THE ATTACK ON THE JUDICIARY IN PENNSYLVANIA, 1800-1810

HEN in 1799 a Jeffersonian Republican administration came into power in Pennsylvania the senate was still under the control of a Federalist majority and the judiciary, protected by life tenure, was also Federalist. The Federalist senators could and did block Republican legislation but in two years they were silenced by a Republican majority. Precisely the same situation confronted the party in national politics when Jefferson was elected in 1800. In both cases the Federalist judiciary was a thorn in the flesh of the Republican administration. It was feared that by giving a political complexion to their decisions Federalist judges would render the Republican victory incomplete. Also, the displacement of these judges must under normal circumstances be at best a slow process, and this, to a party which had even then adopted the principle of rotation in office, was annoying in the extreme. In Pennsylvania, where Governor McKean, possessed of none of Jefferson's scruples, had put the spoils system into immediate and vigorous effect, the situation was particularly tantalizing.

The action taken by the Pennsylvania legislature to remedy the situation forms a striking parallel to that taken by Congress. In both

1 Part of a dissertation entitled "Some Aspects of Sectionalism in Pennsylvania, 1790-1812" presented to the Faculty of Bryn Mawr College in partial fulfillment of the requirements for the degree of Doctor of Philosophy and on file in the Bryn Mawr College Library.
cases impeachment was at first resorted to and a subordinate judge charged with offences which, however objectionable, were hardly "high crimes and misdemeanors," and in both cases this judge—Pickering in the case of the national administration, Addison in Pennsylvania—was declared guilty by a partisan vote and so removed from office. The parallel extended even to the date, both impeachments taking place early in 1803. The next step was an attack upon the Supreme Court itself. Congress contented itself with the impeachment of one judge at a time, commencing with Judge Chase. On March 1, 1805, when the vote was taken, he was voted not guilty on five counts by a majority of the Senate, and guilty, but not by a two-thirds majority, on three others.² Had the impeachment been successful the next step would have been the attempt to impeach Chief Justice Marshall.³ In Pennsylvania the Passmore Case afforded the Republican party an opportunity to impeach all three Federalist supreme court judges simultaneously, the one Republican on the bench having been absent on the day of the decision. On January 28, 1805, the Senate voted them guilty by the narrow margin of 11-13 and the impeachment consequently failed.

Having failed to rid themselves of the Federalist judiciary by impeachment, the radical Republicans of both national and state legislatures turned next to a constitutional amendment which would accomplish the same end. As soon as the federal House of Representatives assembled after the acquittal of Judge Chase, John Randolph, who had been the leading spirit in the impeachment, moved an amendment to the Constitution by which federal judges might be removed by the president on the joint address of a simple majority of both houses. Joseph Nicholson followed with a motion for an amendment by which state legislatures might recall the senators they had elected.⁴ In Pennsylvania the attack upon the four-year term for senators, which had commenced in 1800 as a result of the deadlock between Republican House and Federalist Senate, was now renewed. Under the state constitution judges could be removed by the governor on the joint address of a two-thirds majority of both houses. Constitutional amendments were now suggested by which

⁴ J. B. McMaster, *History of the People of the United States*, III. 182.
(1) judges might be removed on the address of a simple majority, (2) a simple majority vote should secure conviction upon impeachment, and (3) the judges should hold office for a term of years rather than for life. These were among the outstanding proposals for a revision of the state constitution made in the years 1804 and 1805, and were not entirely laid aside when the gubernatorial campaign of 1805, which had been fought out on the issue of calling a constitutional convention, terminated in favor of the conservative element.

A matter peculiar to the state itself was the attack in Pennsylvania upon the judiciary per se and upon the law itself. This attack was also bound up with local Republican policy. It is often a characteristic of popular leaders to raise the cry of one law for the rich and another for the poor, to lament the costs of legal action, and to declare all lawyers knaves. That this cry should arise from the Republicans, who drew their forces from the farm and the frontier rather than from the professional classes, and that it should be accompanied by caustic comments on the legal intricacies requiring specialized knowledge and baffling to common sense, was only natural. What was unusual was the length to which the reformers proposed to go. Two judicial bodies in Pennsylvania—the court of small claims held by a single magistrate without a jury before whom contestants might plead without counsel and the determination of certain types of minor actions by arbitration—were already in existence and had been since colonial days. In both cases the absence of a jury tended to diminish costs, while the informality of proceedings afforded the poor litigant a more favorable chance than he had in the ordinary courts. Judgments by these tribunals were commonly based on the equity of each case rather than on technicalities. On all three counts these tribunals were popular, and it is not surprising that efforts were made to extend the sphere of their jurisdiction and to limit the appeals from their decisions to the courts of common pleas. Against this policy, which would lessen the work of lawyers and judges alike, Governor McKean, himself a lawyer and lately Chief Justice of Pennsylvania, resolutely set his face, in part through sympathy for his profession and in part from the conviction that decisions by men unversed in law would lead to a miscarriage of justice. The party favoring arbitration was headed by William Duane in the city and in the legislature by his friend and coadjutor, Dr. Michael Leib, and by the ris-
ing politicians Simon Snyder of Northumberland, William Findley of Franklin, and Nathaniel B. Boileau of Montgomery. Under Duane's leadership the movement which had commenced with practical objectives went on to such radical measures as defeated their own ends by frightening the more conservative Republicans and causing a local split in the party. Only after the expiration of McKean's third term was the radical candidate, Snyder, elected, and then only after the policies suggested in 1805 had been toned down. Much as one may sympathize with Duane's purpose, one is bound to admit that in his suggestions for the arbitrary simplification of the law, for forbidding all lawyers to practice, for the abolition of the common law (because its understanding required a special education whereas the statute laws were available to all), for the omission from both the statute law and the common law of Pennsylvania of all rulings based on European foundations (because, coming from monarchical governments, they must necessarily be tyrannical!) and so on, his enthusiasm outran his judgment. As an example of the lengths to which radical opinion could go while the Republican party was still in a formative stage, this particular phase of Pennsylvania politics is of absorbing interest.

During the session of 1799-1800 many petitions were addressed to the legislature for "A change in the judiciary system" whereby the number of associate judges in each county should be reduced to two and the number of counties to a circuit district should be increased. The motive alleged for these petitions was that of economy, but an open letter in the General Advertiser for January 28, 1800, by "A Real Democrat" suggests another motive. Many, he writes, object to the present associate judges on the ground that they are not required to be professional lawyers and would replace them by such as fast as possible. Considering the present cost of lawyers' fees, a concession to these demands would entail increased rather than lowered salaries. The remedy proposed by "A Real Democrat" was toward a revision of the law that would enable litigants to plead their own cases without professional assistance. A beginning, he pointed out, had already been made by the Act of 1794 increasing the jurisdiction of justices of the peace in civil suits to the amount of twenty pounds. From this we can distinguish two conflicting types of opinion on matters judicial—that which sought to make all judges
"learned judges," and that which sought to take more cases from the regular courts for hearing before that typical layman, the local justice of the peace. In both houses of the legislature an attempt was made to bring in a bill such as was asked for by the petitioners, but in both cases the attempt was unsuccessful and the subject was dropped.  

During the same session Samuel Dale, the senator from the district of Northumberland, Luzerne, Lycoming and Mifflin, introduced a bill to abolish the English as distinguished from the Pennsylvania common law and to forbid attorneys to cite precedents taken from English courts. The purpose of this bill was the "simplification" of the law already mentioned so that citizens might plead their own cases. A well informed layman might have sufficient knowledge of the common law of Pennsylvania and of the most important decisions of Pennsylvania courts to plead his own case, but the other required special knowledge and should be done away with. Anti-British feeling, never difficult to arouse, was played up in support of the bill, but the senate defeated it by the decisive vote of 19-5, Findley of Westmoreland, the Republican leader, being among the nineteen.

In the following year the attack was taken up in the house, where Roberts and Boileau of Montgomery county on December 20, 1800, moved and seconded that a committee be appointed to bring in a bill to prevent the reading of British precedents in the courts as being unsuited to the manners of the people. Furthermore, since the state courts retained the forms of English law, "which, on account of abstruse and technical phrases, is ill suited to the plain and simple nature of a Republican form of government" and required the assistance of counsel, they also moved that the judges of the supreme court or other qualified persons should be directed by the governor to report a simplified form of legal procedure to the house. When these resolutions came up for a second reading on February 16, 1800, the house refused to act on them by a vote of 29-38.

In the spring of 1802 the Act of March 1, 1799, extending the  

---

6 These sentiments are so characteristic of Duane's signed writings that it is probably safe to conclude he was "A Real Democrat."
8 House Journal, 1800-01.
9 Statutes at Large, Ch. 2012.
powers of justices of the peace expired. Accordingly the legislature passed "An act for the recovery of debts not exceeding one hundred dollars," which continued the informal hearings before justices of the peace, allowed damages to be assessed by arbitrators, and increased the amount of which they could take cognizance from £20 Pennsylvania currency\(^{10}\) to $100. None questioned the principle of this bill, and a slight hesitation in respect to increasing the amount was overcome without difficulty.\(^{11}\) At the same session the house by a strict party vote of 65-8 determined to impeach Judge Addison, president of the court of common pleas in the fifth district.\(^{12}\)

In the session of 1802-03 the anti-legal element began to get into its stride and the pros and cons of the subject were argued warmly in the press. As the session opened, however, these proceedings were obscured by the more spectacular impeachment and did not emerge until that was at an end. The national Republican party, as appears plainly from the reported conversation of senators and congressmen, regarded impeachment not as a trial for high crimes and misdemeanors, but merely as a convenient method of ousting from office anyone not otherwise to be removed.\(^{13}\) This was certainly true in the charges brought against Addison, whose chief offence seems to have been his political bias. Charges to the grand juries, in which, like Judge Chase, he went out of his way to praise the Federalists, had not endeared him to the Republicans of his circuit.\(^{14}\) In particular the charge in which he recommended obedience to the excise laws\(^{15}\) had been resented by the entire western country. Nor had the decision of a number of ejection cases in favor of the warrantees served to render him more popular.\(^{16}\) Accordingly, after a brief trial which lasted only two days, January 18-19, he was declared guilty by a party vote of 20-4, was removed from office, and was declared incapable of ever afterward holding judicial office in Pennsylvania.\(^{17}\)

\(^{10}\) About $60.
\(^{11}\) *House Journal, 1801-02*, Apr. 1, 1802.
\(^{13}\) Henry Adams, *History of the United States*, II. 222, 224; Beveridge, *op. cit.*, III. 158.
\(^{14}\) McMaster, *op. cit.*, III. 156.
\(^{15}\) *Pa. Arc.,* Second Series, IV. 242-4, Charge to the Grand Jury of Allegheny County, Pittsburgh, September 1, 1794.
\(^{17}\) *The Trial of Alexander Addison, Esq. president of the courts of common pleas, in*
A few days later a peppery Philadelphia merchant, Thomas Passmore, who bore a personal grudge against the judges of the supreme court, felt the time propitious for attaining his revenge. On February 28, he presented a memorial to the house of representatives in which he set forth the arbitrary conduct of the judges toward himself and requested their impeachment, claiming that "the constitutional and legal exercise of Judicial authority towards himself, to have been manifestly exceeded," and recommending his case to the consideration of the house on the grounds that it was "pregnant with so many alarming consequences to the rights and liberties of the people." It appeared from this memorial that a firm of Philadelphia underwriters, Bayard and Pettit, had refused to pay the policy on a ship of Passmore's which had been lost, that Passmore had carried the matter to the courts where the case was decided in his favor by arbitration, and that, although exceptions to such a decision were required to be filed within four days in order to secure an appeal, Bayard and Pettit had not done so until afterward. Passmore, "in the fervor of momentary resentment" composed a paper expressive of his feelings and posted it in the Merchants' Coffee House. The keeper of the Coffee House removed Passmore's opinion of the firm of Bayard and Pettit and carried it to Bayard. Instead of instituting a libel suit, Bayard connected the affair with the suit out of which it had arisen, and at the next term of the supreme court, December, 1802, Passmore found himself declared guilty of contempt of court and sentenced to thirty days' imprisonment and a fine of fifty dollars. Passmore claimed that since no appeal had been entered by Bayard and Pettit within the appointed time the suit had lapsed and his offence was therefore no contempt and that he had been unconstitutionally deprived of trial by jury. 18

On March 9 the committee to which this memorial was referred reported that it had been the custom of the courts of Pennsylvania, based on the practice of English courts, to issue attachments for contempt of court, consisting of the counties of Westmoreland, Fayette, Washington and Allegheny. On An Impeachment, By the House of Representatives, Before the Senate of the Commonwealth of Pennsylvania (Second ed., Lancaster, 1803), 151, 154.

tempt; they considered attachments for "constructive contempts," not uttered in the presence of the court nor the result of disregarding court rules, contrary to the spirit of the constitution and the decision of facts without the aid of a jury "a step toward establishing aristocracy"; they therefore recommended that a committee be appointed to bring in a bill defining the powers of courts in punishing contempts summarily. This report did not satisfy the radicals, who on March 15 secured its recommittal to a special committee which on March 18 reported in favor of a bill defining contempts of court, and also, as desired of them, referred an inquiry into the conduct of the judges to the next session. This report was accepted and "An act concerning contempts of court" was hurried through the house until on March 28 it was lost on the third reading by a vote of 36-36.

On December 9, 1802, Governor McKean returned to the senate "An act for the recovery of debts not exceeding one hundred dollars" with his veto. He objected to the bill in that it tended to render the office of justice of the peace oppressive and to substitute for a public trial by jury a private hearing before a single justice; that trial by jury was the greatest safeguard of the liberties of the people and all encroachments on it should be jealously guarded against; that the extension to one hundred dollars was bad policy since by it the entire savings of a poor man might be swept away; that though the intention of the act was to save costs it would actually increase them by increasing appeals from the decisions of the justices to the regular courts; and finally that the provision that all cases must be argued in person rather than through counsel was impractical, since few men without training knew how to do this well. On December 30 the senate attempted unsuccessfully to override the veto. That public opinion on the subject was not yet greatly aroused is clear from the despatch of the Lancaster correspondent of the Aurora, who commented favorably on the sustaining of the veto, declaring that the bill if passed would have set up an aristocracy of justices of the peace:

This important decision of the senate does them much honor, and will greatly promote the cause of republicanism in this state. It has been made in opposition to a powerful interest—the whole host of justices of the peace, and their im-

---

19 House Journal, 1802-03.
20 Ibid., 1802-03.
21 Senate Journal, 1802-03.
22 Ibid., 1802-03.
mediate connections, with a very few exceptions. These are, indeed, a powerful body. . . . It is true there is among them a great number of respectable, worthy and intelligent men: but it is equally notorious, that a great part of them value their commissions only so far, as they bring them fees. . . . For my part, it appears to me, that such a host of petty judges and village chancellors, distributed over the state—if they were invested with the jurisdiction, which some members of our legislature seem anxious to give them—would be a grievance of a most deplorable kind. They would form a numerous aristocratical body in the state, extremely unfavorable to the general interests of the people.

A little later the republican organ at Lancaster published an editorial urging the retention of trial by jury. 23

Undiscouraged by their defeat, the radical senators set to work on the formation of a new bill, "An act to provide for the adjustment of disputes, and the recovery of debts within this commonwealth," which is important as the first bill in which the principle of arbitration was developed to any great extent. The senate, somewhat more conservative in its membership than it had been the previous session, and greatly influenced by the arguments of the veteran Findley, who held that the withdrawal of any cases from the ordinary courts was unconstitutional as depriving men of the right of trial by jury, was slow to act upon the measure. On January 12 it threw out the bill on its second reading, next day reconsidered its decision and referred the matter to a special committee, spent three days in committee of the whole on the remodelled bill, threw out section 3, the core of the arbitration system, and finally after innumerable motions for amendment, divisions, etc., passed the bill on February 14. 24 The house restored section 3 without difficulty but constitutional scruples had been awakened there also and on March 4 the bill passed its third reading by the close vote of 43-36, 25 with radicals who feared for the liberty of the individual uniting with conservatives in opposition to it. On March 21 Governor McKean despatched a veto message to the Assembly. After a passing reference to the folly of embarking upon "crude theories, fanciful alterations, new projects, and pleasing visions," he declared that the bill if passed would tend to assist the rich against the poor and the learned against the ignorant; that it would create such a press of business that the justices of the peace could never attend to it adequately without neglecting their private

23 Aurora, Jan. 4, 1803; Intelligencer & Weekly Advertiser, Feb. 15, 1803.
24 Senate Journal, 1802-03, Jan. 10, 12, 13; Feb. 5, 7, 10, 11, 12, 14, 1803.
25 House Journal, 1802-03.
business and their other official duties; that in consequence only men of inferior capacity and character would be willing to undertake the office of justice of the peace, men such as would be influenced in their decisions by fear or favor or by personal resentment; that the provision that litigants must plead in person rather than through counsel would be manifestly unfair in cases where one party to the suit was a professional lawyer and the other a layman, or one a foreigner unacquainted with the language. In conclusion, all the arguments he had urged in his last veto message on a similar bill applied to this bill also.\textsuperscript{26}

The senate on the same day voted 13-11 in favor of overriding the veto and the bill was consequently lost. A new bill, "An act relative to the decision of disputes by arbitration" was immediately afterward introduced, but on March 26 this measure was defeated.\textsuperscript{27} Both houses were however roused by these persistent vetoes, and an Act to revive the expired Act of 1799 was passed without difficulty. On April 4 when Governor McKean returned with his approval the other bills that had been submitted to him, this one was missing.

During the summer of 1803 the press canvassed the probability of the governor's vetoing the bill and the attention of the general public became centered on the subject.\textsuperscript{28} The \textit{Republican Argus} of Northumberland, edited by John Binns, took the lead in publishing well reasoned essays on arbitration which provoked replies and counter-replies from many quarters. Local interest was strong, for Samuel Maclay, the senator from Northumberland, Mifflin, Luzerne and Lycoming, had been the author of the adjustment bill\textsuperscript{29} and Simon Snyder of Northumberland, a member of the house since 1797, was its earnest advocate. Thomas Cooper, who had done much to bring the Republicans into power in the county and had himself been an advocate of the most radical changes, now dissociated himself from the radical wing of the party and in a long essay entitled "The Ad-

\textsuperscript{26} Senate Journal, 1802-03.
\textsuperscript{27} Ibid., 1802-03.
\textsuperscript{28} Under the Constitution of 1790 a bill submitted to the governor within ten days of the adjournment of the legislature might be retained by him for consideration over the recess but if not returned within three days of the commencement of the next session it became a law without his signature. There were precedents for bills so retained being returned with the governor's approbation and of others returned with his veto.
\textsuperscript{29} Republican Argus and County Advertiser, July 15, 1803.
valuation Bill warned the public of the dangers contained therein. The exercise of judicial power by justices of the peace he did not object to, for they were usually men of understanding and therefore capable of dealing with the smaller civil suits which did not involve complicated points of law, but the transfer of this power to arbitrators he held to be dangerous. Disregarding the fact that the bill provided fines for those refusing service, he added that only idlers and ne'er-do-wells would be induced to serve as arbitrators at seventy-five cents a day. So far as it was already in effect, the system had proved unsatisfactory, because the arbitrators, unwilling to offend any of their neighbors, attempted to compromise each case instead of deciding outright and five out of six awards made by arbitrators were later set aside. After repeating the arguments contained in the veto message he deplored the hostility which had been growing up toward lawyers as a class, and concluded with the assurance that, though he sympathized with the motives of the authors of the bill, he was certain it would increase the expense of litigation. If they wished to end the congestion of business and consequent delay in settling cases, a secondary motive sometimes urged for removing suits from the regular courts, they should act on the governor's oft repeated recommendation to increase the number of circuit districts and of judges.

On December 8, 1803, Governor McKean returned the bill reviving the jurisdiction of justices of the peace with a brief veto message repeating his former arguments. On December 22 the house overrode his veto by the crushing majority of 75-4, and on January 2, 1804, the senate passed the bill by a vote of 20-2. This action was due in part to the agitation started in the summer, in part to the growing rift between the governor and his party, but especially to the fact that the bill was in itself no innovation and the system sanctioned by it was long established and generally considered useful. That a systematic agitation had been carried on in favor of passing the vetoed adjustment bill also is proved by the multitude of petitions which reached the Assembly from all sections of the state. Some of these went so far as to demand the settlement of all civil actions

80 Northumberland Argus, Nov. 18, 1803.
81 House Journal, 1803-04.
82 Ibid., 1803-04.
83 Senate Journal, 1803-04. For text of bill see Statutes at Large, Ch. 2390.
The legislature, willing and even eager to comply with the request, was soon at work upon "An act for the recovery of debts and demands not exceeding one hundred dollars, before a justice of the peace," familiarly known as the "hundred dollar bill," which provided for the settlement of suits for less than $5.33 by a justice of the peace alone and for the settlement of suits for greater amounts by arbitrators or referees chosen by either side and presided over by the justice, or if either party refused to be heard by reference, by the justice alone. Judgment was to be final in all cases concerned with less than fifty-three dollars, a provision more radical than that of the previous adjustment bill. Some hesitation was evinced in each house in regard to this provision, but feeling ran so strongly in favor of the bill that this was brushed aside and the bill passed the house February 29 by a vote of 68-14 and the senate on March 10 by a vote of 18-3. Of the fourteen opposing votes in the house, one was drawn from Luzerne, two from Huntingdon, one from Allegheny, Beaver and Butler, and the remainder from the conservative southeastern counties. Since the majorities in favor of the bill were overwhelming, the governor did not veto it, and after being in his possession for ten days it became a law without his signature.

During the discussion of this bill it was urged in favor of arbitration that it had been used by the Quakers and by some of the German sects with uniformly favorable results. To the objection that the arbitrators would be incapable of judgment, "A Country Clown" pointed out that this objection would hold good also against the sacred institution of trial by jury, since jurymen like arbitrators belonged chiefly to the common herd. The constitutional argument in regard to trial by jury was met by the reminder that the exact wording was, "Trial by jury shall be as heretofore" and that the jurisdiction of justices in minor suits had antedated the Constitution of 1790. But the argument repeated most frequently and that which captured the imagination of many, was the purely demagogic one

---

84 House Journal, 1803-04; and Senate Journal, 1803-04, passim.
85 Ibid., 1803-04, Feb. 24, 1804; Senate Journal, 1803-04, Mar. 8, 1804.
86 Ibid., 1803-04; and Senate Journal, 1803-04.
87 Statutes at Large, Ch. 2482.
88 Aurora, Jan. 10, 1804.
89 Northumberland Argus, Mar. 2, 1804.
90 Intelligencer & Weekly Advertiser, Dec. 27, 1803.
that justice could be obtained better from arbitrators who were plain honest men than in the courts where the rascally breed of lawyers made the worse appear the better case.

The growing opposition to lawyers as a class was partly responsible for the vigor with which the house now pressed forward its preparations for the impeachment of the supreme court judges on the charge of unconstitutional conduct in the case of Thomas Passmore. Party feeling and the desire to secure these offices for Republicans were the chief motives, however, and on March 20 the house determined upon impeachment.\(^4^1\) It was while commenting upon these proceedings that the *Aurora* first made the suggestion that the life term of the judiciary should be reduced to a term of years.\(^4^2\) On March 24 the Assembly was shocked by a memorial from the one Republican judge on the supreme court bench, Hugh Henry Brackenridge. Although he was absent when the decision in the Passmore case had been read, Brackenridge stated that he approved the sentence of his colleagues and desired to be impeached with them.\(^4^3\) Angered by such political treason one ardent Republican exclaimed: "What shall we call Mr. Brackenridge? The spirit of the Constitution provides that the Judges shall be independent, and, that they shall hold their offices during good behavior. But this Judge is not independent. He is a dependent on the will of the Executive Magistrate. Where do we find such a creature, such a nondescript, except, I suppose, in the common law." More than ever convinced that lawyers as a class would stick together, the house declined to impeach but did pass a resolution requesting the governor to remove him and on April 2 the senate assented to this resolution.\(^4^4\) Governor McKean, who considered that the supreme court had been within their rights in the matter, ignored the address of the Assembly although he had previously removed several minor Federalist judges at the joint request of two-thirds of both houses of the legislature.

The impeachment proceedings took place at the following session. The Republican group pushing the matter took the position that the conduct of the judges in Passmore's case was "unprecedented in the

\(^4^1\) *House Journal, 1803-04.*
\(^4^2\) *Aurora, Jan. 12, Mar. 3, 1804.*
\(^4^3\) *House Journal, 1803-04.*
\(^4^4\) *Senate Journal, 1803-04.*
annals of jurisprudence, and that nothing similar to it is to be found in any other country, where law, and not the arbitrary will of the magistrate, is the governing principle.” Mr. Boileau in his opening speech in the senate claimed to be pleading “not only for my own rights, . . . but for the rights of my fellow citizens, and for the rights of man, which I feel have been violated by those venerable gentlemen now at your bar. . . . The trial of this impeachment . . . is involved with the foundation of our liberties, and the security of our freedom.” He summarized his argument in the question: “Shall we hold our liberties by the sacred tenure of the constitution, or by the uncertain tenure, or capricious will of an angry Judge, or Judges.” Throughout the trial the prosecution suffered from a lack of any real evidence of malpractice on the part of the defendants but despite the flimsiness of the charges against them, so strong was radical sentiment that thirteen senators voted the judges guilty, eleven not guilty. Since a two-thirds majority was required for conviction, the impeachment failed. In their disappointment the radicals inserted in a bill for the redistribution of judicial circuits, clauses providing for simplification of court procedure and for an extension of the system of arbitration. On March 18 this bill passed its third reading in the house by a vote of 53-26, the opposition being composed of the few Federalists remaining and of such Republicans as had been alarmed into conservatism by the violence of the radical attack upon all judicial institutions. One member from each of the counties of Chester, Montgomery, Bucks, York, Franklin, Huntingdon, Delaware, Lycoming and Erie, two members from the counties of Lancaster, Northampton and Wayne, Fayette, Adams, Bedford, Luzerne, Westmoreland, Armstrong, Indiana, and Jefferson respectively and the three members from the district of Allegheny, Beaver and Butler voted against the passage of the bill. After its passage by the senate this bill was vetoed by the governor because of its arbitration clauses, and the house upheld his veto by the close vote of 50-26, the distribution of votes being practically the same as before.

The acquittal of the judges aroused great indignation, and the unpopular decision of the United States Supreme Court in the case

---

45 House Journal, 1804-05.
46 Ibid., Mar. 29, 1805.
47 Ibid., Apr. 1, 1805.
of Huidekoper's lessee vs. Douglas, delivered February 27, and the acquittal of Judge Chase on March 1 served to add fresh fuel to the flames. The land companies of Pennsylvania were compared to the notorious Yazoo companies and the local press, despite party discipline, took the part of the radical element in Congress in opposing the administration's bill to settle the Yazoo claims. The passage of the judiciary bill just mentioned and the concurrence in the resolutions of the legislature of Kentucky for an amendment to the federal Constitution limiting the jurisdiction of federal courts in land cases ended the legislature's share in the attack on the judiciary which gathered momentum in the spring of 1805. The old war-cries were sounded with redoubled vigor by the press and soon new demands were voiced by the *Aurora* and copied by its following.

On February 9, 1805, there appeared in the *Aurora* the first of a series of articles by Amicus which commenced with the statement that he welcomed the acquittal of the three judges because such a travesty of justice must rouse the public to a realization of how dangerous and how firmly established was the judiciary, while the fact that the house had had to send to Delaware for counsel must convince the most sceptical that in Pennsylvania the whole fraternity of lawyers were banded together to protect each other against the sovereign people:

> Will the people of Pennsylvania behold a set of men claiming the right to fine and imprison them at pleasure, and holding their office in contempt of the people—will they see the whole bar (made rich and fat by the people's labour) desert in a body to the standard of the enemy, and sit quiet? No they will not. . . .

The constitution has promised 'remedy to every man injured in his reputation, person or property without unreasonable expense or delay.' But the court and lawyers give protection to every injurer; under a pretext that every man is intitled 'jury trial,' and jury trials require pleadings, and pleadings require 'unreasonable delay and expense,' directly inverting the promise of the constitution. Whether jury trial, or arbitration, is the best mode of obtaining a just decision, may be a question: but whether the injurer shall be protected; and

---

48 This bill was the project of Madison, the federal secretary of state, whom Duane had been attacking for the last two years (Adams, II. 193). It is a curious coincidence that the rift in the national Republican party which arose over the passage of the Yazoo bill (Beveridge, III. 175) should occur at the same time as the rift in the state party which arose chiefly out of antagonism to the judiciary.

49 Several prominent Pennsylvania lawyers had in turn been asked to undertake this prosecution, and had declined on the ground that the charges against the judges were insufficient, before the house secured the services of Caesar Rodney of Delaware.
the injured, non-suited and subjected to unreasonable delay and expense; or, whether the doors of courts shall be shut to 'every man' except lawyers, by requiring dexterity in fiction and nonsensical pleadings and rules, arbitrarily imposed by the monkish priesthood, and still preserved by their successors in imposture; can admit of no question to Pennsylvanians: the evil is now seen, the disease is discovered, and the remedy must follow—and thanks to the gentlemen of the bar for deserting the people, defending the judges, and unfolding in that trial, how the people stand and on whom they are to depend.

Had the people of Pennsylvania, jealous as they were of intrusting to any class the power they had won by warfare, realized in 1790 what powers they were conferring on the judiciary, Amicus continued, they would have framed their constitution differently. The best defence against tyranny in a republican government was to return all power to the people at brief intervals, and the present constitution should be amended so that the judiciary, like the other branches, should hold office only for a term of years and be elected by the people. Furthermore, since the two-thirds rule permitted a minority to balk the wishes of the majority, a simple majority should be competent for the determination of an impeachment. To break the dangerous confederacy of the lawyers, so recently revealed, no less than to render justice less expensive, all civil suits should be determined by reference to arbitrators, and to make this possible without technical error which might lead to appeals and non-suiting, all court procedure should be drastically revised in the direction of simplicity. On February 20 Amicus enlarged upon his last suggestion. To end delays and cut expenses he would abolish all special pleading, would omit all declarations, pleas, replications, etc., now made at the commencement of a case, and allow the reading of only the capias writ with a brief description of the situation, would forbid all lawyers to refuse cases, and would fix their fees at the flat rate of $5.00 a case. These suggestions met the approval of the radical leaders and were in part incorporated in the ill-fated judiciary bill of this session. In April Duane himself took the field in the series of essays entitled "Sampson Against the Philistines" which were afterwards collected and distributed in pamphlet form. In these, the fullest statement of the radical creed, he advanced the theory that legal principles are few, simple, easily mastered, and calculated to procure abstract justice; that legal procedure, invented by lawyers for their own benefit, is

*50 For details see *Aurora*, Apr. 4, 1805.
complicated, expensive, slow, and calculated to help murderers to cheat the gallows and dishonest men to steal the property of their more upright neighbors. He advocated a simplification of procedure and an extension of the principle of arbitration by which each citizen could manage his own case.\textsuperscript{51}

On February 28 the \textit{Aurora} published the draft of a memorial to the legislature for the call of a convention to amend the constitution. On March 27 the Society of the Friends of the People was organized in Philadelphia to promote this purpose and correspondence committees were appointed for branches in every county and even in other states.\textsuperscript{52} On April 3 a caucus of the radical members of the legislature was held at Lancaster for the nomination of a candidate for governor at the approaching election at which it was decided that this candidate should not be a lawyer, but should be a German and preferably a man of the people. Simon Snyder of Northumberland, Speaker of the House and an advocate of the various arbitration bills, then received the nomination.\textsuperscript{53}

Conservative Republicans had for some time viewed the attitude of the radicals of their own party with alarm. The proposal for a constitutional convention whose innovations were unpredictable was the signal for a split in the party. With the aid of the Federalists, the conservative group reelected McKean in October, and secured a majority in both houses of the legislature.\textsuperscript{54} The hope of some conservatives that the hundred dollar bill might be repealed\textsuperscript{55} did not materialize, but the revision of the judiciary system recommended by McKean in each annual message and hitherto neglected by the radicals from motives of economy and of personal antagonism was at length effected by "An act to alter the judiciary system of this commonwealth" which became a law on February 25, 1806.\textsuperscript{56} Among

\textsuperscript{51} \textit{Sampson Against the Philistines, or the Reformation of Lawsuits; and Justice Made Cheap, Speedy, and Brought Home to Every Man's Door}, 2d ed. (Philadelphia, 1805). (Variously ascribed to Duane, the publisher, and to William Sampson of New York, 1764-1836, who was an advocate of similar measures in that state, this pamphlet was really written by Jesse Higgins of Delaware; Memoirs of Jonathan Roberts (photostat in H.S.P.), I. 124-36; H. C. Conrad, \textit{History of the State of Delaware} (Wilmington, 1908), II. 528-30.—Ed.).

\textsuperscript{52} \textit{Aurora}, Mar. 28, 29, 1805.

\textsuperscript{53} \textit{Ibid.}, Apr. 5, 1805.

\textsuperscript{54} \textit{Bedford Gazette}, Dec. 14, 1805.

\textsuperscript{55} \textit{Intelligencer & Weekly Advertiser}, Jan. 28, 1806.
other provisions this Act increased the number of circuit districts in
the state from five to ten, an arrangement which the subdivision of
counties and the increase in population had long made necessary. As
a sop to the radicals the number of associate judges in each county
was reduced from three to two, and as a concession to the western
members the state was divided into two supreme court districts,
Eastern and Western. The eastern slope of the Alleghenies was
taken as the dividing line, and cases initiated in the counties of Bed-
ford, Somerset, Westmoreland, Fayette, Greene, Washington, Alle-
geny, Beaver, Butler, Mercer, Crawford, Erie, Warren, Venango,
Armstrong, Cambria, Indiana, Jefferson, Clearfield, and McKean
counties were to be tried before the supreme court in September term
at Pittsburgh, while cases originating in the Eastern district were
tried in Philadelphia at the December and March terms as before.
This arrangement was of incalculable benefit to the poor settlers of
the northwestern counties who could not afford the trip to Philadel-
phia and also to the rapidly expanding business of Pittsburgh and of
the smaller commercial cities of the northwestern counties.

While this bill was being debated in committee of the whole and
after the sections reported by the committee had been dealt with,
William Findley of Franklin introduced ten new sections dealing
with arbitration which were ordered printed with the rest of the bill66
but were omitted during the second reading. At this stage Findley
further attempted to introduce a series of sections for the simplifica-
tion of court procedure. In this he was assisted by Abner Lacock of
Allegheny county and by William Beale of Mifflin. The conservatives
succeeded in referring the resolutions to a separate committee58 where
they were suffered to remain undisturbed for the remainder of the
session. The conservative press reported the debates with some amuse-
ment, for the would-be reformers were unversed in the law and had
difficulty in expressing themselves correctly when dealing with tech-
nical matters.59

A Bill has passed a second reading to regulate proceedings in arbitrations
and courts of justice; the Constitutionalists endeavoured to amend it, so as to
make it consistent and useful to the people, but this attempt was zealously

65 Statutes at Large, Ch. 2646.
66 Freeman’s Journal, Jan. 14, 1806.
58 Ibid., Jan. 25, 1806.
59 Ibid., Mar. 12, 1806.
opposed by the NEW LIGHT and defeated; for although we have a majority, some of our friends were willing to let them have it in their own way, so that the people might experience the effects of their folly and be convinced of the absurdity of their clamours as well as the supposed remedy. . . . The debate on the Bill was, indeed, very amusing: it is easy to conceive the difficulties they had to contend with, when it is considered, that an attempt is made to innovate upon all the proceedings in civil cases in courts of justice, by men, not one of whom even pretended that he had read a book of practice, or was acquainted with the present proceedings in courts. . . . Nothing is to be done in any language but the plain intelligible English; all Latin names are to be abolished. . . . Such a Bill as this is could never have been conceived by an ordinary genius; the goddess of perfectibility must have inspired its authors with her quickening influence; for, every thing is so plain, that like axioms, nothing in it can be illustrated.

Findley's motion to replace Latin terms of process by English equivalents, which had been accepted by the house, was finally done away with in the senate,\(^60\) where a renewed attempt to include arbitration clauses was also defeated.\(^61\) This was done on the pretext that arbitration clauses would be included in the bill to be reported by the committee to which such inconvenient motions had been shunted by the house.\(^62\) Despite the concessions in regard to associate justices and the sound benefits to western litigants, when the bill passed its third reading in the house the members from Allegheny, Beaver, Butler, Washington, and Erie opposed its passage, together with those from the counties of Philadelphia, Cumberland, Franklin, Dauphin, Huntingdon, Mifflin, and Centre and a single member from York.\(^63\)

Meanwhile, although defeated in the election of 1805, the \textit{Aurora} had continued to advocate its former policies and in 1806 resumed the publication of the series entitled "Experience the Test of Government" which had been commenced to prove the necessity for alterations in the constitution.\(^64\) The election of 1806 restored the radicals to power in the legislature, where they at once passed without difficulty an Act continuing and making perpetual the expiring hundred

\(^{60}\) \textit{Freeman's Journal}, Mar. 24, 1806.

\(^{61}\) \textit{Ibid.}, Feb. 8, 1806.

\(^{62}\) William Piper to John Tod, Feb. 3, 1806, H.S.P.


\(^{64}\) \textit{Experience the Test of Government: In Eighteen Essays. Written During the Years 1805 and 1806 to aid the investigation of principles, and operation of the existing Constitution and Laws of Pennsylvania.} Phila., 1807. These essays, collected in pamphlet form in preparation for the gubernatorial campaign of 1808, contain the most complete statement of the radical platform.
dollard Act of 1804 and extending its provisions to all contracts, express or implied, except land titles and breach of promise. They next proceeded to declare unconstitutional the intervention of the federal courts in suits concerning the tenure of land in northwestern Pennsylvania, and, undeterred by the governor’s veto of similar resolutions, to prohibit “attornies and others from reading in court any precedents of cases of law decided in any court, except in some court of the United States.” This resolution was intended by its advocates to shorten the time consumed in pleading, thus reducing the expenses of litigation, and also to abolish the common law of England as opposed to that of Pennsylvania on the ground that the latter alone was applicable to local customs and the use of the former merely another of the tricks of the legal profession. In vain conservatives protested that the law of Pennsylvania itself was founded on older traditions and that if these were removed bodily the skeleton of original material would be too scanty to serve its purpose; in vain they suggested the difficulties of settling commercial cases upon the basis of local in place of international law. Fourth of July oratory was employed with telling effect and members of the legislature were exhorted to free a republican government from the last remnants of British tyranny. The resolution passed the house by a vote of 51-33 which was more definitely sectional in character and less the result of party feeling than most of the votes recorded in this paper. Of the members who opposed the bill, only five—two from Adams, two from Franklin, and one from Bedford—represented counties west of the Susquehanna, while of the remainder all but one member from Luzerne and all six from Lancaster, the great grain exporting county, represented the counties bordering on the Delaware. This vote reveals rather strikingly the extreme provincialism of the interior of Pennsylvania and the indifference to international relations less obvious than actual warfare that was also displayed in regard to the embargo and the non-intercourse Act. The resolution was returned by Governor McKean to the next legislature with a veto message which stressed particularly the impossibility of interpreting the current law, whether statute law or common law, without reference to its ante-

*Statutes at Large, Ch. 2842. Ten days having elapsed without the governor's signature, it became a law April 9, 1807.*

*House Journal, 1806-07, Apr. 6, 1807.*
cedents. An attempt to override the veto failed, and for the time being the matter was allowed to drop.

At the session of 1807-08 the attention of the reformers was transferred from the state to the federal judiciary. On December 15 it was moved by Leib of Philadelphia County and seconded by Lacock of Allegheny that the representatives and senators of the state in Congress should be instructed to work for an amendment of the national Constitution in such a manner that the judiciary should hold office for a term of years, should be removable by the president on the address of both houses, and should be held guilty on an impeachment by the vote of a majority of the senate. This motion was debated in committee of the whole for the entire week of January 4 and was finally reported as negatived. On January 8 the resolutions of the legislature of Vermont for an amendment by which federal judges might be removed by the president on the joint address of two-thirds of both houses of Congress reached the Assembly, and on the 28 the senate committee to which these resolutions had been referred reported that while they favored the resolutions they did not consider that they went far enough. They consequently offered as a substitute the same resolutions which Leib had already offered in the house. On February 10 these resolutions were adopted by the senate and the following day after several unsuccessful attempts at postponement or alteration were also adopted by a vote of 41-37 by the house. On Leib's suggestion and despite the protests of the opposition, the resolutions were then despatched to Washington without the sanction of the governor, a policy probably inspired by his veto in the preceding session of the resolutions against the jurisdiction of the federal courts in northwestern land suits. The vote in the house on this occasion was quite definitely sectional, eastern members generally being opposed to the resolutions and western members favoring them.

In December, 1808, McKean completed his third term as governor.

70 *Senate Journal, 1807-08*.
74 *House Journal, 1807-08*.
and was succeeded by Simon Snyder of Northumberland, the rival candidate of 1805. As a natural consequence of the inauguration of the champion of the hundred dollar Act, the legislature at once embarked on a long series of bills embodying judicial changes. On March 9, 1809, "An act concerning libels" which specifically exempted from prosecution all publications examining into the proceedings of the legislature or the official conduct of government officials became a law.\(^74\) This measure no doubt owed its origin to the libel suits brought by McKean against Duane and other of his enemies after his reelection in 1805.\(^75\) The suggestion first made in the course of the impeachment of the supreme court judges for a law defining offenses punishable as contempt of court was now given effect.\(^76\) As a result of the shoemakers' strike in Philadelphia which had been championed by the *Aurora* but punished by the courts, a committee was appointed to examine the existing laws on conspiracy and to report what changes, if any, were required.\(^77\) On March 13, 1809, this committee reported that the English common law doctrine that trade unions might be punished for conspiracy held good in Pennsylvania and that although not certainly established, it was thought by some that an overt act need not be proved to secure conviction. The committee held the second doctrine to be definitely tyrannical and therefore dangerous and reported that the first doctrine should logically be extended to apply to combinations of manufacturers and retailers. Under the existing system of free competition, however, they saw no need to protect the public from combinations of any sort. They therefore advised that a committee be appointed to bring in a bill to define conspiracy and to provide that no action which was considered innocent when performed by an individual should be construed as criminal when performed by two or more persons acting in concert.\(^78\) At the following session a bill embodying these principles was discussed in committee of the whole,\(^79\) but the rank and file of the Republican party were not yet sufficiently enlightened to appreciate it

---

\(^74\) Ch. 3051.
\(^76\) *Statutes at Large*, Apr. 3, 1809, Ch. 3093.
\(^77\) *House Journal*, 1808-09, Dec. 21, 1808.
\(^78\) *Ibid.*, 1808-09.
\(^79\) *House Journal*, 1809-10, Jan. 24, 1810.
and it was not called up for further action. It was the class affected by
this bill who, under the liberal suffrage of the Constitution of 1790,
were now sufficiently interested in politics to elect as representatives
from the city a portion at least of the liberal candidates.

Of the bills dealing with the Pennsylvania courts, that which at-
dtracted most attention during the session was the supplementary
Act to regulate arbitrations, an Act which was declared perpetual\(^80\)
and which despite the efforts of the conservatives, opened to arbitra-
tion every sort of civil suit in which not more than one hundred dol-
lars was involved. This bill was contested stubbornly at every point
by the conservatives who offered countless amendments and insisted
on frequent divisions but could not wear down the patience of the
administration. The division on the third reading stood 65-22, a
larger attendance being present than usual. Among the twenty-two
nays were the total membership for Chester, Delaware and Luzerne,
all the members present from Lancaster, Bucks and Adams, half
the membership for York, and one each of the three members from
Franklin and Cumberland respectively.

With the session of 1809-10 the work of the radicals for the reform
of the judiciary may be said to have been completed. By the Act of
March 19, 1810, the reading of British precedents in courts was
prohibited. Some of the conservative arguments had reached their
mark since this bill was first agitated, for it was applicable only to
British precedents subsequent to July 4, 1776, and precedents from
maritime law and the law of nations were expressly excluded from
its scope.\(^81\) Two other Acts\(^82\) codified and amended the Acts previously
passed for the determination of civil suits by referees or justices of
the peace. The only extension of the system was the provision, if
both parties desired it, for the determination of suits involving larger
sums before a justice of the peace. Detailed instructions covering
various contingencies made appeals from decisions under these Acts
less likely to be granted on the basis of technical errors. No further
advances in this direction were to be made in the near future. For a
decade or more the various supplements to these Acts merely served
to correct slight imperfections in procedure.

\(^{80}\) *Statutes at Large*, Mar. 29, 1809, Ch. 3080.
\(^{82}\) *Ibid.*, Mar. 20, 1810, Ch. 3219, pp. 131ff; Ch. 3249, pp. 161ff.
The record of the Pennsylvania Republicans in their struggle with the law and the judiciary is a mixed one. In their efforts to simplify procedure and lessen court expenses their greatest contribution was the enlargement of the arbitration system and the jurisdiction of the justices of the peace. Opinions are bound to differ in regard to the efficacy of this system, and no reliable statistics as to the cases finally settled by these tribunals and those appealed are available. There is evidence, however, that the system was popular and that where a choice of jurisdiction was available arbitration was frequently preferred to the regular courts. It is in this system, the earliest suggested and most consistently urged of all their policies, that the Republicans attained their most solid success and even surpassed the goal they had originally set themselves. As we have seen, the efforts to abolish the common law and lawyers root and branch were thwarted, and surely no one can regret it. In the attack on the judiciary their efforts also in large measure met with failure. They did oust one judge by impeachment and a number more by joint address to the governor; but the principle of rotation in office, which could be secured only by the substitution for a life term of a term of years, remained unattained. In 1811 and 1812 proposals for a constitutional convention were again brought forward, but these received nothing approaching the support of the abortive movement of 1805. Not until the convention and new constitution of 1838 did the state acquire an elective and a rotating judiciary. The truth of the matter was that with the removal of McKean's persistent opposition the enthusiasm of his enemies was dampened. After the passage of a few specific bills with little opposition in the legislature and with Governor Snyder's cordial cooperation, the reform movement in respect to the judiciary lost its momentum and presently died a natural death. Inasmuch as the judges of Pennsylvania were at the period liberal rather than conservative in their decisions and as their removal was frankly acknowledged to be an opportunity for new appointments, we may congratulate the party on its failure to accomplish more in this direction.

Philadelphia

ELIZABETH K. HENDERSON