



**ANGLICAN OR AMERICAN:
Re-examining the Impact of the Frontier on Legal
Development in Seventeenth-Century Pennsylvania**

CHRISTOPHER N. FRITSCH

The question of the Americanization of the English common law was a subject of historical interest prior to the American Revolution. In his lectures presented at the University of Oxford, William Blackstone noted that Britain's colonies fell into two categories—areas claimed “by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country” and regions gained by conquest or treaty [1:104]. In his estimation, the former area immediately became subject to the laws of England. In the latter, a legal system of some form pre-existed the conquest or the treaty. In this situation, the older, established laws continued, until the monarch decided to change them [1:104-5]. Blackstone believed that the American settlements existed by right of conquest [1:105].¹ Thus, the common law held no authority there. However, Parliament did and like other English possessions, such as Ireland and the Isle of Man, residents were subject to Parliament and its statutes, but only if they were specifically mentioned.²

Did this allow colonists in British North America the freedom to develop their own common and statute laws? As much as the common law held no authority within this region according to Blackstone, colonial governors and legislatures were barred from passing laws or establishing any legal custom which was “repugnant to any law, made or to be made in this kingdom” [1:105].³

¹ English historians have disagreed with these conclusions. See Holdsworth: xi, 232-41; Keith: 182-6.

² After the Revolution, Anthony Stokes reiterated Blackstone's contention. See Stokes: 11-2.

³ This was established by a statute of 7 & 8 W. III. c. 22. The important section of the statute states “That all laws, by-laws, usages or customes at this time, or which hereafter shall be in practice, or endeavoured or pretended to be in force in practice in any of the said plantations, which are in any wise repugnant to the before mentioned laws, or any of them, so far as they do relate to the said plantations, or any of them, or which are any ways repugnant to

Nineteenth and twentieth centuries legal scholarship

Nineteenth-century American legal scholars saw the development of colonial American law quite differently from Blackstone. In his *Commentaries on the Constitution of the United States* Joseph Story anticipated future historical interpretation. In his assessment of Pennsylvania legal development, Story noted the colony's government and laws were quite liberal and a departure from the norms of the time. He was not convinced that American colonists completely developed their own legal systems and maintained that Blackstone had erred in his assessment of the common law in America. Although the colonists were unable to bring all of the common law across the Atlantic, they brought what was "applicable to their situation, and not repugnant to the local and political circumstances in which they were placed" [104, 109].

Pennsylvania legal scholars agreed with Story's assessment. In his presentation to the Law Academy of Philadelphia in 1851, the Hon. George Sharswood disagreed with Blackstone's interpretation of American legal development during the colonial period [Sharswood: 333-52].⁴ Sharswood told the Academy that Blackstone "fell into error, when he asserted that the American plantations were to be classed as ceded or conquered countries; and that therefore the common law had no allowance or authority there" [333-4]. He believed that colonists discovered the territories that became British North America and under these conditions, the colonists brought with them the common law as their just "birthright" [334]. He maintained that the common law of England formed the foundation of Pennsylvania law and that the sources of it included the common law of England, British Statutes, the common law of Pennsylvania, the Constitution of the Commonwealth of Pennsylvania and the Acts of the General Assembly, and the Constitution of the United States and the laws passed by the United States Congress [334]. With the foundation of Pennsylvania law within the common law of England, he asserted that classic English commentaries, such as, Coke's *Commentaries on Littleton's Tenures*, continued to be valuable to America [346].⁵

Pennsylvania law did not merely mimic the common law of England and the British statutes; however, he argued that the common law of England had been adapted and modified by both Pennsylvania judges and the General Assembly to meet the needs of the developing commonwealth [334]. Likewise, British statutes operated in the same type of context, as some statutes had been accepted, even after the foundation of the colony, and others had been completely or partially rejected. These changes to

this present act, or to any other law hereafter to be made in this kingdom, so far as such law shall relate to and mention the said plantations, are illegal, null and void, to all intents and purposes what soever." Pickering: ix, 432.

⁴ There are earlier nineteenth-century writings on American law and legal development.

⁵ Sharswood's belief in the study of English law and its application had been a heated political debate in Pennsylvania. For a brief summary of the early nineteenth-century debate over law reform in the Commonwealth, see Surrency, Higginbotham, and Ellis.

English common law and Parliamentary statute, not only created a third law of Pennsylvania—Pennsylvania common law—but also allowed for the perception that the American frontier influenced legal development [348].

Twenty-five years after Sharswood's presentation to the Law Academy, Richard C. Dale concurred with Sharswood that Blackstone misunderstood the settlement of the American colonies and their subsequent legal development [553-74]. From his point of view, Dale believed that the English common law had been the foundation of American law. However, the complete transplantation of this legal structure failed to occur in British North America. Americans deemed certain aspects of the common law as inapplicable to "the new conditions of the colonists," and thus, these were never recognized as part of some colonial jurisdictions [554].

What nineteenth-century legal scholars concluded seems quite unusual. First, men like Sharswood and Dale rejected Blackstone's contention that the common law of England held no authority in British North America and they accepted the advance of English common law into the colonies, although this was not a complete adoption. Secondly, commentators like Sharswood and Dale, affirmed their admiration for Blackstone and the common law by calling for both the jurist and the student of the law to study the historical development of English and Pennsylvania-American law [Sharswood: 346]—the study of which included not only the common law and the statute of England, but also included the examination of the Courts of Chancery [349].⁶ Finally, they allowed for a great deal of potential deviation due to American circumstances, like the frontier.

Within years of Sharswood's call at the Academy, a number of historians began to investigate the issue of Pennsylvania legal history. The first, Lawrence Lewis, Jr., published an essay entitled "The Courts of Pennsylvania in the Seventeenth Century". Although Lewis did not directly focus upon the question of the reception of English law, his description of early Pennsylvania practice resembled English civil actions. In the years following the removal of the Dutch government, Pennsylvania law took its direction from the Duke of York's laws, which included actions upon the case, trover, debt, ejectment, trespass, and replevin [150]. Since case documents and the court proceedings were held in English, there was a great similarity with common law practices in England [151]. Colonial courts required the plaintiff to appear and plead his just cause and for the defendant to respond to the plea [151]. The rest of the events followed in familiar fashion, as both were to agree on the issue and appear in court for the trial, but if they failed to appear, the plaintiff was "non-suited" and the defendant had judgment entered against him.

In the last decade of the nineteenth century, the most influential study of American legal history was published by Paul Reinsch, who contended that English colonists to British North America developed their own systems

⁶ Sharswood noted that the "principles adopted by the English Courts of Equity, in the construction of the statute [43 Eliz. c. 4] were considered as obtaining here, not by force of the statute, but as a part of our common law." Furthermore, Dale wrote that decisions in English ecclesiastical courts were important to American jurisdictions, especially those pertaining to wills and estates, even though there were no church courts in this country. See Dale: 563-4.

of law and justice. He saw these early political and legal institutions in very simplistic terms. However, Reinsch noted that as colonial society grew “more intricate, more highly organized, the legal institutions of the mother country [were] gradually received and applied, until a large portion of the common law is transferred to the actual practice of the colonies” [5]. For Reinsch, though, the importance of American legal development was not the period in which reception occurred, but rather the early period of frontier adaptation.⁷

Within the first twenty-five years of the publication of Reinsch’s thesis, two major studies of Pennsylvania legal history appeared in print by William Loyd and Frank Eastman.⁸ Loyd’s thesis, like that of his predecessors, presented Pennsylvania law as a developmental process—a changing system of law and legal administration within local conditions.⁹ He doubted the conclusion “that the colonists brought with them and adopted so much of the common law” [13]. Loyd believed the colonists in Pennsylvania created a simplified legal environment from the complexities of English law, but in the years prior to the American Revolution, as the colony’s population and commerce developed, Pennsylvania’s simplistic legal framework became increasingly unworkable and judges and lawyers relied upon English common law to provide the answers to their legal problems.

Writing in 1940, Francis Aumann explored American legal development during the colonial period. He attempted to bring together the competing sides of the adaptation-reception debate. In the end, Aumann believed that adaptation occurred during the seventeenth century—an adaptation from a number of sources, like religion and English common and local law. Still this conclusion did not negate the reception of the common law [3-18]. Aumann hinted that the root cause for the increased use of English law was the increasing development of population, trade, and imperial politics. These factors brought British North America into greater contact with English common law and for this reason, Americans utilized it. Thus for Aumann, like his predecessors, reception occurred as a precursor to the Revolution, but unlike those predecessors, Aumann believed that the increasing “anglicization” of the American colonies created reception [62].

Re-evaluating Legal Development in Seventeenth-Century New Amsterdam

With no published casebooks, reevaluating seventeenth-century law in the Delaware Valley is difficult. Swedish and Dutch settlers inhabited the region since the 1620s and 1630s. Over the next three decades, the conflict for the Delaware River Valley finally brought the region under the control of

⁷ The impact of Reinsch’s study on American legal history is great. It became the basic interpretation for historians to confirm or refute. See Walsh and Pound & Plucknett: 306. A more moderate view is Kempin: 45.

⁸ Loyd, *The Early Courts of Pennsylvania*. Eastman will not be directly discussed. In Chapter XIV of his four-volume study, Eastman fully quotes Sharswood and his presentation to the Law Academy [157-61].

⁹ For other examples of this perception, see Reinsch.

the English, after their defeat of the Dutch in New Amsterdam, now New York.¹⁰ The Duke of York, as owner and governor of the colony, incorporated English law practice into the region quickly. Unfortunately most of his colony's residents were not English and their familiarity with English law and legal process was limited, to say the least. The inability of Swedish, Finnish, and Dutch colonists to understand English procedure came to the forefront of colonial administration in 1669.¹¹

Within five years of the English takeover of the region, the Duke of York's colonial administrators faced a small but critical insurrection by a Swedish settler on the Delaware. John Binckson claimed to be the son of a Swedish general, Konigsmark, and, as such, knew that the Swedish government was prepared to reconquer the Delaware and drive the English out. He repeated the story to many of the local Swedish and Finnish inhabitants at dinner parties, where after numerous drinks, Binckson reminded them of their Swedish loyalties and told them that the "Swedish war fleet was lying outside the bay there, and when it came it would take the country back from the English." He encouraged his fellow countrymen to prepare "to throw off the foreign yoke" and "strike the English dead".¹²

By the fall of 1669, the government in New York wearied of the Binckson threat and sent an arrest order for him and Henry Coleman—a man with connections to the local native inhabitants. Then Governor Francis Lovelace appointed Matthias Nicolls to be president of a commission, consisting of five men, for the investigation of the insurrection and the trial of Binckson. Their job was to summon all of the suspects to appear before the commission and respond to their inquiries about Binckson and the planned revolt. Although not specifically created as a court, Lovelace granted Nicolls and his commission the power to administer oaths in order to obtain the truth and imprison anyone posing a threat. Within weeks of the appointment of the Nicolls commission, the trial of Binckson seemed imminent [463, 467].

Whether or not Lovelace understood the ethnic and cultural differences within the region he governed and the difficulty in prosecuting Binckson is difficult to say. It is likely he did not until it was brought to his attention by Nicolls and the commission. In the first week of December, Lovelace wrote a letter to the leadership on the Delaware entitled "Form of Holding the Court at the Fort of New Castle, upon the Delaware River, for the Trial of the Long Finne and about the Late Insurrection." The letter, presumably to Nicolls as director of the commission, outlined the duties of the commissioners and the courtroom procedure. The beginning of the letter noted that the clerk would proclaim the opening of the session by "saying, O

¹⁰ See Middleton: 83; Munroe; Weslager, *New Sweden on the Delaware: 1636-1655*: 27-38 and *The English on the Delaware: 1610-1682*. For an old discussion of the settlement of the region, see Armstrong.

¹¹ See Beckman: 18, 77, 96; Kammen: 82-3 and Johnson: 39.

¹² *Documents relating to the Colonial History of the State of New York*, Vol XII. (Reprint edition, New York, NY: AMS Press, Inc., 1969) 463, 467. See "Berattelse om Uprorsmakeren den falska Komingsmark i Nya Sverige," in Joseph J. Mickley Swedish Manuscripts, 1636-1811, folder "Transcriptions in uncertain order (a-m?)," Historical Society of Pennsylvania., translated in an appendix by Evan Haefeli, "The Revolt of the Long Swede: Transatlantic Hopes and Fears on the Delaware, 1669," <http://www.historycooperative.org/journals/pmh/130.2/haefeli.html> [27 April 2007].

yes, O yes, O yes, Silence is commanded....” The commission was to be read and the commissioners called to court before calling all persons “that have anything to do at this special Court...draw near to give your attendance, and if any one have any plaint to enter or suite to prosecute let them come forth & they shall be heard.” With the court now opened, the judges impanelled a jury of twelve men and called the prisoner, Binckson, to the bar [467-8].¹³

Upon his arrival in court, Binckson had the opportunity to review the nominated jurors and if he found them satisfactory, they would be sworn. Here, Lovelace provided the jurors' oath.

You do swear by the Everliving God that you will conscientiously try and deliver your verdict between our Sovereign Lord the King, & the prisoner at the Bar according to evidence & the laws of the country, so help you God & the contents of this book [*Documents Relating to...New York*: 468].

According to Lovelace's letter, the court turned to Binckson and asked him to raise his right hand and seemingly swear an oath but the governor failed to provide what exactly that oath would be. Only after the repeating of these oaths, would the court read the indictment to Binckson and those attending the court [468].¹⁴

The reading of the indictment was no mere formality. In it, the court formally charged Binckson with treason, unlawful assembly, and breaking the King's peace. After it was read, someone asked the defendant “what hast thou to say for thyself, Art thou guilty of the felony & treason laid to thy charge or not guilty?” Lovelace then instructed whoever was reading the indictment, perhaps Nicolls, to respond to Binckson's plea of not guilty¹⁵ by asking him how the defendant would be tried. Here, Lovelace prepared lines for the defendant. Binckson was to respond by saying “By God & his country.” To this the court admonished Binckson, saying “God send thee a good deliverance” [468].

After that Lovelace's letter and perhaps the trial moved quickly. The court called the witnesses; after swearing oaths to their previously recorded testimonies or to new information relayed in open court, the judges would be ready to deliver the trial into the hands of the jury. Lovelace told his judges to charge the jury, directing them to “find the matter of Fact according to the Evidence.” Once they understood their instructions, the jury was asked to leave the room and only return once they all agreed on a verdict. When they reached a verdict, the jurors were to return to court and asked “Are you agreed upon your verdict in this case in difference between our sovereign Lord the King & the prisoner at the bar.” When the jury affirmed that they were in agreement, the nominated spokesman for the jury stated the verdict and the judges asked if this had been the unanimous

¹³ According to the Duke's Laws, Lovelace's commission should have noted that the Court of Assize would sit as a special Commission of Oyer and Terminer to hear the insurrection cases. See Beckman, *Statutes at Large for Pennsylvania*: 77. See also Ritchie: 74 and Merwick: 185. This was hardly the gradual process as proclaimed by Loyd: 10.

¹⁴ Whether or not this printed copy was the exact indictment seems doubtful; this copy was incomplete. It failed to provide a place of residence and an occupation for Binckson, which should have been a part of the indictment according to 1 Hen.5, c.5., the Statute of Additions (1413). See Cockburn: 61-5.

¹⁵ Entering a plea of guilty seems not to have crossed Lovelace's mind.

decision. When they concurred that it was, the court called for the prisoner at the bar to be taken from court and secured. In Lovelace's version the only obvious outcome was a verdict of guilty and his "script" reflected that end [468].

Beyond the fact that Governor Lovelace directed the trial as if it were a stage production, the trial of Binckson clearly outlines an English legal process that seems strikingly familiar. From the opening of the court and calling all those with business to appear until the rendering of the verdict, Lovelace presented his commissioners with a script based on English legal practice. In order to strengthen his position that the court was fair and procedurally sound in its orientation, Lovelace noted to the commissioners that he and, presumably they, rely upon an English legal treatise entitled *Booke of Lawes for Tryall of Criminals* [468].

The Courts of Upland, New Castle and Whorekill

Trials, such as the one involving John Binckson, were hardly the norm. For the most part, local courts handled many of the legal problems and issues within the communities on the Delaware. The courts at New Castle, Upland, and Whorekill consisted of three justices of the peace, whose powers reflected those of their English counterparts, and would constitute the powers of a Court of Sessions [Armstrong: 37-8].¹⁶ Any cause exceeding twenty pounds or involving a crime of either life or limb could be taken upon appeal from this lower court to the Court of Assize. Any causes under five pounds could be tried without a jury, unless the parties demanded one and the Court of Sessions could function as a court of equity. Finally the law to be practiced within these jurisdictions would be the laws established by the Duke and practiced since the establishment of the government [*Records of the Court of Upland*: 39-41].

Justices in the colony faced similar problems as their counterparts across the Atlantic. Litigation and crime were local by nature; therefore, justices worked to lessen difficulties between neighbors and town residents. Their charge to keep the peace in the name of the Duke was no easy matter. For example, at the March 1676/7 session of the Upland Court, Justice Israel Helm brought suit against Oole Oolsen. In his declaration, as recorded by the clerk, Helm said that the defendant "in a most abusiff and malicious manner did beat and strike this Plaintiff; and with many scandalous Evill words did abuse him" [47].¹⁷ According to the clerk's notations, Lace Coleman testified that he had seen Helm after the encounter with Oolsen and that his shirt was torn. At that next sitting of the court, Edmund Cantwell, the High Sheriff, reiterated the story and demanded that the defendant be punished for such an abuse. Oolsen responded that Helm had struck him first—thus creating the possibility that it was self-defense. The court, after hearing all of the testimony, condemned Oolsen's actions;

¹⁶ The importance of the development of the justice of the peace, see Hazeltine: xl.

¹⁷ This case was continued due to the non-appearance of the defendant, who was threatened with judgment being passed against him, "according to Lawe and meritt".

however, the court and Cantwell considered Oolsen's position within the community. His large family and immoderate means would be more strained having to pay the fine of two hundred ten guilders. Thus in an effort to maintain community harmony and not destroy personal relationships, the court demanded that Oolsen ask for forgiveness and remitted one hundred fifty guilders of the fine [54]. The court's work to enforce the law put justices in rather difficult positions and in harm's way. Keeping the peace and creating an orderly society was as much a goal of the court as getting colonists to obey the law. Like justices in England they lived with the people they swore an oath to administer and for this very reason the goal of containing social conflict and not solely punishing it became a critical parallel across the Atlantic.¹⁸

Cases such as Helms were not uncommon for their content or their legal procedures that brought them to trial. During that same term of March 1676/7, Morten Mortensen brought two cases before the justices of the Upland Court. In his filed declaration, which began the first suit, Mortensen declared that Mouns Staecke and his servant killed an ox owned by Mortensen. The Court ordered the case to be continued until next term, due to the failure of Mortensen's witnesses [54]. In the second case, Mortensen filed an action of assault and battery against Mouns Staecke. When the case came before the justices, they heard the testimony of two witnesses, Jonas Nealson and Andries Boen. Both men testified that they came to Staecke's house and upon entering, Staecke ran against Mortensen and threw him to the ground. Again the court ordered a continuance and insisted that the two men find the means to end their differences [54].¹⁹

By the September 1677 sessions the relationship between Staecke and the Mortensens became more hostile, as they brought suit against Staecke twice. The first case in September relayed a frightening story of Staecke chasing Mortensen's wife with an axe. Hearing her scream, Mortensen ran to her and found Staecke not with an axe in hand but rather pointing a gun toward the two of them, threatening to shoot both of them, and calling Mortensen and his wife a "Rogue and whore." Mortensen told the court that Staecke had gone about doing the plaintiff mischief and asked the court to bind the defendant over on good behaviour. Initially, Staecke responded by denying the allegations but later stated that he knew the plaintiff and his wife as nothing but honest people [60]. In the end, the Court condemned Staecke, fined him fifty guilders, and bound over his entire estate as security for his good behaviour. In the second docketed case, this time involving the elder Mortensen, the plaintiff filed an action on the case for slander against Staecke. In accordance with the Duke's Laws, the court must have viewed the words in this case as actionable as well [*Beckman*: 88]. After hearing the parties to the suit and the witnesses, the court ordered Staecke to declare that he knew nothing but honesty of the plaintiff, which he did, and to pay court costs [*Records of the Court of Upland*: 60]. In these slander cases, not unlike those in England, the desire to minimize the threat to the King's peace by serving both plaintiff and defendant was the goal of the court.²⁰

¹⁸ Compare to Wrightson: 24-5 and Dowdell: 16. See also Beaver and Herrup.

¹⁹ The two men did come to some conclusion over the ox. These cases ended at the June sessions.

²⁰ See Bowler: 417.

Obtaining a formal admission of the honesty of the Mortensens and openly allowing Staecke to maintain his estate within the community gave equitable relief to both sides of the conflict.²¹

Staecke, however, had difficulty living with other residents in Upland. In November 1677 Andries Boen brought suit against Staecke for verbal and physical abuse. On his way home one day, Lace Coleman called to him and there, Boen found both Coleman and Staecke. During the meeting, Staecke began to verbally abuse Boen and minutes later assaulted the plaintiff, ultimately wounding him in the face. Two other men testified that they had witnessed the event. In his defense, Staecke declared that he had been drinking and prayed the court to forgive him, which the Court seemingly did and fined Staecke one hundred gilders and the cost of the suit [*Records of the Court of Upland*: 70]. Three years later Staecke found more legal trouble with Hans Jurian. In the first of three docketed cases, Staecke filed an action of slander and defamation. Most of the testimony came from one of Staecke's former adversaries, Morten Mortensen. Mortensen swore that he heard Jurian say "that it was a rogue that broke his calve's leg." Jurian, while not under oath, claimed that Staecke had broken his calve's leg and was a "gallows thief." Staecke asked the court to refer the case to next term, since his four material witnesses failed to appear in court that day [176]. Jurian responded by filing an action of assault and battery and an action of slander against Staecke. In the first case Jurian declared that Staecke assaulted and struck him in his own house and then called him a rogue and dog before threatening to kill him. Morten Mortensen again testified that he heard Staecke confront Jurian. The court listened to both sides of the testimony and bound both plaintiff and defendant to keep the peace for one year and six weeks and further condemned Staecke to pay a fine of two hundred gilders [177]. In the slander case, Jurian claimed that Staecke called him a thief, actionable words by all account and to this statement both Morten Mortensen and Andries Homman testified and again the court ordered Staecke to publicly apologize to Jurian and pay the court costs [178; Baker: 498].

The Court often found the means to forgive indiscretions, even in cases involving servants. The Court indicted Richard Duckett for fornication and bastardy; Duckett, however, confessed to his actions and said that he intended to marry Anna, the woman involved, and to take financial responsibility for the child as soon as he was free of his contractual obligation to his master. Under the Duke's Laws, fornication was punished by forcing the couple to marry, fines or corporal punishment, but the fact that Duckett planned on fulfilling his moral duty and take responsibility played well on the Court's desire to acknowledge the infraction and maintain community harmony. In accordance with the wishes of Duckett's master, the court withheld punishment beyond the humiliation that Duckett experienced [52; Beckman: 91].

²¹ For other defamation cases, see *Edmond Cantwell v. Neeles Laersen*, in *Records of the Court of Upland*: 101, *Clæs Cram v. Hans Peters*, *ibid.*: 175-6, *Justice OttoCoch v. Moens Staecke*, *ibid.*: 180. Actionable by writ of trespass on the case, see *Street*: 1:284. Earlier in the sixteenth and seventeenth century this was not always the case. See *Holwood v. Hopkins* in *Helmholz*: 89. On the desire to maintain social harmony, see *Baker*: 502-3.

In September 1677, Francis Walker filed a writ of attachment against Jon Ashman. Walker demanded that the court attach several cows and horses owned by Ashman. According to Walker, he and Ashman bought several horses and mares from Daniel Wastcoate of Standford, New England, for which Walker and Ashman promised to pay 16,000 pounds of tobacco. Within a time, Ashman took six horses and one colt to Maryland for sale, but he never returned. Walker told the court that he held no account of the sale. Unable to locate Ashman, the Court granted Walker the remaining horses and a number of Ashman's own cattle and declared the attachment to be valid and demanded that Ashman repay the costs of maintaining his cattle [Beckman: 98].

Disputes over real property also came before the Upland Court. On a writ of trespass upon the case, Peter Jegou brought suit against Thomas Wright and Godfrey Hancock. In his declaration, Jegou stated that in 1668 he obtained a permit and grant from Governor Philip Carteret to take up land in the area of Leasy Point for which the Governor would grant him a patent. Carteret permitted Jegou to construct a "house of entertainment for ye accomodation of traveler[s]" [141]. He also obtained other lands which he purchased from local residents, Cornelius Jurissen, Jurian Macelis, and Jan Claessen and lawfully held possession of the lands until 1670—the year of an Indian raid, which drove him from the area. Jegou, then, pursued other opportunities but kept the property for his future return to it. Since his forced removal from the property, Jegou complained that Quakers settled in the area and that two of them, the defendants, began to cultivate his property and build fences upon it, although they had been warned by Henry Jacobs, who acted on behalf of Jegou. Jegou brought suit in Burlington to recover the property, but for reasons that remain unknown, Jegou, with the consent of the justices, had the case removed to Upland. In Upland, justices heard the testimony of both sides on the action on the case and reviewed the documents held by Jegou, but questioned if Jegou filed the proper writ with the court. Apparently he had for the court upheld the meaning of the action on the case in this instance and declared that he should be returned to full possession of the land, according to the original grant [142].

Actions in the other courts on the Delaware were similar to cases heard in Upland. The Court of New Castle heard cases as wide-ranging as mortgage foreclosure and negligence. In *Moll v. Hutchinson*, Moll declared that he was the creditor to one, Daniel Linsy, who relinquished a piece of mortgaged land along the Appoquenemen Creek. Prior to actual transfer, Linsy sold the land to Hutchinson with the promise to pay the plaintiff. The plaintiff pleaded with the court to fulfill the mortgage claim and put him in possession of the land. The court agreed with the plea and ordered that the plaintiff be put in possession [*Records of the Court of New Castle*: 341, in Loyd: 38]. In *Powell v. Pietersen*, the court clerk failed to record the writ utilized by Powell to bring the case to court. The clerk noted that the plaintiff had lost the use of his body and admitted that it had been a year since he was able to work [*Records of the Court of New Castle*: 9, in Loyd: 38].²² Powell asked the

²² There were differences in the pleadings between trespass on the case and trespass. See Salmond: 142-5. It is likely that a writ of action for trespass on the case was the instrument used by Powell. See Maitland: 66-7, 71-2 and Ibbetson: 48-56. For differentiation to a felony charge, see Holmes: 69-72.

court to order the defendant to hire a servant to work for his family in his place, until he was restored to health. Pietersen responded to the plea in court; however, the court clerk did not record the response, but it is likely that the defendant, like his counterparts in England, had little to argue in a case of negligence [Ibbetson: 157-8]. Unless Pietersen could claim some range of justificatory defence, the justices of the court viewed the incident that injured Powell as an aspect of strict liability [59-63].²³ The justices of New Castle, not unlike justices in England who heard similar cases and developed a law of negligence or accidental injury, considered the incident as a case of negligence probably under a writ of trespass on the case on the part of the defendant and ordered the defendant to pay the plaintiff's medical expenses.²⁴ Justices in New Castle went further, assessing compensatory damages on the defendant and awarding exemplary damages to the plaintiff in the sum of 150 gilders for "his smart and Payne" [*Records of the Court of New Castle on Delaware*: 9, in Loyd: 38]. In these cases, American frontier life failed to keep colonial justices from following English procedure and legal theory.

Justices at the court at Whorekill faced similar situations and problems. In the case of *Bowman v. Welles and Newall*, the court heard pleadings on what the court described as a contract [Turner: 57]. Bowman declared that the defendants contracted with him to run a horserace for the sum of three thousand pounds of tobacco—a race that Bowman claimed he had won. English colonists, such as Bowman, and English aristocrats grew increasingly interested in wagering and gambling that existed [Stone: 259]. The gambling contract was hardly new but was the contract itself valid [Breen, 160-2]? Under a statute passed during the reign of Charles II [16 Char II, c. 7], wagering contracts were deemed valid, as long as they did not exceed one hundred pounds. According to the notes on the case, the court listened to the arguments over the contract. Although the full details of the legal arguments are out of our grasp, we may have the ability to theorize what Welles and Newall meant when they stated that the contract had to be confirmed. Since the passage of the *Statute of Frauds* (1677), conveyances of interests in land, wills or real estate, declarations or assignments of trusts, and certain classes of contract had to be evidenced in specific written modes [29 Char II, c. 3].²⁵ If the contract met the requisite value, did the wager need to be in written form according to the *Statute of Frauds* and was this the intention of the defendants, as they argued that the contract had to be confirmed in order to make it unvoidable? If Welles and Newall believed the wager was less serious and more humorous than Bowman thought, the contract could be voidable.²⁶ After listening to both sides argue their cases and the testimony of witnesses, the court referred the case to a jury. They

²³ Examples of justificatory defences or affirmative pleadings would include such things as an act of God, the action of a third party, or a prior act by the plaintiff. There is a certain level of disagreement to this, see Wigmore: 3:506-7.

²⁴ *Weaver v. Ward* (1616) Hob 134 and *Dickinson v. Watson* (1682) T. Jones 205 as cited in Street: 1:78-9 and Ibbetson: 58, 62.

²⁵ According to Oppe, the Statute of Frauds applied generally to the British colonies at the time. See Kent: 494, who believed that the "provisions of which prevail in the United States."

²⁶ See the case cited in Simpson: 534. According to Simpson, the case of the joke contract was cited in W. Sheppard, *Touchstone of Common Assurances* (London, 1641) to Hetley's *Reports*, but oddly the case does not appear there.

returned a verdict in favour of Bowman, awarding him the cost of the suit and one shilling in damages. Their decision seemingly granted a greater victory to the defendants, who did not have to pay the original wager amount of three thousand pounds of tobacco. Whether or not the jury knew the actual circumstances of the wager or arguments in court brought them to this conclusion cannot be ascertained. The defendants, however, failed to see any victory in the decision and asked for the court to arrest the judgment in order to appeal the case at the next sitting of the Court of Assizes. Noting that there were a number of questions about the testimony and due to the fact that the cause was less than twenty pounds, the court at Whorekill decided to discuss the case at their next sitting [Turner: 57].

Seventeenth and Eighteenth Centuries Developments

The quarterly court at Upland, like the other quarterly courts on the Delaware and the county quarter sessions in England, performed more work than adjudging cases of litigation and minor crimes. The court accepted new administrative duties as the colony developed. In 1678, Jan Cornelissen complained to the court that his son, Erik, was incompetent and mad and he was too poor to take care of him. In response, the court ordered and charged a levy for the construction of a blockhouse that would serve as an asylum for Cornelissen's son and a maintenance for him [Armstrong: 102]. One year later the court took up the cause of the church wardens of the Tinicum and Wicaco, who complained of the disrepair of their buildings. The court ordered the members to provide the money and time to repair the church buildings and churchyard or forfeit fifty guilders [152-3]. Finally in 1680 the court appointed overseers of the highways and roads and overseers of fences. The men appointed, like their counterparts in England, held the position for one year and were charged to make reports of roads and fences that demanded attention and those colonists who failed to perform their part in making the repairs [184, 192]. Thus by the time that Charles II granted the region to William Penn, the Upland Court had developed into its role as a court of quarter sessions.²⁷

Law and justice in the Court of Upland held similar features to its counterpart across the Atlantic. Considering the cases between the elder and younger Morten Mortensen and Mouns Staecke, the elder Mortensen probably filed an action of trespass on the case for slander—a common law practice that had grown in England during the seventeenth century. For Staecke, his defense of maintaining that the Mortensens and their wives were neither rogues nor whores but rather honest residents of the colony would have been a normal response in the common law courts across the Atlantic. The court's understated goal in its decisions was to maintain community cohesion by asking that plaintiffs and defendants attempt to mediate solutions to their problems, which many of them apparently did. When cases came to court to be decided, the justices on the bench again sought to maintain harmony within the community and perhaps, raise the

²⁷ Compare to Sydney and Beatrice Webb, *English Local Government: The Parish and the County*.

stature of the court by asking plaintiffs and defendants to apologize for their actions in open court and acknowledge the authority of those who sat in judgment. Through these early years in the Delaware Valley, justices and sheriffs granted writs, fined jurors, witnesses, and litigants for non-appearance, and non-suited plaintiffs in causes that had no legitimacy in this effort to maintain social cohesion and control [Armstrong: 180]. At the center of these local proceedings was a procedural and substantive law that was inherently English. If the Dutch knew little of English legal culture before the takeover in 1664, they were brought further into an English legal empire, which would make them much more able to survive in an English colony now under the control of a friend of the Stuart court, William Penn.

William Penn's colony faced similar local problems. Penn divided his colony into six counties and he established a court in each to administer the law. By the end of the seventeenth century, county courts, such as that for Chester County, heard a variety of civil and criminal cases. For example in 1697 the justices of the Chester County court called Ann Clarke to appear. The court demanded that she answer a presentment from the Grand Inquest involving her pregnancy and specifically addressing who the father was. Ann declared that the father was John Maxfield and subsequently submitted herself to the court for her punishment [Lapp: 2:6].

In that same year, William Robinson brought suit against Peter Blaxfield. When the court called the case in 1697, Blaxfield failed to appear. According to the clerk's notes on the case, the court called the defendant three times. Blaxfield was not the only one under scrutiny by the court; so too were the two men who provided his bail and promised that he would appear. The court declared Blaxfield in default and Robinson desired that the court enter judgment against him. The court, however, did not pursue this course but rather continued the case until the next sessions.

Although actions of debt constituted a significant amount of the court's time, the court occasionally heard actions that were quite unique. In 1700, Joseph Richards brought an action of trover against Nathaniel Lamplugh.²⁸ According to Richards, Lamplugh had found Richard's horse and kept it. The jury heard the evidence and found for the defendant [Lapp: 74]. A year later, the justices of Chester County heard two cases on an action of scandal and defamation. In the first, Reese Kent filed suit against William Thomas. Having heard the case, the court cleared Kent of the scandal and demanded that Thomas pay all costs [79]. In the second case, David and Mary Evan filed an action of scandal against John Pugh. Although the clerk failed to elaborate upon the evidence, he noted that the jury found for the plaintiffs and awarded them costs of the suit and fifty shillings in damages [80].

If Pennsylvania courts conducted themselves differently than their colleagues across the Atlantic, perhaps it can be best seen as the Chester County court convened as the Court of Common Pleas and converted itself into various other types of courts, such as the Court of Quarter Sessions or the Orphans' Court [63, 90]. The most extreme transformation came in 1698,

²⁸ An action of trover is for the recovery of damages against a person who found another's goods and wrongfully converted them to his own use.

when Owen MackDaniell brought suit against Edward Pritchett on an action of debt. When the case was called, they joined issue and the court proceeded to impanel a jury and hear the evidence from both men. According to the clerk, MackDaniell declared that Pritchett owed him three pounds. Pritchett responded that he owed nothing and more importantly, MackDaniell owed him two shillings. Obviously the jury believed MackDaniell and not Pritchett, as they found for the plaintiff and awarded him two pence in damages. In hearing this, the defendant became quite “agrieved with the verdict of the jury” and asked the court to provide him with an appeal to a court of equity. Over the next ninety minutes, the Chester County court transformed itself from a court of law into a court of equity. According to the clerk, the justices evaluated the proof provided by MackDaniell and found it inconsistent in proving the debt. The justices declared that Pritchett had no obligation to pay the debt or the damages which had been awarded by the Court of Common Pleas and further determined that both MackDaniell and Pritchett would split the court costs [22].

By the beginning of the eighteenth century, the law in the Delaware River Valley reflected English law from across the Atlantic. The construction of the courthouse in New Castle looked a great deal like its counterparts in England and the work which Governor Lovelace wished to have conducted within the building reflected its English background.²⁹ From the opening of the court for the trial of John Binckson until the rendering of the verdict and the judgment of the court, Lovelace advanced the development and use of English law and procedure upon residents who were not English. Although the impartiality and justice of the written script by Lovelace seems heavy-handed at best, with the impaneling of an English-style jury, the reading of the indictment and the entering of a plea, English and non-English residents of the Delaware utilized English law and procedural forms.

One might expect that William Penn would find new ways to conduct legal business in colonial Pennsylvania. Penn’s own experiences provided him with unique opportunities through which to view English law. Penn lived in a legal world that was reform oriented and spent a year at the Inns of Court, but his experiences were not limited to these.³⁰ Penn observed these workings of the law and courts firsthand as a defendant.³¹ In spite of these experiences, Penn’s colonial law was influenced more by English legal usage and tradition than influenced by the frontier.

If the American frontier influenced Pennsylvania legal development, it did so in the development of new courts and jurisdictions. Justices in county courts, such as Chester, certainly had a tremendous amount of work to perform as their legal business encompassed a multitude of jurisdictions and directions. Like their counterparts back in England, justices were administrators overseeing the construction and maintenance of roads one moment and adjudging cases in their own courts of common pleas and

²⁹ An early eighteenth-century courthouse still stands in historic New Castle, Delaware.

³⁰ Although brief, the most recent biography of William Penn is that of Geiter. On reform of the English law during the middle of the seventeenth century, see Veall and Cromartie. On the legal persecution of Quakers within English law and courts, see Horle.

³¹ For William Penn’s account see his tract, “The People’s Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead,” in *The Select Works of William Penn*, 3: 179-223.

quarter sessions. The removal from England also placed new burdens on local justices. The registering of deeds and the adjudication of cases involving probate, intestacy and orphans also became part of their yearly workload. The work of these jurisdictions had been performed previously by the Church of England. For William Penn, the removal of these powers and jurisdictions from an ecclesiastical context to justices in local government was necessary in order to oversee the transfer of real and personal property. Quakers understood the need to write wills and non-English residents certainly comprehended the value of declaring the distribution of their estates. In a diverse colony such as Pennsylvania this could no longer be accomplished within a Church of England context. With the founding of the colony across the Atlantic that had already been settled by the Dutch, Swedes and Finns and with no established religion, perhaps divergence from the English norm was due more to William Penn and his theology of Quakerism than the impact of the American frontier.

What then was the impact of the frontier on Pennsylvania's legal development? Forasmuch as we might think that this impact would be great, perhaps it is much less than we assume. Quaker colonists certainly brought with them a working understanding of the English law at both the local and national levels. They understood the position they lived within while in England relative to their private affairs, such as marriage and estate planning. They arrived, though, to a world that was hardly unsettled. The Delaware River Valley was not an environment devoid of inhabitants. Europeans lived on the Delaware for nearly fifty years prior to Penn's grant from Charles II and the native Americans for a much greater length of time. The Quakers arrived to find courts practicing English law, which only gave them greater security in the idea of continuing the practice of English law in the region.

WORKS CITED :

Primary Sources

- ARMSTRONG, Edward, ed. *The Record of the Court at Upland in Pennsylvania, 1676 to 1681*. Philadelphia: J. B. Lippincott & Co., 1860.
- BECKMAN, Gail McKnight, ed. *The Statutes at Large of Pennsylvania in the Time of William Penn*. New York: Vantage Press, 1976.
- BLACKSTONE, William. *Commentaries on the Laws of the England*, A Facsimile of the First Edition of 1765-1769. 4 Vols. London and Chicago: University of Chicago Press, 1979. *Documents Relating to the Colonial History of the State of New York*. Vol. XII. Reprint edition: New York, NY: AMS Press, Inc., 1969.
- HELMHOLZ, R.H., ed. *Select Cases on Defamation to 1600*. London: Selden Society, 1985.
- LAPP, Dorothy, ed. *Records of the Courts of Chester County, Pennsylvania*. 2 Vols. Danboro, PA: Richard T. and Mildred C. Williams Publishers, 1972.
- PENN, William. *The Select Works of William Penn*. 3 Vols. Reprint edition: New York: Kraus Reprint Co., 1971.
- PICKERING, Danby, ed. *The Statutes At Large from the First Year of King William and Queen Mary to the Eighth Year of King William III*. Cambridge, 1764.
- STOKES, Anthony. *A View of the Constitution of the British Colonies in North America and the West Indies at the time the Civil War Broke out on the Continent of America*. London, 1783.
- TURNER, C.H.B., ed. *Some Records of Sussex County, Delaware*. Philadelphia, 1909.

Secondary Sources

- AUMANN, Francis R. *The Changing American Legal System: Some Selected Phases*. Columbus, OH: Ohio State UP, 1940.
- BAKER, J.H. *An Introduction to English Legal History*. London: Butterworths, 1990.
- BEAVER, Daniel C. *Parish Communities and Religious Conflict in the Vale of Gloucester, 1590-1690*. Cambridge, MA: Harvard UP, 1998.
- BOWLER, Clara Ann. "Carted Whores and White Shrouded Apologies: Slander in the County Courts of Seventeenth-Century Virginia." *Virginia Magazine of History and Biography*, 85 (1977): 411-26.
- BREEN, T.H. "Horses and Gentlemen: The Cultural Significance of Gambling Among the Gentry of Virginia," in *Puritans and Adventurers: Change and Persistence in Early America*. Oxford: Oxford UP, 1980.
- COCKBURN, J.S. "Trial by the book? Fact and theory in the criminal process 1558-1625," in J.H. Baker, ed. *Legal Records and the Historian*. London: Royal Historical Society, 1978.
- CROMARTIE, Alan. *Sir Matthew Hale 1609-1676: Law, Religion and Natural Philosophy*. Cambridge: Cambridge UP, 1995.
- DALE, Richard C. "The Adoption of the Common Law by the American Colonies," *The American Law Register*, Vol. 30, No. 9, New Series Volume 2 (September, 1882): 553-74.

- DOWDELL, E.G. *A Hundred Years of Quarter Sessions: The Government of Middlesex from 1660-1760*. Cambridge: Cambridge UP, 1932.
- EASTMAN, Frank M. *Courts and Lawyers of Pennsylvania: A History, 1623-1923*. New York: American Historical Society, 1922.
- ELLIS, Richard E. *The Jeffersonian Crisis: Courts and Politics in the Young Republic*. New York: Oxford UP, 1971.
- GEITER, Mary K. *William Penn*. Harlow, England: Pearson Education Limited, 2000.
- HAEFELI, Evan. "The Revolt of the Long Swede: Transatlantic Hopes and Fears on the Delaware, 1669,"
 < <http://www.historycooperative.org/journals/pmh/130.2/> > [11 June 2007]
- HAZELTINE, H.D. "General Preface: The Justice of the Peace," in E.G. Dowdell, *A Hundred Years of Quarter Sessions: The Government of Middlesex from 1660-1760*. Cambridge: Cambridge UP, 1932.
- HERRUP, Cynthia B. *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England*. Cambridge: Cambridge UP, 1987.
- HIGGINBOTHAM, Sanford W. *The Keystone in the Democratic Arch: Pennsylvania Politics, 1800-1816*. Harrisburg: Pennsylvania Historical and Museum Commission, 1952.
- HOLDSWORTH, Sir William. *A History of English Law*. London: Methuen & Co., 1938.
- HOLMES, Oliver W. *The Common Law*. Edited by Mark DeWolfe Howe. Boston: Little, Brown and Co., 1963.
- HORLE, Craig W. *The Quakers and the English Legal System, 1660-1688*. Philadelphia: University of Pennsylvania Press, 1988.
- IBBETSON, David. *A Historical Introduction to the Law of Obligations*. Oxford: Oxford UP, 1999.
- JOHNSON, Herbert A. *Essays on New York Colonial Legal History*. Westport, CT: Greenwood Press, 1981.
- KAMMEN, Michael. *Colonial New York: A History*. Millwood, NY: KTO Press, 1975.
- KEITH, A. Berriedale. *Constitutional History of the First British Empire*. Oxford: Clarendon Press, 1930.
- KEMPIN, Jr., Frederick G. *Historical Introduction to Anglo-American Law*. 3rd ed.: St Paul: West Group Publishing, 1990.
- KENT, James. *Commentaries on American Law*. New York: William Kent, 1848.
- LEWIS, Jr., Lawrence, "The Courts of Pennsylvania in the Seventeenth Century," *The Pennsylvania Magazine of History and Biography*, V (1881): 141-90.
- LOYD, William H. *The Early Courts of Pennsylvania*. Boston: Boston Book Company, 1910.
- MAITLAND, F.W. *The Forms of Action at Common Law: A Course of Lectures*. Cambridge: Cambridge UP, 1962.
- MERWICK, Donna. *Possessing Albany, 1630-1710: The Dutch and English Experiences*. Cambridge: Cambridge UP, 1990.
- MIDDLETON, Richard. *Colonial America: A History, 1607-1760*. Cambridge: Blackwell, 1992.
- MUNROE, John A. *History of Delaware*. Newark, DE: University of Delaware Press, 1979.
- OPPE, A.S. *Wharton's Law Lexicon*. London: Sweet & Maxwell, Ltd., 1957.

- POUND, Roscoe and Theodore F.T. PLUCKNETT, eds. *Readings on the History and System of the Common Law*. 3rd edition: Rochester, NY: Lawyers Co-operative Publishing Company 1927.
- REINSCH, Paul Samuel. *English Common Law in the Early American Colonies*. Reprint edition: New York: De Capo Press, 1970.
- RITCHIE, Robert C. *The Duke's Province: A Study of New York Politics and Society, 1664-1691*. Chapel Hill: University of North Carolina Press, 1977.
- SALMOND, John W. *Essays in Jurisprudence and Legal History*. London: Stevens & Haynes, 1891.
- SHARSWOOD, George. "The Common Law of Pennsylvania," *The Pennsylvania Bar Association Reports*, 1 (1895): 337-52.
- SIMPSON, A. W. Brian. *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*. Oxford: Oxford UP, 1975.
- SMITH, Joseph H. and Thomas G. BARNES. *The English Legal System: Carryover to the Colonies*. Los Angeles: Clark Memorial Library, 1975.
- STOEBUCK, William B. "Reception of English Common Law in the American Colonies." *William and Mary Law Review*, 10 (1968-9): 393-426.
- STONE, Lawrence. *The Crisis of the Aristocracy, 1558-1641*. Abridged edition. Oxford: Oxford UP, 1967.
- STORY, Joseph. *Commentaries on the Constitution of the United States*. 5th ed.: Boston, 1891.
- STREET, Thomas Atkins. *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law*. 3 Vols. Northport, Long Island, NY: Edward Thompson Company, 1906.
- SURRENCY, Erwin C. "When the Common Law Was Unpopular in Pennsylvania," *Pennsylvania Bar Association Quarterly*, 33 (1962): 299-300.
- VEALL, Donald. *The Popular Movement for Law Reform 1640-1660*. Oxford: Clarendon Press, 1970.
- WALSH, William F. *A History of Anglo-American Law*. 2nd ed.: Indianapolis: Bobbs-Merrill, 1932.
- WEBB, Sydney and Beatrice. *English Local Government: The Parish and the County*. London: Longmans, Green & Co., 1906.
- WESLAGER, C.A. *The English on the Delaware: 1610-1682*. New Brunswick, NJ: Rutgers University Press, 1967.
- . *New Sweden on the Delaware: 1638-1655*. Wilmington, DE: Middle Atlantic Press, 1988.
- WIGMORE, John Henry. "Responsibility for Tortious Acts: Its History," in *Select Essays in Anglo-American Legal History*. 3 Vols. Boston: Little, Brown and Co., 1907.
- WRIGHTSON, Keith. "Two Concepts of Order: Justices, Constables and Jurymen in Seventeenth-Century England" in *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries*, 21-46. Edited by John Brewer and John Styles. New Brunswick, NJ: Rutgers UP, 1980.