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Date Due

THE COURTS OF NEW JERSEY

Their Origin, Composition and Jurisdiction

By WILLIAM M. CLEVENGER III

OF THE ATLANTIC COUNTY BAR

ALSO

Some Account of their Origin and Jurisdiction

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PREFACES.

The need of a concise and systematic account of the origin, composition and jurisdiction of the several courts of the State of New Jersey prompted the compiler in 1895 to print in the *New Jersey Law Journal* a series of articles based upon notes made while he was a clerk in a lawyer's office. The suggestion made in 1902 by the Board of Examiners for admission to the Bar that students should refer to these articles is the excuse for the present publication in book form. Some changes have been made in the text by reason of the fact that the County court act has been declared unconstitutional.

W. M. C.

Atlantic City, N. J., May, 1903.

The account of the origin and history of the Courts of New Jersey, which follows the matter prepared by Mr. Clevenger, was written for the most part as a series of articles in the *New Jersey Law Journal* in 1894 and 1895. It was intended chiefly for the use of law students and the purpose was to show how the numerous courts referred to in our constitution and statutes came to exist, and in a general way what their functions are, and by what means and to what extent the jurisdiction and powers of the English Courts devolved upon the various courts of New Jersey. Much of this information is furnished in Judge Field's scholarly discourse upon the "Provincial Courts of New Jersey," read before the New Jersey Historical Society in 1848, but this has been long out of print. Other facts have been gathered by an examination of the Colonial statutes in "Leaming and Spicer," of the records of the Ordinances of the Provincial Governors and of the early statutes of the State.

E. Q. K.

Newark, N. J., May, 1903.

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SOME ACCOUNT OF THEIR ORIGIN AND JURISDICTION.

THE COURTS OF NEW JERSEY.

The history of the respective courts, their origin and jurisdiction, are spread throughout the Law and Equity Reports of our state. More particular information may be found in Field's Provincial Courts; a series of articles in the New Jersey Law Journal, commencing with Volume 17, No. 5, and continued at irregular intervals, and now reproduced in connection herewith; Leaming & Spicer's Grants and Concessions; Griffith's Law Register, Volume 4, and an article in Nixon's Digest (4th ed.), 1069.

For the purpose of this sketch the New Jersey courts will be classed as follows:

Courts, { **Civil.** { **Common Law.** / **Equity.** / **Probate.**
Criminal.

COURTS WITH CIVIL JURISDICTION.

I. Common Law.
II. Equity.
III. Probate.

I. COURTS WITH COMMON LAW JURISDICTION.

1. Justice's Court.
2. The Small Cause Court.
3. Police Court.
4. Court of two Justices of the Peace.
5. Court of three Justices of the Peace.
6. District Court.
7. Court of Quarter Sessions.
8. Court of Common Pleas.
9. Circuit Court.
10. Supreme Court of Judicature.
11. Court of Errors and Appeals in the Last Resort in all Causes.

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1. JUSTICE'S COURT.

Composition.

Justice of the peace.

Terms.

No specified terms.

Jurisdiction.

The jurisdiction of this court is purely original. The justices of the peace are given civil powers under various statutes to hold a court for the recovery of penalties, etc. For example, oleomargarine act, 1 G. S. 1166, sec. 13.

Origin.

See Justice's Court under head of Courts with Criminal Jurisdiction. This civil jurisdiction, however, is entirely statutory, and perhaps cannot be exercised in cities where there is a District Court. P. L. 1898, p. 564, sec. 31; P. L. 1902, p. 501, sec. 8.

Appeals.

An appeal lies from this court to the Court of Quarter Sessions; or if there is no jurisdiction then *certiorari* lies to either the Supreme or Circuit Court. 1 G. S. 369, sec. 11. The revision of the *certiorari* act seems to deprive the Circuit Court of the jurisdiction in *certiorari* matters. P. L. 1903, p. 343. Can this be done?

An attempt was made to give an appeal to the District Court by P. L. 1882, p. 138, but the Supreme Court in Evernham v. Hulit, 45 N. J. L. (16 Vr.) 53, declared the act unconstitutional in so far as it applied to this court, as the object was not expressed in its title.

All violations of city ordinances cognizable before this court are reviewable in the Supreme Court by *certiorari* only. P. L. 1895, pp, 296 and 764; Stokes v. Schlacter, 66 N. J. L. (37 Vr.) 247. The re-enactment of this act seems to have been to change the word "of" before "city boards" in the title to "or." It seems, however, that the defendant is given the right to have his case reviewed by having the proceedings *certified* to the Court of Common Pleas. P. L. 1898, p. 534. Is this constitutional? See Flanagan v. Plainfield, 44 N. J. L. (15 Vr.) 118 and McCullough v. Circuit Court of Essex Co., 34 Atl. Rep. 1072.

A like power is given to Justices of the Supreme Court. 1 G. S. 1206, sec. 43.

Notes.

By State v. Newton, reported in 50 N. J. L. (21 Vr.) 549, and State v. Neptune City, reported in 28 Atlantic Reporter 378, it will be seen that the courts do not approve of the disassociation of the civil powers of a justice, so far as they are given outside of the Small Cause Act, from those given to them by that act. See Chief Justice Beasley's dissenting opinion, however, in State v. Newton, 51 N. J. L. (22 Vr.) 553.

The mayors, aldermen and recorders of some cities of the state are given, by charter, and also by general laws, the powers of a justice of the peace, and hold a court that is practically the same as the Justice's Court. From their judgment an appeal lies to the city council, Court of Common Pleas or Court of Quarter Sessions as the case may be. Recorders have power to appoint a justice of the peace to hold their court during absence or sickness.

2. THE SMALL CAUSE COURT.

Composition.

Justice of the peace.

Terms.

No specified terms.

Jurisdiction.

The jurisdiction of this court is purely original. It has cognizance over every suit of a civil nature at law where the debt, balance or other matter in dispute does not exceed, exclusive of costs, the sum of $200; except actions of replevin, slander, trespass for assault, battery or imprisonment, or any action where the title of any lands, tenements, hereditaments or other real estate shall or may in any wise come in question. P. L. 1903, p. 251, sec. 1.

It has jurisdiction in attachment for any sum not exceeding $200; P. L. 1888, p. 38.

Jurisdiction for recovery of penalties is specifically given by certain statutes to this court.

In all cities where there is a District Court, the Justice has no civil jurisdiction as a Court for the Trial of Small Causes, P. L. 1898, p. 564, sec. 31; P. L. 1902, p. 501, sec. 8; Hankins v. Berrian, 62 N. J. L. (33 Vr.) 180; State v. Walker, Ibid 631, nor over the defendant who lives in a city where such a court exists. P. L. 1903, p. 251, sec. 1.

Origin.

In 1675, ten years after the first settlement in this state, a court called "Monthly Court of Small Causes," was constituted in East New Jersey; this was presided over by a justice of the peace and two other persons; they had jurisdiction to the amount of 40 sh. In West New Jersey in 1681 a Court of Three Justices or Commissioners, empowered to hear all causes, was established, but later, in 1685, a single justice was given like jurisdiction. Up until the year 1798 the jurisdiction and the names of the court were changed several times. In that year, however, an act was passed which, with amendments, comprises the law of to-day regulating the Court for the Trial of Small Causes. The court is now called The Small Cause Court. P. L. 1903, p. 251, sec. 1.

Appeals.

An appeal lies from this court to the Court of Common Pleas where a trial *de novo* is had, P. L. 1903, p. 276, secs. 80-84; or if there is no jurisdiction a writ of *certiorari* may be taken either to the Supreme or the Circuit Court, 1 G. S. 369, sec. 11; P. L. 1903, p. 279, sec. 93; P. L. 1903, p. 343, or an appeal to the Court of Common Pleas. Ritter v. Kunkle, 39 N. J. L. (10 Vr.) 259-264.

All violations of city ordinances, cognizable before this court, are reviewable in the Supreme Court by *certiorari* only. P. L. 1895, pp. 296 and 764; Stokes v. Schlacter, 66 N. J. L. (37 Vr.) 247. But also see P. L. 1898, p. 534.

Notes.

Jurisdiction is never given to this court by implication. For history see Honeyman's Practice and Precedents, (Ed. 1892), Ch. 1.

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3. POLICE COURT.

Composition.

Police justice, or a justice of the peace appointed by him. Honeyman's P. and P. 688, par. 1075 (Ed. 1892).

Terms.

No specified terms, although in most cities it is held daily.

Jurisdiction.

The jurisdiction of this court is purely original. Every police justice is empowered to hold a Court for the Trial of Civil Causes arising under the city ordinances for the recovery of a fine or penalty.

Origin.

See Police Court under head of Courts with Criminal Jurisdiction.

Appeals.

An appeal from this court lies either to the Court of Common Pleas or Court of Quarter Sessions as the statute may provide; or, if there is no jurisdiction, *certiorari* will lie either to Supreme or Circuit Court. 1 G. S. 369, sec. 11. But see P. L. 1903, p. 343.

All violations of city ordinances, cognizable before this court, are reviewable in the Supreme Court by *certiorari* only. P. L. 1895, pp. 296 and 764, and Stokes v. Schlacter, 66 N. J. L. (37 Vr.) 247. But also see method of review by *certifying* record to Court of Common Pleas, P. L. 1898, p. 534.

Appeals in contempt cases are to the Supreme Court only. 2 G. S. 2600, sec. 381.

An attempt was made to give an appeal to the District Court, P. L. 1882, p. 138, but the Supreme Court, in Evernham v. Hulit, 45 N. J. L. (16 Vr.) 53, declared the act unconstitutional in so far as it applied to this court, as the object was not expressed in its title, and the new District Court act makes no provision for such an appeal.

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4. COURT OF TWO JUSTICES OF THE PEACE.

Composition.

Two justices of the peace.

Terms.

No specified terms.

Jurisdiction.

The jurisdiction of this court is purely original, and that which is of a civil nature is derived from the statutes; for example, see Landlord and Tenant Act, 2 G. S. 1918, sec. 10 *et seq.;* Poor Act, 2 G. S. 2508, secs. 17, 20 and 23.

Origin.

Statutory.

Appeal.

The appeals from this court depend entirely upon the statute that gives it jurisdiction. In the case of the Landlord and Tenant Act, there is no remedy by appeal or *certiorari*, but an action of trespass may be instituted against the landlord under the terms of the statute; on the other hand under the Poor Act, an appeal lies to the Court of Quarter Sessions.

5. COURT OF THREE JUSTICES OF THE PEACE.

Composition.

Three justices of the peace.

Terms.

No specified terms.

Jurisdiction.

The jurisdiction of this court is purely original. The justices take cognizance where disputes arise between master and apprentice and master and servant, in case the same cannot be settled by one justice of the peace. 1 G. S. 66, sec. 5.

Origin.

Statutory.

Appeals.

An appeal lies to the Court of Quarter Sessions, 1 G. S. 66, sec. 5; but no *certiorari* will lie either to this court or the Court of Quarter Sessions, 1 G. S. 67, sec. 10, unless the proceedings are not in accordance with the act, Tallman v. Woodward, 2 N. J. L. (1 Penn.) 258, or a failure of jurisdiction is shown.

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6. DISTRICT COURT.

Composition.

Judge, or the court may be presided over by the judge of any other District Court, or by any judge of the Court of Common Pleas, whenever requested so to do. P. L. 1898, p. 560, sec. 19.

Terms.

This court is held daily in most cities.

Jurisdiction.

The jurisdiction of this court is only original since the revision of 1898. The territorial jurisdiction is co-extensive with the limits of the county wherein the city is situate. P. L. 1898, p. 564, sec. 29. Within the limits of the city, no justice of the peace or Court for the Trial of

Small Causes shall have any jurisdiction over any cause or proceeding cognizable before a District Court, where the defendant or defendants reside within the limits of any city. P. L. 1898, p. 564, sec. 31; Hankins v. Berrian, 62 N. J. L. (33 Vr.) 180; Thompson v. Walker, Ibid, p. 631. The District Court takes cognizance of every suit of a civil nature at law, or to recover any penalty imposed or authorized by any law of this state where the debt, balance, penalty, damage or other matter in dispute does not exceed, exclusive of costs, the sum of $300. The court also has jurisdiction in proceedings between landlords and tenants and in actions of forcible entry and detainer, as well as in replevin and attachment cases. P. L. 1898, p. 564, sec. 30. It will be noticed that the original act provided that the jurisdiction of this court should not extend to any action wherein the title to any lands and real estate shall come in question; but in amending section 30, the Legislature omitted this restriction. P. L. 1902, p. 368. As to the question of the constitutionality of that section of the act which makes the jurisdiction of the District Court exclusive, reference is made to the case of Payne v. Mahon, 44 N. J. L. (15 Vr.) 213. The practice in this court may be found by an examination of McCarter's District Court Practice.

Origin.

It being desirable that the large cities of this state should have city courts presided over by a lawyer, which courts were to have civil jurisdiction the same as the Court for the Trial of Small Causes, an act was accordingly passed in 1873, constituting District Courts for the city of Newark. These proving satisfactory, in the year 1877, a general statute was enacted, which from time to time was amended, and now, under the revision of 1898, two District Courts exist in all cities having 100,000 inhabitants or over, and one District Court exists in all cities between 20,000 and 100,000 inhabitants. P. L. 1898, p. 556, sec. 1.

Appeals.

An appeal in contempt cases lies only to the Supreme Court. 2 G. S. 2600, sec. 381. Since the revision of 1898 there is no appeal on factual questions, although an attempt was made to give an appeal on questions of law to

the Circuit Court. P. L. 1898, p. 630, sec. 205 *et seq.* This was declared to be unconstitutional. Green v. Heritage, 64 N. J. L. (35 Vr.) 567 reversing Reilly v. 2nd District Court of Newark, 63 N. J. L. (34 Vr.) 541. This destroyed, therefore, the method of appeal provided by the act, so the Supreme Court from that time on exercised its common law right of review by means of a writ of *certiorari.* Stier v. Koster, 66 N. J. L. (37 Vr.) 155; Smart v. North Hudson Co. Railway Company, Ibid. 156.

Later, however, a method of appeal was provided to the Supreme Court, which, in effect, seems to be nothing more or less than the writ of *certiorari* under a new name. This appeal, so called, however, must be taken within ten days, and a bond must be given. P. L. 1902, p. 565. It may be questionable whether this act is effective to deprive a litigant of his remedy by *certiorari* in case he chooses to refrain for more than ten days to take the appeal provided thereby. All violations of city ordinances cognizable before this court, are reviewable by *certiorari* only to the Supreme Court. P. L. 1895, pp. 296 and 764; and Stokes v. Schlacter, 66 N. J. L. (37 Vr.) 247; but also see method of review by *certifying* record to Court of Common Pleas. P. L. 1898, p. 534.

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7. COURT OF QUARTER SESSIONS.

Composition.

See Court of Quarter Sessions under Courts with Criminal Jurisdiction.

Terms.

See Court of Quarter Sessions under Courts with Criminal Jurisdiction.

Jurisdiction.

The jurisdiction of this court from a civil standpoint is purely appellate. Under the common law this court had no civil original jurisdiction. By statute it hears appeals from proceedings in the Court of Three Justices of the Peace, Court of Two Justices of the Peace, Justice's Court (Civil) and Police Court (Civil). For example see Poor Act, 2 G. S. 2509, secs. 24 and 25.

Origin.

See Court of Quarter Sessions under Courts with Criminal Jurisdiction. Under the common law this court had no civil jurisdiction whatever, and what has been given it, is derived solely from statutes.

Appeals.

No appeal by way of *certiorari* lies from this court to the Supreme Court in apprentice cases, except when the court has no jurisdiction. 1 G. S. 67, sec. 10. See Tallman v. Woodward, 2 N. J. L. (1 Penn.) 258. Appeals in contempt cases are to the Supreme Court only. 2 G. S. 2600, sec. 381.

It may be said generally, that in all cases where the court has no jurisdiction, the proper remedy is *certiorari* to the Supreme Court.

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8. COURT OF COMMON PLEAS.

Composition.

This court shall consist of one judge specially appointed, who shall be called the president judge, and the Justice of the Supreme Court holding the Circuit Court within the county, shall be ex-officio judge of said court, and either of the said judges may hold this court. P. L. 1900, p. 332, sec. 1. The justices of the Supreme Court shall be ex officio judges of this court, and the justice holding the Circuit, when present, shall preside. P. L. 1900, p. 356, sec. 33. Formerly this court consisted of three judges, all of whom, for a long period, were laymen, and, later on, one of whom was a lawyer termed a law judge. These lay judges were afterwards abolished. Kenny v. Hudspeth, 59 N. J. L. (30 Vr.) 320; P. L. 1896, p. 149. The year previous an attempt was made to consolidate all the county courts, and to have the same presided over by one judge. P. L. 1895, p. 323. The act, however, was declared to be unconstitutional, Schalk v. Wrightson, 58 N. J. L. (29 Vr.) 50, and was afterwards repealed. P. L. 1896, p. 236. A Court of Common Pleas judge of another county may hold this court. P. L. 1900, p. 333, sec. 7. This court was always known as the Inferior Court of Common Pleas, but in 1900 it was changed as above. P. L. 1900, p. 332, sec. 1.

Terms.

There shall be three stated terms at the times and places prescribed by the Supreme Court, pursuant to law. P. L. 1901, p. 399. The court has authority, at any stated term, to order and appoint a special term. P. L. 1900, p. 333, sec. 6.

Jurisdiction.

The jurisdiction of this court is of a peculiar nature, having a general, original jurisdiction given by the ordinance constituting the early New Jersey courts, and by acts of the Legislature; also an appellant jurisdiction given by the statutes constituting the Small Cause Court. P. L. 1903, p. 276, sec. 80. It is also given authority to try Supreme Court issues. P. L. 1903, p. 591, sec. 208.

1. ORIGINAL JURISDICTION.

(a) In general: held to have unlimited original jurisdiction at common law in all personal actions where the freehold does not come into question. Ordinance A, 6 N. J. L. (1 Hals.) Appdx. 584. Recorded in Book C of Commissions, No. 2, pp. 57-60, and dated April 29th, 1723. This jurisdiction lately seems to have been somewhat exemplified. P. L. 1900, p. 332, sec. 4.

(b) Statutory: On petition of at least twelve freeholders within the limits of any town or village, this court may change the name of the said town or village. 3 G. S. 3738, sec. 120.

Any person residing in any county of this state may petition this court for an order authorizing the assumption of another name. 2 G. S. 2258, sec. 7.

It has exclusive jurisdiction in all cases concerning roads, insolvency and wrecks. 3 G. S. 2828, sec. 119; 2 G. S. 1728, sec. 6; 3 G. S. 3764, sec. 1.

A writ of *scire facias* may be issued out of this court for the sale of mortgaged premises, when there are no other person or persons necessarily interested than the mortgagor or mortgagors and the mortgagee; and when the said lands are subject to one mortgage only. 2 G. S. 2103, sec. 4.

Has jurisdiction in attachments against absent and absconding debtors. P. L. 1901, p. 158.

This court shall constitute a court of exemptions to hear and determine applications for exemption to military duty. P. L. 1900, p. 463, sec. 161.

May license pawnbrokers. 2 G. S. 2444, sec. 1.

If a constable neglects or refuses to execute a tax warrant, he may be sued for the amount of the tax in this court. 3 G. S. 3285, sec. 23.

Aliens are naturalized in this division. R. S. of U. S. (Ed. '78) 378, sec. 2165; P. L. 1895, p. 693, sec. 1.

May grant liquor licenses. 2 G. S. 1788, sec. 1.

2. APPELLATE JURISDICTION.

Statutory: The appellate jurisdiction of this court is to be particularly noticed in this, that it is a court of appeal from The Small Cause Court, and, upon an appeal being taken, the case is removed entirely from the hands of the justice of the peace, and a trial *de novo* is had. P. L. 1903, p. 276, secs. 80-90. Formerly a like appeal in certain cases was also given from the District Court to this court; but since the Revision of 1898 this has been abolished. This court is given an appeal under the meadow act. 2 G. S. 2039, sec. 77; 2 G. S. 2044, sec. 97. Various appeals are given to this court from inferior courts by virtue of the statute. The defendant in all cases of violation of city ordinances, or ordinances of city Boards of Health, is given the right to have the proceedings *certified* to this court for review. P. L. 1898, p. 534. But read McCullough v. Circuit Court of Essex Co., 34 Atl. Rep. 1072.

Origin.

The origin of this court seems to have been the County courts or Court of Sessions in East New Jersey, and the Court of Three Justices or Commissioners in West New Jersey. The Court of Common Pleas itself was established by the ordinance of Lord Cornbury in 1704 (Field's Prov. Cts., Appdx. C). In this, it is ordained "that there shall be kept and holden a Court of Common Pleas in each respective county within this province." This court was to be held in each county at the same place where the Court of General Sessions was usually held, and to begin immediately after the end of the sessions of the peace, and to continue as long as there was any business not exceeding, however, three days.

The court had power to try all matters triable at common law. This declaration was repeated by Governor Hunter in his ordinance of April 17th, 1714, (Field's Prov. Cts., Appdx. D) and the court was confirmed and established by the ordinance of April 29th, 1723, Book C of Commissions, No. 2, pp. 57-60, and Ordinance A, 6 N. J. L. (1 Halst.) Appdx. 584, which forms the constitution of our whole judicial system.

While the ordinance of April 29th, 1723, (Book C of Commissions, No. 2, pp. 57-60) was followed and repealed by the ordinance of April 23rd, 1724, (Field's Prov. Cts., Appdx. E), one of August 21st, 1725, (Field's Prov. Cts., Appdx. F), another of February 10th, 1728, (Field's Prov. Cts., Appdx. G), and still another of August 1st, 1751, (Book AAA, No. 1 of Commissions, 313, and 6 N. J. L. (1 Halst.) Appdx. 590, Ordinance C), the changes seem to have been principally in the organization of the courts and the times and places of sitting. The jurisdiction of the Common Pleas remained the same as in the ordinance of 1704, except that, through the influence of the proprietors, it was restricted to matters triable at common law, excepting where the freehold came in question.

Appeals.

From the common law side of this court a writ of error lies only to the Supreme Court. Entries v. State, 47 N. J. L. (18 Vr.) 140; 2 N. J. L. J. 221; Corbin's Ct. Rules, 25; 2nd Ed., p. 29.

From the statutory and appellate side a writ of *certiorari* lies to the Supreme Court; or from appeals from The Small Cause Court a *certiorari* lies to the Circuit Court. P. L. 1903, p. 279, sec. 92.

In cases of contempt an appeal lies to the Supreme Court. 2 G. S. 2600, sec. 381.

Notes.

Licenses must be granted on the first day of the term or upon a day certain fixed on the first day, or they are void. State v. Steopel, 54 N. J. L. (25 Vr.) 486.

If actions that can be brought in The Small Cause Court are instituted in this court, on a judgment for less than $100, no costs are carried. 2 G. S. 2578, sec. 272.

This court may try cases handed down from the

Circuit Court, P. L. 1900, p. 360, sec. 48; and may certify the same into the Supreme Court for advisory opinion. P. L. 1900, p. 360, sec. 50. But this does not apply to mechanics' lien cases. Coles v. 1st Baptist Church, 20 N. J. L. J. 18.

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9. CIRCUIT COURT.

Composition.

Held in every county in the state by one or more justices of the Supreme Court. P. L. 1900, p. 351, sec. 14 and p. 352, sec. 19. It may also be held by a judge appointed for that purpose. Art. 6, sec. 5, par. 2, N. J. Const.; P. L. 1900, p. 357, sec. 39. The president judge of the Court of Common Pleas, when so requested by the justice of the Supreme Court who holds the Circuit for that district, may also sit in this court. P. L. 1900, p. 357, sec. 37; Commonwealth Roofing Co. v. Palmer Leather Co., 67 N. J. L. (38 Vr.) 566.

The fact that the Common Pleas Judge may hold the Circuit Court has been construed by some to mean that a Supreme Court issue referred to the Circuit Court for trial may be tried by the Common Pleas Judge sitting in the Circuit Court, and to that extent that the Common Pleas Judge has the same right to report the result of the trial to the Justice of the Supreme Court as the Circuit Judge. See P. L. 1900, p. 358, sec. 41, and p. 357, sec. 37.

Terms.

Three stated terms are to be holden in each of the counties of the state at the times and places fixed by the Supreme Court. P. L. 1900, p. 352, sec. 19; P. L. 1900, p. 349, sec. 2. The Chief Justice or any Justice of the Supreme Court who shall hold this court may order a special term. P. L. 1900, p. 355, sec. 30.

Jurisdiction.

The jurisdiction of this court is two fold:

(a) Original: It has concurrent jurisdiction with the Supreme Court in all cases within the county, except those of a criminal nature. Art. 6, sec. 5, par. 2, Const. of N. J.

Every writ of dower and of admeasurement of dower (but see 2 G. S. 1279, sec. 21) or of pasture shall issue out of and be made returnable to this court, or to the Supreme Court. 2 G. S. 1277, sec. 9.

Legacies may be sued for in this court. 2 G. S. 1938, sec. 1.

Has power to remove trustees in certain cases, 3 G. S. 3684, sec. 4.

The several Circuit Courts of this state are given power to hear and determine cases in which an election is contested. P. L. 1898, p. 312, sec. 162.

Any person residing in any county of this state may petition the Circuit Court of such county for an order authorizing the assumption of another name. 2 G. S. 2258, sec. 7.

Newspapers published in this state may apply to the Circuit Court of the county in which they are published for authority to change their names. 2 G. S. 2325, sec. 8.

On application of a township committee this court may appoint three commissioners to re-assess taxes. 3 G. S. 3619, sec. 225.

Any person not married, or husband with wife's consent, or wife with husband's consent, or wife and husband may petition the Orphan's Court, or this court, of the county wherein they reside to adopt any minor child or children, and also to change the name of the child. 2 G. S. 1716, sec. 22.

Mechanics' lien claims when duly filed may be enforced in this court. P. L. 1898, p. 547, sec. 23.

It is also given authority to try Supreme Court issues. P. L. 1903, p. 591, sec. 208.

(b) Appellate: Of course it is understood that this court does not possess the appellate and extraordinary jurisdiction with which the Supreme Court, as the successor of the King's Bench, was originally vested, but by statute passed before the adoption of the constitution of 1844, all judgments, orders and proceedings of justices of the peace and police justices, under any statute or ordinance, and in the Court for the Trial of Small Causes and Court of Common Pleas, on appeal from Small Cause Court, 1 G. S. 369, sec. 11, may be removed into this court by means of the writ of *certiorari*. This jurisdiction was given to the Circuit Courts before the adoption of the constitution of 1844, and does not extend to the review

of proceedings of taxing officers or of so-called city courts. See Dufford v. Decue, 31 N. J. L. (2 Vr.) 302; Flanagan v. Plainfield, 44 N. J. L. (15 Vr.) 118, yet, notwithstanding, the Legislature in 1903 seems to have undertaken to deprive this court of a part of this jurisdiction. P. L. 1903, p. 343; Ibid, p. 279, sec. 92.

All appeals from condemnation proceedings are to be taken to this court. P. L. 1900, p. 83, sec. 9.

Landlord and tenant proceedings, if of sufficient importance, on order of a Justice of the Supreme Court, may be ordered filed with the clerk of any Circuit Court of the proper county. P. L. 1903, p. 39, sec. 8.

An appeal lies to this court under the Meadow act. 2 G. S. 2048, sec. 121.

Origin.

Nisi prius sittings of the Supreme Court were established by an act passed June 6th, 1799, (Pat. Laws 394, sec. 10), or earlier, (18 N. J. L. J. 66) but the Circuit Court pure and simple as it now exists, was not established until 1838, when the practice and proceedings of the Supreme Court were extended to it, and the Circuit placed on the footing of a Court of Record. P. L. 1838, p. 61, sec. 2.

Appeals.

A writ of error lies to this court from the Court of Errors and Appeals or Supreme Court. Art. 6, sec. 5, par. 3, Const. of N. J.

In statutory and some few other cases a *certiorari* lies to the Supreme Court.

Notes.

If less than $100 be recovered, no costs are allowed the prevailing party unless he obtains, in a suit on contract, a certificate from the judge that the damages were reduced below $100 by recoupment or failure of consideration, and that he had reasonable grounds for bringing the action in this court; and in a suit for tort, a certificate that the action should have been brought in this court. 2 G. S. 2578, secs. 272-273-274.

In actions for assault, slander, libel, etc., $50 must be recovered or the plaintiff will receive no more costs than damages. 2 G. S. 2579, sec. 277.

Under statute of 1900 this court may transfer cases to the Court of Common Pleas for trial. P. L. 1900, p. 360, sec. 48; North Hudson Co. Ry. Co. v. Flanagan, 57 N. J. L. (28 Vr.) 236; Collins v. Keller, 58 N. J. L. (29 Vr.) 429.

An attempt was made to give an appeal from this court to the Supreme Court from any order made on argument on rule to show cause why a new trial should not be granted, P. L. 1890, p. 33, but this was declared unconstitutional. Falkner v. Dorland, 54 N. J. L. (25 Vr.) 409, and Railroad Co. v. Tunison, 55 N. J. L. (26 Vr.) 561. In 1885 a similar attempt was made to give an appeal from the Supreme Court and Circuit Courts to the Court of Errors and Appeals, but another act was passed in the same year repealing this so far as the Supreme Court was concerned; and the next year the Court of Errors and Appeals decided the remainder was unconstitutional. See P. L. 1885, pp. 169 and 209, 13 N. J. L. J. 127; Dodd v. Lyon, 49 N. J. L. (20 Vr.) 229.

This court has power to certify any case to the Supreme Court for its advisory opinion thereon. 2 G. S. 2574, sec. 247. See Destefano v. Calandriello, 31 Atl. Rep. 385.

This court, on the direction of the Chancellor in divorce cases, will try an issue before a jury. P. L. 1902, p. 507, sec. 18.

The Orphans' Court may certify questions involved in the filing of a *caveat* against the probate of any will, into this court for trial by jury, and if an application is made for a new trial, the judge may certify it to the Supreme Court for an advisory opinion. P. L. 1898, p. 719, sec. 18.

Exceptions to assignments for the benefit of creditors may be sent to this court for trial by jury. P. L. 1899, p. 149, sec. 7.

10. SUPREME COURT OF JUDICATURE.

Composition.

Chief Justice and eight associate justices, P. L. 1900, p. 349, sec. 1, but may be held by Chief Justice or any one associate. Ibid, sec. 7.

Terms.

At least three stated terms are to be holden annually. P. L. 1900, p. 349, sec. 2. They are now held at Trenton on the third Tuesday of February and first Tuesdays of June and November respectively. Special terms, upon two days' notice, may be called upon order of Chief Justice, and any two associate justices. P. L. 1900, p. 352, sec. 18.

This court now has power not only to fix times for holding its own courts, but also that of the Circuit, Oyer and Terminer, Common Pleas, Quarter Sessions and Orphans' Courts. P. L. 1900, p. 349, sec. 2.

Jurisdiction.

The jurisdiction of this court is two fold:

(a) Original: It has original cognizance of all actions and demands at common law, whether real, personal or mixed. In general it possesses all the common law jurisdiction of the several courts of King's Bench, Common Pleas and Exchequer in England, unless where specially restrained by the constitution. See ordinances mentioned under "Origin."

It is fully possessed of the remedial writs which belong to Westminster, such as *mandamus, prohibition, scire facias,* the several writs of *habeas corpus, quo warranto, certiorari,* etc.

Every writ of dower and of admeasurement of dower (but see 2 G. S. 1279, sec. 21) or of pasture are to issue out of and be made returnable to this court, or to the Circuit Court, of the proper county. 2 G. S. 1277, sec. 9.

Legacies may be sued for in this court, 2 G. S. 1938, sec. 1, and see also 2 G. S. 1940, sec. 15.

Has power to remove trustees in certain cases. 3 G. S. 3684, sec. 4.

Aliens may be naturalized in this court. R. S. of U. S. (Ed. 1878) 378, sec. 2165; P. L. 1895, p. 693.

A writ of *scire facias* may be issued out of this court

for the sale of mortgaged premises, when there are no other person or persons necessarily interested than the mortgagor or mortgagors and the mortgagee; and when the said lands are subject to one mortgage only. 2 G. S. 2103, sec. 4.

Sheriff's bonds shall be sued on only in this court. 3 G. S. 3112, sec. 12.

Title to lands may be perfected when deeds have been lost or destroyed. P. L. 1898, p. 694, sec. 60.

The court takes cognizance of matters of taxation on the writ of *certiorari*.

Power is given, on petition, filed within one year, to declare laws and joint resolutions inoperative and void, on the grounds that they were not duly passed and approved. 3 G. S. 3192, secs. 19-24.

The justices are given power concerning the custody and maintenance of children. P. L. 1902, p. 263, sec. 6 *et seq.*

(b) Appellate: Its power to review the proceedings of other courts comes from the same source from which it derives its original jurisdiction. A writ of error lies to the Circuit Court and to the Court of Common Pleas. All suits commenced in the Circuit Court or Court of Common Pleas, where the debt or damage exceeds $200, may be removed to this court by writ of *habeas corpus cum causa*, before issue joined. 2 G. S. 2569, sec. 222.

By means of the writ of *certiorari* it has the superintendence of all inferior courts, of all corporations in the exercise of their corporate powers, and of all public commissioners in the execution of their special authorities and public trusts. It causes their proceedings to be certified before it, in order that, upon inspection, they may be stayed, affirmed or set aside as the case may require. All proceedings before city judge, police courts, or other inferior courts for violation of city ordinances or ordinances of city boards of health are reviewable by writ of *certiorari*. P. L. 1898, p. 534. So far as this writ is applicable to military matters see Smith v. Wanser, 52 Atl. Rep. 309, and cases cited.

This jurisdiction cannot be diminished by the Legislature. Dufford v. Decue, 31 N. J. L. (2 Vr.) 302; Flanagan v. Plainfield, 44 N. J. L. (15 Vr.) 118; Flanigan v. Guggenheim Smelting Co., 63 N. J. L. (34 Vr.) 647. The act giving jurisdiction to the Circuit Court to review

the proceedings of certain inferior courts by *certiorari* was passed before the adoption of the constitution of 1844. See effect of P. L. 1903, p. 343, upon above.

The act constituting District Courts provides for an appeal to the Circuit Court; but this is nothing but a writ of *certiorari* in a new name, and the Supreme Court has declared it unconstitutional. Flanagan v. Plainfield, 44 N. J. L. (15 Vr.) 118; Green v. Heritage, 64 N. J. L. (35 Vr.) 567, reversing Reilly v. 2nd District Ct. of Newark, 63 N. J. L. (34 Vr.) 541. The Supreme Court accordingly has discretion as to whether costs will be allowed or not. Smith & Co. v. Holshauer, 52 Atl. Rep. 308.

The constitution prohibits the removal of the proceedings of any Orphans' Court by means of the writ of *certiorari*, except in cases where the court has no jurisdiction. Art. 6, sec. 4, par. 3, Const. of N. J.; and State v. Berry, 28 Atl. Rep. 668.

Origin.

Lord Cornbury, the first Royal Governor, promulgated an ordinance, in 1704, (Field's Prov. Cts., Appdx. C) which, among other things, provided for a Supreme Court. In 1714 (Field's Prov. Cts., Appdx. D), and at various times thereafter ordinances relative to this court were promulgated, until April 29, 1723, (Book AAA of Commissions, 184), when an ordinance was given the people, which to this day is the foundation of the several courts therein mentioned. As is noted under the head of "Origin" in the Court of Common Pleas, other ordinances were passed after the one of April 29, 1723, but the changes made were principally in reference to the times and places of meeting. Attention is called to the ordinance of August 1, 1751, recorded in Book AAA of Commissions, No. 1, p. 313, and printed in 18 New Jersey Law Journal, 202. The paragraph defining the jurisdiction of the Supreme Court is somewhat different from that contained in the ordinance of April 29, 1723. It reads: "We do hereby fully empower the said Supreme Court to have cognizance of, to hear, try and determine all pleas, civil, criminal and mixt, and all other actions and suits in law and equity as fully and amply, to all intents and purposes whatsoever, as all or any of our courts of King's Bench, Common Pleas, or Exchequer, in

that part of the Kingdom of Great Britain called England, have or of the right ought to have." Just at about this time the people of New Jersey were very much set against the Court of Chancery, and only five years after this ordinance was promulgated, Smith, writing of New York, said that the wheels of the court rusted on their axles, and that its practice was condemned by all gentlemen of eminence in the profession. Was it the intention of the Governor and council, by this ordinance, to give the Supreme Court the equity powers of the Court of Chancery?

Appeals.

An appeal by way of writ of error lies from this court to the Court of Errors and Appeals.

Notes.

To facilitate the business of the court, branch courts are constituted, consisting of one or more members of the court, before whom causes are argued, etc. P. L. 1900, p. 350, sec. 8.

These courts when separated are termed respectively the "Main Court," the "Branch Court," and the "Sub-Branch Court." The Chief Justice and three associates sit in the Main court, three associates sit in the Branch court, and two associates sit in the Sub-branch court.

The Main court hears all litigated causes on the call of the list, and such litigated business as may be ordered on the paper under Rule 75 of the court. Cases heard here are arguments for new trials, demurrers, cases certified, and the like.

The Branch court hears all common motions on call of the counsellor's roll. On first call unlitigated motions are heard. Rule 75. On second call litigated motions, limited to half an hour, (Rule 76) and on the third call all remaining litigated business is heard, but on third call no matter may be presented unless ten days' notice be given here and the same set down on the yellow list. These cases are heard in the order printed. Rule 76. Cases heard are *quo warranto* cases, *certiorari* matters, and all sorts of summary review. *Certiorari* cases can now be heard at chambers. P. L. 1903, p. 344, sec. 4.

The Sub-Branch sits to hear, without call, any causes

that may be brought before it by agreement of counsel. Rule 76.

The state is divided into nine judicial districts, to each of which one of the justices is assigned to hold the circuit for each county in that district for the purpose of trying all issues of fact. P. L. 1900, p. 351, secs. 13 and 14.

The justices sit in chambers at various places for the purpose of hearing common motions, allowing and hearing writs of *certiorari, habeas corpus,* etc.

If judgment be had for less than $200, the prevailing party recovers no costs, unless the title to lands comes in question, 2 G. S. 2586, sec. 319, unless he obtains certificate from the justice that the damages were reduced by recoupment or failure of consideration, and that he had reasonable grounds for bringing his action in this court, 2 G. S. 2578, sec. 273, excepting when the parties to the suit in which the amount recovered, exclusive of costs, exceeds $100 do not reside in the same county. 2 G. S. 2586, sec. 319.

Cases in this court sent down for trial to the Circuit when a jury is waived, may be tried in the Circuit Court before the Circuit Judge, by consent of the parties, either with or without a jury. P. L. 1900, p. 358, sec. 41; Newark Passenger Ry. Co. v. Kelly, 57 N. J. L. (28 Vr.) 655. It is contended by some that the President Judge of the Court of Common Pleas may hear these cases also. P. L. 1900, p. 357, sec. 37. This power is also conferred upon both the Circuit and Common Pleas by P. L. 1903, p. 591, sec. 208.

In cases of escheated land, if parties traverse the inquisition issued out of the Court of Chancery the same is handed to this court to be sent to the Circuit, where the lands are situated, for trial, before a jury. 2 G. S. 1395, sec. 3. Inquisitions in the case of lunacy, idiocy and habitual drunkenness, when privilege to traverse is *allowed* by the Chancellor, take a like course.

Cases may be certified from the Court of Common Pleas hearing Circuit Court cases, and the Circuit Courts, to this court for its opinion, P. L. 1900, p. 360, sec. 50; 2 G. S. 2574, sec. 247, and questions of law that arise in the Court of Chancery are certified to this court for its opinion. P. L. 1902, p. 537, sec. 79. Questions of fact in divorce and all other cases that arise in the Court

of Chancery are sent to this court for trial by jury. P. L. 1902, p. 537, sec. 79; p. 507, sec. 18.

The justices of the Supreme Court, or any two of them, of whom the Chief Justice shall be one, are empowered to appoint Supreme Court Commissioners. 2 G. S. 2545, sec. 66. These commissioners are empowered to take recognizances of bail, affidavits, and depositions to be used in the court, and to order judgments to be entered on bond and warrant of attorney, etc., and are required to be Counsellors at Law. They also have same right to appoint Supreme Court Examiners. P. L. 1898, p. 62. These examiners are empowered to take affidavits and depositions for use in the courts of this state, and may be Attorneys at Law or laymen.

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11. COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES.

Composition.

The Chancellor, justices of the Supreme Court and six judges specially appointed, or a major part of them. Art. 6, sec. 2, par. 1, N. J. Const. The Chancellor is president of this court; in his absence the Chief Justice; but when neither the Chancellor nor Chief Justice is present, then the senior in office of the justices of the Supreme Court, who may be present, is president. P. L. 1900, p. 344, sec. 5.

The Secretary of State is clerk. Art. 6, sec. 2, par. 4, N. J. Const.

Terms.

Three stated terms are to be holden each year at such times as shall be fixed by the court. P. L. 1900, p. 343, sec. 1. This court is now held at Trenton on the first Tuesday of March, and the third Tuesdays of June and November, respectively.

Jurisdiction.

The jurisdiction of this court is purely appellate.

The jurisdiction was given to this court by the commissions and instructions of Queen Anne on the surrender of the rights of government by the proprietors in 1702; this was confirmed by the constitution of 1776, Art. 9, and again by the constitution of 1844, Art. 6.

It takes cognizance of cases in the Court of Chancery and the Prerogative Court by appeal from interlocutory orders and final decrees and of cases in the Supreme Court and Circuit Courts by writ of error after final judgment. Errors occurring in the course of a trial at the Circuit, can only be brought before the Court of Errors and Appeals upon a bill of exceptions taken at the trial. The exception must be to some specific error in admitting or excluding evidence, or in making the charge. 3 N. J. L. J. 166-167. It will not review the judgment of the Supreme and Circuit Courts in election cases. O'Brien v. Benny, 58 N. J. L. (29 Vr.) 189.

An attempt was made to give an appeal to this court from the Circuit and Supreme Courts from any order made on argument on rule to show cause why a new trial should not be granted, P. L. 1885, p. 169, but so far as the Supreme Court was concerned this was repealed by P. L. 1885, p. 209, and so far as the Circuit Court was concerned, it was declared to be unconstitutional in Dodd v. Lyon, 49 N. J. L. (20 Vr.) 229. See also Flanigan v. Guggenheim Smelting Co., 63 N. J. L. (34 Vr.) 647.

The ancient test as to the jurisdiction of this court to review the proceedings of the lower courts by means of a writ of error has been greatly enlarged in this state. Here it performs a two-fold office, that is, all the functions of a writ of error at common law, and in addition, many of those of a *certiorari*. Eames v. Stiles, 31 N. J. L. (2 Vr.) 490.

Mr. Griffith characterizes this as an "assumption of jurisdiction," 4 Am. Law Reg. 1179.

Origin.

The origin of this court seems to have been in a tribunal, partaking of the nature of the House of Lords and Privy Council in England.

It was provided by the original instructions to the colonial government, that appeals might be had from the courts to the Governor and council. Our present constitution, however, provides for this court.

Appeals.

There is no appeal from this court.

Notes.

This court was never deliberately constituted as the

best for the purpose, but it is merely a curious relic of our early history. The Chancellor and six judges specially appointed are simply a survival of the colonial Governor and Council. The Supreme Court justices were added by the constitution of 1844. For history of the lay element in this court see 10 N. J. L. J. 57. For concise statement on practice in error, see Corbin's Supreme Court Rules, p. 25; 2nd Ed., p. 29.

II. COURTS WITH EQUITY JURISDICTION.

1. Circuit Court.
2. Court of Chancery.
3. Court of Errors and Appeals in the Last Resort in all Causes.

1. CIRCUIT COURT.

Composition.

See Circuit Court under Courts with Common Law Jurisdiction.

Terms.

See Circuit Court under Courts with Common Law Jurisdiction.

Jurisdiction.

The jurisdiction of this court is purely original. The constitution of the state provides that the Legislature may invest the Inferior Courts of Common Pleas and Circuit Courts of the counties of this state with Chancery powers, so far as the foreclosure of mortgages and the sale of mortgaged premises are concerned. Art. 4, sec. 7, par. 10, N. J. Const. By act of 1851, p. 342, the Circuit Courts were given Chancery powers in conformity with this provision of the constitution. 2 G. S. 2104, secs, 9-16.

Origin.

(As above).

Appeals.

An appeal lies to the Court of Errors and Appeals, and is taken in the same time and in the same manner as appeals from Chancery.

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2. COURT OF CHANCERY.

Composition.

The constitution of New Jersey says the Court of Chancery shall consist of a Chancellor. Art. 6, sec. 4, par. 1. (But see "Notes" *infra).*

Terms.

Three stated terms are to be holden at Trenton on the first Tuesday of February and third Tuesday of May and October, respectively. Special terms may be holden at such other times and at such place as the Chancellor shall from time to time appoint. P. L. 1902, p. 510, sec. 1.

Jurisdiction.

The jurisdiction of this court is purely original. In the early days in England the Court of Chancery was the office for the issue of common law writs, before the Chancellor began to exercise equitable jurisdiction, and the former was called the ordinary and the latter the extraordinary jurisdiction of the court. There was also a jurisdiction, which was exercised by the Chancellor as representing the King as *parens patriae,* and which may be called the delegated jurisdiction. In this state certain powers, not within any of these jurisdictions, have been conferred upon the court by statute.

1. Common Law or Ordinary Jurisdiction.

This may be said to be obsolete unless the power to issue writs of inquisition of lunacy and of escheat be referred to this.

2. Delegated.

The jurisdiction of the court over inquisition of lunacy, and over the persons and estates of infants arose out of this. State v. Baird, 19 N. J. Eq. (4 C. E. Gr.) 481.

3. Equity.

As a Court of Equity the Court of Chancery exercises jurisdiction to afford judicial relief outside of and beyond that which was afforded by the common law courts. Bisp'h. Eq. 13. Its jurisdiction was acquired for the purpose of supplying the defects of the common law, and giving redress when a wrong is done, for which there is no plain, adequate and complete remedy at law. 1 Story Eq. Jur., par. 49. It differs from the courts of common law in its mode of relief, and has a jurisdiction auxiliary to the courts of common law as well as concurrent and exclusive jurisdiction. These last arise out of the mode of relief and the subject matter. Laussat's Fonblangue Eq. 21, note.

The classification of subjects made by Mr. Maddock, and generally adopted, is as follows: 1. Accident and mistake. 2. Account. 3. Fraud, except fraud in obtaining a will, Bispham's Eq., par. 199. 4. Infants. 5. Specific performance. 6. Trusts. 1 Madd. Chan. 23. The court has power to restrain waste and prevent nuisances, to decree specific performance of agreements, to reform agreements and conveyances defective through fraud or mutual mistake, to grant injunctions, to compel discovery, to enforce trusts and to protect the separate estate of married women. It has jurisdiction over the foreclosure of mortgages, the partition of lands, the settlement of partnership affairs, and the appointment of receivers. It entertains bills of interpleader, bills of peace and *quia timet,* and bills for the recovery of legacies held in trust. 2 Bl. Com., Ch. 32.

This court has concurrent jurisdiction with the Orphans' Court in settlement of the estates of deceased persons. See Clarke v. Johnston, 10 N. J. Eq. (2 Stock.) 287 and 3 Bl. Com., p. 98.

The ordinance of Lord Bacon is in force in this state, and this court will not hear a case involving a sum less than $50, not founded on fraud, or brought to establish a right of a permanent nature. Allen v. Demarest, 41 N. J. Eq. (14 Stew.) 162; Kelaher v. English, 62 N. J. Eq. (17 Dick.) 674.

4. Statutory.

It was by statute that the court acquired jurisdiction over cases of divorce and alimony. (P. L. 1902, pp. 502-4). As to its jurisdiction concerning divorces beyond that expressly conferred by the statute, see McClurg v. Terry, 21 N. J. Eq. (6 C. E. G.) 226-228.

By statute it is given power to issue a commission in the nature of a writ *de lunatico inquirendo* to inquire whether a person be an habitual drunkard. 2 G. S. 1708, sec. 58.

It is to be noticed that the power of this court in cases of lunacy, idiocy and habitual drunkenness goes only so far as the finding upon the inquest. Certified copies of the proceedings are sent to the Orphans' Court of the county where the subject resides, and that court takes charge of the person and property. 2 G. S. 1696, sec. 1; In re Farrel, 51 N. J. Eq. (6 Dick.) 353-359.

Power is conferred on the court by statute to obtain discovery and appoint a receiver in aid of unsatisfied judgments at law, P. L. 1902, p. 534, sec. 70; Whitney v. Robbins, 17 N. J. Eq. (2 C. E. Gr.) 360; Spendthrift Trusts in N. J., 14 N. J. L. J. 166; to make a decree removing a cloud from the title to lands, which is the only

instance in which a Court of Equity will try title to lands; to order the sale of lands on proceedings for partition, P. L. 1898, p. 660, sec. 44, and for foreclosure, P. L. 1902, p. 528, sec. 53, and to order infants' lands to be sold. 2 G. S. 1712, sec. 1. Extensive powers are given by statute with respect to the property and business of insolvent corporations and voluntary associations and the appointment of receivers. P. L. 1896, p. 297, sec. 65; P. L. 1899, p. 485; Henry v. Simanton, 54 Atl. Rep. 153.

This court has power to issue writ of assistance in case of sale of lands for taxes. 3 G. S. 3354, sec. 337; In re Borough of Belmar, 53 N. J. Eq. (8 Dick.) 466. It has jurisdiction concerning the custody and maintenance of children. P. L. 1902, p. 263, secs. 6 *et seq.* (But see Rossell v. Rossell, 53 Atl. Rep. 821).

Origin.

A Court of Chancery was recognized as an essential part of the judiciary, from the first settlement of the state, although no separate tribunal seems to have been instituted in East or West New Jersey. Lord Cornbury provided by ordinance in March, 1705, (Book AAA of Commissions, p. 66; 19 N. J. Eq.(4 C. E. Gr.) 578 Appdx.) that the Governor or Lieutenant Governor and any three of the council, should constitute the court, the usage or custom of the High Court of Chancery of England to govern them; but Governor Hunter afterwards claimed the right to exercise alone the powers of Chancellor, and this was sanctioned by the King. On March 28, 1770, Governor Franklin, with the advice and consent of his council, promulgated an ordinance declaring that the Court of Chancery had always been held in the province of New Jersey, and appointed himself Chancellor and Judge of the High Court of Chancery of New Jersey, with the power to appoint and commission all proper and necessary officers. Book AB of Commissions, p. 54; 19 N. J. Eq. (4 C. E. Gr.) 580, Appdx.

The Governor is no longer Chancellor, but the Chancellor is appointed by the Governor with the advice and consent of the Senate. Art. 7, sec. 2, par. 1, N. J. Const.

Appeals.

No appeal was provided for, unless it were to the King in council, until 1799, when the Legislature enacted

that an appeal might be taken to the Court of Errors and Appeals. Pat. 434, sec. 59. See also 19 N. J. Eq. (4 C. E. Gr.) 583, Appdx.

Notes.

The court has power to direct an issue to the Supreme Court or Circuit Courts for the trial of questions of fact in proceedings for divorce or nullity. P. L. 1902, p. 507, sec. 18. In all other cases issues may be directed for the trial of questions of fact in the Supreme Court. The Chancellor may also send any matter of law to the Supreme Court for its opinion to be certified thereon. P. L. 1902, p. 537, sec. 79.

The state is divided into four districts for the trial of causes, and the six Vice-Chancellors ordinarily sit in Newark, Jersey City, Trenton and Camden, and now at Paterson for the purpose of hearing motions and trying causes. P. L. 1902, p. 542, sec. 99; P. L. 1903, p. 196. All decrees and orders must be signed by the Chancellor. The Vice-Chancellor who hears a cause merely advises that an order or decree be made. P. L. 1902, p. 541, sec. 96. On the first day of the term, the Vice-Chancellors always sit with the Chancellor in Trenton for reading opinions, and hearing the list of causes set down for the term.

To relieve the court when there is a press of business, it is lawful for the Chancellor to appoint twelve advisory masters, to whom cases may be referred for hearing. P. L. 1902, p. 544, secs. 104-108. See Rule 203.

In addition to the advisory masters, the Chancellor appoints: 3 G. S. 3142, sec. 11.

(a) Masters in chancery, to whom references are made under interlocutory orders in ordinary foreclosure cases, for stating accounts and computing damages and the like. These officers also have the power to administer oaths and affirmations, to take acknowledgments of deeds and other instruments in writing. These officers must now be counsellors at law.

(b) Special Masters in Chancery, to whom references are made in matters of a more important nature, as in cases of divorce, partition, applications for sale of lands of infants, idiots, lunatics and habitual drunkards, proceedings for ascertaining the value of dower and curtesy in moneys in court, application for surplus mon-

eys on foreclosure sales, and applications for the proceeds of sale in partition suits for payment of debts. Rule 45. These officers also approve bonds, etc., and conduct sales of lands under foreclosure, partition, and other proceedings. They are usually counsellors of the Supreme Court of at least five years standing, and each county is entitled to such number as the Chancellor shall determine.

(c) Examiners in Chancery, who have power to take examinations of witnesses, to be used on the hearing of a cause. P. L. 1902, p. 521, sec. 33.

(d) An Injunction Master, who, in case of absence or sickness of the Chancellor, is authorized to grant and dissolve injunctions. P. L. 1902, p. 539, sec. 89. This master must be a resident of Trenton. Rule 121.

The Chancellor may call to his assistance in certain cases one of the Masters in Chancery. P. L. 1902, p. 537, sec. 80. By the revised Chancery act, the Chief Justice of the Supreme Court and his associates are relieved of a like duty impliedly imposed upon them by Rev. 123, sec. 101.

For an article on the origin of the office of Chancellor, see 7 N. J. L. J. 29. For a history of the court see Harris v. Vanderveer, 21 N. J. Eq. (6 C. E. Gr.) 424, and Jersey City v. Lembeck, 31 N. J. Eq. (4 Stew.) 255-265. For an interesting and valuable account of the jurisdiction of our Court of Chancery, see 19 N. J. Eq. (4 C. E. Gr.) 577, Appdx., and also an article by Edward Q. Keasbey, in 18 N. J. L. J. 69, and printed with this article.

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3. COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES.

Composition.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

Terms.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

Jurisdiction.

The jurisdiction of this court is purely appellate. It

hears *appeals* from all cases in the Circuit Courts in equity, 2 G. S. 2105, sec. 14, and Court of Chancery. P. L. 1902, p. 545, sec. 111. This jurisdiction was given by statute of January 17, 1799, re-enacted February 29, 1820. Pat. 434, sec. 59; Pennington 707, sec. 13.

Origin.

See Court of Errors and Appeals, under Courts with Common Law Jurisdiction.

III. COURTS WITH PROBATE JURISDICTION.

1. Surrogate's Court.
2. Orphans' Court.
3. Prerogative Court.
4. Court of Errors and Appeals in the last resort in all causes.

1. SURROGATE'S COURT.

Composition.

Held in each county by the Surrogate of that county.

Terms.

No specified terms.

Jurisdiction.

The jurisdiction of this court is purely original. The office of Surrogate is both ministerial and judicial. See Steele v. Queen, 50 Atl. Rep. 668.

(a) Ministerial: As a ministerial officer he is clerk of the Orphans' Court. P. L. 1898, p. 717, sec. 7. He shall audit and state the accounts of executors and administrators. P. L. 1898, p. 759, sec. 121. When an assignment for the benefit of creditors is made he shall accept and file the valuation of the estate, the inventory and the bond prepared by the assignee. P. L. 1899, p. 147, sec. 3.

(b) Judicial: As a judicial officer he has original jurisdiction to take the depositions to wills, admit the same to probate and grant letters testamentary thereon; except where doubts arise on the face of a will or a *caveat* is put in, or dispute arise as to its existence, P. L. 1898, p. 718, sec. 13, and also to administrations, inventories and administrators' bonds in cases of intestacy and issue thereon letters of administration, except where dispute arise as to the fairness of an inventory or the right of administration. P. L. 1898, p. 724, sec. 26.

The Surrogate has power to grant letters of guardianship. P. L. 1898, p. 728, sec. 36; Ibid, sec. 40.

He has power to make orders limiting the demands of creditors against the estate of deceased persons to the period of nine months. P. L. 1898, p. 738, sec. 67. In cases arising within the exceptions above stated, the application is certified to the Orphans' Court. *Ibid.* In the case of application for administration upon the estate of a deceased non-resident under section 29 of the said act, and an ensuing contest, the matter is determined by the Surrogate and certified to the Orphans' Court. In re Russell's Estate, 53 Atl. Rep. 169.

Origin.

When the state was in its infancy it was inconvenient, and almost impossible, for the people in all parts of the province to resort to the Governor, therefore he appointed deputies, called Surrogates, to act for him (as ordinary). These Surrogates were appointed by commissions under the seal of the province, the commissions setting out the powers given. They were, of course, removable at the pleasure of the Governor. The duties of the Surrogate are now prescribed by statute, and he is no longer appointed by the Governor, but is elected by the inhabitants of the county in which he lives. 3 G. S. 3267, sec. 1.

Appeals.

An appeal lies from this court to the Orphans' Court of the county from any order or proceeding in proving an inventory or granting letters of administration or of guardianship; also from the probating of wills. P. L. 1898, p. 793, secs. 201 and 202. In all other cases the appeal is to the Prerogative Court. P. L. 1898, p. 793, sec. 203. Where disputes arise in the inception of the application for administration, etc., the cause is *certified* into the Orphans' Court of the county. *Supra.* See In re Russell's Estate, *supra.*

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2. ORPHANS' COURT.

Composition.

The judge of the Court of Common Pleas of the respective counties of the state. P. L. 1898, p. 715, sec. 1. The justices of the Supreme Court are judges ex officio, and the justice holding the Circuit, and in his absence the president judge of the Court of Common Pleas is the presiding judge. *Ibid.* P. L. 1900, p. 356, sec. 33. The Surrogate is clerk of this court. P. L. 1898, p. 717, sec. 7.

Terms.

See Common Pleas Court under Courts with Common Law Jurisdiction, and also P. L. 1898, p. 717, sec. 10.

Jurisdiction.

The jurisdiction of this court is two-fold:

(a) Original: The court has power to hear all controversies respecting the existence of wills and the fairness of inventories, the right of administration and guardianship, the allowance of the accounts of executors, administrators, guardians or trustees, P. L. 1898, p. 715, sec. 2, and also all the powers formerly belonging to the ordinary with respect to the appointment of guardians for orphans under twenty-one years of age and the care of their persons and estates, but the jurisdiction does not extend to infants that are not orphans, except in cases where the infant has property. Graham v. Houghtalin, 30 N. J. L. (1 Vr.) 552; Friesner v. Symonds, 46 N. J. Eq. (1 Dick.) 521, but see Kocher's observations at p. 72 of his Orphans' Court Act.

In all cases of idiocy and lunacy of persons who have been or may be in the military, naval or marine service of the United States, their widows, children, mothers or fathers, the idiocy or lunacy may be summarily heard and determined by this court or the Prerogative Court. 2 G. S. 1702, sec. 27.

This court has jurisdiction over suits for the recovery of legacies and distributive shares where the will has been proved in the same court or before the Surrogate or a decree for distribution made in the same. P. L. 1898, p. 716, sec. 3.

It is lawful for any widow entitled to dower in lands, or for any heirs or guardians of minor child entitled to an estate in said lands, to apply to the Orphans' Court of the county in which the land is situate for the appointment of commissioners to set off her dower to her. 2 G. S. 1280, sec. 27.

Where two or more persons hold real estate as co-parceners, joint tenants, or tenants in common, one or more of whom are minors, it shall be lawful for the Orphans' Court of the county in which said lands are situate, to order and direct a division of the land between the owners in such proportions as they may be entitled to by law. P. L. 1898, p. 648, sec. 9.

Partition of an estate less than a fee in lands held by co-parceners, joint tenants or tenants in common may be had in any court having authority to make a partition. P. L. 1898, p. 653, sec. 26.

Mr. Dickinson in his Probate Practice says there is a doubt if under the old statute this court had a right to *sell* land if it were impossible to make a just partition; under section 26 of the old act it would seem that if there was to be a sale, the Court of Chancery only has jurisdiction, but this seems to have been remedied by the new act. P. L. 1898, p. 654, sec. 27.

The judgment of this court on final account of assignee in the matter of assignment for the benefit of creditors, final accounts of executors, administrators, guardians and trustees, is conclusive, except for assets which may afterwards come to hand, or for fraud or apparent errors. P. L. 1899, p. 150, sec. 9, and P. L. 1898, p. 761, sec. 127.

This court has power, on petition, to decree the adoption of minor children. P. L. 1902, p. 259, sec. 1.

Upon receipt of certified copy of proceedings in Chancery regarding lunacy, idiocy, and habitual drunkenness, this court is authorized to appoint a guardian who shall have control of the estate and person of the subject. 2 G. S. 1696, sec. 1, p. 1708, sec. 58.

Persons who are non-residents and have been declared to be idiots or lunatics according to the laws of another jurisdiction, and who may own real or personal estate in New Jersey, may have a guardian appointed by the ordinary without recourse to the Court of Chancery. 2 G. S. 1704, sec. 37; In re Devausney, 52 N. J. Eq. (7 Dick.) 502.

(b) Appellate: The Orphans' Court hears appeals from the Surrogate, P. L. 1898, p. 793, sec. 201, and cases certified therefrom. *Supra.*

Origin.

Orphans' Courts were established by statute as early as December 16th, 1784. Pat. 60, sec. 5.

The jurisdiction is borrowed from that of the Court of Orphans of London and the ecclesiastical courts of England so far as it was adapted for use in our Prerogative Court.

Notes.

This court may certify questions of fact in assignment cases into the Circuit Court for trial by jury. P. L. 1899, p. 149, sec. 7.

The Orphans' Court is not a court of common law, but a court partaking of the powers of a Court of Chancery and a Prerogative Court, instituted by law to remedy and supply the defects in the powers of Prerogative Court with regard to the accountability of executors, administrators and guardians. Kinsey, C. J., in Wood v. Tallman's exrs., 1 N. J. L. (Coxe) 153-155.

For a history of this court, see Graham v. Houghtalin, 30 N. J. L. (1 Vr.) 552; Obert v. Hammel, 18 N. J. L. (3 Harr.) 73, and particularly Coursen's case, 4 N. J. Eq. (3 Gr. Ch.) 408.

Appeals.

Appeals from this court lie to the Prerogative Court. P. L. 1898, p. 793, sec. 204; P. L. 1899, p. 158, sec. 27. Where this court has no jurisdiction, then a *certiorari* will lie to the Supreme Court. Art. 6, sec. 4, par. 3, N. J. Const. An appeal to the Prerogative Court may be taken in contempt cases. 2 G. S. 2600, secs. 381-382.

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3. PREROGATIVE COURT.

Composition.

The Chancellor is the ordinary or Surrogate General and Judge of the Prerogative Court. Art. 6, sec. 4, par. 2, Const. of N. J.

The Secretary of State is the register. Art. 6, sec. 4, par. 4, Const. of N. J.

Terms.

A Prerogative Court shall be holden at Trenton, at each stated term of the Court of Chancery, and at such other time and at such place as the ordinary shall from time to time appoint. P. L. 1900, p. 346, sec. 3.

Jurisdiction.

The jurisdiction of this court is two-fold:

(a) Original. The authority of the ordinary shall extend only to the granting of the probate of wills, letters of administration, letters of guardianship and to the hearing and determining of disputes that may arise thereon. P. L. 1900, p. 346, sec. 1.

But since 1898, after a will has been proven, or letters of administration or guardianship have been granted by the ordinary, all subsequent proceedings are to be had in the Surrogate's and Orphans' Courts of the county where, by law, such proceedings might have been had. P. L. 1898, p. 716, sec. 6. Is this restriction upon the jurisdiction of this court constitutional?

When lands and real estate are subject to wife's dower, or are owned by co-parceners, joint tenants or tenants in common, of whom one or more are minors, and are situate in two or more counties, then the Prerogative Court has sole right of setting off dower and making partition. 2 G. S. 1279, sec. 21; P. L. 1898, p. 648, sec. 9.

In case of lunacy or idiocy of persons who have been or are in the military, naval or marine service of the United States, their widows, children, mothers or fathers, said lunacy or idiocy may be summarily heard and determined by this court without costs. 2 G. S. 1702, sec. 27.

Persons who are non-residents and who have been declared to be idiots or lunatics according to the laws of another jurisdiction, and who may own real or personal estate in New Jersey, may have a guardian appointed by the ordinary without recourse to the Court of Chancery. 2 G. S. 1704, sec. 37. In re Devausney, 52 N. J. Eq. (7 Dick.) 502.

The ordinary exercises jurisdiction over orphans so far as appointing guardians over their persons and estate is concerned, and also will call such guardians to account and settlement.

It will be borne in mind that an orphan is a minor who has lost one or both of his parents, more particularly a father. The Prerogative Court has no jurisdiction over infants that are not orphans. Graham v. Houghtalin, 30 N. J. L. (1 Vr.) 552-560, except where the infant has property, *supra*.

The ordinary also has power to make family allowance in cases where a contest has arisen in any court of this state touching the probate of a will. P. L. 1895, p. 633.

(b) Appellate. This court has power to hear appeals in the matter of assignment of dower, 2 G. S. 1279, sec. 20, and in all matters where the party is not satisfied with the judgment of the Orphans' Court, P. L. 1898, p. 793, sec. 204, including order punishing contempt, 2 G. S. 2600, secs. 381-382; and hears appeal from the Surrogate's Court in all cases not provided for, P. L. 1898, p. 793, secs, 201-202; P. L. 1898, p. 793, sec. 203, and under assignment act, P. L. 1899, p. 158, sec. 27.

Origin.

The ecclesiastical jurisdiction was, in the first, reserved to the Bishop of London, excepting only "the collecting of benefices, granting licenses for marriages and the probate of wills," which were assigned to the Governor. By virtue of this grant he became the Ordinary and Metropolitan of the province, having all the powers in regard to the estate of deceased persons, which in England belonged to the courts of the Bishop and Archbishop. As judge of the Prerogative Court, which is the title of the Archbishop's Court, he has sole and exclusive jurisdiction of matters relating to wills, to administrations and guardianships. Upon the adoption of the new constitution, of course, these powers passed to the Chancellor who was declared to be the "Ordinary or Surrogate General and Judge of the Prerogative Court." It is understood that the policy of our government is against the unity of the Church and State; therefore the powers granted, other than those relating to matters of probate, lie dormant.

Appeals.

An appeal lies from this court to the Court of Errors and Appeals. P. L. 1900, p. 347, sec. 9.

Notes.

See "Jurisdiction" under Orphans' Court respecting partition. A history of this court can be found in Dickinson's Probate Practice, 1 *et seq.*, In re Coursen's will, 4 N. J. Eq. (3 Gr. Ch.) 408, and Graham v. Houghtalin, 30 N. J. L. (1 Vr.) 552.

The ordinary is assisted in his duties by one of the Vice-Chancellors assigned by him for that purpose, and who is termed and commissioned the Vice-Ordinary, P. L. 1900, p. 348, sec. 12, and in certain cases it is the duty of the Ordinary to call to his assistance one or more of the justices of the Supreme Court to sit and advise with him. P. L. 1900, p. 347, sec. 5.

4. COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES.

Composition.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

Terms.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

Jurisdiction.

The jurisdiction of this court is purely appellate. It hears *appeals* from the Prerogative Court, which appeals are to be taken within the same time and prosecuted in the same manner as appeals from the Court of Chancery. P. L. 1900, p. 347, sec. 9.

Origin.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

Notes.

Harris v. Van Derveer's Execr's., 21 N. J. Eq. (6 C. E. Gr.) 424, is the leading case as to the right of appeal from the Prerogative Court to this court. This right of appeal was first given by the Act of February 17, 1869. P. L. 1869, p. 84. The act was declared to be constitutional in the above case.

COURTS WITH CRIMINAL JURISDICTION.

COURTS WITH CRIMINAL JURISDICTION.

1. Court for the Trial of Impeachments.
2. Court of Pardons.
3. Court of Errors and Appeals in the Last Resort in all Causes.
4. Supreme Court of Judicature.
5. Court of Oyer and Terminer.
6. Court of Quarter Sessions.
7. Court of Special Quarter Sessions.
8. Court for the Trial of Juvenile Offenders.
9. Coroner's Court.
10. Police Court.
11. Justice's Court.

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1. COURT FOR THE TRIAL OF IMPEACHMENTS.

Composition.

The members of the Senate. Art. 6, sec. 3, par. 1, N. J. Const.

The Secretary of State is clerk. Art. 6, sec. 3, par. 4, N. J. Const.

Terms.

No specified terms.

Jurisdiction.

The jurisdiction of this court is purely original. The House of Assembly has the sole power of impeaching by a vote of a majority of all the members, and all impeachments are tried by the Senate. Art. 6, sec. 3, par. 1, N. J. Const. The Governor and all other officers of this state are liable to impeachment for misdemeanor in office during their continuance in office and for two years thereafter. Art. 5, sec. 11, N. J. Const. No person may be convicted without the concurrence of two-thirds of all

the members of the Senate. Art. 6, sec. 3, par. 1, N. J. Const. Judgment extends no farther than to removal from office, and disqualification to hold any office of honor, profit or trust under the state. Art. 6, sec. 3, par. 3, N. J. Const. The jurisdiction of this court is not, in express terms, defined, but it seems to be clear that its cognizance is confined to the misconduct of state officials. Per Beasley, C. J., in State, *ex rel.* Police Com'srs. of Jersey City v. Pritchard, 36 N. J. L. (7 Vr.) 101, 117.

Origin.

This court comes to us from England, where the House of Commons found the articles of impeachment, which were tried by the House of Lords. This custom was derived by the English from the constitution of the ancient German. 4 Black. Com. 259.

Appeals.

The judgment of this court is final; there is no appeal therefrom.

Notes.

On the trial of Patrick W. Connelly, a justice of the peace of this state, on March 15, 1895, Mr. Corbin, in summing up the Manager's case, said that in case the Senate found Connelly guilty, which he thought they should do from the evidence, they could do any of five things. They could suspend verdict; could suspend him from his official duties for a limited time; could remove him from office; could disqualify him from holding office forever; and could disqualify him from holding office for a limited time.

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2. COURT OF PARDONS.

Composition.

The Governor, or person administering the government, the Chancellor, and the six judges of the Court of Errors and Appeals specially appointed, or a major part of them, of whom the Governor, or person administering the government, shall be one. Art. 5, par. 10, N. J. Const.

The Secretary of State is clerk. 2 G. S. 2418, sec. 2.

Terms.

This court meets at such times and places as the Governor, or person administering the government, may direct, usually at Trenton, during the session of the Court of Errors. 2 G. S. 2418, secs. 1 to 7.

Jurisdiction.

This (so called) court is not a part of the judiciary, but belongs to the executive department. It is authorized to remit fines and forfeitures and grant pardons after conviction in all cases except impeachment; and to commute sentence of death to imprisonment at hard labor for life, or for a term of years. Art. 5, par. 10, N. J. Const. 2 G. S. 2418, sec. 3.

"The concurrence of a majority of the members of the Court of Pardons, of whom the Governor, or person administering the government, shall be one, shall be necessary to all acts of this court." 2 G. S. 2418, sec. 5.

See act of 1891, p. 426, respecting ticket-of-leave men. 2 G. S. 2419, secs, 1 to 13.

Origin.

The constitution provides for this court; the idea being, it would seem, to have a tribunal clothed with the pardoning power given the King and privy council under the common law. Read Cook v. Freeholders, 26 N. J. L. (2 Dutch.) 326.

Appeals.

The judgment of this court is final; there is no appeal therefrom.

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3. COURT OF ERRORS AND APPEALS, IN THE LAST RESORT IN ALL CAUSES.

Composition.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

Terms.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

Jurisdiction.

The jurisdiction of this court is purely appellate. It takes cognizance of all criminal matters only by writ of error to the Supreme Court, after judgment in that court; in cases where the penalty is death, the writ was formerly considered one of grace, and issued only upon the *allocatur* of the Chancellor. Corbin's Court Rules, 25; 2nd Ed., p. 29. This idea, however, was changed by the Court of Errors and Appeals in the case of Kohl v. The State, 59 N. J. L. (30 Vr.) 195. In this case the court declared the act of 1878 to be constitutional. This act is now a part of the new criminal procedure act. P. L. 1898, p. 914, sec. 134. The rules of this court governing such writs of error may be found in the promulgation of 1898. Rule 27. It would seem now to be the law that in all criminal cases punishable by death, the writ of error is one of right, and issues out of this court to the court in which the capital case was tried. Whether or not the Supreme Court in like cases has a right to review on a writ of error issued by the order of the Chancellor, is still undecided. The old rule seems to have been changed to the extent only that the appeal may be taken directly to this court, without the *allocatur* of the Chancellor, and without first having gone to the Supreme Court, in cases where the Chancellor has refused to order a writ of error. Kohl v. State, *supra;* Entries v. State, 47 N. J. L. (18 Vr.) 140; E. & A. Rule 27; Roesel v. State, 62 N. J. L. (33 Vr.) 368. The right to review rests in the state as well as in the defendant. State v. Meyer, 65 N. J. L. (36 Vr.) 233.

Origin.

See Court of Errors and Appeals under Courts with Common Law Jurisdiction.

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4. SUPREME COURT OF JUDICATURE.

Composition.

See Supreme Court under Courts with Common Law Jurisdiction.

Terms.

See Supreme Court under Courts with Common Law Jurisdiction. A special circuit of the Supreme Court for the purpose of trying any indictment for murder or manslaughter that may have been removed into this court, may be ordered by the court or any two justices in vacation. P. L. 1900, p. 350, sec. 11.

Jurisdiction.

The jurisdiction of this court is two-fold:

(*a*) *Original.* Empowered to have cognizance of all criminal pleas within the state as fully and amply as the Court of King's Bench in England (see Ordinances under "Notes"), although it does not exercise its original jurisdiction in these matters. Prior to the Revolution grand juries were summoned to appear before the Supreme Court by writ directed to the Sheriff of the county in which it sat, who inquired and made presentations and passed out indictments for offenses committed in that county. Other cases were brought there by the Attorney General or by leave of the defendant. Special writs of oyer and terminer, as in England, were issued for the trial of felonies in the different counties where considered necessary. Nixon's Dig. (4th Ed.) 1069, *et seq.*

All acts of treason against the state which are committed or done upon land out of the state or upon the sea shall be tried in this court. P. L. 1898, p. 920, sec. 157.

(b) Appellate. This court reviews the acts of other courts by means of the writs of *certiorari* and error. All writs of error to inferior courts, in criminal cases must issue out of the court, except where the crime is punishable by death, when the writ must issue out of and under the seal of the Court of Chancery, returnable to the Supreme Court, upon the *allocatur* of the Chancellor. Corbin's Ct. Rules, p. 25; 2nd Ed., p. 29. This still seems to be the law. Kohl v. State, 59 N. J. L. (30 Vr.) 195.

Into this court also indictments from inferior courts may be removed by writ of *certiorari,* and from there they are sent to the jury of the county out of which the indictment is brought, 1 G. S. 367, secs. 3-6, or returned to the court from which it was removed. P. L. 1903, p. 344, secs. 6-8.

Origin.

See Supreme Court under Courts with Common Law Jurisdiction.

Appeals.

An appeal lies from this court to the Court of Errors and Appeals by means of a writ of error.

Notes.

See Ordinance, 6 N. J. L. (1 Halst.) Appdx., p. 590; Chandler v. Monmouth Bank, 9 N. J. L. (4 Halst.) 101; Corbin's Ct. Rules, 25; 2nd Ed., p. 29, and for history, State v. Justices, etc., of Middlesex, 1 N. J. L. (Coxe) 244.

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5. COURT OF OYER AND TERMINER.

Composition.

Any justice of the Supreme Court for the time being, and the judge of the Court of Common Pleas, shall constitute this court. The Justice of the Supreme Court shall be the presiding judge, and no court shall be held without his presence. The Supreme Court Justice may hold the court alone. In counties having more than 300,000 inhabitants, the Common Pleas judge may hold the court alone. P. L. 1898, p. 867, sec. 3. State v. Taylor, 53 Atl. Rep. 392.

Terms.

This court shall be held in the several counties of the state, at the times of holding the Circuit Courts in the said county, and at any other time that the Chief Justice, or one of the Justices of the Supreme Court, shall think it necessary to appoint. P. L. 1898, p. 867, sec. 4.

Authority for holding a special term of this court is also given to the Chief Justice or any Justice of the Supreme Court who shall be holding any Circuit Court, or this court in the county. P. L. 1900, p. 355, sec. 30.

Jurisdiction.

The jurisdiction of this court is purely original. It has cognizance of all crimes and offenses of an indictable or presentable nature committed or attempted within the county in which it is holden, and to deliver the jail of such counties of the prisoners therein. P. L. 1898, p. 868, sec. 7. It is given power to fine justices of the peace or coroners who are remiss and do not take inquisitions. 1 G. S. 901, sec. 22.

Origin.

In the early history of the state, most of the criminal business was conducted in the Supreme Court; but later, special writs of Oyer and Terminer were issued for the trial of felonies in the different counties when considered necessary, and regularly for the yearly circuit courts, this being in accordance with the law and custom of England where commissions were issued to the Justices to hold the assizes, etc. Nixon's Dig. (4th Ed.) 1069, *et seq.* Formerly this court was known as the Court of Oyer and Terminer and General Gaol Delivery, but in 1898, by the codification of the criminal procedure act, the name of the court was changed to Court of Oyer and Terminer. P. L. 1898, p. 867, sec. 3. The county court act, so called, mentioned in this article as published by the New Jersey Law Journal, was declared to be unconstitutional. P. L. 1895, p. 323; Schalk v. Wrightson, 58 N. J. L. (29 Vr.) 50; Johnson v. State, 59 N. J. L. (30 Vr.) 271.

Appeals.

An appeal by way of writ of error lies only to the Supreme Court. Entries v. State, 47 N. J. L. (18 Vr.) 140; State v. Noyes, 2 N. J. L. J. 221; Corbin's Court Rules 25; 2nd Ed., p. 29. The Court of Errors has held, however, in capital cases, that under the act of 1878 a writ of error may be issued directly out of the Court of Errors and Appeals to review the judgment of this court, without the *allocatur* of the Chancellor, and without first having gone to the Supreme Court in cases where the Chancellor has refused to order a writ of error. Otherwise the rule would seem to be the same as indicated by Mr. Corbin. Kohl v. State, 59 N. J. L. (30 Vr.), p. 195; E. & A. Rule 27. The Noyes case was decided by the Court of Errors and Appeals on June 24, 1879. See also Roesel v. State, 62 N. J. L. (33 Vr.) 368.

Indictments may be removed into the Supreme Court by *certiorari*. P. L. 1903, p. 344, secs. 6-8. In contempt cases an appeal lies to the Supreme Court. 2 G. S. 2600, sec. 381.

6. COURT OF QUARTER SESSIONS.

Composition.

The judge for the time being of the Court of Common Pleas of any county shall constitute the Court of Quarter Sessions. P. L. 1898, p. 866, sec. 1. The Justices of the Supreme Court shall be ex officio Justices of this court, and the Justice holding the circuit shall preside when present. P. L. 1900, p. 356, sec. 33.

Terms.

There shall be three terms of this court, held annually at the time and places prescribed by law for the holding of the Circuit Court of the county, and also such special terms as the court from time to time shall appoint. P. L. 1901, p. 398, sec. 1.

Jurisdiction.

The jurisdiction of this court is two-fold.

Original.

The Court of Quarter Sessions, like the Court of Oyer and Terminer, has cognizance of all crimes and offenses of an indictable nature, done or attempted within the county; with the proviso that indictments for treason and murder, although found in the Quarter Sessions, must be tried in the Supreme Court or Court of Oyer and Terminer. P. L. 1898, p. 866, sec. 1.

Appellate.

This court hears appeals in bastardy cases and proceedings under the vice and immorality acts, and acts concerning disorderly persons, and various statutory criminal actions in the lower criminal courts where a constitutional right to indictment and trial by jury does not exist. See P. L. 1898, p. 948, sec. 21.

Origin.

Commissions of the peace were issued in the early history of the state just as commissions of Oyer and Terminer were. "The general court of sessions," is referred to in Lord Cornbury's ordinance of 1704. Field's Prov. Courts, app.; 17 N. J. L. J. 214. This court is very closely allied to the old Court of Common Pleas. Up

until the codification of the criminal procedure act of 1898, this court was known by the name of the Court of General Quarter Sessions of the Peace; but from that year the name was changed as above stated. P. L. 1898, p. 866, sec. 1. As above stated, the attempted consolidation of this court under the County Court Act was a failure, because of its being declared unconstitutional.

Appeals.

An appeal by way of writ of error lies from this court to the Supreme Court only. Entries v. State, 47 N. J. L. (18 Vr.) 140. Corbin's Court Rules 25; 2nd Ed., p. 29. In cases arising out of the special jurisdiction given by the statutes, a writ of *certiorari* lies to the Supreme Court. Indictments may also be removed to that court by *certiorari*. P. L. 1903, p. 344, secs. 6-8. In contempt cases an appeal lies to the Supreme Court. 2 G. S. 2600, sec. 381.

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7. COURT OF SPECIAL QUARTER SESSIONS.

Composition.

Judge for the time being, of the Court of Common Pleas. P. L. 1898, p. 870, sec. 12.

Terms.

No specified terms.

Jurisdiction.

Whenever any person shall be charged upon oath before any magistrate of a county with an offense triable before the Court of Quarter Sessions, and such person shall in writing signed by him, addressed to the Prosecutor of the Pleas, waive indictment and trial by jury, and request immediate trial without a jury, before the Court of Special Sessions, it is declared to be the duty of the Prosecutor to report such fact to the judge of this court, and unless he thinks that the public interests will be benefited by denying the request, he shall with all reasonable speed hold this court to try such person and determine and adjudge his guilt or innocence. P. L. 1898, p. 870, sec. 13.

Origin.
The origin of this court is purely statutory and originated within the past few years for the purpose of relieving the regular terms of the press of business which usually accumulated in the fall of the year. It is a specially constituted court. O'Keefe v. Moore, 60 N. J. L. (31 Vr.) 138; Kampf v. State, 30 Atl. Rep. 318.

Appeals.
The same as in the Court of Quarter Sessions.

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8. COURT FOR THE TRIAL OF JUVENILE OFFENDERS.

Composition.
The judge for the time being, of the Court of Common Pleas. P. L. 1903, p. 478, sec. 2.

Terms.
No specified terms.

Jurisdiction.
When a boy or girl under the age of sixteen years shall be arrested upon complaint of any crime (except murder or manslaughter), or of being a disorderly person, or being habitually vagrant, or being incorrigible, it shall be lawful for the magistrate before whom he or she shall be taken, to forthwith commit such boy or girl to the county jail, to await trial or to parole him to await trial, upon such conditions as the said magistrate shall determine, and forthwith to send a complaint to the court for the trial of juvenile offenders. Where two or more are jointly charged with the commission of the same crime, and one of them is over the age of sixteen years, the court has no jurisdiction. P. L. 1903, p. 477, sec. 1.

Origin.
The origin of this court is purely statutory, and is probably an outgrowth of the disposition exhibited by legislators throughout the country to treat criminals in a manner that would tend to their reform, rather than to punish them for the wrong which they have done. So far, the court in large cities seems to work very satisfactorily.

Appeals.
No appeal seems to be provided for by the court, although there would seem no doubt that a writ of *certiorari* would lie, to review any illegal act committed by the court. It is provided by the act that the delinquent shall have a right to be charged upon indictment or presentment by the grand jury, and to have a trial by jury, and if he or she so demands before trial, it is the duty of the court to order the complaint sent to the clerk of the grand jury to be dealt with according to the usual course.

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9. CORONER'S COURT.

Composition.
The coroner; and it is presumed that the Chief Justice of the Supreme Court may also hold this court as the Chief Justice of the King's Bench was, at common law, the chief coroner of the kingdom. 1 Black. Com. 346.

The duties of the coroner may be exercised by a justice of the peace or commissioner of wrecks in certain cases, 1 G. S. 897, sec. 4; p. 900, sec. 17, and also by the Sheriff, 2 G. S. 1478, sec. 11.

Terms.
No specified terms.

Jurisdiction.
The office of coroner is both ministerial and judicial, but principally judicial. His jurisdiction is purely original.

(a) Ministerial. As a ministerial officer he acts as a substitute for the Sheriff when he is interested in the suit, etc. 1 Black. Com. 349.

(b) Judicial. As a judicial officer he sits to inquire when any one dies in prison or comes to a violent, sudden or casual death, by what manner he comes to his end, and this he is only entitled to do *supra visum corporis.* 1 G. S. 1897, sec. 3; 1 Black. Com. p. 274.

Whenever it may appear by affidavit and upon the request of the officers of any insurance company that a

building has been set afire, the coroner, the sheriff or a justice of the peace is authorized to inquire of the truth of such belief as in the matter of death. 2 G. S. 1478, sec. 11.

Origin.
The office of coroner is of very ancient origin, being recognized by the common law. 1 Black. Com. 346.

Appeals.
There is no appeal; the record is sent up to the next Court of Oyer and Terminer for filing and action. 1 G. S. 899, sec. 13.

Notes.
Where there is a county physician, the coroner is not to act until requested so to do by such physician. 1 G. S. 1018, secs. 2, 3 and 5.

As to rights of a justice of the peace to act as coroner, see State v. Erickson, 40 N. J. L. (11 Vr.) 159.

The court of two justices of the peace and two police justices for the trial of petty larceny was abolished by the criminal procedure act of 1898; but the jurisdiction of criminal and police courts, under statutory authority, was preserved. P. L. 1898, p. 87, sec. 14. However, the powers of the two courts as first mentioned seems to have been preserved to the police courts in cities of the first class. 18 N. J. L. J. 268; P. L. 1895, p. 195, sec. 3.

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10. POLICE COURT.

Composition.
Any police justice or justice of the peace appointed by him. P. L. 1895, p. 197, sec. 9; Honeyman's P. & P. 688, par. 1075, (Ed. 1892).

Terms.
No specified terms; although it is held daily in most cities.

Jurisdiction.
The jurisdiction of this court is purely original. It is held by a police judge in cities of this state, as provided for by statute, and has criminal jurisdiction in the city for which the justice is appointed, the same as a justice of the peace. In cities of the first class the court has additional and enlarged powers. Honeyman's P. & P. 688, par. 1078, (Ed. 1892); P. L. 1895, p. 195, sec. 3; P. L. 1898, p. 532; P. L. 1898, p. 478.

Has an exclusive jurisdiction in bastardy cases concurrent with recorders. P. L. 1891, p. 478.

Origin.
These courts are purely statutory, and the acts constituting the same are constantly being repealed, supplemented and amended, so as to accord with the political complexion of the Legislature, although the acts passed for cities of the first class seem to have proven quite satisfactory.

Appeals.
An appeal lies to the Court of Quarter Sessions. Honeyman's P. & P. 694, par. 1091, (Ed. 1892), or by *certiorari* to the Supreme Court, or by certifying the same to Court of Common Pleas. P. L. 1898, p. 534. Is not this latter method unconstitutional? It seems nothing more nor less than a writ of *certiorari*. McCullough v. Circuit Court of Essex Co., 34 Atl. Rep. 1072.

In contempt cases an appeal lies to the Supreme Court. 2 G. S. 2600, sec. 381. See State v. Springer, 31 Atl. Rep. 215.

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11. JUSTICE'S COURT.

Composition.
Justice of the peace.

Terms.
No specified terms.

Jurisdiction.
The jurisdiction of this court is purely original; and

herein the justice performs a two-fold duty, that is, he is both a ministerial and judicial officer.

(a) Ministerial. As a ministerial officer, under the common law, he was a conservator of the peace, a high constable authorized to suppress riots and affrays. 1 Black. Com. 349.

(b) Judicial. As a judicial officer he is to take securities for the peace, apprehend and commit, or place under bail for action of the grand jury, felons and inferior criminals, or before the police court in cities of the first class. P. L. 1898, p. 478.

P. L. 1889, p. 347, gives one justice of the peace the right to hear and determine bastardy cases, but P. L. 1891, p. 478, excepts cities where there is a Recorder's or Police Court.

Under the act concerning disorderly persons he can apprehend, convict and imprison; under the tramp act power is given to commit. Powers are also delegated under the acts concerning vice and immorality, cruelty to children and forcible entry and detainer.

A justice of the peace also has a criminal jurisdiction for the recovery of penalties. It might be said here that the distinction between those penalties, that are criminal, and those that are civil, is not very clear. As an example of the criminal jurisdiction, reference is made to the Clams and Oysters Act. An aid to distinguish the difference is to keep in mind the distinction between a forfeiture annexed to a statutory crime, which follows a criminal conviction, and a penalty on common information recovered by suit at law. Honeyman's P. & P. 449, n. 1, (Ed. 1902).

Origin.

The origin of the justice of the peace is almost as ancient as the common law, for, as Blackstone says, the common law has always had a special regard and care for the conservation of the peace. 1 Black. Com. 349.

Appeals.

An appeal lies to the Court of Quarter Sessions or by *certiorari* to the Supreme Court, and by *certifying* the same to the Court of Common Pleas. P. L. 1898, p. 534. Of course so far as his duties as a magistrate to bind for the next grand jury are concerned, they are final

until passed upon by that body. State v. Springer, 31 Atl. Rep. 215.

Notes.

For history see Honeyman's P. & P., Ch. 1 (Ed. 1892), and Schroder v. Ehlers, 31 N. J. L. (2 Vr.) 44. See also 1 Black. Com. 347.

The mayors, aldermen and recorders of most cities of the state are given by charter the powers of a justice of the peace, and in those cities having recorders the power has been very much enlarged.

If the constitutional amendments proposed by the Legislature are adopted by the people of the state, what has been before written, relative to the composition and jurisdiction of the New Jersey courts, will be changed in some particulars.

1. The composition of the Court of Pardons will be the Governor or person administering the government, the Chancellor and the Attorney General or two of them, of whom the Governor or person administering the government shall be one.

The jurisdiction will be to remit fines and forfeitures and grant pardons after conviction, in all cases except impeachment. The words "to commute sentence of death to imprisonment at hard labor for life, or for a term of years," seem to have been omitted.

2. The Court of Errors and Appeals will be an independent court.

The composition will be a chief judge and four associate judges, or any four of them. In case any judge shall be disqualified to sit in any cause, or shall be unable to discharge his duties, whereby the whole number of judges shall be reduced below four, the Governor shall designate a Justice of the Supreme Court, the Chancellor, or a Vice-Chancellor to discharge such duties until the disqualification or inability shall cease. The Secretary of State still continues to be clerk of the court. The jurisdiction heretofore exercised by the Supreme Court by writ of error shall be exclusively vested in the Court of Errors and Appeals.

3. The Court of Chancery will consist not only of the Chancellor but of the Vice-Chancellors, each of whom may exercise the jurisdiction of the court.

4. As will be noted above, the Supreme Court will be deprived of its jurisdiction so far as the writ of error is concerned, and will be authorized to sit in divisions at the same or different times and places.

5. The Court of Common Pleas is made a constitutional court.

THE COURTS OF NEW JERSEY.

Some Account of Their Origin and Jurisdiction.

I. GENERAL.

One must know a good deal of legal history before he can learn even the meaning of the names of some of the courts of New Jersey, and a law student must have read his Blackstone intelligently and have asked many questions of what used to be called his preceptor, before he can begin to understand the functions of the various courts and their relations to one another.

One of the first questions a student asks is what is the meaning of all these courts, and any one who attempts to answer it will find himself giving a lecture, more or less complete, on the history of the English law and the colonial history of New Jersey. He cannot even refer the student to the constitution or the statutes for a list of the courts and a brief account of their functions. Most of the courts are older than the constitution and the statutes, and when they are referred to in these documents it is assumed that everybody knows what they are. Of the Court of Common Pleas, for example, the constitution says nothing, except that there shall not be more than five judges of this court, and that they shall be appointed by the governor with the advice and consent of the senate, and shall hold their office for a certain term. Most of the courts are named in the constitution, and there are directions as to the appointment and term of office of the judges, but there is no account of the nature or jurisdiction of any of the courts except the Circuit Courts.

For information with regard to the other courts we must go back beyond the constitution of 1776 and consult the ordinances of the colonial governors and the acts of assembly under the Proprietors. Even these will give us no clear idea of the nature of the courts, unless we have some acquaintance with the early history of the courts in the colonies and are familiar with the English courts from which our own were taken.

The courts referred to in the first constitution had already been created by ordinance or by statute. Their nature and jurisdiction were well understood, and there was no need to do more than refer to them by name. Even in the ordinances and the statutes, the name of a court familiar to the people, either in the colony or in the old country, was enough to define its character, and so we must go back to the old colonial and English law for a full understanding of the courts now organized in the state of New Jersey.

For our present purposes it is only necessary to refer to the old colonial statutes and to the ordinances by which our courts were expressly created. The English common law of the courts is, of course, familiar and is too broad a subject for discussion here. We need only say by way of a general statement that the system of courts created in New Jersey was substantially the system existing in England in the early part of the eighteenth century, and was adapted to administer the several systems of English law. There were the Supreme Court and the Court of Common Pleas, for the cognizance of civil actions at common law, and judges of Oyer and Terminer, and justices of the peace, for the hearing of criminal cases, while the Governor himself, as Chancellor, Ordinary and Vice-Admiral, administered the remedies afforded by the Court of Equity, disposed of questions relating to wills and administrations and adjudged questions within the admirality jurisdiction.

II. EARLY COLONIAL COURTS IN EAST AND WEST NEW JERSEY.

Before the appointment of a Royal Governor in 1703, the people had already formed courts for themselves under the Proprietors, and it was these courts that formed the basis of the ordinance of Lord Cornbury, under which the now existing courts were first created.

Courts were held in Monmouth county, under the patent of Governor Nichols, of New York, as early as 1667,[1] and in 1668 courts were held in Bergen and Woodbridge,[2] authorized by Governor Nichols, with power to

(1). The Discovery and Settlement of Monmouth, by Rev. A. A. Marcellus.
(2). Proc. N. J. Hist. Soc., Vol. I, p. 167; Field's Prov. Cts. of N. J., p. 6; Collections of the N. J. Historical Society, Vol. III, 1849.

try all causes that came before them. Newark held its own town courts annually, as early as 1669,[3] the verdict being by a jury of six men, and before any court was established by the Legislature the people had already chosen men to fill the office of justice of the peace, the judicial officer coming closest to the people in their old home and one that seemed necessary to the preservation of good order.

It was the justice of the peace that furnished the material for the first court created by an act of the Legislature in New Jersey. The assembly in East New Jersey created several courts in its session at Elizabethtown in November, 1675. It provided for a monthly court for the Trial of Small Causes (under 40 s.) to be held by three persons, one of whom should be a justice of the peace, in each county, and the court was given power to grant space and time for payment of judgments against poor debtors. Provision was also made for a county court to be held twice a year, in each county, the judges to be elected by the people, and it was declared "that all causes actionable shall be tried before the county court, from whence there shall be no appeal, except to the Bench or to the Court of Chancery." The same statute declared that there should be a Court of Assize, held the first day of October yearly, in the town of Woodbridge, or where the Governor and Council should appoint.[4] This seems to have been "the bench" to which an appeal might be taken from the county court, and Judge Field, in his Discourse on the Provincial Courts of New Jersey,[5] says: "This was the Supreme Court of the Province; but from it appeals would lie to the Governor and Council, and from them, in the last resort, to the King."

In 1682, on the transfer of East New Jersey to the twenty-four proprietors, the assembly divided the province into four counties for "the better governing and settling courts in the same," and proceeded to make a new organization of the courts. It was enacted that there should be one court held monthly throughout the year in every town "for the determining of small causes and cases of debt, to the value of forty shillings and under," the cases to be tried by three persons without a jury.

(3). Newark Town Records, p. 13.
(4). Acts of 1675, Ch. 6, 7, 14; Learning & Spicer, Grants and Concessions, pp. 96, 99.
(5). Field's Prov. Cts. of N. J., 8.

Secondly, there were to be courts of Sessions or County Courts, to be held every year for the trying of all cases that might be brought there, both civil and criminal, the cases to be tried by the verdict of twelve men of the neighborhood of the county, the judges to be the justices of the peace of the several counties, or three of them at least. There are existing records in Middlesex county of a county court held at Woodbridge, in 1682, and this, President Scott of Rutgers, who has made a study of our colonial history, believes to be the earliest record of the proceedings of a county court.

The statute of 1682 provided also in chapter 7 for a new kind of court called the Court of Common Right. It was given power and jurisdiction "to hear, try and determine all Matters, Causes and Cases, capital, criminal, or civil, Causes of Equity and Causes tryable at common law; in and to which said court all and every person and persons whatsoever shall and may if they see meet remove any Action or Suit, the Debt or Damages laid in such Action, or Suits, being *Five Pounds* or upwards;" and "shall or may by Warrant, Writ of Error or certiorari, remove out of any inferior Court, any Indictment, Information or Judgment there had or depending; and may correct Errors in Judgment, and reverse the same if there be any just cause for the Same; which said court shall be the Supream court of this Province; which court shall consist of Twelve members or Six, at the least." The court was to be held four times a year, and it was expressly provided that no person's right or property should be by this court determined, except in case of cognovit or default, "unless the fact be found by the verdict of twelve men of the neighborhood as it ought of right to be done by the common law." (Leaming & Spicer, p. 232).

An appeal was given from the Court of Common Right to the King, provided that the party should pay the costs of the suit and all other debts and costs recovered against him, and should give security to prosecute his suit with effect within eighteen months, or pay costs "if cast in the appeal."

This peculiar form of court was devised by the Scotch proprietors. It was framed after the model of the Scotch rather than the English courts and was given equity as well as common law powers, but in 1698 an act

was passed by the Assembly declaring that the judges of the Court of Common Right should not be "judges of the High Court of Chancery, any custom or usage to the contrary notwithstanding." An act passed in 1694 provided that actions in the county courts might be "removed after judgment by writ of error to the Court of Common Right and in cases in equity to our High Court of Chancery." (Leaming & Spicer, p. 368, and see also the earlier act limiting appeals to the Bench, or to the Court of Chancery, L. & S. p. 347).

What constituted the Court of Chancery does not appear. The word "our" is used by the Legislature in describing the court and the reference cannot be to the Court of Chancery in England, and yet it appears that when Governor Hunter began to exercise chancery powers in 1718 it was insisted that this was an undue assumption of authority.[6] This, however, may have been due to the fear of the Court of Chancery which was felt very generally in the American colonies and led to the total prohibition of the exercise of chancery powers by the courts of Massachusetts and Pennsylvania.

In West New Jersey the courts were different from those in the eastern division, and were more like the courts established in the united colony. A statute was passed in 1681 (Leaming & Spicer, p. 428), providing that "there shall be in every court three justices or commissioners at least, to sit with the twelve men of the neighborhood, and with them to hear all causes and assist the twelve men with the law, and pronounce the judgment of the twelve men in whom the judgment resides."

In 1682 it was enacted that four courts of session should be held yearly at Burlington and at Salem (Leaming & Spicer, p. 448). They had unlimited jurisdiction, civil and criminal, except in cases of a capital nature for which no provision whatever was made.

A statute of 1685 (Leaming & Spicer, p. 509) provided for Courts of Small Causes, to be held by one justice of the peace to hear causes in which the matter in dispute was under forty shillings. An appeal to the county court or Court of Sessions was allowed on giving security.

In 1693 a county court was created in the new county of Cape May, with a jurisdiction limited to twenty

(6). Whitehead's East Jersey Under the Proprietors, 167, note.

pounds, and this limit was removed in 1697. (Leaming & Spicer, p. 520).

A Court of Appeals was created by the act of 1693, ch. 6, (Leaming & Spicer, pp. 514, 553), to consist of one or more of the justices of the peace of each county with one or more of the Governor's Council.

In the same year (Leaming & Spicer, p. 517) a Court of Oyer and Terminer was created, the judge to be "named and commissionated" by the Governor, with the advice of the council, "which judge assisted by two or more justices of that county where the fact may arise," was "empowered to try such criminals as" were "under accusation for capital offences."

In the same year there was created a "Supreme Court of Appeals," (Leaming & Spicer, p. 517), consisting of one or more of the justices of each county court with one or more of the Governor's Council, any three of whom, one of whom should be of the council, should be a quorum. There was a change made in 1699 (Leaming & Spicer, p. 563); instead of the members of the council there were to be three "circular judges" to be chosen yearly by the House of Representatives. These were to sit with one or more of the justices of the peace of each county, and any two of the judges with three of the justices of the peace were to constitute a quorum. The court was now called the "Provincial Court, or Court of Appeals." It had original, as well as appellate jurisdiction, and an appeal was given to the general assembly when the matter in dispute was over twenty pounds; and from the general assembly an appeal might be taken to England, on giving proper security to prosecute the appeal with effect or pay within eighteen months the costs of the appeal.

Such were the courts established in the two divisions of New Jersey before the time when the government was surrendered to the Crown by the Proprietors, and the then existing courts formed to a large extent the basis of the judicial system organized by the royal governors. The new courts were framed more closely after the model of the English courts, but it is in the earlier courts that we find the origin of some of the peculiar features of the New Jersey system. We find in the first place the civil jurisdiction of the justice of the peace in the Court for the Trial of Small Causes. This is the earliest of all our

courts. The magistrate, a familiar judicial officer, is made the judge of the first civil court set up in the new country, and some of the rules of our present practice are found in the earliest statutes regulating this court. Secondly we find in the county courts the beginning of our common pleas, and in the provision that this court shall be held by the justices of the peace of the various towns, we have the origin of the lay judges, for until the constitution of 1844 limited the number to five, the court consisted of an indefinite number of justices of the peace and other persons of local consequence.

In West New Jersey we have the Court of Oyer and Terminer framed upon the English model like our present court, except that a special judge, instead of the judges of the Supreme Court, is appointed to hold the court. The Bench or Assize in East New Jersey and the Provincial Court of West New Jersey formed the basis of our Supreme Court, which, however, was framed more closely after the Court of King's Bench in England. In the references to the Court of Chancery we see at least a suggestion of the jurisdiction of that court, and in the appeals to the Governor and Council we find an imitation of the appeal from the Colonies to the King in council, and the origin of the present Court of Errors and Appeals, in which the Chancellor takes the place of the Governor, and the lay judges are the survivals of the council.

It remains now to show how the judicial system was reorganized by Lord Cornbury in 1704, and the Governors who followed him within the next fifty years, and then what changes were made by the constitutions and statutes since the organization of the state.

III. THE PROVINCIAL COURTS.

The courts established in the two provinces under the Proprietors were created by the people themselves either in their town meetings or by act of the Legislature, but when the government was surrendered to the crown the courts of the united province were established and regulated by ordinances of the Royal Governors and of the King.

The instructions to Lord Cornbury, dated November 16, 1702, contained no provision for any change in the

courts. The language of the forty-fifth paragraph was, "You shall not erect any court or office of judicature not before erected or established, without our special order."[7]

Such an order was given, however, in Lord Cornbury's commission dated a few days later, December 5, 1702.[8] In this the Queen said:

"And (we) do further give and grant unto you full power and authority, with the advice and consent of our said council, to erect, constitute and establish such and so many Courts of Judicature and Public Justice within our said Province under your Government, as you and they shall think fit and necessary, for the hearing and determining of all causes as well criminal as civil, according to Law and Equity, and for awarding execution thereon with all reasonable and necessary Powers, Authorities, Fees and Privileges belonging with them. * * And we do hereby authorize and empower you to constitute and appoint Judges, and in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace and other necessary Magistrates in our said Provinces for the better Administration of Justice, and putting the Laws in Execution, and to administer or cause to be administered unto them, such Oath or Oaths as are usually given for the due Execution and Performance of Offices and Places and for the clearing of Truth in judicial causes." Power was also given to pardon offenders and remit fines and penalties, except in cases of treason and murder, and in that case on extraordinary occasions to grant reprises.

With respect to admiralty jurisdiction, the Governor was given no power to try any officers or men under commission in actual service for any act committed at sea, this being reserved to the commission appointed by the King or Lord High Admiral, but officers on shore might be tried before the Governor.

(7). Smith's New Jersey, p. 230; New Jersey Archives, First Series, Vol. II., pp. 506, 520; Leaming and Spicer's Grants and Concessions.

(8). Lib. AAA Commissions, fol. 1 Burlington; Field's Provincial Courts of N. J., Collections of N. J. Historical Society, Vol. III, App. B, p. 249.

IV. THE ORDINANCE OF LORD CORNBURY.

Under the authority conferred by his commission, Lord Cornbury made an ordinance establishing courts and defining their jurisdiction, and this ordinance is the original charter of the courts of New Jersey. Other ordinances were made from time to time during the next fifty years, but they made no substantial changes, and the courts as established by these ordinances continued until the time of the Revolution, and were only slightly modified by the constitution of 1776, and the act of October 2, 1776,[9] and in 1844 the new constitution referred to and adopted the existing courts, and there were made such changes as circumstances seemed to require. It is to the ordinance of Lord Cornbury, therefore, that we must look for a definition of the nature and jurisdiction of the existing courts of New Jersey.

The ordinance cannot be found in the records at Burlington, and it is not printed in Leaming and Spicer's collection of the original Grants and Concessions. Judge Field in his lecture before the New Jersey Historical Society on the Provincial courts of New Jersey gave an interesting account of his search for this important document and said that he found it accidentally, "bound up in an old volume of Acts of Assembly, in the State Library, where it had no doubt slept undisturbed for many a year." "The name of Cornbury," he says, "in very large capitals is subscribed to it, and it purports to have been printed by William Bradford, Printer to the Queen's Most Excellent Majesty, in the City of New York, 1704."[10]

This ordinance is not dated, but Judge Field refers to it as the ordinance of 1704. There seems to have been an earlier ordinance providing temporarily for the justices courts and courts of sessions. Lord Cornbury, in a letter to the Lords of Trade, dated September 9, 1703, (N. J. Archives, Vol. III, p. 4), says he asked the gentlemen of his council what courts they had under the proprietary government, and they said their courts were never very regularly settled, and they described to him the Justice Court, the Quarterly Court and the Court of

(9). An act to confirm and establish the several courts of justice within this State. Paterson's Laws, 38.

(10). Field's Provincial Courts of New Jersey, p. 48.

Common Right, and he told them he thought a Court for the Trial of Small Causes under forty shillings might be very useful, but that he thought it ought not to be in the power of one justice alone, but rather of three, and that the judgment should be definitive, and this, he says, they approved of, "and soe it is settled till the Assembly meets when I shall use my best endeavors to prevail on them to settle it by act." And again he says: "I told them I thought the courts which sate quarterly in the province of New York were more regular than theirs, for there the quarterly courts are held in each county by a judge of the Court of Common Pleas and four justices assistants, whereof three make a quorum, and the judge of the Common Pleas or the first assistant judge always to be one. This they likewise approved of, and those courts are soe settled by an ordinance of the Governor and Council until your Lordships direct otherwise. I have appointed sheriffs and justices of the peace throughout the whole province," etc.

This must have been a temporary ordinance, for it seems to refer only to the Quarterly courts, and the ordinance found by Judge Field establishes the whole judicial system, and, moreover, it provides that small causes shall be tried before one justice, and not three, and it does not follow exactly the New York plan with respect to the Quarterly courts.

Judge Field suggests that the author of the ordinance of 1704 establishing courts of judicature was probably Roger Mompeson, a member of Lord Cornbury's Council and the first Chief Justice of the Supreme Court of New Jersey.

The existing courts of the two provinces were taken as the materials out of which the new system was arranged, and the plan of West New Jersey was followed more closely than that of the eastern province. East New Jersey had departed a little from English traditions, and had followed those of the Scotch proprietors in creating the Court of Common Right. The ordinance established the courts upon English lines, and followed substantially the plan already adopted in West New Jersey. Distinct reference was made, however, to the English courts for the purpose of defining the jurisdiction and prescribing the practice of the courts of the province. The Supreme Court of Judicature was expressly empowered to have cognizance of all pleas, "civil, criminal and mixt, as fully and amply to all intents and purposes whatsoever as the Courts of Queen's Bench, Common Pleas and Exchequer within her Majesties Kingdom of England have or ought to have." The English name of Court of Common Pleas was given to the civil side of the County Court or Court of Sessions, and the justice of the peace familiar to English law was retained with the new functions which the necessities of the colonists had required of him.

The ordinance provided first, that justices of the peace should have cognizance of civil cases of debt or trespass to the value of forty shillings, with power to determine such cases without a jury, subject to an appeal to the Justices at the next Court of Sessions in cases for over twenty shillings. Next there was established a Court of Common Pleas to be held in each county at the place where the general Court of Sessions is usually kept, to "begin immediately after the Sessions of the Peace does end and terminate." It was thus assumed rather than ordained that the judges of the Common Pleas should be the same as the judges of the sessions, and these latter had always been the justices of the peace of the county. The Court of Common Pleas was given general civil jurisdiction at common law except in cases where the title to land came in question, and there was a right of appeal or removal when the judgment is upwards of twenty pounds. The Court of General Sessions of the Peace is simply assumed to exist, and this ordinance merely directs that it shall be held in each county at a certain place on such a Tuesday in certain months four times a year. Provision was made, as we have seen, for a Supreme Court to be held at Perth Amboy and Burlington alternately twice in each year, and the general common law jurisdiction of the higher courts of England is given to it, besides the right to hear cases removed from the Common Pleas and General Sessions of the Peace. It was given original jurisdiction of suits for upwards of ten pounds, and the power "by certiorari, habeas corpus or any other lawful writ to remove out of the Courts of Sessions of the peace or Common Pleas any information, or indictment, or judgment thereon in any criminal matter, and also all civil suits or judgments for upwards of

ten pounds, or concerning the right or title to any freehold.

Process was to issue out of the office of the court at Burlington or Amboy under the teste of the Chief Justice, and one of the Justices shall once a year, if so required, go the circuit and hold and keep the Supreme Court for the several counties, "which the Justice, when he goes the circuit, shall be assisted by two or more justices of the peace during the time of the two days which the court in the circuit is sitting, and no longer."

The court was given power to make rules and orders, and it was expressly provided that no rights of property should by any of the courts be determined, except upon confession or default, "unless the fact be found by verdict of twelve men of that neighborhood, as it ought to be done by law." This, however, was, no doubt, subject to the previous provision for trial by justices without jury in cases under forty shillings.

No provision was made in this ordinance for any appeal to the Governor and his council, nor to the King, and nothing was said about a Court of Chancery. This was provided for in an ordinance of Governor Cornbury, made in 1705,[11] declaring that the Governor or Lieutenant Governor and any three of the council should constitute a Court of Chancery. It was not until some years after this that this court became of much importance. We must first follow in detail the series of ordinances relating to the common law courts, and see what changes were made in them previous to the constitution of 1776. The ordinance of 1704 is the foundation of them all, and since Judge Field's book is out of print, it may be well to furnish a copy of the ordinance here:

By His Excellency EDWARD VISCOUNT CORNBURY Capt General and Governor in Chief in and over her Majesty's Provinces of New Jersey, New York, and all the Territories and Tracts of Land depending thereon in America, and Vice Admiral of the same, &c. AN ORDINANCE FOR ESTABLISHING COURTS OF JUDICATURE.

Whereas, Her Most Sacred Majesty, Anne, by the Grace of God, Queen of England, Scotland, France and Ireland, Defender of the Faith &c., by her Royal Letters Patents, bearing date the 5th day of December, in the

(11). Book AAA of Commissions, fol. 54, Burlington; Field's Prov. Courts, p. 256.

first year of her Majesty's Reign, did among other things therein mentioned, give and grant unto his Excellency Edward Viscount Cornbury, Captain General and Governour in Chief in and over the Province of Nova-Cesarea, or New Jersey, &c., full Power and Authority, with the Advice and Consent of her Majesty's Council of the said Province, to erect, constitute, and establish such and so many courts of Judicature and publick Justice within the said Province and Territories depending thereon, as his said Excellency & Council shall think fit and necessary, for the Hearing and Determining all Causes as well Criminal as Civil, acording to Law and Equity, and for awarding Execution thereupon, with all necessary Powers, Authorities, Fees and Privileges belonging to them.

His Excellency the Governour, by and with the Advice and Consent of her Majesty's Council, and by virtue of the Powers and Authorities derived unto him by her said Majesty's Letters Patents, doth by these presents Ordain and it is hereby Ordained by the Authority aforesaid, That every Justice of the Peace that resides within any town or County within the Province is by these presents fully empowered and authorized to have Cognizance of all Causes or Cases of Debt and Trespass to the value of Forty shillings and under; which Causes or Cases of Debt and Trespasses to the value of Forty shillings or under, shall and may be Heard, Try'd and finally Determined without a Jury, by every Justice of the Peace residing as aforesaid. The process of warning for a Freeholder or inhabitant shall be by Summons under the Hand of the Justice directed to the Constable of the Town or Precinct or to any deputed by him where the party complained against does live and reside; which Summons being personally served or left at the Defendant's House or place of his abode four days before the hearing of the Plaint shall be sufficient Authority to and for the said Justice to proceed to hear such Cause or Causes, and determine the same in the Defendant's absence, and to grant Execution thereupon against the defendant's Person, or for want thereof, his Goods and Chattels which the Constable or his Deputy of that Town or Precinct shall and may serve, unless some reasonable excuse for the Parties' absence appear to the Justice. And the Process against an itinerant Person, Inmate or Foreigner shall be by

Warrant from any one Justice of the Peace, to be served by any Constable or his Deputy within that County, who shall by virtue thereof, arrest the Party and him safely keep till he be carried before the said Justice of the Peace, who shall and may immediately hear, try, and finally determine, all such Causes and Cases of Debt and Trespass, to the value of Forty Shillings, or under, by awarding Judgment and Execution; and if payment be not immediately made, the Constable is to deliver the Party to the Sheriff, who is hereby required to take him into Custody, and him safely keep till payment be made of the same, with Charges; *Always Provided*, that an Appeal to the Justices at the next Court of Sessions held for the said County, shall be allowed for any sum upwards of Twenty Shillings.

And his said Excellency, by the advice and consent aforesaid, doth by these Presents further ordain that there shall be kept and holden a Court of Common Pleas in each respective County within this Province, which shall be holden in each County at such place where the General Court of Sessions is usually held and kept, to begin immediately after the Sessions of the Peace does end and terminate, and there to hold and continue as long as there is any business, not exceeding three days.

And the several and respective courts of Pleas hereby established shall have Power and Jurisdiction to hear, try and finally determine all Action or causes of Action, and all Matters and things tryable at Common Law, of what nature or kind soever, *Provided always and it is hereby ordained* that there may be and shall be an Appeal or Removal by *Habeas Corpus*, or any other lawful Writ, of any Person or of any Action or Suit depending and of judgment or execution that shall be determined in the said respective Courts of Pleas, upwards of ten Pounds, and any Action or Suit, wherever the Right or Title of, in and to any Land or any things relating thereto shall be brought into Dispute or upon Tryal.

And it is further Ordained by the Authority aforesaid, That the General Sessions of the Peace shall be held in each respective County within this Province at the times and places hereafter mentioned, that is to say,

For the County of Middlesex, at Amboy, the third Tuesdays in February, May and August, and the fourth Tuesday in November.

For the County of Bergen, at Bergen, the first Tuesdays in February, May and August, and the second Tuesday in November.

For the County of Essex, at Newark, the second Tuesdays in February, May and August, and the third Tuesday in November.

For the County of Monmouth, at Shrewsbury, the fourth Tuesdays in February, May and August, and the first Tuesday in December.

For the County of Burlington, at Burlington, the first Tuesday in March, June and September, and the second Tuesday in December.

For the County of Gloucester, the second Tuesdays in March, June and September, and the third Tuesday in December.

For the County of Salem, at Salem, the Third Tuesdays in March, June and September, and the fourth Tuesday in December.

For the County of Cape May, at the house of Shamger Hand, the fourth Tuesdays in March, June and September, and the first Tuesday in January.

Which General Sessions of the Peace in each respective County aforesaid, shall hold and continue for any term not exceeding two days.

And be it further Ordained by the Authority aforesaid, that there shall be held and kept at the cities or towns of Perth Amboy and Burlington, alternately, a Supream Court of Judicature, which Supream Court is hereby fully empowered to have Cognizance of all Pleas, civil, criminal and mixt, as fully and amply, to all intents and purposes whatsoever, as the Courts of Queens Bench, Common Pleas and Exchequer within her Majesty's Kingdom of England, have or ought to have, in and to which Supream Court all and every person or persons whatsoever shall and may, if they see meet, commence any Action or Suit, the Debt or Damage laid in such Action or Suit, being upwards of Ten Pounds, and shall or may by Certiorari, Habeas Corpus, or any other lawful Writ, remove out of any of the respective Courts of Sessions of the Peace or Common Pleas, any Information or Indictment there depending, or Judgment thereupon

given, or to be given in any criminal matter whatsoever, cognizable before them, or any of them, as also all Actions, Pleas or Suits, real, personal or mixt, depending in any of the said Courts, and all Judgments thereupon given, or to be given, Provided always, that the action or suit depending, or judgment given, be upwards of the value of Ten Pounds, or that the action or suit there depending or determined be concerning the right or title of any Free-hold. And out of the office of which Supream Court at Amboy and Burlington all process shall issue out, under the test of the chief justice of the said Court; unto which Office all Returns shall be made. Which Supream Court shall be holden at the Cities of Amboy and Burlington alternately, at Amboy on the first Tuesday in May, and at Burlington on the first Tuesday in November, annually and every year; and each Session of the said Court shall continue for any term not exceeding five days.

And one of the Justices of the said Supream Court shall once in every year, if need shall so require, go the Circuit and hold and keep the said Supream Court, for the County of Bergen at Bergen, on the third Tuesday in April. For the County of Essex, at Newark, on the fourth Tuesday in April. For the County of Monmouth at Shrewsbury, the second Tuesday in May. For the County of Gloucester at Gloucester, the third Tuesday in May. For the County of Salem, at Salem, the fourth Tuesday in May. For the County of Cape May, At Shamger Hands, the first Tuesday in June.

Which Justice when he goes the Circuit, shall in each respective County be assisted by two, or more Justices of the Peace, during the time of two days, whilst the Court, in the Circuit, is sitting, and no longer.

And it is further Ordained by the Authority aforesaid, That all and every of the Justices and Judges of the several Courts afore mentioned, be, and are hereby sufficiently Impowered and authorized to make, ordain and establish all such Rules and Orders, for the more regular practising and proceeding in the said Courts, as fully and amply, to all intents and purposes whatsoever, as all or any of the Judges of the several Courts of Queens-Bench, Common Pleas, and Exchequer, in England legally do.

And it is further Ordained by the Authority aforesaid, That no Person's Right of Property shall be, by any of the aforesaid Courts Determined, except where matters of Fact are either acknowledged by the Parties, or Judgment confessed, or passeth by the Defendant's fault for want of Plea or Answer, unless the Fact be found by verdict of twelve men of that neighborhood, as it ought to be done by law. CORNBURY.

V. LATER ORDINANCES CONCERNING THE COURTS OF COMMON LAW.

The courts established by Lord Cornbury shortly after the two provinces were united, remained substantially unchanged until the organization of the state government in 1776. The second ordinance of which we have any record, is that of Governor Hunter, dated April 17, 1714. This made no change in the nature or jurisdiction of the courts. It was provided that the Supreme Court, instead of sitting alternately at Perth Amboy and Burlington, on the first Tuesday of May and the first Tuesday of November, shall sit every year at Burlington, on the first Tuesday of May and the first Tuesday of November, and every year at Perth Amboy on the second Tuesdays of the same months. Some changes were made in the times of meeting of the Common Pleas and General Sessions, and provision was made for holding these courts for the new counties of Somerset and Hunterdon. The court for Somerset county was to be held at Amboy with that for Middlesex, and the Hunterdon court was to be held at Maidenhead and at Hopewell, "until the court house and gaol for said county be built, and thereafter at the court house of said county only."

No mention is made in the ordinance of 1714 of the circuits to be held by the Justice of the Supreme Court, but these were no doubt continued under the practice established by the former ordinance. The only change of any importance made in the jurisdiction of the courts was a provision that the right of appeal from the decision of the Common Pleas was limited to cases involving twenty pounds, instead of ten pounds as well as to cases in which the title to lands came in question. Provision was made for a clerk and his deputy, to keep an office at Perth Amboy for the eastern division, and at Burlington for the western division, and process was to issue out of these

for each division respectively. The clause declaring that no question of fact should be determined without the verdict of a jury of twelve men was omitted.

The next ordinance was made by the King himself, with the advice of the Lords of the Privy Council in the ninth year of the reign of George I. It is entitled "An ordinance concerning Justices' Courts, County Courts for holding Pleas, and Supreme Court," and was made April 29, 1723. It is recorded in Book AAA of Commissions, p. 184, and was printed by Mr. Halsted (omitting the times and places of holding courts) as an appendix to the first volume of his reports, with the remark that it remained, so far as he was able to discover, unrepealed. 1 Hals. Rep., App. A. This was in 1823. William Griffith, in his account of the origin and jurisdiction of the courts of New Jersey, written for the Annual Law Register for 1821-2, referred to this ordinance and said it might "be considered as the foundation of the jurisdiction of the courts of New Jersey in civil and criminal cases at common law (4 Ann. Law Reg. 1169, note), and Judge Knapp, in delivering the opinion of the Supreme Court in Gray v. Bastedo, (17 Vroom 457), said that, although Lord Cornbury under his commission received power to establish courts, "the ordinance of George II *(sic)*, established in 1723, found in the appendix to 1 Halsted, has always been regarded as the direct source of the jurisdiction of this (the Common Pleas) as well as other courts in the state." Judge Field, however, in his Discourse, says that Mr. Griffith must have been unaware of the ordinances of 1704 and 1714, and shows that this ordinance of 1723 remained in force for less than one year and was superseded by another on April 23, 1724, and the place of this in turn was supplied by the ordinance of August 21, 1725, which was superseded three years afterwards by the ordinance of February 10, 1728. These three ordinances were not recorded in the Book of Commissions, but were published in pamphlets at the time of their adoption, and were reprinted by Judge Field in his discourse on the Provincial Courts. (Field's Provincial Courts, p. 49, and App. D. E. F. G.).

There is a still later ordinance which Judge Field did not refer to. This is the ordinance of August 25, 1751, which is recorded in Book AAA of Commissions,

on page 313.[12] This appears to be the last of the ordinances and the one that was in force in 1776. It was so declared by Chief Justice Ewing in Chandler v. Monmouth Bank, 4 Hals. 101 (1827). He referred to this ordinance as that "which remained in force on the second day of October 1776, when the act passed entitled 'an act to confirm and establish the several courts of justice within the state.' Pat. 38." It is a curious fact, however, that in referring to this ordinance he quoted the language of the ordinance of 1723, and not that of the ordinance of 1751. The language of the portion quoted, is for the most part the same in both ordinances, but in the latter ordinance, the Supreme Court is given power to determine not only "all pleas civil, criminal and mixt," but also "all other actions and suits in Law and Equity," as fully as the courts of Kings Bench, Common Pleas and Exchequer in England, and the Chief Justice omits this reference to suits in equity in his quotation of the ordinance. The Court of Exchequer in England had at that time general equity jurisdiction. It was a jurisdiction which it had usurped, just as it had its general common law jurisdiction, by means of the fiction that the King's revenues were in danger, but it was fully established at a very early period, and continued until October 15, 1841, when it was transferred by 5 Vict. c. 5 to the Court of Chancery, and even this statute did not take away the Equity jurisdiction of the Exchequer as a Court of Revenue. (Atty. Gen. v. Halling, 15 M. & W. 687). If such masters of the common law as Baron Parke and the other judges of the Court of Exchequer were willing to deal with questions of equity, our Colonial Supreme Court might also have given equitable relief and New Jersey would have been the first to have one court for both law and equity.

VI. THE PROVISIONS OF THESE ORDINANCES.

Beginning with the ordinance of 1723, we may now compare the provisions of the later ordinances with those of 1704 and 1714.

The provisions of the ordinance of 1723 relating to Justices' courts were for the most part the same as

(12). It is printed in 1 Hals. Rep.. App. vi, and a literal copy of it may be found in 18 N. J. Law Journal 202.

those in the earlier ordinances. Every justice of the peace within any town was empowered as before to try cases of debt and trespass of the value of forty shillings and under, and without a jury, excepting such cases where the titles of land were concerned and the appeal to the justices of the county at the General Sessions was given when the sum involved was upwards of ten shillings instead of twenty shillings. The same provision was made for a warrant of arrest in an action of debt or trespass against "an itinerant person, inmate or foreigner," and for delivering him over to the Sheriff until he should pay the judgment and charges.

The provision for the Court of Common Pleas was made more explicit than in the earlier ordinances. Those ordinances declared that there should be kept and holden a Court of Sessions in each county at such place where the General Court of Sessions was held, and general jurisdiction was given to hear all cases tryable at common law of what nature or kind soever with an appeal or removal by habeas corpus or any lawful writ on judgments for over ten, and in the second ordinance twenty pounds, and where the right or title to land came in dispute. The ordinance of 1723 directs that the court for holding pleas do continue to be held and kept in each of our respective counties, to hear and, by the verdict of a jury of twelve resident freeholders, determine any controversy arising within the county for any sum above the value of the forty shillings ("causes wherein the right and title of any lands [are] concerned, excepted"). Provision is made for the review of questions of law by the Supreme Court on special verdicts and on demurrer and to this end the clerks are directed to make up a record of the pleadings or special verdict, as the case may happen, and transmit them to the Chief Justice of the Supreme Court at the next term, and besides this there remains the provision that any suit, controversy, indictment or prosecution on which judgment has been given in any inferior court may be removed to the Supreme Court "by certiorari, habeas corpus or writ of error or any other lawful writ or method," and there was no proviso in this ordinance that the amount in dispute should be over ten or twenty pounds.

It is interesting to observe that the appeal from the judgment of a justice of the peace is given, not to the

Court of Common Pleas, but to "the justices of the same county at the next General Court of Sessions of the Peace." It was the justices of the peace of the county that held the Court of Common Pleas at that time as well as the Court of General Sessions.[13] There was no provision for the appointment of judges especially for the county courts, until, by the constitution of 1776, it was provided that they should be appointed by the council and assembly in joint meeting, and should hold office for five years. The only change made in 1844 was to limit the number of judges to five. Mr. Griffith says in 1821 that the number varied from time to time, and that in some cases there had been as many as thirty, though the average in his time was twelve or fifteen. He thought, however, that any one of the judges was competent to hold the court and execute all its judicial duties, and it has recently been decided by the Supreme Court that this is so, Gray v. Bastedo, 17 Vr. 453.

No change was made by the ordinance of 1723 in the character or jurisdiction of the Supreme Court except that its original jurisdiction is extended to all actions above the value of five pounds and that no money limit is put upon its jurisdiction on the removal of causes from inferior courts. There is no provision for any certain number of judges, and the only description of the jurisdiction of the court is the same as that in the earlier ordinances. It is "fully empowered to have cognizance of all pleas, civil, criminal and mixt within this Province as fully and amply to all intents, constructions and purposes whatsoever, as the courts of King's Bench, Common Pleas and Exchequer have or ought to have in our kingdom of Great Britain."

The ordinance of April 23, 1724, is substantially the same as that of April 29, 1723. It recites that this latter ordinance had been found inconvenient with respect to the times of the sittings of the courts and for want of persons authorized to take bail in the counties and of courts for trials in the counties of cases that were at issue

(13). Governor Hunter, writing to the Lords of Trade, June 23, 1712, says: "The judges of this court (the Common Pleas) are commonly the justices of the peace of their respective counties." New Jersey Archives, Vol. 4, p. 166.

in the Supreme Court, and the changes made relate to these subjects.[14]

The times and places of holding the courts were altered a little. Some of the county courts were begun on Mondays and Thursdays, instead of on Tuesdays, and the Supreme Court sat at Perth Amboy for five days in March and in August, and at Burlington in May and in September. The session of the Supreme Court circuit for Hunterdon county was to be held at Trent Town. Direction was given to the judges of the Supreme Court to go annually and every year (if there be occasion) into every county of the province, except Bergen and Cape May, to try cases at issue in the Supreme Court and to give judgment at the next term of the Supreme Court. Power was given to the Chief Justice with another judge of the Supreme Court to appoint commissioners to take recognizances of bail and to transmit them to the court, according to the directions of the act of William and Mary, entitled "An act for taking special bails in the country upon actions and suits depending in the courts of King's Bench, Common Pleas and Exchequer at Westminster." And this act was specially recommended to the judges and commissioners as a direction to govern themselves by. In this ordinance and this act, therefore, we have the origin of the jurisdiction of Supreme Court commissioners.

The ordinance of August 21, 1725, seems to be substantially a copy of that of April 29, 1724, except with respect to the times and places of holding courts. The Supreme Court is authorized to sit for six days, instead of five, (the earlier ordinances limited the sessions to three days).

The ordinance of February 10, 1728, makes a substantial change with reference to the organization of the Supreme Court. It recites that the sitting of the Supreme Court at Burlington and Perth Amboy alternately had, by experience, been found to be inconvenient and to occasion intricacy in the administration of justice, and

(14). The preamble refers also to a "late ordinance for establishing courts of judicature" which had been made conformable to certain acts of Assembly which were disallowed in the eighth year of the reign of George I. These statutes seem to be the same as those referred to by Governor Hunter in his letter of August 27, 1714, to the Lords of Trade, complaining the misdoings of the Practisers of Law, (there were no lawyers, he said), and the "late ordinance," therefore, was that of Governor Hunter, dated April 17, 1714. New Jersey Archives, Vol. 4, p. 196.

orders that there shall be one Supreme Court held four times a year at Burlington for the western division and one other Supreme Court held four times a year for the eastern division at Perth Amboy, and that the courts should continue for five days and should have cognizance of pleas arising in the respective divisions. There was one clerk, as before, who was directed by himself or his deputy, to keep the records at Perth Amboy and at Burlington, but the old provision that writs might be issued out of either office indifferently, was omitted. The judges, as well as the clerks of both courts, were the same, and the only effect of the ordinance was to make sure that actions arising in one province should not be tried in the other. Judge Field says that this ordinance did not remain in force for many years, and that it appears by the minutes of the Supreme Court that on May 18, 1734, a new ordinance was produced and read, but what its provisions were was not stated, and he was unable to find the ordinance itself. (Field's Prov. Courts, p. 49, note 1).

There is an ordinance dated April 8, 1742, entitled "An ordinance to lengthen the several terms of the Supreme Court of the Province of New Jersey," (Book AAA of Commissions, p. 152; 1 Hals. App. 5). This authorizes the court to sit from Tuesday until Tuesday, instead of for only five days, and it is interesting to note that Tuesday was named in nearly all the ordinances as the first day of the terms of all the courts.

The ordinance of 1751 is entitled "An ordinance respecting the Supreme Court." It is not, like the earlier one, an ordinance establishing or regulating courts of judicature in general. It recited that the times appointed for holding the Supreme Court and our annual Circuit Courts "for the trial of such causes arising in the respective counties as should be brought to issue in the Supreme Court," had been attended with divers inconveniences, and for the remedying thereof ordained that the Supreme Court should be held at Burlington on the first Tuesday in November and the second Tuesday in May, and in Perth Amboy on the third Tuesday in March and the third Tuesday in August in each year, and that they should sit until Saturday, and should then adjourn to next term, unless the judges on account of multiplicity of business should see fit to prolong this term until the next

Tuesday, and it was provided that there should be two return days in each term, the first Tuesday and the Thursday following, or such other day or days as the judges might appoint. Then follows the clause giving the court the jurisdiction of the Courts of King Bench, Common Pleas and Exchequer in the same language as in the earlier ordinances, except that after the words "all pleas, civil, criminal and mixt," there are inserted the words "and all other actions and suits in law and equity." Under this ordinance there is but one court instead of two as in 1728, but the office of the clerk shall be kept by the secretary or his deputy at Perth Amboy and at Burlington, and writs or process shall issue out of either office indifferently, only so that actions arising in either province shall be tried before a jury of that province. Provision was made as in the earlier ordinances for trials in the several counties, and it was ordained that the time and place for holding the yearly Circuit Courts in the several counties for such trials should be fixed by the judges themselves, in certain counties in September or October, and in others in April or May.[15]

VII. THE COURTS ESTABLISHED BY THESE ORDINANCES WERE ADOPTED BY THE CONSTITUTIONS OF 1776 AND 1844.

The courts of common law created by these ordinances of the reign of Queen Anne and George I and II remained the same during the half century that elapsed before the constitution was adopted in 1776. This constitution, as we have said, simply took the courts as it found them. It was with political changes that the members of the convention had to do at that time. The nature and jurisdiction of the courts were well understood and there was no need to describe them. A Court of Appeals was provided for, but not a word was said about the other courts, except to provide that the judges of the Supreme Court and the Common Pleas should continue in office for certain terms and that they should be appointed by the council and general assembly and commissioned by the Governor.

The constitution of July 2, 1776, was drawn in view

(15). For the bibliography of the ordinances and colonial statutes, consult an article by Francis B. Lee in 14 N. J. Law Journal 326.

of the proposed declaration of the independence of the United States, and was intended to provide for new political rather than judicial machinery, and it was not even declared by the convention that the old courts should be continued. This was done by the Legislature, by the act of October 2, 1776, Pat. Laws 38, which declared "that the several courts of law and equity in this state shall be confirmed and established, and continue to be held and established with the like powers under the present government, as they were held at and before the declaration of independency, lately made by the honorable, the Continental Congress," and so they continued without further change until by the act of Feb 14th, 1838 (P. L. 1837, p. 61), the Circuit Courts were given original jurisdiction, and made courts of record and not merely *nisi prius* sessions of the Supreme Court, (State, Dufford, Pros., v. Hull, 2 Vr. 302-305; Den v. Hull, 4 Halst. 277), and then came the constitution of 1844, adopting the Supreme Court and the Circuit Courts as constitutional courts, and providing that the inferior courts should continue, but might be altered or abolished by the Legislature at its pleasure.

This constitution declared that the judicial powers should be vested in certain existing courts, the composition and jurisdiction of which was well understood. These courts had been established by the ordinances of the Colonial Governors and by the commissions to the judges, and some of them by statutes of the state Legislature, and, therefore, it is that we must examine these ordinances, commissions and early statutes in order to know what was meant by the constitution in naming these courts, and what jurisdiction and powers were vested in them. It is only by studying the history of the courts that we can understand what is implied in the names of the courts, for there is nothing in the constitution except the names to define the judicial power that is vested in them. The history, of course, will carry us back behind the ordinances to the jurisdiction and practice of the courts of England, from which they are derived, but it is enough for us now to refer to the ordinances and commissions by which the courts with their English traditions were established in New Jersey.

VIII. THE SUPREME COURT.

It will be observed that the ordinances we have referred to relate to the courts of common law alone. The courts established or recognized by these ordinances are the Court for the Trial of Small Causes, the Court of Common Pleas and the Court of General Sessions of the Peace, and the Supreme Court. All of these, together with the Circuit Courts, are recognized and adopted by the Constitution of 1844, but all, except the Supreme Court and the Circuit Court, were made subject to be altered or abolished by the Legislature. These two Courts were established unalterably with all the jurisdiction and power that they possessed when that constitution was adopted. The Constitution declared that the judicial power should be vested in certain courts, including "a supreme court, circuit courts and such inferior courts as now exist and as may be hereafter ordained and established by law, which inferior courts the legislature may alter or abolish as the public good may require." (Const., Art. VI, Sec. 1). "By that enumeration," says Chief Justice Beasley in Harris v. Vanderveer, 6 C. E. G. 627, "those tribunals became constitutional courts, that is, courts that could not be altered or abolished, except by an alteration of the instrument creating them."

"These provisions," said Judge Adams in a later case in the Court of Errors, "guarantee the integrity of the constitutional courts of which the Supreme Court is one. Whatever powers that Court exercised at the date of the adoption of the constitution were by such adoption incorporated into the fundamental law itself. To abolish the Court, to alter its organic character, to impair its jurisdiction, to diminish its authority, are beyond the legislative power because that character, jurisdiction and authority form part of a body of law which upon wise grounds has been made immutable by any mere legislative act.[17]

The Court of Common Pleas, being one of the Inferior Courts referred to in Section 1 of Article VI of the

(17). Flanigan v. Guggenheim Smelting Co., 34 Vr. 648, 651. See also Jersey City v. Lembeck, 4 Stew. 255, 265; State, Dufford, Pros. v. Decue, 2 Vr. 302; Traphagen v. West Hoboken, 10 Vr. 232, 234; Flanagan v. Plainfield, 15 Vr. 118; Central Railroad Co. v. Tunison, 26 Vr. 561; Kenny v. Hudspeth, 30 Vr. 320, 323; McCullough v. Essex Circuit Court, 30 Vr. 103.

Constitution of 1844, is subject to be altered or abolished by the Legislature.[18]

The Circuit Courts, on the other hand, although they were created by the Legislature, were adopted by the Constitution of 1844, and were made unassailable by subsequent legislation.[19]

The Common Pleas was given by the Ordinance of Lord Cornbury power "to hear, try and finally determine all actions and causes of action and all matters and things tryable at common law," and the Circuit Courts created by the act of February 14, 1838, (Laws 1838, p. 61, Elmer's Digest, p. 542) were vested with "all the power and authority incident to courts of common law, except in cases of a criminal nature," but these powers related to the trial of cases between party and party. The Supreme Court alone was vested with all the great powers of the Court of King's Bench in England, of which Lord Coke declared: "It is truly said that the Justices *de banco regis* have supream authority, the King himself sitting there as the law intends."[20]

At the time of the adoption of the Constitution "the ordinary common law original jurisdiction was shared by the respective county Circuit Courts, and to a definite extent by the Court of Common Pleas, but the appellate and extraordinary jurisdiction with which the Supreme Court, as the successor of the King's Bench, had been originally vested, remained centered still exclusively in that tribunal—with the single anomaly that the act constituting the Circuit Courts had conferred upon them the power to review suits originating in the Justices Courts by the instrumentality of the writ of certiorari."[21] This was the language of Chief Justice Beasley in an opinion of the Supreme Court in 1865, and in the same case he said: "The distinction between the ordinary and prerogative jurisdiction of the Supreme Court has always been clearly and sharply defined. In England the ordinary jurisdiction of the King's Bench was shared, in a great measure, by the Common Pleas and in a lesser degree by some of the other courts. But the authority

(18). Engeman v. State, 25 Vr. 247; Kenny v. Hudspeth, 30 Vr. 320, but see Schalk v. Wrightson, 29 Vr. 50. The briefs and opinion in this case relate to the history of the Court of Common Pleas.

(19). Central Railroad Co. v. Tunison, 26 Vr. 561.

(20). 4 Inst. Cap. 7, p. 73.

(21). State, Dufford, Pros. v. Decue, 2 Vroom 302.

which was exercised by means of the various writs of mandamus, quo warranto, certiorari and others of a similar character belonged to this high tribunal alone. * * * It was thus that the authority of this Court was always held to be supereminent. Its transcendent prerogatives were to keep all inferior jurisdictions within their bounds; to superintend all inferior jurisdictions; to command the performance of their duty by magistrates and others in all cases where there was no other specific remedy, and it originally possessed the exclusive power to protect the liberty of the subject by summary interposition.[22] It was also a Court of Appeal into which could be removed by writ of error all determinations of the Court of Common Pleas, and all inferior courts of record in the Kingdom. All these great powers were by the ordinance of our first provincial Governor transferred to the Supreme Court and were held exclusively by that tribunal from that time to the era of the new constitution."

The jurisdiction of this court is very high and transcendent. Among other things, it has the superintendence of all inferior courts, both civil and criminal, of all corporations in the exercise of their corporate powers, and all public commissioners in the execution of their special authorities and public trusts.[23]

These powers and prerogatives of the Supreme Court have been jealously guarded, and this court and the Court of Errors have repeatedly held that the exclusive powers of the Supreme Court cannot be given by the Legislature to any other tribunal, and that the authority which it exercises by means of the writs of certiorari, mandamus and quo warranto cannot be curtailed.[24]

The Supreme Court by the ordinance of Lord Cornbury was given the criminal as well as the civil jurisdiction of the King's Courts in England with power "by certiorari, habeas corpus, or any other lawful writ, to remove out of any of the respective Courts of Sessions of the Peace, or Common Pleas, any information or indictment there depending, or judgment therein given, or to be given in any criminal matter whatsoever, cognizable before them, or any of them." Lord Coke in the fourth book of his Institutes (Cap. VII, p. 71) mentions among the subjects of the jurisdiction of the King's Bench: First, all pleas of the Crown, as all manner of treasons, felonies and other pleas of the Crown, etc. Secondly, regularly to examine and correct all and all manner of errors in fait and in law of all the judges and justices of the realm in their judgments, process and proceedings in Courts of Record, and not only in pleas of the Crown, but in all pleas, real, personal and mixt (the Court of Exchequer excepted).

So far as pleas of the Crown are concerned the latter paragraph refers to the supervisory and appellate jurisdiction of the King's Bench. The former paragraph refers to the original jurisdiction of that court. This original jurisdiction was exercised by the justices of the King's Bench under the commissions of Oyer and Terminer.

"By the constitution of the Supreme Court, it was invested with plenary jurisdiction in criminal as well as civil cases. Until several years after the Revolution it was the practice to summon grand juries by virtue of a writ for that purpose, directed to the Sheriff of the county in which it sat, who inquired and made presentments and passed on indictments for offenses committed in that county. Other criminal cases were brought there by the Attorney-General, or, on special leave, by the defendant. Trials of criminal and civil cases, by a jury of the county in which the offense was alleged to have been committed, or the cause of action arose, were quite frequent, there being seldom a term without one or more."[25]

Writs of error to this court issue out of the Court of Errors and Appeals. (Rev., p. 373).

(22). Quo warranto, certiorari, mandamus and habeas corpus. The act of March 1, 1795, gave the power to issue this last writ to the Chancellor as well as the Justices of the Supreme Court, (R. S. 1846, p. 23), but the name of the Chancellor was omitted in the Revision of 1874, Rev. p. 468, although the Chancellor still retains the power in cases within his jurisdiction.

(23). Ludlow v. Executors of Ludlow, 1 South. 387, 389; Whitehead v. Gray, 7 Hals. 36, 38, and see cases cited in 1 Stew. Dig. 244.

(24). Traphagen v. West Hoboken, 10 Vr. 232, Jersey City v. Lembeck, 4 Stew. 255; Green v. Jersey City, 13 Vr. 118; Flanagan v. Plainfield, 15 Vr. 118; Dodd v. Lyon, 20 Vr. 229; McCullough v. Essex Circuit Court, 30 Vr. 103; Flanigan v. Guggenheim Smelting Co., 34 Vr. 647; Green v. Heritage, 35 Vr. 567.

(25). Constitution and Government of New Jersey before the Revolution, Nix. Dig., 4th ed., 1069.

IX. THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY.

The origin of the Court of Oyer and Terminer is found far back in the history of English law. The justices in eyre, or itinerant justices, heard the pleas of the Crown in Glanvil's time in the reign of Henry II. In Pollock and Maitland's History of English Law we read (Vol. 1, p. 134): "The visitation of the counties by itinerant justices has been becoming systematic. From the early years of the reign we hear of pleas held on circuit by Richard Lucy, the chief justiciar, by Henry of Essex, the constable, and by Thomas Becket, the Chancellor. * * * These itinerant justices seem to have been chiefly employed in hearing pleas of the Crown (for which purpose they were equipped with the power of obtaining accusations from local juries), and in entertaining some or all of the possessory actions. The court they held was, as already said, *curia regia,* but it was not *capitalis curia Regis* and probably their powers were limited by the words of a temporary commission. They were not necessarily members of the central court and they might be summoned before it to bear record of their doings (Glanvil viii, 5); still it was usual that each party of justices should include some few members of the permanent tribunal."[26]

Commissions of Oyer and Terminer were issued not only to the King's justices, but also to others specially appointed, and they were issued for the purpose of making inquests of various kinds with a view to the collection of revenue and obtaining information as well as for the punishment of crimes. The statute of Northampton, 2 Edw. III., Ch. vii, enacted that the King should assign justices within the King's Bench and elsewhere, to hear and determine all manner of felonies, robberies, manslaughters, thefts, etc.[27]

This power was exercised as a matter of course by the justices of the King's Bench. Lord Coke, (4 Inst. Cap. VII, p. 71), says: "It is truly said that the justices *de banco Regis* have supream authority, the King himself sitting there as the law intends. They be more than justices in eire. The justices of this court are the soveraign justices of Oier and Terminer, Gaol Delivery, Conservators of the peace, etc., in the realm;" and Blackstone, in speaking of the authority of the judges of the King's Bench, says (4 Blackst. Com. 266): "The fourth authority is to hear and determine all treasons, felonies, and misdemeanors. This is directed to the judges and several others, but the judges only are of the quorum." And he goes on to explain the distinction between the commission of oyer and terminer and the commission of general jail delivery. "The words of the commission are to 'inquire, hear and determine,' hence they could act only on an indictment found at the same assizes. Therefore, they have, "fifthly, a commission of general jail delivery which empowers them to try and deliver every prisoner who shall be in the jail when the judge arrives at the circuit town, whenever indicted or for whatever crime committed."[28]

No reference is made to the Court of Oyer and Terminer in the statutes of East New Jersey, but in West New Jersey an act was passed in 1693, creating a Court of Oyer and Terminer, the judge to be named and "commissionated" by the Governor.[29]

The Instructions to Lord Cornbury empowered him to create courts or commissions of Oyer and Terminer, and although no such court was mentioned in his ordinance, nor in the ordinances of the later Governors, yet it appears that the Governors did issue such commissions to the judges of the Supreme Court, and even without such commissions, these judges could have exercised the criminal jurisdiction of the court of King's Bench. The commission of Chief Justice Morris, printed in 9 N. J. Arch., p. 214, gives him "authority in our Supreme Court of our said Province to hear, try and determine all pleas whatsoever, civil, criminal and mixt," and by a statute passed Sept. 20, 1777, (Wilson, p. 22), it was recited that the governors before the Declaration of Independence had issued commissions of Oyer and Terminer and General Jail Delivery, and the same power was given to the State governors to issue such commissions with

(26). This was in the latter part of the 12th Century. As to the procedure of the court and the presentment of the juries in the 13th Century, see 2 Pollock & Maitland 519, 642.

(27). Reeves Hist. Eng. Law, 170.

(28). See also 4 Co. Inst. 186; Hale P. C., ch. 5, pp. 32-35; Hawkins P. C., 17, etc.; Year Book, 14 Hen. 7, p. 16.

(29). Leaming and Spicer 520; XIII N. J. Arch. 200, 203, Minutes of the Council.

the advice of the Council as occasion should require.[30]

A statute passed November 27, 1794, (Ch. 497, Pat. Laws 137) is entitled, "An Act constituting courts of Oyer and Terminer and General Gaol Delivery," and it declares that "the justices, for the time being, of the Supreme Court and the judges, for the time being, of the respective courts of Common Pleas in and for the several counties of this State, and any three of them, of whom one of the justices of the Supreme Court shall always be one, shall, by virtue of this act and without any other commission, constitute the Courts of Oyer and Terminer and General Gaol Delivery in and for the said counties respectively," and the court was authorized, when an indictment was found that was triable in the Court of Quarter Sessions, to order the indictment to be delivered to the clerk of that court for trial there.

By the act of March 11, 1841, (Laws 110, R. S. 1846, p. 220), it was declared that the Courts of Oyer and Terminer, and of General Jail Delivery should be deemed and taken to be one court, to be called the Court of Oyer and Terminer and General Jail Delivery, with all the powers of both courts. The court was not mentioned in the Constitution of 1844, but was included in the words "such inferior courts as now exist," which were subject to be altered or abolished by the Legislature.

The number of the judges of the Court of Common Pleas, who are also judges of the Court of Oyer and Terminer, has been changed from time to time by the Legislature, and it is now reduced to one (Laws 1896, p. 149); but it had been held that if only one judge of the Court of Common Pleas were appointed, he, with a Justice of the Supreme Court, was competent to hold the Court of Oyer and Terminer.[31] Now, by the Revision of 1898 of the Criminal Courts Act (Laws 1898, p. 886) it has been provided that, in the absence of the judge of the Court of Common Pleas, the Justice of the Supreme Court may hold the Court of Oyer and Terminer alone, and that in any county having three hundred thousand inhabitants, in the absence of the Justice of the Supreme

(30). See Roesel v. State, 33 Vr. 216, 248; and see also the Commission of Governor Bernard, 9 N. J. Arch. 29, authorizing him to appoint judges and in cases requisite commissioner of oyer and terminer.

(31). Patterson v. State, 20 Vr. 326, 333. See also, as to the title and constitution of the court, State v. Gibbons, 1 South. 40, 45; State v. Price, 6 Hals. 203; Berriam v. State, 2 Zab. 9, 31.

Court, the judge of the Common Pleas may hold the court alone. The Court of Errors has decided that this act does not impair the functions of the Supreme Court, and is not unconstitutional. The Court said: "The Court of Oyer and Terminer is now and always has been a statutory, not a constitutional, tribunal, notwithstanding that until the act of 1898, one of its members was always required to be a Justice of the Supreme Court." And the Court added, that it should be observed that the commission by which these courts were constituted prior to 1794, did not issue to the Supreme Court, but to the individual members of that tribunal, and that the only alteration made in that year was the substitution of what is sometimes called "a statutory commission" in place of the commission of Oyer theretofore issued by the Governor, and the Court said that, while the Constitution preserved the functions and powers of the Supreme Court, it does not protect those functions and powers which are lodged in the several members of the Court as distinguished from the Court itself. Chancellor Magie dissented and insisted that the authority conferred upon the Supreme Court to have a Justice hold the Oyer and Terminer was conferred upon the Court itself and not upon a particular Justice.[32]

The Court of Oyer and Terminer and General Jail Delivery has cognizance of all crimes and offenses whatsoever which by law are of an indictable or presentable nature, which have been done or attempted within the counties respectively in which the court is held. (Criminal Procedure Act, Sec. 30).

The Court is a trial court, with power to render judgment and issue execution, and its proceedings are subject to review by writ of error. In ordinary cases the writ issues out of the Supreme Court, and in capital cases out of the Court of Errors. When writs of error were writs of right, the jurisdiction to issue them was in the Supreme Court alone, but in capital cases the writ could only be issued upon the order of the Chancellor. (Act of March 6, 1795, Pat. Laws, p. 162); and in such cases it has been held that the Legislature has power to direct that a writ of error to the Oyer and Terminer may issue out of the Court of Errors.[33]

(32). State v. Taylor, 53 Atl. Rep. 392, Nov. 17, 1902.

(33). Kohl v. State, 30 Vr. 195; Roesel v. State, 33 Vr. 368, distinguishing State v. Entries, 18 Vr. 140; State v. Noyes, 2 N. J. L. J. 221. See also Laws 1858, p. 177; 1878, p. 80; 1898, p. 866; Pat. Laws, p. 162.

X. THE COURT OF QUARTER SESSIONS.

Courts of Sessions, or County Courts, were provided for in East New Jersey in 1675, and again in 1682, (Leaming and Spicer, 97, 230). They were to be held once a year and were to have jurisdiction of causes criminal, as well as causes civil; the judges were to be the justices of the peace, and the clerk of the sessions was to keep a record of indictments.

In West New Jersey, by the act of May 2, 1682, it was provided that four courts of sessions should be held yearly at Burlington and Salem.

The Ordinance of Lord Cornbury refers to the General Court of Sessions as an existing court, and says that a Court of Common Pleas shall be held "in each county at such place where the General Court of Sessions is usually held and kept to begin immediately after the Sessions of the Peace does end and terminate," and the Court of General Sessions of the Peace is required to be held four times a year in each county.

The act of November 22, 1794, entitled "An Act concerning Justices of the Peace and Courts of General Quarter Sessions," provided that the justices of the peace of every county, or any three or more of them, shall constitute a Court of General Quarter Sessions of the Peace in and for such county, which court shall be a court of record and shall have cognizance of all crimes and offenses of an indictable nature done or attempted in the county, provided that indictments for treason, murder, manslaughter, sodomy, rape, polygamy, arson, burglary, robbery, forgery, perjury and subordination of perjury and crimes punishable with death, although found in such Court of General Quarter Sessions, shall be tried in the Supreme Court, Oyer and Terminer or General Jail Delivery, to be held in such county, (Laws 1794, p. 937; Pat. Laws, p. 129; Rev. 1846, p. 223). This act was in force when the constitution of 1844 was adopted and the Court was one of the inferior courts subject to legislative control.

Special public acts were passed from time to time providing for the Court of Quarter Sessions to be held by the Judges of the Court of Common Pleas, and for a president judge of that Court (see note to Revision of 1875, p. 270); and by the Revision of 1875 it was declared

that any two or more of the judges of the Court of Common Pleas of any county should constitute the Court of General Quarter Sessions of the Peace, provided that in counties having a law judge as president judge he should be a member of the court, and the only crimes excepted from its jurisdiction were treason, murder and manslaughter. (Rev. 1875, p. 270). By the act of March 26, 1896, it was declared that there should be one judge of the Court of Common Pleas in each county besides the Justice of the Supreme Court, and that either this judge or the Justice of the Supreme Court should hold the General Quarter Session and the Special Sessions (without a jury) for the county. (Laws 1896, p. 149).

The Revision of 1898 (Laws, p. 886) provides that the Judge of the Court of Common Pleas shall constitute a Court of Quarter Sessions, and shall have cognizance of all crimes or offenses of an indictable nature committed within the county, provided that indictments for treason or murder, although found in the Quarter Sessions, shall be tried in the Supreme Court, or Court of Oyer and Terminer; but the same statute provides that in counties having three hundred thousand inhabitants, the Judge of the Common Pleas, in the absence of the Justice of the Supreme Court, may hold the Oyer and Terminer, sitting alone.

The judgments and proceedings of the Quarter Sessions are subject to review in the Supreme Court by certiorari, habeas corpus and writ of error.

XI. THE CIRCUIT COURT.

The Circuit Court was not established by the ordinances, but by subsequent legislation prior to the constitution of 1844, and this also is a constitutional court and cannot now be altered or abolished by the Legislature, but it possesses only the powers that were given to it by the early statutes and the other powers of the Supreme Court cannot be conferred upon it. (Flanagan v. Plainfield, 15 Vr. 118; Central R. R. Co. v. Tunison, 26 Vr. 501).

The Circuit Court as a court of original jurisdiction with a record of its own, was established by the act of February 14, 1838. (Laws 1837, p. 61). It is true that what was called a Circuit Court was established by the

act of March 9, 1798, modified June 5, 1799; (Laws of N. J. 1795-1799, pp. 346, 535; Pat. Laws 393), but, as Chief Justice Ewing said in Den. v. Hull, 4 Hal. 277, 280: "It will be right for us here to recollect that the Circuit Court is organized (under that act) as auxiliary only to the Supreme Court, and merely for the trial of issues of fact; that the mutual pleadings of the parties are filed, not there, but in the office of the latter court." The Circuit Court organized under these acts was only the Supreme Court judge trying cases at *nisi prius* upon a transcript sent from Trenton, and it was held in that case that the judge had not even the power to permit an amendment of the pleadings.

These acts were entitled "An act concerning Supreme and Circuit Courts," and, after providing for the terms of the Supreme Court in Trenton, they declared that the Justices of the Supreme Court, or one of them, should, twice a year, hold a court in each county, except Cape May, for the trial of issues joined in the Supreme Court, or brought there to be tried, and which are triable in the respective counties, "which courts shall be called Circuit Courts." Transcripts of the records containing the issues were to be sent to the Justice that held the circuit, and he was given power to try the issues and to record non-suits and defaults. This merely gives the Supreme Court judge in the county on the circuit power to try Supreme Court cases, and this act was only a modification of a former act, which gave the same powers to the "several courts of *nisi prius* for the trials of issues joined in the Supreme Court." This was the act of Nov. 23, 1791, Ch. 361, and directed that two Justices should be appointed to hold the courts of *nisi prius,* but that in the absence of one the other could proceed to try a cause. It was then enacted that no case should be tried at bar unless the matter in dispute exceeded one thousand pounds. The *nisi prius* sessions of the Supreme Court were referred to as our "annual Circuit Court" in the ordinance of Governor Belcher of August 1, 1751. (Book AAA Commissions, 1, 313).

The act of February 14, 1838, declared that the Chief Justice, or one or more of the associate justices of the Supreme Court should hold a court in each county which, in addition to the power already possessed by the Circuit

Court, should be a court of original jurisdiction and of record and be vested within the county with all the power and authority incident to courts of common law except in cases of a criminal nature. The courts so created were adopted by the Constitution of 1844, and were given common law jurisdiction concurrent with the Supreme Court within the county, except in criminal cases, and were authorized to be held by a judge of the Supreme Court or a judge specially appointed for the purpose. (Const. Art. VI, Sect. V).

The same Constitution authorized the Legislature to vest in the Circuit Courts and Courts of Common Pleas chancery powers so far as the foreclosure of mortgages was concerned, and this power was given to the Circuit Courts by the act of 1851, (Rev. 705), but the fees and costs are smaller than in the Court of Chancery and the Bar has not availed itself of the privilege of bringing suits in the Circuit Court.

The common law jurisdiction given to the Circuit Court concurrently with the Supreme Court was only "the cognizance over actions arising within the county in the usual course of law between parties." It did not include the prerogative jurisdiction or its jurisdiction as an appellate tribunal, except only that it was expressly given the power to review suits in justices courts by the writ of certiorari, and it has been held that the Circuit courts have not jurisdiction by certiorari over other inferior courts, or over matters of taxation or municipal affairs,[34] but such powers as it has cannot be taken away by legislation. It is a constitutional court and all its essential powers and functions are beyond legislative control.[35]

A writ of error to the Circuit Court may be issued out of the Supreme Court or the Court of Errors and Appeals at the option of the party prosecuting the writ. (Rev. 373).

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(34). State, Dufford, pros. v. Decue, 2 Vr. 302; Flanagan v. Plainfield, 15 Vr. 118; McCullough v. Essex County Circuit Court, 30 Vr. 103; Green v. Heritage, 35 Vr. 567.

(35). Central Railroad Co. v. Tunison, 26 Vr. 561; Flanigan v. Guggenheim Smelting Co., 34 Vr. 647; Kenny v. Hudspeth, 30 Vr. 330.

XII. THE COURT OF ERRORS AND APPEALS.

It remains now to enquire into the origin of the Court of Errors and Appeals, the Court of Chancery and the Prerogative Court, and to see if we can find in it an explanation of the peculiar features of these courts, as they exist in New Jersey.

Governor Hunter in his Account of the Present State of the Courts of Judicature of New Jersey, sent to the Lords of Trade, June 23, 1712, mentions the Supreme Court, the Court of Quarter Sessions, the Court of Common Pleas, the "Court of Conscience" held by every justice of the peace for matters under forty shillings, and then says: "The Court of Chancery is not open. But the Governor and council are a Court of Appeals from the judgment of the Supreme Court upwards £100 value, from which there lyes a further appeal to the Queen in council if upwards £300 value, but the appeal does not barr execuc'on." (4 N. J. Archives 166; From the Public Record Office, London, Board of Trade, New Jersey, Vol. I, c. 120).

The appeal to the Queen in Council was an incident of the dependence of the colony upon the British crown. The Privy council had at the time of settlement of the colony and still has the judicial power of hearing appeals from the courts of all the foreign possessions of the Crown. This part of the judicial power was retained by the King in Council after the Courts of Law and Equity had been established, and after the House of Lords had become the court of last resort in civil causes within the realm. The Privy Council still had great power in England until it was restricted by the Long Parliament in 16 Car. I, c. 4, and in the colonies it was through the Privy Council alone that the Crown exercised its ultimate right to hear and determine questions arising between its subjects in the colonies.

The King in Council had formerly exercised the power to hear appeals from the King's Bench, Common Pleas and Exchequer, and since the House of Lords had taken jurisdiction only over cases arising in England, the Governor and Council naturally assumed the right to hear appeals from the courts of common law established in the colony. It followed, therefore, that without any ordinance the Governor and Council became the court of appeals from the decisions of the Supreme Court while at the same time the Queen in Council retained the right of decision in the last resort.

Even under the Concessions to the Proprietors which gave them powers of government over the colonies of East and West New Jersey there was an appeal from the highest court of the colony to the Governor in Council and from him to the King in Council, (Field's Prov. Courts 8; Leaming & Spicer, 232; 17 N. J. L. J. 133, 134), and so strongly was the idea fixed in the minds of the people that the Governor in Council had the power to review the judgments of the courts, that in West Jersey, according to the account given by Lord Cornbury, there was an appeal to the Governor in Council from the Court of Common Right, even though that court consisted of the Governor and his Council, so that, as Lord Cornbury said, it "was appealing from, to the same persons."

When the government was surrendered to the Crown in 1702, the appeal to the Governor in Council and from him to the Queen in Council remained as a matter of course. The Instructions to Lord Cornbury (Leaming & Spicer's Grants & Concessions, p. 641; 2 N. J. Archives, p. 531, sec. 85) directed that appeals be made in cases of error to the Governor and his council in civil causes if the sum appealed for did not exceed £100 and provided security be given for such charges as should be awarded if the first sentence should be affirmed, and if either party was not satisfied an appeal was given from the decision of this tribunal to the Queen in her Privy Council, provided, however, that the sum appealed for exceeded £200, that the appeal was taken within fourteen days and that security be given to prosecute the same with effect, to answer the condemnation and to pay the costs. No mention is made of these Courts of Appeal in the Ordinance of Lord Cornbury "For establishing Courts of Judicature" nor in the later ordinances on the same subject. The courts existed even before the surrender to the crown and the Instructions to Lord Cornbury defined their jurisdiction and made them permanent. The Instructions contain provisions with regard to security for costs which form the basis of the practice of the Court of Errors and Appeals on this subject at the present day. The eighty-fifth paragraph of the Instructions provided only for ap-

peals in cases of errors in civil causes. Whether this included cases in equity is a question to be discussed later. The eighty-seventh paragraph gave a right of appeal to the Queen in Council in criminal cases, not generally, but only in cases of fines imposed for misdemeanors exceeding two hundred pounds.

At the time of the Instructions to Lord Cornbury, and for some years afterwards, the judges of the highest courts, from which appeals were to be allowed, were members of the Governor's Council, and it is for this reason that we find in the instructions (Sec. 85) the rule that still exists, that such of the members of the Council as should "be at that time judges of the court from whence the appeal shall be made," "shall not be admitted to vote upon the said appeal, but they may nevertheless be present at the hearing thereof to give the reasons of the judgment given by them in the cause wherein such appeals shall be made." It was soon found that even though there were twelve members of the Council there was a practical difficulty in having the Supreme Court and the Court of Appeals composed of the same persons. Governor Hunter in a letter written to the Lords of Trade in 1711, (4 N. J. Arch., p. 69), says that as the Supreme Court was then constituted all the Council were judges assistants, "by which means the benefit of appeal might be lost, for it may soe fall out that soe many of the councill are upon the Bench as not to leave a quorum for the councill in case of appeal," and he asked leave of the Lords of Trade to alter the constitution of the Supreme Court by ascertaining the number of the assistants, (4 N. J. Arch., p. 71). They wrote to him on May 11, 1711, that he had power to constitute such courts and commission such judges as he saw fit, (4 N. J. Arch., p. 114), and so he gave special commissions to two gentlemen not in his Council to serve as judges of the Supreme Court. (Oct. 22, 1711, 4 N. J. Arch., p. 139). So Governor Hunter removed the inconvenience which was brought back again and made permanent by the constitution of 1844.

The Governor and Council having been declared by the instructions to Lord Cornbury to be a Court of Appeals "in cases of error in civil causes," remained such until the adoption of the constitution in 1776, and by that instrument it was declared as follows:

"IX. That the Governor and Council (seven of whom should be a quorum) be the Court of Appeals in the last resort in all causes of law, as heretofore, and that they possess the power of granting pardons to criminals after condemnation, in all cases of treason, felony or other offences."

The constitution adopted the existing court, and the Governor and Council were to be a Court of Appeals in the last resort, in all causes of law, as heretofore, but it is to be observed it is only in all causes of law. There had been no appeal from the Court of Chancery to the Governor and Council. The Court of Chancery as provided for by Lord Cornbury, consisted of the Governor and his Council (Ordinances dated March 1705, Book AAA of Commissions, p. 66; Appendix to 4 C. E. G., p. 578) and although Governor Franklin, by his ordinance, constituted himself alone the Chancellor, (Ordinance of March 28, 1770, Book AB of Commissions, p. 54; App. 4 C. E. G. 580), no provision was made for an appeal to himself and the Council, and no appeal had ever existed in England from the Chancellor, who held the King's seal to the King in Council. There were indeed few suits decided in the Court of Chancery of New Jersey before the Revolution, and few occasions for appeal. There did exist, however, the right of appeal from the Chancellor of New Jersey to the King in Council by virtue of the Royal prerogative over colonies.

It was not until 1799 that provision was made for an appeal to the Court of Errors from the decisions of the Chancellor. The act respecting the Court of Chancery, approved June 13, 1799, which is the original of our present act of that name, was drawn by William Paterson, then one of the Justices of the Supreme Court of the United States, and his draft of the act contained no provision for any appeal. The Legislature, however, added section 59, providing for an appeal to the Court of Errors from interlocutory and final decrees, and so by force of a statute the old Court of Errors became a Court of Last Resort in all causes in equity, as well as at law, and by the constitution of 1844 the new Court of Errors then formed was declared to be the "Court of Last Resort in all causes as heretofore." Mr. Griffith in his Law Register in 1821, (4 Griffith's Ann. Law Reg., p. 1179), contended earnestly that it was a usurpation of power on the

part of the Legislature to give the Court of Errors power to review the decisions of the Chancellor, but the matter was set at rest by the language of the constitution of 1844, after the power had been exercised for nearly half

The question still remained whether the Court of Errors had the power to hear appeals from the decisions of the Prerogative Court. No statute made provision for such an appeal until the passage of the act of Feb. 17, 1869, (Rev. p. 221), and the question whether this act was constitutional or not was the subject of a sharp discussion between the Chancellor, Zabriskie, on one side, and Chief Justice Beasley and Justice Van Syckel on the other in the Court of Errors in Harris v. Van Derveer's Executors, 6 C. E. G.424. The origin and history of the Court of Errors, the Court of Chancery and the Prerogative Court were thoroughly discussed, and there was an argument over the effect and meaning of the words "as heretofore" used in the constitution in describing the jurisdiction of the Court of Errors. It was admitted by the majority of the court that the Court of Errors had no jurisdiction over equity cases until the passage of the act of 1799, but it was insisted that the words "as heretofore" should not be taken as confirming the jurisdiction within the precise limits existing at the time of the adoption of the constitution, and that the court was then a court with enlarging jurisdiction and was a court in the last resort in all causes. The decision was that the Prerogative Court was not one the decrees of which were inherently final, and that the Court of Errors had jurisdiction to hear appeals from that court when they were provided for by statute.

The Governor and Council constituted the Court of Appeals from the time of Lord Cornbury until 1844, but the new Constitution provided that the government should be divided into three distinct departments, Legislative, Executive and Judicial, and that no person belonging to one of these departments shall exercise any of the powers properly belonging to the others. Under the old Constitution the judges of the Supreme Court were not allowed to sit in the Assembly, but the judges of the highest court were the Governor and the members of the Legislative Council. Under the principle declared in the new Constitution, the Governor and Senate could not constitute the Court of Appeals, and it was necessary to find

new material for the court. There was not business enough then to occupy the Court many days, and it was thought best to make use of the judges of the existing courts, the Court of Chancery and the Supreme Court, and to add to them some other judges who should serve by the day as occasion required. There was some question in the convention whether there should be any such other judges and whether their number should be six, or eight, or ten. It was even suggested that the Court should consist of the Senate as well as of the Chancellor and Justices of the Supreme Court.[36] The number agreed upon exceeded the number of the justices of the Supreme court at that day, and the "six judges" were a survival of the council and the decision in the last resort was not left wholly to professional judges.

The composition of the court was the result of the past history and the present conditions—a survival of the ultimate appeal from the courts to the sovereign power represented by the King in Council, and afterwards by the Governor and the Council chosen by the people, and the unconscious purpose of it was doubtless to control by natural equity the technical tendencies of the judges trained in the law, but the result has been, with the increase in the number of the common law judges on the bench of the Supreme Court, and through the force of their superior learning, to give the ultimate decision of cases in equity to the judges of the courts of common law, and at the same time to give them a better knowledge of the principles of equity.

With the increase of business it has long since become evident that the burden of the appellate work ought no longer to be placed upon the Chancellor and the justices of the Supreme Court, and that there ought to be a separate Court of Appeals consisting of a smaller number of trained judges who may devote themselves to the hearing and decisions of causes in the last resort.

This is the purpose of the amendment to the constitution to be submitted to the people on September 22, 1903, providing for a Court of Appeals to consist of a chief judge and four associate judges, or any four of them.

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(36). Journal of the Proceedings of the Convention, pp. 113-120.

XIII. THE COURT OF CHANCERY.

It was by no means a matter of course that a Court of Chancery should be established at all in the colonies of East and West New Jersey. The people of the colonies would hardly have thought of establishing such a court for themselves. The courts they were familiar with were the magistrates and the judges of the King's Bench who held the jury trials in the counties. The Chancellor was an officer of the King, and his power seemed to be an arbitrary one. It was looked upon with dread and suspicion by the people of several of the colonies. In Massachusetts no Court of Chancery was ever established,[37] and in Pennsylvania it was resisted by the Quakers, and was abolished in a few years after it was first established in 1720.

In the early days of the colonies the Lord Chancellor in England was, in fact, looked upon rather as an officer of the King than as a court. Few bills in equity were filed in those days, and they were usually rather an appeal to the King to mitigate the rigors of the law than an assertion of any established right.

It is true that Lord Chancellor Ellesmere, in 1616, had maintained the dignity and power of the Chancellor against Lord Coke, and had established his right to issue an injunction against the enforcement of a judgment at law, but there were few cases in equity, even in England, when the colonial courts were first established in New Jersey, and it was not until 1673 that Lord Nottingham, who has been called the Father of Equity, began to formulate the principles of equity jurisprudence. Blackstone, writing as late as 1758, and lecturing to English university students on the courts of their country, devotes only a few pages to the principles and practice of the Court of Chancery. We need not wonder, therefore, if we find that little demand for this court existed in the colonies of New Jersey in the beginning of the Eighteenth Century.

In East New Jersey the old Court of Common Right, created by act of assembly in 1682, L. & S. 232, under the proprietors was, indeed, declared to be a Court of Equity, as well as a Court of Law, but this was due, as Judge

(37). See an interesting article on Chancery in Massachusetts, 5 Harv. Law Rev. 370.

Field points out (Field's Prov. Courts, 13), to the influence of the Scotch proprietors, because in Scotland a Court of Equity, as distinct from a Court of Law, was unknown.

Provision was thus made at this early day for merging the courts of law and equity. The one Court of Common Right, a court of the people and not of the King, was to exercise all jurisdiction and to do justice according to equity, as well as according to the common law.

It is interesting to speculate as to what would have become of the principles of equity if the Courts of Equity had been merged into the Courts of Law before the principles of equity had been fully developed. It is very doubtful whether they would have been developed so rapidly or so well by the Courts of Law of those days of technicality and special pleading.

The judges of the Court of Common Right seem to have retained their equity powers until the act of February 21, 1698, L. & S. 368, Ch. 4, gave the assembly power to regulate all courts except the present High "Court of Chancery," and declared that the judges of the Court of Common Right should not be judges of the High Court of Chancery. Mr. Griffith says that the court was held by the Governor and his council from 1698 to 1705, and the Court of Common Right (4 Griff. Law Reg. 1183), consisted in 1698 of these same men.[38]

The government was in effect taken away from the proprietors at that time by Governor Andros, and the surrender of the proprietors was accepted by the Crown in 1702, and the Queen's commission to Lord Cornbury, dated December 5, 1702, gave him power to establish, with the consent of the council, such courts of judicature and public justice as he then might "think fit and necessary for the hearing and determining of all causes, as well criminal as civil, according to law and equity, and for awarding execution thereupon, with all reasonable and necessary powers, authorities, fees and privileges belonging to them."

In 1703 Lord Cornbury issued an ordinance declaring that the courts should remain as they had been, and in 1704 an ordinance was made establishing the Courts of Law. The first ordinance relating especially to the Court

(38). See 3 N. J. Archives, p. 479.

of Chancery was promulgated in March, 1705.[39] It recited that it was absolutely necessary that a Court of Chancery should be established in the province, that the subject might find remedy in such matters and things as were properly cognizable in the said court in which the common law, by reason of its strict rules, could not give them release, and declared that the Governor or the Lieutenant Governor and his council, or such of them as should take the oath prescribed, were empowered to be the High Court of Chancery of this province, and, as such, to hear and determine all causes and suits in the said Court, which from time to time shall come before them, in such manner, or as near as may be according to the usage and custom of the High Court of Chancery in the Kingdom of England.

Four stated terms were provided for, and it was ordained that the Governor or Lieutenant Governor and any two of the council should sit every Thursday at Burlington to hear motions and make orders thereon, and it was also ordained that there should be appointed two masters, a register, who should also be a purse bearer or seal bearer and sealer of writs, two clerks, one sergeant-at-arms and one messenger, and no other officer whatsoever. Only two counsel were to be allowed to each party, and the court was given power to make such rules and orders as it should think fit, the rules and orders made in England to be observed in the meantime.

It appears, however, that the court, if it was organized at that time, did not long continue to sit, for Governor Hunter, in writing to the Lords of Trade on May 7, 1711, says: "I have been pelted with petitions for a Court of Chancery, and I have been made acquainted with some cases which very much require such a court there being no relief at common law" referring to a case of a man in jail on a judgment confessed for four thousand pounds, when the real debt was not above four hundred, and he says he had ordered the committee of both councils to devise a scheme for such a court, but to no purpose, because they said the trust of the seals constituted the court, and that unless the Governor could part with the seals no one could constitute the court but himself; and the Governor said that he had more business than he could attend to, and besides was very ignorant of law matters. He, therefore, begged for directions as to that court. On June 23, 1712, in his report of the Present State of Judicature in New Jersey, Governor Hunter names the Court of Chancery with the remark "Not Open." (4 N. J. Archives 166). It is said, however, that he did sit as Chancellor in 1718, both in New Jersey and in New York, and claimed the right to sit alone without the Council, and that this claim, though it met with some opposition, received the approbation of the Crown,[40] and from that time on the office was exercised by the Governor alone until a separate Chancellor was provided for by the Constitution of 1844.

(39). Book AAA of Commissions, p. 66; 19 N. J. Eq. Rep. (4 C. E. G.) 578; 4 Griffith's Law Reg. 1183.

Judge Field, in his Provincial Courts, (3 N. J. Hist. Soc. Coll. 114), says that an ordinance was made by Governor Burnet, in 1724, regulating the fees in the Court of Chancery, but we have been unable to find this ordinance in the books of Commissions or bound up with the early laws. The ordinance of November 26, 1723, which is found in Book AAA of Commissions, is bound up with the colonial laws, 1703-1723, printed in 1724 by William Bradford. It regulates the fees of the Prerogative office, and of the judges and officers of all the courts, except the Court of Chancery.

Judge Field says Governor Burnet thought well of the Court of Chancery and did what he could to maintain it, but Governor Montgomery disliked it, and rarely sat as Chancellor, either in New Jersey or New York. Under him a committee was appointed in 1730 to revise the fees, and they made the revision unsparingly for the avoidance of extravagance and to make them conform to the circumstances of the province. The committee complained of the prolixity of the pleadings, and that it had become usual to amass a number of iniquities against a defendant as a mere matter of form, and to turn the whole things charged into questions afterwards." It was insisted that solicitors and counsel should reform the proceedings, and all the blame for the evils of the system was laid upon the lawyers. No ordinance appears to have

(40). Whitehead East Jersey under the Proprietors 168; Answer to the Elizabethtown Bill in Chancery, 4; Dunlap's New York, 281.

been made at that time in pursuance of the recommendation of the committee. (Field's Prov. Courts 115).

There was not yet any general desire for aid of the Court. It is true that it was in 1745 that the famous Elizabethtown bill in Chancery was filed, but in 1756, Smith, writing of New York, said that the wheels of the court rusted on their axles, and that its practice was condemned by all gentlemen of eminence in the profession. On November 23, 1753, an ordinance was made by Governor Belcher regulating and establishing the fees to be taken by the officers of the Court of Chancery. (Allinson, Appendix).

In 1768, Governor Franklin sent a message to the assembly recommending the Court, and that provision be made for its officers. It was suggested that salaries should be provided for a master of the rolls and master in chancery for one division of the province, two masters in chancery for the other division, and a sergeant at-arms for each division. For clerks, registers and examiners he thought the fees would be sufficient.

The assembly took no action upon this suggestion, and in 1770 the Governor, with the advice and consent of his Council, promulgated an ordinance declaring that the Court of Chancery had always been held in the province of New Jersey, and appointing himself Chancellor and judge of the High Court of Chancery of New Jersey with power to appoint and commission masters, clerks, examiners and registers, etc.[41] This was the ordinance that was in force at the time of the adoption of the Constitution, 1776. This constitution made no provision for the courts. The convention was concerned with political affairs and assumed that the courts would remain as they were. Shortly afterwards, however, on October 2, 1778, the Legislature passed an act reciting that it was absolutely necessary that justice be duly and regularly administered and declaring that "the several Courts of Law and Equity should be confirmed, established and continued with the like powers under the present government as they were held at and before the declaration of independency lately made by the honorable the Continental Congress." (Pat. Laws, 38).

The jurisdiction and practice of the Court, therefore, was derived wholly from the English Court. It was at

(41). Book AB of Commissions, p. 54; 4 C. E. G. Chy. Rep. 580.

first assumed and afterwards declared by ordinance that the Governor should exercise the judicial powers exercised by the Lord Chancellor in England. There was seldom any occasion for their exercise, and none but lawyers were familiar with the matter. A committee of the Legislature made complaints in regard to the prolixity of the pleadings and the amount of the lawyers' fees, but there was no legislation on the subject, and when an ordinance was made in 1770, declaring that the Court had always existed, and the governor should exercise the office of chancellor, no definition of his jurisdiction was attempted and he was left with all the jurisdiction held by the English Chancellor as a judicial officer as distinguished from his power as a minister of the king, or representing the king as *parens patriae*. The constitutional powers of the chancellor are the powers possessed by the English Chancellor as a judge at the time of the Declaration of Independence, and the practice of the Court of Chancery in New Jersey was the same as that of the Court of Chancery in England. The ordinance of Lord Cornbury gave the governor and council power to hear such suits as should come before them in that Court, in such manner, or as near as might be, according to the usage and custom of the Court of Chancery in England, and the ordinance of Governor Franklin gave to the governor alone power to hear such causes in such manner as theretofore had been used and as nearly as might be according to the usage and custom of the Court of Chancery in England. The English practice was based upon the ordinances of Lord Bacon, and it has been held by Vice-Chancellor Van Fleet that by the ordinances of Cornbury and Franklin, these ordinances of Lord Bacon were made the law of the Court of Chancery of New Jersey.[42] The practice of the Court to-day is the practice of the English Court before the Revolution, except as it has been modified by our legislature or by our Court of Chancery itself. "In the absence of statutory regulation, or an independent practice," said Vice-Chancellor Van Fleet,[43] "this court follows the practice of the English Court of Chancery, and

(42). Jones v. Davenport, 45 N. J. Eq. (18 Stew.), 77-82; Allen v. Demarest, 41 N. J. Eq. (14 Stew.), 162-164; Beames' Orders in Chancery.

(43). Southern Nat. Bank v. Darling, 49 N. J. Eq. (4 Dick. Chy.), 398-400. See also West v. Paige, 9 N. J. Eq. (1 Stock.), 202-204; Morris v. Taylor 23 N. J. Eq. (8 C. E. G.), 131-134.

the rule of practice of that Court is, in such a case, the law of this Court."

The first statute relating to the practice of the Court seems to have been an act to facilitate the foreclosure of mortgages. It was the act of September 26, 1772, which provided for an order of publication against absent and absconding mortgagors who could not be served with process or refused to appear. It provides for an appraisement of the mortgaged premises before decree and for a public sale. The act having expired by limitation was revived in 1783, (P. L. 1783, p. 10).

An act was passed November 22, 1790, providing for the examination of witnesses by examiners openly in the presence of counsel instead of secretly as in the old practice, and providing also for depositions to be taken *de bene esse* and for the service of process by the sheriffs. This act also contained the provision that the Chancellor may call to his aid the Chief Justice, or any Justice of the Supreme Court or Master in Chancery.

This act was substantially embodied in the act of June 13, 1799, entitled "An act respecting the Court of Chancery." (Laws, Vol. III., p. 597). This latter statute is the foundation of our present Chancery act. It was prepared by William Paterson, one of the framers of the Constitution, and then a Justice of the Supreme Court of the United States. He was a learned lawyer and familiar with the law and practice of the Court of Equity. He took the English practice and revised and simplified it, adapting it to the needs of the people of this State. The act as he drew it was adopted, with the addition of section 59, providing for an appeal to Governor and council, and the act is in frame and substance the same as the Chancery act in force to-day. Nearly all the changes that have since been made in the practice of the court have been made by means of amendments to this statute.

The original jurisdiction of the Court did not include divorce, the custody of idiots and lunatics and their property, the care of property of infants or discovery in aid of executions at law. Jurisdiction over these subjects belonged to the Chancellor in England as *parens patriae* rather than as a court, and was conferred upon the Chancellor of New Jersey by statute. The first act concerning divorce and alimony was the act of December 2, 1794, (Laws, Vol. II., p. 969), and this was followed by the act

of February 16, 1820, (P. L., p. 43). The act for "Supporting idiots and lunatics and preserving their estates," was passed November 21, 1794, (Laws, Vol. II., p. 931). The act providing for inquests of idiocy and lunacy was passed February 28, 1820. On December 1, 1794, an act was passed to enable infants who are seized or possessed of estates in trust, or by way of mortgage to make conveyance of the same, (Laws, Vol. II., p. 963). The act relative to the sale and disposition of the real estate of infants was not passed until March 19, 1845, (P. L., p. 99), after the adoption of the second Constitution. In the same year was passed the act giving power to the Chancellor to compel discovery in aid of an execution at law and to reach the choses in action of the judgment debtor. This was a jurisdiction which had not been exercised in New Jersey before the Revolution and was conferred by the statute.[44]

The Constitution declared that the Court of Chancery shall consist of a Chancellor, (Art. VI, Sect. 4, p. 1), but it was the established practice for the Chancellor to refer causes of a master to hear and determine and to advise him what decree should be made, and cases in which the Chancellor was interested were referred to the Chief Justice or some other justice of the Supreme Court, and when the business of the Court had outgrown the capacity of a single man the legislature[45] created advisers called Vice Chancellors who, under orders made for that purpose by the Chancellor and in his stead, hear matters pending the Court of Chancery, and advise him what orders and decrees should be made in them.[46] The orders advised by them are usually signed by the Chancellor without question, and they are thereby made the orders of the Court. A statute passed in 1871, (Laws, p. 127), provided for the appointment of one Vice Chancellor who was to be a counsellor at law of ten years standing and was to be appointed by the Chancellor and commissioned by the Governor. A second Vice Chancellor was provided for in 1881, and two more in 1889, and now there are six and the Chancellor is authorized to appoint seven, (Laws 1902, p. 541). The Vice Chancellors are given by

(44). See Whitney & Robbins, 18 N. J. Eq. (2 C. E. G.), 360, and an article on Spendthrift Trusts in New Jersey, 14 N. J. L. J. 166.

(45). See Rules of Chancery, 42-47; Rules of Chancery as printed in Pott's Precedents, 1872; Laws, 1870, p. 43, Rev. 123.

(46). Per McGill, C., in Buckley v. Perrine, 9 Dick. Ch. 296.

statute the power to punish contempts committed in the presence of the court, (Laws 1892, p. 291), and also power to grant writs of habeas corpus and to hear and determine the same that the Chancellor has, (Laws 1889, p. 426), but it has been held that this is not the power that the Chancellor has as parens patriae to award the permanent custody of infants, and that a Vice Chancellor cannot, upon a proceeding on habeas corpus, and without an order of reference in a suit in chancery, make an order for the permanent custody of an infant.[47]

The amendments to the constitution to be submitted to the people on September 22, 1903, provide that the Court of Chancery shall consist of a Chancellor, and such number of Vice Chancellors as shall be provided by law, each of whom may exercise the jurisdiction of the court. They are to be appointed as well as commissioned by the Governor.

XIV. THE PREROGATIVE COURT AND ORPHANS' COURTS.

"In England the proof of wills and granting of administrations and the business connected with them, and, in fact, almost all matters now within the jurisdiction of our Prerogative Courts, had been for centuries entrusted to the Ecclesiastical Courts. When England separated from the See of Rome, this jurisdiction by the statute of 23 Hen. VIII., was declared to be in the bishop or ordinary of the diocese, and in cases of goods within two dioceses, in the archbishop. The bishop exercised this jurisdiction by an official called his chancellor, and sometimes the ordinary; the archbishop, by an official called the judge of the prerogative court, a name derived from the fact that jurisdiction in such cases was by the archbishop's prerogative."[48]

It was the Bishop of London, and not the Archbishop of Canterbury, that had the nominal supervision of Ecclesiastical affairs in the English colonies in America, and his jurisdiction was recognized in New Jersey in the "In-

(47). Buckley v. Perrine, 9 Dick. Ch. 285. The Supreme Court of the District of Columbia, in dealing with the custody of these same infants, questioned the constitionality of the practice of having cases in chancery heard and decided by Vice Chancellors. Slack v. Perrine referred to in 19 N. J. Law Journal 36.

(48). Per Chancellor Zabriskie in Harris v. Vanderveer's Exrs., 6 C. E. Gr. 424-452. See also Reeves' English Law, Vol. I, p. 312; III, p. 125; IV, p. 125. History of English Law, by Pollock & Maitland, bk. II, ch. VI, §§ 3, 4; Dickinson's Probate Practice, I.

structions to Lord Cornbury," the first royal governor, on the surrender of the government by the Proprietors in 1702, but an exception was made of the collating to benefices, granting licenses for marriage and probate of wills and these powers were expressly reserved to the Governor.[49] And so it was that all the jurisdiction and powers of the English Prerogative Court, with respect to the probate of wills and the administration of the estates of deceased persons, were vested in New Jersey in the royal Governor and he became the Ordinary and Judge of the Prerogative Court.

The jurisdiction of the English Prerogative Court had not been recognized under the Proprietary government either in East or West New Jersey, and in the eastern province no provision appears to have been made for any court having jurisdiction over the probate of wills and the administration of estates, but by a statute (March 1, 1682), it was provided that all wills in writing, attested by two credible witnesses, should be of the same force to convey lands as other conveyances, being registered in the secretary's office forty days after the testator's death;[50] and by the act of February 27, 1698, three witnesses were required and provision was made for citing executors in case of neglect. (Ibid, p. 371).

In West New Jersey the commissioners of the Proprietors (elected by the people) were directed to take care that the will of a deceased person be duly performed, and that security be given by those that proved the will, and that an inventory be made and that all wills be registered in a public register, and, in case of intestacy, the commissioners were to take security for the administering of the estate, two-thirds for the children and one-third for the wife,[51] and, if there be no children, then one-half to the next of kin, and the other half to the wife.

When Lord Cornbury became Governor of the united provinces and assumed the duties of the Ordinary, he appointed Thomas Revell, of Burlington, his surrogate or deputy, and the first will recorded in the Provincial Book

(49). Leaming & Spicer's Grants and Concessions, p. 639, § 75 (2 New Jersey Archives 506). See Coursen's Case, 3 Gr. Chan. 411; Harris v. Vanderveer's Exrs., 6 Hals. 435.

(50). Leaming & Spicer's Grants and Concessions, p. 236.

(51). Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey in America, chapter XXIX. Leaming & Spicer, p. 403.

of Wills was admitted to probate by him. The record of this probate is interesting because the form is evidently taken from that of the English Prerogative Court, the jurisdiction of which was based on the fact that there were *bona notabilia* in several dioceses.[52]

A surrogate acted for the Governor in admitting this will to probate. He was exercising the jurisdiction of the Lord Bishop of London, which was reserved to the Governor with respect to the probate of wills. A surrogate in England was a deputy or delegate of an ecclesiastical judge. The Provincial governors were quite ready to avail themselves of the services of such deputies in the discharge of their unaccustomed duties as judges of the Ecclesiastical Court, and they appointed these deputies

(52). The order for probate is as follows:

"Edward Viscount Cornbury Captain Generall and Gouvernor. in Cheif in and over ye, Province of Nova Cesarea and New Yorke.

"To all to wheme these presents come or may concerne Greting—Know yee that at Burlington in ye. Province aforesaid the seaventh day of March ye. Last will and of Andrew Smith was proved aproved and allowed of by me having whilst he lived and at ye. time of his Death Goods Chattles and Credits in divers places Within this province by meanes Whereof the full disposition of all and Singular ye. Goods and Chattles and Credits and the Granting the Administration of them Also the hearing of Accots Calculation or Recking and the finall Discharge and Dispost'n of the same unto me Solely and not unto any other inferior Judge and manifestly Known to belong and Ye admision of all and Singular the Goods and Chattles and Credits of the said deceased Andrew Smith and his Said last will and Testament in any manner of wayes concerning is Granted unto Thomas Smith and Elizabeth Smith Executors of ye. sd last. Will and Testament of the said Andrew Smith named Cheifly of Well and duely Administring ye same and of making a true and perfect inventory of all and singular the said Goods, Chattles and Credits & Exhibiting ye. same into ye. Secretaries office of ye said Province at or before ye first day of Aprill next ensuing and of Rendering a Just and true accot Calculation or Reckning when thereunto shall bee Lawfully Required.

"In Testimony Whereof I Thomas Revell Esqr. Surrogat Commissionated and appointed by ye. sd Lord Cornbury have hereunto set my hand and Seal this Eight day of March 1703. Anno. Reg. Regn. Anna Secund.

"Entered in ye office by

"J, BASS S. & Reg."

This record may be seen on the first page of Book I of Wills in the Secretary of the State's office in Trenton.

This will was proved before Lord Cornbury himself came to the Province and before he actually received his instructions. The instructions, dated August 12, 1702, were not received until July 29, 1703. Lord Cornbury arrived in New York May 3, 1702, but he did not come to New Jersey until August 10, 1703. (2 N. J. Archives 543.)

Thomas Revell was for many years the Register or Recorder of the West Jersey Proprietors at Burlington and was a member of Lord Cornbury's first council. See 3 N. J. Archives 290. Jeremiah Basse was not appointed Secretary and Register until Nov. 10, 1704. (3 N. J. Archives 23.)

It will be observed that this is a probate in common form and not in solemn form. There is no adjudication of the validity of the will. See Judge Skinner's opinion in Cartwright's case, N. J. L. J., August, 1903, and consult Kocher's Orphans' Court Practice 13, and Straubs' case, 4 Dick. Ch. Rep. 264; 5 Dick. Ch. 795, and Gordon v. Old, 7 Dick. Ch. 317.

in different parts of the province to act in their stead upon such cases as the people chose to submit to them.

"In 1720 Michael Kearney was commissioned under the great seal Surrogate of the Province of New Jersey." "Afterwards one was appointed for each division, and as occasion required more, sometimes one for two or three counties, and sometimes more than one in the same county."[53]

As was said by Governor Pennington, sitting as Ordinary in Coursen's Case, (3 Gr. Ch. 408, 413): "Sometimes there were more of these deputies, sometimes less; sometimes more than one in a county, sometimes only one for two or three counties. They were mere deputies, subject to the control and supervision of the Ordinary, and to be removed at his pleasure. By appointing them, the Ordinary did not in the least curtail his own jurisdiction. Whilst he held appellate jurisdiction of their acts, his own original jurisdiction remained entire. These surrogates did not hold to the Ordinary the relation which the English ordinaries hold to their metropolitan * * * New Jersey has never been sub-divided into dioceses. The doctrine of *bona notabilia* never had any place here."

In 1784 an act was passed, entitled "An Act to Ascertain the Power and Authority of the Ordinary and his Surrogates; to Regulate the Jurisdiction of the Prerogative Court and to Establish an Orphans' Court in the several counties of the state."[54] This act declared that from and after the passing of this act "the authority of the Ordinary shall extend only to the granting of the probate of wills, letters of administration, letters of guardianship and marriage licenses, and to the hearing and finally determining of all disputes that may arise thereon." And also that he should statedly hold a Prerogative Court when he should hear and finally determine all causes that should come before him, either directly or by appeal from any of his surrogates or the Orphans' Court thereby established. The Secretary of the State was made the register of the Prerogative Court, and it was provided that but one surrogate should be appointed in each county and that his power should be limited to his

(53). In an article on the Constitution and Government of New Jersey before the Revolution, Nixon's Digest, 4th ed., p. 1073.

(54). Laws 1784, p. 135, Ch. 70; Harr. 297: Rev. 776; R. S. 203; Rev. 220, Gen. Stat.

county, and the judges of the Court of Common Pleas, or any three of them, were constituted judges of a Court of Record, to be held four times a year, and to be styled the Orphans' Court and the surrogate of the county was to be the clerk or register of said court.

The Orphans' Court was given "full power and authority to hear and determine all disputes and controversies whatsoever respecting the existence of wills, the fairness of inventories, the right of administration and the allowance of accounts of executors, administrators, guardians or trustees, audited and stated by the surrogate," and certain other matters and things therein submitted to their determination. Provision was made for allowances, for the education and maintenance of children, for the investment of minors' money, and for the division of the lands of intestates and the practice of the court was regulated.

The effect of this statute of 1784 was to declare that the jurisdiction of the Ordinary in New Jersey did not include the collating of benefices or the regulation of ecclesiastical affairs. The right to grant marriage licenses was retained, but, for the most part, his jurisdiction was that of a Probate Court, with power to grant probate of wills and letters of administration and guardianship, and the determination of all disputes that may arise thereon. The power to grant marriage licenses was omitted in the Revision of 1820. Some of the powers of the Ordinary as a Probate Court were given by this act of 1784 to the Orphans' Court, reserving to the Ordinary the right of decision on appeal; and some powers were given to the Orphans' Court which, although they related to the estates of deceased persons, were not within the proper jurisdiction of the Ordinary[55] with regard to which latter the act provided that, when no appeal was given to the Ordinary the decree of the Orphans' Court should be subject to removal to the Supreme Court by certiorari;[56] and this supervision of the Orphans' Court by the Supreme Court continued until the Constitution of 1844, which provided that all persons aggrieved by any order, sentence or decree of the Orphans' Court might appeal from the same to the Prerogative Court.

The jurisdiction of the Ecclesiastical Courts in

(55). Wood v. Tallman's Ex'rs.. Coxe 153, 155.
(56). Pat. 63; Rev. Laws 1820, 787; 4 Griff. Ann. Law Reg. 1198.

England with respect to the estates of deceased persons had its origin in very early times. It arose out of the care for the soul of the decedent and the desire to secure to the Church the property that he had left in its care for the good of his soul. Blackstone is mistaken in saying that the jurisdiction over the probate of wills followed of course upon the assumption of the Church of the right to dispose of the goods of intestates. (2 Blackstone's Com. 494). To die intestate was to die unconfessed, and intestacy was rare. As early as the Eighth Century the "last words" of a dying man were attested by the priest; and we read that the clergy were advised to take with them one or two witnesses, so that the avarice of the kinsfolk might not contradict what is said when one priest alone is present. (Pollock & Maitland History of English Law 317). Then came the written "cwithe" or dictum, a sort of "last words" in advance, disposing of lands or goods by gift, to take effect after death. In the time of Cnut the Dane, one who died without "last words" was regarded as a sinner to be excused only because of negligence or sudden death. (Ibid, 320), and in Alfred's day men disposed of folklands, as well as goods, in post obit gifts in writing, with a prayer that the king or the bishop would allow his gift to stand. (Ibid, 318). After the Conquest there was no sudden change, and we learn from Pollock and Maitland, in their History of English Law, that it was in the Twelfth and Thirteenth Centuries that the changes took place which established the definite law, gave the jurisdiction to the Church over wills of personal property and left the lands under the control of the King's Courts. The King's Courts condemned the post obit gifts of land, and the development of the law of primogeniture gave the land to a single heir, who had nothing to do with the chattels. The Church asserted the right to protect and execute the will of the dead man, and the executor of it became gradually the personal representative who took the chattels, but had nothing to do with the freehold lands. The dread of intestacy increased, and the church asserted the right and duty of administering the goods of the dead man for the repose of his soul. (Ibid, 323). By the time of Henry II. it was settled that the Church Courts might take care of wills, provided there were no testamentary gifts of lands, and "we may

well doubt whether any such procedure as we call probate was known in England before the time when the jurisdiction over testaments had been conceded to the Church." (Ibid, 339). With the growing horror of intestacy the goods of an intestate were the more freely distributed for the good of his soul, although this was done by the hands of those nearest of blood, and in the Great Charter of 1215 there is a clause which says: "If any free man dies intestate, his chattels shall be distributed by the hands of his next kinsfolk and friends under the supervision of the Church, saving to every man the debts owed to him by the dead man."[57] This clause was omitted from the charter of 1216, but the rule established became the settled law, (see Bracton, p. 606), and the duty to pay the debts was declared by the Statute of Westminster 2, in 1285.[58] By the end of the Thirteenth Century, it was the settled law that the executors must prove the will before the Bishop's Court, and take an oath duly to administer the estate; and they became bound to make an inventory and account for their dealings. By Statute of 31 Edward III., Ch. 11, in 1358, the ordinary was directed to depute the next and most lawful friends of a dead person to administer his goods and they were required to collect dues to him and administer them for the good of his soul, and they were required to answer in the King's Courts and made accountable to the Ordinary in the same manner as executors. (3 Reeves' Hist. of English Law 127). The purpose of this statute was to enable the next of kin to realize the assets and pay the debts, rather than, as Blackstone says, to prevent the Ordinary from taking the estate without paying the debts. (2 Blackstone's Com. 494, 496).

It was not until after the end of the Thirteenth Century that it was established that if the dead man had goods in more than one diocese, the jurisdiction was in the court of the Archbishop by reason of his "prerogative." (2 Pollock & Maitland 340).

The jurisdiction thus acquired by the Ordinary in the Prerogative Court extended to the probate of wills of personal property, the appointment of administrators and the distribution of intestates' estates, and the accountability of executors and administrators.

(57). Charter 1215, ch. 27; 2 Pollock & Maitland 334.
(58). 13 Edward I., ch. 19; 2 Reeves' Hist. Eng. Law 439; 2 Blackst. Comm. 495.

Suits by and against the personal representatives for debts and legacies belonged to the King's Courts of common law, and Chancery also had jurisdiction of the accounts of executors and trustees. The construction of wills belonged to the Court of Chancery, and the Prerogative Court had no authority and could make no decree for the payment of legacies or shares under a will, nor could it decree distribution by the administrator until the Statute of Distribution (22 and 23 Car. 2, Ch. 10) allowed the Judge of the Prerogative Court to direct to whom the payment secured by the administrator's bond should be made.[59]

The jurisdiction of the Ecclesiastical Courts over the probate of wills affected only the disposition of personal property. Wills relating to land were allowed to be proved in order to qualify the executors and enable them to sue for debts, but the probate had no effect upon the title to land.[60] And even after land was by statute made freely devisable, the question of the validity, as well as the construction of the will, remained with the courts of common law, and so it is that in New Jersey the probate of a will is conclusive with respect to personal property only and the title to the land devised may be tried in an action of ejectment or by an issue from Chancery.[61]

The Statute passed in New Jersey in 1784 relating to the Prerogative Court and Orphans' Courts gave the Orphans' Court jurisdiction of some matters which were not within the jurisdiction of the Prerogative Court. Chief Justice Kinsey, in 1793, said: "The Orphans' Court is not a Court of Common Law, but a court partaking of the powers of a Chancery and Prerogative jurisdiction instituted by law to remedy some of the defects in the powers of the Prerogative Court with regard to the accountability of executors, administrators and guardians."[62] It gave them power to require administrators, guardians and trustees of minors to give security and to revoke their letters; to order the lands of decedents to be sold for the payment of debts in case the personal

(59). Ordinary v. Barcalow, 7 Vr. 15; In Re Eakin, 5 C. E. Gr. 481: Adams v. Adams, 1 Dick. Ch. 298; Hughes v. Hughes, 1 Lev. 223; Slawney's Case, Hobart 83; Tooker v. Sloane, Hobart 191.
(60). Partridges Case, 2 Salk. 253; "Administration," 3 Salk. 21. 22; 1 Wms. Exrs. 388, 389; Schouler on Exrs., § 59; Barden, Goods of, 1 Sw. & Tr. 465.
(61). Wilkinson v. Trustees, 11 Stew. 514.
(62). Wood v. Tallman's Exrs., Coxe 153, 155.

estate is insufficient; to authorize guardians to sell the real estate of their wards for their education and maintenance; to put minors' money out at interest; to divide the lands of intestates; to take decrees for the allowance and final settlement of the accounts of guardians, executors, administrators and trustees and to grant letters of guardianship. Some of these powers, as we have said, although they related to the estates of decedents were not within the proper jurisdiction of the Ordinary, and the act of 1784 provided that in such cases, where no appeal was given to the Prerogative Court, the final decree of the Orphans' Court should be subject to removal to the Supreme Court by certiorari,[63] and many decisions on the powers of the Orphans' Courts may be found in the early Supreme Court reports.

This supervision of the Orphans' Courts by the Supreme Court continued until the constitution of 1844, which provided that all persons aggrieved by any order, sentence or decree of the Orphans' Court from the same, or from any part thereof to the Prerogative Court,[64] and afterwards, in 1869, it was provided by statute that "all persons aggrieved by any order or decree of the Prerogative Court might appeal the same to the Court of Errors, (Laws 1869, p. 84), and it was held by that Court in Harris v. Vanderveer's Executors, (6 C. E. Gr. 424), that the act was not unconstitutional. The Court said that although the Prerogative Court was a constitutional court, yet its decrees were not inherently final, and that to make them appealable did not detract from its established jurisdiction.

In that case Chief Justice Beasley said: "By the Constitution of 1776, the only Ecclesiastical Court that was preserved in our system was that of the Ordinary, that office being placed, as it had formerly been, in the Governor of the State," but the fact is that the Ordinary was not mentioned in that Constitution, nor did the Constitution expressly establish any of the courts of the State. The only reference to the courts is in the provisions for the terms of office of the judges and clerk of the Supreme Court, and in an allusion to the office of justice of the peace. The existing courts were left undisturbed and the Prerogative Court was one of them, and by the act of October 2, 1776, (Laws 1776, p. 4, Pat. 38), the several courts of law and equity before existing are confirmed and established, and while the Prerogative Court is not strictly a Court of Law or Equity, it has been conceded that this court, as well as the others, was "established, perpetuated and protected" by the similiar language in the Constitution of 1844.[65]

(63). Act of Dec. 16, 1784, Pat. 63; Rev. Laws 1820, 787, § 37; 4 Griffith Law Reg. 1198; Harris v. Vanderveer, 6 C. E. Gr. 424, 435.

(64). Const. 1844, Art. VI, Sec. IV, R. S. (1846) 205, Sec. 16; 1849, p. 165; Rev. (1874), 791, Sec. 176.

The Orphans' Court, established in 1784, was not one of the courts existing when the Constitution of 1776 was adopted, and in the Constitution of 1844 it was included among the inferior courts which might be altered or abolished by the Legislature, (Const. 1844, Art. VI, Sec. 1), but the Prerogative Court with all its existing powers was preserved and protected by that Constitution.

The jurisdiction and powers of the Orphans' Courts have in fact been extended and modified by the Legislature in various acts both before and since the Constitution of 1846. As early as 1804, the Orphans' Court was given power to carry out contracts for the sale of lands of decedents,[66] and the first general revision of the State was made in 1820,[67] but the changes were for the most part by way of addition and in matters of detail.

By the act of June 13, 1820, (R. L. 784), the powers and duties formerly exercised and performed by the Ordinary relative to the appointment of guardians for persons under twenty-one years of age were conferred upon the Orphans' Courts subject to an appeal to the Prerogative Court.[68]

In 1822 the appointment of the judges was taken from the Ordinary and given to the Legislature in joint meeting, and the Constitution of 1844 put this power in the Governor. The judges of the Orphans' Courts were originally the judges of the Court of Common Pleas, and the number of these was indefinite until it was reduced to five by the Constitution of 1844, and to one by the act of March 26, 1896. By the act of February 9, 1855, entitled "An Act to Reorganize the Courts of Law," the Justices of the Supreme Court were made ex officio

(65). Harris v. Vanderveer's Exrs., 6 C. E. Gr. 424, 434.

(66). Revision passed June 13, 1820, Rev. 776, Elmer's Digest 359.

(67). Act of Nov. 13, 1804; Rev. (1820) 776; Elmer's Digest 359; Rev. (1874) 782; Laws 1898, 773.

(68). Harris v. Vanderveer's Exrs., 6 C. E. Gr. 424, 435.

judges of the Orphans' Courts, and the Justice holding circuit in any county was made president judge of the Orphans' Court.

By the act of 1784 the Secretary of State was made the Register of the Prerogative Court, and the Surrogate of the county the clerk or Register of the Orphans' Court, and the Surrogate was given power to take the depositions to wills, administrations and inventories when no difficulty, objections or disputes should arise thereon, but otherwise he was to issue citations to all persons concerned to appear at the next Orphans' Court where the cause should be heard in a summary way, and determined by the judges, subject to appeal to the Prerogative Court. By the act of November 9, 1803, Bloomfield's Rev. 1820, 772, he was given power to issue letters testamentary with the same effect as if they were issued by the Prerogative Court and so his adjudication became final if there were no appeal.[69]

The jurisdiction of the Prerogative and Orphans' Courts, with respect to the appointment of guardians of minors, was originally confined to cases in which the minors were orphans; they could not appoint guardians for a child whose father was living. Judge Peter Vredenburgh in Graham v. Houghtaling, 1 Vroom 552, 561, said: "The name and idea of the Orphans' Court were borrowed, not from the English Ecclesiastical Courts, but from a court called the Court of Orphans, for a long time established in London and other large cities of England, and which, as its name imports, had jurisdiction of the estate of orphans only." The power to deal with the estate of minors who were not orphans did not belong to either of these courts, until it was given to them both by the act of February 22, 1843.[70]

It is not the purpose of this paper to define the jurisdiction of the courts in detail, for this purpose, with respect to the probate courts, reference may be had to the Statutes, to Dickinson's Probate Practice, and to Kocher's Practice of the Orphans' Courts in New Jersey.

(69). See Cartwright's Case, opinion of Judge Skinner, Essex Co., 1901, 26 N. J. L. J., August, 1903; 52 Atl. Rep. 713, opinion by the Ordinary.

(70). Laws 1843, 84; R. S. (1846) p. 374, par. 10; Rev. 1874, p. 760, sec. 38; Laws 1898, p. 730, sec. 40; Garrabrant v. Sigler, April, 1829, Chancery; Morris v. Morris, 2 McCart. 239, 240.

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