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THE COURTS OF PENNSYLVANIA PRIOR TO 1701.

For more than two hundred years the courts of province and state have administered justice to the inhabitants of Pennsylvania. Created under the peculiar conditions surrounding the foundation of the colony, subjected to numerous legislative experiments, their organization and practice present many peculiarities that can only be understood by a reference to their history. This history has been sadly neglected owing partly to the paucity of material, and partly to lack of interest. The founders were more bent on developing the resources and organizing the administration of the great territory that had come under their control, than on preserving the records of their proceedings for the benefit of posterity, while their immediate descendants, living in an uncritical age and possessed with a passion for rhetoric to the exclusion of history, carelessly permitted the records of the preceding generation to be scattered or ruthlessly destroyed. Documents that would now be regarded as precious memorials of the past, and that would throw valuable light on

our early institutions, were used to feed the fires in the old court house. Fortunately, sufficient fragments have escaped and found their way into the collections of individuals and societies to enable us, with the aid of the State archives, to present, if not a picture, at least a sketch of the judicial organization and procedure in days which the rapidity of our national development has made more remote in thought than in time.

As the first organized settlements in the territory now included in the State of Pennsylvania were those of the Swedes and the Dutch, so the first courts of justice were established under their auspices. To give a complete account of their administration would involve a tedious narrative of the political vicissitudes of these unsuccessful colonies which never developed to the point of establishing lasting institutions. In fact, throughout their stormy history the judicial and executive functions of the various governors and local officials are scarcely distinguishable.

It would seem, however, that the first court in the proper sense must have been established by the Swedish governor, John Printz, who arrived at the settlements on the Delaware in 1642 with instructions "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" (then worn by Christina, the little daughter of the great Gustavus Adolphus.)

Printz established the seat of government on the island of Tinicum, but he must have found his duties onerous, for he wrote several times to obtain the services of a learned and able man to administer justice and attend to the law business. The territory, however, passed into the possession of the Dutch West India Company, and Swedish law ceased to be a factor in the development of Pennsylvania, although the Swedes were permitted to retain their own magistrates, under the supervision of the officials of their conquerors.

In 1655 a vice directorship of the "South River" was created, and Jean Paul Jacquet, who for years had been an agent for the company in Brazil, was appointed to the office. Andries Hudde was named as secretary, a commissary was appointed, and these, with two others, formed a council for general administration, as well as a court for the trial of civil and criminal cases, with right of appeal in all important matters to the director and council in New Amsterdam. The minutes of this court from December, 1655 to March 1657 have been preserved, and afford some interesting information upon the methods and procedure of the Dutch justices, as well as the social condition of the colonists. Actions for the recovery of small debts are most frequent on the civil side, while on the criminal side, complaints for minor breaches of the peace are the principal matters disposed of. The striking features of these trials is the mild and paternal attitude of the court, the constant endeavor to obtain amicable adjustments of disputes, the merciful treatment of offenders, and the leniency to unfortunate debtors.

The following case, extracted from the minutes of the court, July 7, 1656, is interesting as an early attempt to apply the principles of set-off:

"Jan Flaman appears before the council against the wife of Tobias Willeborgh, and demands payment for a shirt lost by her, the defendant, and for passage from the manhattans hither, viz.

for the shirt..... 14
for her passage & freight 16

30

The defendant says, that she lost on the voyage, being wrecked with the bark, a chest containing four shirts, one coat of red duffel, one underwaist coat, and a powder horn with copper mountings, valued by her, the defendant at fl 28
Paid to plaintiff in money fl 4
From above fl28

32

The defendant is told that the freight shall be set off against her lost goods; in regard to the shirt, she is ordered to pay plaintiff four guilders 15 stivers."

A second case gives new and interesting grounds for a continuance:

"Before the council appeared Jacob Crabbe against Robert Martyn and complained that he Robert Martyn had shot and killed his, the plaintiff's pig. Defendant answers, that fourteen days ago he entreated the plaintiff to pen up his hogs as the same did great damage to his corn. Plaintiff upon being asked what he wanted, answers, "Payment for his pig." It was proposed to the parties, that plaintiff shall take the pig, as it is still living, but that if it should die, each one shall keep his action in the law unprejudiced.

As in the other Dutch settlements the principal prosecuting officer of the district was the Schout whose duties combined those of a sheriff and district attorney; he convened the justices' courts and executed the orders of the States General and officials of the company. Where local courts were established the justices were known as schepens. Their jurisdiction extended to the rendition of judgment for sums under one hundred guilders. In cases exceeding that amount the party aggrieved was allowed an appeal to the Director General and Council of the New Netherlands. The schepens also had authority to pronounce sentence in criminal cases subject to appeal.

In 1656 the Dutch West India Company, being deeply in debt and compelled to obtain aid from the City of Amsterdam, transferred to that city a portion of their possessions on the Delaware. This colony was called New Amstel, special inducements were held out to emigrants, and a town government was established consisting of a schout, three burgomasters and five to seven schepens, a formidable body for the government of a village of less than five hundred inhabitants. Thenceforth the jusisdiction on the river was divided between the officials of the company and those of the city's colony.

Laws and ordinances were sent from New Amsterdam to the Delaware and there proclaimed for the general government of that territory. With occasional modifications, they were the same as prevailed in the older settlements on the Hudson, the ordinances of the West India Company, the Civil Law, the enactments of the States General, and the customs of Holland.

At the last period of the Dutch dominion (1673–4)

three judicial districts were recognized, one for the inhabitants of the Whorekill, between Cape Henlopen and "Boomties" (Bombay) Hook, another for New Amstel, from Bombay Hook to Kristina Kill, and a third for Upland from Kristina Kill "unto the head of the river. Roughly speaking, the first of these districts corresponds to the lower counties of the State of Delaware, the second to New Castle County, and the third to so much of the southeastern part of Pennsylvania as was then settled, extending to the falls at Trenton. The humble and widely scattered settlers seldom had time or occasion to indulge in law suits involving questions or amounts beyond the limited jurisdiction of the schepens, but such disputes as did arise were the cause of endless discussion and much heartburning between the officers of the West India Company and those of the City of Amsterdam, whose jealousies were thereby excited and whose complaints and recriminations distracted the governor at New Amsterdam. In justifying the action of the council in such a contest Peter Stuyvesant writes to the Directors in Holland: "We might here remark upon and continue with the insults and slights, heaped on your Hon^ble^. Worships' servants in their capacity as supreme judges of this province, but will desist for the present to keep ourselves above party spirit and avoid further displeasures." Appeals heard and decided by the governor and council seem to have been carried to the directors in Holland, and occasionally reversed to the chagrin of Stuyvesant, who thus reproaches his employers in a letter dated July 21, 1661:

"Your Noble Worships say in regard to the third and last point concerning the appeal and the reversing of a sentence pronounced against one Jan Gerritsen van Marcken, that we would have done better not to meddle with this case. Honorable Worships! It surpasses our conception to understand how to avoid such proceedings and the reproaches following them, how to satisfy your Honors and the parties to the suit without exposing ourselves to blame for refusing a hearing and justice, as long as it is your Hon^ble^ Worships' order, and pleasure, that appeals are to be brought before your Honors' humble servants and we declare with good conscience that in this and the abovementioned case we have not aimed at nor intended

anything else, but what we in our humble opinion judged to be just, equitable and our duty: God the Ominiscient is the witness for it: we have no knowledge of it, that the Sheriff van Sweeringen was to be forced here, to ask pardon of God and justice in addition to what his opponent had demanded: we refer to the sentences regarding this point."

Dutch rule and Dutch laws, however, were not destined to endure on the Delaware. On the twelfth of March 1664, Charles II of England granted to his brother the Duke of York (afterwards James II) the territory comprising the New Netherlands to hold "in free and common socage and not in capite or by Knight service," the consideration named in the charter being the payment within ninety days after demand in each year of forty beaver skins. To the Duke was given full power to govern the inhabitants of the territories according to such laws as he should establish, not contrary to the laws of England, reserving to the crown the right to hear and determine appeals from judgments or sentences there given.

With the history of the conquest of the New Netherlands we are not directly concerned; suffice it to say that Sir Robert Carr who was charged with the reducing of the Dutch possessions on the Delaware arrived at that river in the latter part of September 1664, and without much bloodshed obtained the surrender of the colony. Carr established the seat of government at New Amstel, the name of which was now changed to New Castle, and under the terms of his agreement with the inhabitants, continued all the magistrates in their offices as formerly, upon their taking oath of allegiance. The wise policy of enlisting the local authorities in support of the new government was continued, and the Dutch and Swedish magistrates administered justice to their neighbors until long after the arrival of William Penn.

The period of the Duke of York's rule is of more importance in our judicial history than at first would be supposed. It was a formative period, and the law and practice as then developed had a marked influence upon

the early legislation of the Province of Pennsylvania. The establishment of English jurisprudence in the colonies on the Delaware was not the work of a day, but a gradual process, involving compromises with the established customs and practices of the inhabitants, the gradual transformation of the Dutch schouts and schepens into their English equivalents, the education of the magistracy in the rudiments of English court practice and the actual modification of many of the rules of the common law, both as to property and practice, to meet the necessities of the primitive social conditions in the New World.

The legal conceptions of the new rulers found expression in a brief code promulgated at Hempstead, Long Island, in March 1664, which, quaint and unsystematic as it may seem to us now, contained several notable departures from the common law which are well worth careful study by those interested in legal history. Although outside of the scope of this discussion it may be of interest to refer to the provisions for the administration of decedent's estates, the registration of births, deaths, and marriages, and particularly to the requirement for the acknowledgment and recording of deeds and mortgages, where the grantor remained in possession.

As to the remedial law, it was provided that all actions of debt or trespass under the value of five pounds between neighbors should be put to the arbitration of two indifferent persons of the neighborhood to be nominated by the constable, or if the parties refused their arbitration, the justice of the peace should choose three other persons who were to meet at the cost of the dissenter from the first arbitration, and their award should be conclusive. It is important to note this provision since arbitration occupied such a prominent place in Penn's system of justice, was by far the most popular method of determining minor civil cases during the early period in Pennsylvania and, though less used now, is still a part of the law.

The courts were organized by the new governor on a basis not dissimilar from that which already prevailed under the Dutch rule, with modifications suggested by the practice in the older English colonies. The principal court was the General Court of Assizes, held once a year in the autumn, presided over by the governor, and attended by the council, the mayor and aldermen of New York, and the justices of the various courts of sessions. The limits of the jurisdiction of this court were undefined, and it seems to have combined both legislative and judicial functions; indeed it was the closest approximation to a legislature that New York was destined to enjoy for some time. The court heard appeals from the sessions, tried the more important civil cases, heard complaints against local officials and tried all capital cases, except where a special commission of oyer and terminer was issued to the justices of a distant community in order to obtain a more speedy trial. In this connection it should be noted that capital offenses were few and punishments not severe, the laws in this respect resembling the merciful code of William Penn rather than the bloodthirsty system which then and for many years afterward disfigured the criminal law of England.

Courts of Sessions were established in districts roughly corresponding to counties (in the neighborhood of New York called Ridings in imitation of the division of the English County of Yorkshire). These courts were held three times in the year, and were attended by the justices of the peace. The governor, if present, presided or in his absence a member of the council or the senior justice. All actions from the value of five to twenty pounds were triable at this court, from which there was no appeal "unless the debt appear to be above the summe of twenty pounds or where there is dubiousness in the expression of the law." In addition the court was charged with the granting of letters of administration, the preservation of the peace, the trial of petty offenders, and the usual duties associated with the

quarter sessions including the granting of liquor licenses, a duty still imposed on our quarter sessions to the discomfort of the judges. In this connection the law provided:

"Every person Licenced to keep an Ordinary shall always be provided of strong and wholesome Beer, of four bushels of malt, at the least to the Hoggshead which he shall not Sell at above two pence the quart under the penalty of twenty shillings, for the first Offence, forty shillings for the Second, and loss of his Licence. It is permitted to any to sell Beer out of the Doores at a peny the Ale quart or under.

"No Licenced Person shall suffer any to Drink excessively or at unseasonable hours after Nine of the Clock at night in or about any their houses upon penalty of two shillings six pence for every Offence if Complaint and proofe be made thereof."

"No Licenced Person shall unreasonably exact upon his Guest for any sort of entertainment, and no man shall be compelled to pay above eight pence a Meale, with small beer only, unless the Guest shall make other agreement with the person so lycenced."

"No Licence shall be granted by any two Justices in Sessions for above the terme of one year, but every person so Licenced before the expiration of the said Terme shall and are hereby enjoyned to repair to the Sessions of that Jurisdiction for renewing their several Licences for which they shall pay to the Clark of the Sessions two Shillings Six pence, or else they shall forfeit five pounds as unlicenced persons."

Last in the official scale were the constables, whose badge of office was a staff six feet long with the King's arms thereon. Among their other onerous duties they were required to whip or punish any one so ordered by authority "unless they can get an other person to do it."

A singular feature of the code was the section relating to jurors. It was provided that, "No jury shall exceed the number of seaven nor be under six unless in Special Cases upon Life and Death, the Justices shall thinke fitt to Appoint twelve."

"A verdict shall be so esteemed, when the major part of the Jury is agreed, and the Minor shall be concluded by the Major without the allowance of any protest by any of them to the contrary; except in case of Life and Death where the whole Jury is to be Unanimous in their Verdict."

This remarkable innovation upon the English jury system was not destined to survive. In the records of the court of Upland, to which reference will be made

hereafter, there is a case concerning title to real estate which was tried in 1681 before a jury of seven, but in other cases in the same court juries of twelve were drawn.

Such are some, but by no means all, of the interesting features of this code which is stated to have been "collected out of the Severall Laws now in force in His Majesties Plantations," and which was probably prepared by Governor Nicholls with the assistance of the secretary and the members of the Court of Assizes. The greater part of Long Island had been, before this, occupied by settlers from New England and from the laws of the New England settlements much of its material was drawn, with "a relaxation of their severity in matters of conscience and religion" and additions from English and Dutch sources, the whole being molded into such form as best to meet the needs of civil administration in a proprietary province, without attempting to exploit any theoretical views on jurisprudence. Indeed, we may recognize in this and other provincial codes a kindred spirit, drawing upon a common source for so much of English law and custom as could be applied to the social and economic conditions of frontier life and for so much of English practice as would retain the names of actions, debt, replevin, etc., with a very crude appreciation of their distinctions, rejecting much that a trained bar would not willingly have parted with and which would scarcely have been permitted had the Privy Council kept as strict an eye upon provincial legislation then as they did in later times.

We may further recognize the germs of a provincial common law, based on the principle, as stated by Blackstone, that the colonists carried with them only so much of the English law as was applicable to their own situation, and were unaffected by English statutes passed after the establishment of the colony, unless particularly named therein. In all the proprietary colonies, the most marked feature in the early judicial system is the predominance of the governor and council. This

was true, as we see, in New York, and true also in Maryland and the Carolinas, in all of which colonies they formed part of or constituted the highest provincial court. For a few years in West Jersey councillors formed part of the court of appeals. The part played by the council in Pennsylvania will be referred to hereafter.

The Duke of York's laws were not put into execution in the territories on the Delaware immediately upon their adoption. As already stated the Dutch and Swedish magistrates were retained in office, but it was wisely resolved to carry the necessary changes into effect gradually. In 1668 Governor Lovelace issued directions to Deputy Governor John Carre to associate the schout and certain magistrates with himself as a council, and that

"The Lawes of the Governmt establisht by his Royal Highness be shewed & frequently Communicated to the said Councellors & all othrs. To the end that being therwth acquainted the practice of them may also in convenient tyme be established wch conduceth to the Public Welfare & Common Justice."

Under this plan the government was steadily brought into harmony with English ideas, the temporary check received in 1673, when the Dutch for a few brief months repossessed themselves of the New Netherlands, scarcely interrupting this process. At a council held at New York, May 17, 1672, it was ordered:

"That for ye better Governmt of ye Towne of New Castle for the future, the said Towne shall be erected into a Corporacon by the name of a Balywick, That is to say, it shall be Governed by a Bailey & six Assistants, to bee first nominated by the Governor and at ye expiracon of a yeare foure of the six to go out & foure others to be chosen in their places, the Bailey to continue for a yeare, & then two to be named to succeed, out of whom ye Govenor will elect one; Hee is to preside in all ye corts of the Towne & have a double vote. A constable is likewise annually to be chosen by ye Bench.

"The Towne Court shall have power to try all causes of debt or damage to the value of ten pounds without appeal.

"That ye English Lawes according to the desire of the inhabitants, bee establisht both in ye Towne & all plantations upon Delaware River.

"That the office of Schout be converted into a Sheriffalty & ye High Sheriffs power extend both in the corporacon & river & that he be annually chosen by two being presented to the Governr, of whom he will nominate & confirm one."

Finally, on September 26, 1676, an ordinance was passed by Governor Andros and the council formally introducing the Duke of York's laws and establishing courts on the Delaware, the material portion of which is as follows:

"Whereas upon a peticon of the Magistrates and officers of New Castle and Delaware River, Goveno^{r} Lovelace did resolve & in part settle the Establish Lawes of this Government and appoint some magistrates under an English Denominacon accordingly, In the which their having been an obstruction for reason of the late warres & Change of Government; And findeing now an absolute necessity for y^{e} well being of the Inhabitants, to make a speedy settlement, to be a generall knowne rule unto them for the future, Vpon mature deliberation and advise of my Councell, I have resolved, and by vertue of the Authority derived unto me, doe hereby in his Ma^{ties} Name Order as followeth.

"1. That the booke of Lawes Establisht by his Royal Highnesse & practiced in New Yorke, Long Island, and Dependencies bee like wise in force, and practiced in this River and Precincts, Except the Constables Courts, Country Rates & some-other things peculiar to Long Island, and the Militia as now ordered to remaine in y^{e} King, but that a constable in each place bee yearely chosen for the Preservacon of his Ma^{ties} Peace with all other Power as directed by y^{e} law.

"2. That there bee three Courts held in y^{e} several (parts of the river) & bay as formerly. To witt one in the Townes (New Castle) one above at Uplands another below at the Whorekil.

"3. That the said Courts consist of Justices of the Peace whereof three make a Coram, & to have the Power of a Court of Sessions & decide all matters under twenty pounds without Appeale, in which Court the oldest Justice to preside, unless otherwise agreed amongst themselves above twenty pounds & for crime Extending to life Limbo or Banishment, to admitt 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 Partyes as also matters of Equity.

"5. That the Court for New Castle bee held once a month, to begin the first Tuesday in each Month And the Court for Uplands & the Whorekill, Quarterly & to begin the Second Tuesday of the Month.

"6. That all necessary By lawes or orders (not repugnant to the Lawes of the Government) made by the said Courts, bee of force & binding, for the space of one whole yeare, in the severall places where made, They giveing an Account thereof to the Governo^{r} by the first Convenience, And that noe fines be made or imposed but by order of Court.

"7. That the severall Courts have power to regulate the Courts and Offic^{rs} Fees, not to exceed the Rates in the books of Lawes, nor to bee under halfe the Value therein exprest.

"8. That there bee a high Sheriffe for the Towne of New Castle, the River and Bay: And that the said high Sheriffe have power to make an Under Sheriffe or Marshall being a fitt person, and for whom hee will bee responsable, to be approved by the Court, But the Sheriffe, to act as in England & according to the now practice on Long Island, to act as a principall officer in the Execution of the Lawes, but not as a Justice of the Peace or Magistrate.

"9. That there bee fitting books provided for the Records in which

all Judiciall Proceedings to be duely and fairely Entered, as also all Publick Orders from the Governo[r] And the names of the Magistrates & Officers Authorized, with the time of their Admission: The said Records to bee kept in English, To which all persons concerned may have free Recourse at due or seasonable times.

"10. That a fitt person for Clarke when Vacant, be recommended by each Court to the Governo for his Approbacon in whose hands the said Reccords to be kept.

"11. That all writts, Warrants & Proceedings at Law shall be kept in his Ma[ties] Name. It haveing been practiced in y[e] Government ever since the first writing of the Law booke, And being his Royall Highnesse Speciall pleasure & Order."

The promulgation of the laws and the more definite instructions for the administration of justice must have given general satisfaction, for in their communications with the governor the justices seem to have been in doubt on many points, and a delay in forwarding copies of the laws seems to have given them considerable anxiety. In a letter of June 8, 1677, the magistrates of New Castle write: "We likewise humbly desire that the sending of the law booke may not be forgot, there being great occasions for the same."

There is one request for instructions that is important enough for special mention. On June 17, 1678, the court at New Castle drew up an address upon a number of matters to be laid before Governor Andros for his opinion. One of these was: "To know whether houses and lands of p[r]sons deceased or Runaway, are liable and may be publicquly sould for ye paying the Partees just debts In case the p[r]sonall estate falls short and how the Court shall act in that & ye Lyke business."

The reply of the governor dated October 26, 1678, to this question is brief and to the point;—"Houses and Improved lands are Lyable to pay Debts, as well as moveable(s) and where none administ[r] the co[t] may appoint Som responsible persons to doe itt having due regard to Widdows."

It is needless to remark that at common law lands were not subject to execution for debts and that in the time of Charles II the creditors only practical remedy was by writ of Elegit under which the rents and profits of one half only of the debtor's real estate could be levied

on. Even Penn's first legislation, as will be seen, did not venture as far as the bold dictum of Governor Andros.

That land was subject to seizure for debts under the Dutch rule is indicated by the following extract from the minutes of Jacquet's court, February 14, 1657:

"Isack Allerton has had seized by the Court Messenger subject to the decision of the Hon^ble^ Council, the immovable property belonging to Peter Hermausen here on the river."

From such records as have escaped destruction we are enabled to present a fair outline of the actual practice in these primitive tribunals, presided over by laymen and unembarrassed by the conflicting arguments of our learned profession. Appeals to New York were frequent and were specially allowed by the governor, as would appear from the following example:

"By the Governor
Upon the request of Hans Pieterson, concerning several Judgm^ts^ of the Courts of New Castle & Upland in Delaware in a case between the sd Pieterson & Do Lawrentius Carolus, concerning a certain Mare, The Jureys tho' composed in part of the same Persons, yet brought in several Verdicts, the Courts having given different Judgm^ts^ accordingly, & it not appearing by any Testimonies what Mare was in Difference; I do therefore hereby Order, that the Execucons in sd Matter be Suspended, & a full Acco^t^ of all sd Proceeding in both Co^ts^ be forthwith sent me.
Actum in New York this 28th day of July 1677.
E. ANDROS.
To the Courts of New Castle and Upland & all Officers in Delaware whom it may concern."

Such appeals were heard at the General Court of Assizes in the City of New York, the minutes of which present a spirited picture of assembled worthies. One appeal from a judgment of the court at the Whorekill concerning the title to a tract of land was tried in 1680 before the following distinguished company: the Governor Sir Edmund Andros, five members of the council, the mayor and five aldermen of New York, the chief justice of Nantucket, the two commissaries of Albany, three justices from New Jersey, and a dozen more from Long Island and New York. The judgment of the lower court was affirmed at the cost of the appellant. On

another occasion (in 1681) the following interesting case was tried:

"Mr John Moll Justice of the Peace and President of the Court at Newcastle being called to Answer to an Indictment Exhibitted against him by one Abram Mann for severall Words and Expressions by him said to be uttered and spoken in Court and at other Times, To which the said John Moll pleaded not Guilty, and a jury being Impanelled and Sworne with several Evidences they brought in their Verdict and found him guilty of Speaking the Words mentioned 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 taking into Consideration Do adjudge the said Indictment to be illegal and vexatious and that the said John Moll by what found against him is not Guilty of any Crime or Breach of any known Law Therefore do Acquitt the said John Moll from the same and Order the said Abram Mann to Pay the Costs of Court. The said Mann moved for an Appeale for England which is granted he giving sufficient Security to the value of One Thousand Pounds to Prosecute the same and pay damage to the Party if lost."

An interesting feature of this case is the allowance of an appeal to England, which was probably dropped. The parties also were afterwards prominent in Penn's government. Justice Moll became a member of the first Provincial Council and was one of the committee that drew up the amended frame of government or charter of 1683, while Abram Mann was a member of the assembly from New Castle in the sessions of 1684–5.

It would not do to omit mention of the first state trial, if it may be so called, that was held on the Delaware. Near the close of 1669 a disturbance was created by one Marcus Jacobson, alias John Binkson, but better known as "Long Finne", who pretended to be a son of Conningsmark, a Swedish general. Whether this so called insurrection was a serious attempt to overthrow the government, or a mere riotous or seditious disturbance, it was taken with the utmost seriousness by the Deputy Governor Carre as well as Governor Lovelace. An order for the Finne's arrest was issued, and he was put in irons, while the other persons implicated were bound over for court. At a meeting of the council in New York on October 18, 1669, it was resolved:

"Vpon serious & due Consideracon had of the Insurrection begann by ye Long ffinne at Delaware, who gave himself out to bee son of

Coningsmarke a Swedish Generall & y^e^ dangerous consequences thereof, It is adjudged that y^e^ said Long ffinne deserves to dye for the same. Yet in regard that many others being concerned w^th^ him in that Insurrection might be involved in the same Premunire if the rigour of the Law should be extended & amongst them diverse simple and ignorant People: It is thought fitt and Ordered, that the said Long ffinne shall be publickly & severely whipt & stigmatiz'd or Branded in the fface with the Letter (R) with an Inscription written in great Letters & putt upon his Breast, That hee receiv̊ed that Punishment for Attempting Rebellion, after wh^ch^ that hee bee secured untill hee can bee sent & sold to the Barbadoes or some other of those remoter Plantations."

But after deciding upon his fate, it was determined to try him according to the forms of law and a special commission was issued to Mathias Nicholls and others to try him, whose instructions were to hold the court according to a prescribed form which presents an exceedingly interesting picture of the practice then followed in a criminal trial.

The forme of holding the Co^rt^ at the Fort in Newcastle upon Delaware River for the Tryall of the Long Finne &c. about the late Insurrection, Decem. y^e^ 6th 1669.

Vpon the meeting of the Court let a proclamation bee made by saying, O yes, O yes, O yes, Silence is commanded in the Co^rt^ whilst his Ma^ties^ Commissioners are sitting Vpon paine of imprisonment.

Lett the Commission be read & the Commission^rs^ called vpon afterwards, if any shall bee absent Let their names bee recorded.

Then let the proclamacon bee made again by O yes, as before, after which say: All manner of persons that have anything to doe at this speciall Co^rt^ held by Comission from the Right Ho^ble^ Francis Lovelace Esq. Governo^r^ Genr^l^ vnder his Royal Highness the Duke of York of all his Territories in America draw neare to give yo^r^ attendance, and if any one have any plaint to enter or suite to prosecute let them come forth & they shall bee heard.

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

Then let the Long Finne prisoner in the Fort bee called for & brought to the Barr.

Vpon which the jury is to be called over & numbered one, two &c. & if the prisoner have no exception against either of them let them bee sworne as directed in the Booke of Laws for Tryall of Criminals, and bid to look vpon the prisoner at the Barre.

The forme of the oath is as followeth: You do swear by the Everliving God that you will conscientiously try and deliver your verdict between o^r^ Sovaraigne Lord the King, & the prisoner at the Barre according to evidence & the lawes of the Country, so helpe you God & the contents of this booke.

Then let the prisoner bee again called vpon and bid to hold up his right hand:

Viz. John Binckson alias Marcus Coningsmark alias Coningsmarcus alias Mathew Hincks. . . .

Then proceed with the indictment as follows:

John Binckson, Thou standest here indicted by the name of John

Binckson alias Coningsmark alias Coningsmarcus alias Mathews Hinks, alias, etc. for that having not the feare of God before thine eyes but being instigated by the devill vpon or about the 28th day of August in y^e^ 21st year of the Raigne of o^r^ Soveraigne Lord Charles the 2d by the Grace of God of England, Scotland, France and Ireland, King, Defender of the Faith &c. Annoque Domini 1669, at Christina & at severall other times & places before, thou didst most wickedly, traitorously, feloniously & maliciously conspire and attempt to invade by force of armes this Government setled vnder the allegiance and protection of his Ma^ties^ & also didst most traitorously solicit & entice divers & threaten others of his Ma^ties^ good subjects to betray their allegiance to his Ma^ties^ the King of England persuading them to revolt & adhere to a forraign prince, that is to say, to the King of Sweden in prosecution whereof thou didst appoint and cause to bee held Riotous, Routous & Vnlawfull Assemblyes, breaking the Peace of o^r^ Sovereign Lord the King and the laws of this Government in such cases provided John Binkson &c what hast thou to say for thyself, Art thou guilty of the felony & treason layd to thy charge or not guilty. If hee says not guilty, then ask him By whom wilt thou be tryed. If hee say be God & his countrey, say, God send the a good deliverance.

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

Vpon 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 bee 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 Co^rt^ let them bee called over againe & then ask : Gent^s^, are you agreed upon your verdict in this case in difference between o^r^ soveraign Lord the King & the prisoner at the Barr. Upon their saying yes, aske who shall speak for you. Then the . . . . . .bring in their verdict & the . . . . then read the verdict and say: Gentlemen, this is y^r^ verdict upon which you are all agreed; upon their saying yes, call that the prisoner bee taken from the barre & secured.

As a matter of course the Finne was convicted and sentenced. The last we hear of him is in this minute of the council, January 25, 1669-70:

"This day ye Long ffinne called Marcus Jacobsen was by warrt put on board Mr. Cosseaus Ship called y^e^ Fort Albany to be Transported & sould at y^e^ Barbadoes according to y^e^ sentence of Court at Delaware for his attempting rebellion. He had beene a prisoner in y^e^ State house ever since y^e^ 20th day of Decemb^r^ last."

We are fortunate in possessing the records of the courts of New Castle and Upland during this period. That of Upland is particularly interesting as presenting a complete record of the first county court on Pennsylvania soil from the year 1676 to the announcement, in June, 1681, of the transfer of the government to William

Penn. It would be tedious to recite the manifold duties performed by the justices, whose functions included those now delegated to the county commissioners, directors of the poor and auditors as well as those pertaining strictly to their judicial office. They granted applications for taking up land, took acknowledgements of deeds, and exercised a general supervision over the churches, the repair of the highways, the maintenance of fences, the sale of the time of bound servants, and even recorded the ear marks of cattle. In the practice of the court and in the trial of cases the primitive methods employed can only be appreciated by reading from the cases themselves.

Actions for the recovery of debts, for assault and battery and slander predominate. It would seem that the judges sometimes found it necessary to appeal to their own tribunal, as the following case shows:

"Justice Otto Ernest Coch Plt. } In an action of slaunder
Moens Petersen Staecket Deft. } & defamat.

The p[lt] Complaines that this deft. maliciously has defamed and most highly slaundered him in his Honor and reputation by terming him a hogh theef, desires that this deft (if hee or any others can) will prove ye same, or other wayes that hee may bee punisht according to Lawe.

The deft sayes and protests, that hee never Knew heard or sawe, that this Plt was guilty of any such fact, and that hee to his knowledge never sayed any such thing, but if that he hath sayed itt (as the witness doe affirme:) that itt must haue ben in his drink, hee humbly desires forgivenesse, sence hee finds himselfe in a great fault;

Hans Jurian, william orian & andries homman sworne in Co[rt] declare that they haue heard moens Peterss Staecket say in full tearmes & substance, Mr Otto is a hogh theef of ye one & andries Boen of ye other syde & further say nott;

The Court haueing heard ye Case doe order that ye deft: shall publicqly in open Court declare that hee has wrongfully falsly & malisiously slaundered & blamed this p[lt] and doe further fyne him for an Example to others to pay the sume of one thousand gilders w[th] the Costs;

The deft. did willingly in open Court, declare as above & humbly desires forgivenesse & prayes that ye fyne may bee remitted, Upon ye intercession of Justice Otto Ernest, the Co[rt] did remit ye fyne aboves:"

Judgments are entered sometimes in guilders and styvers and sometimes in pounds of tobacco, wheat or other products.

An interesting case, showing the practice in attachment, is that of

James Sanderlins plt
agst
John Edmunds of
maryland Deft

The plt demands by bill from this deft. ye sume of 1200 lb of good & merchandable Tobbacco & Caske to bee paid in Great Chaptank River in maryland on all demands after ye 10th of october 1675; as by the said bill under ye hand and seale of the deft bearing date ye 9th of June 1675; & produced in Court did more att Large appeare, the plt further declaring & prooveing in Court that hee hath made severall Legall demands of the sd debt, and yt the same was not paid to this day, desiering that this Cort would be pleased to grant him Judgemt agst ye deft and to allow of his attachment Laid upon a certaine great Boate or shiallop & appurtenances now att upland—That the same might bee publicqly sould and the plt payed his Just due wth ye Costs;

mr walter wharton one of the witnesses to ye sd bill being sworne in Court declared that hee was prsent and did see John Edmundsen signe seale and deliver, the abovesaid bill of 1200 lb of Tobacco, to James Sanderlins;

The Court haueing Examined into ye buisnesse, and finding the Case to bee Just, did order that Judgment bee Entered against the deft: John Edmunds, for the paymt of ye sd. 1200 lb of Tobacco, or the True vallue thereof, and alloweing of ye Plts attachmt doe hereby order the vendu master, to sell the boate & appurtenances, this Courtday to the most bidders, out of which hee to pay James Sanderlins his debt wth ye Costs, and the overplus to bee returned to John Edmunds or his order;

According to the abovesd order of Cort was this day, being ye 12th Novembr, by publicq outcry sould unto mr John Test, as ye highest bidder the boate & appurtenances for ye sume of six hundred and twenty fyve gilders; to bee paid in New Castle with merchandable Tobbacco & Caske dutch wth & tarr att 8 styvers pr lb or wth merchandable wheat at 5 gilders pr schipple att or before ye Laest of march next Ensuing, as by the Conditions of sale upon ye fyle att Large doth & may appeare;

James Sanderlins bound himselfe as security for ye true payment of ye aboves 625 gilders according to the conditions"

What would appear to be the first recorded action for negligence is entered as follows on the New Castle records.

Mounes Powell plt
Hans Pietersen Deft

The plt declares that this deft about one yeare since was the occascon that he the plt lost the use of his boddy so that he was & is not able to worke for his wife and family and therefore humbly craves that the deft may be ordered to hire a servant for him untill he bee restored to health. The court having heard the answer of the deft and finding by the evidence sworne in court, as also by the plt owne confession that itt was an accidental mischange, doe order that the

deft shall pay the curing to the doctors bill this date and moreover Pay unto the plt in regard of his smart and Payne wth the plt hath suffered the sume of one hundred and fifty gilders and pay cost of sute.

A competent authority has remarked "the whole method of practice was rather a dispensation of justice, as the ideas of it existed in the heads, and was tempered by the hearts of the judges, than the administration of any law written or unwritten". And yet when we remember that these men were all laymen, pioneers on the border of the wilderness, whose true business was to hew the forests and till the soil, and whose judicial office was a burdensome duty, performed at a considerable sacrifice of time and money in the interest of their little community, that they were without books or forms and sometimes without blank books in which to write their records, we may wonder that they did so well. The justices of these courts as members of the provincial council, as assemblymen, and as judges, played their part in the "Holy Experiment" heralded in the last entry in the Upland records. This entry, the last official act under the Duke of York's administration, is a notice to the magistrates of the cession of the territory to William Penn and a direction that they should yield due obedience to the new proprietor. Here then it is that the histories of the Commonwealths of Pennsylvania and Delaware begin, if commonwealths may be said to have a beginning.

On March 4, 1681, the province of Pennsylvania was granted by King Charles II to William Penn, son of Vice Admiral Penn, to whom a considerable debt was then owing by the crown. It would be tempting at this point to turn aside and discuss the character and career of the remarkable man who founded the Commonwealth of Pennsylvania. Much has been written about him and yet it is doubtful if he has yet received his real due from history. William Penn was an idealist, perhaps in some respects a visionary man, and yet his views were eminently sensible and fundamentally sound. The leader of an exclusive religious sect, the welcome guest at court,

the friend alike of James II, of Algernon Sydney and of John Locke, a man of brilliant parts and attractive personality, yet modest, generous, tolerant and forgiving, the nobility of his character as revealed in his writings and conduct is worthy of our highest admiration, little as it was appreciated by those, who, like Franklin, owed much of their prosperity to his "Holy Experiment," but could not understand his motives. To his enlightened benevolence and faith in mankind, civilized and savage, was due the early prosperity and progress of the commonwealth. As a German writer has well observed, "Of all the colonies that ever existed none was ever founded on so philanthropic a plan, none was so deeply impressed with the character of its founder, none practised in a greater degree the principles of toleration, liberty and peace, and none rose and flourished more rapidly than Pennsylvania. She was the youngest of the British colonies established before the eighteenth century, but it was not long before she surpassed most of her elder sisters in population, agriculture and general prosperity."

An analysis of the charter granted to Penn belongs rather to constitutional history than to our subject. The English government was becoming more impressed with the importance of the colonies in America, and in consequence the document was drawn with more care for the royal prerogative than the earlier charters. One of the most important of its provisions was that requiring a transcript of all laws made and published in the province to be transmitted within five years to the privy council, and if within six months such laws should be declared inconsistent with the king's prerogative or sovereignty, the same should be declared void, otherwise to remain in full force. Penn was given full power to make laws, with the advice and consent of the freemen of the country or their deputies in assembly, to appoint judges, justices and other judicial officers, to pardon crimes, treason and wilful and malicious murder excepted, and to "do all and 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" and by judges appointed, to award process, hold pleas and determine all actions, suits and causes whatsoever, as well criminal as civil, personal, real and mixed. By three deeds the Duke of York conveyed to Penn the territory covered by the charter and the three lower counties.

On April 10, 1681, Penn commissioned his cousin, William Markham, to be Deputy Governor, who arrived on the Delaware about the first of July following. His first act was to call a council and on November 30th, we find him holding court at Upland. Prior to this we have the first entry in the records of the Upland Court as part of the Province of Pennsylvania. Nine justices are recorded as present. The first cases tried were two cross actions of assault and battery in which all parties were convicted and fined.

Before sailing for America Penn drew up his famous "Frame of Government," the original manuscript of which, with interlineations and notes in the handwriting of Algernon Sidney and John Locke, is preserved in the Archives of the Historical Society of Pennsylvania. Penn was a close student of political institutions and lived at a time when, in his own words, there was "nothing the wits of men are more busy and divided upon." He like many of his co-religionists had suffered imprisonment for conscience sake. The printed account of his trial (6 Howell's State Trials 951) is a faithful picture of the administration of justice in the principal criminal court of London during the period of the Restoration. When we read those stirring pages we can understand the hatred and suspicion with which the courts were regarded by the colonists and their exaggerated faith in trial by jury. This hatred had a marked influence on the development of our courts, was instrumental in checking the growth of chancery jurisdiction for several generations and was the primary cause of that jealousy of the judiciary which was long a feature of local politics.

But Penn, while aware of the unsatisfactory condi-

tions of public life in his time, was not a republican; he was a believer in men rather than in methods. In his preface to the frame of government he says:

"When all is said, there is hardly one frame of government in the world so ill designed by its first founders, that in good hands would not do well enough; and story tells us, the best in ill ones can do nothing that is great or good; witness the Jewish and Roman states. Governments, like clocks, go from the motion men give them, and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men, than men upon governments. Let men be good, and the government cannot be bad; if it be ill, they will cure it. But if men be bad, let the government be never so good, they will endeavor to warp and spoil to their turn."

The principal features of his first system were the governor; the elective provincial council, charged with execution of the laws, and also with the proposing of new laws to the general assembly; and the general assembly, also elected by the freemen of the province, who should meet yearly and accept or reject the laws prepared and proposed by the council. The governor and council were to erect such courts as they should judge convenient. It was not always easy to get the right men to assume the onerous duties of justices, as the minutes of the council clearly show, but when chosen, the commissions were issued in the name of the proprietor and signed by the lieutenant governor for the time being. It will be seen that the courts played but a subordinate part in the constitutional system. Indeed the conception of the judiciary as a co-ordinate branch of the government was as yet unrealized; balanced constitutions were the final products of the eighteenth century, the seventeenth was concerned with the fundamental liberties and privileges of the subject, embodied in the series of petitions and bills of rights. These rights, as applied in the administration of justice, are embodied in the "Laws agreed upon in England," and published with the frame of government. It is therein declared:

"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 com-

plaint 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.

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.

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.

That all fees in all cases shall be moderate, and settled by the Provincial Council and General Assembly, and be hung up in a table in every respective court; and whosoever shall be convicted of taking more, shall pay two-fold, and be dismissed his employment, one moiety of which shall go to the party wronged."

After a "prosperous passage of about two months," Penn arrived before New Castle on the twenty seventh of October, 1682, and received livery of seisin of the territory from John Moll, Esq. and Ephraim Harman, the attorneys of the Duke of York appointed for that purpose. One of his first acts, after taking possession, was to commission six justices of the peace for New Castle and to send out notices for the holding of a court. At this court, which was attended by several of the council, as well as the justices, Penn delivered an address stating his purpose to call an assembly and recommending the magistrates, in the interim, to follow the laws of the Duke of York for the province of New York. Before the end of the year the province of Pennsylvania was divided into three counties, Philadelphia, Bucks and Chester (which replaced Upland), and the lower territories into three also, New Castle, as before, while of the two counties into which the Whorekills had been divided, Deal became Sussex and St. Jones, Kent. The county courts continued, practically, as already constituted, and for some time the board of justices, therein assembled, exercised most of the functions of local government. The number of justices in any county varied from time to time with

the pressure of business, the willingness or ability of those chosen to perform their duties or the favor of the council. Sometimes a man of prominence was commissioned as justice for the whole province.

Under the Duke of York's laws the attendance of the justices was enforced by a fine of ten pounds for every day's absence, and there are entries of such fines in the records of the courts of Upland and New Castle, and under the Act of May 10, 1685 (ch. 176) the same policy was continued, but the fine reduced to thirty shillings. When possible the justices were assisted by the presence of the governor, members of the council or judges of the provincial court, after its establishment, all of whom were ex officio of the commission of the peace. In the minutes of the court of Bucks County it is noted that on the 4th and 11th day, 1 mo. 1683, the Governor, William Penn, was present and held an orphans' court. The county courts with their vague and indefinite jurisdiction in civil and criminal causes and county affairs would seem to have been regarded with favor by Penn, who was adverse to complicated procedure, hence at the first assembly held at Chester, December 7, 1682, there is little said of the courts in the "Great Body of Laws" then adopted, although most important modifications of the common law were therein enacted both as to persons and property.

At the session, in March, 1683, it was enacted that in every precinct three persons should yearly be chosen as common peace makers, to whom differences might be submitted for arbitration and whose findings should be as conclusive as those of the county court. In the minutes of the provincial council, 7th 9 mo. 1683, will be found a case "referred to the peace makers and in case of refusal to the County Court." Voluntary arbitration was then an accepted and popular method of settling disputes in England, particularly in cases involving merchants' accounts, enforced by bond conditioned to submit to the award, and arbitration, by rule of court, was adopted by statute 9 & 10 William III ch. 15. The

office of peace maker, however, seems to have survived only until 1692 when the assembly decided that the law was not in practice. Arbitration was always a popular method of settling disputes and beginning with the Act of January 12, 1705 (II Stat. at Large 242), a law for reference by rule of court in the spirit of the Statute of William III, there is a long series of acts perfecting this method of disposing of litigation. The early dockets of our common pleas courts are full of rules for references.

At the session of 1683 it was also enacted that the first process in every suit should be the exhibition of a complaint *fourteen* days before trial, that the defendant should be summoned *ten* days before trial and furnished with a copy of the complaint, which was required to be delivered to him at his dwelling house. The jurisdiction of the county courts was also more clearly defined.

"That all actions of debt, Accompt, or Slander, and all actions of Tresspass, 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 Judgment 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."

It cannot be said that the early laws were uniformly put into practice; indeed an atmosphere of uncertainty surrounds all of the legislation prior to the second visit of Penn to America. In 1693, when Penn's government was suspended and Governor Fletcher of New York was in charge, an investigation was made by the latter and the rolls of the laws found in confusion and not passed under the great seal, nor is there any certain evidence that they were transmitted to the Privy Council for approval, as required by the charter, although Deputy Governor Lloyd stated that he knew that Mr. Penn had delivered some at least to the council. However that may be, it is certain that in their more general provisions these laws were recognized and observed, but the

unsettled political conditions, brought about partly by the absence of the proprietor after 1684 and the English revolution of 1688, led to confirmations, re-enactments and repetitions of statutes in varying phraseology, which must have caused confusion, particularly as the laws were not at this time allowed to be printed, manuscript copies being filed in the county courts with the president or clerk.

The county courts were vested with criminal jurisdiction in all except such important crimes as treason, murder and manslaughter and, after 1693, burglary, rape and arson. At times, however, a special commission of oyer and terminer was issued to some of the justices to try a special offender or to clear the jail. The offences for which indictments were most frequently found and trials had were for drunkenness, larceny, profanity, assault and battery and breach of the peace, offences against morality, "selling rum to the Indians," speaking disrespectfully of the magistrates and breaking the Sabbath. In the lower counties there are occasional arrests on suspicion of piracy and smuggling. The following entry in the Chester county court records carries a faint echo from Monmouth's Rebellion.

"Ordered that the sheriff take into his custody the body of David Lewis upon suspicion of treason, as also the body of Robert Cloud for concealing the same; for that he the said Robert Cloud being attested before this court, declared that upon the 3d day of the weeke before Christmas last at the house of George Foreham, the said David Lewis did declare in his hearing that he was accused for being concerned with the Duke of Monmouth in the West Country."

On the civil side the practice at this period did not differ materially from that under the Duke of York, although there is a gradual improvement in the forms and methods of procedure, as the courts acquired experience or became better informed as to their duties through the importation of law books into the province. Although without legal training, the justices lived in a time when a knowledge of the rudiments of the law and the ordinary forms was essential to a gentleman, or merchant of importance, and a copy of Dalton's Justices

with the Acts of Assembly would meet most of the requirements of a rustic community. Some at least of the justices were drawn from the same class as supplied the quarter sessions in the rural districts of England.

A difficulty seems to have confronted them in properly upholding the dignity of the courts. A rule of the Philadelphia county court for 1686, after reciting that many disorders had been committed in the courts of this county, partly through ignorance and partly through negligence of otherwise well meaning persons, goes on to order "that plaintiffs, defendants, and all other persons speak directly to the point in question; and that they put their pleas in writing (this being a court of record) and that they forbear reflections and recriminations either on the court, jury or on one another; under penalty of a fine."

In the trial of cases the procedure was characteristically simple. If the plaintiff failed to serve his process he was non-suited; if the defendant failed to appear judgment was entered against him. If both parties were present the defendant was called on for his answer, which could set up any defence legal or equitable or claim a set off. The law required the pleadings to be short and in English. The parties would sometimes leave the case to the bench without a jury, particularly in the lower counties, but if a jury was called, it now consisted invariably of twelve men. After verdict judgment was entered and the practice survived for some time of entering judgments in kind—perhaps reaching a climax in an entry of judgment for "one thousand of six-penny nails, and three bottles of rum."

As to process of execution, we know little except that the proceedings would seem rather summary. An order of council was passed in 1686 "that there should be tenn days respite between judgment and grant of execution in all Civill Causes between man and man, In all Courts within this Province and territory." To this the Assembly in 1687 made strenuous objection and urged that the order be revoked, whereupon the coun-

cil decided to leave the matter to the discretion of the courts. There are recorded several petitions to the council for relief against executions on judgments entered by default and others for relief against vexatious and oppressive executions. In one of these a widow complains that judgment having been obtained against the estate of her deceased husband, the sheriff had levied on the plantation where she and her children dwelt, although there was sufficient property elsewhere to satisfy the debt. The council sent for the sheriff and told him that if there were other effects of the decedent he ought not to levy on the plantation where the widow and children lived. In other cases relief seems to have been given on account of the poverty of the defendant, a practice that would pave the way for the debtor's exemption law.

In criminal cases the sentences were usually limited to fines, whippings or the stocks. Sentences to terms of imprisonment were rare; the colony could ill afford to spare the labors of any individual, however depraved, and still less was it inclined to support him in idleness. Penn's incarceration in Newgate had familiarized him with the evils of prison life and he expressly ordained that prisons should be workhouses. Such prisons as were built at this time were neither particularly commodious nor strong. In 1688 the council found it necessary to reprimand the sheriff of Sussex for permitting a dangerous prisoner to be at large. The prisoner magnanimously sent word to the council that he would yield himself up rather than "ye sheriff should suffer." A similar reprimand was administered to the sheriff of Philadelphia for permitting two prisoners suspected of piracy to go at large.

By the Act of 1683 the justices of the county courts were required to sit twice a 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."

The name as well as the original purpose of this court was derived from the court maintained by the corporation of London, which, by immemorial custom, had charge of the estates of orphans of freemen of the city. The practice and jurisdiction of the court differed from that of its prototype but was not distinctly settled at this time and we find the provincial council taking cognizance of matters that subsequently were assigned to this tribunal or to the register's court, such as the appointment of administrators, and sale of land for debts.

Prior to 1684 there existed in the province no tribunal having cognizance of appeals other than the provincial council, which, in some degree, supplied the place of the general court of assizes under the Duke of York's laws. As the colony grew, the ever increasing number of appeals took up more and more of the council's time and made this duty exceedingly burdensome, not to speak of the inconvenience to the suitors in travelling to Philadelphia with their witnesses for a hearing *de novo*. To remedy this inconvenience the Act of May 3, 1684 (Charter & Laws, p. 168) was passed, which provided that there should be five provincial judges, appointed by the governor, any three of whom should form the provincial court and sit twice a year in Philadelphia, while two of them should every spring and fall go on circuit into every county and there hold court. The court was to hear and determine all appeals from inferior courts and all causes, criminal and civil, not determinable in the county courts. In 1685 the number of judges was reduced to three, but the original number was restored by the Acts of 1690 and 1693. A commission was accordingly issued by Penn (4th, 6 mo. 1684) to five judges, of whom Nicholas Moore was named first, the commission to be in force for two years. The law did not fix any definite period for service and the commissions were drawn for various periods. In one instance it is noted in the minutes of the council that the commission is to continue "only for this present court." Jealousies quickly arose as to the geographical apportionment of the judges and in

1687 the Assembly requested that at least one of the judges be named from the lower counties. In 1690 the appointment of the judges caused a split in the council, the members from the lower counties objecting to the naming of but one judge from the territories and also demanding that, according to what they stated was the proprietor's example, two commissions issue, one for the province and one for the counties, so that each would have a chief justice from their own district. Unable to prevail on their colleagues, the members from the lower counties held a separate meeting and drew up commis sions to suit themselves. The keeper of the great seal, however, refused to seal these commissions and at a regular meeting of the council, subsequently held, the action of these members was denounced as irregular and annulled. This was the first open manifestation of the dissatisfaction of the territories with the union with Pennsylvania, which continually increased until a separate government was obtained.

The provincial court did not at once command or obtain the respect and influence due to the chief judicial tribunal of the colony. It was founded in the most trying times, when political dissensions among the leading colonists and war and revolution in England distracted the province. The terms of office were irregular, the compensation wholly inadequate and the journeys on circuit tedious and even dangerous. It is not to be wondered at that it was difficult to induce properly qualified men to accept a place on the bench and that nominees for that honor sought excuses to decline the office. No traces of the records and opinions of the court at this time have come down to us. It is doubtful if their duties at first compelled them to grapple with legal problems with a view to the value of their decisions as precedents. The correction of errors arising on issues of fact and the trial of the more serious crimes probably made up the bulk of the business. As time went on the court strengthened its position, and appeals to the council became less and less frequent, until in

the early eighteenth century the two bodies, executive and judicial, assumed their normal functions.

It is sad to relate that Nicholas Moore, the first chief justice of the provincial court, was impeached by the Assembly within a year after the creation of the court. Moore was President of the Society of Free Traders and a large purchaser of land from Penn. Although not a Quaker he immediately obtained a position of influence, was elected to the Assembly and was Speaker in 1684. While capable and energetic he lacked tact and discretion and assumed an arrogant and imperious tone which had offended his fellow members of the Assembly and gave still greater offence after his elevation to the bench. In the minutes of the Assembly there are numerous instances of his interruptions and protests during the consideration of bills. It was reported to the council, during the session of 1684, that the Speaker had said: "The proposed laws were cursed laws" and "hang it Damn them all." The principal complaints against his conduct on the bench seem to have come from the lower counties. Ten formidable articles of impeachment were presented, among which were the following:

"The said Nich. More, 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 of a Jury, after ye said Persons was Lawfully attested to ye True Tryall of ye Cause, thereby rending 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.

"The said Nich. More, Sitting in judgmt, did in ye towne of New Castle refuse a verdict brought in by a Lawfull Jury, and by Divers threats & Menaces, and Threatening ye jury with ye fame of Perjury and crim of their Estates, forced ye said Jury to goe out so often-until they had brought a Direct Contrary verdict to the first, There, by preventing justice, and wounding the Libertyes of ye free people of this Province and Territories in the Tenderest point of their Privielege, and violently Usurping over ye Consciences of the Jury.

"The said Nich. More assuming to himselfe an Unlimited and unlawful Power, did, Sitting in Judgmt at ye aforesaid Towne of New Castle, wherin two persons stood Charged in a Civil action, it being in its own Nature only Trover & Convertion, and ye pretended Indictmt raised it no higher, notwithstanding the said Moore did give the judgmt of fellony, Comending the Defendant to be Publickly Whipt, & Each to be fined to pay three fould, thereby Tyranizeing

over the persons, Estates and reputations of the people of this Province and Territories, Contrary to Law and Reason.

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

A committee of five was appointed to manage the impeachment, one of whom was Abraham Mann, whom we have previously seen engaged in the prosecution of Justice Moll before the court of assizes in New York. The council showed little disposition to further this impeachment but treated the accusers with due civility and fixed a time for the hearing. Moore, however, was by no means inclined to submit tamely to the proceedings, and in the house, of which he was still a member, accused Abraham Mann of being "a person of seditious spirit," in which he was probably right. The house, however, expelled Moore and proceeded to collect evidence for the prosecution. They met with a decided obstacle in the conduct of Patrick Robinson, clerk of the court, who declined to produce the records of the court, declaring that they were "written in Latin where one word stood for a sentence, and in unintelligible characters which no person could read but himself, no, not an angel from Heaven." But this did not end his offences; he declared the articles of impeachment were drawn "hob nob at a venture" and threatened to "have at" the Speaker when he was "out of the chair." The house issued a warrant for his arrest and requested the council to remove him from office. From the hearing on the impeachment Moore contemptuously absented himself, but the evidence was thought sufficiently grave by the council to suspend the judge from his official functions until the matter was finally decided. The council showed every disposition to treat Moore with leniency, although it had been testified that he had called the members thereof "fools and loggerheads, and said it were well if all the laws had drapt and that it would never be good

Times as Long as ye Quakers had the administration." Knowing the proprietor's predilection for Moore the house addressed a letter to Penn on the subject, a quotation from the last paragraph of which shows that in spite of their quarrels and jealousies they still regarded him with affection.

"Dear and honored Sir, the honor of God, the love of your person, and the preservation of the peace and welfare of the government, were, we hope, the only centre 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 Moore, 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 all the freemen we represent, Your obedient and faithful freemen.

JOHN WHITE, Speaker."

By one excuse after another the council prevented further proceedings in the impeachment until the matter was lost sight of in the more important and perplexing affairs of state which soon required attention.

The provincial council, although not strictly a court, for a long time exercised judicial functions and, through the fortunate preservation of its minutes, is by far the best known of the early tribunals. The exercise of judicial functions by the governor and council was strictly in accordance with the custom in other proprietary colonies.

The extraordinary growth of the province, the long absences of the proprietor in England and the large measure of self government which the citizens enjoyed, threw upon the council an amount of executive business which made judicial duties particularly onerous, and we find numbers of petitions and appeals referred back to the courts.

Aside from their judicial duties the governor and council, as an executive body, appointed the judges and magistrates, regulated commerce, conducted negotiations with the Indians and the other colonies, subdivided counties, laid out towns, established fairs and markets, ordained the principal highways, bridges and ferries, and exercised a general supervision over local administration. As a legislative body, they

drew up all the laws, prior to 1693, when that right was assumed by the Assembly, being finally confirmed to that body by the second frame of government. By that instrument also, the council lost its direct judicial functions.

During the first twenty years of its existence the amount of judicial business transacted in the council was very large; prior to the establishment of the provincial court it was the only general tribunal and was looked upon not only as the court for hearing appeals but also as a court of first instance for such suitors as could obtain a hearing before it. This, of course, was natural at the first settlement, as a matter of practical necessity. We therefore find in the early part of the minutes trials for petty offences and the collection of small debts; in fact at the fifth meeting of the council we find one of its own members fined five shillings "for being disordered in Drink." The council seems to have exercised its good offices in composing differences. In 1684 there is the following entry:

"Andrew Johnson Pl. Hance Peterson Deft. There being a difference depending between them, the Govr. & Council advised them to shake hands and forgive One another. And Ordered that they should Enter in bonds for fifty pounds apiece, for their good abearance; which accordingly they did. It was also Ordered that the Records of Court concerning that Business should be burnt."

There are other cases where the council would seem to have acted more as a final board of arbitration than as judges in the strict sense.

Prior to the establishment of the provincial court in 1684, the council heard all appeals, and although after that time such appeals were discouraged, they nevertheless continued to be brought before the council for some years. Beside regular appeals, there were numerous petitions for executive clemency, complaints against severe sentences in criminal cases and, in civil cases, petitions for relief against judgments entered by default and against executions which bore too severely on the debtor. In one early case of an appeal from the

county court of Philadelphia, when it was shown to the council that the case concerned the title to land in Bucks County, when the law required cases to be tried where the cause of action arose, the council remitted the case to the court of Bucks County and fined the Philadelphia court "forty pounds for giving judgment against law."

The council was also the only court for the trial of important crimes until 1685 when that jurisdiction was conferred on the provincial court. The only important cases of this kind were those of the Proprietor against Pickering for counterfeiting and against Margaret Mattson for witchcraft, both of which are reprinted from the minutes in Pennypacker's Colonial Cases pp. 32, 35. The latter case is peculiarly interesting as illustrating the superstition of the times and in its outcome was most creditable to the common sense of Penn and the jury. The accusation against the woman was that she had bewitched the witness's cattle, but the evidence was mostly hearsay, as the defendant herself cleverly pointed out. The verdict of the jury was "Guilty of having the Common fame of a witch, but not guilty in manner and form as shee stands indicted." The defendant was permitted to go, on entering bond for good behavior. The fear of witchcraft did not disappear for some time in Pennsylvania. In 1695 the grand jury of Chester County presented "Robert Roman of Chichester for practising Geomacy according to Hidon and Divining by a Stick." The accused submitted to the court, was fined five pounds and ordered "never to practice the arts" but behave himself well, which he promised. His books "Hidon's Temple of Wisdom, Scot's Discovery of Witchcraft and Cornelias Agrippa's Necromancy" were ordered to be brought into court. Another accusation of witchcraft was brought to the attention of the council in 1701 but dismissed as trifling.

The jurisdiction of the council in admiralty matters was a source of much trouble to them. There are numerous cases in the minutes relating to seamen's wages, pilots' fees, violations of the navigation laws and com-

plaints against masters for ill treatment of passengers. An example of the last is the case of *March* v. *Kilner*, Pennypacker's Colonial Cases 29. The proprietor was, by his charter, personally charged with the duty of seeing to the enforcement of the English Navigation Acts and that fines and duties were imposed and collected according to that complicated, and, as the colonists thought, burdensome system. These functions fell to the lot of the council and many were the complaints to the home government of their indifference and laxity in these matters. Indeed Penn was obliged to write to them in 1697 urging the enforcement of the laws and stating that it had been reported to him "that you doe not onlie wink at but Imbrace pirats, shipps and men." The council indignantly denied this accusation.

Nevertheless the records of the time are full of references to piracy, and Pennsylvania was reported to have "become ye greatest refuge & Shelter for pirats & Rogues in America." Undoubtedly the "pirats and rogues" took advantage of the mild temper and humanity of the Quaker justices. In 1698 the town of Lewes was plundered by pirates, a woeful account of which is contained in a letter from the local justices to Lt. Gov. Markam, and in 1700 it was reported to Penn that the great Captain Kidd was lying off Cape Henlopen and trading with some of the inhabitants.

To deal with such matters, a court of Vice Admiralty was established, by the Crown, for Pennsylvania and the territories in 1697, of which Colonel Robert Quarry was appointed judge. Quarry was a former Governor of South Carolina, a vain and quarrelsome person who disliked the Quakers and was bitterly opposed to the proprietary system of government. Almost immediately after his appointment his court came into conflict with the county court of Philadelphia. Certain goods having been seized by the king's collector of customs under a warrant issued by Col. Quarry, a judge of the county court at the instance of David Lloyd, a lawyer and member of the council, granted a writ of replevin under

which they were taken from the collector. Quarry was exceedingly indignant at this and complained to the governor and council, who made such apologies as they could, handed over the replevin bond to him, and reprimanded the judge, who tendered his resignation. David Lloyd, however, was as obstinate and hotheaded as Quarry himself. At the succeeding county court he brought an action against the marshal for the detaining of the goods. In the words of Quarry.

"Ye marshall being called to defend the sute, hee produced in his owne 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 Comission 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 & reflecting expressions on his matie to ye like effect."

For this and other insults to the Court of Admiralty, Penn and the other members suspended Lloyd from the council, and he from that time became a bitter opponent of the proprietor.

It must not be supposed that either the provincial court or the council, in its judicial capacity, was a court of last resort. Under the charter the right was reserved to the king to hear and determine appeals from all judgments given in the province, and until the revolution there was no court of last resort in Pennsylvania. While the right to such appeals to England was unquestioned, the difficulty and expense of prosecuting them was such as to render them infrequent. In 1685 there is a minute of an appeal to England allowed by the provincial court upon entry of security, but it would seem that the appellant failed to enter security as required.

With the adoption of the second frame of government, or charter of privileges of 1701, the government of the province assumed a form that it was to retain until the revolution. The power of proposing and enacting laws

passed to the assembly and the council ceased to exercise judicial powers. More important still, the council ceased to be an elected body and was thereafter appointed by the proprietor or in his absence by his lieutenant governor. The effect of this was to throw into the assembly the abler spirits of the opposition and greatly strengthen that body, while the council, chosen from among the friends of the governor or proprietor, was thereafter regarded as representing the proprietary interests rather than those of the populace.

One humble court has not been referred to, that of the Coroner. The following is a specimen of a verdict taken in 1699 in Chester County:

"We whose names are underwritten, summoned and attested by the Coroner to view the body of Sarah Baker, haveing made strict enquiry, and alsoe had what evidence could be found, attested to what they know, and wee can find noe other but that it pleased Almighty God to visit her with death by the force of Thunder; and to this we all unanimously agree."

Who will say that this is not quite equal in intelligence to such verdicts at the present time?

WILLIAM H. LOYD, JR.

NOTE. The subject of equity jurisdiction has been intentionally omitted, it being intended to treat that subject separately. For the Courts between 1682 and 1700 special reference must be made to the very interesting essay of Lawrence Lewis, Jr., Esq., entitled "The Constitution, Jurisdiction and Practice of the Courts of Pennsylvania in the Seventeenth Century," read before the Historical Society of Pennsylvania March 14, 1881.