meeting and accompanying together upon the First-days of the week, or any other day or time, in great companies or numbers; that (sic) if any person or persons give notice thereof (and to whom they respectively belong) to any justice of the peace within this province, the same being above the number of four in company and upon no lawful business of their master's or owner's, such negroes so offending shall be publicly whipped at the discretion of one justice of the peace, not exceeding thirty-nine lashes.

This act was allowed to become a law by the lapse of time, having been considered by the Queen in Council, October 24, 1709, and not acted upon.[1]

It was finally repealed by the Act of Assembly passed March 1, 1780, 10 Statutes at Large, page 267, entitled "An act providing for the gradual abolition of slavery." Two justices were commissioned under this act for Sussex county on July 25, 1726, and as late as January 25, 1771, and December 9, 1775, two justices were commissioned thereunder on each date for New Castle county.[2]

By an order of the Court of Quarter Sessions of Philadelphia County confirmed by the Council in 1693, entitled "An order against the tumultuous gathering of the negroes of the Town of Philadelphia on the First-days of the week," the constables were empowered to arrest all negroes, male or female, whom they should find gadding abroad on the first day of the week without a ticket from their master or mistress, or not in their company, and to carry them to gaol there to remain that night, and that without meat or drink, and to cause them to be publicly whipped next morning with thirty-nine lashes well laid on their bare backs, for which their said master or mistress should pay fifteen pence to the whipper at his delivery of them to their said master or mistress. This philanthropy with which the Quakers were supposed to be bubbling over evidently did not extend to men and women with black skins.

In 1700 Penn arranged with the Quakers that there should be a monthly meeting at which negroes might have the benefit of "being truly informed in the Christian religion!"[3] The Act of 1700, above referred to, was drawn up by Penn's direction.[4]

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[1]See 2 Statutes at Large, p. 532.
[2]Martin's "Bench and Bar of Philadelphia County," pp. 21-22.
[3]Proud's "History of Penna.," p. 423.
[4]Col. Rec., vol. 1, p. 610.

The Act of March 5, 1726[5] entitled "An act for the better regulating of negroes in this province," provides that the owners of any negro convicted of any capital crime and executed should be paid the value of the slave from the duty laid on the importation of negroes into the province. The act also recites that "'tis found by experience that free negroes are an idle, slothful people and often prove burdensome to the neighborhood, and afford ill examples to other negroes," wherefore masters were forbidden to manumit any negro until they had entered into a recognizance in the sum of thirty pounds to secure the locality where he resided from any charge resulting from the sickness of the negro or his incapacity to support himself. Any negro made free by will or testament was not to be deemed free unless a like recognizance was entered upon, proving the will. If any free negro, fit and able to work, should not do so, but loiter about and misspend his time, or wander from place to place, any two magistrates might bind him out to service from year to year. Ministers or magistrates marrying any negro with any white person incurred a penalty of one hundred pounds, and if any free negro man or woman intermarried with a white woman or man, such negro should become a slave during life. It has always seemed to the writer rather remarkable that Pennsylvania, being a Border State, had no later law against miscegenation.

No master might give liberty to his negroes to seek their own employment and work for themselves under a penalty of twenty shillings. The Act reads like a selection from the statutes of Mississippi.

[5] 4 Statutes at Large, 59.

CHAPTER XVII.

PENN'S LAST CHARTER—AFFIRMATIONS—JUDICIARY ACT OF 1701 AND EVAN'S ORDINANCE FOR THE ESTABLISHMENTS OF COURTS.

CHAPTER XVII.

Penn's Last Charter—Affirmations—Judiciary Act of 1701 and Evans' Ordinance for the Establishment of Courts.

On October 28, 1701, was executed the last charter of privileges granted by William Penn to the inhabitants of the province. We have seen that the two charters or frames of government adopted at the session of the Assembly of 1683 were superseded by Markham's Frame of Government in 1696, which in turn was superseded by the charter of 1701. The government of the province had now been in existence nineteen years, in the course of which it had been demonstrated that many of the provisions of the early charters were impracticable.

By the charter of 1701 an elective council was wholly done away with, in fact, such body was mentioned only incidentally in the charter, although the governors afterwards appointed councils to assist them with their advice and to aid them in the performance of the duties of their office. It was provided that the Assembly should consist of four persons elected from each county, with power to be judges of the qualifications and elections of their own members, sit upon their own adjournments, appoint committees, prepare bills in order to pass laws, impeach criminals and redress grievances.

The freemen of each county were to choose a double number of persons to present to the governor for sheriffs and coroners, to serve for three years during good behavior, out of which the governor was to appoint one for each of said offices, and the justices of the respective counties were to nominate three persons to the governor from whom the governor was to commission a clerk of the peace for the county.

It was provided that all criminals should have the same privileges of witnesses and counsel as their prosecutors, and that no person should be obliged to answer any complaint whatsoever relating to property before the governor or council, or in any other place but in ordinary course of justice, unless appeals thereunto should thereafter be appointed by law.

The charter also provided that if the representatives of the province and territories should not thereafter agree to join in legislation and the same should be signified to the proprietary or his deputy in open Assembly, or otherwise, from under their hands and seals of the representatives from the province and territories, or a majority of either of them, at any time within three years from the date of the charter, in that case the counties of the province should not have less than eight persons to represent them in the Assembly for the province, and the inhabitants of Philadelphia two persons to represent them therein, the inhabitants of each county in the territories to have as many persons to represent them in a distinct

Assembly as they should request.[1] Advantage was taken of this provision of the charter and separate Assemblies for the province and territories were established in 1704.

The eighth provision of the charter provided that if any person should destroy himself through temptation or melancholy, his real and personal estate should descend to his wife, children or relations as if he had died a natural death, and that there should be no forfeiture to the Governor, because of the killing of any one by casualty or accident. It appears that forfeitures in cases of suicide were not wholly abolished in England until the passage of the Felony Act of 1870, 33 & 34, Vict., c. 23.[2]

Down to 1689 the Quakers had gotten along very comfortably under the Act of 1682, which required that testimony should be given by witnesses solemnly promising to speak the truth, the whole truth and nothing but the truth, any person bearing false witness to undergo such damage or penalty as the person against whom he gave the same should or did undergo, but in 1689 an act of Parliament was passed providing that Protestant dissenters, to avoid the penalties of non-conformity, should take an oath of fidelity and allegiance to the Crown and of belief in the Trinity and Holy Scriptures, in lieu of which Quakers were permitted to affirm in the following form: "I do sincerely promise and solemnly declare before God and the world," etc., but this was, to the "tender consciences" of the Quakers, no better than an oath.

No attention seems to have been paid to this act in the province, and a simple attestation was provided for in Markham's Frame of Government of 1696, in the charter of 1701 and in the Acts of 1700 and 1701. But by 7-8 William III, Chapter 34, and 13 William III, Chapter 4, it was enacted that the form of attestation to be taken by Quakers should be: "I do declare in the presence of Almighty God the witness of the truth of what I say," which was no better, from a Quaker standpoint.

Then came an order in Council dated January 21, 1702, requiring all judges to take the oath or the affirmation prescribed by said acts, and that all persons who were required in England to take an oath in any judicial proceeding should be admitted to do so elsewhere, in default of which qualifications of the judges and the administration of an oath to persons who were not Quakers, the proceedings of the courts to be null and void.[3]

This embarrassed the administration of justice in many ways. Quaker judges and witnesses would not take the affirmation prescribed by the acts of Parliament, and the judges considered the administration of an oath just as wicked as the taking of one. Hence, except in cases where the judges were not Quakers, and therefore were free to administer oaths, neither Quakers nor other persons could testify. The Assembly humbly petitioned the Queen that an affirmation might be taken by every one, whether Quakers or not, "for asmuch as those that are and have been so earnest to introduce oaths here have often declared they would be willing

[1]Votes in Assembly, vol. 2, p. 1.
[2]Bouvier's "Law Dictionary," p. 1064.
[3]Votes in Assembly, vol. 1, par. 2, p. 6.

to take the said solemn affirmation instead of an oath upon all occasions, and in all matters wherein the life of a subject was not in question."[4] Their prayer was not granted and the Parliamentary form of affirmation was generally taken, but the difficulty as to the administration of oaths to non-Quakers continued.

By an act of Parliament of 1 George 1, the Statute of 7 and 8, William III, was made perpetual in Great Britain, and was extended to the colonies for five years. By a provision of this latter act no Quaker by virtue thereof could be qualified or permitted to give evidence in criminal cases or serve on juries or hold any office of profit in the government. Governor Gookin contended that this act repealed the Provincial law upon the subject of affirmations, and had the same disqualifying effects upon Quakers as it had in England.[5] The justices of the Supreme Court hesitated to perform their duties in the fact of the Governor's opinion, and criminal justice was for a time not administered throughout the province.

In 1715, Jonathan Hayes, a resident of Chester county, who had served as a justice of the court for a long time, was murdered, and Hugh Pugh and Lazarus Thomas were convicted of murder in 1718, having been out on bail for a part of the three years which had elapsed since the date of the murder, and sentenced to be hung. The condemned petitioned the Governor for a reprieve until the pleasure of the King could be known, which was denied, and an appeal taken to England. The grounds taken in the appeal were as follows:

1st. Because seventeen of the Grand Inquest who found the bill of Indictment against them, and eight of the Petty Jury who found them guilty were Quakers or Reputed Quakers, and were Qualified no otherwise than by an affirmacon or Declaracon contrary to a statute made in the first year of your Maties reign.

2ndly. Because the act of Assembly of this Province, by which Judges, Jury & Witnesses were pretended to be Qualified was made & past the Twenty eighth Day of May, in the first year of your Majestie's Reign, which was after sd murder was supposed to be committed; and after another act of Assembly of the same nature was repealed by her Late Majesty, Queen Anne.

3dly. Because sd act of Assembly is not consonant to Reason, but Repugnant & contrary to the Laws, Statutes and Rights of your Majestie's Kingdom.[6]

A number of acts were passed permitting the affirmation without using the name of God, but they were all abrogated by the Crown, until 1724, when an act was passed omitting the holy name from the affirmation and permitting any one who so chose to be affirmed,[7] which was confirmed.[8] While this matter remained unsettled the administration of jus-

[4] *Ibid*, vol. 1, par. 2, p. 7.
[5] Smith's "Hist. of Del. Co.," p. 223.
[6] *Ibid*, p. 228.
[7] 3 Statutes at Large, p. 427.
[8] *Ibid*, p. 431.

tice was seriously embarrassed, and persons held for capital crimes were not tried for long periods. For an elaborate account of the legislation relative to this subject the reader is referred to Sheppard's "History of Proprietary Government in Pennsylvania," Chapter VII.

The Act of 1693 providing for a Provincial Court was re-enacted by the Act of November 27, 1700, 2 Statutes at Large, page 134. This act in turn was superseded by the Act of October 28, 1701, 2 Statutes at Large, page 148, which was the first of a series of acts for the establishment and regulation of the courts of the province enacted during the next twenty years, to be successively disallowed and reënacted in different forms.

The Act of 1701 provided that a county court or session should be held four times a year in each county, and that a competent number of justices therefor should be appointed by the governor or his lieutenant by commission under the great seal, three of whom to constitute a quorum, who were empowered to deliver the gaols, award process and hold all manner of pleas of the Crown or criminal causes, except treason, murder, manslaughter, rapes, sodomy, buggery, burglary and burning of houses, and to award process, call special courts, hold pleas and hear and determine all actions, suits and causes, civil, personal, real and mixed, "observing as near as may be, respecting the infancy of this government and capacities of the people, the methods and practice of the King's Court of Common Pleas in England; having regard to the regular process and proceedings of the former county courts; always keeping to brevity, plainness, and verity in all declarations and pleas, and avoiding all fictions and color in pleadings."

The justices were authorized to hear and determine, in a brief and summary way, causes arising between merchants and seamen, not within the proper jurisdiction of the admiralty, and to call a special jury of twelve merchants, ship masters or ship carpenters, to serve in such cases as might be required. The justices of the said court were also authorized to hear and decree all such matters of equity as should come before them, wherein the proceedings were to be by bill and answer, with such other pleadings as are necessary in chancery courts and proper in these parts, with power to enforce obedience to their decrees in equity by imprisonment or sequestration of lands.

Appeals were to be granted to the judges of the Provincial Court on the payment of court charges and the giving security to prosecute the same, an appeal to operate as a supersedeas.

Suitors might move in arrest of judgment after verdict and before judgment, but, if they neglected their motion until after judgment, they were required to apply to the Governor for a writ of error commanding the justices to cause the record of judgment and proceedings to be brought before the Provincial Judges at the next court, which writs were to be presented to one or more of the justices of the county court where the judgment was entered, with an assignment of error in writing, and if it

appeared to the justice or justices that the errors assigned were errors in law, and not errors in process or pleadings, whereto the plaintiff in error might have demurred or pleaded in abatement, nor want of form in any writ which would bring the matter within the Statute of Jeofails, in which case redress should be given by the justices without writ of error, then the justices were to allow the writ on the giving of a recognizance in double the sum involved in the judgment. In addition to the power to grant writs of error, the Governor was also authorized to grant writs of habeas corpus and all other remedial writs.

The Provincial Court was constituted as in the Acts of 1696 and 1700, with exclusive original jurisdiction in the case of the crimes excepted from the jurisdiction of the county courts. The five provincial judges, or any two of them, were to hear and examine all errors in law in cases of appeal and to reverse or affirm judgments, after which the records were to be remanded to the court from which they were removed for execution or otherwise. An appeal from their judgment was granted to the King, if taken within twelve months, on the giving of security for the prosecution of the same. Two of the judges were to go on circuit as formerly.

A quorum of the justices of the county courts with the register-general or his deputy of the county were empowered to hold an orphans' court, with power to award process, with very much the same powers as orphans' courts now have. This act remained in force until it was abrogated by the Queen in Council on February 7, 1706.

It will be observed that this act does not change the constitution and practice of the courts in any important respect, only the provisions relating to writs of error, appeals and orphans' courts being new. The act, however, was not confirmed by the Queen. On January 17, 1706, the Lords Commissioners for Trade and Plantations presented objections to it, with other acts passed at the same time, on the ground that "this act is so far from expediting the determination of law suits that we conceive it will impede the same."

On November 16th, 1706, in his objections to the Assembly's bill to establish courts, Governor Evans said: "The Act for Establishing Courts in this Govmt, Passed in the year 1701, was found exceedingly inconvenient and was complained of by all men of understanding in affairs of this nature, who were concerned in the Practice of our Courts, & being presented to the Queen was by her repealed."[9]

On November 27th, 1706, the Assembly in their answer to Evans' objections to their bill state that the reasons for the repeal of the Act of 1701 are concealed from them[10] to which he replied that he knew of "no concealment of the reasons for repealing the late Bill, having never heard directly or indirectly of any that were given."[11]

[9]Col. Rec., vol. 2, p. 262.
[10]*Ibid*, vol. 2, p. 266.
[11]*Ibid*, vol. 2, p. 271.

The only objection of the Queen's Attorney General appears to have been the following:—

Upon perusal of this act (I conceive) ejectments may and ought to be brought and prosecuted in Pennsylvania in the same manner as in England, notwithstanding an uncertain expression in the act (keeping to brevity, plainness and verity in all declarations and pleas, and avoiding all fictions and colour in pleadings). The meaning of which clause (I think) can only extend to avoid such fictions as in their nature tend to prejudice or delay either party, and hinder the merits and right of the cause from a fair and speedy determination. The bringing therefore ejectments as aforesaid, being in no ways prejudicial to either party, but the most speedy and easy method of bringing the matter in question to an issue, and restoring the party injured to his right, ought to be allowed and encouraged, and if the justices or judges there, from too strict construction of said clause, will not allow of such ejectments, it will (as I conceive) be convenient, if not necessary, to endeavor to stop Her Majesty's passing the act, until the same be amended or better explained in this point.[12]

As appears elsewhere, David Lloyd raised this very point against an action in ejectment, in 1705.

The Judiciary Act of 1701 having been abrogated in 1706, a new Judiciary Act was considered in Council on the 7th of January, 1706, but no action appears to have been taken thereupon in Assembly.[13] On September 19, 1706, however, Governor Evans sent to the Assembly a bill for establishing courts drawn upon "by the practitioners in the law," asking that they take action upon the same.[14] We have no means of knowing what the provisions of this bill were.

On the 23d of the same month the House presented a substitute, the principal features of which were that the Governor or his deputy, with a part of the Council, might hold a court of equity, with jurisdiction over the province, to hear all matters of equity, the proceedings in which should be by bill and answer, with such other pleadings as are used in chancery, with power to make rules and orders proper and consonant to the laws and conditions of the province, such court not to meddle with matters wherein sufficient remedy might be had in any other court at law. The governor might issue special commissions of oyer and terminer for capital offenses which offenses should be tried in the county where the fact was committed. A Provincial Court of three judges was provided for to sit in each county twice in each year, to hear and determine all pleas brought before them by habeas corpus, certiorari or writs of error. The county courts were to have jurisdiction of all criminal and civil cases, except felonies punishable by death.[15]

The Governor consulted G. Lowther, the attorney general, R. Assheton, clerk of the Courts of Philadelphia, and Thomas Clark, and proposed

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[12] 2 Statutes at Large, 472.
[13] Col. Rec., vol. 2, p. 222.
[14] *Ibid*, vol. 2, p. 252.
[15] *Ibid*, vol. 2, p. 253.

the following amendments: "That in cases where a person dare not put himself upon the particular county where the action was commenced he might have a trial by such court as he can better depend upon to be unprejudiced in his case; that there be a power in every county to extend its executions to other counties; that in cases removed by habeas corpus or certiorari before the provincial judges, so that the first trial came before them, an appeal should lie to the governor and council before any appeal should be taken to England, and that a clause be added that nothing in the act should abridge the proprietary from erecting manorial courts.[16]

A long and tedious controversy took place between the Governor and the Assembly over the proposed measures. Evans insisted "that there should be full room left for any cause to be brought out of the county courts, if commenced there, either before or after trial, into the Provincial Court, to be heard and tried by the judges thereof, but in the proper county, or to be first entered in the Provincial, at the election of the plaintiff."[17]

The outlines of still another bill were drawn up by Evans and the Council on the 3d of October, providing for a court in every county to be held four times a year in which all actions, except capital crimes, might be tried; matters of life and death to be tried by commissions of oyer and terminer granted to the Provincial judges or others; a Provincial Court for the whole province to be held at Philadelphia, to go on circuit twice a year, in which all civil actions of the value of ten pounds or upwards might be commenced, as well as in the county courts, at the election of the plaintiff; all matters entered in the county courts, except civil causes under the value of ten pounds, to be removed into the Provincial Court by habeas corpus or certiorari before trial, or by writ of error after trial. It was ordered that the bill be drawn up along the lines indicated by Judge Guest, the attorney general, David Lloyd, John Moore, Robert Assheton and Thomas Clark.[18] On October 15th, the Assembly waited upon the Governor, to whom he delivered a copy of the new bill, intimating that if it was not passed he might establish courts by ordinance.[19] On November 14 the Governor laid before the board "a long and tedious bill" which he had received from some members of the Assembly, entitled "An act for the establishment of Courts of Judicature in this Province."[20]

On the 16th of November, 1706, a series of twenty-nine objections to the bill last prepared by the Assembly was drawn up in Council and transmitted to that body, with a statement that if it did not agree to the bill prepared by the Governor and Council, the Governor would establish courts by ordinance.[21] On November 27th, the Assembly came back with an answer to the objections to their bill.[22]

[16] *Ibid*, vol. 2, pp. 254-5.
[17] *Ibid*, vol. 2, p. 257.
[18] *Ibid*, vol. 2, p. 259.
[19] Col. Rec., vol. 2, p. 260.
[20] *Ibid*, vol. 2, p. 261.
[21] *Ibid*, vol. 2, p. 262.
[22] *Ibid*, vol. 2, p. 266.

And so the controversy went on, with ever increasing bitterness, until finally, on February 22, 1707, Evans issued an ordinance for the establishment of courts, which recited that the Assembly having refused to agree to such a bill as he could properly assent to, he finds himself obliged to issue the ordinance under the authority conferred upon the proprietor by his patent "to appoint any judges and justices, magistrates and officers whatsoever for what causes soever and to do all every other thing and things which unto the complete establishment of justice unto courts and tribunals, forms of judicature and manner of proceedings do belong."[23]

The principal differences between the Assembly and Governor Evans were, briefly:

1. The Assembly desired that judges should hold office during good behavior, unless removed on the address of the Assembly, without a provision for the trial of a judge sought to be removed; Evans contended that they should be removable at the pleasure of the proprietary, this being one of his rights by patent, and that the provision for removal by an address infringed that right, and such removal without a trial was unfair to the judges.

2. The Assembly demanded that fines and forfeitures should go to the Crown; Evans insisted that they belonged to Penn.

3. The Assembly wished the Provincial Court to be confined to the hearing and determining of matters of law; Evans wished that plaintiffs might at their option remove suits to it from the county courts by habeas corpus, certiorari or similar writs, and for them to be tried and determined there.

4. Evans required that the Governor and Council, or commissioners appointed by them, should constitute a court of equity, while the Assembly insisted that such court should be otherwise constituted, although, as we have seen, the plan first favored by them provided for a court of equity of which the governor and a certain number of the Council should be members.[24]

The bitterness of the controversy, however arose over the first two differences, in which it seems to us that Evans was in the right, at least so far as the removal of judges on the address of the Assembly was concerned, which amounted to what is now termed "a judicial recall," and as to the disposition of fines and forfeitures, that was a mere technicality on the part of the Assembly, if they were right in their contention that fines and forfeitures given to the Crown in the province would ultimately go to the proprietary.

The Assembly worked itself into a fine phrenzy over the contemplated infringement of the alleged privileges of the freemen of the province, and Lloyd made the best of the opportunity to vent his animosity to the long-suffering proprietary, now in failing health and shortly to be confined in the Fleet at the suit of the heirs of a rascally creditor. James Logan

[23] Charter and Laws of Pa., p. 319.
[24] Col. Rec., vol. 2, p. 253.

as secretary of the Council had signed the various communications to the Assembly. He was the able and faithful servant of Penn. Consequently he was arraigned as an enemy of the governor and government, and impeachment proceedings were instituted against him, which, however, were never permitted to come to a trial.

Evans' ordinance "For the Establishing of Courts" provided for a "Supream or Provincial Court of Pensilvania," this being the first time that the court was so designated. In the Act of 1711 which superseded this ordinance, the court is styled the "Supream Court of Pennsilvania," by which title it has since been designated. This court was to consist of three judges appointed by separate commissions, and was to sit twice a year in each of the counties.

The judges, or any one of them, had power to determine all pleas which should be removed or brought before them from the court of general quarter sessions of the peace, or the county court of common pleas, or from the courts of record held for the city of Philadelphia, or from any other court of record, by writs of habeas corpus, certiorari, writs of error, prohibitions, injunctions, audita querela, or any other remedial writ, and to correct all errors of justices and magistrates in their judgments, process and pleadings, as well as all pleas of the Crown, and to reverse or affirm such judgments as the law should direct. Also to examine, direct and punish contempts, omissions, corruptions and defaults of all justices of the peace and other court officers, and generally to administer justice as fully as justices of the Court of Queen's Bench, Common Pleas and Exchequer at Westminster might do. All of the said writs were to be granted as of course, issue from the office of the clerk or prothonotary of the Supreme Court in the name of the Queen, her heirs and successors, bear test in the name of the chief justice, and be sealed with the Provincial seal.

The judges of the said court were to hold a court of equity in each county, with power to decree all such matters of equity as should come before them by appeal from the inferior courts, and to make such decrees as should be proper.

For the first time, a separate court of quarter sessions of the peace was constituted, to consist of a competent number of justices in each county to sit on the same week in which the courts of common pleas were held.

The county courts, now styled the "County Courts of Common Pleas," were to be held by the justices of the courts of general quarter sessions of the peace at times and places therein prescribed. These courts had in civil matters practically the same jurisdiction as the former county courts. All writs and process were to issue out of the office of the clerk or prothonotary of the respective counties under the county seal. The title "prothonotary" occurs for the first time in this ordinance.

The courts of common pleas were to hold courts of equity four times a year, proceedings before them to be by bill and answer, with such other pleadings as are necessary in chancery.

Power was given to all courts to make reasonable rules for the regulation of their officers and for fixing practice before them.

Special commissions of oyer and terminer and gaol delivery were to be granted unto any of the counties for the trial of offenses where the life of any person should be brought in question.

Any person leaving the province, who was the defendant in a cause which required a speedy determination, might be granted a special court on application to the judges of a court of common pleas, upon giving bail to abide judgment.[25]

Nothing was provided in the ordinance relative to the disposition of fines and penalties nor as to the term of judges. The idea of having the Governor and Council or their commissioners constitute a court of equity seems to have been abandoned, but all matters might be brought up to the Supreme Court by proper writ, whether before or after judgment.

This ordinance remained in force throughout Governor Evans' term and was continued in force by a proclamation of February 28, 1709, on the advent of Governor Gookin. It was superseded by the Act of February 27, 1711, 2 Statutes At Large, page 301.

[25]Charter and Laws of Pa., p. 319.

CHAPTER XVIII.

DAVID LLOYD.

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David Lloyd.

Next to William Penn, the most prominent and interesting character in the early history of the province was David Lloyd. He was born in the year 1656, in the Parish of Marravon, in the county of Montgomery, North Wales. He received a regular legal education, and was sent to Pennsylvania by Penn, in 1686, to act as attorney general, being at that time the only lawyer by profession in the province.

Deborah Logan states on page 155 of the Penn and Logan Correspondence that David Lloyd was one of the conspirators against King William in 1690, and that his name was included in Queen Mary's proclamation against the conspirators. Unquestionably there was a David Lloyd among the conspirators, but it is very doubtful if it was this David Lloyd. Lloyd, as is well known, is an extremely common surname among the Welsh, and David is or was a very common given name among them. James Logan makes no reference to this in the letters and could have personally known nothing about it, because Logan was a boy in 1690 and had no familiarity with Pennsylvania until his coming hither in 1699.

If Penn's attorney general was, as a matter of fact, one of the conspirators, it is not likely that Penn, who was also charged with conspiring against William and Mary, would have come off as well as he did, and it would have been strange, had Lloyd been one of the conspirators, that he was not charged with it during the many years in which he was engaged in acrimonious disputes with his opponents in Pennsylvania. A less conspicuous man than David Lloyd would not have found Pennsylvania a healthy place of residence had he been the conspirator.

As Mrs. Logan states in the same note that Lloyd was a captain in the Republican army, which is evidently incorrect, inasmuch as he was born, as above stated, in 1656, it is likely that she was also mistaken in identifying him with the conspirator David Lloyd.

Lloyd presented his commission from Penn, bearing the date of April 2, to Council on August 6, 1686, and was attested on the 3d day of the next month.[1] The clerk of the County Court of Philadelphia having been removed, Lloyd was appointed to succeed him,[2] and on October 1, 1686, he was appointed to succeed Patrick Robinson as clerk of the Provincial Court, Robinson having been removed at the instance of the judges of that court, as we have already seen.[3]

On the 25th day of February, 1689, Lloyd having been required by

[1] Col Rec., vol. 1, p. 188.
[2] *Ibid*, vol. 1, p. 190.
[3] *Ibid*, vol. 1, p. 192.

Council to produce the records of the Provincial Court, refused to do so, was removed from office as clerk of that court,[4] and on February 28th was succeeded by James Claypoole. It would appear that he was afterwards reinstated in that office, because a petition filed with the Council by Charles Butler on the 8th day of August, 1693, recites that he was clerk of the Provincial Court held the 24th day of September, 1691.[5]

On March 5, 1689, Claypoole reported that he had demanded the records of his office from Lloyd, who refused to deliver them to him. Thereupon Lloyd was sent for to appear before Council, and on his appearance produced a commission from Thomas Lloyd, the keeper of the great seal, as clerk of the peace and clerk to the justices for the County of Philadelphia,[6] but nevertheless promised to deliver the papers to Claypoole. The Governor said that he could understand how Thomas Lloyd might appoint a Deputy Master of the Rolls, but as for his making a clerk of the peace and a clerk to the justices of Philadelphia county, there was no such precedent. It was resolved that it was a usurpation of the Governor's authority, and the secretary of Council retained the commission. As Lloyd did not claim the right to retain the papers by virtue of this commission, it is not clear what the object of producing the same was.[7] Later, on March 25th, the papers had not been delivered, and the Governor gave him two days wherein to make delivery of the same. He was clerk to the Assembly in 1689 and 1690.[8]

On August 8, 1693, the petition of Charles Butler against David Lloyd recited that when the latter was clerk of the Provincial Court in 1691, he added "&c" to the verdict of the jury, "whereby yor petitioner had sentence of misprision of Treason pronounced agt him, viz: That he shall forfeit his goods and chattels forever and the profitts of his Land during his Life and be Imprisioned during his life."

Lloyd replied that the addition was for form's sake, and could not be the cause of the sentence. The Council found that the complaint had matter of law in it against Lloyd, not cognizable by the Lieutenant-Governor and Council, and requested the Governor or Lieutenant-Governor to pardon the petitioner.[9]

On May 24, 1693, Lloyd as one of a committee from the Assembly delivered the book of the Laws to the Governor. The Governor questioned the authenticity of the same, whereupon Lloyd said that he did see some of those laws and knew that they were delivered in to the Privy Council by Mr. Penn, and being in nowise disallowed they must needs be in force.[10]

On May 17, 1693, Governor Fletcher in an address to the Assembly relative to the old laws, said, evidently referring to Lloyd, "I am informed

[4] *Ibid*, vol. 1, p. 247.
[5] *Ibid*, vol. 1, p. 386.
[6] *Ibid*, vol. 1, p. 256.
[7] Votes in Assembly, vol. 1, p. 48.
[8] *Ibid*, vol. 1, p. 57.
[9] Col. Rec., vol. 1, p. 386.
[10] *Ibid*, vol. 1, p. 417.

that there is a person amongst you brought up in the law of England who can inform you."[11]

In June, 1694, "His Excellie (Governor Fletcher) did acquaint the board that hee did receive informaon Saturday night that after the dissolution of the Assembly, David Lloyd with the representatives returned to the place of their sessions, and David Lloyd assumed the Chair and said they were not dissolved until they had dissolved themselves also, and caused some minute to be entered upon record." The minutes were thereupon ordered to be produced, when an inspection of them showed no such entry."[12] Lloyd was speaker during that session.[13] He was elected to Council in 1695[14] and 1696,[15] not elected in 1697,[16] and again in 1698 to 1700, inclusive.[17]

In September, 1696, Governor Markham, who had succeeded Governor Fletcher on the restoration of Penn to his government, disregarded the provision of the Frame of Government that the members of Council should be elected, and instead of issuing writs for the election of such members, appointed a new Council of twelve members, some of whom had been members of the old Council, and among these was David Lloyd.[18] Because of this action, John Goodson, appointed by Penn one of Markham's two assistants, resigned.[19]

Here was an opportunity for a tribune of the people to make a stand for the chartered right of the freemen of the province to elect members of Council, but Lloyd did no such thing. He retained his place in Council under Markham's appointment. He "went along" very peaceably with the others.

On October 26, 1700, the speaker asked that the Assembly be adjourned for a time, and that Griffith Jones, David Lloyd and John More be employed to peruse the laws now in force in order to amend them, and to draw up other bills for the several occasions.[20]

Lloyd was now forty years of age. He had apparently acquired a competence, because Markham in addressing the new Council said to the members: "I know you are all men that are fastened to the country by visible estates, I mean such as the law calls real estate, *of which each of you have a plentiful portion,* and that is a great security that you will study the interests of the country.[21] He owned valuable property at Chester.[22]

In the absence of any court records of this period, we have no means

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[11] *Ibid,* vol. 1, p. 406.
[12] *Ibid,* vol. 1, p. 445.
[13] *Ibid,* vol. 1, p. 445.
[14] *Ibid,* vol. 1, p. 478-9.
[15] *Ibid,* vol. 1, p. 495.
[16] *Ibid,* vol. 1, p. 516.
[17] *Ibid,* vol. 1, pp. 547, 567, 595.
[18] Charter and Laws, of Penna., p. 564.
[19] Col. Rec., vol. 1, p. 498.
[20] *Ibid,* vol. 1, p. 617.
[21] *Ibid,* vol. 1, p. 497.
[22] *Ibid,* vol. 1, p. 557.

of knowing what the extent of his practice was, but it was probably extensive, and the fact that there is no record of the appearance of any of his clients for relief before Council shows that his skill rendered that unecessary. He had up to this time shown none of those traits which characterized him in later life. Aside from his refusal to produce the records of the Provincial Court when ordered so to do by Council, he had displayed no unusual combativeness. He was on equally good terms with the proprietor and with the people. He had played no other part in politics than such as a lawyer might naturally play. He appears to have been concerned in the preparation of all the laws relating to the courts. Had he died at this time he would have been remembered to-day only as the first lawyer in the province. But a great change was about to take place in him. We have seen in the chapter on the Court ofAdmiralty how he was suspended from Council in 1700 because of his opposition to that court and his contempt of the Crown in connection therewith. From that time he became a bitter enemy of Penn, and the leader of those opposed to the proprietary interests.

There was method in his madness. He did not allow his animosities to run counter to his interests. He was just as bitter against Judges Quarry and Webb as he was against Penn, but the popular sentiment against the Court of Admiralty subsided; that court was evidently there to stay, and there was nothing to be gained by his continuing to indulge in his hatred of those gentlemen. Consequently he made friends with them, and we find him shortly afterwards Deputy Judge and Advocate to the Admiralty.[23]

But if it was to his interest to conciliate Quarry, it was equally to his interest to continue to oppose Penn. The proprietary interest was unpopular and growing more so, and in opposing it he both gratified his animosity and furthered his ambition. He had all of the characteristics calculated to fit him for a popular leader. He was skilled in controversy, aggressive, persistent, fertile in resources, fierce in his animosities when it was not to his interest to suppress them, and not too scrupulous. His first disaffection toward the proprietary government is thus related by Logan:—

The two persons chiefly struck at by Quarry were the lieutenant-governor and David Lloyd, attorney general, a man very stiff in all his undertakings, of a sound judgment and a good lawyer, but extremely pertinacious and somewhat revengeful: he, at that time, was one of the council; and those mighty wrongs that had been put upon the king coming to be debated there, David resolutely defended all that had been done, and too highly opposed the governor's resolution of composing all by mildness and moderation, and reconciling all animosities by his own intervention, which he thought the only advisable expedient to put an end to those differences that had cost him so much trouble. This soon created some small misunderstanding: several of the most noted friends were involved more or less in David's business, and though troubled at his stiffness,

[23]Penn and Logan Correspondence, vol. 1, p. 39.

yet wished him in the right, because the most active enemy and assiduous councillor against the other party, who on all occasions would be glad, they thought, of their utter ruin. This obstinacy the governor could by no means brook; he could not but think there was more deference and consideration due to his character and station. The other knew not what it was to bend; he was engaged in the cause, and would stand or fall by it, offering to plead it at Westminster Hall; but the Governor, who was most sensible of the pulse of the court, and affairs in general at home, knew this course would never take, and therefore was some times warm enough to inveigh highly against past proceedings, not sparing several in express words that were concerned in them, and laying open in large discourse what would be the consequence if they took not some more effectual ways to satisfy superiors at home, who perhaps would be very well pleased with any occasion, by whatsoever hand administered, to wrench the government out of the Proprietor's hands and throw it on the king.[24]

It is greatly to the disadvantage of the memory of Lloyd that practically everything which we know about him, except such data as is supplied by the Minutes of Council and the Votes in Assembly, is contained in the letters exchanged between Penn and James Logan, both of whom he bitterly opposed. Their evidence must, therefore, be received with caution, but after every allowance has been made the conclusion is irresistible that, in the leading part which he took in the affairs of the province for a number of years, a critical period in the history of the proprietary government, his actions were largely governed and controlled by his enmity to Penn. Logan thus recounts the beginning of his personal animosity to the proprietary:—

When upon the complaint of the Judges of the Admiralty against him, the Proprietor, soon after his last arrival here, was by command of the Lords Justices of England, who then represented the king, required to turn him out of all offices and prosecute him for the contempt he had put upon the regal authority and the opposition to the powers of the Admiralty in its courts here, David Lloyd received the account of it with very high indignation, though the Proprietor made him acquainted with it in the mildest method, being to my certain knowledge very much concerned in his behalf. A rancour of which the seeds had been laid ever since he lost a certain commission under Governour Blackwell, began then to break out, and as occasions offered he gave provocations till the matter came entirely to a rupture. But while the Proprietor was here, he exerted his resentments little further than privately to serve as a general depository of ill and disaffected humours towards the Government. Yet as often as the Assembly sat he was not idle with them, tho' not of their number; and in the last the Proprietor held he was most active in diffusing those humours.[25]

A favorable opportunity to harass the proprietor and his government did not occur until 1704, when Lloyd was elected speaker of the Assembly and absolutely dominated that body. As Logan says in one

[24] *Ibid*, vol. 1, p. 18.
[25] *Ibid*, vol. 2, p. 371.

of his letters to Penn, "Then was the proper scene presented, and accordingly he acquitted himself."[26] An account of the long and acrimonious controversy between the Assembly and Governor Evans, which began in that year, over a bill for the establishment of courts, is elsewhere given, but an incident of that controversy which took place at a conference between the Council and the Assembly, held on February 6, 1717, may be here given as illustrative of the contemptuous attitude which Lloyd assumed toward the proprietary government. It is thus related in the minutes of Council:

The speaker after his first standing up when he presented the House to the Govr. in Order to hold the Conference, having kept the seat for the first two or three times he spoke, and afterwards at the several times he had occasion to speak, sometimes standing but often sitting and at length continuing to sit altogether without rising at all, as all the members of Council did & always do when they speak at the Board to the Govr., and as the rest of the members of the Assembly likewise did, the Govr. told him that those that spoke to him upon such occasions always stood up, for it was necessary in point of good Orders, that whoever spoke should stand all the time, which secured him from Interruption.

The Speaker answered, that as he Sate there he was the mouth of the Countrey, being the Speaker of the House of Representatives, that he was to take his directions from them, and ought not to be abridged of his liberty.

The Govr. asked what he meant, if he intended by that a ffreedom of speech it was not denied him, for he had it fully, but that it was necessary for Decency and Good Orders, that whoever spoke in a Conference with him should stand at the time, and then proceeded to argue with him upon the Business in hand. . . .

The Speaker made two or three short answers to the Govr. upon the same subject, still keeping his seat, and so continued to speak as there was occasion without once moving, upon which the Govr. told him again, that if he spoke to him there he must stand up as others did, otherwise there would not be much notice taken of what he said, for it was necessity for the reasons given. The Speaker told the Govr. he must desire his Excuse, in anything that lay in his power he should be very ready to pay him all civil regards, but he could not answer him in this, the Govr. continued to tell him of the necessity of every man standing when he spoke, and that he ought to do as others in that case did.

Upon which the Speaker arose and said he was a free agent, and not to be directed by any one but the House, that he would continue no longer there & therefore must break up the conference. . . .[27]

The Assembly expressed regret for this misunderstanding, as they term it, on the next day, and desired that the conference should continue and that their Speaker should have leave to sit. Evans required an apology, which was not forthcoming, although the Assembly tried to excuse Lloyd's incivility, and the conference was never resumed. Those were

[26] *Ibid*, vol. 2, p. 329.
[27] Col. Rec., vol. 2, p. 314.

times of ceremony, and Lloyd's conduct was a much more serious offence than such a piece of boorishness would now be considered. It will be understood that there was no precedent for the speaker to remain sitting. He would not, by rising, have disclaimed any right theretofore claimed by his predecessors.

But Lloyd's opposition to the government was not confined to the quarrel over the judiciary bills. As Logan says, in a statement prepared by him, "From thence were occasions taken to discourse of everything from the first foundation of this government that would admit of the proprietor's disadvantages." The Assembly quibbled about the form of Evans' commission. They would confer with the Governor only by committee, and not, as had been the former practice, by conferences with the whole House. They insisted on the right to adjourn themselves. They blamed the proprietor for not having the English statute regarding oaths and affirmations repealed or modified. They accused his officers of all sorts of misfeasances in office. In short it would be tedious to enumerate the various charges against the administration.

But the crowning act of abuse was the preparation, at Lloyd's instance, of a representation to the proprietor, the heads of which were agreed upon in Assembly on August 26th, 1704. The record of the Assembly sets out that the representation was to be drawn up from these heads, be examined by the members charged with the duty of examining the minutes, signed by the Speaker and sent to Penn. Logan says that this much of the record was a forgery inserted in the minutes by Lloyd, in his own handwriting. Be that as it may, the "heads" in themselves were bad enough in all conscience. Among them are the following:—

First, that the Proprietary at the first Settling of this Province promised large Privileges and granted several Charters to the People, but by his Artifices brought them all at his Will and Pleasure to defeat. . . .

Thirdly, That he had great Sums of Money last time he was here, for Negotiating the Confirmation of our Laws, and for making good Terms at Home for the People of this Province and ease his Friends here of Oaths &c., but we find none of our Laws are confirmed, nor any Relief against Oaths, but an Order from the Queen to require Oaths to be administered, whereby the Quakers are disabled to sit in courts.[28]

There were seven other "heads," all of them nearly as offensive as the foregoing. One would suppose that a paper strictly following the instructions of the Assembly, if there were such instructions, would have satisfied Lloyd's malice. But it did not. He had prepared a violent philippic against the proprietor, dressing up what was agreed upon in the Assembly in the most offensive language, and adding matter not authorized by that body. This paper he kept by him until the term of the Assembly of which he had been Speaker had expired, entitled it "A Remonstrance," finally signed it, after some of the committee which had been appointed to coöperate with him in the preparation of the representation

[28]Votes in Assembly, vol. 1, part 2, p. 16.

had refused to sign it, and sent it to Penn, with copies to two of the proprietor's ill-wishers in the Society of Friends in England. These copies, by a curious chance, were never delivered, but came into Penn's hands. Logan thus describes the drawing up of this document in a letter to Penn, under date of October 27, 1704:

At the breaking up of last assembly, when the country members were eager to be gone home, it was concluded by the House, and a minute made of it, that there should be an address drawn up to thee, upon some heads then agreed on, and because the whole house could not attend to it, it was committed to David Lloyd, Joseph Wilcox, Isaac Norris, Joseph Wood. . . and Samuel Richardson; but they never meeting about it, Jos. Wilcox, as Isaac thinks, drew it up, stuffiing it with all the most scurrilous and scandalous refleceions, and running upon a great many particulars not before thought of, or once touched at, by the assembly. David Lloyd contributed his assistance. Griffith Jones and Joseph Wood were privy to it and agreed to what was done; and besides those not one person ever saw it, that could be heard of upon inquiry, except Samuel Richardson, who upon a cursory view declared his dislike of it. When they had finished, David, without further communicating it to the persons concerned, signed it as speaker of the house, after the 1st of October, when the assembly by charter is dissolved, and therefore he no speaker at all.

To warrant this his signing it, he produces an order for it in the minutes; but that proves to be an interlineation in David's own hand, and in a different ink, inserted between the close of the paragraph and the adjournment. The letter runs as if from the body of Friends, and even talks of money given thee by Friends for thy assistance, when the authors of it, and those who are to represent this body, are those four I have mentioned David Lloyd, whom scarce any man of sense believes to have any religion or principles, but that of his interest and revenge.[29]

Penn bitterly resented this attack, and urged that Lloyd be prosecuted for this and other offences which he enumerated. This matter had its sequel in 1709, until which year the attacks against the proprietor were continued with unrelenting bitterness. In 1707 the Assembly impeached James Logan, the secretary of Council, whom Penn had brought with him on his return to the province in 1699, and who was the leader of his adherents in the province, but the impeachment was never brought to a trial, though Logan urged that it might be. Finally, in 1709, Logan preferred charges against Lloyd, then again speaker of the Assembly, for a "high misdemeanor," probably founded on the foregoing remonstrance of 1704. Lloyd presented a "Vindication" to the House in which he denied the charge that he had forged the minute of the proceedings of the Assembly above referred to.[30] Perhaps he was innocent of the offence, but on October 29, 1710, Isaac Norris, who was a member of the committee charged with drawing up the representation in that year, wrote: "There is not a word to be seen of the foul minutes of 1704, but a fair, large, lying full one, stitched up in the book."[31]

[29] Penn and Logan Cor., vol. 1, p. 338.
[30] *Ibid*, vol. 2, p. 402.
[31] Janney's "Life of Wm. Penn," p. 514.

Lloyd also disavowed any personal enmity to Penn, in this vindication, but we think that no one can read Lloyd's letter to "G. W.", which he sent with a copy of the remonstrance to an enemy of Penn in England,[32] without being convinced to the contrary. In 1710 the people of the province had grown tired of the attacks on the proprietary and not one of Lloyd's adherents was returned to the Assembly in that year.

It is not to be understood that Lloyd's legislative services were confined to attacks on the proprietor. They were not. He was by all odds the most valuable member of the Assembly during the many years he was a member of that body. More than any one else he was responsible for the many laws enacted during his term of service relative to the courts and legal proceedings. Logan admitted this, when, in 1706, at a time when he felt most bitterly toward Lloyd, he wrote:—"There are many excellent labored laws which it must be owned are chiefly owing to David Lloyd."[33] He was very active in securing the passage of the laws which finally allowed affirmations to be taken in place of oaths. In fact the history of legislation was for many years a history of David Lloyd.

He served as recorder of the City Court of Philadelphia from 1702 to 1708.[34] He was commissioned chief justice of the Supreme Court in 1717 and served in that office continuously until his death in 1731. He was evidently prevented by the infirmities of age from discharging the duties of his office for a time before his death, as the Governor, in a message to the House, on February 6th, 1731, stated:—

The death of that worthy gentleman Mr. Hill & the Indisposition of Mr. Lloyd, which renders him unfitt to attend the Public Service, has occasioned two vacancies in the Commission of the Supreme Court by our Constitution established, and though I have used all proper endeavors to get them supplied, yet I find so great Difficulty in prevailing with Men of Knowledge & Abilities to undertake those Offices, that I am obliged to acquaint you therewith lest this Failure should be laid at my Door.[35]

David Lloyd was twice married. His first wife, Sarah, who was born in Cirencester, Gloucestershire, England, came with him to the province in 1686. After her death, he married Grace Growden, the daughter of Joseph Growden of Bucks county, a dignified woman of superior understanding and great worth of character. They had but one child, a son, who died at an early age as the result of a fright caused by his being shut up in a closet in the cellar, as a punishment for some childish fault, by a relation, in the absence of his mother. His second wife survived him many years, and continued to live in the house he built near Chester. She lies buried by him in the Friends' graveyard at that place. On his tombstone is the inscription, "Here lyeth the body of David Lloyd, who departed this life the 6th day of the 2nd month, Anno Domini 1731, aged 78

[32]Penn and Logan Cor., vol. 2, p. 142.
[33]*Ibid,* vol. 2, p. 142.
[34]Martin's "Bench and Bar of Phila.," p. 59.
[35]Col. Rec., vol. 3, p. 398.

years."[36] Mrs. Deborah Logan, the wife of the grandson of James Logan, whom Lloyd so bitterly opposed, thus sums up his character:

Some years after this [1726] we find him in a kind and friendly disposition of mind, assisting James Logan in ascertaining the proprietary title to the lower counties, and it is soothing to observe the character of men who have, like him, hitherto been swayed by prejudice or passion, that when the evening of life advances, the storms which have agitated them subside, and the soul, like the sun of the natural world emerging from the clouds which have obscured it, illuminates the horizon with its parting beam, and the day closes in serenity and peace.

Such is the contrariety of human character that undivided praise or blame cannot justly be bestowed perhaps on any, nor can his intrigues against William Penn and his practices to perplex the government, ever find excuse. Proud appears to be afraid to touch upon his character, but says that his political talents 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.

He was accounted an able lawyer, and though in this capacity he had completely the art to perplex and dash maturest counsels, and to make the worst appear the better reason, yet he was believed to be an upright judge, and in private life he was acknowledged to be worthy, a good husband, a kind neighbor and a steady friend.[37]

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[36] Penn and Logan Cor., vol. 1, pp. 41, 155.
[37] *Ibid,* vol. 1, p. 155-6, *note.*

CHAPTER XIX.

OTHER MEMBERS OF THE EARLY BAR.

CHAPTER XIX.

Other Members of the Early Bar.

The indifference of the Pennsylvania bar to the memory of its early members has been surprising. So learned and accomplished a lawyer as David Paul Brown, writing in 1856, says in his *"Forum:"*

But it would be of no great interest to the reader, nor, we presume, of any value to jurisprudence, did we attempt to exhume the nearly forgotten history of John White, "attorney general of Pennsylvania," of whom we know nothing but what we get from Proud, that, on the "25th October, 1683" he was appointed "to plead the cause between the Proprietary and Governor, and Charles Pickering and Samuel Buckley"; of another king's attorney, of whom even the name is lost to us, but who was appointed 17th November, 1685, "to prosecute John Curtis, accused of speaking treasonable words against the king"; of Samuel Hensent, empowered 16th January, 1685, "to prosecute all offenders against the penal laws, and to search for those who are on record convicted, and prosecute them if they have not satisfied the law"; of David Loyed, his successor, appointed 24th April, 1686, and of whom we know only that he attempted unsuccessfully to control—against William Bradford, its first defender in America—the freedom of the press, which Mr. Penn had invited here; a matter we tell hereafter: of G. Lowther, whose annals are shorter still than Loyed's, since we know nothing of him but the date of his appointment, 23rd September, 1706, or of Joseph Growden, Jun., who, succeeding Andrew Hamilton in his office, was commissioned 5th March, 1725. Our readers would soon be wearied with such annals.[1]

It will be observed that a number of names are misspelled in the foregoing, among them that of David Lloyd, one of the great men of the province, of whom Mr. Brown says that but a single fact is known, whereas all the facts set out in the preceding chapter of this work, relative to that able man, were in print when "the Forum" was written.

"Of the primitive Bar of the Province," says Horace Binney in the preface to his "Leaders of the Old Bar of Philadelphia," published in 1859, "we know nothing; and next to nothing of the men who appeared at it from time to time, up to the termination of the Colonial government." The statement of Chief Justice Tilghman, in the Bush Hill case, reveals to us all we know, and all that probably we can ever know, in regard to this subject; for, as the grandson of Tench Francis, who was attorney general in 1745, and connected by marriage and associated with the most eminent families of the bar, he knew as much of the former bar as any of his contemporaries, and they have all long since departed without adding

[1]Brown's "The Forum," vol. 1, p. 266.

anything to what he left. From what I have been able to learn, said the Chief Justice, "of the early history of Pennsylvania, it was a long time before she possessed any lawyers of eminence."

It is true that but little is known of the others members of the early bar, but what little is known is worth recording.

The most prominent of the early judges who were learned in the law was Judge Roger Mompesson, commissioned chief justice of Pennsylvania in 1706, who was also chief justice of New York and the Jerseys. He is said to have moulded the judicial system of New York more than any other man. He was also a member of the councils of the colonies named and of Pennsylvania. He came from England in 1703 as Judge of the Admiralty for New York, the Jerseys and Pennsylvania. Penn wished him installed as chief justice of the province then, but for some reason this was not effected. On August 27th, 1703, Penn wrote to Logan as follows:

The gentleman who brings this is constituted Judge of the Admiralty of Pennsylvania, the Jerseys and New York, and is yet willing to be my attorney general, to rectify matters in law, and to put you into better methods; in which respect he is, by the judicious here, thought to be very able. . . . It is a moderate churchman, knows the world here, has been in two several Parliaments and recorder of Southampton; only steps abroad to ease his fortune of some of his father's debts, he was early unwarily engaged for. It is a favorite of Lord Cornbury's father, the Earl of Clarendon. I have granted him a commission for chief justice, in case the people will lay hold of such an opportunity as no government in America ever had before, of an English lawyer, and encourage him by a proper salary of at least one hundred pounds, if not one hundred and fifty per annum. . . .[2]

Philadelphia, 13th, 6th-mo., 1703.

. . . to the no small surprise (undoubtedly) of Col. Quary, arrived here, as soon (or before) report, one Roger Mompesson, Judge for the Admiralty; famed a man of great abilities, free, it is said, from prejudices or party, of integrity, friendly to Governor Penn, and, as it is thought, like to be a happiness to this place.[3]

Deborah Logan says, in a note to the foregoing:

The singularity of the name has made me fancy this gentleman was the son of the pious and courageous rector of Eyam, who, in discharging the duties of his station in a humbler sphere, appears to have been actuated by the same philanthropic and Christian spirit as the good Bishop of Marseilles or the humane Howard.[4]

On April 3rd, 1704, Logan wrote to Penn:

The judge is exceeding firm and in the right interest, and somewhat incensed at the unaccountable commission that arrived about ten days ago, constituting Col. Quary judge of the admiralty for this province and

[2]Penn to Logan, Penn and Logan Cor., vol. 1, p. 212.
[3]Extract from a letter to Samuel Preston, Penn and Logan Cor., vol. 1, p. 212.
[4]Penn and Logan Cor., vol. 1, p. 213.

West Jersey, dated in 9br. last, and supersedes that part of R. Mompesson's. . . . If the assembly make a new regulation of the courts, and give encouragement to R. Mompesson to be our chief justice, he will be well enough pleased with his being superseded here, for it has been of no profit at all hitherto, we are become so superlatively honest; and he is of opinion that these two commissions—of the admiralty, I mean, and of the civil courts,—are not very consistent.[5]

On July 14th, Logan wrote again:—

Judge Mompesson has been here during their late sittings, and of great service in council, but going to New York, as he said, for a few days, has not returned yet, nor I fear intends it, to stay with us, Bridges, the chief justice there, being lately dead, whose place 'tis expected he will supply. He seems to be tired of us, as we have reason to be of ourselves, all things considered.[6]

On May 28, 1706, Logan writes that Mompesson has accepted the commission of chief justice, and that he (Logan) has paid him twenty pounds for the last Provincial Court, and "about ten pounds more for what thou calls his viaticum, or expenses, in thy letter to him."[7] The letter to Mompesson from Penn was as follows:

In the mean time pray help them not to destroy themselves. Accept of my commission of Chief Justice of Pennsylvania and the territories;—take them all to task for their contempts, presumption and riots;—let them all know and feel the just order and economy of government, and that they are not to command but to be commanded, according to law and constitution of the English government. And, 'till those unworthy people that hindered an establishment upon thee, as their Chief Justice, are amended or laid aside, so that thou art considered by law to thy satisfaction; I freely allow thee twenty pounds at each session; which I take to be at spring and fall; and at any extraordinary session thou mayst be called from New York, upon mine or weighty causes; having also thy *viaticum* discharged. Let me entreat thee, as an act of friendship and as a just and honorable man.[8]

Referring to the judiciary bills of 1706, Logan wrote: "What made us mostly incline to have it done by Act of Assembly, was the hope of procuring a salary for Judge Mompesson; but that we now see is vain."[9] This appears to have terminated Mompesson's services in Pennsylvania. Though Lloyd charged him with being too well-affected to Penn, he seems to have been trusted by both parties. Lloyd claimed that he drank too much, which could probably be said of most men in those days. Mompesson died in March, 1715.

Judge John Guest figures quite largely in the annals between 1700 and 1707. He was appointed chief justice of the Provincial Court on August 20, 1701,[10] and again in 1705. He was also a justice of the Phil-

[5] *Ibid*, vol. 1, p. 281.
[6] *Ibid*, vol. 1, p. 299.
[7] *Ibid*, vol. 2, p. 129.
[8] Janney's "Life of Wm. Penn," p. 477.
[9] Penn and Logan Cor., vol. 2, p. 180.

adelphia county court,[11] and that of Chester county.[12] He was appointed one of the commissioners to deliver the gaol of Philadelphia on February 9, 1703.[13] It does not specifically appear that he was learned in the law, but it is probable that he was. He was a member of Council for a number of years, and while serving in that capacity excited the wrath of the Assembly because of advice given the Governor in the matter of the bill for renewing the franchises of Philadelphia.[14]

On August 8th, 1704, the Assembly, being given to understand that John Guest, one of the Governor's Council, had misrepresented the proceedings of that body relative to the bill for the confirmation of the charter of Philadelphia, a committee was appointed to draw up an address to the Governor upon that subject, which was accordingly prepared in the following language:—

May it please the Governor: We the Assembly, having, after considerable time spent in the service of the Country, prepared and presented to the Governor for his consideration, certain Bills to be passed into Laws, for the securing the good People of this Government in their just Rights, Liberties and Properties, being in Expectation, that if any Thing were thought therein unreasonably urged, or wanted Explanation, the Governor would have taken seasonable Opportunities of signifying the same to us; and thereupon a Conference might be appointed between the Governor, or such as he might order on his Behalf, and a Committee of this House, which might have settled Matters satisfactorily between us; but so it is, that nothing of this Kind being effected, whilst we have patiently waited the Governor's Pleasure in the Premises, we are given to understand that John Guest, one of the Council, not having had a due Regard to the Welfare and Prosperity of the People of this Province, nor to the Concord and Amity intended by this Assembly to be kept and maintained with the Governor, hath used endeavors to render abortive our Labours and Care in the Premises, by representing our Proposals in the said Bills absurd, unreasonable and monstrous; and ridiculed us both publicly and privately, tending to the Dishonour of this House, and endeavoring to render us obnoxious to those we represent: Wherefore, whether such his Practices be contrary to the Rules of the Council-board, or the Oath or Attestation there taken, we shall not determine; but do earnestly desire that the said John Guest may give Satisfaction to this House, and receive a just Rebuke for his abusive, false and scandalous Speeches and Behaviour toward us; which hath tended to our Discouragement in proceeding upon the other Affairs of Moment before us.[15]

The Governor replied that as there was no specific charge against Guest, the board could take no notice of the address, but if they had any such charges he should answer them,[16] and whereupon the matter ended.

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[10] *Ibid*, vol. 1, pp. 57, 195.
[11] Col. Rec., vol. 2, p. 159.
[12] *Ibid*, vol. 2, p. 103.
[13] *Ibid*, vol. 1, p. 86.
[14] *Ibid*, vol. 2, p. 137.
[15] Votes in Assembly, vol. 1, part 2, p. 10.
[16] Col. Rec., vol. 2, p. 156.

He was urgent that the equity jurisdiction granted to the courts by the Act of 1701 should be exercised[17] and finally secured the adoption of rules of practice. On April 3rd, 1706, we find a special meeting of Council called for the purpose of the consideration of ways and means for the payment of his salary as chief justice, when the matter was left to the consideration of the Assembly.[18] That body did nothing in the premises, for which reason it appears he did not seek a reappointment. Guest's character is thus drawn in a letter from James Logan to William Penn:

A desire to be somebody, and an unjust method of craving and getting, seems to be the rule of his life. He has often been of great service, which should of itself be acknowledged, but it is owing to little good in his temper. It was his failings—that were laid hold of, to lead him to it—and, upon the whole, I must give it as my opinion that he is not to be trusted. He is remarkable in an unhappy talent of abusing every past governor, and seems fixed to no moral.[19]

He died in Philadelphia and was buried there September 8, 1708.[20]

John Moore, a descendant of titled stock, emigrated from South Carolina with his family sometime prior to 1696, and settled in Pennsylvania. He is mentioned in the Minutes of the Provincial Council as "a practitioner in law in the courts of this province" as early as 1698. As we have seen, he was shortly afterwards appointed advocate of the newly constituted court of admiralty under Colonel Quarry, and for a time was prominent in his defence of the jurisdiction of that tribunal, in the course of which he is frequently referred to by Logan in his correspondence with Penn. He ultimately became on good terms with both those gentlemen, was appointed as attorney general in one or more cases of note, and was afterwards appointed register general and later collector of the port of Philadelphia. He was a communicant of the Church of England, a member and vestryman of Christ Church, and died somewhere about 1731.[21]

Moore would not give up the records of the Register General to Markham, contending that the office was his property and freehold, whereupon the question was left to be decided at law.[22] The title to the office had apparently not been decided in 1704, when, after Markham's death, it was resolved in Council that the Governor might take the office into his own hands.[23]

George Lowther is thus referred to in a letter from Logan to Penn under date of July 29, 1702:

The captain, who is one George Lowther, mustered two days ago, had a sufficient company for the first appearance. He is a gentleman of

[17] *Ibid*, vol. 2, pp. 114, 160.
[18] *Ibid*, vol. 2, p. 184.
[19] Penn and Logan Cor., vol. 1, p. 21.
[20] *Ibid*, vol. 2, p. 280.
[21] Lewis' "Courts of Penna.," Pa. State Bar Ass'n. Reps., vol. 1, p. 399.
[22] Col. Rec., vol. 2, pp. 121, 122.
[23] *Ibid*, vol. 2, p. 151.

Nottinghamshire, the family of Yorkshire, himself bred to the law, in which he excels. He arrived here a few weeks after thy departure, and would be useful would he stay, but it is not expected, having retired from England only till some storm blew over. He is a young man, has only his wife with him, having left two or three children in England; has a good interest by his discourse, in which he seems to be believed, with several of note, particularly the Duke of Newcastle and Lord Lexington, to the last of which he designs to write in favor of this place. He is opposite to the hot Church party, and I hope will be helpful to make an interest against them.[24]

He was one of the "practitioners in the Law in this City" called upon to give their sentiments upon the judiciary bills by Governor Evans on September 23, 1706.[25] Lowther died in the spring of 1708, having been attorney general at the time of his death.[26]

Of Thomas MacNamera we know only that the freeholders of Philadelphia petitioned the Assembly that he be disbarred, because at the supreme court held at Philadelphia on the 11th of April, 1709, he declared that the Queen's Order in Council allowing an affirmation to be taken by Quakers in lieu of an oath, was "inconsistent with the Queen to grant such an Order & that it was against Law, and other Expressions in Derogation of the said most gracious order,"[27] and that, on another occasion, in the case of Heather v. Frankfort Company, he is alleged to have received a fee of "a couple of periwigs" worth ten pounds. Payment of fees in periwigs was evidently unusual or this fact would not have been mentioned. McNamera was one of the four lawyers who, Governor Pennypacker says, were in practice in the province in 1709.

Samuel Hersent was named as one of two persons from whom a local tax collector for Philadelphia county, with a compensation not to exceed twenty pounds per year, was to be chosen, on May 22, 1684.[28] On February 1st, 1686, he was attested attorney for Philadelphia county.[29] It appears that he was high sheriff of that county at the time, and he was afterwards continued in that office, but appears to have been ousted as county attorney by a resolution which declared that attorneys should not practice in the courts of counties of which they were sheriffs.[30] On April 2, 1687, his petition was read in Council praying for relief from a judgment of the County Court of Philadelphia, which was referred to the Provincial Court.[31] He is last referred to in a letter of Governor Blackwell, who, after his resignation in 1689, states, "Samll Hersent left a Child there that was at my Charge, but I think ought to be maintayned by ye Community," from which it would seem that Hersent had died

[24] Penn and Logan Cor., vol. 1, pp. 124-5.
[25] Col. Rec., vol. 2, p. 254.
[26] *Ibid*, vol. 2, p. 280.
[27] *Ibid*, vol. 2, p. 457.
[28] *Ibid*, vol. 1, p. 111.
[29] *Ibid*, vol. 1, p. 167.
[30] *Ibid*, vol. 1, p. 170.
[31] *Ibid*, vol. 1, p. 199.

before that time in impecunious circumstances, but this may not have been the case.[32]

Thomas Clark was one of those "practitioners in the Law in this City" consulted by Governor Evans in 1706 about the judiciary bills then under consideration,[33] and that is all that we know about him.

Robert Assheton was also one of the lawyers then consulted. He was related to Penn. On February 9, 1703, he complains to Council that his predecessor as clerk to the Philadelphia Court, David Lloyd, would not turn over to him the records of his office.[34] On August 10, 1703, he was given a *dedimus potestatem* to qualify the judges and other officers of his court.[35] The Assembly complains of him in June, 1709, because he held the offices of town clerk of Philadelphia, clerk of the peace of the county, prothonotary of the court of common pleas and prothonotary of the Supreme Court, which offices, the Assembly thinks, should be held by different persons.[36] On July 19, 1714, he laid before Council a draught of an ordinance for reëstablishing the courts of judicature, which he had been directed to prepare. This was Gookin's Ordinance.[37]

Brown, in referring to the Philadelphia courts, in his "Forum," says: "After 1704, the indictments which were drawn by one of the Asshetons, are entirely scientific; and indeed all the proceedings of the officers of the court—proceedings, I mean, only clerical—appears in general to be good."[38]

Assheton was admitted to the Council in 1711, and was an associate justice of the supreme court from 1722 to 1726, and a master in chancery in 1722. He was also at one time deputy clerk of the Council, and Naval Officer. Very few offices escaped him. He died suddenly on May 29, 1727, in the fifty-eighth year of his age.[39]

Robert Assheton was the father of William Assheton, of Gray's Inn, judge of the admiralty, a member of the Council and a master in chancery. He died at the age of thirty-three years on September 23, 1723.[40]

Joseph Growden, chief justice from 1703 to 1717, came to the province soon after Penn. He declined to serve as an assistant judge in 1701, because he would not serve as an inferior to Chief Justice Guest.[41] He represented Bucks county in the Assembly many years and was several times speaker of that body. He was also a member of Council. He died the 9th day of December, 1730.[42] He was not learned in the law.

His son, Lawrence Growdon, born in 1694, was an associate justice of the supreme court for twelve years. He was afterwards, while a

[32] *Ibid*, vol. 1, p. 319.
[33] *Ibid*, vol. 2, p. 254.
[34] *Ibid*, vol. 2, p. 89.
[35] *Ibid*, vol. 2, p. 98.
[36] *Ibid*, vol. 2, p. 456.
[37] *Ibid*, vol. 2, p. 571.
[38] Brown's "Forum," vol. 1, p. 227.
[39] Keith's "Provincial Councillors," p. 282.
[40] *Ibid*, p. 283.
[41] Penn and Logan Cor., vol. 1, p. 57.
[42] Keith's "Provincial Councillors," p. 222.

county judge, prothonotary of the court of common pleas, clerk of the orphans' court and recorder of deeds of Bucks county. He died on the first day of April, 1770.[43]

Chief Justice William Clark was a member of Council from Sussex county for a dozen or more years, and was prominent in the deliberations of that body. He was an associate justice in 1701, 1702 and 1703, and was commissioned chief justice in 1704. He died about February, 1705.[44]

"Griffith Jones, the Welsh Attorney in the Lower Counties," is referred to by Penn in a letter, and then disappears from human knowledge. He was not the Griffith Jones who was mayor of Philadelphia.

John White was appointed Attorney General to plead the cause between the proprietor and Charles Pickering, on October 25, 1683, when the defendant was tried before the Council for counterfeiting,[45] and he was again appointed, on November 17, 1695, to be Attorney General "for the prosecuting of John Curtis of Kent county, who stands accused of Speaking Dangerous and Treasonable words against ye King,"[46] and that is all that we know about *him*.

Edward Shippen, who was mayor of Philadelphia, and one of the associate justices of the supreme court, was born in 1639 in Yorkshire, England, whither his family had recently removed from Cheshire, where their ancestral home, "Hellham," was located. He emigrated to Boston in 1668, where he accumulated a fortune of ten thousand pounds. He there married Elizabeth Sybrand, a Quakeress, and adopted her faith, after which time, it is unnecessary to say, his affairs did not continue to prosper. He came to Philadelphia in 1693, was speaker of the Assembly in 1695, and in 1696 became a member of Council, and so continued for several terms. He was the first mayor of Philadelphia under the charter of 1701, and a justice of Philadelphia county. He was an associate justice of the supreme court about 1699. After the death of his wife he married again, became separated from the Society of Friends, and died in 1712. He was said to have been distinguished for three great things: The biggest person, the biggest house and the biggest coach.[47] He was the great-grandfather of Chief Justice Shippen.

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[43] *Ibid*, p. 223.
[44] Martin's "Bench and Bar of Phila.," p. 14.
[45] Col. Rec., vol. 1, p. 87.
[46] *Ibid*, vol. 1, pp. 163-4.
[47] Sharf & Westcott's "Hist. of Phila.," p. 1496.

CHAPTER XX.

COURTS OF PHILADELPHIA AND VICINITY.

CHAPTER XX.

Courts of Philadelphia and Vicinity.

On October 25, 1701, Penn granted a charter incorporating the city of Philadelphia. There was an earlier charter of 1691, the existence of which had been forgotten until 1887, when it was published in Allinson and Penrose's "Philadelphia." There is no record showing that any organization took place under this first charter, but this affords no presumption that the city was not governed by it until it was superseded by the charter of 1701.

By the latter charter the mayor, recorder and aldermen were made justices of the peace and of oyer and terminer, with plenary jurisdiction within the liberties of the city, and any four or more of them, the mayor and recorder being two, were given power to hear and inquire into all crimes and felonies, larcenies, riots and unlawful assemblages and breaches of the peace, and to try and punish all crimes and vices. They were to hold a court of record quarterly or oftener, and to abate nuisances and arrest encroachments. They were constituted of the quorum of the justices of the county courts of quarter sessions, oyer and terminer and gaol delivery of the county of Philadelphia.

They were authorized to erect a jail and workhouse, and to take cognizance of debts, according to the statute of merchants and of Actions Burnel, and appoint a clerk of market. The freemen of the city were to elect a coroner and a sheriff as such officers were chosen in the counties, but by the Act of January 12, 1706, (2 Stats. at Large, 275) the sheriff and coroner of Philadelphia county were constituted the sheriff and coroner of the city. The recorder was required to be skilled in the law. He might be removed for misconduct by the mayor, with five aldermen and nine members of the common council.[1]

Among the recorders of this court were some of the ablest men at the provincial bar, such as Andrew Hamilton, William Allen, Tench Francis and Benjamin Chew. The jury for the court were summoned by the mayor's writ. This court tried most of the crimes committed within the old city, wherein, as the only populous part of the county, the greater part of the offences were committed, thus relieving the judges of the court of common pleas of the county, sitting in quarter sessions, from most of the criminal business.[2]

By a city ordinance a "two weeks" or "forty shillings" court was held by members of the city court for the trial of small civil cases, but, as

[1]Sharf & Westcott's "Hist. of Philadelphia," p. 174.
[2]Brown's "Forum," vol. 1, p. 221.

we shall see later, this court was abolished by the Act of May 28, 1715, which gave justices of the peace jurisdiction of all such cases, and remained in force until 1810.

On the 3rd of October, 1704, the Governor laid before Council a complaint of the mayor and aldermen of Philadelphia, in which they complained, among other things, that the Governor did not license persons recommended to him by

ye Mayor's Court, for keeping houses of Entertainment, until they had obtained a second recommendation from ye County Court, to ye Charge & Trouble of ye persons concerned, & as we think a great Infringemet of ye power granted us by ye Charter & rendering our Authority Contemptible to ye Inhabitants.[2]

To which Evans replied,

I can boldly affirm yt until I saw your Remonstrance I never once heard it suggested that ye Justices of ye County ought not to have ye same power in ye Citty, concurrent with ye Citty Magistrates. If in ye Eye of ye Law it be otherwise, to that I must leave it to be determined & shall be very well pleased to have it decided by proper Judges; as to ye Recommendations of persons to be Licensed, the County Justices were of opinion that they were unkindly dealt by, & therefore were willing to asserts their Right (as they took it to be) not with any design to clash but to act in concurrence.[3]

By the fifth section of the Act of May 22, 1722,[4] it was provided, inter alia:

That when any writ of error shall be granted upon any judgment given or to be given for the said city of Philadelphia, the mayor, recorder and aldermen of the said city of Philadelphia, and their successors, or any of them, shall not be compelled upon any of the said writs, or any other writ or writs directed to them or any of them, to remove, send or certify into the said supreme court, or elsewhere, any of the indictments or presentments taken or to be taken before them, or the record of the judgments and proceedings upon any such indictments or presentments, but only the tenors or transcripts of the said records under their common seal. And after such judgments are reversed or affirmed, or causes lawfully removed from the said city courts are tried in the said supreme courts, it shall and may be lawful for the mayor, recorder and aldermen, and their successors, to proceed to execution or otherwise, as shall appertain according to law.

The Revolution was considered as having put to an end the corporation of the city of Philadelphia as it existed under the charter of Penn. On March 21, 1777,[5] an act was passed which provided that the President of the Commonwealth and the Executive Council should appoint five judicious inhabitants of the city of Philadelphia to be judges of a court to be held in that city to be called the City Court, any three of whom might hold

[2] Col. Rec., vol. 2, pp. 161-2.
[3] 3 Statutes at Large, pp. 301-2.
[4] 9 *Ibid*, p. 105.

the same. This court was to be held four times in the year, and the judges were to have the same or equal power and authority within the city as the late "Mayor's Court" had had. This act was repealed by section nine of the Act of March 31, 1784,[6] which provided that a court of record of the City of Philadelphia should be held by the justices of the peace elected for the city, with the same jurisdiction as had been exercised by the court created by said Act of 1777.

By the Act of March 11, 1789, 13 Stats. at Large, 193, entitled "An Act to Incorporate the City of Philadelphia, all laws providing for the appointment of justices of the peace for the city of Philadelphia were repealed. The mayor, recorder and aldermen were given the powers of justices of the peace and of oyer and terminer as in the charter of 1701. The mayor, recorder and aldermen, or any four of them, of whom the mayor or recorder should be one, were given the same jurisdiction as a court of quarter sessions in the case of crimes committed within the city, and were to hold a court of record four times in each year to be known as "the Mayor's Court of the City of Philadelphia." An appeal lay from the judgments of this court to the Supreme Court.

An "Aldermen's Court" was established, to consist of three aldermen, appointed by the mayor and recorder, four times in the year, two of whom constituted a quorum. This court was required to meet on the forenoon of each Monday, and sit as far into the week as might be necessary. It had an exclusive jurisdiction within the city of all suits cognizable before a single justice of the peace in the county, in civil matters, where the debt or demand amounted to forty shillings and less than ten pounds, subject to the same provisions with regard to process execution and appeals.

The mayor and aldermen, individually, had exclusive jurisdiction of debts and demands under forty shillings, with an appeal to the Aldermen's Court. The justices of the court of quarter sessions were not to have any further or other power within the city than the mayor, recorder or aldermen had.

The Aldermen's Court of Philadelphia, established by the Act of 1789, was abolished by Section 30 of the Act of March 20, 1810,[7] entitled "An act to amend and consolidate with its supplements an act for the recovery of debts and demands not exceeding one hundred dollars before justices of the peace, and for the election of constables and for other purposes." The jurisdiction theretofore exercised by the Aldermen's Court devolved upon the justices of the peace of the city, under the provisions of the said Act of 1810.

The first section of the Act of 1836, P. L. 785, provided that the Governor should appoint a recorder of legal learning and ability for the District of Northern Liberties, Spring Garden and Kensington, in the county of Philadelphia, who should receive a salary of five hundred dollars for his services, and who, together with the mayor of the Northern Liberties,

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[6] 11 *Ibid*, p. 306.
[7] 5 Sm. Laws, p. 174.

Spring Garden and Kensington, or any four of them, should hold a court of record four times in the year to be called the "Recorder's Court for the Incorporated District of Northern Liberties, and the District of Spring Garden and Kensington." This court had the same powers in the district within its jurisdiction as were possessed by the mayor's court of Philadelphia in that city. For some reason, not now known, it was irreverently called "the Flax Seed Court."[8] It was abolished by the Act of March 19, 1838, P. L. 122.

The Mayor's Court of Philadelphia was abolished by the Act of March 19, 1838, P. L. 122, which provided for the creation of a Court of Criminal Sessions for the City and County of Philadelphia. This court consisted of three judges learned in the law, appointed to serve during good behaviour, with the same compensation as that received by the president of the Court of Common Pleas of Philadelphia county. It had the same jurisdiction previously had by the mayor's court and so much of the jurisdiction of the court of quarter sessions as did not relate to roads, highways and bridges. The first session was to be held on the first Monday of April, 1838, and thenceforth all laws giving jurisdiction to the Court of Quarter Sessions of the County of Philadelphia, to the Mayor's Court of Philadelphia and to the Recorder's Court of Northern Liberties, Kensington and Spring Garden, were repealed so far as they were inconsistent with that act.

The Court of Criminal Sessions was abolished by the Act of February 25, 1840, P. L. 61, which established in place thereof the Court of General Sessions for the City and County of Philadelphia, which like its predecessor was composed of three judges learned in the law, one of whom was to serve as president, each to receive the same salary provided for the judges of the Court of Common Pleas of the City of Philadelphia. These judges were to be nominated by the Governor and confirmed by the Senate for a term of ten years. The court had the same jurisdiction as the Court of Criminal Sessions, and also of all matters of which the quarter sessions of the peace for Philadelphia County had jurisdiction, excepting certain powers relative to the incorporation of boroughs, the licensing of taverns, etc. It also had a concurrent jurisdiction with the court of Oyer and Terminer of the County of Philadelphia, and might at least twice a year hold sessions for the trial of cases of homicide.

This court was abolished by the Act of February 3, 1843, P. L. 8, which restored to the Courts of Quarter Sessions and Oyer and Terminer the jurisdictions of which they had been deprived by the acts establishing the Courts of Criminal Sessions and of General Sessions, respectively. The acts relating to the establishment of courts local to the city of Philadelphia after 1843 will be considered in a later chapter.

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[8]Martin's "Bench and Bar of Phila.," p. 92.

CHAPTER XXI.

THE JUDICIARY ACTS OF 1711, 1713 AND 1715—GOVERNOR GOOKIN'S ORDINANCE OF 1714—MISCELLANEOUS ACTS.

CHAPTER XXI.

The Judiciary Acts of 1711, 1713 and 1715—Governor Gookin's Ordinance of 1714—Miscellaneous Acts.

The Assembly issued a long and vigorous protest against Governor Evans' Ordinance of 1707 and sought to have it recalled but without avail, and it remained in force, as already stated, until the passage of the Act of February 27, 1711.

The animosities developed during the controversy with Governor Evans having largely, though by no means wholly abated, a new judiciary act was passed on the date named. Like the bill advocated by the Assembly in 1706, it was "long and tedious," being in fact a copy of that bill with some changes. It covers no less than thirty pages of the Statutes at Large. It was repealed by the Queen's Council on February 20, 1714, and was therefore in force a little less than three years.

This act provided for a Supreme Court consisting of four judges, who might bring up cases from below on writs of habeas corpus, certiorari, etc., but could issue no original writs; in other words, no suit might be instituted in the first instance in that court.

Criminal cases might not be brought up before trial below, unless the writ for removal was awarded in open court by a judge or judges of the Supreme Court, on the motion of an attorney, bail having been first given before one or more judges of the court below, conditioned for the appellant to appear and plead in the Supreme Court, and to procure the issue joined upon the indictment to be tried at the next Supreme Court for the county wherein the indictment was found. Failing the giving of such bail before the writ for removal was granted, the defendant was to be tried below as if no writ had issued. Writs of removal might be granted in vacation by judges endorsing their names on the same, with the name of the appellant, bail to be first given as above provided.

To take up a civil case before trial, the writ was required to be produced to the court below before issue or demurrer joined, all fees already incurred to be first paid. On the payment of such charges, one of the judges of the court below was to allow the writ and make return of it. The appellant was then required to give special bail before a justice of the Supreme Court, in such amount as he should determine, first giving notice to the plaintiff below or his attorney, within four days after the allowance of the writ by the court below, of the names and additions of his bail, the date when application for the approval of the bail would be made and the name of the judge who would be applied to. If neither the plaintiff below nor his attorney could be found, then notice of the foregoing facts was to be filed with the clerk of the court below and affidavits of the filing

taken, failing which the bail should not be approved and a *procedendo* should issue. If the plaintiff below or his attorney did not attend at the time set for applying for the approval of the bail, nor within twenty days thereafter, the bail might be taken *de bene esse,* and, upon affidavit made of the notice aforesaid, be forthwith filed in the Supreme Court by the attorney suing out the writ, but, if the same were not filed within four days after the expiration of the said twenty days, a *procedendo* was to be granted on a certificate from the prothonotary that it was not filed. The object of all these restrictions apparently was to confine the Supreme Court in large measure to the consideration of cases brought up after trial by writs of error, by making the taking up of cases before trial as inconvenient as possible.

The separate courts of Quarter Sessions and Common Pleas, first instituted by Evans' Ordinance, were continued, and distinct dates were fixed for the holding of the sessions of each.

The justices of the Common Pleas were given full powers in equity, with appeals to the Supreme Court, but nothing might be decreed in equity wherein a sufficient remedy might be had in any other court or before any magistrate or judicature in the province, either by the rules of the common law or according to the laws of the province, and when matters determinable at the common law should come before them in equity they were required to remit the parties to the common law, all matters of fact to be tried at law before the court proceeded to decree anything in equity.

The courts of Common Pleas were to determine all causes as nearly as conveniently might be according to the common law and the rules of practice of the Queen's Court of Common Pleas, and justice was to be administered in the courts of Quarter Sessions as nearly as conveniently might be to the laws of England. The justices of the Supreme Court were required to hold sessions in Bucks and Chester counties only when causes were brought before them therefrom. Forfeited recognizances went to the Governor; fines and amercements for such uses as they were or might be appropriated for. The English statutes of Jeofails were extended to the province, as well as certain statutes of Henry VI, William III and Anne, in whole or in part.

The act went into minute details of practice and was more a code of law and practice than an act. This act was repealed by the Queen's Council on February 20, 1714, the Queen's Attorney General having found the following objections to it:

> I conceive there are several things not proper to be established as law, and I can't see any occasion for erecting such a supreme court of judicature as therein is mentioned, since justice as to all the particulars mentioned in this act [is administered] in courts which this act calls inferior courts, and those are still to continue, only this court to be erected is to draw from them what business they think proper by certiorari, writs of error, habeas corpus, &c., which will only multiply suits or make proceedings at law more dilatory and expensive.
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> The justices of peace have power given to them to make persons find

sureties for threatening any persons in body or estate and yet 'tis not required the charge should be on oath or affirmation, which leaves a very arbitrary power in the justice. In that part of the act which enacts several laws of Great Britain to be observed there, 'tis enacted that the act of the 8th and 9th of W. 3d, for preventing frivolous and vexatious suits, shall be put in execution in Pennsylvania, as far as circumstances admit. What is meant thereby I can't apprehend, but it seems very improper to say an act shall be observed as far as circumstances will admit. In relation to the proceedings in equity there is a clause that they shall determine nothing determinable at common law nor try any fact arising on hearing the cause, but send it to an issue at law, which I apprehend must make proceedings in equity insufferably dilatory and multiply trials at law in the plain cases to no manner of purpose, for which reason I am humbly of opinion that this act ought to be repealed.[1]

The objection of the attorney general to a Supreme Court is not surprising when we consider that such a tribunal was not known to English jurisprudence in those days, except as the House of Lords might be considered as one, and that no court having jurisdiction of appeals in criminal cases existed in England until the last few years. However, it is strange that he did not recognize the necessity for a court of review in a system where the judges of the courts below were not learned in the law.

A Statute of Limitation was passed on March 27, 1713,[2] in which the limitation was fixed at six years in civil cases after cause of action or suit, and two years in actions for trespass, assault, menace, battery, wounding or imprisonment. In the case of actions upon the case for words, the limitation was within one year next after the word spoken. This act was not disallowed in England, not having been disapproved within the six months from its submission, and is still in force.

On the same date was approved "An act for establishing Orphans' Courts,"[3] which was also allowed to remain in force through lapse of time. By this act the Orphans' Court was declared a court of record, with power to cause to come before it all persons who, as guardians, trustees, tutors, executors, administrators or otherwise should be entrusted with or in anywise accountable for any lands, tenements, goods, chattels or estate belonging to any orphan or person under age, and to cause them to make and exhibit inventories and accounts of the estate. They were also empowered to oblige the Register-general or his deputy to bring in duplicates of all bonds, accounts, etc., relating to such estate. By the third section they could compel persons having the care and trust of minors' estates to give security, if likely to prove insolvent or neglecting to file inventories and accounts. By the fourth section, executors, guardians or trustees might by the leave of the court put out their minors' money at interest. Other powers over trustees for minors was given to the court by the eleventh section. This act remained in force until 1832.

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[1] 2 Statutes at Large, p. 548.
[2] 3 *Ibid*, p. 12.
[3] 4 *Ibid*, p. 14.

The Judiciary Act of 1714 was replaced by an ordinance issued by Governor Gookin dated July 20, 1714. This document was prepared by Robert Assheton, Esqr., by direction of the Governor and Council. The Assembly protested against the issue of this ordinance, as it had protested against that issued by Governor Evans, requesting that a simple declaration or other public instrument might be issued, directing the courts to be held at the usual times and places, continuing the pleas and process then depending until the succeeding courts, and to make all new process returnable accordingly, before which time they hoped to have the solicitor general's opinion relative to the repeal. The Governor replied that the current of justice should not be stopped, as it must necessarily be, if some such provisions were not made, because the reason for the repeal of the former law was left behind. Thereupon the ordinance remained in operation until supplied by the Act of January 13, 1715. This ordinance was not materially different from that of Governor Evans.

On May 28, 1715, was passed an act regulating appeals to Great Britain.[4] This act was repealed by the Lords Justices in Council in 1719, but notice of its repeal seems not to have reached Pennsylvania, as it was printed as if in force in all the revisions of the laws down to the Revolution.

In preparing bills to take the place of acts which had been disallowed in England, the Assembly was frequently much hampered by not having before them the reasons why such acts were not approved, and even when they were in possession of such reasons, the objections were frequently found to be so brief as to give no indication of what would meet with the approval of the Crown as substitutes for the repealed acts. Sometimes they deliberately enacted measures, such as the provisions for a Supreme Court, which had been expressly disallowed in England upon reasons given, and which there was, therefore, every reason to believe would be again disallowed. Their persistency was, however, usually rewarded by the ultimate allowance of such measures, either because of arguments produced to the King's Council or because of a change of opinion on the part of the Council or the King's Attorneys General.

In 1715, the Assembly hit upon the expedient of passing separate acts relative to the Judiciary, instead of passing one act covering the whole subject. They accordingly enacted four separate laws, one each for the establishment of the Supreme Court,[5] the courts of Quarter Sessions,[6] and the courts of Common Pleas,[7] and an act providing for "the better Ascertaining the Practice of the Courts of Judicature in this Province."[8]

The substance of these acts appears to have been taken from the different parts of the "long and tedious" Act of 1711, with some changes. The Supreme Court, however, seems to have been given original jurisdic-

[4] 3 *Ibid*, p. 32.
[5] 3 *Ibid*, p. 65.
[6] 3 *Ibid*, p. 33.
[7] 3 *Ibid*, p. 69.
[8] 3 *Ibid*, p. 73.

tion of all matters cognizable by the other courts, and is to try all capital cases, which were to be tried by commissioners of oyer and terminer under the superseded act.

These acts were all repealed by the Lords Justices in Council on July 21, 1719, the Supreme Court Act, for the identical reasons urged against the Act of 1711. The Quarter Sessions Court Act was disallowed, because of the provision that they should execute all things as near as conveniently may be to the laws of Great Britain, "which words seem to give too great a latitude to the justices who are to judge of that convenience, and may upon some occasions be made use of to serve an ill purpose." A similar objection was made to the provision in the Common Pleas Court act that all pleas therein should be according "to the course and practice of the King's Court of Common Pleas at Westminster." The objection to the practice court act was that it provided that the Act of 8 and 9th, William III, preventing frivolous and vexatious suits, and amendments thereto of 4 and 5 Anne, should be put in practice in Pennsylvania as far as circumstances permit, to which the same objection was made as was made against the use of the same language in the Act of 1711; that "It seems improper to say an act shall be observed as far as circumstances will permit."

The penalties provided by the early criminal laws of the province were comparatively mild, but a reaction in favor of severity set in about 1700. In that year was passed the Act of November 27, 1700, 2 Statutes at Large, page 7, where a first offense of rape was punished by the infliction of a public whipping with thirty-one lashes on the bare back, and seven years imprisonment at hard labor. The second offense was punished by castration, and branding the culprit with the letter R on his forehead. Referring to this act, the Queen's attorney general said that castration was a punishment never inflicted by any law in any of her Majesty's dominions, and the act was accordingly disallowed.[9] An act passed on the same day provided that sodomy or beastiality should also be punished by castration, if the culprit were a married man. It will be remembered that these acts were passed while the Quakers were still dominant in Pennsylvania.

By 1718 a considerable criminal element had been introduced into the province, and the murder of Justice Hayes, elsewhere referred to, called attention to the necessity of severer laws for the punishment of crimes. Accordingly the Act of May 31, 1718, was passed, 3 Statutes at Large, page 199, which provided that petit treason, misprision of treason, murder, manslaughter, homicide, sodomy or buggery, rape, highway robbery, mayhem, accomplished by lying in wait, burglary, arson, and concealing the death of an infant, were made punishable by death, "as the laws of Great Britain now do or hereafter shall direct and require in such cases respectively." Benefit of clergy was allowed according to the laws of England, without requiring the criminal to read. Persons refusing to plead and standing mute were to "suffer as a felon convict," as if they had been

[9] 2 Statutes at Large, p. 490.

found guilty, instead of being subjected to the *"peine forte et dure,"* as appears to have been done in New England near the end of the seventeenth century.[10]

By a provision of this statute, as elsewhere stated, a Statute of James I relative to witchcraft was to be put into execution in the province.

A horrible account of the burning of a woman under the provisions of this act, for petit treason, at New Castle in 1731 will be found in Lloyd's "Early Courts of Pennsylvania," at page 91, to which persons who enjoy the perusal of Fox's "Book of Martyrs," and those misguided Pennsylvanians who are accustomed to refer to the burning of the witches at Salem (who were, as a matter of fact, hanged) are referred.

The act further provided that judges, inquests and witnesses might be qualified by taking the solemn affirmation allowed by act of Parliament to those called Quakers in Great Britain, which affirmation was to have the full effect of an oath in any case whatsoever. This still left the holy name in the affirmation, from which it was removed by a later act. Separate prior acts providing for affirmation by Quakers in judicial proceedings had been disallowed, but this act was promptly approved in its entirety.

This act was drawn up by David Lloyd after a conference with the Governor and Council, and was accompanied by an address to the King pleading that Quakers might be permitted to affirm with the same force and effect as if they had taken oaths.[11]

A controversy arose between Governor Keith and the Council in 1717 as to the form of the commissions to justices and judges.[12] Since the return of Penn to England the commissions had been issued merely in the name of the lieutenant-governor. Keith contended that they should be in the name of the King and attested by the Governor, inasmuch as all writs were given in the King's name. The Council, however, stood out for the existing practice, but at Penn's death in 1718, the commissions were issued in the King's name, and continuously thereafter until the government was assumed by his sons, when the commissions were issued in their names, as proprietors.

The Judiciary Acts of 1715 having been disallowed in England in 1719, the familiar condition of a government without courts was again presented. To meet this situation Governor Keith, at the request of the Assembly, continued the courts by the simple expedient of issuing a commission to the Provincial Court authorizing it to try all capital crimes[13] and commissions to the county courts directing them to deliver the jails and try all criminal cases not capital, according to the common law and the laws of the province, and to hold courts of common pleas "according to the rules of practice heretofore lately used or which hereafter may be settled to be observed in the said courts within this province.[14] These

[10]Hildreth's "History of the United States," vol. 2, p. 160.
[11]Votes in Assembly, vol. 2, pp. 234-236.
[12]Col. Rec., vol. 3, p. 33.
[13]*Ibid*, vol. 3, p. 76; Charter and Laws, p. 385.
[14]Charter and Laws, p. 382.

commissions were prepared by David Lloyd, who was then chief justice. The commission to the Supreme Court, it will be noted, is silent on the subject of its civil jurisdiction, either original or appellate. Justice was administered in this manner until the passage of the Act of May 22, 1722, 3 Statutes at Large, page 298.

On May 28, 1715,[15] was passed an act giving any justice of the peace exclusive original jurisdiction of suits for debts or demands under forty shillings. This act superseded numerous earlier acts providing for the trial of such suits by one or more justices. It conferred the power to issue necessary writs and process, and abolished the "two weeks court," or "forty shillings court," which had been held by the aldermen of Philadelphia, under an ordinance of that city for the trial of such causes. This act was allowed to become a law by lapse of time, and remained in force until repealed by the Act of March 20, 1810, P. L. 208.

The Act of May 28, 1715,[16] provided elaborately for court and other fees. As the judges at that time were paid only by such fees, it is of interest to know what the same were. The fees of the justices of the Supreme Court were as follows:

For allowing and signing the allocatur of every certiorari for removing of indictments, orders, etc., four shillings; for every cause brought up by certiorari or writ of error, eight shillings; for taking bail to prosecute a certiorari, two shillings six pence; for judgment on every writ of error, etc., eight shillings; per diem allowance for each justice when sitting, twenty shillings; for every rule of court, continuance, etc., two shillings; for sitting by commission of oyer and terminer in capital cases, ten pounds.

From this it will be seen that the compensation of the justices of the Supreme Court was but meagre. It seems that in April, 1701, Penn had promised Judge Guest, who was made chief justice in that year, a salary of one hundred pounds per annum for his services, which salary he relinquished at Penn's departure, and frequently afterwards applied to the commissioners of the Land Office for grants of land and such grants were made. The commissioners having refused to grant more land, he applied to the Council to have his compensation fixed, declaring that he expected his salary of one hundred pounds per annum to this time from whose hands soever it should come. The matter was referred to the Assembly.[17]

The fees allowed the attorney general by this act were not excessive:

For every capital cause where life is concerned, twenty-four shillings; for every criminal matter, by bill or indictment found by the grand inquest, twelve shillings; when not found by the grand inquest, six shillings; for drawing indictments found to be true bills, six shillings; if not so found, three shillings; for drawing every information, six shillings.

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[15] 3 Statutes at Large, p. 63.
[16] 3 *Ibid*, p. 96.
[17] Col. Rec., vol. 2, p. 237.

This act also fixed the fees which might be charged by attorneys at law. Among these were the following:

For every proecipe, one shilling; for every arrest, attachment or summons drawn by the attorney, one shilling six pence; for every replevin drawn by him, three shillings; for every action undertaken in court, twelve shillings; for drawing any pleading, except a declaration, three shillings; for drawing a declaration, from five to twelve shillings, depending upon the nature of the action. Any attorney charging any greater fees than were therein prescribed, without giving the party of whom the same were demanded a bill of particulars and a receipt for the payment of such fees, forfeited twelve pounds for the first offense and twenty pounds for the second.

Not to be overlooked among the acts passed about this time, are the Act of January 12, 1706,[18] entitled "An act for taking lands in execution for the payment of debts," and the Act of May 28, 1715,[19] entitled "An act for acknowledging and recording of deeds," many of the provisions of which acts are still in force.[20]

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[18] 2 Statutes at Large, p. 244.
[19] 3 *Ibid*, p. 53.
[20] 1 Stewart's Purdon, 1194, 1171 and 1186.

CHAPTER XXII.

KEITH'S COURT OF EQUITY.

CHAPTER XXII.

Keith's Court of Equity.

We have seen that equity was administered on the Delaware from the advent of the English in 1664, but that equity was at first something very different from what is technically known by that name. The practice was informal, and its administration amounted to little more than the rendering of substantial justice in cases where the same had been denied in trials at law. In the course of time, however, it approximated more nearly to the practice of the Court of Chancery in England. Mr. Lewis says that the proceedings were for a time by bill and answer, and it elsewhere appears that the justices of the county courts, when sitting in equity were styled "commissioners," but an equity jurisdiction administered by judges unlearned in the law must have still been very different from what we know as equity. The popular conception of it was a jurisdiction which determined suits without the interposition of juries, and which had power to reverse judgments based on the verdicts of juries. Equity was something different from the common law, to which the colonists were devotedly attached. It suggested the Star Chamber and all sorts of arbitrary proceedings, and the colonists feared it.

In 1701, however, by which time there was a small but intelligent bar learned in the law, the true nature of equity became better understood, and the Judiciary Act passed in that year provided that the county courts should hear and determine all such causes of equity as should come before them, "wherein the proceedings shall be by bill and answer, with such other pleadings as are necessary in chancery suits and proper in these parts, with power also for the said justices to force obedience to their decree in equity by imprisonment or sequestration of lands, as the case may require," with appeals to the Provincial Court. This act, as well as the subsequent Acts of 1711 and 1715, was principally drawn by David Lloyd, who knew what equity was as well as any man.

The Act of 1701 was superseded by the Act of 1711, which also conferred an equitable jurisdiction upon the courts, which was to be exercised "observing as near as may be the rules and practice of the High Court of Chancery in Great Britain."

The Act of May 28, 1715, created "a Supreme or Provincial Court of Law and Equity," the proceedings in equity of which were to be "according to such rules or orders and in such manner and form as the Courts of Chancery and Exchequer in Great Britain have used to proceed by." This jurisdiction was exclusive in the Supreme Court, and no equitable jurisdiction was conferred upon the courts of common pleas by the act for establishing said courts passed at the same session.

Thus from 1701 to 1719, when the Judiciary Acts of 1715 were disallowed, there were in Pennsylvania, during the periods in which the Acts of 1701, 1711 and 1715 were in force, true courts of equity. There seems to have been no objection to such courts at this time. In the bitter fight between the Assembly and Governor Evans over the Act of 1711, the Assembly, it is true, would not agree that the Governor and Council should constitute a court of equity. They wished equity to be administered by commissioners appointed by the Governor. Finally the same equitable jurisdiction was conferred upon the law courts as had been provided for by the Act of 1701, but no one objected to the establishment of courts of equity.

In 1720, when the province was without a judiciary act, by reason of the disallowance of the Acts of 1715, and the courts were operating under commissions from Governor Keith, that officer, in a message to the Assembly, informed that body that it had been represented to him that a court of equity was much needed, and he had been advised that the office of chancellor could be lawfully executed only by him, who, by virtue of the great seal, might be taken as the King's representative, but he submitted the subject to the opinion of the House.

There was, of course, nothing in this contention. The Queen's attorney general had objected to the referring of all questions of fact by the courts of equity to an issue at law, as provided in the Act of 1711, but had raised no question as to the power to confer a jurisdiction in equity upon the courts of the province. It was afterwards expressly held by the attorney general that such courts might be instituted under the patent to Penn. The governor of most of the other provinces acted as Chancellors, and Keith wanted to have the same power. However, the Assembly, which was favorably disposed to Keith, promptly passed the following resolution on May 4, 1720:

Resolved, that considering the present Circumstances of this province, this House is of opinion, that for the present the Governor be desired to open and hold a Court of Equity for this Province, with the assistance of such of his Council as he shall think fit, except such as have the same Cause in any inferior Court.[1]

At a meeting of Council held on August 6, 1720, the following resolution was adopted:

That it is the Opinion of this Board, that by virtue of the Powers granted by the Royal Charter to the late Proprietor, his Heirs and Assigns, and to his and their Lieutents. or Deputies, being regularly appointed, the present Governour William Keith, Esqr., safely may comply with the Desire of the Representatives of the ffreemen of this Province, signified to him by an unanimous Resolution of their House, dated at Philadelphia the 4th day of May last, And that the holding of such a Court of Chancery in the manner aforesaid, may be of great Service to the Inhabi-

[1]Col. Rec., vol. 3, p. 91.

tants of this Colony, and appears agreeable to the practice which has been approved of in the neighbouring Governments.

But the Governour speaking to his own want of Experience in Judicial Affairs, and representing to the Board the great Addition of Attendance and Fatigue in the public Business which would be thereby laid upon him, He was pleased to add nevertheless, that considering the many marks the House of Representatives and this Board had shown of their Confidence in him in this as well as divers other respects, He should not decline to serve the Publick in that Station, but insisted on this, that as no Court of Chancery could by the method proposed be held without him, So that He, on the other hand, should not fail of having a due assistance from the Council on their parts; And it was thereupon, at the Governours desire, established and declared.

That as often as the Governour is to sit in Chancery and hold a Court, All the members of Council in or near Philadelphia, shall be summoned to attend the Governour as his assistants upon that Bench, and that there shall not any Decree be pronounced or made in Chancery but by the Governour as Chancellor, with the assent and concurrence of any two or more of the Six eldest of the Council for the time being, And that those Six eldest Counsellors or assistants, or any of them, may be employed by the Governour as Masters in Chancery, as often as Occasion shall require.[2]

It was further resolved that a proclamation announcing the establishment of the court should be issued, which was accordingly done on August 10th, as follows:

Whereas Complaint has been made, That Courts of Chancery, or Equity, tho' absolutely necessary in the Administration of Justice, for mitigating in many Cases the Rigour of the Laws, whose Judgments are tied down to fixed and unalterable Rules, and for opening a Way to the Right and Equity of a Cause for which the Law cannot, in all Cases, make a sufficient Provision, have notwithstanding, been too seldom regularly held in this Province, in such Manner as the aggrieved Subjects might obtain the Relief which by such Courts ought to be granted. And whereas the Representatives of the Freemen of this Province taking the same into Consideration, did, at their last Meeting in Assembly, request me, that I would, with the Assistance of the Council, open and hold such a Court of Equity for this Province: To the End, therefore, that his Majesty's good Subjects may no longer labour under those Inconveniences, which are now complained of, I have thought fit, by and with the Advice of the Council, hereby to publish and declare, That, with their Assistance, I purpose (God willing) to open and hold a Court of Chancery or Equity, for this Province of Pennsylvania, at the Court-house of Philadelphia, on Thursday, the Twenty-fifth Day of this instant August; from which Date, the said Court will be and remain always open for the Relief of the Subject, to hear and determine all such Matters, arising within this Province aforesaid, as are regularly cognizable before any Court of Chancery, according to the Laws and Constitutions of that Part of Great Britain called England; and his Majesty's Judges of his Supreme Courts, as well as the Justices of the inferior Courts, and all others whom it may con-

[2] *Ibid*, vol. 3, pp. 105-106.

cern, are required to take Notice hereof, and to govern themselves accordingly.[3]

The new court was organized on August 25, 1720, by the taking of an oath by Keith, as chancellor, and the appointment and qualification of Charles Brockden, as register, and James Logan, Jonathan Dickinson, Samuel Preston, Richard Hill and Anthony Palmer, members of Council, as masters in chancery. William Trent was nominated and qualified on October 4th.

Practically nothing was known of the proceedings of this tribunal until William Henry Rawle, Esquire, discovered its records, in 1868, among the records of the office of the secretary of the commonwealth, in a volume the existence of which had been forgotten for many years, although the secretary in office in 1838 had recommended the publication of the contents of the same.

The records begin with the erection of the court in 1720, and the appointment and qualification of masters, examiners and other officers are given down to 1739, when the court was discontinued; but the record of cases begins in 1724, although it appears from references in entries of later dates that causes had been entered before that year. These records are printed as an appendix to Mr. Rawle's "Equity in Pennsylvania," a lecture delivered before the Law Academy of Philadelphia in 1868. This record as printed in Mr. Rawle's book occupies forty-six octavo pages, of which but thirty-nine are devoted to the cases considered. The first case is that of "Joseph England and als. Complts. Cont. Thomas Shute &c. Defdts." which was begun in 1724. It occupies more than six pages of the record, and the final disposition of the case is not given. A motion made in the course of this suit is here given as an instance of the method of procedure:

23rd June.—Mr. James Alexander for the Defts. made a Motion in the Court for setting aside an Attachment issued out of this honble. Court against the Defdts. the 11th day of May last and returnable the 27th of the Same Month for their not answering Praying the Chancellor that the several heads from which he deduceth his Argumts. for that purpose may be set down in Order to have the Mind of the Court the more clearly thereunto Vizt.

First. For that the Attacht was not regularly entered in the Six-Clerk or Register Book.

2dly. For that this Process is not Signed by a Six-Clerk, or any one fully and regularly authorized.

3dly. For that the special Cause of issuing this Writt is not thereon indorsed.

4thly. For that the Writt ought to be Close and not Patent Whereas this writt is an open Writt.

5thly. For that no Person is compellable to appear in any other Court than that to which the Writt commands; Whereas by the Stile of this Writt it seems to direct otherwise.

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[3]Votes in Assembly, vol. 2, p. 273.

6thly. For that the Seal ought to be always in the Chancellor's Custody and not affixed without his special direction.

Upon hearing Council on both Sides, the Court took the special Matters into Consideration, and Over-ruled the Motion of Mr. Alexander.

First. For that the Attacht. was well entered by the Register and issued pursuant to an order of this Court of the 21st of April last.

2ndly. For that this Process is signed by the Register of this Court with Mr. Kinsey's name thereunto Clerk for the Complts. agreeably to the constant Practice of issuing Writts out of this Court.

3dly. For that the Praecipe or Note of the Writt (setting forth the particular matter for which this Writt was issued) was filed with the Register. And so to the end of such Indorsement fully answered.

4thly. For that the Writ is such as this Court has always used and find no Inconvenience arising from this Method of sealing such.

5thly. For that the Stile in the Writt (objected against by Mr. Alexander under the fifth head of Argt.) vizt: before us in our Chancery wheresoever it shall be in our Province of Pensilvania, has been hitherto used for the Stile of this Court.

6thly. For that the Chancellor's Direction for sealing this Writt and all others regularly issuing out of this Court is special.

Whereupon Mr. Alexander further moved for discharging the Prisoners Setting-forth, that Interrogatories were not filed in 8 Days after their Appearance entered with the Register, whom Mr. Alexander urged to the Complts. Clerk with whom their Pleadings were filed—

And the Matter being debated by Council on both Sides, this Motion of the Defdts. Council, is also over-ruled For that the Council or Sollicitors appearing in the Cause must be allowed and understood here to be the Clerk of this Court, unto whom all Notices in that Case are to be directed Since a Multiplication of Officers here seems impracticable and if established would become a grievous Burthen to the Subject.

Whereupon Mr. Alexander further moved for an Order of this Court, for striking the Name of James Steel, one of the Dfts. in this Cause, out of the Complts. Bill of Complaint upon his Disclaimer And that Thomas Shute, the other Defendt. and also James Steel (if the Motion for Striking out his Name of the Bill Complaint shall be over-ruled) may have a longer Time to answer in. To the first Part of this Motion Mr. Kinsey objected their not giving him timely Notice, yet agreed to argue the Matter next Morning, on the Dfts. paying costs in Case the Motion was overruled.[4]

This court was continued by Governor Gordon. Soon after assuming office in 1726, that officer acquainted Council that he had been informed that a court of equity or chancery had been held by the late Governor, and that several matters were pending in it concerning which he had been frequently applied to by persons concerned to the end that he might himself execute the office of chancellor, but that he had hitherto declined the same, until he should be better informed how the court was created, and have the advice of Council about it. Whereupon it was observed that the erection of that court was in compliance with a resolution of the Assembly

[4] "Rawle on Equity," Appendix, pp. 9-11.

and with the approbation of the Council, and it was therefore the opinion of the board that the Governor might lawfully take upon himself the execution of said office, that there might be no stop in the administration of justice, provided always that due regard be had to a rule adopted at the institution of the Court, above given, as to the assistance of the members of Council:

Then the Governour took the Oath of Office, After wch it was proposed, that some certain Rules for the better regulating of the Court & the Speedier Dispatch of Business should be drawn up by Persons skill'd in the Law, & the Constitution of such Courts, Which Proposal was approved of, & David Lloyd, Esquire, Chief Justice, & Andrew Hamilton, Esqr., Counsellor at Law, were named for that Purpose.[5] (These rules are not extant).

It appears from the records of the court that it exercised jurisdiction in cases of bills for account; for partition; to subject real estate to the payment of debts and legacies; to stay waste; to restrain proceedings at law; to take testimony of witnesses in foreign parts; to settle differences between partners. Also in cases of petitions for writs *de lunatico inquirendo,* and many writs *ne exeat provincia.*[6]

Among the counsel who practiced before this court were Alexander Hamilton, Peter Evans, Joseph Growden, who was then attorney general, Thomas Hopkinson and John Kinsey, who was afterwards chief justice of the Supreme Court.[7]

One of the few facts known about this court before the discovery of its records was, that Mr. Kinsey having refused to remove his hat in court in 1725, according to the custom of Quakers, it was removed by order of the chancellor, who was also a Quaker. This appears to have caused great consternation in the province, and at the next quarterly meeting the Society of Friends appointed a committee to address the Governor and to require of him the free exercise of the privilege to which they were entitled by law of appearing in court or otherwise in their own way and according to their religious persuasion. It was the policy of Keith to court popular favor, and, as the result, a rule of court was adopted providing that any practitioner of law or person whatsoever professing himself to be one of the people called Quakers might be permitted to officiate in the court without being obliged to observe the usual ceremony of uncovering his head.[8]

On January 22, 1736, after the Court of Chancery had been in existence for some fifteen years, petitions were addressed to the Assembly from the inhabitants of the three counties protesting against the continuance of the court upon the ground that it existed in violation of the provision of the charter of 1701 which provided that no person should be obliged to answer any complaint, matter or thing whatsoever relating to

[5]Col. Rec., vol. 3, p. 266.
[6]Rawle's "Equity in Penna.," p. 26.
[7]*Ibid,* p. 44.
[8]Laussatt's "Equity in Penna.," Penna. Bar Assn. Reps., vol. 1, p. 231.

property before the Governor and Council or in any other place but in the ordinary courts, unless appeal should be thereunto granted by law. These petitions were signed by three hundred and sixty-two inhabitants in all. They were presented at practically the same time, and were evidently prepared by concerted action.[9] Upon the receipt of these petitions the Assembly passed the following resolution:

Resolved upon the Question: That Whereas, sundry Petitions from a considerable Number of the Inhabitants of the respective Counties of Philadelphia, Bucks and Chester, have been presented to this House, and read, complaining that the holding a Court of Chancery, as it is now used in this Province, is contrary to our Charter of Privileges, and may be attended with divers Inconveniences; that therefore a Message be sent to the Governor, requesting him that he will be pleased to inform this House how the said Court of Chancery is constituted.[10]

At the meeting of Council held on February 16, 1736, a long defense of the court which had been prepared by James Logan was read, approved and signed by the other members of Council and forwarded to the Assembly.[11] In this document it was contended that the word "property" in the provision of the charter, referred to in the petition, referred only to the property of the proprietor, an obviously indefensible proposition, and the existence of the court was otherwise justified on the grounds that it was constituted only after the approval of the best lawyers in the province, among whom was Andrew Hamilton, the then Attorney General, but who was now Speaker of the House, and that it had existed without objection for so many years. It was also urged, with more force, that the provision of the charter relative to the Governor and Council could not have been intended to prevent the establishment of a court of which they should be members, but such a court could, of course, have been established only by act of Assembly. On February 21, the Assembly replied with an answer which effectually disposed of the feeble arguments of the Council,[12] and here the matter rested.

Governor Gordon died shortly afterwards, and the court practically died with him. An act was passed confirming the changes of property, which had taken place in consequence of the decisions of the court, thus quieting the only objection which could have been raised to the mode of its abrogation. The last that we hear of the court is the delivery of the Chancery seal to Governor Thomas on his accession to the government in 1743.[13]

The Assembly had no objection to a court of equity; in fact, at the session when the validity of the existing court was questioned, two bills were pending for the establishment of such a court.[14] The petitions from Bucks

[14] *Ibid*, vol. 4, p. 23.

[9] Col. Rec., vol. 4, pp. 35-38.
[10] *Ibid*, vol. 3, p. 617.
[11] *Ibid*, vol. 4, p. 327.
[12] *Ibid*, vol. 4, p. 41.
[13] *Ibid*, vol. 4, p. 639.

and Chester counties both asked for the establishment of courts of equity more convenient for their attendance and less expensive.[15]

In the answer of the Assembly to Keith's message in defense of the court, they complain of the Governor's delay of twenty days since the passage of the resolution above referred to, and add:

> And as it was thought necessary by the Governor and Council to take notice of it in the manner they have been pleased to do, we hope to be pardoned for saying that in our opinion it would have been more reasonable if it had been earlier, for then it might have saved us some time in framing, and the Governor the trouble in considering, the two bills relating to the court of equity, which have lain long before him without our being at all informed in what state they are, though the session of Assembly is now very near a close.[16]

It appears that these bills conferred a jurisdiction in equity upon the county courts, with an appeal in cases involving the value of one hundred pounds to a superior court having a jurisdiction in equity, to consist of three judges, to be commissioned by the Governor out of six to be nominated to him by the House. Thereupon the proprietors requested the opinion of the attorney general and solicitor general of England as to the legality of the court. They declared that the court was legally constituted, notwithstanding the clause in the charter of 1701, but if the Governor had established it without the consent of the Assembly his act would have been questionable. They asserted also that as the assent of the Governor and six-sevenths of the Assembly had been given in 1720, the establishment of the court did not violate the charter of privileges, and that the resolution of 1736 did not make that illegal which was not illegal before.[17]

It appears that the proprietors were always desirous that a court of equity should be established, and in 1751 they instructed Governor Hamilton to pass no bill for otherwise doing what ought to be done by a court of chancery. Ultimately the proprietors offered to allow persons other than the Governor and Council to hold such a court, but the Assembly continued its opposition.[18]

"In this manner," says Mr. Laussatt in his Essay on Equity in Pennsylvania, "was abolished the first, perhaps the last Pennsylvania court of chancery, and it is easy to perceive from a slight view of the papers interchanged upon this subject, that the true, though hidden cause, was a jealousy of the governor entertained by the people. Appointed by the proprietary, and subject to removal at his pleasure, it was natural that he should favour the interest of him upon whom he depended; and the consequence was a loss of popular favour, and a suspicion of the integrity of his conduct. So long as the court remained under the direction of Sir William Keith, who had obtained the good opinion of the colonists by an attachment to their interests, no murmurs or complaints were heard; but

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[15] Col. Rec., vol. 4, pp. 36-37.
[16] *Ibid*, vol. 4, p. 45.
[17] Shepherd's "Proprietary Government in Penna.," p. 393.
[18] *Ibid*, p. 395.

the accession of a governor more favourable to the proprietary, was the signal for the bursting forth of a flame which had been concealed, not extinguished."[19]

With the discontinuance of this court the administration of equity in Pennsylvania through the forms of chancery ceased for one hundred years. As stated by Horace Binney in his eulogium on Chief Justice Tilghman, "Pennsylvania lost the system, because her Governor and representatives could not agree by whom the office of Chancellor should be held."[20]

Why no attempt was made to pass an act providing for a court of equity after Gordon's death in 1736 does not appear. The Assembly was willing to pass one in his lifetime, the only objections urged against the existing court having been that it was formed in violation of the charter, that the fees were excessive, and that it was a great inconvenience that the people were obliged to be at great expense and trouble in coming from the remote parts of the province to Philadelphia to attend the court.[21] These objections could have readily been met in an act for the establishment of a new court.

It would be interesting to know to what extent equity had been administered through equitable forms prior to the establishment of Keith's Court. Judging from the number of cases tried in that court, it would seem that the cases theretofore tried must have been few. On January 29, 1704, Judge Guest exhibited to Council a complaint:

That notwithstanding ye Laws of this Govmt had erected Courts of Equity & ye Justices, have a power also in their Commission for ye same: Yet that to ye great oppression of ye People, there have been no such courts as yet held in pursuance of ye present Law, the Rules of ye said Court not having yet recevd so full a sanction as tis thought may be requisite.[22]

On the other hand, the persistency with which provisions for courts of equity were continued in the Judiciary Acts of 1711 and 1715 would indicate that there was a necessity for such courts. Moreover, the records of Keith's Court show a familiarity with chancery proceedings which would seem to indicate that chancery practice was something well known to the bar at the time of its institution.

Mr. Rawle says that he became satisfied from the familiarity with the principles of equity shown in the early reported cases, that there must have been a time when those principles were administered in more or less conformity with the rules and practice of chancery,[23] which led to the

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[19]"Equity in Pennsylvania," by Anthony Laussatt, Jr., 1825, First Annual Report Penna. Bar Assn., pp. 230-233.

[20]Appendix to 16th Serg. & Rawle, p. 448.

[21]Col. Rec., vol. 4, p. 36.

[22]*Ibid,* vol. 2, p. 114. The rules referred to in this complaint were approved on April 13, 1705, and ordered put in practice in all the courts of equity of the province: Col. Rec., vol. 2, p. 184.

[23]Rawle's "Equity in Penna.," p. 22.

discovery of the records of Keith's Court. By a similarity of reasoning, we may infer from the records of that court that those principles had been administered according to chancery practice prior to the time of its establishment to a sufficient extent to make the bar familiar with such practice.

Had Keith not been possessed of the desire to be chancellor, it is probable that no court of equity would have been established in 1720, and that when the Judiciary Act of 1722 was passed, it would have provided for courts of equity as the former acts had provided, and that act having never been passed upon in England, and hence continuing in operation for a very long period, equity would have been administered indefinitely through chancery forms.

How the failure of the Court of Chancery led to the administration of equity through common law forms in Pennsylvania is not within the province of this work, but the learned reader is referred for the history of the same to the "Essay on Equity in Pennsylvania" by Anthony Laussatt, Jr., published in 1825, and reprinted in Volume 1 of the Reports of the Pennsylvania Bar Association; to Rawle's "Equity in Pennsylvania," and to an address of the late Judge Simonton on "Pennsylvania Jurisprudence," also published in the first volume of the Proceedings of the State Bar Association.

CHAPTER XXIII.

THE JUDICIARY ACT OF MAY 22, 1722, AND AMENDMENTS THERETO.

CHAPTER XXIII.

The Judiciary Act of May 22, 1722, and Amendments Thereto.

We now come to the Judiciary Act of May 22, 1722.[1] This act was not disallowed in England and continued to be in force for many years, with the exception of a short time during which it was superseded by the Act of August 17, 1727, which latter act was disallowed in England on August 12, 1731.

By this act it was provided that a court of record should be held in Philadelphia twice in every year on specified dates, which court should be called the Supreme Court of Pennsylvania. It was to consist of three persons of known integrity and ability, commissioned by the Governor or his lieutenant for the time being by several distinct commissions under the great seal of the province, one of whom was to be distinguished in his commission by the name of chief justice. Each of said justices had authority to issue writs of habeas corpus, certiorari and writs of error, and all remedial and other writs and processes, returnable to the said court.

Any issue joined in said court was to be tried in the county from whence the cause was removed before the justices, or any two of them, who were obliged, if occasion required, to go the circuit twice in every year upon certified dates into the counties of Chester and Bucks, to try such issues in fact as should be depending before the court and removed out of either of the said counties, where they were to try said causes as fully as justices of *nisi prius* in England might do.

The said justices or any two of them were also authorized to hear and determine all causes removed from the courts of quarter sessions and courts of common pleas of the respective counties, as also for the city of Philadelphia, and to examine and correct all manner of errors of the magistrates of the province in their judgments, process and proceedings in the said courts, and to reverse or examine the said judgment as the law should direct; also to examine, correct and punish contempts, omissions, etc., of any justice of the peace or court officers, and to award process for levying fines, forfeitures, etc., and generally to exercise such jurisdictions and powers as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, might do, saving a right of appeal to the King in Council, or to such courts as the King should appoint; provided that the appellant should pay all the accrued costs and give a bond in the sum of three hundred pounds to the defendant in the appeal, conditioned to prosecute the appeal with effect within eighteen months and to satisfy the judgment of the court from which the appeal

[1] 3 Statutes at Large, p. 298.

was taken. Justices of the Supreme Court were also authorized to deliver the jails of all persons, charged with offenses punishable by death, the jurors in such cases to be selected from good and lawful men of the city and county of Philadelphia, as if the said offenses had been committed within the said city or county of Philadelphia.

The act also provides for the institution of Courts of Quarter Sessions, for which a competent number of justices were to be commissioned in each county, with powers similar to those conferred by the former acts. It also provided for courts to be held by a competent number of persons commissionated by the governor or his lieutenant under the broad seal of the province, to be called the County Court of Common Pleas, to be held four times in every year in each county on specified dates. The said justices or any three of them might hold pleas of assizes, scire facias, replevins, and hear and determine all manner of pleas, actions, suits and causes, civil, personal, real and mixed, according to the laws and constitutions of the province, and they might issue subpoenas under such penalties as were provided by the rules of the common law and course and practice of the King's Courts at Westminster. It will be noted that different justices are provided for holding the courts of common pleas from those appointed to hold the courts of quarter sessions.

As above stated, this act was not disallowed in England, but the failure to disallow it was owing to an oversight. Before the time within which the act might have been disallowed had expired, the Act of August 27, 1727, to be hereafter mentioned, was passed, and the Lords Justices, considering that the Act of 1722 had been superseded by the later act, failed to take any action upon the Act of 1722.

Keith's Court of Equity had been established two years before and was in existence at the date of the passage of this act, for which reason no jurisdiction in equity was conferred by it such as had been conferred by former acts.

The Assembly had had so much experience in drawing judiciary acts during the past few years that they might reasonably have been expected to make it clearly appear in this act whether the Supreme Court should have any original jurisdiction in civil causes, but, as will hereafter appear, it was by no means plain that the act did not confer any such jurisdiction upon that court. The court did, however, exercise an original jurisdiction in one very important case, which will be hereafter noted, which led to the temporary repeal of the Act of 1722 by the Act of August 27, 1727.[2]

On the 23rd of November, 1726, one Lawrence Lawrence petitioned the Assembly, setting forth that he was detained in jail by virtue of a writ issued by the Supreme Court at the instance of John Moore, the King's Collector of Customs, at Philadelphia, who claimed that the said Lawrence was indebted to the Crown in the sum of twenty thousand pounds. The petitioner denied the debt, and questioned the power of the court to issue original process under the law constituting it. The petition was read

[2] 4 Statutes at Large, p. 84.

and ordered to lie upon the table, and the same disposition was made of a memorial presented to the Assembly in answer to the matter set forth in the petition.

On December 10th, the committee of the whole house reported that they had agreed to resolutions providing that the law for establishing courts in this province be amended, and that no original process be issued out of the Supreme Court in civil causes. Francis Rawle, John Kearsey, Joseph Kirkbride and Richard Hayes, were thereupon appointed to draw up a judiciary bill agreeably to these resolutions, and to report at the next meeting of the Assembly. This committee, however, did not finally report until the 15th of August, 1727. A bill was then introduced and became a law on the 27th of that month.[3] It was provided that the Supreme Court should have jurisdiction in civil cases only after final judgment in any other court of the province. In other respects it was very similar to the Act of 1722.

The Act of 1727 having been submitted to the Lords Commissioners for Trade and Plantations, the Attorney General gave a lengthy opinion thereupon from which the following is taken:

. . . I apprehend there is no material difference between this act and an act passed in the eighth of the late King but in relation to the jurisdiction of the supreme court of this province as to its power of issuing original process and hearing causes in that court, for in all other respects this last act only re-enacts what was before enacted by the eighth of the late King. By this last act the original jurisdiction of the supreme court is in all cases except in indictments taken away, the sole motive of which Mr. Sharpe alleges was to defeat Mr. Moore, the collector of the customs in that province, of the benefit of a very valuable seizure he had made at Philadelphia of the ship "Fame," laden with East India and contraband goods to the value of twenty thousand pounds, which he was then suing for by original process in the said supreme court. I beg leave to observe to your Lordships that it does not very plainly appear to me that this was the sole motive of this alteration; but there is one circumstance which induces me to think that the legislature had prosecutions of this kind in view when this matter was under consideration by rejecting what I apprehend to have been a reasonable and proper clause offered, which was to retain an original jurisdiction in the supreme court in all actions *qui tam,* informations, &c., wherein the Crown was interested. This I think would have been a proper reservation, as it was not to be presumed that his Majesty's causes would ever be carried on with vexation or oppression in order that they might receive the most solemn and impartial determination, the supreme court being filled with persons bred to the profession of the law, whereas in the inferior courts the persons presiding are generally bred in the mercantile way and who may reasonably be supposed in cases of seizure to be under at least the temptation of being partial in favor of the claimant.

Another objection offered against this law is that a general original jurisdiction being unquestionably vested in the supreme court by the eighth of the late King, the assembly had no power to take it away, for by the

[3] Charter and Laws of Penna., p. 307.

Pennsylvania charter if the acts passed there were not repealed by the Crown in five years they were from thenceforth to remain in full force, and the act of the eighth of the late King not having been repealed in five years, it must now be considered as having the royal sanction of the Crown and cannot be repealed, varied or altered by any future act without the express leave of the Crown. This fact of the charter I agree to be true, but the question is whether an original jurisdiction was vested in the supreme court by the eighth of the late King; and I take it that there are not words sufficient in that act to give the supreme court an unquestionable jurisdiction. There are some words that point that way, but none so expressive in my opinion as to bring this case within the reason of the beforementioned restriction. It is true the judges of the supreme court in the case of Mr. Moore have thought fit to exercise a jurisdiction, but I see no great conclusion from thence, because courts of law are ever willing, upon the slightest pretenses, to extend their jurisdiction.

. . . . There were many reasons offered by Mr. Paris in support of this law, the most material of which I shall take the liberty of stating to your Lordships. The principal argument offered in support of this law and alleged as the chief reason for taking away this original jurisdiction from the supreme court is the much greater expense suitors would be put to in prosecuting actions in this court than in the inferior courts from the very great delay that must necessarily happen in legal proceedings from the seldom holding of the supreme court, which I think is to be held but thrice a year and then held at Philadelphia, and the expense and trouble which will necessarily follow by the claimants being obliged to bring their witnesses perhaps from the remotest parts of the kingdom. I am sure I should be very far from objecting to anything which would make the coming of justice more easy in point of expense or more expeditious in its effect, and I think in civil causes, supposing this method is less expensive, that the regulation is perfectly right, but I can't agree that this restriction is at all proper in His Majesty's causes for the reasons I have already mentioned with regard to the dignity of the courts; besides, the delay of justice is an objection in the power of the legislature very easily to remove by appointing the superior court to meet oftener if the necessity of the business should require it.

Another reason offered in support of this law is that it is inconsistent that the same court should have an original jurisdiction and sit likewise as a court of error. If there was any weight in this argument this law is now liable to that objection, because there is actually an original power continued by this act in this supreme court in all indictments. For my part I cannot see any inconsistency in it, nor is it unusual, for the court of King's Bench, whose constitution I never heard arraigned, has both these jurisdictions.

. . . Another objection is that to repeal this Act of 1727 would overturn and unhinge all the courts of judicature in this province. This fact I beg leave to observe to your Lordships is not true, for I don't find that the act of the eighth of the late King is repealed by this law. But if it was, by His Majesty's repealing this act which is now under consideration, that law would revive again and the judicature of this province would then stand upon the very same foot it does now, except only as to the point of jurisdiction upon which the objections to this act have arisen.[4]

[4] 4 Statutes at Large, pp. 442-43, 445, 446.

The said Act of 1727 was thereupon disallowed. The failure of that act would have operated to revive the Act of 1722, but, to make this certain, the Act of November 27, 1731,[5] was passed, by which the Act of 1722 was expressly revived. This left the question whether or not the Supreme Court had original jurisdiction in civil causes under the latter act still in question, and except in cases of common recoveries, which were only actions in form, the justices of that court do not seem to have exercised any original jurisdiction prior to 1786, in civil causes.[6]

The Act of 1722 was amended and supplemented by the Act of September 29, 1759.[7] This act provided that the chief justice of the Supreme Court should receive two hundred pounds per year and each associate justice one hundred pounds, and that each justice of a county court of common pleas should receive twenty shillings for every day he sat in said court. Up to this time the justices of the Supreme Court seem to have received no other compensation than the fees heretofore referred to. The salaries of the associate justices were later raised to one hundred and fifty pounds per year.

The act also provided that five persons of the best discretion, capacity, judgment and integrity should be commissioned by the Governor under the broad seal, two or any three of them should hold a court of record to be called the County Court of Common Pleas, with powers such as had theretofore been exercised by said courts. The justices of said court, as well as the justices of the Supreme Court, were to hold office during good behavior, unless removed by the Governor upon the address of the Assembly. Up to this time the justices had been removable at the pleasure of the proprietors.

The justices of the Court of Common Pleas or any three of them were to hold a court of record in each county to be called "the Orphans' Court," with powers similar to those theretofore exercised by the justices in the orphans' courts. No justice of the county court of quarter sessions was to be commissioned as a justice of the county court of common pleas. This act, however, went the usual way of such acts, and was disallowed in England on September 2, 1760.

Another amendment to the Act of 1722 was the Act of March 20, 1767,[8] which recited that a practice had been introduced of trying all issues in fact, joined in causes which had been removed from the several counties into the said court, in the city of Philadelphia, to the great and unnecessary expense of parties, jurymen and witnesses, and thereupon enacted that there should be four justices of the Supreme Court instead of three, who were required to go the circuit twice in every year into the several counties, at such times as they should appoint, where they or any one of them should try all such issues in fact as should be depending in the court and removed out of any of the counties. This act was per-

[4] *Ibid*, p. 229.
[4] Binney's Reports, p. 117 (1811).
[5] Statutes at Large, p. 462.
[7] Statutes at Large, p. 107.

mitted to become a law by lapse of time in accordance with the proprietary charter.

If any cause was removed from a court of common pleas, the amount involved in which was less than fifty pounds, the title to lands not being in question, the party removing the same, if the plaintiff below, could receive no costs of suit, or if the defendant, was required to pay double costs. The act does not say that appeals shall not be allowed in such cases. It assumes that they may be removed into the Supreme Court; and it would seem that on removal they might be tried in that tribunal, subject to the above provision relative to costs.

At the beginning of the Revolution, therefore, we find the judicial system of Pennsylvania to consist of the following courts: First, a Supreme Court, consisting of a chief justice and three associate justices, which court had an exclusive original jurisdiction in capital cases. It appears to have exercised no original jurisdiction, except in cases of common recoveries. One or more of the justices went upon circuit twice a year into the several counties to hear cases brought into the court from such counties, respectively. The original six counties (including the three lower counties which seceded in 1704) had now been increased by the addition of Bedford, Berks, Cumberland, Lancaster, Northampton, Northumberland, Westmoreland and York counties to eleven, each one of which had to be visited by one or more of the justices twice a year if any case within the jurisdiction of the court had been removed therefrom.

In each county there was a Court of Quarter Sessions, and a Court of Common Pleas, in each of which presided a distinct number of justices of the peace. The justices of the Court of Common Pleas held the Orphans' Court. The Court of Quarter Sessions had jurisdiction of all offenses, except capital crimes. Appeals might be taken from any decision of the Court of Common Pleas involving the titles to land, without regard to the amount involved. It appears that other cases involving any amount might also be removed to the Supreme Court, but if the amount so involved was less than fifty pounds, the plaintiff below recovered no costs and the defendant was mulcted in double costs.

Justices of the peace in the several counties had individually jurisdiction over civil suits involving an amount under forty shillings. The City Court of Philadelphia remained practically as constituted by the charter of that city granted by Penn in 1701.

It thus appears that the judicial system established at the founding of the colony had been elaborated, but had not been materially changed.

CHAPTER XXIV.

THE BENCH AND BAR PRIOR TO THE REVOLUTION.

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The Bench and Bar Prior to the Revolution.

James Logan, who was chief justice from 1731 to 1739, was born at Lurgan, in Ireland, in 1674. His parents were from Scotland, where their valuable estates were confiscated because of a charge of participation in the conspiracy of the Earl of Gowrie. He must have been a precocious youth, as he speaks of having attained a knowledge of Latin, Greek and Hebrew before he was thirteen years old, and also that in his sixteenth year he made himself a master of mathematics without an instructor.

His father having gone to Bristol, where he was employed in teaching, his son became a teacher in his school, where he improved himself in the classics and learned the French and Italian languages and some Spanish. In the year 1698 he was engaged in trade between Bristol and Dublin. He was appointed by Penn as his secretary, and came to Pennsylvania with him in 1699 in the ship *Canterbury*. He was secretary of the province, commissioner of property, president of the Council for some time, and afterwards chief justice for the period above stated. He was a justice of Philadelphia county for many years.

In the long and bitter controversies which took place, after the final departure of Penn in 1701, between the Assembly and the Governor and Council, Logan took a prominent part. He was held responsible by Lloyd's faction for most of the acts of the proprietary government. When Governor Gookin arrived in 1709, the Assembly presented an address to him, signed by David Lloyd, as speaker, asking that his predecessor Evans might be prosecuted for malfeasance in office, and intimating that Evans had been influenced by "evil counsel." In another address the Assembly stated that the evil counsellor was Logan. Logan applied for a trial upon the charges preferred against him, but the Assembly took no action until just before their adjournment, when they adopted a remonstrance against him which they caused to be read in the several counties on the day for the election of members of the next Assembly.

The next Assembly passed a resolution providing for his arrest and imprisonment for reflecting on sundry members of the Assembly, and charging their proceedings with unfairness and injustice. The Governor interfered by a writ of *supersedeas,* and Logan sailed for England. About this time the Assembly entered upon its minutes an assurance, which Lloyd claimed to have received from parties in England, that Logan should be brought to trial there upon the articles brought against him. It appears that after a full hearing there he was triumphantly acquitted both by the Friends and the civil authorities.[1] At the election of 1710 the province

[1]Janney's "Life of William Penn," p. 513.

showed its confidence in Logan by not returning a single member of the previous Assembly.

Logan was educated as a Friend, but advocated defensive warfare. It is said that on the voyage from England, the vessel in which Penn and Logan were passengers was attacked by a hostile vessel, whereupon Penn went below, but Logan fought with the crew, for which he was reproved by his employer. Logan retorted that if Penn had lived up to his principles he would have ordered him (Logan) to go below also. Logan is said to have been of a dignified bearing and rather distant in his manner, which gave Lloyd, who had all the arts of a politician, an advantage over him.

Logan was created by Penn's will a trustee for all of the latter's possessions in America, and Hannah Penn afterwards appointed him one of her attorneys. He was mayor of Philadelphia in 1723. He was removed as Secretary of Council by Governor Keith, but thereafter visited England, and secured a letter from Hannah Penn ordering Keith to restore him to Council and to be controlled by him in the general management of his office. Keith refusing to do this, was removed by the Penns, and was succeeded by Gordon, who restored Logan to the secretaryship of Council. After the death of Gordon, Logan became president of Council and chief magistrate of Pennsylvania until the arrival of Governor Thomas. He died in 1751. Several of his scientific productions were published in Europe. While Chief Justice, he translated the *De Senectute* of Cicero and the *Disticha* of Cato. He established a free library to which he gave a lot and one thousand pounds worth of books. He also erected a library building which he designed to add to his gift, but died before it was transferred. This was the beginning of the Loganian Library.[2]

His correspondence with Penn was edited by Mrs. Deborah Logan, the wife of his grandson, George Logan, and published in 1870. It is from this correspondence that the most of the political history of the province from 1700 to 1712 is known. He was not educated to the law, but his experience in the various offices which he held before coming to the Supreme Bench must have given him a knowledge of that subject unusual for a layman.

Andrew Hamilton was perhaps the first member of the Pennsylvania bar whose reputation extended beyond the province and the territories thereof. He is supposed to have been born in Scotland about 1676. He came to Accomac county, on the eastern shore of Virginia, when about twenty-one years of age. It is not certain what his family name really was, as he first went by the name of Trent, which he changed to Hamilton before 1706. The reasons for this change are not known. On his arrival in Virginia he kept a classical school for a time, was afterwards steward of an estate, and finally married the widow of the proprietor and began to practice law soon thereafter. He purchased an estate of six thousand

[2]Sharf & Westcott's "Hist. of Phila.," pp. 1497-98.

acres in Kent county, Maryland, known as "Henbery," on March 26, 1708, where he resided for some time.

He was one of an Assembly called in 1715 to codify the laws of the Province of Maryland. In 1712 he was retained by the agents of William Penn in a suit in Sussex county in the Pennsylvania territories involving the collection of quit rents due the proprietor, in which he displayed considerable skill in avoiding a trial. In 1712 he sailed for England, where he was entered of Gray's Inn, and on the 10th of February of that year he was called to the bar, without having kept the usual terms. Shortly after his return he removed to Philadelphia where he was not long after indicted for speaking in a disrespectful and threatening manner of Governor Gookin. Hamilton gave bond in the sum of one thousand pounds, but no trial appears to have been had upon the indictment.

He was appointed attorney general of Pennsylvania in 1717, and was *ex officio* included in the commissions of the peace for Philadelphia and Bucks counties. He became a member of the Provincial Council in 1720, and remained a member for more than twenty years, but seldom took part in its deliberations. He was appointed a judge of the Court of Vice-Admiralty in 1737, the only judicial office ever held by him.

He visited England between 1720 and 1726 upon the business of the Penns, and is said to have appeared in chancery for the formal proving of William Penn's will. He was undoubtedly also concerned while there in the Maryland boundary dispute. He returned to Philadelphia in December, 1726, and received for his services from the Penn family a grant of one hundred and fifty-three acres, which estate was named "Bush Hill," and now lies in the heart of the city of Philadelphia, where he built a handsome country seat at which he resided until his death. He had also a large estate in Lancaster county upon which the city of Lancaster was laid out in 1728.

In 1727 he was appointed master of the rolls, recorder of Philadelphia and prothonotary of the Supreme Court. In the same year he was elected a member of the Assembly from Bucks county, and with the exception of a session in 1733, served continuously in that body until 1739. He was elected speaker in 1729, and annually thereafter during his term of service, except in the year 1733. He was a trustee of the loan office, and one of the committee for the erection of a State House. He seemed to have been independent in politics, and to have had the confidence of both the proprietary and popular factions.

As we have seen, he professionally approved of the legality of the establishment of Keith's Court of Equity, but when the authority of that court was questioned, and the Council alleged in favor of it that it had been established with the advice of the then attorney general, Andrew Hamilton, who was esteemed and allowed to be as able in that profession as any one on the continent of America, Hamilton replied, as Speaker, that the opinions of one or more lawyers in favor of the court was of no consideration in the case.

Besides serving in the Pennsylvania Assembly, Hamilton appears

to have also occupied for one or more years a seat in the Assembly of the three lower counties, after their separation from the province. He retired from public life in 1739 and died in 1741. On his death the following obituary notice, which was attributed to Benjamin Franklin, was published in the "Pennsylvania Gazette":

On the fourth instant, died Andrew Hamilton, Esq., and was next day interred at Bush Hill, his Country Seat. His Corpse was attended to the grave by a great number of his friends, deeply affected with their own, but more with their Country's loss. He lived not without enemies; for, as he was himself open and honest, he took pains to unmask the hypocrite, and boldly censured the knave, without regard to station or profession. Such, therefore, may exult in his death. He steadily maintained the Cause of liberty; and the laws made during the time he was Speaker of the Assembly, which was many years, will be a lasting monument of his affection to the people, and of his concern for the welfare of this Province. He was no friend to power, as he had observed an ill-use had been frequently made of it in the Colonies; and therefore was seldom on good terms with the Governors. This prejudice however, did not always determine his conduct towards them, for, when he saw they meant well, he was for supporting them honourably, and was indefatigable in endeavoring to remove the prejudice of others. He was long at the top of his profession here; and had he been as griping as he was knowing, he might have left a much greater fortune to his family than he has done. But he spent much more time in hearing and reconciling differences in private (to the loss of his fees) than he did in pleading cases at the bar. He was just when he sat as Judge, and though he was stern and severe in his manner, he was compassionate in his nature, and very slow to punish. He was a tender husband and a fond parent. But these are virtues which fools and knaves have sometimes, in common with the wise and honest. His free manner of treating religious subjects gave offence to many, who, if a man may judge from their actions, were not themselves much in earnest. He feared God, loved mercy, and did justice. If he could not subscribe to the Creed of any particular Church, it was not for want of considering them all, for he had read much on religious subjects. He went through a tedious sickness with uncommon cheerfulness, constancy and courage. Nothing of affected bravery or ostentation appeared; but such a composure and tranquility of mind as results from the reflection of a life spent agreeably to the best of man's judgment. He preserved his understanding and his regard for his friends to the last moment.

David Paul Brown in his "Forum" describes a portrait of Hamilton, as follows: The only portrait we have, near this date, which represents the costume of the bar, is a very good one of Andrew Hamilton, done no doubt in England; he is dressed in a long flowing wig, a scarlet coat, frilled bosom and *bands,* precisely like those worn by some denominations of clergymen in our time.

His eldest son James was twice lieutenant-governor of the province, and twice, as president of the Council, acting governor. His daughter Margaret married Chief Justice Allen, who will be hereafter referred to.

His biographer states that traces of his employment are found in the

courts of several of the colonies, and that his opinion was often sought for by different provincial governors. While at home he probably had a part in every important case. Hamilton's fame, however, chiefly rests upon his defense of Zenger, publisher of the "New York Weekly Journal," who was prosecuted in 1735 upon an information filed by the Attorney General of New York, charging him with printing and publishing certain false, scandalous and seditious libels in his paper against the Colonial authorities. Two of the most prominent lawyers at the New York Bar were retained for Zenger, but upon their filing exceptions to the commissions of the judges before whom Zenger was being prosecuted, they found themselves promptly disbarred for contempt, whereupon the popular party in New York retained Hamilton to assist other counsel appointed by the court to represent the defendant. The case was tried on August 4, 1735.

We have already seen, in the case of Proprietor vs. Governor Keith, *et al.*, tried in the Philadelphia quarter sessions in December, 1692, that it was held that in a suit for sedition or libel, evidence of the truth of the seditious or libelous statements might be offered and submitted, and the jury left to decide whether or not the statements were seditious or libelous. This was the first time that the law had ever been so held, and in fact, the ruling was contrary to law as it then existed. At the Zenger trial, Hamilton was not permitted to offer any evidence as to the truth of the facts alleged in the publications complained of, but he appealed to the jury as witnesses to the truth of the facts involved, and by a brilliant effort secured the acquittal of his client, for which he received the public thanks of the corporation of the City of New York, and the freedom of the city enclosed in a gold snuff box. The proceedings in the case were printed in New York, Boston and London, and excited general interest. Of his argument in this case Horace Binney says:

> He merely claimed to liberate the jury from the authority of some disagreeable law and of an obnoxious court holding its appointment from the crown. No lawyer can read that argument without perceiving, that, while it was a spirited and vigorous, though rather overbearing harangue which carried the jury away from the instruction of the court, and from the established law of both the colony and the mother country, he argued elaborately what was not law any where with the same confidence as he did the better points of his case. It is, however, worth remembering, and to his honour, that he was half a century before Mr. Erskine, and the declaratory act of Mr. Fox, in asserting the right of a jury to give a general verdict in libel as much as in murder, and in spite of the court, the jury believed him and acquitted his client.

It is extraordinary that so little is known of Tench Francis, who was, possibly next to Hamilton, the undisputed leader of the Pennsylvania bar in his time. He was born of English parentage in Ireland at an unknown date, and emigrated to Maryland shortly after 1700. His brother Philip was the father of the celebrated Sir Philip Francis, the reputed author of "The Letters of Junius." Francis removed to Philadelphia, and soon became prominent at the bar of that city. He was counsel for the pro-

prietaries from 1740 to 1744; attorney general from November 5, 1742 to January 14, 1755, and recorder of Philadelphia from 1750 to 1754.

He married Elizabeth Turbott, of Maryland, in 1725, by whom he had a numerous issue, among them Tench Francis, Jr., born in 1730, who figured largely in the Revolution and died in 1800. Chief Justice Shippen married his daughter Margaret in 1753. Another daughter was married to William Coxe, an alderman of Philadelphia. His daughter Ann married James Tilghman and was the mother of Chief Justice Tilghman.

It is stated in Keith's "Provincial Councillors" that Francis returned to England on account of ill health. In Martin's "Bench and Bar of Philadelphia" he is said to have died August 16, 1758, but whether in Pennsylvania or abroad does not appear.

He was one of the joint commission to adjust the boundary dispute with Maryland which met at New Castle, Delaware, in 1750. There are some of his manuscript letters addressed to his son-in-law Tilghman in the possession of the Pennsylvania Historical Society, on social and other unimportant subjects. He was cotemporary with Andrew Hamilton, though younger by some years, and by some was thought to be his superior at the bar. The fact that so much more is known concerning Hamilton than Francis may arise from the fact that Hamilton held many public offices while Francis held but few, and from the great notoriety of the Zenger trial in which Hamilton featured. A part of Philadelphia is still known as Francisville by the old residents of that city, taking its name from property owned by descendants of Francis.

The following letter addressed by Francis to Thomas Penn on February 21, 1744, is of interest:

I lately had the favor of yours of the 8th of August last, and soon after the Governor was pleased to mention a sum for my services in general for three years ending in October, (as I kept no account nor could be particular in any charges for that time) which I received and am satisfied. According to what you mentioned in your letter he named *fifty pounds* for an annual salary to which I submitted without objection. As I cannot possibly foresee what trouble my duty may be attended with I should fully as willingly have left it entirely to your own discretion at the end of every year. . . .

Jeremiah Langhorne, who was chief justice from 1739 to 1743, was the son of Thomas Langhorne, who came from the Kendall meeting in Westmoreland, England, in 1684, and settled in Bucks county. He was of a branch of the Langhorne family of Wales, which was of great wealth and note. He died three years after his arrival in the province. It does not appear whether Jeremiah came to Pennsylvania with his father or was born in the province.

Jeremiah Langhorne served as speaker of the Assembly at the session held in 1721. He was constituted one of the Commissioners of the General Loan Office by the Act of August 15, 1739. He was an associate justice from 1727 to 1739, when he became chief justice. He was an extensive land owner in Bucks county, and was one of the twelve foun-

ders of the Durham Iron Works, established in 1727. He was not learned in the law. He was a bachelor and lived on his estate, Langhorne Park, on the Neshaminy Creek, with his sister Grace until her early demise, and afterwards alone. Another sister married Lawrence Growden. Langhorne died in 1743. The most of his property went to the Growden and Galloway families. He had no brothers and the family name became extinct with him.

He is described as rather under than over the medium height, but erect and sprightly in habit, with a dignity which inspired respect. By his will he manumitted all his slaves over the age of twenty-four years, and provided that the others should be freed on arriving at that age. He also left them lands and personalty sufficient for their support. Mr. Brown says in his "Forum" that scarcely any records whatever remain of him, and yet, as is apparent from the foregoing, he was a man of great prominence in his county during his life time.

John Kinsey, who was probably next in prominence at the bar to Francis, was born in New Jersey in 1693, the son of John Kinsey, an Englishman, who came to America in 1677 as commissioner of the proprietors of West Jersey. The son practiced in New Jersey, and was a member of the Assembly of that province, at one time speaker. He removed to Philadelphia and served in the Pennsylvania Assembly. He was attorney general from 1738 to 1741, and chief justice from 1743 to 1750. He died in 1750. His son, James Kinsey, born in 1731, was also a lawyer, and was chief justice of New Jersey at the time of his death.

William Allen, who was chief justice from 1750 to 1774, was the son of William Allen, an eminent physician of Philadelphia, who died in 1725. The family were Presbyterians and came from Dungannon, Ireland. He was entered as a student of the law at the Temple in London, but instead of practicing, he became a merchant. He was a member of common council in Philadelphia in 1727, and a member of the Assembly from 1731 to 1739. He was mayor of Philadelphia in 1735. He married Margaret Hamilton, the daughter of Andrew Hamilton. On the approach of the Revolution he returned to England, where he died in 1780. He was much distinguished as a friend of men of genius, and patronized Benjamin West. He was influential in establishing with Doctor Franklin the College of Philadelphia. In 1774 he published in London "The American Crisis," in which he suggested a plan for restoring the dependence of America. He was said to have been the wealthiest man in the province.

Chief Justice Benjamin Chew, the son of Doctor Samuel Chew, was born at his father's seat on West River, Maryland, November 29, 1722. He removed with his father to the lower counties on the Delaware while still a boy. He was brought up a Quaker, but afterwards joined the Church of England. He became a student of law under the tuition of Andrew Hamilton, who died in 1741 before Chew had reached his nineteenth year. Thereupon the latter went abroad and became a student at the Middle Temple. On the death of his father in 1743 he returned to the province, and was admitted as an attorney of the Supreme Court at the

September term, 1746, but he does not appear to have practiced until about nine years later, during which time he resided at Dover and practiced at that place and New Castle. He was included in the Boundary Commission in 1751 as a representative of the lower counties, and in 1752 was appointed by the legislature as a trustee to make sale of certain lots of ground.

He removed to Philadelphia about 1754, and in 1761 built his country seat called "Cliveden," on the outskirts of Germantown. He succeeded Tench Francis as attorney general in 1755, and as recorder of Philadelphia, and in professional eminence. He was attorney general until November 4, 1769, and recorder until June 25, 1774. He became a member of Council in 1755, and served until the abolition of that body at the Revolution. He was speaker of the Assembly of the lower counties in 1756. In addition to his other offices he was made register-general of the Province in 1765, having direct charge of the probate business of Philadelphia county, while the registers of Bucks, Chester, New Castle, etc., were his deputies.

After his resignation of the office of attorney general he became more actively engaged in private practice. On the resignation of William Allen in 1774 he became chief justice of the Supreme Court. At the Revolution, all his offices fell with the authority from which they were derived, but he continued to act as register-general, and his deputies continued to perform their duties until the Act of March 14, 1777, provided for the appointment of a register of wills in each county. In 1777 an act was passed confirming what had been done by him and his deputies.

In 1777 a warrant was issued for his apprehension as a possibly disaffected person, but he was allowed to remain a prisoner in his own house. Later, he was permitted, on giving his parole, to reside at the Union Iron Works, partly owned by his wife's uncle, where he remained until on May 15, 1778, Congress resolved that he and others be conveyed into Pennsylvania and there discharged from their parole. After John Penn had departed for England, Chew was attorney for the Penns. He was appointed judge and president of the High Court of Errors and Appeals of Pennsylvania by two commissions dated respectively the 3d and 4th days of October, 1791, which position he held until the court was abolished in 1808.

He died on January 20, 1810. He was twice married, first to Mary Thomas, who died in 1755, and afterwards to Elizabeth Oswald, who survived him. Of Chief Justice Chew, William Rawle, the elder, in an address delivered to the associated members of the Bar of Philadelphia in 1824 said:

Mr. Chew was one of the prominent characters of earlier times. In 1774 he was preferred to the bench. Perhaps no one exceeded him in an accurate knowledge of common law, or in sound exposition of statutes —His solid judgment, tenacious memory, and persevering industry rendered him a safe and steady guide. At the bar his language was pertinent and correct, but seldom characterized by effusions of eloquence—his argu-

ments were close and frequently methodised on the strict rules of logic—his object always seemed to be to produce conviction, not to obtain applause.

Says Mr. Brown, in his "Forum":

About the year 1745 there appears to have been adopted by at least a portion of the bar, more dignified conceptions of the law, and a more scientific sort of professional practice than had hitherto prevailed among such lawyers even as Andrew Hamilton and John Kinsey. . . . In 1748 Edward Shippen, afterwards Chief Justice, had been sent to the Temple to be educated, as at a later date was Thomas Willing, originally designed for the bar, and at a still later Joseph Reed, Benjamin Chew, Edward Tilghman, Jared Ingersoll, William Rawle and others. In 1745, we find the lawyers barring entails, for the first time, by common recovery; a process which, before that time, they would seem not to have sufficiently understood to resort to, since we know that entails had been extremely odious, and two ineffectual legislative attempts to give power to dock them by common deed had been defeated by the Queen in Council.[3]

Besides those named by Mr. Brown, the following Pennsylvanians were entered as students of law at the Inns of Court in London from 1760 to the end of the Revolution: Thomas McKean, William and Richard Tilghman, Jasper Yeates, John Dickinson, Nicholas Waln and Peter Markoe.[4]

In 1759 the Supreme Court made an order:

That for the future no persons be admitted attorneys or council of this court without being previously examined as to their qualifications to practice, nor without having taken the oaths or affirmations of allegiance to his Majesty and subscribed the usual Declaration."

At September term, 1760, Mr. Chew and Mr. Ross were appointed to examine an applicant and at April term, 1761, Francis Hopkinson was examined by Mr. Ross and Mr. Dickinson. Later admissions do not recite an examination, and, perhaps, this duty was delegated to the local bar, but the fact that there are no common pleas dockets for Philadelphia county on file prior to the Revolution renders the subject obscure. From the few minute books of the Philadelphia common pleas that have escaped destruction we find that by 1790 it was the established practice for a member of the bar to move in open court for the admission of the candidate. The court would then appoint a special committee of three members of the bar to conduct the examination, and, if the result was favorable to the applicant, he was admitted and sworn.[5]

Presumably the same practice was adopted by the courts of the other counties.

An event of interest to lawyers took place in 1771, when an American edition of about fourteen hundred copies of "Blackstone's Commentaries" was printed at Philadelphia, all of which were subscribed for in advance,

[3] Brown's "Forum," vol. 1, p. 234.
[4] Loyd's "Early Courts of Penna.," p. 117.
[5] *Ibid*, p. 119.

notwithstanding that one thousand copies of the English edition, published six years before, had been sold in America. When we consider that a sale of twenty-five hundred or three thousand copies of a text book of general interest to the profession is now considered satisfactory, it will appear how extraordinary the sale of the "Commentaries" was. It is perfectly safe to say that there were not five hundred members of the bar at that time in America.

CHAPTER XXV.

MISCELLANEOUS.

CHAPTER XXV.

Miscellaneous.

Under the Duke of York's Laws no person was permitted to be a public seller of wine, beer, ale or strong waters by retail, or a less quantity than a quarter cask, without a certificate of his good behavior from the constable and at least two overseers of the parish wherein he dwelt, and a license first obtained under the hand of two justices of the peace in the sessions. Such license was to be renewed yearly, and for such renewal the party was required to pay the clerk of the sessions two shillings six pence.

Under the government of Penn, licenses to tavern keepers were granted by the Governor, and the price of liquors was prescribed by statute. Any person selling rum, brandy or spirits mixed with water or any other liquor forfeited the liquor so adulterated, and paid treble the value thereof, one-half to the Governor and the other half to the informant.[1]

By an act passed at the Session of 1699,[2] it was provided that the Governor should grant licenses to only such persons as were recommended to him by the justices in open court in the county wherein the party intended to keep his drinking house.

By the Act of November 27, 1700,[3] however, the Governor might issue licenses without the recommendation of the justices, but by the Act of February 28, 1711,[4] the provision that the candidates for license should be recommended by the justices was restored. By this act the license fee for selling wine and other liquors in Philadelphia was fixed at three pounds; to sell all other liquors in that city, except wine, forty shillings; in the towns of New Bristol, Frankford, Germantown, Darby, Chester and Chichester forty shillings, to sell wine and other liquors, and in other parts of the province, thirty shillings.

The Act of August 26, 1721,[5] provided that the justices should recommend no one to the Governor for a license before such person became bound unto the Governor for the time being, with security, if required, in any sum not exceeding one hundred pounds, that on obtaining such license he should be of good behavior and observe the laws relative to innkeepers.

By the third section of the Act of May 12, 1722,[6] common brewers

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[1] Charter and Laws of Penna., p. 175.
[2] *Ibid*, p. 286.
[3] 2 Statutes at Large, p. 93.
[4] 2 *Ibid*, p. 357.
[5] 3 *Ibid*, p. 248.
[6] 3 *Ibid*, p. 291.

were required to give bond in quarter sessions in the sum of one hundred pounds penalty, conditioned that they should observe the requirements of said act.

Various acts were passed imposing an excise tax on liquors sold in less quantities than thirty-five gallons or other quantities fixed by the acts. These acts provided that no person should sell such quantity until they had obtained a recommendation from the mayor, recorder, and aldermen of the city of Philadelphia, for the said city, or from the justices of the respective counties where such persons dwelt and had given bond for a sum agreed upon to be paid in place of the excise tax.

By the seventh section of the Act of March 21, 1772,[7] retailers of liquors in less quantities than twenty gallons were required to obtain a permit from the collector of excise for the county, which seems to have been additional to the license required to be obtained from the Governor on the recommendation of the justices. We thus find that down to the time of the Revolution liquor licenses were granted by the Governor on the recommendation of the justices of the county courts.

The third section of the Act of February 18, 1777,[8] provided that no person should keep a tavern, inn, public house of entertainment, ale house, beer house, or dram shop, unless first recommended by the justices in the respective county courts of quarter sessions, for the said county, to the president and Council of State for a license for so doing, who should, on such person having given bond and paid to the clerk of such court respectively the whole of the fees directed by the former laws to be paid for such license, grant the same, the secretary of the Council to receive for each license the sum of six shillings.

Excise tax on liquors was continued by various acts after the Revolution. By the Act of March 19, 1783,[9] all tavern license fees were doubled.

The Act of February 24, 1721,[10] provided that if any one should be convicted before any two magistrates of the city of Philadelphia or before any two justices of the peace in their respective counties with having feloniously stolen any money, goods or chattels under the value of five shillings such persons should have judgment to be immediately and publicly whipped upon his or her bare back not exceeding fifteen lashes or be fined not exceeding twenty shillings, make restitution to the party wronged, pay the charges of prosecution and whipping, or be sent to the work-house to be kept at hard labor; for want of such work-house to be committed to prison for such charges, for any time not exceeding twelve days. From such judgments an appeal might be taken to the general sessions or court of record for the city or county, but only on giving security for their appearance to answer; otherwise the person appealing to be committed as usual in such cases. If the person charged were a servant he was not allowed an appeal, unless his master, mistress or friend should

[7] 8 *Ibid*, p. 211.
[8] 9 *Ibid*, p. 58.
[9] 11 *Ibid*, p. 62.
[10] 3 *Ibid*, p. 246.

become surety for his appearance at the next court. This act was in force until repealed by the fifth section of the Act of September 15, 1786, P. L. 280.

An act was passed February 14, 1730,[11] entitled "An act for the relief of insolvent debtors within the Province of Pennsylvania." This act provided that any person charged in execution for any sum not exceeding one hundred pounds might exhibit a petition to the court from which the process issued, certifying the cause of his imprisonment, an account of his estate, and the names of the witnesses to the facts involved. Upon such petition the court might summon the prisoner and all his creditors to appear on a day appointed when the court should in a summary way examine into the matter of the petition and might tender the prisoner an oath or affirmation to the effect that the petition contained a full account of all his effects, except wearing apparel and bedding for him or his family, and the tools or instruments of his trade, not exceeding five pounds in value, and that he had not during his imprisonment disposed of any property other than as mentioned in the petition. The court might then immediately order the sale or assignment of all lands and effects contained in the account, or so much as might be necessary to satisfy the debts, and the prisoner should thereupon be discharged. No person so discharged should thereafter be imprisoned by reason of any judgment obtained for payment of money owing before the time of his discharge, but any property subsequently acquired by the prisoner was liable to be taken on execution. This act, as variously amended, was in force until repealed by the Act of March 26, 1814, P. L. 216.

"An act for the more easy and speedy recovery of small debts" was passed on February 21, 1736,[12] the provisions of which were re-enacted by many subsequent acts. This act provided that all actions for debt or other demands for the value of forty shillings and upwards and not exceeding five pounds should be cognizable before any justice of the peace of the county in which the defendant resided, and the justices were empowered to issue a warrant in the nature of a summons or a capias as the case might require. Process against a freeholder was to be by summons only. After judgment the justice should grant execution to levy the debt or damages and costs of the defendant's goods or chattels, and for want of sufficient distress to take the body of the defendant, subject to the authority of the court of common pleas to give relief to any insolvent debtor. An appeal was granted to the Court of Common Pleas, if taken within the space of six days, on the defendant entering into a recognizance with at least one sufficient security.

The Act of January 12, 1706, entitled "An act for Defalcation," provided, among other things, as follows:—

That in all cases where the plaintiff and defendant have accounts to produce one against another shall, by themselves or attorneys or agents,

[11] 4 *Ibid*, p. 179.
[12] 4 *Ibid*, p. 291.

consent to a rule of court for referring the adjustment thereof to certain persons mutually chosen by them in open court, the award or report of such referees being made according to the submission of the parties and approved of by the court and entered upon the record or roll, shall have the same effect and shall be deemed and taken to be as available in law as a verdict given by twelve men; and the party to whom any sum or sums of money are thereby awarded to be paid, shall have judgment, or a scire facias, for the recovery thereof, as the case may require and as is hereinbefore directed concerning sums found and settled by jury, any law or usage to the contrary of this act in any wise notwithstanding.[13]

This provision is still in force. It superseded the law providing for "peacemakers." It was intended to, and did for many years, dispense with lawyers and juries in a great number of cases. While it contemplated references only where the parties had accounts against each other, it was extended in practice to other actions. At the April term of the Supreme Court, in 1765, an action *in ejectment,* in which Benjamin Franklin was a party defendant, was thus referred to arbitrators, and the following award made:—

We do find that the title to the same lands and heriditaments is in the plaintiff; but that, nevertheless, the defendants have an equitable claim thereto; wherefore we are of opinion, that in justice and equity the lessors of the plaintiff ought to sell and dispose of the said lands and hereditaments to the defendants, and we do accordingly award, that the lessors of the plaintiff shall, on the payment of the sum of five hundred pounds lawful money of Pennsylvania, to them, by the defendants, convey and release to the said defendants respectively, the said several lots and lands in fee; which said sum of five hundred pounds we do settle and fix as the price, which ought in equity and good conscience, be paid by the defendants to the lessors of the plaintiff, in lieu of the lots and lands aforesaid; and do accordingly award the same to the plaintiff in satisfaction of said lands and heriditaments. We are likewise of opinion that in the conveyances and releases of the lessors of the plaintiff to the defendants, there ought to be contained covenants of warranty against themselves and their heirs, and the heirs of George Fox, the original purchaser. Lastly we do award that the costs of suit and the necessary expenses of the referrees be paid equally by both parties.

"What Lord Chancellor," asks Mr. Brown, from whose "Forum" the foregoing is taken, "ever made a better award?" Such men as Edward Shippen, Charles Willing, Israel Pemberton, Samuel Powel, John Stamper, John Kearsly and others were so frequently called upon to act as arbitrators in the early part of the eighteenth century, that they practically constituted a *de facto* court which settled great numbers of disputes. In the latter part of the century Robert Morris, Tench Francis, Archibald McCall, Francis Gurney and others were constantly acting as referees and settling questions involving commercial differences.[14]

[13] 2 *Ibid,* p. 242.
[14] Brown's "Forum," vol. 1, pp. 218-20.

The important part taken by arbitrators in the adjustment of suits may be judged from the statement in the preface to 1 Dallas, published in 1790, wherein it is stated that the volume will not be "without its use in furnishing some hints for regulating the conduct of referees, to whom, according to the present practice, a very great share of the administration of justice is entrusted."

An act to regulate arbitrations and proceedings in courts of justice was passed on March 21, 1806, in an article relating to which Judge Brackenridge, in his "Law Miscellanies," relates the following amusing experience:

In the year 1807, on the circuit towards Lake Erie, I fell in with an inhabitant unknown to me, to whom I was unknown; and entering into conversation with him, on the affairs of the country, I found him dissatisfied with it, and disposed to leave it. His grounds of dissatisfaction, were a great variety of matters; but, amongst these, he spoke of the hills, the roads, the mountains as unpleasant; and the winds, the weather, and the seasons, as unfavourable: but most of all, the laws, the lawyers, the justices, the judges, the courts and arbitrations. What of the *justices,* said I, you have an appeal in some cases, and where they do *wilful wrong,* there is a law enabling you to take depositions, and bring them to account. Ay, said he, but if we do get a hitch upon them, and bring them to the trig *they plead ignorance, and who can dispute that?*

But as to judges, said I, you have the presidents of districts; do not they do pretty well? Why, said he, they might be of *some use,* if they would let the jury take their own way, but this they will not do. They swear them; but dont swear themselves, and so are at liberty to say just what they please.

But said I, you have *circuit judges* that come trotting up here; (circuit courts had not been then abolished;) judges of the supreme court, they call them, what fault do you find with these? Why, said he, I have been at some of their courts; and have heard their charges; and they seem to steer pretty clear a while, in the trial of a cause; but towards the *winding up,* I have observed, that they *always lean a little more to one side than the other.*

As to the judges not being sworn, said I, presidents or circuit court judges, they are sworn at *first,* when they take the *oath of office.* That is, said he, like the man saying grace over a tub of beef which he salted up; but none when he sat down to dinner.

But, said I, in the administration of justice, there is a way provided of *getting clear of judges;* you have your *arbitrations;* justice brought home to your own doors. If a cause is brought into court, you can take it out, and leave the judges sitting on their stools with nothing to do. Ay, said he, but they have *a trick of taking the cause back again; so that we are just where we were at first, with more costs to pay.*

Though this illustration of the way of thinking of the people is introduced with a view of pleasantry not always suitable for a serious work, yet it did appear to me, and does now, that *appeals ought to be restrained, to the party called upon to refer.* Why shall he who calls for a reference, appeal from a *tribunal of his own chusing,* unless in the case of misbehaviour of parties, or of referees? This is *the common law ground of setting aside an award.*

Says David Paul Brown, in his "Forum":

With such laws, and such popular dispositions as we have indicated, we can understand what is otherwise difficult of comprehension, that the Court of Common Pleas, prior to the Revolution, had scarcely ever a single lawyer upon its bench; that to be "learned in the law," was not a requisite for appointment to the judicial office; and that, as we believe, the bench was composed—in the associate part of it, certainly—of such aldermen of the city, or justices of the peace from the county, as chose to set in banc, in a solemn way. From the causes mentioned, however, the court, in its earlier history especially, was relieved of much that would otherwise have engrossed its time; and of much, perhaps, that if tried with the technical formality of English law, it would have been hardly able to go through. In addition to this, the Recorder of the city, who was usually, if not always a lawyer, presided in the Mayor's Court, as it was then and and long afterwards called; a court in which the jury were regularly summoned by the mayor's writ. To this jurisdiction belonged the trial of most crimes committed within the old "City"; then—as being the only populous part of the county—the chief seat of Crimes; that the judges of the Common Pleas, sitting as the Quarter Sessions, were relieved of much of the most disagreeable, as well as the most onerous, business which now afflicts them. The Court of Common Pleas, under its different forms of Orphans' Court or Quarter Sessions, was occupied, it will be thus seen, chiefly with such civil affairs as required the executive order and action of the court, rather than its judicial function; such as the laying out of roads, the appointment of certain city officers, perhaps; with many other duties of like kind, now transferred by the progress of the times, to the wisdom of the people; the granting of licenses, discharge of insolvents, appointments of guardians, confirmation of partitions, regulation of the wharves, I suppose, and other matters now attended to by the wardens of the port. Great trusts, no doubt, were reposed in them, and their jurisdiction was at once legislative and judicial; common law, equitable and prudential: but in earlier times especially, it was a jurisdiction which required the *arbitrium boni viri* much oftener than such learning as is now necessary for the proper discharge of the judicial office. . . .

Indeed, at that day, law itself was a simpler science than now; we had not a single volume of reports in America, and only about fifty from England. We had not yet fairly passed from the feudal into the commercial existence. The rules of evidence were much less attended to; and if a man understood a few Acts of Assembly, and knew Dalton's Justice of the Peace, he had all the legal education which any one could teach, and almost all that any could attain.

There is no doubt, indeed, however much our pride may be gratified in magnifying the greatness of our early colonists, that for the first ten or twelve years after the charter, the legal proceedings were of a very simple and unlearned kind, and indicate a state of society, *generally,* pretty coarse and ignorant; and sometimes, pretty ridiculous also. Pennsylvania was in that day of the kind of nation, in which "the one-eyed are kings;" and when we hear of lawyers and of judges, we must not look for Tilghmans, for Binneys, for Washingtons, or Marshalls. The town, as yet, was not much more than a collection of huts or log houses, and its population an association of traders, adventuring their fortunes in a region

from which the savages were scarcely dispossessed. They brought large names from England, and gave them to humble things. Some idea may be formed of what the judicial labors of a chief justice came to, from such a fact as this, that at a much later day all the proceedings of so considerable a jurisdiction as the Orphans' Court—for the space of twelve years, from 1719 to 1731—though the petitions, evidence, and orders in each case, are set out very much more full than is now customary, occupy but sixty-nine pages of a docket, whose leaves were of the size only of ordinary cap paper. Large margins also, are left at the top, bottom and sides, and the lines having large spaces between them, and being written mostly in courthand, make what printers would call very "lean" matter. About five small pages, therefore, contain the whole records of a year. No great observance of formalities, I presume, took place in any court, either civil or criminal.[15] . . .

Mr. Brown's reference to the justices of the peace sitting in the court of common pleas in banc in a solemn way suggests the following anecdote:

Judge Hugh Lloyd was an associate judge of Delaware county for thirty-three years, resigning from that office in 1825 at the age of eighty-three years. On being asked if the duties devolving on an associate judge were not onerous he is said to have replied, "Yes, very. I sat five years on the same bench in the old court house at Chester without opening my mouth. One day, however, towards night, after listening to the details of a long and tedious trial, the president leaned over towards me and putting his arms across my shoulder, asked me a question. 'Judge,' he said 'don't you think this bench is infernally hard?' To this important question I replied 'I thought it *were*,' and that's the only opinion I ever gave during my long judicial career."[16]

Session laws corresponding to our pamphlet laws were regularly issued from 1712, and collections of the laws were printed from time to time, beginning with the collection printed by Andrew Bradford in 1714, a second edition of which was published in 1728. Another compilation was printed by Franklin in 1742, and in 1762 two editions of a compilation of the laws were printed by Peter Miller, known respectively as "Big Peter Miller" and "Little Peter Miller."

Galloway's Acts of Assembly of the Province of Pennsylvania, printed by Hall and Sellers, was published in 1775. A compilation of the Acts of Assembly of the Commonwealth passed between September 30, 1775 and the Revolution, revised and corrected by Judge McKean, was published by order of the General Assembly in 1782.

Volumes one, two and three of Dallas' Laws were printed in 1797, and the fourth volume in 1801, when the pamphlet laws begin.

The first volume of Bioren's Laws was published in 1803, the seventh volume in 1806 and the eighth in 1808. In 1810 Bioren published the laws from 1700 to 1810, in four volumes, by authority of the legislature. The notes to this work were by Charles Smith, afterwards president judge of

[15]Brown's "Forum," vol. 1, pp. 221-2, 224-6.
[16]Ashmead's "Hist. of Delaware County," p. 241.

the District Court of Lancaster. A fifth volume was published in 1812. These five volumes constitute Smith's Laws.

The first edition of Purdon, entitled "An Abridgment of the Laws of Pennsylvania from 1700 to April 2, 1811," was published in 1811. The second edition, called a "Digest," was published in 1818, the third in 1824 and the fourth in 1831. Subsequent editions were published in 1837, 1841 and 1847 by George M. Stroud, Esqr., associate judge of the District Court of Philadelphia.

The first edition of Parke & Johnson's Digest was published in 1836, and the second in 1837. This digest contains the reports of the commissioners appointed to revise the civil codes, and is for that reason valuable.

The first report of Pennsylvania decisions was Volume I of Dallas' Reports, published in 1790, which contains notes of decisions as early as 1754, but the cases reported begin in 1778. Hopkinson's Admiralty Cases was printed in 1792, and was followed by a number of reports of cases in Admiralty and before the Circuit Court of the United States for the Third District, in the next few years. The reader is familiar with reports published at later dates. A full account of all editions of the laws and of reports of Pennsylvania decisions will be found beginning on page 185 of Martin's "Bench and Bar of Philadelphia."

CHAPTER XXVI.

CHANGES EFFECTED BY THE REVOLUTION—THE HIGH COURT OF ERRORS AND APPEALS—CONNECTICUT CLAIMS.

CHAPTER XXVI.

Changes Effected by the Revolution—the High Court of Errors and Appeals—Connecticut Claims.

With the beginning of the Revolution, the proprietary government of the Penns terminated, and with it fell the laws and the system of courts which had been enacted and established thereunder.

The first ordinance enacted by the Constitutional Convention assembled in June, 1776, passed on the first day of August, 1776,[1] set out in its preamble as follows:

Whereas at this time the courts of justice within this state are surceased, and all process and proceedings by which suits can be legally commenced, proceeded in or determined are by the authority of the people justly and totally suppressed:

And whereas the detaining in custody debtors under execution who are willing to deliver up their estates for the use of their creditors, or debtors confined under mesne process who have no legal mode of entering bail in order to free their persons from imprisonment is not only oppressive but can be of no real benefit or advantage to the creditors:

And whereas a total change of government by the assistance of Divine Providence has been effected within the United States, and acts of grace to criminals sometimes are granted on events of such importance.

The ordinance proceeded to provide that all persons detained in any jail within the State by reason of any process for debt or any criminal offence whatsoever, except for capital offences or "practices against the present virtuous measures of the American States," or prisoners of war, should be forthwith released, such persons to exhibit petitions setting forth the reasons of their imprisonment, and if they were imprisoned for debt to comply with the provisions of the Act of 1722 relative to insolvent debtors.

Certain persons named in the ordinance were empowered to hear and discharge the prisoners in the jails of the several counties. The sheriffs and jailers of the counties were commanded to keep in safe custody all persons committed for capital offences, practices against the measures of the American States, and prisoners of war, until they should be discharged by due course of law or by the authority of the Congress of the United States.

By the ordinance passed September 3, 1776,[2] certain persons named in the ordinance were appointed justices of the peace for the State, and

[1] 9 Statutes at Large, p. 5.
[2] *Ibid*, p. 13.

others were appointed justices of the peace for the several counties, respectively. These justices were given authority to take acknowledgements of deeds and cognizance of criminal offences and breaches of the peace, and in cases of petty larceny under five shillings to proceed to punishment. All coroners, constables, overseers of the poor and supervisors of the highways who were lawfully in office at or immediately before the dissolution of the late government of the State were to continue to exercise the duties of their offices until a new appointment or future provision should be made.

An Act of the first General Assembly convened under the Constitution of 1776, passed on February 5, 1777,[2] provided for the election of justices of the peace for the city of Philadelphia and the several counties in the Commonwealth. By the seventh section it was provided that said justices might exercise all the powers, authority and jurisdiction that the justices of the peace had under the late laws and charter of the Province of Pennsylvania before the 14th day of May, 1776, subject to the exceptions contained in the Act of January 28, 1777, providing for the revival, with exceptions, of the laws of the province, hereinafter referred to.

Chapter 2 of the Constitution of Pennsylvania adopted in 1776, contained the following provisions relative to the courts:

Section 23. The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehaviour at any time by the general assembly; they shall not be allowed to sit as members in the continental congress, executive council, or general assembly, nor to hold any other office, civil or military, nor to take or receive or perquisites of any kind.

Section 24. The supreme court, and the several courts of common pleas of this commonwealth, shall, besides the powers usually exercised by such courts, have the powers of a court of chancery, so far as relates to the perpetuating testimony, obtaining evidence from places not within this state, and the care of the persons and estates of those who are non compotes mentis, and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution.

Section 25. Trials shall be by jury as heretofore: And it is recommended to the legislature of this state, to provide by law against every corruption or partiality in the choice, returns, or appointment of juries.

Section 26. Courts of sessions, common pleas, and orphans' courts shall be held quarterly in each city and county; and the legislature shall have power to establish all such other courts as they may judge for the good of the inhabitants of the state. All courts shall be open, and justice shall be impartialy administered, without corruption or unnecessary delay: All their officers shall be paid an adequate but moderate compensation for their services: And if any officer shall take greater or other fees than the law allows him, either directly or indirectly, it shall ever after disqualify him from holding any office in this state.

Section 27. All prosecutions shall commence in the name and by the

[2] *Ibid*, p. 41.

authority of the freemen of the Commonwealth of Pennsylvania; and all indictments shall conclude with these words, "Against the peace and dignity of the same." The style of all process hereafter in this state shall be, "The Commonwealth of Pennsylvania."[4]

By the twenty-ninth section of the same chapter it was provided that excessive bail should not be exacted for bailable offences, and all fines should be moderate. The thirtieth section provided that two or more persons should be chosen as justices of the peace by the freeholders of each city and county for each ward, township or district, from whom the President in Council should commissionate one or more for each such ward, township or district, to serve for the term of seven years; and the thirty-first section provided for the election of sheriffs and coroners, two persons to be elected for each office, one of whom for each was to be commissioned by the President in Council.

The Act of January 28, 1777, IX Stats. at L, 29, provided:

That each and every one of the laws and general acts of Assembly that were in force and binding on the inhabitants of said province on the fourteenth day of May last, shall be in force and binding upon the inhabitants of this state from and after the tenth of February next, as fully and effectually to all intents and purposes as if the said laws and each of them had been made or enacted by this General Assembly, and all and every person or persons whosoever are hereby enjoined and required to yield obedience to said laws as the case may require until the said laws or acts of the General Assembly shall be repealed or altered, or until they expire by their own limitation, and the common law, and such of the Statute Laws of England as have hereunto been in force in the said province, except as herein excepted.

The exceptions cover oaths to the King of Great Britain, laws acknowledging any authority in the heirs of Penn, and certain other provisions repugnant to the constitution and laws of the Commonwealth.[5]

The third section of said Act of 1777, provided as follows:

That courts of general quarter sessions and gaol delivery and courts of petty sessions, courts of common pleas, orphans' courts and supreme courts, courts of oyer and terminer and general gaol delivery, shall be held and kept in each respective county in this state at the times and places directed and appointed by the said laws or acts of general assembly, and circuit and nisi prius courts as directed in and by an act of general assembly of the said province passed the twentieth day of May, one thousand seven hundred and sixty-seven, entitled "An act to amend the act for establishing courts of judicature within this province" by the justices and judges that shall be hereafter elected and appointed, the same to commence in each county on the same days of the same months respectively appointed by the said laws for holding such courts that shall be next after the judges or justices of such courts are qualified to hold the same, and shall have, use and exercise all the powers, authority and jurisdiction that by

[4] *Ibid*, p. 597.
[5] *Ibid*, p. 30.

the aforesaid laws, justices and judges of such courts respectively heretofore have had, used and exercised, and the powers of chancery given to the justices by the constitution of this state, agreeable nevertheless with this act and such other act or acts of general assembly as shall be hereafter made, and every officer of all and every of the courts in this state that is or shall be appointed shall have, use and exercise the same or like powers that such officer or officers of the same title, character and distinction might, could or ought to have had, used and exercised under the charter and laws of Pennsylvania until displaced.

The fifth section provided that the President in Council should appoint one of the justices in each county to preside in the respective courts, and in his absence the justices attending the court should choose one of themselves president for the time being.

By the sixth section it was provided that every action pending at the last term that any court was held, except such as were discontinued or satisfied, should be in the same state and on the same rule and to be prosecuted in the same manner as if the authority of the court in which they were originally brought had never ceased.

The Act of March 14, 1777,[6] established offices for the probate and registering of wills and granting letters of administration and an office for the recording of deeds, indicating by name the persons who should serve as registers and recorders.

The first section of the Act of January 2, 1778[7] provided that a new seal should be made under the direction of the Prothonotary of the Supreme Court, having the arms of the State engraven thereon, with such other devices as the justices of that court should direct, with an inscription around the edge, and near the extremity thereof in these words: "Seal of Supreme Court of Pennsylvania," with the figures 1776 underneath the arms.

The Act of November 27, 1779,[8] provided that all the estate of the grantees or others claiming as proprietaries of Pennsylvania, together with the royalties, franchises, lordships, and all the other hereditaments and premises comprised and mentioned in the letters patent of Charles II to William Penn should be vested in the Commonwealth of Pennsylvania for the use and benefit of the citizens thereof, freed and discharged from all charges or encumbrances whatever, and that the said soil and lands, except as therein excepted, should thereafter be subject to the disposal of the Commonwealth. All unpaid arrears of purchase-money for lands, other than for lands within the tenths and manors of the proprietors, were to be paid the Commonwealth.

By the eighth section, one hundred and thirty thousand pounds sterling was to be paid to the devisees and legatees of Thomas and Richard Penn and to the widow of the said Thomas Penn, in such proportions as the legislature should deem equitable upon a full investigation of the

[6] *Ibid*, p. 68.
[7] *Ibid*, p. 171.
[8] 10 *Ibid*, p. 31.

claims, no part of the said amount to be paid within less than one year after the termination of the Revolution.

The former proprietors were also left in possession of their tenths or manors which had been surveyed and returned into the land office before the fourth day of July, 1776.

The Act of March 19, 1785,[9] provided elaborately for the regulation of juries. By the second section it was provided that the sheriff or other proper officer to whom the return of process for the trial of causes should belong should summon and return as jurors sober and judicious persons of good reputation and no other, from which it would appear that the summoning of jurors was left wholly to the discretion of the sheriff or other proper officer. The number of jurors summoned was to be not less than forty-eight nor more than sixty, but the judge or judges appointed to go the circuit and sit as judge of oyer and terminer, gaol delivery and *nisi prius* might direct a greater number to be summoned, not to exceed eighty. Jurors for the trial of causes before the Supreme Court were to be not less than forty-eight nor more than sixty. Jurors to try causes in the courts of common pleas were not to be less than twenty-four nor more than thirty-six; in the quarter sessions not less than thirty-two nor more than forty-four.

The names of the persons summoned were to be written on distinct pieces of paper of the same size and placed in a box from which the names of twelve persons were to be drawn by some indifferent person, and as jurors were challenged or set aside, further names were to be drawn until the jury was completed. Where a jury was to be drawn before a previous jury had been discharged, the names of the jurors were to be drawn from the names remaining in the box.

The sixteenth section provided that in any civil action or cause a rule might be entered for a special jury to be struck before the prothonotary or clerk of such court "in such manner as special juries have heretofore been struck."

The first general act to provide for the granting of divorces in Pennsylvania was passed on September 19, 1785.[10] This act, which was quite liberal in its provisions for the time at which it was passed, provided for divorces *a vinculo* for any of the following causes: Impotence, entering into a second marriage in violation of the previous vow, adultery, and wilful and malicious desertion without a reasonable cause for the space of four years. The Supreme Court was given jurisdiction in such cases.

Where one party on a false rumor, well-founded, of the death of the other, who had been absent for two or more years, had married again, it was at the option of the absent person on his or her return to insist on having his or her wife or husband restored or to have his or her own marriage dissolved, and the other party to remain with the second husband or wife.

The eighth section provided that a divorce from bed and board with

[9] 11 *Ibid*, p. 486.
[10] 12 *Ibid*, p. 94.

alimony might be granted to a wife because of abandonment or cruel and barbarous treatment, such as endangered her life, or offering such indignities to her person as to render her condition intolerable and life burdensome, and thereby forcing her to withdraw from his house and family.

The jurisdiction in divorce granted by this act was extended to the circuit courts and to the courts of common pleas by the Act of April 2, 1804.[11]

By the Act of September 25, 1786,[12] the justices of the Supreme Court were given original jurisdiction and cognizance of all manner of suits, causes and actions within the city and county of Philadelphia, with power to issue writs of capias and ad respondendum, writs of summons, scire facias, attachment, partition, dower and other process upon the said suits, but no such actions were to be begun in the Supreme Court for any cause which arose before the passage of the said act, except suits of the Commonwealth, and suits wherein the title of land or other real estate should come in question.

By the fourth section of this act the justices of the Supreme Court were directed to make and establish such rules for regulating the practice of the said court and expediting the determination of suits as they should deem necessary in their discretion. After the first of January next ensuing no plea depending in the county court of Common Pleas in the county of Philadelphia was to be removed to the Supreme Court by any writ of certiorari or habeas corpus after the same had been at issue two terms or more.

By the Act of September 15, 1786,[13] the penal laws of the State were revised in compliance with the 38th and 39th sections of Chapter II of the Constitution of 1776. This act repealed the Act of February 24, 1721, providing for the trial and punishment of larceny under five shillings, and provided that jury trials should be had in such cases. The act also repealed all laws providing for the burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping or imprisonment for life, in any case of felony. It also provided that the concealment by a woman of the death of her child which, if born alive, should by the law be deemed a bastard, should not be sufficient evidence to convict the party indicted without probable presumptive proof was given that the child was born alive. The 17th section provided that the act should be in force as to the offences therein mentioned, which should be committed within three years from and after the first day of November following, and to the end of the next succeeding session of the General Assembly and no longer. This act contained a number of humane provisions looking to the separation of first offenders from hardened criminals and for the reformation of prisoners.

This act was superseded by the Act of April 5, 1790,[14] entitled "An

[11] 4 Sm. Laws, p. 182.
[12] 12 Statutes at Large, p. 308.
[13] *Ibid*, p. 280.
[14] 13 *Ibid*, p. 511.

act to reform the penal laws of the State," which provided specially for the punishment of robbery, burglary, and sodomy or buggery, horse stealing and larceny of choses in action, but prescribed that every other felony or misdemeanor should be punished as theretofore. It provided elaborately for the construction and management of the jail of the county of Philadelphia, and for the custody of convicts therein. The convicts were to be clothed in habits of coarse material, uniform in color and make and distinguishing them from the good citizens of this Commonwealth. The males were to have their heads and beards close shaven at least once a week. They were to be fed on Indian meal or other inferior food, and to be kept at labor of the hardest and most servile kind. The keeper of the jail might punish convicts by confining the offenders in the dark cells or dungeons, and by keeping them upon bread or water for a term not exceeding two days, and for any offense which the keeper was not authorized to punish he was required to report the same to two of the inspectors of the jail, whose duty it was to report the offence to the mayor, who might order the offender to be punished by moderate whipping or *repeated whippings* not exceeding thirteen lashes each. This act was to be in force for five years, and from thence to the end of the next session of the Assembly, but it was renewed for a period of three years by the Act of April 18, 1795,[15] and was renewed perpetually by the Act of April 4, 1799.[16]

Aaron Doran having been attainted of a robbery in the county of Bucks by process of outlawry was brought before the Supreme Court on the 24th day of September, 1784, and execution was awarded against him on the 9th day of October.[17] The President and Supreme Executive Council being reluctant to execute a person who had not been found guilty by a jury, required of the Supreme Court whether the proceedings in the case were founded on the common law or any act of Assembly or of Parliament, whether there were any modern instances in England prior to the Declaration of Independence of persons being executed upon outlawry by judicial proceedings alone, and whether such attainder was compatible with the constitution of the State, and made other pertinent inquiries. The answer of the court to these questions will be found beginning on page 90, 1 Dallas' Reports. Doran was executed, as were afterwards his brothers Abraham and Levi, also attainted as felons by outlawry. These cases probably led to the passage of the Act of September 23, 1791, which provided at considerable length for proceedings to outlaw persons charged with crimes.

This act also repealed the Statute of 1 James I, Chapter XII, relative to witchcraft, hereinbefore referred to, and provided that in cases where persons refused to plead to indictments a plea of not guilty should be entered, and where such persons challenged more jurors on their trials

[15] 15 *Ibid*, p. 355.
[16] 17 *Ibid*, p. 243.
[17] 1 Dallas' Reports, p. 86.

than they were legally entitled to, the supernumerary challenges should be disregarded.

The Act of April 22, 1794,[18] provided that no crime whatsoever should be punished with death, except murder in the first degree, and defined the various degrees of murder. It further provided that persons liable to be prosecuted for petit treason should be punished as directed in other kinds of murder, and abolished all claims to benefit of clergy. It also prescribed the punishment for various other offences. This act was in force until the passage of the Criminal Code in 1861.

The preamble to the Act of March 2, 1789,[19] recited as follows:

Whereas the periods for holding the several terms of the supreme court at Philadelphia have by experience been found too short for the dispatch of and expediting the business of the said court owing partly to the great length of time necessary to the discussion of any important and complex cases which have been there determined, whereby many other trials have been unavoidably postponed and partly to a portion of points of law and motions in actions removed from the several counties in the state, and it is conceived that a power in the said court to hold courts of nisi prius for the trial of such issues in fact as are or shall be depending in the said supreme court either by removal or otherwise from the city or county of Philadelphia would greatly expedite the determination of the business in the said supreme court and be a great relief to such suitors as should not be able from want of time to procure trials at bar.

The act then proceeded to provide that the justices of the Supreme Court in term time or a majority of them in vacation should direct the holding of courts of nisi prius in the city of Philadelphia for the city and county of Philadelphia before them or any one or more of them on such dates as they should appoint and for that purpose to direct the usual process to issue for the trial of all such issues and facts as should be depending in either civil or criminal pleas originally instituted in the Supreme Court, or removed thither by writs of removal, appeals or otherwise from any jurisdiction in the city or county of Philadelphia.

The Congress having recommended to the several States the establishment of Courts of Admiralty, an Act was passed on September 9, 1778,[20] for the appointment of a "Judge of Admiralty of the State of Pennsylvania," whose term was to be for three years, and who should hold a court of admiralty having cognizance of all manner of controversies, suits and pleas within the jurisdiction of the Admiral and not determinable by common law, crimes excepted. An appeal lay from the decrees of this judge to the Continental Congress or such persons as they might appoint for hearing and trying appeals. This act further provided that all pirates and criminals who should offend upon the sea should be inquired of, tried and adjudged by grand and petit juries in the manner prescribed by and according to the directions given for the trial of traitors, pirates, felons and

[18] 15 Statutes at Large, p. 175.
[19] 13 Statutes at Large, p. 258.
[20] 9 *Ibid*, p. 277.

others offending upon the sea, in the Statute of 28 Henry VIII, entitled "For pirates."

The judges of this court were George Ross, commissioned April 6, 1776, who was succeeded by Francis Hopkinson on July 16, 1779. By Act of January 15, 1780, Congress established a court of appeals in admiralty, to hear appeals from this and other state courts of admiralty. That court expired with the Confederation.

The act for the establishment of a Court of Admiralty in Pennsylvania was superseded by the Act of March 8, 1780,[21] which provided for a judge of admiralty, with a term of seven years, and provided more elaborately than the former act for the exercise of a jurisdiction in admiralty. This court ceased to exist on the adoption of the Federal Constitution, Article III, Section 2 of which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdictions.

By the Act of March 28, 1787,[22] a "Court of Admiralty Sessions for the Commonwealth of Pennsylvania" was established to consist of the judge of the Admiralty of the State, who was to be president thereof, and any two justices of the City Court of Philadelphia or of the Court of Quarter Sessions for the County of Philadelphia whom the judge of the Admiralty should take to his assistance. This court had jurisdiction of all crimes and offences, under the degree of felony, committed on the high seas or within admiralty jurisdiction. This court also terminated with the Federation.

The proviso to the Act of February 28, 1780 (1), entitled "An act for erecting an High Court of Errors and Appeals," read as follows:

Whereas by the laws of the late province, now state, of Pennsylvania a very expensive, difficult and precarious remedy was provided for parties injured by erroneous judgments, sentences and decrees given or pronounced therein, by establishing an appeal from the final judgment, sentence or decree of any court within the said province to the king of Great Britain in council, or to such court or courts as by the said King, his heirs and successors should be appointed in Britain to hear and judge of appeals from the plantations, in many cases to the denial and in all to the great obstruction of justice:

And whereas the good people of this commonwealth, by their happy deliverance from their late dependent condition, and by becoming free and sovereign are released from this badge of slavery and have acquired the transcendent benefit of having justice administered to them at home and at moderate costs and charges:

And whereas it is requisite that the good people of this commonwealth, who have adopted the common law of England, should enjoy the full benefit thereof by the erection of a competent jurisdiction within this state for the hearing, determining and judging in the last instance upon complaints of error at common law; and also that a competent court of appeals should be provided within the same for reviewing, reconsidering

[21] 10 *Ibid*, p. 97.
[22] 12 Statutes at Large, p. 24.

and correcting the sentences and decrees of the court of admiralty other than in cases of capture upon the water in time of war from the enemies of the United States of America, and likewise the decrees and sentences of the several registers of wills and for granting administrations.[23]

The court created by this act consisted of the president of the Supreme Executive Council, the judges of the Supreme Court, the judge of the Admiralty Court for the time being, and three persons of known integrity and ability to be appointed for seven years, and removable from office in the same manner as the justices of the Supreme Court then were, no justice who sat in a case below to sit in the same case on appeal. The court had jurisdiction to examine all such errors as shall be assigned in any judgment given in the Supreme Court, wherein the sum involved should exceed the value of four hundred bushels of wheat, and to affirm or reverse the judgment as the course of the common law and justice should require, other than for errors to be assigned for want of form in any writ, return, pleadings or process. All errors complained of were to be brought before the court by a writ of error according to the course of the common law, but not otherwise, under the less seal of the Commonwealth, directed to the chief justice or other justice or justices of the Supreme Court commanding him or them to cause the record and all other things concerning the judgment complained of to be brought before the court. In the case of an appeal from a definitive sentence or decree from the Court of Admiralty, or from any register of wills and for granting administrations, the appellant or appellants were also given an appeal to the said court.

Appeals which had been taken to the King of Great Britain in Council, upon which no judgment had been had before July 4, 1776, might be brought before the court by a new writ of error, provided security were first given and the amount involved as above stated. No fine or common recovery, nor any judgment in any real, personal or mixed action, nor any other appeal might be reversed, unless the writ of error were commenced or the appeal brought and prosecuted with effect within twenty years after such fine, levied, recovery suffered or judgment signed or entered of record, but infants, persons *non compotes mentis,* in prison or without the limits of the United States, might bring their writs of error within five years after the removal of their disability notwithstanding said limitation. The compensation of the three persons associated with those who served *ex officio* was fixed at the value of two bushels of wheat for each day, to be ascertained as fixed by the Act of November 27, 1779,[24] by reference to which act we find that a bushel of wheat, weighing at least sixty pounds, was formerly sold in times of war and difficulty for ten shillings, so that the compensation of each of the three judges was equivalent to twenty shillings for each day they should attend upon the business of the court.

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[23] 10 *Ibid,* pp. 52-53.
[24] 10 Statutes at Large, p. 39.

By the Act of September 19, 1785,[25] the Supreme Court was given jurisdiction in actions of divorce, and by the tenth section an appeal might be taken from a final sentence, or decree given, to the High Court of Error and Appeals, upon the entering of a recognizance conditioned to prosecute the appeal with effect.

The Act of 1780, constituting the High Court of Error and Appeals was repealed by the Act of April 13, 1791,[26] entitled "An act to establish the judicial courts of this Commonwealth in conformity to the alteration and amendments in the constitution," by the seventeenth section of which it was provided that the said court should thereafter consist of the judges of the Supreme Court, the presidents of the several courts of common pleas for the five districts created by the act, together with three other persons of known legal ability to be appointed to serve during good behavior, and to be removable in the same manner as the judges of the Supreme Court.

No appeals were to be allowed where the matter in controversy did not exceed the value of four hundred dollars. The period within which an appeal might be taken was limited to seven years. The compensation of the three persons associated with the judges of the other courts was fixed as six dollars for each day they should attend upon the business of the court. Otherwise the act was similar to the Act of 1780.

By the third section of the Act of September 30, 1791,[27] the Governor was empowered to appoint one of the members of the court to be the president thereof, whereupon he appointed Benjamin Chew to that office.

Joseph Reed and John Dickinson, as presidents of the Supreme Executive Council, presided in this court during their terms of office, but it is probable that Franklin, who succeeded them in that office, not being a lawyer, did not often sit, and that Chief Justice McKean presided in his place. The High Court of Errors and Appeals was abolished by the Act of February 24, 1806.[28] It is sometimes designated as "The Lost Court."

From the foregoing it is apparent that the changes effected by the Revolution in the judicial system of Pennsylvania were merely nominal. The same courts were continued under the Commonwealth which had existed under the province. The old laws were re-enacted, except such as acknowledged the authority of the King of England and the proprietors. Practically the only changes effected were the appointment of judges and court officers by the President in Council, the election of justices of the peace, and process running in the name of the Commonwealth instead of in that of the King. For the appeals from judgments of the Supreme Court to the King in Council, was substituted an appeal to the high court of errors and appeals. A State Court of Admiralty was substituted for the King's Court. These were practically all the material changes which were effected.

On December 30, 1782, occurred an event of the greatest possible

[25] 12 *Ibid*, p. 94.
[26] 14 *Ibid*, p. 110.
[27] *Ibid*, p. 192.
[28] 4 Sm. Laws, p. 270.

importance to Pennsylvania. On that day a commission appointed by Congress to pass upon the so-called Connecticut Claims decided that the State of Connecticut had no right to the lands in controversy, and that the jurisdiction and preemption of all the territory lying within the charter boundary of Pennsylvania and claimed by the State of Connecticut belonged of right to the State of Pennsylvania. This terminated a long controversy between the States of Connecticut and Pennsylvania, involving armed conflicts between citizens of the two States, known as the Pennamite Wars.

If the reader will examine a map of the United States he will notice that a line coinciding with the northern boundary of Connecticut, if extended due west, would nearly coincide, north of Pennsylvania, with the northern boundary of that State, and that a line drawn due west from the southern boundary of Connecticut would enter the State of Pennsylvania near Stroudsburg, extending thence between Milton and Sunbury and striking the western boundary of the State somewhat to the southwest of New Castle.

The title to the lands embraced within these two lines was claimed by the State of Connecticut under various early charters, including that given to the Plymouth Company, but more particularly by the charter granted by Charles II incorporating "The Governor and Company of the English Colony of Connecticut," by which Connecticut was bounded on the east by the Narragansett river or bay, and from thence to the South Sea on the west part, with the usual proviso that the grant should not apply to lands possessed or inhabited by any other Christian prince or state. The lands along the Hudson were at the date of this charter possessed and inhabited by the Dutch, but it was contended on the part of Connecticut that the grant skipped those lands, and then, beginning again, extended indefinitely westward.

In 1753 about six hundred inhabitants of Connecticut associated themselves under the name of the Susquehanna Company, secured titles from the Indians and proceeded to settle the Wyoming Valley, and the settlements made therein were later organized as a county of Connecticut. Various attempts to eject the Connecticut settlers were made by the proprietors of Pennsylvania, and much misery and bloodshed resulted which it is not within the province of this work to relate in detail.

The decree at Trenton established the jurisdiction of Pennsylvania over these lands, but it did not determine the rights of the settlers thereto, which were not finally adjusted for many years and until after the passage of many acts of assembly enacted for that purpose. Connecticut acquiesced in this decision, and was granted lands in the Western Reserve to compensate for the loss of the lands named. The territory claimed by Connecticut included the principal parts of the counties of Luzerne, Lackawanna, Wyoming, Bradford, Columbia, Montour, Clearfield, Elk and McKean, smaller portions of Susequehanna, Northumberland, Union and Centre Counties, and the whole of Sullivan, Lycoming, Tioga, Potter and Cameron counties. The loss of this territory, therefore, would have reduced Pennsylvania to comparatively insignificant dimensions.