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*Treason and its Punishment
in Revolutionary Pennsylvania*

“PENNSYLVANIA,” said Chief Justice Thomas McKean, “was not a nation at war with another nation, but a country in a state of *civil war*; and there is no precedent in the books to show what might be done in that case. . . .”¹ In these words he explained in 1781 Pennsylvania’s status during the Revolutionary period. Actually, until February 11, 1777, when the Whig legislature passed an act defining treason, and defined it in prospective terms, every man residing in Pennsylvania had a legal right to choose his party, Whig or Tory. By all Whig standards that was a generous decision, but the historian may justifiably extend the characterization of civil war to the whole period that lasted from the suspension of all law in May, 1776, until the expulsion of the Doan band of guerrillas in June, 1784. In these years, the revolutionists faced as a major problem the fact that many inhabitants were adherents of the British and ready to oppose the new government with violence. If revolution was justified, this sort of adherence to the Crown, as distinguished from the passive resistance of the nonassociators and nonjurors, had to be regarded as a high crime. To meet the active

¹ As reported in *Respublica v. Chapman*, 1 Dallas 53, page 58.

threat, the Whigs used, in the first place, prosecution in the courts; and whenever this procedure seemed inadequate, they resorted to bills of attainder, that is, procedures which led to an official judgment without trial. In either event, the principal penalties were forfeiture and death. The seizure of loyalist estates was intended to be a punitive measure (and, of course, a financial provision for the state). The hanging of perhaps a score of men, on the other hand, was carried out less to punish than to warn. There exists no way to measure the effectiveness of the warning.

It is paradoxical that, during the Revolution, neither prosecutions for treasonable offenses, nor acts of attainder, were initiated against Pennsylvanians by the British government, while in the same period headstrong Pennsylvania Whigs proscribed, or prosecuted as traitors, hundreds of citizens who had never deviated from the allegiance in which they were born. The policy of prosecution developed as the armed resistance directed by the Continental Congress grew more serious. As resistance gradually became revolution, so the concept of treason to America matured.

Though a few men in America might in spirit side with the British, it was not anticipated, at the start, that many would render physical aid to the redcoats. It was in the autumn of 1775 that this calm and trusting attitude began to change in Pennsylvania, for on August 23 of that year the King had issued a proclamation calling upon his officers and loyal subjects in America for aid in suppressing rebellion and sedition. When the proclamation was received in Philadelphia, certain men, chiefly natives of England, undertook to transmit intelligence to the British cabinet. The intercepting of their report on October 6 caused a tremendous stir. Pennsylvania leaders felt that the letter constituted an invitation to the British to invade the province, and Congress immediately recommended that the provincial assemblies and committees of safety arrest and secure all persons "whose going at large may endanger the safety of the colony, or the liberties of America."²

² Worthington C. Ford, ed., *Journals of the Continental Congress, 1774-1789* (Washington, 1904-1937), III, 280, hereinafter *Journals of Congress*. For details on the Kearsley group see William Duane, ed., *Extracts from the Diary of Christopher Marshall . . .* (Albany, 1877), 45-46; *Pennsylvania Archives, Second Series*, XIII, 295-296, 298, 503-504; Peter Force, *American Archives* (Washington, 1837-1853), *Fourth Series*, III, 240-241; *Second Report of the*

In effect, the resolution of Congress vested in the extralegal Whig committees the power of imprisoning citizens at will. As for the immediate situation, Dr. John Kearsley, Leonard Snowden, and other leaders of this Philadelphia group of loyalists were ordered held in various county jails as the prisoners of Congress itself, during pleasure.

The situation in which these prisoners found themselves involved was deplorable. For most political prisoners, physical suffering was great. While they were in prison, Kearsley died and Snowden is said to have lost his reason, but these misfortunes resulted from the inefficiency of the infant government rather than from intentional cruelty. Colonial jails were unwholesome places, never designed nor intended for long-term incarcerations. Congress was far too busy to devote time to penal reform, and it was impossible to turn over these prisoners to local authorities, even after the formation of new governments; an inherent barrier to transfer lay in the circumstance that no legal basis existed at any time for holding these men.

In the months that followed the exposure of Kearsley's activities at Philadelphia, other incidents made evident the certainty that loyalist individuals and groups would generate further interference. Notably, John Connolly, a former Pennsylvanian, was captured in Maryland with commissions for a regiment of "Loyal Foresters" and a plan to bring about an uprising in the vicinity of Fort Pitt. Like the Philadelphians, Connolly and his close associates became congressional prisoners.³

Becoming increasingly aroused, Congress moved gradually into a firmer policy in treating loyalism. On January 2, 1776, there was passed a second resolution urging assemblies and committees of safety "by the most speedy and effectual measures" to counteract

Bureau of Archives of the Province of Ontario (Toronto, 1904), 1219-1223; George Stevenson to Council of Safety, Nov. 12, 1776, Records of the (1st) Council of Safety, Division of Public Records, Harrisburg; *Loyalist Transcript*, IV, 310-311; V, 470-471; XLIX, 417-445; L, 42-57; LI, 5-11, 513-517, New York Public Library.

³ On the Connolly group see Elizabeth H. Buck, "John Connolly," *Dictionary of American Biography* (New York, 1928-1944), XXI, 188-189; H. M. Stephens, "Sir Alan Cameron," *Dictionary of National Biography* (London, 1885-1900), VIII, 285-286; E. Irving Carlyle, "John Ferdinand Smyth Stuart," *ibid.*, LV, 102-103; *The Royal Commission on the Losses and Services of the American Loyalists, 1783 to 1785, Being the Notes of Daniel Parker Coke . . .* (Oxford, 1915), xviii.

inveterate toryism.⁴ True, this resolution called for no more than what the committees had in mind already, and it appears to have been aimed chiefly at those persons who were accusing Congress of secretly plotting a declaration of independence. Five months later, in the middle of May, another recommendation of Congress cleared the legal atmosphere by putting an end to the civil authority of the Crown. A stiffened attitude toward aggressive loyalists followed inevitably. On June 24, Congress decided on capital punishment for such spies as were not subjects of any of the United Colonies, at the same time recommending that the various legislatures enact punishments for inhabitants and residents guilty of offering aid or comfort to the King of Great Britain or other enemies of America. All this demanded a commitment from the government of Pennsylvania, which had hitherto ignored these matters; "treason to America" had been punished only by public indignities and irregular imprisonment, following hints or suggestions given by Congress.

The Pennsylvania convention to frame a new constitution, which met during the assembly's recess, enacted, on September 5, 1776, an ordinance on treason. McKean's discussion of treason law seems to have ignored this legislation. The committee that drafted the ordinance was dominated by moderates, and, considering the extremism of the other delegates, the precedents in English law, and the tendency of treason statutes passed in subsequent years, the provisions of the ordinance were not harsh. High treason was defined as the offense of any person owing allegiance to Pennsylvania (that is, of any inhabitant or voluntary resident) who should "levy war against this state or be adherent to the King of Great Britain or others of the enemies of this state or the enemies of the United States of America by giving him or them aid or assistance." Forfeiture of all real and personal estate, and imprisonment for any term not exceeding the duration of the war, was the penalty set. Persons who knew of such treason and concealed it, or who knowingly received or assisted a traitor, were to be adjudged guilty of misprision of treason. Such were to forfeit one-third of their estates, and to be imprisoned for any term not exceeding the duration of the war.⁵ This humane

⁴ *Journals of Congress*, IV, 18-20.

⁵ *The Statutes at Large of Pennsylvania from 1682 to 1801*, IX, 18, hereinafter *Statutes at Large*.

ordinance was nominally in force until the following January, but, because courts of oyer and terminer did not exist in that period, it was not invoked. The sole person formally charged with high treason in 1776 was never brought to trial.⁶ At that time a trial would have been fraught with legal difficulties, brought about by the effective suspension of the whole body of law previously practiced in Pennsylvania.

A second ordinance, that of September 12, against seditious utterances, was drawn less liberally. The offense was defined as speaking or writing in an attempt to "obstruct or oppose . . . the measures carrying on by the United States of America for the defense and support of the freedom and independence of the said states." Anyone accused was to be tried by the nearest justice of the peace, and persons convicted were to be imprisoned, or bound over to keep the peace, at the justice's discretion. If the justice thought the prisoner too dangerous to be allowed bail, two other justices of the peace were to be consulted, and two of the three were empowered to imprison for a term not exceeding the duration of the war. Although appeal to the council of safety was permitted, no provision was made for keeping a record or for impaneling a jury.⁷ The principal attack on the new measure came from the remnant of the old provincial assembly. On September 26, the last day of its corporate existence, this group nullified the ordinance, charging that it was a dangerous attack on the people's liberties, and a violation of their most sacred rights.⁸ No prosecutions under the ordinance are known to have occurred.

Pennsylvania's Whig leaders were unable to gain respect for their own laws. This circumstance, in combination with the imminent danger of invasion, brought about in November, 1776, an unusual outburst of hysteria in Philadelphia. A group of Whig extremists suddenly began to break into houses, seize suspects, and commit them to prison. On November 25, these Whigs held hearings at the Indian Queen tavern. Thomas McKean, the only revolutionist of prominence who was present, acted as chairman; probably he pre-

⁶ *Colonial Records of Pennsylvania*, XI, 12, hereinafter *Colonial Records*; Peter Force, *American Archives, Fifth Series*, III, 194; J. Thomas Scharf and Thompson Westcott, *History of Philadelphia, 1609-1884* (Philadelphia, 1884), I, 326.

⁷ *Statutes at Large*, IX, 19.

⁸ *Pennsylvania Archives, Eighth Series*, VIII, 7586.

sided unwillingly, as the proceedings were not consistent with the stand he later professed. A witness repeated testimony he had given three months before, concerning men who made boasts of their loyalty, or who joined in the chorus of "God Save the King" at private social gatherings. The meeting was inconclusive, for the vigilanist movement was poorly supported and was already petering out. At least one other meeting was held to examine the culprits, but this time McKean did not attend.

The total number of persons arrested in this drive late in 1776 is unknown. Seven prominent citizens, none of them dangerous at the time, were held in prison until December 13, when the council of safety released them on terms similar to those of a military parole. An eighth victim was still in prison in January.⁹ Though further information is lacking, it can be assumed that the movement subsided very quickly, partly because alarm over the military situation increased, but also because there were no sensational discoveries to feed and fire the antiloyalist drive.

Before the transitory character of the wave of persecution was evident, however, panic seized the peaceful conservatives of Philadelphia. What happened is not altogether clear and definite, but it appears that a young lawyer, Christian Huck, learned that the leaders of the drive had listed two hundred persons, whom they intended to imprison or to banish to North Carolina, and that the list included not only his own name but also those of many kinsmen of the Allen connection, the group of families which ranked highest in provincial society. Huck passed this information to others. John, Andrew, and William Allen, brothers-in-law of Governor Penn, and their young cousins, Tench Coxe and Edward Shippen, joined Huck in flight to New Jersey, seeking the protection of the British army. Whether Joseph Galloway was aware of Huck's story is unknown, but his flight to British headquarters was another result of the same outburst of hysteria. Still others, frightened by the extremists, hid in the countryside for a time and returned to Philadelphia only when a

⁹ Draft minutes of the meeting of Nov. 25, 1776; Joseph Stansbury to Council of Safety, Dec. 6, 10, 12, 1776; parole of Stansbury and five others, Dec. 13, 1776; Joel Arpin to Council of Safety, Jan. 3, 1777, all in Records of (1st) Council of Safety. It is possible that this vigilanistism was officially inspired, as Galloway believed. Thomas Mifflin to Washington, Nov. 26, 1776, William B. Reed, *Life and Correspondence of Joseph Reed* (Philadelphia, 1847), I, 266-267.

degree of stability had been restored. Eventually, Shippen and Coxe were forgiven and permitted to return.¹⁰ The significant result of this flare-up, brought on by an irresponsible minority, was that some of the ablest men in the state were alienated, driven to the British permanently. What they had claimed was only the right of neutrality, and by more tolerant treatment they might in time have been won over by the revolutionists. The later behavior of the elder Jared Ingersoll,¹¹ of Chief Justice Benjamin Chew, and of many others illustrates this probability. The Allens, and Galloway, and their kind had not been spies or traitors; much as they disliked separation from the British Empire, until persecution embittered them they were more than reluctant to take up arms against Americans.

Two measures of the first assembly to meet under the new constitution are of vital significance, inasmuch as they established judicial safeguards for civil rights and provided a lasting statute for the prosecution of treasonable offenses. The first of these achievements was the revival of the laws. An act passed January 28 and effective February 11, 1777, declared binding the common law of England and, so far as they were not in conflict with the political revolution, all British and provincial statutes hitherto in force in Pennsylvania.¹² This act brought an end to committee government and cleared the way for the re-establishment of courts. As a second accomplishment, the assembly enacted a new law to displace the treason and sedition ordinances passed in September, 1776. The treason act of 1777, though long in force, was not necessarily an improvement over the ordinances mentioned, but it was milder than the treason laws of most governments of the time. A committee of six assemblymen, extremists without legal training or political experience, had been appointed on January 13 to draft a treason bill. They reported a bill which, after some amendment, was adopted on February 11, and,

¹⁰ Alexander Graydon, *Memoirs of a Life, Chiefly Passed in Pennsylvania within the Last Sixty years* . . . (Harrisburg, 1811), 108-109, 261; Thomas Balch, *Letters and Papers Relating Chiefly to the Provincial History of Pennsylvania* . . . (Philadelphia, 1855), 255-256; "Diary of James Allen," *Pennsylvania Magazine of History and Biography (PMHB)*, IX (1885), 193; Loyalist Transcript, XLIX, 77.

¹¹ Lawrence H. Gipson, *Jared Ingersoll: A Study of American Loyalism* (New Haven, 1920), 374.

¹² *Statutes at Large*, IX, 29.

except for changes in the penalties, remained the fundamental treason law of the state until 1860. It seems certain that the bill was actually drawn for the committee by a trained lawyer. Three other states passed, at about the same time, treason acts similarly worded, and it is therefore conceivable that the bill was discussed with, and perhaps written by, one or more of the delegates to Congress.

The act identified seven specific offenses, each of them constituting high treason when committed by Pennsylvanians and directed against Pennsylvania or the United States: accepting a commission from the enemy; levying war; enlisting, or persuading others to enlist, in an enemy army; furnishing arms or supplies to the enemy; carrying on a traitorous correspondence with the enemy; being concerned in a treasonable combination; and furnishing intelligence to the enemy. The penalty for treason was disinheritance and death, with forfeiture of all property, including the dower of the traitor's wife, but excepting such income as the supreme court might appropriate to the offender's wife and child, or to the child only. Section III of the new act replaced the sedition ordinance of September 12, 1776, and defined misprision of treason to include, specifically, these offenses: speaking or writing in opposition to the public defense; attempting to convey intelligence to the enemy; attempting to incite resistance to the government or a return to British rule; discouraging enlistment; stirring up tumults, or disposing the people to favor the enemy; and opposing, and endeavoring to prevent, the revolutionary measures. Anyone convicted of misprision of treason was to be imprisoned for the duration of the war, and to forfeit half of his estate.¹³

Despite the increased severity of the penalties provided, the effect of this law was unpredictable, though usually liberal towards loyalists. Some lawyers have held that the list of categories recited was intended to limit the scope of treason prosecutions.¹⁴ This interpretation is disputed, but it gains support from the fact that every prosecution on which we have adequate information falls into one or another of the categories specifically enumerated. Whether or not the view of the intention is correct, under the existing political conditions the very severity of punishment operated in favor of narrow

¹³ *Ibid.*, 45.

¹⁴ *Anthony Cramer, Petitioner v. U. S. A., Appendices to Brief for the U. S. on Reargument*, U. S. Supreme Court, No. 13 Oct. Term, 1944, 234-235.

application of the law. The humane treason ordinance of 1776 was appropriate for the punishment of all the guilty, while the act of 1777 was practicable only to punish a few *in terròrem*. The legislators had turned away from an enlightened, but as yet unenforceable, penology, to embrace once more the prevailing Anglo-American system, which was becoming to weak governments. The records of the court of oyer and terminer show that, exclusive of proceedings initiated by conditional bills of attainder, which we will later consider as a special class, the prosecution of 118 persons for high treason was begun during the war. Of these, twenty-three were acquitted at trial, and but four were convicted. Furthermore, three of the four found guilty were pardoned, and only one man, Ralph Morden, was hanged.¹⁵ The record of punishments for misprision of treason under this act is also unimpressive. For the state, two counties excepted, the total of men charged was eighty-one; the result was one case abated by death, twenty-five acquitted, and fifteen convicted, of whom not more than three suffered the full penalty of imprisonment and partial forfeiture.¹⁶

In practice the act was too liberal and uncertain for the loyalists' own good. In enumerating rather definite classes of treason, in requiring two witnesses, and in its purely prospective outlook, it was well within the liberal tradition established by the treason statute of 25 Edward III, on which Coke had written:

Therefore, and for other excellent laws made at this Parliament, this was called *Benedictum Parliamentum*, as it well deserved. For except it be *Magna Charta*, no other Act of Parliament hath had more honour given unto it. . . . And all this was done in severall ages, that the faire Lillies and Roses of the Crown might flourish, and not be stained by severe and sanguinary Statutes.¹⁷

But like the mother statute, the Pennsylvania act proved so restrictive in its application that subsequent legislatures could not let it

¹⁵ Oyer and Terminer Docket, 1778-1786, Philadelphia Office of the Prothonotary of the Supreme Court; Conviction and Clemency Papers, Return of the Special Commission of Oyer and Terminer for Bedford County, Sept. 28-Oct. 2, 1778, Division of Public Records.

¹⁶ Oyer and Terminer Docket, 1778-1786; dockets of the courts of Quarter Sessions in the courthouses at Philadelphia, Doylestown, West Chester, Lancaster, York, Carlisle, Bedford, and Greensburg; estreats of all the fines imposed in the State, 1780-1783, Supreme Court Notes, XLV, Historical Society of Pennsylvania.

¹⁷ Quoted in *Cramer v. U. S., Appendices*, 56.

stand alone. For one thing, two witnesses were required to prove either treason or misprision of treason. In default of two, it was doubted whether any appropriate punishment could be imposed.¹⁸ An act of March 8, 1780, resolved this uncertainty, declaring that an offense containing elements of treason could be prosecuted and punished as a misdemeanor.¹⁹ Many prosecutions for "misdemeanor" are recorded, and, although few of the available records contain specifications, it is to be supposed that a substantial number of such cases were political. In York County, for example, prosecutions for treasonable misdemeanor had certainly begun before the act of 1780 was passed, but the cases we know about were dismissed after its passage, perhaps to escape any argument that the new enactment proves the earlier rule.²⁰ In the same county, at least four men were convicted of political misdemeanor in 1780 and 1781; the heaviest sentence was a fine of twenty-five pounds specie, along with imprisonment from October until the following Independence Day.²¹

The small number of executions for treason was also attributable to the circumstances that some persons indictable for treason were technically guilty of other heinous offenses as well. Loyalists helped the British cause whenever they found a clear opportunity, fusing their politics with their personal advantage to the extent that other men did and still do. Moreover, they were freed from normal inhibition by the consideration that they need respect neither the new laws nor the would-be government. In a number of places they operated as uninstructed guerrillas, rendering themselves liable to prosecution for nearly every felony.

The range and variety of felonies was great, and most of the crimes so classified were, according to the basic statutes and rules of penal law, punishable by death. Yet the degree of inhumanity suggested by this circumstance had been greatly mitigated in Pennsylvania by importing, in 1718, "benefit of clergy." Originally, in the

¹⁸ Jonathan Dickinson Sergeant to George Bryan, May 12, 1779, *Pennsylvania Archives*, VII, 396.

¹⁹ *Statutes at Large*, X, 110.

²⁰ E.g., *Respublica v. Casper Spahr* and *Respublica v. Daniel and John Lamot*, indictments, Historical Society of York County, York.

²¹ *Respublica v. Nicholas Yost*, *v. Samuel Worley*, *v. James Brittain*, *v. John Ham*, Quarter Sessions Docket No. XII, 139-140, 144, 224, 234, 265, No. XIII, 5, Office of the Clerk of Quarter Sessions, York; and the indictments for those cases at the Historical Society of York County.

Middle Ages, this privilege was reserved for felons who possessed clerical status; in the following centuries, it became democratized to affect finally all persons convicted of certain felonies for the first time, as a statutory commutation of the death penalty to a branding of the hand and brief imprisonment. In Pennsylvania, benefit of clergy proved by no means a dead letter; although nominally abolished in 1794, it actually continued in force until 1860, with the difference that after 1794 branding was omitted and judges were required to grant the benefit without awaiting the prisoner's request.²²

At first, early in 1777, when counterfeiting the currency and uttering counterfeit bills were made capital offenses, benefit of clergy was allowed for those offenses. There followed numerous complaints of the part played by loyalists in depreciating the currency. Therefore, by four acts passed in the years 1779-1781, both offenses were "ousted of clergy"; the death sentence became mandatory upon even a first conviction.²³

Definition of the capital crime of robbery, unchanged since 1718, was broadened in 1780, and at the same time the barbarous penalties for horse stealing were increased.²⁴ Collectors who had been robbed of public moneys began flooding the legislature with requests for exonerations. To meet the situation in eastern counties, where loyalist communities were obviously in connivance with the plunderers, an unsuccessful attempt was made in the assembly to extend to Pennsylvania in modified form the Statute of Winchester, so as to make the township in which the crime was committed liable to the collector for his loss, for damages, and for all the costs of litigation in case the offenders were not caught within thirty days.²⁵

In a six-year period, 1778 through 1783, the civil authorities of the state hanged forty-eight men for crimes other than treason.²⁶ It is notable in this connection that the executions between the coming of

²² Leonard Manyon, "Benefit of Clergy," *Encyclopaedia of the Social Sciences* (New York, 1930-1934); Sections XI and XIV, act of May 31, 1718, *Statutes at Large*, III, 204, 206-207; Section IX, act of Sept. 22, 1794, *ibid.*, XV, 177, repealed by act of Mar. 31, 1860, P. L. 452.

²³ Two acts of Mar. 20, 1777, *Statutes at Large*, IX, 100, 104; acts of Nov. 26, 1779, Mar. 25 and June 1, 1780, Apr. 7, 1781, *ibid.*, X, 12-16, 189, 212, 307.

²⁴ Acts of Mar. 8 and 10, 1780, *ibid.*, X, 110-112.

²⁵ *Minutes of the First Session of the Sixth General Assembly of the Commonwealth of Pennsylvania* (Philadelphia, 1781), 556.

²⁶ *Colonial Records*, XI-XIII, *passim*, for death warrants; cf. *Journal of the Senate . . . of Pennsylvania*, III, 61 (Jan. 5, 1793).

William Penn and the outbreak of the war had not exceeded eighty-four.²⁷ Just how many of the forty-eight hanged were actually loyalists cannot be ascertained, since few records of the cases are available; it is evident, however, that a substantial number of the men convicted had acted with some political motivation. For example, when it was made clear that Abijah Wright, a captured loyalist, had entered a man's house by night to kidnap him for the British, the charge against him was changed from treason to burglary, and he was quickly convicted and hanged.²⁸ Similarly, after James Sutton led a mutiny on the Whig privateer *Chevalier de la Luzerne*, and induced the crew to deliver the vessel to the British as a prize, he was convicted of piracy and hanged.²⁹ A third Pennsylvania loyalist, Thomas Wilkinson, sentenced to be hanged in chains on a similar specification of piracy, was allowed to live because of a serious technical error in his trial.³⁰ In four years, 1779-1782, twenty-two men were tried for counterfeiting, of whom eleven were acquitted and eleven convicted, and five of those convicted were hanged.³¹ The captured members of the Nugent and Shockey gang, who were apparently part of Colonel William Rankin's Associated Loyalists, were prosecuted chiefly as counterfeiters and robbers; at least two were hanged for uttering counterfeit bills, and two for robbing someone of a bottle of yeast worth three pence.³² James Roberts, who risked his life by carrying Rankin's messages to Sir Henry Clinton, was upon his return tried and executed for offering counterfeit currency.³³ The noted Fitzpatrick, guerrilla and plunderer of Whigs, was

²⁷ Lawrence H. Gipson, "Crime and Its Punishment in Provincial Pennsylvania," *Pennsylvania History*, II (1935), 12-14.

²⁸ *Pennsylvania Packet*, Dec. 8, 1778.

²⁹ *Ibid.*, Oct. 24 and Dec. 2, 1780; "Journal of Samuel Rowland Fisher," *PMHB*, XLI (1917), 310; *Colonial Records*, XII, 535; transcript of the record of Sutton's conviction, Sept. 25, 1780, Conviction and Clemency Papers.

³⁰ Case of Thomas Wilkinson, convicted in U. S. Admiralty Sessions, *ibid.*; *Colonial Records*, XII, 730, 732, 751, and XIII, 135; "Journal of Samuel Rowland Fisher," *PMHB*, XLI (1917), 427.

³¹ William Bradford, "Statement of Facts and Observations Respecting the Penal Laws," Dec. 3, 1792, entered on *Journal of the Senate . . . of Pennsylvania*, III, 61 (Jan. 5, 1793).

³² Cases of Benjamin and James Nugent, of Henry Trout, and of Christopher Shockey, Conviction and Clemency Papers; *Colonial Records*, XII, 179, 375, 386.

³³ Case of James Roberts, *ibid.*, 375; Christopher Sower, Jr., to John André, Oct. 5, 1779, and Nov. 5, 1779, page 4 of an eight-page résumé of the correspondence between Rankin and Clinton, 1780, Sir Henry Clinton Papers, William L. Clements Library.

convicted of burglary and larceny, and was the first Pennsylvania loyalist to die at the hands of the civil authorities.³⁴ The fabulous Doan gang—loyalist guerrillas, guides to escaping prisoners of war, harborers of British emissaries—committed at least thirty robberies of collectors of taxes and militia fines, or of county treasurers. It was the practice of the Doans to seize the collectors' tax warrants and duplicates, and to warn collectors to desist from performing their official functions. In the opinion of Whig officials, it was simplest to treat these men as burglars or robbers; as such the state tried and convicted eighteen of the Doan gang, of whom seven received benefit of clergy and eight were hanged.³⁵

One of the more difficult problems facing the Whigs was how to treat loyalists captured while serving under British enlistment, commission, or letters of marque. Congress ordered on December 30, 1777, that henceforth such persons should be turned over to their respective states for punishment. Washington, whose forces would have to bear the brunt of retaliation for any drastic action, chose in general to let the resolution "sleep."³⁶ Presumably, then, any provincial troops taken were either held or exchanged as prisoners of war. By exception, Frederick Verner, a Pennsylvania officer in the British service, was held prisoner by Congress to await trial for treason in the state courts, and apparently state officials were greatly relieved when an opportunity arose to exchange him for an American civilian then in the hands of the British.³⁷ Not until July, 1779, did the state actually face the important question. The decision came following the transfer to state custody of a number of naval prisoners, seamen and marines from Pennsylvania who had been captured on the loyalist privateers *Patsy* and *Impertinent*. It became necessary to

³⁴ Case of James Fitzpatrick, Conviction and Clemency Papers; *Pennsylvania Packet*, Aug. 29, Sept. 26, Oct. 10 and 29, 1778.

³⁵ These statistics do not include those Doan associates who were outlawed by the courts; their case is discussed later.

³⁶ Washington to President of Congress, Apr. 4, 1778, J. C. Fitzpatrick, ed., *The Writings of George Washington* (Washington, 1931-1944), XI, 217. Congress repeated the order on Aug. 28, 1778, *Journals of Congress*, XI, 848.

³⁷ *Colonial Records*, XI, 561, 720-721, 752; Historical Manuscript Commission, *Report on American Manuscripts in the Royal Institution of Great Britain* (London, 1904-1909), I, 418-419; *Journals of Congress*, XI, 797-798, 848; XII, 1198; XIII, 315. Verner had been attainted of high treason conditionally, as described later, and was apparently the only person captured during the forty days of grace allowed by act of Mar. 6, 1778.

determine whether these captives were traitors, pirates, or prisoners of war. President Reed, always attentive to the interests of Washington's army, asked McKean for an advisory opinion regarding the prisoners, and in asking presented an important lead, for he asked the Chief Justice to distinguish, if necessary, "between the predicament of such as Joined the Enemy before the Declaration of Independence, the New Establishment of Civil Government, or any other Era he may judge material."³⁸ Thus he threw the way open for a very striking decision.

McKean proved co-operative; in a few days he produced an opinion to the effect that all prisoners who did not owe allegiance to Pennsylvania on February 11, 1777, or any subsequent date, were to be regarded as prisoners of war, while the others might be prosecuted for treason upon the sea at a specially constituted court of oyer and terminer. It is evident, then, that McKean and Reed deserve credit for establishing a liberal policy for such cases. McKean was under no obligation to distinguish a civil from a foreign war, as he did in this instance; in fact, to do so was contrary to the tone of all the rhetoric and legislation of the revolutionists. And to recognize, as he did, the existence of an anarchic interregnum, with a consequent season of free choice of sides, was an enormous theoretical concession. Of the several dates that he might have set for the terminus of the period of choice, McKean generously chose the last, "the safer course in so unprecedented and doubtful a case," because treason was not accurately defined or declared by the legislature until the time mentioned.³⁹ It is doubtful that this opinion would have been politically possible a year earlier, and perhaps its acceptance can best be explained as a matter of military expediency. Evidently, the opinion introduced into the revolutionary government a broadened sense of military responsibility. Under the rule set forth, most of the loyalist prisoners in detention at the moment could be held for trial, since they had not joined the British until the latter part of 1777. Never-

³⁸ Capt. James Montgomery to Reed, June 9, 1779, *Pennsylvania Archives*, VII, 476-477; *Colonial Records*, XII, 49, 71.

³⁹ *Ibid.*, XII, 74-75; McKean's opinion, Aug. 13, 1779, *Pennsylvania Archives*, VII, 644-646. For the method of prosecuting sea traitors see act of Sept. 9, 1778, *Statutes at Large*, IX, 281-282. Despite the language of the congressional resolution of May 14, 1776, and of the act of Jan. 28, 1777, McKean could not conceive that the common law had been inoperative during the interregnum.

theless, early in 1780 the council authorized their exchange as prisoners of war.⁴⁰

It is therefore surprising to learn that Reed attempted, a few months later, to punish as a traitor a man who, as he knew, had joined the British in 1776. This was Lieutenant Samuel Chapman of the British Legion, who had been captured at sea and taken to Massachusetts, where at first he was treated as a prisoner of war. Reed requested that Chapman be extradited to Pennsylvania, and Massachusetts acceded. The explanation given at the time by the prisoner's family and friends is the only one that has come down to us: Reed took this action, so they said, to oblige General John Lacey, at that time the councillor from Bucks. A native of that county, and in fact a cousin of Lacey, Chapman had taken a prominent part in the engagement at the Crooked Billet near Philadelphia, on April 30, 1778. In that fight a small party of provincial and British troops surprised and put to flight a brigade commanded by Lacey, causing heavy American losses. The consequent indignation of Lacey, it was said, was the mainspring of the action against Chapman. This explanation is supported by circumstance; Lacey was one of the few men sitting at the council table at the time the request was sent to Massachusetts.⁴¹ In view of the earlier interchange between Reed and McKean, Reed must have written the letter against his better judgment.

McKean, who showed great deference to the legislature, could nevertheless be depended upon to hold judicial ground against any challenge from the executive branch. Chapman, who was brought into his court in April, 1781,⁴² pleaded that he had always been a British subject, had never been a "subject or inhabitant" of the commonwealth, and was now a prisoner of war. McKean, in giving his decision on these points, merely confirmed and elaborated the ad-

⁴⁰ McKean to Reed, Sept. 20, 1779, *Pennsylvania Archives*, VII, 703-705; *Colonial Records*, XII, 246.

⁴¹ Reed to Jeremiah Powell, May 19, 1780, *Pennsylvania Archives*, VIII, 254; G. P. [George Playter] and Christopher Sower, Jr., to Oliver Delancey, Memorandum concerning Lt. Samuel Chapman, September, 1780, Sir Henry Clinton Papers; *Royal Pennsylvania Gazette*, May 5, 1778.

⁴² Chapman had been attainted *nisi* by a proclamation of the Council, which he had ignored; he was therefore not tried, but was brought before the Supreme Court to give reasons in arrest of judgment.

visory opinion he had given in 1779, that until February 11, 1777, a choice of sides was legal. In saying so, he laid less emphasis than before on the fact that the treason act passed on that date, and gave more attention to the act of January 28, 1777, which revived the laws as of February 11, following. The wording of the latter act, he said, indicated a belief of the legislature that no laws were in force between, as a beginning point, either May 14 or July 4, 1776, and February 11, 1777. This belief he held to be sufficient to establish legally the existence of an interregnum. If no laws were in force, there was no protection; then allegiance (the reciprocal of protection) could not be required; then treason (the betrayal of allegiance) could not exist, and Chapman was a prisoner of war. Accordingly, he was exchanged a few weeks later.⁴³ Thus the first and perhaps the most important Pennsylvania ruling on the citizenship of loyalists was made.

Doubtless the hangman's harvest would have been larger had the courts and lawyers relaxed their vigilance. In the legal defense of Tory causes, James Wilson was most prominent. So galling was his success to the extreme Whigs that some of them sought to make him the scapegoat for the economic derangement of 1779. Scarcely less active than Wilson was the Philadelphia attorney William Lewis (1748-1819). These two were assisted for a short time, at the height of the treason trials, by George Ross (1730-1779) of Lancaster. Either Wilson, or Lewis, or both, appeared for the defense in nearly every treason case that was docketed in Pennsylvania down to that of John Fries in 1799.⁴⁴ Both were men of highly conservative background, Wilson a Scottish Seceder turned Episcopalian, and Lewis a nominal Quaker. Later both became extreme Federalists. These facts suggest that their effective defense of the loyalists may have been due in part to a special and sympathetic understanding of the predicament of their clients, and also in part to a conviction that such persons could again become useful citizens.

⁴³ *Respublica v. Samuel Chapman*, 1 Dallas 53-60; Supreme Court Appearance Docket (April 1780-September 1781), 330, Philadelphia Office of the Prothonotary of the Supreme Court; "Journal of Samuel Rowland Fisher," *PMHB*, XLI (1917), 325, 419, 424, 427; intelligence memorandum of Lt. Samuel Chapman, May 11, 1781, Sir Henry Clinton Papers.

⁴⁴ Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania 1776-1790* (Harrisburg, 1942), 75-76; J. S. Futhey and Gilbert Cope, *History of Chester County* (Philadelphia, 1881), 635-636; Supreme Court Appearance Docket, and Oyer and Terminer Docket, for the war years.

It became evident before the end of 1777 that the general treason act could not cope with widespread, notorious, and successful treason. When British forces entered the state that autumn, thousands of loyalists flocked to the protection of the royal standard. Many of these men left property within the American lines and therefore could be punished, whether captured or at large, merely by abridging their right to a day in court. Before the end of this civil war, attainders or outlawries had been enacted by the assembly, and independently, under statutory authority, by the executive branch, and under the common law by the judges.

On September 17, 1777, a few days after the battle of Brandywine, the assembly appointed a committee to draft a bill for confiscating the estates of those who had joined the enemy. This committee never reported, for its function was absorbed by a second committee appointed but a few weeks later "to digest some Plan for preventing Supplies and Intelligence going to the Enemy." The latter group proposed "a Degree of Military Power" until the new assembly should convene, and following this proposal a council of safety was created—the second board of that name—and was vested with dictatorial powers, especially with regard to the lives and property of loyalists. The new council of safety passed an ordinance on October 21, which called for sequestering the estates of all inhabitants who "have, or hereafter shall, abandon their families, or habitations," to join the British. Transactions made by loyalists after such abandonment were declared null and void, and loyalists were denied any appeal from the decisions of the commissioners appointed in each county to enforce the decree. However, it appears that only five confiscations took place, four in Northampton County and one in York County; the gross revenue realized under this ordinance was £142 14s 10d specie.⁴⁵

It seemed obvious to the Whig extremists that the policy of confiscation must be continued and must be provided with a firmer basis in law. In December the council of safety was dissolved, although its ordinance of October 21 was continued by specific action of the

⁴⁵ *Journals of the House of Representatives of the Commonwealth of Pennsylvania* (Philadelphia, 1782), I, 91, 93, 95 (Sept. 17, Oct. 6, 8, 1777); *Colonial Records*, XI, 325-331; *Pennsylvania Archives, Sixth Series*, XIII, 231-238; Attainder Papers at Division of Public Records. The personal property of James Rankin was seized under this ordinance; since he was later attainted of high treason, it is accounted for under the Attainder Act.

assembly. Even before that time, on November 27, Congress intervened to urge that each state seize and sell the estates of such of its citizens as had forfeited their right to protection, and recommended that the proceeds be invested in the continental loan office. This last suggestion was ignored, but on the same day the assembly appointed a committee of three to draft a confiscation bill.⁴⁶

The bill was drawn without delay and was reported on December 23, but not passed until March 6 following. Robert Whitehill, the common factor of personality in all the other confiscation committees, also headed this committee, and the trained mind of Thomas McKean worded the bill. In its complete acceptance of the policy of conditional attainder, the first and final draft mirrors clearly the bitterness and frustration built up in Whig circles during the winter of Valley Forge. The terms were harsh.

Harking back to a procedure developed to deal with the Jacobites during the uprising of 1745, the new act to combat loyalism named thirteen of the most prominent persons who had joined the British, gave them until April 21 following to surrender and stand trial under the general treason act, and provided that any of the thirteen failing to surrender before the set limit should stand attainted of high treason. To be so attainted would mean, of course, the forfeiture of all property to the commonwealth, the loss of all right to inherit or have heirs, and, in case of capture, hanging.⁴⁷

Furthermore, the act affected not alone the thirteen named, but provided for other and similar attainders by the executive. To the supreme executive council the House delegated authority to proclaim at its discretion additional attainders, which became absolute forty days after the date of proclamation. Agents for forfeited estates were appointed for each county, with authority to seize the property of the supposed traitors and to sell it after the forty-day period set.

Acts of attainder had long been unpopular. Even Henry VIII had expressed doubt as to the legality of condemning a man unheard. Absolute acts of attainder, such as those passed in New York and in

⁴⁶ *Journals of the House of Representatives* (Philadelphia, 1782), I, 12, 18 (Nov. 27, Dec. 8, 1777); *Journals of Congress*, IX, 971.

⁴⁷ Act of Mar. 6, 1778, *Statutes at Large*, IX, 201-215, based upon 19 Geo. II cap. 26, an act of Parliament. Joseph Galloway, the Allen brothers, and perhaps others named in the Pennsylvania act, could have been cleared under the decision in the Chapman case, 1 Dallas 53-60, had McKean not held that the legislature was entitled to pass *ex post facto* laws.

Delaware, forbade trial, and the conditional attainder procedure of 1745, now borrowed by Pennsylvania, was dangerous only to a slightly lesser degree. In either form, attainder embodied the notion that the legislature, or even the executive, could with safety assume the guilt of an untried individual, even when the offense involved was in its nature highly technical and, moreover, political.⁴⁸

At the bottom, there was slight difference between absolute and conditional attainder; to labor the distinction is to ignore the significant, even though imponderable, effect upon its victim of the attainder proclamation itself. However innocent he might be in a technical sense, it was a rare defendant who could demonstrate that he had provided to the cause of independence such support as would encourage him to risk his life before a partisan judge and an antagonistic jury. The loyalists knew that in 1777 anarchy had prevailed in Pennsylvania, and they suspected that anarchy would prevail there again, as indeed it did in 1779. For most loyalists, then, the condition imposed was unacceptable, and their return for trial was scarcely to be anticipated. There was also the regrettable and inevitable circumstance that damage done to reputations by the publication of names was not to be repaired by surrender, however prompt, even in case a *nolle prosequi* or a rapid acquittal resulted.⁴⁹

The carelessness with which the council prepared attainder proclamations increased the damage to reputations, as the record clearly shows. The names of persons supposed to have joined the enemy were sent to the council by the agents for forfeited estates. These agents, who profited by receiving a percentage on sales of estates, all too often based their reports on hearsay and assumption, since not even sworn information was required before a proclamation was posted. In a few cases, an influential Whig may have saved a Tory friend from proscription, as we know that Major Solomon Bush saved the elder Thomas Coombe and a few others, but it is certain that there was no systematic screening of names before they ap-

⁴⁸ C. H. McIlwain, *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England* (New Haven, 1910), 225-229; Julian P. Boyd, ed., *The Papers of Thomas Jefferson* (Princeton, 1950), II, 189-193.

⁴⁹ E.g., the case of Tench Coxe, discussed by his political enemy Graydon in *Memoirs*, 109, and the case of Benjamin Gibbs, a passive loyalist, reported in *Respublica v. Gibbs*, 4 Dallas 253-255 and 3 Yeates 429-438; both had surrendered on conditional attainder, and had been discharged by the court without trial.

peared on the proclamations. Embarrassing mistakes were made, families were broken up, and innocent persons found their lives ruined.⁵⁰ On the other hand, inefficiency of operation not infrequently left untouched the lives and property of other persons, of the sort for whom the penalties had been intended.

Despite omissions, the number of persons attainted was considerable. The basic statute named thirteen, and the council added many more: the four proclamations issued in 1778 included 396 persons; the two of 1779 named thirty-two persons; the two of 1780 listed forty-three persons; and the two of 1781, the two last, added sixteen more. Repetitions caused by misnomer introduce a slight uncertainty into statistics, but the total of attainders *nisi* announced by the legislative and executive branches was certainly close to 500.⁵¹ That nearly four-fifths of these attainders came in 1778, following the winter of Valley Forge, is not surprising. During that winter loyalist hopes rose highest, and British sympathizers in Pennsylvania enjoyed their best opportunity for flight.

The fate of the five hundred persons conditionally attainted in Pennsylvania can be readily traced in the records. One died with the British during his forty-day period of grace, and two others, after surrendering, died before trial; 113 avoided absolute attainder by surrendering within the time limit set, and, of these, less than a score came to trial, for the evidence was in most cases too flimsy for prosecution. One man was exchanged as a prisoner of war without trial, thirteen were tried and acquitted, and three were tried and convicted. One of the three convicted, being insane, was pardoned, and the other two, John Roberts and Abraham Carlisle, were hanged.

The conditional attainders of some 386 persons became absolute when they failed to surrender. Aside from Chapman, who was released as a British subject, six of these attainted traitors fell into the hands of the Whigs during the war, and the supreme court awarded execution against them. Five of the six, however, were

⁵⁰ Attainder Papers, Circular from Council to the Agents, broadside, May 6, 1778; Loyalist Transcript, LI, 529; advertisements of Samuel Garrigues, Jr., and of John Taylor, *Pennsylvania Packet*, Aug. 29, 1778, and Jan. 14, 1779; *in re* Dennis Crockson, *Colonial Records*, XII, 58, 65.

⁵¹ The text of the ten proclamations is given in *Colonial Records*, XI, 482-485, 493-495, 513-518, 610-612, 768, XII, 27-29, 496-497, 665-666, 710-711, and *Pennsylvania Archives, Fourth Series*, III, 774-777. The reports of agents and other documents concerning confiscated estates are given in *Pennsylvania Archives, Sixth Series*, XII-XIII.

subsequently pardoned, with the end result that of the 386 only one, David Dawson, was hanged.⁵² He was probably the first American ever legally executed untried, under the provision of a bill of attainder. It were well had he been the only one.

In desperate effort to check the activities of the Doan gang, special varieties of attainder were invoked. The assembly passed a law naming seventeen members of the band, for each of whom a reward of £300 would be given, dead or alive.⁵³ But the heaviest artillery was outlawry, a sort of judicial attainder brought to bear on the guerrillas by Chief Justice McKean.

Outlawry was a process of the common law used very rarely in America, even in the eighteenth century. Although in 1718 an act of assembly had been passed to implement this procedure in Pennsylvania, it had never been invoked. Since it was based on indictment, and was administered under many safeguards, outlawry was more regardful of human dignity than were the legislative or executive types of attainder, but it did deny the ultimate right to a trial. In four proclamations during the years 1782 to 1784, the judges cited seventeen of the Doan gang, on sixty-one counts, calling on them to surrender and be tried for their lives, or in default of surrender, to be adjudged outlaws sentenced to death.⁵⁴ By calling their offense robbery or burglary, and by disregarding the large degree of political motivation present, it was possible to ignore the effect of the Treaty of Paris, which terminated the prosecution of loyalists for political offenses; therefore pursuit of the Doans continued to the end of the decade. The supreme executive council even applied to Sir Guy Carleton, during the last days of the British occupation of New York, for extradition of some of the outlaws then in that city. The council did not inform the British commander, of course, that the men wanted were loyalists. Carleton agreed to the request in principle, but he could not find the outlaws.⁵⁵

⁵² Supreme Court Appearance Docket, and Oyer and Terminer Docket, for the war years; *Colonial Records*, XI–XIII; *Pennsylvania Archives*, VII–VIII.

⁵³ Act of Sept. 8, 1783, *Statutes at Large*, XI, 109.

⁵⁴ Supreme Court Appearance Docket (1782–1783), 226–230, (1783–1786), 215; Oyer and Terminer Docket (1778–1786), 142, 146–147, 193, 239; *Respublica v. Aaron Doan*, 1 Dallas 86.

⁵⁵ *Colonial Records*, XIII, 680; *Pennsylvania Archives*, X, 101–103, 131; Alfred J. Morrison, tr., Johann David Schoepf, *Travels in the Confederation, 1783–1784* (Philadelphia, 1911), I, 126–127. The literature on the Doans is extensive; much accurate information, and some that is wildly inaccurate or imaginative, appears in George MacReynolds, ed., *The New Doane Book* (Doylestown, 1952).

None of the band responded to the spider's invitation. They remained in the countryside, carrying on their bitter campaign against collectors until the militia were mustered against them in June, 1784. Thereafter they seem to have been entirely law-abiding, and a number of the associates drifted to New Brunswick and Lower Canada.⁵⁶ Individual members were captured from time to time, at least eight of them in 1783 and 1784. One outlaw, an accessory, was allowed benefit of clergy. A number of the standing outlawries against the Doans were argued in court and were set aside because of error in the proceedings, though that step did not preclude trial and conviction. In Whig circles no noteworthy objection to the principle of outlawry was raised until October, 1784, after the supreme court handed down its first award of execution under this process, following argument but without trial.

Then, in view of the novelty of the procedure, and in order to seek a special opinion from the court, President Dickinson and the council delayed issuing the death warrant against Aaron Doan. The precedent, they felt, would be illiberal and dangerous. On March 28, 1785, a majority of the council, to justify their vote that they could not legally issue a death warrant in this case, alleged a number of technical errors in the proceedings, and suggested that the assembly reverse the outlawry.

This assumption of a right of the executive to review court decisions was not well received. The chief justice could find no error in his work, and the assembly was unsympathetic. After nearly three years of waiting, confined in irons and expecting death, Aaron Doan was finally pardoned on condition that he leave the United States forever.⁵⁷ In October, 1785, the supreme court awarded execution

⁵⁶ Commissioners of Washington County to Dickinson, June 28, 1784, *Pennsylvania Archives*, X, 584-585; certified copy (1875) of the official List of United Empire ("U.E. List") Loyalists in Upper Canada, Public Archives of Canada; index and abstracts of loyalist petitions, New Brunswick Provincial Archives, 1785, Nos. 81, 86, and 1786, Nos. 100, 122-124, 126, Public Archives of Canada; Henry C. Mercer, "The Doans and Their Times," *Collection of Papers Read Before the Bucks County Historical Society*, I (1908), 271-282. Robberies of collectors were numerous after 1784, but were not necessarily the work of the Doan gang. Henry Wynkoop to McKean, Mar. 16, 1786, *Pennsylvania Archives*, XII, 298-299; Wynkoop to Council, May 6, 1786, *ibid.*, XII, 302.

⁵⁷ *Respublica v. Aaron Doan*, 1 Dallas 86; *Colonial Records*, XIV, 388, XV, 214; George Bryan to James Irwin, Oct. 20, 1784, *Pennsylvania Archives*, X, 609; petitions of Aaron Doan, Oct. 17, 1784, Nov. 8, 1785, and memorial of seven refugees in Halifax, N. S., Dec. 30, 1785,

against a second member of the band, but the council pardoned him also.⁵⁸

Again, in 1788, the issue of hanging a man without trial arose. In March of that year George Sinclair was apprehended. Earlier, he had been attainted of high treason, for which he could no longer be punished, but the court had also outlawed him as one of the Doan bandits, and there they had him. On argument his outlawry was set aside, but he was tried and convicted of burglary—no longer a capital offense—and was sentenced to ten years' imprisonment at hard labor.⁵⁹ In the same year, two others of the gang, Abraham and Levi Doan, were arrested, and were duly reminded in court that their lives were forfeited.

Aware that the Doans had been initially the victims of persecution and were now harmless, many citizens would have been glad to let them go, but their old enemies, the Scotch-Irish minority in Bucks, demanded that the outlawry take its course. Moreover, the two prisoners, like the exiles to Virginia and certain other loyalists, were in reality victims of intra-governmental jealousies. The assembly, dominated by Republicans, took an interest in this case and without due tact urged the council, dominated by Constitutionalists, to exercise clemency. The executive thereupon took the attitude that its constitutional monopoly of pardon was at stake, and refused to yield. After months of delay, the council voted down a renewed request of the assembly for a reprieve, and on September 24, 1788,

ibid., X, 348, 716-718; *Minutes of the Second Session of the Ninth General Assembly* (Philadelphia, 1785), 295-297 (Apr. 7, 1785). A year after his departure from Pennsylvania, Aaron Doan was tried in New Jersey and convicted of robbery of a tax collector; again he was sentenced to be hanged. Being reprieved, not pardoned, he evidently escaped, and subsequently he received a grant of land in Upper Canada. Minutes of Oyer and Terminer, July sessions, 1788, Essex County, N. J., and minutes of the New Jersey House of Representatives, Sept. 3, 1788, both in New Jersey State Library, Trenton; certified copy of the "U. E. List," Public Archives of Canada.

⁵⁸ *Respublica v. Robert Johnston Steele*, 1 Dallas 92; *Colonial Records*, XIV, 558. At an unknown date Thomas Bulla, Jr., attainted of high treason and outlawed as a bandit, returned to the state; in some way he escaped the death penalty, but he was sued by a collector whom he had robbed. Loose slip, ca. 1800, lying between pages 231 and 232 of the Oyer and Terminer Docket for 1778-1786.

⁵⁹ *Respublica v. St. Clair*, 2 Dallas 101, act of Oct. 4, 1788, *Statutes at Large*, XIII, 163; *Colonial Records*, XVI, 209.

Abraham and Levi Doan were hanged.⁶⁰ They were the last loyalists of Pennsylvania to suffer that punishment, and perhaps the only persons ever executed on outlawry in this country.

There remains for consideration the effect of attainder on the wives of traitors. Of necessity they continued within the American lines after their husbands fled. At least three marriages were abandoned because of political differences, differences in which attainder was an added factor.⁶¹ Flight was seldom possible for an entire family, and except at the evacuation of Philadelphia, it was rare for a wife to accompany her husband. Even when it was possible, clandestine travel was risky, and New York, the usual refuge, was a crowded garrison town, expensive and unsuitable for rearing a family. Therefore, attainder brought about an increase of travel on pass from Pennsylvania through the American lines to New York. Such travel became so heavy that it aroused serious fears of betrayal in American headquarters.

On April 24, 1779, the supreme executive council took note of Washington's objections to the excessive number of recommendations for passes. Agreeing that the security of the army was at stake, the council decided that passes should be recommended only "in cases of a particular and extraordinary nature," and that the person passed must give two sureties that, lacking special permission, he or she would not return to Pennsylvania. Nevertheless, before the end of the year no less than forty-four "cases of a particular and extraordinary nature" were recognized.⁶²

In June, a grand jury made the following presentment:

the wives of so many of the British emissaries remain amongst us, keeping up a most injurious correspondence with the enemies of this country, by sending all the intelligence in their power, and receiving and propagating their poisonous, erroneous and wicked falsehoods here, which pernicious practice, in our judgement, ought immediately to be inquired of and remedied.⁶³

⁶⁰ *Autobiography of Charles Biddle* . . . (Philadelphia, 1883), 232-234; *Colonial Records*, XV, 497, 500-501, 515, 535, 544; case of Abraham and Levi Doan, 1788, Conviction and Clemency Papers.

⁶¹ *Loyalist Transcript*, XXV, 146-162, 214-225, XLIX, 323-356.

⁶² *Colonial Records*, XI, 757, and *passim*.

⁶³ Reed, II, 147.

But as no action was taken, frustrated Whigs presently began to lay plans for a vigilantist expulsion of the wives and children of the exiles. A mob, gathered for that purpose, became deflected into the famous siege of James Wilson's house, where many Republican leaders had gathered.⁶⁴

Rumors of incidents of the kind so subjectively described by the grand jury are not hard to find. In December, 1779, Jane, wife of Robert White, an attainted traitor, was accused of trading with the enemy. Again, in March, 1780, Rebecca, wife of the attainted traitor Samuel Shoemaker had, it was alleged, aided prisoners and others in their escape to the British lines. It happened that Mrs. Shoemaker had earlier petitioned for a passport, which the council refused as inconsistent with the interest of the state. Stirred to new action, the council reversed its stand, and resolved to give notice to wives of traitors that they *must* apply for passes and proceed to the enemy lines before April 15 next; their failure to do so would "make it necessary to take farther measures for this purpose, as the public security shall require." It is doubtful, however, that such notice was ever published, as no passes were granted during the time allotted. Moreover, with feminine persistence, Mrs. Shoemaker applied again in May for a permit to go to New York *and return*.⁶⁵

No definite banishment of loyalist dependents occurred until June, 1780, when a military crisis was thought imminent. Martial law was authorized by the assembly on the first of June, and was proclaimed on the ninth. On the sixth, without legal basis, solely on the ground of danger to the state, President Reed and the council gave public notice "to wives & children of those persons who have Joined the enemy" to leave the state within ten days. Any remaining after that time were to be considered entitled to no further protection, and liable to treatment as enemies of the state. Clearly, this was an executive bill of pains and penalties, an extension of the attainder act of 1778; worse than that, it punished a group for the alleged offenses of a few.

The time limit of ten days was rather poorly observed. In June and July warrants were issued to commit five wives to the workhouse until they should give security to leave Pennsylvania, not to return,

⁶⁴ Brunhouse, 75.

⁶⁵ *Colonial Records*, XII, 198-199, 203-204, 206-207, 224, 270-271, 352.

and at the end of October passes to New York had been given to twenty-four additional wives under the June 6 proclamation and other supplemental orders of banishment. Two other wives were indulged for a time because of ill health, and one, Elizabeth Graeme Ferguson, was permitted to remain in the state, in essence pardoned of her husband's offense.⁶⁶ Mrs. Ferguson's own activities, in conveying to President Reed the offer of a British bribe, had made her in the eyes of the Constitutionals more dangerous to the American cause than any other woman, except possibly Susanna Adams and Margaret Arnold. Susanna Adams was the only woman attainted of high treason, and, of course, Margaret Shippen Arnold was the wife of Benedict Arnold.

The enumeration here presented probably falls short of complete documentation for the story of banishment; there is no way of telling how many women and children were silently indulged by sympathetic officials, or how many of them actually suffered banishment by the decisions of others.

We find, then, that the revolutionary state prosecuted offenses that it considered subversive under a variety of charges: high treason, misprision of treason (which embraced sedition), piracy, burglary, robbery, misdemeanor, counterfeiting, uttering counterfeit currency, and larceny. The procedures that the state invoked, besides infrequent connivance in vigilantist action, were prosecution on indictment, outlawry, acts of attainder, and executive proscription. The penalties imposed were fines, imprisonment, forfeiture, disherison, banishment, and death by hanging.

In general, men at the upper level of the new government—army officers, the supreme executive council, and the higher courts—dealt with the more militant loyalists. On this level, sympathy was rarely evident, but legal experience and respect for precedent helped to shape decisions. Here the treatment of aggressive loyalists, though unpredictable, was usually mild. Fortunately for most offenders, in Anglo-American law the enforcement of penalties was still controlled by the broadly merciful policy of punishment *in terrorem*. Imprison-

⁶⁶ *Ibid.*, XII, 377, 386-387, 390-391, 397, 425, 494, 503, 509, 518, 522; *Pennsylvania Archives, Second Series*, III, 358-360; act of Apr. 2, 1781, *Statutes at Large*, X, 281; memorial of Daniel Coxe to Clinton, June 28, 1780, memorial of Coxe, Samuel Shoemaker, and John Potts to Clinton, July 4, 1780, Coxe to John André, Aug. 27, 1780, Sir Henry Clinton Papers.

ment was impracticable, extreme penalties were barbarous and likely to invite reprisals; the tendency therefore was to find some excuse for clemency.

In some respects Pennsylvania's loyalists were better off than those of other states. For example, Pennsylvania passed fewer acts of attainder or confiscation than either New York or New Jersey. Moreover, the New York legislature proclaimed judgment of death without trial, whereas the acts of attainder passed in Pennsylvania took effect only if the accused failed to surrender. Yet in certain respects Pennsylvania was comparatively severe. Pennsylvania executed four men for treason, Connecticut but one. The wives of traitors may have fared worse in Pennsylvania, where their dower was forfeited, and where they were banished, than in Virginia or most other states. The acts of attainder passed in Massachusetts and in some other states applied only to property and rights of residence, but those of Pennsylvania applied ultimately to property and life.

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