Courts, Cases, and Counselors in Revolutionary and Post-Revolutionary Pennsylvania

In establishing the judicial branch of the government of the Commonwealth of Pennsylvania, William Penn and the first Quaker settlers sought to keep to a minimum the role of professional lawyers and jurists, and to devise the simplest court procedures possible. Procedures so plain that “all persons of all persuasions [might] freely appear in their own way, and according to their own manner, and . . . personally plead their own cause . . . , or if unable, by their friends. . . .”¹ Their treatment in the courts of England in the seventeenth century had made Friends suspicious of intricate judicial systems and the technicalities of the courts. They had come to look upon the profession of law with marked distaste. Writing in the 1690’s, Gabriel Thomas well expressed the aversion of Friends for trained lawyers: “Of Lawyers and Physicians I shall say nothing, because this Countrey is very Peaceable and Healty [sic]; long may it so continue and never have occasion for the Tongue of

¹ The Statutes at Large of Pennsylvania from 1682–1801 (Harrisburg, 1896–1908), II, 128.
the one, nor the Pen of the other, both equally destructive of mens Estates and Lives. . . .”

This hostility, and the practice of settling controversies and deciding causes by an appeal at meeting tended to discourage the growth of the legal profession. But not for long. Soon, and almost as if to obviate the plans of the Proprietor and the Quakers, the Commonwealth became a center of colonial law. As Pennsylvania prospered and as her trade and finance flourished, Philadelphia developed and drew to itself the best legal minds and forensic talents. The two decades before the American Revolution saw the rise of a brilliant bar in Pennsylvania, and no colony, except South Carolina, had more lawyers trained in the Inns of Court. Pre-eminent in their calling, of exceptional ability and broad culture, knowledgeable and skillful in the law, the distinguished attorneys of Philadelphia were no less men of wealth, position, and power in Pennsylvania. By the time of the Revolution the term “Philadelphia lawyer” was current and the era of the “Special Pleaders” begun.

The coming of independence, however, checked briefly the professional lawyers’ rise to place and privilege. Active in the counterpoint of Pennsylvania politics, accustomed to authority within its many factions—Quaker, Proprietary, Tory, moderate Whig—articulate in the expression of every shade of opinion, and, in particular, eloquent in the defense of colonial rights, the Commonwealth’s counselors were rudely surprised when circumstances denied them control of the state’s government and affairs. In the forefront in resisting imperial policy, the voice of Pennsylvania’s patrician ruling class, the lawyers hesitated until too late to declare for independence and revolution. As a result, the writing of Pennsylvania’s Revolutionary constitution and control of the institutions to emerge with this instrument went to Philadelphia’s middle class and to the restless men of the west—Pennsylvania’s radical Whigs, primed in democracy, for some time in pursuit of office, and ready for rebellion. Frustrated in every attempt

2 Gabriel Thomas, An Historical and Geographical Account of the Province and County of Pennsylvania and of West Jersey in America (London, 1698), 32.
3 Ibid., 38.
5 Alexander Graydon, Memoirs of His Own Times, with Reminiscences of the Men and Events of the Revolution (Philadelphia, 1893), 120-121.
either to remake or make amenable Pennsylvania's Revolutionary machinery, disdainful of the state's "inexperienced and unknown" Revolutionary leaders, and unwilling, even temporarily, to forego dominance, the men of law led the Commonwealth's elite in a "deliberate sabotage" of the Constitution of 1776. By refusing to appear, the lawyers hoped to prevent the courts from opening and to render the new government stillborn; "there was an agreement, or at least an understanding among the lawyers," recalled Graydon, "neither to practice or accept of any office under the constitution. . . ." Matthias Slough informed Jasper Yeates that it was the "wish and hope [of Philadelphians] that the Gentlemen of the Bar [would] agree not to Act under the present Government," and Edward Burd wrote Yeates he was not attending the courts in Reading "because the Constitution was not settled." Yeates confessed he too had not gone near the courts: "nor do I think I shall until I cannot help it. In my idea there is little law amongst us." From Carlisle, John Montgomery wrote James Wilson that the newly elected justices were on their way to Cumberland County: "We shall have a blessed Set of Justices . . . they are to me[e]t . . . to hold Court next Tuesday, the Town will be full and Stinking with—yellow wiges. [John] Creigh has demanded the Records off [John] Agnew, we advise him not to Deliver them; and not to Deliver the County Papers to [William] Lyon, will you let us have your sentiments on this affair, will you advise to Submit our necks to the Yoak like ass. . . . I am affraid if they once are alowd to open the Courts, it will be over with us, we are told, that the City and County of Philada have agreed to open the Courts . . . but I think it not true."

8 Graydon, 332.
9 Matthias Slough to Jasper Yeates, Mar. 28, 1777, Yeates Papers, Historical Society of Pennsylvania (HSP).
11 Jasper Yeates to Edward Burd, Feb. 15, 1778, Shippen Papers, III, HSP.
12 John Montgomery to James Wilson, Apr. 21, 1777, Simon Gratz Collection, HSP; Pennsylvania Archives, First Series, VI, 228; J. Bennett Nolan, Neddie Burd's Reading Letters (Reading, 1927), 81–82.
While it lasted, the lawyers' boycott threatened the administration of justice. The "Law business having languished from March to June [1776], totally stopt then," recorded James Allen, son of the colonial chief justice, "all the Courts declining to proceed; the Magistracy of the City also ceased & we have ever since continued without Justice, in a State of nature." 13 Anxious to get the courts going, the Constitutionalists were solicitous of anyone who might fill a judicial post. Thomas Wharton, president of the Supreme Executive Council, appealed to John Morris: "Some conversation... passed... between you and Mr. [John] Evans induces Council to hope your patriotism will induce you to attend the opening sessions of the peace at Lancaster & Reading as public Prosecutor. Should these courts pass without proceedings, the disruption of such a lapse would hurt Government considerably...." 14 Determined to deal with the obstructions put in the way of the courts, the Council ordered its secretary, Timothy Matlack, to inquire of the register and recorder of Chester County whether: "he has received the Papers and Records belonging to those Offices, and to inform him that if he has not, the Council expects he will use the means pointed out by the Law passed for such purposes... to gain possession of them...." 15 On complaint from the prothonotary of Cumberland that the seals and papers of his office were being withheld, the Council directed the secretary to let Lyon "know the mode of obtaining" the materials of his office, and to assure him that should "Mr. Agnew, the late acting Prothonotary," persist in his refusal "so as to make the interposition of Council necessary... Council will take further order thereon." 16 When the Council learned that the "Public Records of... Westmoreland had been in an unlawful & Clandestine manner, removed & Secreted" in Lancaster by the "late Deputy Prothonotary," Michael Hooffnagle, who was "now at camp," it ordered that "His Excell'y Gen. Washington be requested to send... Mich'l Hooffnagle to this City immediately, to answer his conduct therein." 17

15 Minutes of the Supreme Executive Council of Pennsylvania, XI, 216 (June 6, 1777).
16 Ibid., 244 (July 11, 1777).
17 Ibid., 253 (July 26, 1777).
Guided by the young and ambitious James Wilson, and involving Prothonotary Thomas Smith, the most stubborn resistance came from Bedford County. Smith, sketchily trained and recently admitted to the bar, conservative in outlook, and, perhaps, feeling the need to please Bedford’s powerful conservatives, used his office to embarrass the courts and to taunt the Constitutionalists—“the Skunk Association.”

He was replaced at once by Robert Galbraith, a lawyer and a radical Whig. Though Galbraith succeeded in holding the courts, he was intimidated by the opposition and fearful of the strength of the conservatives who had entered a remonstrance in behalf of Smith. He cautioned the Council to act discreetly: “I have . . . opened the Courts without any opposition. . . . Mr. Smith still refuses to deliver up the Records. . . . If the Council thought proper to send for Mr. Smith, and dispose of him in some other way than confining him in Bedford, it might answer a better purpose, for I am apprehensive he might be rescued here, and I am of opinion if he were brought before Council he would agree to deliver them up. . . .”

The Council refused to tolerate Smith’s insubordination and issued a warrant for his arrest. “I put the Warrant . . . into the Hands of the Sheriff,” Galbraith reported, “who took Mr. Smith into Custody, upon which he delivered up the Records, Seals, &c. . . . I have the pleasure to inform you matters wear a good aspect now. . . . There was a large court at Carlisle and a prity one at York. . . .” In May, 1778, Galbraith wrote that court sessions were being held with “regularity and propriety” and that: “a reconciliation is effected. . . . Mr. [George] Woods, Mr. Smith & Mr. [David] Espy, all applied . . . for admission as attornies, and were . . . admitted accordingly; previous to which they . . . gave assurance of their sincere intensions of burying all past disputes. . . . The Bench and Bar, as usual, Dined together two Days of the Court Week, and transacted with great unanimity. I had several reasons for joining with them, (. . . the application came from Mr. Smith to me) first, because a return-

20 Galbraith to Wharton, Feb. 6, 1778, ibid., VI, 238.
ing penitent ought to be admitted, and, because they had it in their power to do a great deal of good or harm; they were old settlers, acquainted with business, still had the confidence of a number capable of giving uneasiness and trouble, notwithstanding we had brought them under the Law.”

Though the outbreak of the Revolution and Pennsylvania’s fierce political struggle momentarily stopped the practice of law, the disruptions of the war and inflation and the aftermath of depression and dislocation increasingly embroiled the people of the Commonwealth in cases at law, burgeoning the demand for justices, lawyers, and judges. In addition to the usual business of the courts, the dockets were crowded with cases of treason, confiscation and counterfeiting, cases of debt and the recovery of property and title, and, in the west particularly, cases of ejectment. So burdened was the schedule of trials that Joseph Reed was called from his congressional post to assist the state’s Attorney General Jonathan Dickinson Sergeant in prosecuting treason trials. The urgent need for their services ended the last of the resistance of the lawyers. With more clients than they could attend, with opportunity under the new government for setting precedents in American law, with the possibility of winning political as well as legal battles in court, and with the field cleared of many of its renowned and established names—Chew, Allen, Waln, Shippen, Dickinson, Galloway—Philadelphia’s young attorneys turned to the task of proving they were the equal of their celebrated predecessors and a match for the times. They met the challenge brilliantly. The brightest and ablest of the new generation, among them William Lewis, James Wilson, George Ross, Jared Ingersoll, Francis Hopkinson, William Bradford, Jr., Peter Stephen Du Ponceau, Edward Tilghman and his cousin William, Alexander J. Dallas, and William Rawle, won fortunes and reputations in cases vigorously contested and tried at length. These city practitioners made a highly competitive game of pitting their legal erudition and agility against one another, and they were joined in this by their contemporaries from the west—advocates like Thomas Smith, Jasper Yeates, H. H. Brackenridge, Alexander Addison, John Lucas, and Jacob Rush. Before the high court at Philadelphia or on circuit across the Com-

21 Galbraith to Wharton, May 16, 1778, ibid., 511.
monwealth, the “smallest cases were fought inch by inch; the most ponderous learning . . . was brought to bear upon the most insignificant points, libraries were ransacked for authorities, notes for arguments fairly bristled with citations.”

The appearance of Pennsylvanians at the bar of the Supreme Court of the United States was “always a scene of triumph,” wrote Du Ponceau, recalling the closing decades of the eighteenth century and the beginning of the nineteenth, “our causes had a preference over all others . . . the greatest liberality was shown to us by the members of the profession. . . . It was really a proud thing . . . to be a Philadelphia lawyer.”

Along with a self-conscious and all-important legal brotherhood, the Commonwealth supported any number of “unread” small town and country lawyers, and, in the years following the Revolution as in colonial days, Pennsylvania continued to call heavily upon the services of justices of the peace—judges not learned in the law who, now popularly elected, were commissioned to preside over the county courts from Philadelphia to the frontier. Though scorned by the trained elite, the lay lawyers and justices were an essential part of the judicial organization. If they did not add to the pride of the profession they contributed in good measure to the functioning of the legal system and they played their role in its seeming ubiquity.

The local justices of the peace, the immediate law officers, had wide ranging administrative duties, including binding offenders to

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22 From a monograph by Judge Pringle on Charles Evans quoted in Nolan, 13.
24 Even the genial and unpretentious Du Ponceau shared this sense of superiority: “one day we were sitting together in the court room, at a meeting of the bar. . . . In the intervals of business, the lawyers would converse with each other; and a great deal of mirth and good humour generally prevailed. On that occasion, the conversation turned upon ignorant judges, who were not a rarity at that time; when the President of the Court of Common Pleas, was an honest Justice of the Peace, who kept a little shop . . . and knew no more of law, than he did of Greek. Many hackneyed stories, well known among the profession were related upon the subject.” *Ibid.*, 81–82.

The attack on Supreme Court Justice George Bryan who, though of wide and detailed knowledge and informed views, lacked formal legal training, was a typical expression of the resentment of the practitioners against lay intrusion upon their eminent domain: “And is this the day the commission of George Bryan expires as a Judge? And is he to serve another seven years in the same station? Are the public to retain him . . . in their employ forever? Have we no other persons among the respectable practitioners of the law to fill that place? Yes, surely! there are some distinguished worthies whose professional skill and knowledge . . . entitle them to a commanding preference . . .” *Independent Gazetteer*, Mar. 26, 1787.
keep the peace pending trial; issuing marriage certificates and attachments to property; paying wolf and squirrel bounties; arbitrating differences between masters and servants; returning runaway slaves; guarding against drunkenness and other excesses, and against riotous games, sports, and plays. In contrast, the judicial responsibilities of the local magistrates were restricted sharply. They were limited to examining into charges of criminal offenses and, in civil disputes, to trying causes involving incidental sums.

Justices of the peace bearing the commission of county justices were empowered, in their administrative capacities, to bind out indigent orphans; in some cases, to see to the provision of widows and the poor; to license and regulate inns and taverns; and to rule on requests for new roads and bridges. As presiding judges of the county courts they "rode the county circuit," sitting, in the various districts, with the local justices to form the court of quarter sessions, the court of common pleas, and the orphans' and the registers' courts. Each of the courts met quarterly and, as the need arose, jurors were chosen by lot from lists of names supplied by the district sheriffs. Appeals from the decisions of individual justices were heard, and civil cases involving forty shillings or more originated in the court of common pleas, presided over by county justices specially commissioned as judges by the Supreme Executive Council. Trials for very minor crimes were tried before a number of justices in attendance at the court of quarter sessions. The judges of the Supreme Court on circuit held the courts of oyer and terminer and nisi prius and had jurisdiction over major crimes and appeals from the lower courts.

The Constitution of 1790 drastically curtailed the role of the county justices and transformed the nature of the county courts. The governor appointed no fewer than three, but no more than four justices for each county to serve both the court of common pleas and the quarter sessions, with the jurisdiction of the quarter sessions extended to capital crimes, making it a court of oyer and terminer. However, neither the common pleas nor the court of oyer and ter-

miner could be held except with the attendance and under the direc-
tion of a president judge who was learned in the law. The president
judge, appointed by the governor to preside over from three to six
counties, rode the circuit within his district holding the common
pleas and the oyer and terminer courts with the assistance of one or
more county justices. Because the Supreme Court justices still rode
the circuit across the state, each president judge arranged his district
circuit so that he would never hold court within a county at the same
time the Supreme Court was sitting there. While it was on circuit,
the Supreme Court held the criminal courts and anyone tried in a
court of oyer and terminer before a president judge could, under
certain regulations, remove the indictment or proceedings or a tran-
script into the higher court.

An act of September 9, 1759, incorporated in the Constitution of
1776, called for county justices of “discretion, capacity, judgement
and integrity,” and for the most part the justices served their com-

cmunities admirably. They were successful in the west especially,
where by “their good sense and native ability,” they provided for the
“administration of justice in the backwoods . . . probably as well
as trained lawyers could have done.” Among the justices to attend
the first court at the new county seat in West Chester in 1786 were:
John Ralston, noted for his “intelligence and probity”; Philip Scott,
who “enjoyed a local reputation for legal knowledge and acumen”;
and Thomas Cheyney, “in character . . . prudent, sagacious, reso-
lute and brave.” George Wallace, presiding judge at the first court
in Allegheny in 1788, was a man of “education and substance” who
“filled all the requirements” of the court and ruled it with “honor
and success.”

But the record was not unblemished. A county justice was con-
icted of forging a name to the acknowledgment of a deed, and
another stepped from the bench into the spectators in court to brawl
with men he claimed had insulted him. Several complaints against
magistrates Benjamin Weiser and William Atkinson reached the

27 A. B. Reid, “Early Courts, Judges and Lawyers of Allegheny County,” Western Penn-
sylvania Historical Magazine, V (1922), 188.

28 Wilmer W. MacElree, Side Lights on the Bench and Bar of Chester County (West Chester,
1918), 82-84, 86.

29 Reid, 190.
Assembly in 1779, and in 1783 Henry Taylor, one of the first justices commissioned in Westmoreland, was indicted for assault and battery. In Bucks in 1787, Judge Thomas Dyer was tried for his part in an attack on Joseph Thomas, who had applied to the judge for a warrant against the notorious Joseph Doan for forcible entry. When Dyer refused and Thomas insisted, the judge's brother-in-law laced Thomas with a cowwhip. Found guilty as an instigator and an accessory, Dyer was fined £25 and censured by Supreme Court Justice Bryan.30

Scandal and condemnation were not the prerogatives of "unlearned" justices, however, as the state's proud practitioners were to learn. Between 1780 and 1804, two president judges, a judge of admiralty, and a half dozen justices of the Supreme Court came under the shadow of impeachment.

For habitually burdening his addresses to the jury with political views offensive to his western constituency and for peremptory treatment of a fellow justice, Alexander Addison forfeited his judgeship. Born in Scotland in 1759 and educated in Edinburgh, Addison immigrated to Pennsylvania soon after completing his studies for the ministry. Unable to make a career in the Presbyterian Church in the Commonwealth,31 he "read the law" and was admitted to the bar in 1787 in Washington County. In 1791 he was appointed president judge of the fifth judicial district, which embraced, at first, Allegheny, Fayette, Washington, and Westmoreland Counties, and, later, Armstrong, Beaver, Butler, and Greene as well. An articulate and uncompromising conservative, by temperament and training alien to the frontier, devoted to "law and order," and outraged by events such as the Whiskey Insurrection, Judge Addison was suspect from the first and his circuit troubled to the last.

The appointment of John Lucas in 1800 as an associate judge proved fatal to Addison. Lucas, like his superior, was an educated emigré and a trained lawyer who had taken his degree in 1782 at Caen, but he was an ardent and active democrat and the two men were incompatible. Addison, resentful of Lucas' assumption that he too would make charges to the jury, repeatedly interrupted Lucas' addresses, instructing the juries to dismiss them as irrelevant. When

30 *Respublica v. Thomas Dyer, Esq.*, Bucks County, May, 1787, George Bryan Papers, HSP.
he abruptly adjourned the court during one of Lucas’ charges, Lucas, possibly at the instigation of and with the compliance of Brackenridge, petitioned the legislature for articles of impeachment. Early in 1803, the senate found Addison guilty of abuse of authority, and removed him from office, banning him permanently from any bench in the Commonwealth. Addison’s trial and conviction terminated his considerable professional promise and, in all likelihood, contributed to his death in 1807. The first volume of his Reports of Cases in the County Courts of the Fifth Circuit, and in the High Court of Errors and Appeals of the State of Pennsylvania and Charges of Grand Juries of the County Courts appeared in 1800; he never produced the second.

Jacob Rush’s penchant for publicly chastising his “unread” associate judges came close to costing him his judicial post. The younger brother of Benjamin Rush, Jacob Rush was born in 1747 in Philadelphia County and in 1765 graduated from the College of New Jersey, from which he later received a doctorate of laws. He was admitted to the bar in 1769, and in 1771 studied in London at the Middle Temple. However much his studies cultivated his mind and increased his competence, they failed, apparently, to grace the man. His friends found him a “rough diamond, unseemly in exterior, but of great value . . . his manner . . . plain, perhaps slightly unamiable and his temper . . . impatient of contradiction and subtlety when in the exercise of his official functions.”

32 Appointed a Supreme Court justice, he sat on the high court for seven years only. With the reorganization of the state courts in 1791 he was commissioned president judge of the third circuit and made Reading, the judicial seat, his permanent residence. Had he presided over a western district it is likely that, like Addison, he would have been impeached. His tenure was marked by domineering pronouncements of the law, by fanatical Federalism, and by a tendency for puritanical moralizing that would have found little favor on the frontier. As it was, the legislature dismissed the charges of his subordinate judges whom he had scolded from the bench for not appearing promptly at the opening of a court, just as it discounted the complaints against the associate justices Rush lodged in retaliation.

Member of a distinguished provincial family, gifted and versatile, educated at the College of Philadelphia, a favorite of Provost

William Smith, Francis Hopkinson studied law with the eminent Benjamin Chew and, sponsored by George Ross, was admitted to the bar and to practice in the Supreme Court in 1761. A conservative Whig sympathetic to the views of James Wilson and Robert Morris, Hopkinson used his talented quill against the radicals in one telling satire after another, and he scratched deep. Nevertheless, in 1779, at the death of Admiralty Judge George Ross, he succeeded to that bench.

Within months of his assuming office he was under articles of impeachment charged with offering to make a lucrative appointment for a “present of a suit of cloaths,” of issuing a writ to sell the cargo of a prize before actual condemnation, and of accepting a much larger fee for condemning a vessel than was permitted by law.\(^{33}\) The impeachment created a small furor in Philadelphia, the conservatives crying that Hopkinson was being persecuted for his political beliefs and because of his informed criticisms of the Admiralty Court as constructed by the radicals.

The proceedings heard by the Assembly and the Supreme Executive Council sitting jointly as a court—with Assemblymen Robert Galbraith and James Smith, and Attorney General Sergeant for the prosecution, and Jared Ingersoll and James Wilson for the defense—were conducted expertly by both sides. The sharply contradictory testimony revealed more than anything else the animosity the court’s personnel felt for the judge, and the cynical acceptance of opportunism and corruption in admiralty by those who did business there. Witness after witness, called for purely technical testimony about the practices of the court, indicated that in the matters of gifts and fees it was customary for judges to profit as much as they could.\(^{34}\)

Delivering the court’s opinion, President Reed reflected that in an “infant State it is of the highest importance . . . the streams of justice should be kept pure, and that the people should have a confidence in the integrity of the Judges.” Reed’s statement of the decision of the court that the admiralty judge “ought to be acquitted upon all three charges,” was careful not to clear Hopkinson of guilt.


\(^{34}\) *Ibid.*, 47-54.
Hopkinson had used the practices of admiralty, wherein fees and sales were left largely to the discretion of the judge, much as his predecessors had done, no better, no worse—"indeed, he took things as he found them."

In 1788, Eleazer Oswald, "that stormy petrel of the press," publisher and editor of the Independent Gazetteer, prepared a memorial for the Assembly calling for the impeachment of three justices of the Supreme Court. Chief Justice Thomas McKean, and Associate Justices William Atlee and Jacob Rush, he argued, had convicted him of a contempt of court unjustly and they had sentenced him illegally to serve a month in prison. The incident of Oswald's arrest and imprisonment—he was called before the Supreme Court for a reference in the Gazetteer to a case pending in the Court—developed beyond the immediate issues of his trial and far outdistanced the raging controversy over the adoption of the federal Constitution in which it was entangled. Before the affair was finished the whole question of freedom of the press had been reviewed; the prerogative of judges in contempts of court involving the press scrutinized; and, in time, came the adoption of two rules aimed at curtailing the courts and increasing the power of the press: the truth of a statement might be offered in a case of libel in behalf of the defense, and, contempt of court cases were to be tried, not by judges, but by juries.

Oswald's "concise and satisfactory account" of his case, presented in a series of pieces in the Pennsylvania Packet, kept before the citizens of Philadelphia the familiar matter of legal and judicial power and deportment, as did the Assembly hearings where William Lewis, with a brilliant, if overdone, display of legal erudition took up most of the three days of the inquiry in an ingenious and elaborate defense of the court. Following Lewis, George Clymer, representing the conservatives in the Assembly, at once motioned for a dismissal of Oswald's petition, a move the radicals frustrated when William Findley rose to answer Lewis and to introduce a resolution of his own. Deliberately, Findley emphasized the contrasts between himself and the renowned attorney, speaking simply and briefly, sparing in all except in sarcasm for the legal mentality and legal language and for the men of the law. Whatever chuckling disdain the lawyers

entertained among themselves toward the "unlearned," in his company Findley would permit them very little about which to feel superior and nothing at all to smile about.

The Westmorelander gratefully acknowledged the "great information" and pleasure he had gained from the advocate's "learned and eloquent" dissertation. He did not think it necessary, however, in this case to "explore the dark and distant periods of juridical history." The rights and privileges for which the Revolution was fought "were capable of an easy and unequivocal definition: they were not of such remote antiquity as to be lost, even to the feelings of the people; and the constitution of the state was the only proper criterion, by which they could be judged and ascertained." It would be dangerous indeed if the language of liberty required "the technical learning of a lawyer" to be understood. He did not intend, therefore, to follow Lewis "in the track of legal disquisition," but in the light of the Commonwealth's constitution, as he and others saw it, it was his duty to say that the "decision of the supreme court was a deviation from the spirit and the letter of the frame of government." While he agreed there was no cause for an impeachment, he felt the Assembly needed to guard against giving "additional strength and authority to the mistaken judgment of the court." That it was mistaken "every man who possessed a competent share of common sense, and understood the rules of grammar, was able to determine on a bare perusal of the [state] bill of rights and constitution" and he defied "all the sophistry of the schools and the jargon of the law to pervert or corrupt" their language. And with the bill of rights and the constitution in mind he found, though he regretted to say it, that "in listening to the ingenuity of Mr. Lewis' paraphrase, his admiration was not necessarily followed by conviction."36

Findley's resolution dismissed the demand for articles of impeachment, but it charged the justices with an "unconstitutional exercise of judicial power" that set "an alarming precedent of the most dangerous consequences to the citizens" of Pennsylvania. To prevent any repetition of the abuse, he proposed that the Assembly take steps to define contempt in the Commonwealth. Because the legislature

had been remiss in defining the nature of contempts and in directing "the nature or extent of their punishment . . . the justices had been left to act under the influence of arbitrary and illegal usages." Both the resolution and the proposal failed, Clymer's original motion carrying by a party vote. The justices "certainly would have been impeached," observed Charles Biddle, had there been a majority of Constitutionalists in the Assembly, "for it ever has, and always will be, the case that the party in power will bend a little to one of their own . . . and Oswald at that time was considered a Constitutionalist although some time before he had been violent against them."

Biddle commented also on the many lawyers who doubted that the legislature had the power to define the nature and extent of contempt. He disagreed, reasoning that "if the court have a right to confine a man for a month for a contempt they may for any length of time." Infringement on the court or not, had the Assembly taken action perhaps the Passmore case, which culminated in 1804 in the impeachment of Supreme Court Justices Edward Shippen, Jasper Yeates, and Thomas Smith, might never have happened. Like Oswald, Thomas Passmore was punished by the Supreme Court on attachment for a publication which the justices maintained attempted to prejudice the public mind on the merits of a case before the Court. Unlike Oswald's, Passmore's call for an impeachment was granted, and though, the judges were acquitted, they had to undergo an open trial and make a public defense.

The somewhat relentless testing of the judicial branch was both a testimony to the ever-expanding sphere of the lawyers, and an expression of characteristic Commonwealth skepticism and scorn for the profession. As the lawyers strode toward a new and greater "position of political and intellectual domination," as Pennsylvania proliferated new counties and county seats, and as the courts were more and more widely patronized, Pennsylvanians continued in their traditional view that the "mystery of the law was a gigantic con-

38 Autobiography of Charles Biddle, Vice-President of the Supreme Executive Council of Pennsylvania (Philadelphia, 1883), 228.
39 Ibid.
spiry . . . against their helpless integrity,” and they kept intact their habitual distrust of and resentment for the men of law. The Assembly regularly received memorials protesting every phase of legal practice, from high fees to undue delay in trial schedules. No one from the clerks of the courts to the chief justice escaped criticism. And the complaints were not confined to petitions. Letters and editorials finding fault with the Commonwealth’s courts and counselors filled the pages of the press. “A. B.” in the Pennsylvania Packet of September 7, 1785, called attention to the “secret murmurings and open censures” heard daily against the justices of the peace. “The peace and happiness of the common people is more immediately interested in the character and conduct of the magistrate of the wards, than of the president of the state.” “A. B.” hoped the judges might be made “more independent and respectable” by making it impossible for them to profit by encouraging “litigation or [to] grind the faces of the poor by legal extortion.”

On the other hand, “A Susquehanna Farmer,” writing in 1793, pleaded for the return of justices of the peace to the courts so that the people might have some relief from the professional men of law. About lawyers and judges he said:

> I esteem and would increase this class of citizens as far as I consider their profession necessary to the other orders of citizens, but it must be acknowledged that the farmer, the mechanic and dealer add something to the public stock; and that the lawyers do not; therefore the lawyers ought only to be encouraged in society as far, and no farther. Much as I respect this order of men, I would not be sorry to see such of them as are unnecessary, more honorably employed at the plough. I expect they would make skillful farmers and useful members of society when they would have more of a common interest therewith, for they themselves will acknowledge that in the arts of delay, the chicane, bargains, etc. in use with these gentlemen and upon which much of their profits depend . . . they have not a common interest with the community. . . .

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Ever on the alert, the Independent Gazetteer of February 16, 1788, carried a report of displays of official arrogance during a session of the Supreme Court in Philadelphia. Curiosity, wrote “A Militia Man,” had led him “with a vast number of others,” to attend the trial of

41 National Gazette, Feb. 13, 1793.
John Schaeffer, and "considering the great crowd . . . it was generally thought the people behaved with common decency." Two incidents, however, soon drove him home "with disgust and mortification." First, when a pane of glass was accidentally broken in one of the windows of the court, the "goaler was suffered, club in hand, and with the most insulting language, to drive the spectators out of the windows, off the steps, and in short from whatever place he chose, threatening to knock them down instantly if they refused: amongst these were persons of respectable characters as citizens, and would be considered such in any court of justice in the United States (except Pennsylvania)." Second, when the "prosecutrix was . . . about to give her evidence (the nature of which for the honor of her sex, we will suppose caused some hesitation) one of the Judges called out that he did not hear one word she said." When the sheriff rose and told "his Honor that she had not yet said a word," the judge "with a degree of official insolence replied; your wit, Mr. Sheriff, is extremely impertinent, it is impudence in you, Sir, to make me such a reply." It was astonishing, continued "A Militia Man," to see one who, a few years before "was not considered a thirteenth rate Lawyer, behave with such consummate pride and insolence to the Sheriff of the city and county of Philadelphia, the only Officer of the Court chosen by the people, and whose commission is treated with respect in every part of the world." The present sheriff, concluded the writer, was a person of "gentlemanly manner, who lost a considerable fortune during the war, and whose services to his country . . . entitle[d] him at least to common respect from the most exalted in office."

Another irate citizen would not have shared "A Militia Man's" real or pretended shock. On the contrary, he would have been surprised had things been otherwise. "He that would go to law must have a good cause—a heavy purse—a skillful attorney—an able advocate—good evidence—an intelligent jury—an upright and patient judge—and having all these, unless he has very good luck, he will stand a small chance of succeeding in his suit!"42

In his Law Miscellanies, Brackenridge speculated on what, in something of a genteelism, he called the "prejudgment against the

42 Pennsylvania Packet, July 12, 1785.
profession of law in Pennsylvania." He attributed it, first, to the historic opprobrium of the Friends who did "not admit a practitioner of the law to be in full communion," and among whom it was a "regulation of discipline, not to go to law, but to decide all matters of meum et teum by reference to members of the religious body"; and, second, to the inclination of lawyers, irritating to the uninitiated, to talk for hours on every point, "the abuse of speaking at the bar."  

Brackenridge believed the requirement of the full Court at jury trials in the Supreme Court and certain customs of the circuit provided a third source for rancor. These procedures cut into the usefulness of the Court, opening it to the charge of making for delay and postponements and, consequently, exposing it to the severest criticism. "It was a radical error," he wrote, "that the whole four judges suffered themselves to be occupied a considerable part of their time, sitting upon a jury trial. It was a monstrous mis-application of their services. . . . I saw the error, and knew the dissatisfactions that it occasioned both with bar and country. . . ." The circuit courts were just as wasteful. "It was the arrangement that two judges sat on trials at these courts; though not made necessary by the act under which these courts were constituted. This was . . . injudicious. . . . The time and services of the judges could have been distributed singulation. . . . The augmentation of judges . . . prevented the dispatch of business. . . ."  

Whether with one or two judges, the circuit system was impracticable. Though no more than a few of the many cases scheduled in each county could be heard, "all the suitors must have a chance of having their actions brought forward, all must be put down for trial, and witnesses summoned, and attending in the respective cases." Litigants found this very expensive and it was a "source of great pain to the judge to be under the necessity . . . to detain suitors, and witnesses for the trial. For action could not be continued over until another sitting, without the consent of both parties. And the court, consistent with their duties elsewhere, could not sit more than once in the year."  

44 Ibid., 284-285.  
A fourth and final cause of bitterness against the men of law, said Brackenridge, was their "wealth and connexion." It was regrettable that the three justices with whom he shared the Supreme Court bench for many years, Shippen, Yeates, and Smith, were all related, all of one political persuasion, and all of the "aristocracy." 46

Albeit they held on to their dislike of the professionals, in the years of the American Revolution and the decades to follow Pennsylvanians shed their traditional reluctance to go to court and acquired instead a "rage for litigation." Everywhere lawyers found eager patrons. The French visitor, the Duc Francois de La Rochefoucauld-Liancourt, traveling over the state in 1794 and 1795, believed he detected a definite predilection for suits at law. He commented in detail about his observations of the courts at Reading. The "inhabitants" were all

either Germans or of German descent; great numbers of the inhabitants of the town and the neighboring country do not understand a word of English, and yet, all the public acts and all the judicial proceedings are drawn and conducted in the English language.

Hence it often happens . . . that the judges understand no German, and the parties, witnesses, and jurymen, no English, which renders the constant attendance of interpreters necessary, to repeat to the judges the deposition of the witnesses, and to the jurymen the summing up of the judges. The administration of justice is therefore extremely imperfect.

Despite these difficulties the courts were popular instruments and frequented at the least provocation.

Many lawsuits . . . having no other object than to satisfy the hatred and passions of the moment by dragging an adversary before the judge, both parties are frequently satisfied with the sentence, of whatever complexion it may be. How many differences might be settled on amicable terms but for this revengeful disposition to proceed to extremities, which prevails in all counties and insures to lawyers a certain subsistence; or rather how many law suits might be accommodated, but for the great number of lawyers and courts of justice! Law suits are very frequent in Reading and originate chiefly in debts, quarrels, and assaults. 48

46 Ibid., 283.
47 Minutes of the legislature, however, and minutes of political conventions, etc., were all printed and published in German as well as English.
On a mission to the frontier in 1785, the itinerant Methodist preacher, the Reverend Robert Ayres, was struck by the taste for litigation among western Pennsylvanians. Somewhat ruefully he recorded a typical experience at a small frontier community. "I was surprised when I came within rods of the place to see a little cabin and a number of old and young men standing in the door with their hats off and going out and in. Behold when I came in I found there was a magistrate among them and they were at law. Poor Creatures. Amazing to see old men (as they chiefly were) trembling upon their stavs contending with each other. Seeing no prospect of good there I set out again. . . ."49

Though the fashion throughout the state, prosecutions were particularly prevalent in the west where the courts constituted an important part of the lives of the settlers. From the courthouse, the heart of the county, radiated the politics, the decisions on land, taxes, and improvements, and the regulations that vitally affected the daily existence and eventual destiny of the frontiersmen. The crucial question of the location of the county seat and the courthouse was raised and fought over with the creation of each new county. Wherever the first courthouse stood there grew the first town, with predictable consequences for land values and road building.

Educated and talented, brilliant and eccentric, philosophical and quixotic, H. H. Brackenridge made his way to the western frontier in 1781 to settle in Pittsburgh with the hope of achieving eminence in law and politics. "When I left Philadelphia," he reminisced many years later, "I saw no chance of being anything in that city, there were such great men before me, Chew, Dickinson, Wilson. . . . I pushed my way to these woods where I thought I might emerge one day . . . in a Congress or some other public body."50 This aim in view, he helped establish the Pittsburgh Gazette in 1786, and, elected to the Assembly, he saw to the creation of Allegheny County in 1788 with Pittsburgh as its county seat. He expressed his beguiling and candid arguments in the Gazette:

Pittsburgh . . . seems intended by nature for a public good, being situated in the most advantageous manner at the confluence of two rivers that glide

through a very extensive and luxurious soil. At the same time the farmer is obliged to attend the courts . . . he can carry his produce to market at an early expense, being favored by the rivers between which the town is situated; the farmer is obliged often to attend court, let him have business of a private nature or not; in many parts of the country he finds much difficulty in defraying his expenses, there being no market at such place for his produce; upon this account he is obliged in the first place to go to Pittsburgh with his produce, before he can attempt going to court, in order that he may be able to satisfy the avarice of the lawyer and the greed of the tavern keeper; and this . . . is no small matter . . . ; the complaint can only be removed by fixing a Seat . . . at Pittsburgh, where the farmer . . . can kill two birds with one stone. Provided he has no money . . . he can bring beef, port, cheese, butter, tallow, etc., and if he cannot get cash for them, let him barter with the tavern keeper, or in many cases they may serve for a retaining fee.\footnote{Pittsburgh Gazette, Feb. 3, 1787.}

During the Revolution and for a number of years following, petitions for new counties and for the construction of courthouses or for their relocation poured into the Assembly. A memorial from Sunbury, Northumberland, told of the “great expense” the citizens had incurred by “building houses in, and adjoining the said town, upon a confidence that it would continue to be the county town” and it prayed that the “courts . . . and public offices might not be removed.” Some months earlier another petition from Northumberland had complained of the inconveniences of the “county-town,” and of how the people “labour[ed] under great difficulties on account of [the courts] being held at a place not suitable.”\footnote{Journals of the House of Representatives of the Commonwealth of Pennsylvania . . . 1776 . . . 1781 . . . (Philadelphia, 1782), I, 126, 102-103.} Bucks and Chester Counties knew bitter and protracted feuds over the location of their respective county seats, and the struggle in Westmoreland was classic. The act establishing Westmoreland in 1773, the first “western” county, specified that the courts were to meet at the “house of Robert Hanna” until a site for the county seat was decided upon and a courthouse and jail built. Almost at once the neighborhood became Hanna’s Town and new log cabins were added to the scattered huts already there. Deep in the woods, Hanna’s Town was on Forbes Road, a military pass winding over three mountain ranges—“the path to the west,” used, among others, by lawyers and judges on circuit to attend court in Westmoreland.
The first court was held in April, 1776, in a room in Hanna's house—"the "locale of the first administration of English jurisprudence west of the Appalachian mountains." Though this "courtroom" was to serve for years, it was challenged immediately. Five trustees, including Robert Hanna, Joseph Erwin, and Arthur St. Clair, had been named to select the county seat and to contract for the public buildings. Hanna, whose house was leased to Erwin as a tavern, persuaded the board to recommend his property as a temporary courthouse. St. Clair protested, proposing, to no avail, Fort Pitt, where he had land holdings. While St. Clair and others persevered in trying to move the court, the adherents of Hanna's Town worked rapidly to develop the area into a respectable county seat of about thirty crude dwellings and with a jail boasting the regulation whipping post, stocks, and pillory. When Indians burned and razed the town in 1782, it seemed the court would have to find another place, but Hanna's house escaped the torch and the courts continued there until 1787, when the county seat was transferred to Greensburg. St. Clair and his faction had been pressing for a new county seat and for a new state road three and a half miles south of Hanna's Town and finally success had come!

A courthouse of heavy logs was constructed at once, and was replaced after 1789 by a two-story brick structure. The entire first floor of this building, one large room divided by a balustrade, with judges, lawyers, jurors, and litigants sitting on one side and spectators on the other, was used as a courtroom. The second story, also one room, was the grand jury room, which served as a hall for public meetings, for official and social functions, and for theatrical performances as well. Adjoining the courthouse, a two-story brick building held the offices of the sheriff, recorder, clerk of the court, the prothonotary, and so on; and a one-story brick structure housed the

53 Presided over by County Justice William Crawford, the session was jammed with suitors and witnesses, jurors and spectators, prisoners and lawyers—all standing or leaning against the walls. Only the court officers had seats, rough hickory chairs which, placed on a platform of clapboards for the occasion, served as the judicial "bench" when the Supreme Court was on circuit. Reid, 186.


justices of the peace. Typical of the court edifices of the last decade of the eighteenth century, these buildings were not completed until 1801. In the meantime courts in Westmoreland met in makeshift quarters, most often, as in other counties, in taverns. From 1787 until 1794, court was held in the new log courthouse. During 1794, when the courthouse was converted into public offices, court was held in a tavern kept by Robert Taylor. From 1795 until 1801, the court met in a tavern run by Bertel Laffer.\(^\text{56}\)

On the frontier, court sessions were more than occasions for settling disputes and for trying and convicting or acquitting criminals. They were social holidays, family reunions, and political forums as well. Generally, courtrooms were crowded with spectators from the town and with visitors from the outlying areas who had come to attend the court meetings carrying provisions and whiskey. Anyone running for office found the gathering ready made for electioneering. Grievances were aired and the whole range of government and its administration discussed and debated. Here it was the people of the west met to “pass resolutions and adopt remonstrances.”\(^\text{57}\)

The courts brought trade and patronage to innkeepers; taverns and courts sharing a natural affinity and, when not actually under the same roof, a definite propinquity. Within three years after a county seat had been established in West Chester in 1786, five new pubs were thriving in the vicinity of the courthouse.\(^\text{58}\) One enterprising tavern keeper, whose property adjoined the court, built a covered passageway from his hostelry to the courthouse, and was busy removing bricks from the courthouse wall to make an opening for the “convenience of the judges,” when the authorities and his competitors stopped him in “this novel method of securing and retaining judicial favor. . . .”\(^\text{59}\) The judges riding in on horseback, the lawyers on circuit, the converging litigants, witnesses, and functionaries were all welcome at the public houses. No opportunity was overlooked to entice the traveling court and its company. “I will take it kind,” wrote Robert Traill to the prothonotary of the Supreme Court, “if you’d be so obliging as to inform me which Road the Judges will take

\(^{56}\) Ibid.

\(^{57}\) Russell J. Ferguson, *Early Western Pennsylvania Politics* (Pittsburgh, 1938), 49.

\(^{58}\) MacElree, 88.

\(^{59}\) Ibid., 92.
to this place; and at what time and place I should meet them—Mr. Shannon has left home, but before his going off, prepared some good Wine and Spirits, would be glad to know if it will be agreeable to the Judges to put up at Shannons, or if I should make accommodations some where else. . . .”

After hours, as well as in court, the lawyers practicing in the county courts gained something of a reputation. At favorite inns and taverns they dined at a common table, recounting the adventures and mishaps of the road and reviewing cases and decisions. Over glasses of wine and whiskey, perhaps at a game of cards, they exchanged stories, wit, and ribaldry—the bawdy tales for which the circuit became famous. Since trials for adultery, fornication, and sodomy were not unusual, and the language of witnesses and advocates unequivocally direct and graphic, it is likely that at least some of the Rabelaisianisms of the lawyers came straight from their court cases.

At the trial of James Rowen, indicted for fornication and charged with being the father of Sally Jack’s bastard, defense witnesses testified to Sally’s taste for “frolicks,” to her reputation for having “had connection” with “three different Persons,” and to her indulgence in outspoken commentary upon the relative endowments and prowess of the local lovers. Testimony in the sodomy trial of Hugh McMullen was even more uninhibited and specific. Robert Irwin, the prosecution’s eyewitness, described the defendant’s alleged act at length and in basic terms. McMullen, however, was acquitted; the defense argued that Irwin was a prejudiced witness, jealous of the attentions the accused had shown his wife.

President Dickinson may have been thinking of the notoriety of the circuit when he wrote the Supreme Court justices in the fall of 1785:

While the Judicial Authority is employed in [the] Solemn Progress for the Punishment of Evil doers, We should be glad, that besides the Terror of legal Penalties, all the Influence to be derived from your Characters, and the Dignity of your Stations, might be applied in disseminating the best

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60 Robert Traill to Edward Burd, May 15, 1784, Shippen Papers, XVI, 109, HSP.
62 Respublica v. James Rowen, May, 1788; Commonwealth v. Hugh McMullen, York, 1791, Yeates Papers, Miscellaneous Legal Papers, HSP.
Principles and setting forward the most effectual Regulations for the prevention of offences.

When the Individuals of a society are impressed with a Just Regard for Industry, Temperance, Morality and Piety and of course with a proper Contempt for Habits and Dispositions opposed to these qualities, they will rise to . . . simple, manly, dignified Character. . . .

It is our next wish that you would be pleased strongly to recommend in the several Counties, the Establishment of Schools, attendance at places of public worship, Provisions for Ministers of the Gospel, and Observance of the Sabbath.68

Not insignificantly, sessions of the court meant ceremony and pageantry to the people of the west. When he became the first chief justice under the Pennsylvania Constitution of 1776, McKean kept in force all the ceremony traditional to the court. He held his attendants “to the most rigid observance of respectful duty.”64 At the opening of the Supreme Court in Philadelphia and of the Court on circuit he insisted upon all the pomp and circumstance associated with this ritual in the courts of England. The sheriff with tipstaves and attendants preceded the retinue of the chief justice and the associate justices into the Court and waited upon the judges until they were seated at the bench.

In letters to his wife McKean told repeatedly of the attentiveness extended to him on circuit and of the formal observance of the opening of the Court. "I arrived here on Tuesday morning," he wrote from Lancaster, "and was escorted into Town by a number of Gentlemen of the Law, Justices of the peace and besides the officers who met me near to Mr. Scott's. Matters have been conducted equal to my most sanguine hopes, indeed everything is as I would wish it."65 From Reading he assured his family that the justices had "all arrived . . . safe, thro' bad roads, and were met at the line of the

63 Pennsylvania Archives, First Series, XI, 601.
64 Brown, II, 327. To heighten the effect of grandeur in the high court, the chief justice tried to introduce red judicial robes in place of the customary black. Public smiles, however, and the shafts of political rivals brought the use of the red robes to a quick and unheralded end. McKean considered also the wig of English judges. "He engaged one of Kid for 100 dollars, and being found, when delivered, to be so strange and outre, he refused it, and was sued for the value." Willis P. Hazard, Annals of Philadelphia and Pennsylvania in the Olden Time (Philadelphia, 1899), I, 197.
65 McKean to Mrs. McKean, Apr. 9, 1778, McKean Papers, VI, 11, HSP.
county by the Sheriff and seven other Gentlemen, with white rods. The Magistrates, prothonotary and other Gentlemen of the Law waited upon us soon after our arrival, and show every mark of attention and regard." And in 1789, he was much pleased to report that "the Gentlemen in the several counties do not abate in their respectful attention towards me, but increase them, and all business is transacted much to my satisfaction."

When Supreme Court Justices Atlee and Bryan attended a court in Montgomery they were met by the officers of the county, including the sheriff and the coroner, the lieutenant of the cavalry, and a detachment of cavalry commanded by Captain James Morris, who was president of the court of common pleas. At the session "twenty-two of a most respectable Grand jury answered the next call, the only two absentees having sent reasonable excuses." The sheriff and a troop of cavalry escorted the justices to the county line of Berks at the completion of the session, where the judges went on to Northumberland.

The cases tried on circuit covered a wide range of law, though trials over land, land titles, ejectments, boundary disputes and other aspects of land tenure were the most numerous by far. A close and not unrelated second were cases of debt; cases of violence ran third. Time and again the western readiness to brawl, the free flow of frontier liquor, the hostility between the red man and the white, and the prickly relationship of the Scotch-Irish and the Germans, found the circuit court ruling on acts of outrage that covered all the varieties of mayhem from simple assault to manslaughter and murder.

Perhaps the severest test to the Revolutionary legal system lay in the explosive nature of the causes claiming its first attention. The Commonwealth courts were forged in the fire of treason trials and confiscation cases: before peace came, almost five hundred Pennsylvanians were prescribed and one hundred and eighteen prosecuted in the Supreme Court. The state relied upon three measures to deal

66 McKean to Mrs. McKean, May 10, 1779, ibid., 22.
67 McKean to Mrs. McKean, May 13, 1789, ibid., 41.
68 Pennsylvania Mercury, Oct. 20, 1786; Pittsburgh Gazette, Nov. 4, 1786.
with the "disaffected": the treason law; the rule of attainder and confiscation; and test oaths. The treason law of February 11, 1777, was in force throughout the war, and it was under this law and under the provisions of the act of March 8, 1780, that treason was tried. A number of specific offenses were defined as high treason: accepting a commission from the enemy; levying war against the Commonwealth or the United States; enlisting in enemy forces; carrying on a traitorous correspondence; being part of a treasonable combination; and supplying intelligence to the enemy. Treason was punishable by hanging and forfeiture of all property, including the dower of the traitor's wife. The Supreme Court, however, had discretion to except any income it felt should be allowed to the offender's wife and/or children.

Misprison of treason was defined as: speaking or writing in opposition to the public defense; attempting to carry information to the enemy; advocating resistance to the government or a return to British rule; discouraging enlistment; inciting disorder; propagandizing for the enemy; and opposing or trying to inhibit Revolutionary measures. The penalty was forfeiture of half of all the property of the offender and imprisonment for the duration of the war. Reflecting the best liberal traditions that had evolved under English law, two witnesses were required to an act of treason or misprision in order to convict. Because this made it almost impossible to get a verdict of guilty, the act of March 8, 1780, was passed. It provided that crimes with overtones of treason were to be prosecuted and punished as misdemeanors.

In addition to the treason laws the state used bills of attainder. In October, 1777, the Committee of Safety, acting as the state's executive, passed an ordinance for confiscating the estates of all Pennsylvanians who had or in the future would join the British. In December, 1777, the Assembly reported its own rule of attainder to replace that of the dissolved Committee of Safety. Justice McKean directed the writing of the severe law of March 6, 1778. It named thirteen Loyalists who had joined the enemy, and it required that they surrender and stand trial for treason. Those failing to comply would be attainted of treason, sustaining forfeiture of all property, the loss of the right to inherit or to have heirs, and, if captured, becoming liable to death by hanging without jury trial. The act
empowered the court to issue proclamations of “conditional” attainters which provided for forty days within which persons named could give themselves up to the authorities. Failure to surrender made the proclamation an absolute attainder with all its doleful consequences. Agents, who received a percentage, were appointed to seize and sell the property of attainted persons at the end of the forty-day waiting period.

Throughout the early years of the war Pennsylvania’s jails and courts were filled with persons accused of treason or related crimes. Abijah Wright, James Sutton, and Thomas Wilkinson were in prison on charges growing out of the Revolution, as were James Roberts and James Fitzpatrick. George Bryan’s legal notes contain the record of three convictions of misprision: that of Peter Blue for assisting in the escape of the British prisoner, Sergeant Grant; that of Jacob Meyers and others for harboring and aiding prisoners; and that of John Bulla for “advising Tho. Woodward to steal and supply the Enemy with a Horse.” In a report to the Council, McKean listed twenty prisoners held as traitors in the city’s new jail—almost all Pennsylvanians who had joined General Howe and been captured in battle or taken “in different vessels” belonging to the enemy. William Ryan, “a horse jockey by Profession” who had gone over to the British in September, 1777, “was taken as a Captain of marines on board the privateer sloop Jenny of New York.” Joseph Paxton, a freeholder in Bucks before joining the enemy, had been taken prisoner “in the Fort at Stony Point.”

Friend Samuel R. Fisher, one of Philadelphia’s most pertinacious British sympathizers, recorded in his prison Journal that militia men had picked up and hauled off to prison John Drinker, John Wirth, and Matthew Johns, and that George Houghton was in prison for putting a light in his window when the British entered Philadelphia and for speaking against Washington. He had given bail “for his appearance at that called the Supreme Court,” but, alarmed, had attempted to escape to New Jersey. Captured, he had been “tryed and found guilty of Misprision of Treason,” and sentenced to the

71 Commonwealth v. Peter Blue, Oct. 16, 1782; Commonwealth v. Jacob Meyers et al., Oct. 20, 1782; Commonwealth v. John Bulla, May 7, 1783, George Bryan Papers, HSP.
72 Pennsylvania Archives, First Series, VII, 703-705.
"forfeiture of the half of all he had and imprisonment during the War," as had Francis Nelson for his "conduct while the British Army lay in this city," and Joseph Prichard for acting as a guard for the enemy. John Wilson, Edward Greswold, and John McCarty, who had enlisted in the British army and deserted, were brought before McKean who sentenced Wilson and Greswold to hang "without any sort of ceremony of a trial." David Franks, Robert Strettel Jones, Edward Cutburt, Peter Miller, and Richard Mason were all tried and acquitted of treasonable crimes; John Elmslie and David Dawson were in prison for refusing to serve as constables; while Charles Humphreys was acquitted of misprision; and John Brown, William Williams, Michael Ryan, Christian George, Philip Allebach, William James, and John Pike were discharged for lack of evidence or witnesses against them.

William Whitefield and George Hardy had been tried for assisting enemy soldiers collect guns from the people of the city—Whitefield had been acquitted, Hardy found guilty. With macabre detail, Fisher related Hardy's last minute reprieve. "I met with George Harding [Hardy] who had been taken out to the Gallows with a Rope about his neck to be hanged . . . and just as he was to stept into the cart, he was reprieved and brought back again." In time Hardy, whose property was confiscated, was pardoned on the condition he leave "the State (as they call it)." Hardy owed his pardon largely to McKean, Atlee, and Evans who petitioned in his behalf and to the recommendation of the jury. The justices sent the Council the jury's address, a memorial signed by citizens of Philadelphia, and a plea for leniency on the ground that his crime was not "the most aggravated species of treason." During and after his trial he had been "decent, respectful, and penitential," and he was known for his good character. The judges argued that "his death (being a man of small note or consideration) would afford little benefit by the example."

Though there were arrests, indictments, and trials by the hundreds, convictions for treason, such as Hardy's, were rare. The case of John Elwood, accused of piloting for the British, was another of

74 Pennsylvania Archives, First Series, VII, 327; Minutes of the Supreme Executive Council, XI, 753-754, 761, 764.
the exceptions. A resident of Bucks County, he was tried and convicted on October 28, 1778, at Newtown before McKean, Atlee, and Evans, and sentenced to be hanged on December 2. A stay of execution until January 2, 1779, was issued on November 30 because of "some [official] doubts of his sanity." On December 31, 1778, Elwood was given a thirty day reprieve and eventually he was spared.75 Though they were few, treason executions did take place, however. The unfortunate Abraham Carlisle and John Roberts, Quaker patriarchs attainted by proclamation, upon surrendering were tried, convicted, and hung. Nothing could save them—not the testimony of patriots in their favor; the court’s plea for mercy; the memorials of the juries; the petitioners by the thousands begging leniency because of the exemplary lives of the men, "except in those fatal instances," and out of pity for their distressed wives and children; nor even the petition of the officers of the Continental Army pressing for "Principles of Liberty and Lenity." Through all the excitement of the convictions, one voice remained obdurate, that of Prosecuting Attorney Joseph Reed.76

The execution of David Dawson on November 25, 1780, was carried out on the authority of an attainder following a proclamation of the Assembly listing him as a traitor. Captured after failing to surrender himself, he was sentenced by McKean without a trial. He was taken out of jail, wrote Fisher of Dawson’s execution, "amidst a Crowd of spectators." He walked behind a cart containing his coffin, a ladder, and other paraphernalia, with a rope around his neck and his hands tied behind, "accompanied by a Brother, two Sisters and another Woman." He was "hanged on the Commons of this city abt. 1 o’clk."77

Ralph Morden was the fourth and last man to die for the crime of treason during the Revolution. McKean, Bryan, and Atlee presided over his trial in Northampton in 1780. He was charged with helping Robert Land escape into Canada, and, as he had given himself up voluntarily, it is doubtful either he or the officials concerned anticipated he would be hanged for his offense.78 Accused of being a British

75 Pennsylvania Archives, First Series, VII, 59.
76 Joseph Reed to President Bryan, Oct. 23, 1778, Reed Manuscripts, V, New-York Historical Society.
77 PMHB, XLI (1917), 326-327.
agent on a mission to incite the Indians against the rebels, he pro-
tested his innocence, and based his defense for his assistance to Land,
it is believed, on his Quaker principles—he was trying to save a life.
But circumstances militated against him. It was known that three
of his younger brothers were serving with the Loyalists; a letter of
protection from the British was discovered on his person; he was
tried in a frontier community two years after the Wyoming Massacre
and one year after the Sullivan Expedition; word of Benedict Ar-
nold’s treachery reached Easton just before his trial; and the prose-
cutor, Edward Burd, was married to Peggy Shippen Arnold’s older
sister. Morden did not appeal the sentence handed down from the
bench, and he was executed in November, 1780. In one thing only
was he spared. The transcript of his conviction carried the legend
that he was without estate—a legal fiction of the local authorities to
preserve his meager property for his family, a compassion not at all
likely had the charge of collaboration with the Indians really been
believed.

The fear and grief of the treason trials was matched by desperate
resentment over the confiscation of estates. Early in 1778, the state
had realized no more than £142 in specie under the Confiscation
Ordinance, but by spring sales had begun to multiply rapidly, and
by 1796 Pennsylvania had accumulated between £90,000 and
£100,000. Many of the sales were challenged in the courts where
demands of one kind or another, or legal intricacies of some sort,
complicated the transfer of the property involved. Legal convolu-
tions developed in such numbers and with such purpose—some the
outcrop of change in ownership, others legal artifices contrived to
frustrate, circumvent, or deny confiscation—that they gave promise
of being endless. Some forfeitures, stubbornly resisted, were fought
in case after case and session after session. They were resolved only
after years of trials and appeals consuming hundreds upon hundreds
of court hours. Under the Ordinance the state assumed responsibility
for the payment of private claims for debts against the estates of
traitors; it satisfied contracts binding on these properties; and it
undertook to defend purchasers of forfeited estates in court when
ejjectments were brought against them. From all this came countless

79 Ibid., 441.
80 Pennsylvania Archives, Sixth Series, XII, 233, 235; XIII, 370, 378; Third Series, V, 20,
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issues to be settled—tediously and painstakingly—by the courts and counselors of the Commonwealth.

Onerous though they were, the treason and confiscation trials were only part of a great variety of cases and questions to come before the courts and to be put to the lawyers and jurists of the Revolutionary and post-Revolutionary era, their views, in ever widening circles, became more and more the basis for decisions on Commonwealth affairs. All bills creating corporations were referred to the judges of the Supreme Court and no incorporation became law without their approval; questions pertaining to the granting of monopolies and relating to taxes and tariffs were submitted regularly; the judges were consulted on the wording of new and the interpretation of old laws; and the state sought their opinion on the knotty and delicate legal and political questions relative to the disposition of the Pennsylvania property of the Penns. In 1779, the Assembly requested the justices "to give their attendance in this House," and submit their opinions, "during the time that the arguments of Counsel on the subject of the Charters of the College and the Academy of Philadelphia are hearing,"\(^1\) with the whole legal brotherhood participating, or so it seemed, in one of the most intense, protracted, personal, and partisan debates of the period. Active on the civic and social as well as the legal front, the lawyers led the movements for penal reform and for the reform in the marriage and divorce laws. Even in the arts the men of law played a role. William Rawle, recalling the "great debate upon the establishing the theatre," remembered that it was William Lewis, despite his Quaker background, who had spoken in favor of the bill and recommended that the president of Council, the chief justice, and the president of the common pleas of Philadelphia sit as a board of review to grant or refuse permission for individual plays according to their moral merits.\(^2\) The power of the Philadelphia lawyer was once again a force with which to conjure!

\(^1\) Journals of the House, Sept. 27, 1779.
\(^2\) Journal of William Rawle for 1789, William Rawle Papers, HSP.