The Transition from Colonialism to Independence

by ERWIN C. SURRENCY*

THE LEGAL EFFECTS

The American Revolution provided the newly independent States an opportunity to reorientate their laws and an governments towards a more democratic model. The endurance of law and institutions and previous experience in governmental affairs is clearly demonstrated by the fact that so much from the colonial period was continued but yet, significant changes were made by enacting legal doctrines long put forth by the colonists under the Colonial Governments. For the American colonist, the legislative bodies were considered the bulwark of their government for this was the only elected body in the colonial governments. This will explain why the powers of the legislatures under the new constitutions were expanded at the expense of the governor. However, the same organization of the courts was continued in all the states with the exceptions of Virginia and Georgia. Little or no change was made in judicial procedure with several exceptions. Several Institutions which were part of the Imperial government and never a part of the colonial governments had to be replaced. Admiralty was outside the control of the colonies. Final appeals were taken to the Privy Council in London. South Carolina and New York attempted to replace the functions of the Privy Council by establishing institutions patterned in some measure after that body.

The majority of colonies were governed by the King who appointed the Royal Governors who had extensive powers. His authority was extensive for he participated in the legislative process as the presiding officer in the upper house and presided in several courts. The Royal Governors had no alternative but to carry out the directions he received from the King through the Privy Council. The most frightening change at the end of the Seven Years' War or the French and Indian War was the laws enacted by Parliament which directly impacted the colonies. The attempt to repeal the Massachusetts Charter was an harbinger of changes to come as was the authority given to the Royal Navy to enforce the Navigation and Trade laws.

The American Revolution was a legal, as well as a political revolution, for the colonist took the opportunity to bring about some significant changes in areas of private law. This included revision of the laws without fear of their disallowance by the Privy Council which had caused some discontent previously. Several states took the opportunity afforded by

*Professor of Law Emeritus, University of Georgia; founding editor of the American Journal of Legal History.

their Independence to revise their laws, ridding them of many statutes which did not accord with the democratic principles of the period. Virginia, under the leadership of Thomas Jefferson, during the Revolution undertook to revise completely their laws making them consistent with their constitution and their independence. Connecticut, a colony which had the least interference from the British Government, modernized its statutes as well.

Significant changes were made in at least two areas of private law: property and criminal law. Primogeniture and estates tail were abolished and the fee simple tenure was substituted for the all previous forms of tenure that had existed in the Colonies. Changes in the method of disposing of unoccupied property were also made to prevent the abuses that had developed under the royal governments.

The most significant change in the law was in the area of Criminal law. Pennsylvania, in her first constitution of 1777, provided that the general assembly should, as soon as practical after the Revolution, reform the Criminal law. Beginning with an act of September 15, 1786, the legislature began to implement this constitutional mandate by reducing the penalties provided under the Criminal law which previously had been practical in that colony. The New Hampshire Constitution of 1784, provided that all penalties were to be proportionate to the offense. "No wise legislature," continued the constitution, "will affix the same punishment to crimes of theft, forgery, and the like as they do to murder and treason; true design of all punishment is to reform not to exterminate." Immediately following the Revolution, all the states undertook to follow the example of Pennsylvania. This spirit of change, which was implemented at this period, was incorporated into the Law.

ORGANIZATION OF STATE GOVERNMENT

The causes leading up to the Revolution are well known and need not be reviewed here for events, both in England and America, were pushing the former colonies towards Independence. The first major task of those who were seeking Independence was to establish governments in each colony replacing the colonial regimes. It should be noted that Rhode Island and Connecticut were practically independent and their governments had few restraints on their independence. As a matter of fact, the original charters of these two colonies served as their constitutions for several decades following the Revolution.[1] During the period from 1765 to 1776, the colonists had formed unofficial bodies as a means of making their grievances known. After Henry Lee introduced his resolution declaring that the colonies should be independent, these unofficial bodies gradually assumed more functions of government. During the years of 1775 to the early part of 1776, the first Continental Congress and the beginning of the Second

1. Connecticut adopted its first Constitution after Independence in 1818 and Rhode Island in 1842. It would be interesting to know the reasons for this delayed action.

Continental Congress considered themselves more as an unofficial body representing the grievances of the people, not as legislative body of a new government. The address of the First Continental Congress to George III indicates this view. It was at this point that many of the colonists had to make up their minds as to whether they would take the road to independence or remain loyal to the King. For a period of nearly a year, a "loose and unrestricted government was carried on in the colonies...without protest or discontent, so long as the general expectation of a return to allegiance, following upon a redress of grievances, continued to exist".[2]

These extra-legal committees, generally the former Committees of Safety in each colony, took steps to operate the government, ignoring the royal governors who, in most situations, felt the need to accept the hospitality of the Royal Navy. If, as many of the early state constitution declared, the government was a compact between the people and the government, a better method of government was imperative.

The Provincial Congress of Massachusetts took the lead by sending a letter dated May 16, 1775 to the Continental Congress asking for their advice concerning the type of government to be formed.[3] The Continental Congress answered in June that inasmuch as the Parliament had undertaken to alter the Massachusetts charter, it followed that no obedience was due to the governor or to the lieutenant-governor who were endeavoring to subvert the provisions of this document. These officials were to be considered absent and their offices vacant. It was suggested to the Provincial Congress of Massachusetts that the inhabitants of the cities which were entitled to representation in the assembly, elect representatives which would govern the colony until a governor of his majesty's appointment will consent to govern the colony according to the charter.[4] It is stated by one leading authority that the replies to New Hampshire, South Carolina, and Virginia in November and December of 1775 of the Continental Congress implied that a constitutional convention was to be held.[5] Even at this point, Congress did not envision a clear break with the mother country.

It was not until May 15, 1776 that Congress recommended to all the states that it was necessary to suppress the authority of Crown and that all functions of the government should be exercised under the authority of the people. The resolution recommended that a convention be held whose purpose would be to adopt such government as should in the opinion of the representative be best conducive to the happiness and safety of their constituents.[6] This resolution is cited as the inspiration of the first constitution.[7] May 14, 1776 was the date chosen as the benchmark for the end

2. John Alexander Jameson, *A Treatise on Constitutional Convention* (4th ed. 1887), p. 114.

3. John Alexander Jameson, *A Treatise on Constitutional Convention* (4th ed. 1887), p. 114.

4. John Alexander Jameson, *A Treatise on Constitutional Convention* (4th ed. 1887), p. 114.

5. John Alexander Jameson, *A Treatise on Constitutional Convention* (4th ed. 1887), p. 117.

6. John Alexander Jameson, *A Treatise on Constitutional Convention* (4th ed. 1887), p. 115. Journal of the Continental Congresses, *Vol. I*, p. 219.

7. *Pennsylvania Manual 1951/52*, p. 58, and later editions.

the application laws adopted under the English rule and the beginning of a new era in law making.[8] These adoption statutes clearly stated that the common law and the statutes in support of the common law enacted before l607 would continued in effect until changed.

New Hampshire was the first state to draft a constitution during December 1775 under these recommendations of the Continental Congress. During the year 1776, all the other colonies except Massachusetts, Connecticut and Rhode Island which held charters granted by the King, adopted constitutions.[9] The Constitution of Virginia was adopted June 29, 1776. Of all these early constitutions adopted during this period, this was the most technically correct and skillfully drafted. Virginia did not adopt another constitution until 1830.[10] The constitution of New Jersey endured even longer, until 1844.[11] All these constitutions were the original work of the bodies drafting them, with the exception of the constitution of Vermont of 1777, which was a copy of the Pennsylvania Constitution.[12] As would be suspected, these constitutions had a number of provisions in common. These constitutions did not have a standard pattern of numbered articles, and sections that would become familiar in later constitutions.

Scholars have long speculated over the origin of the concept of a constitution without taking into account prior experiences of the colonists. Some have ascribe this idea to the writings of political philosophers of the eighteenth century, especially those of John Locke who espoused the theory that the people had entered into a contract with the sovereign. If a constitution is a document which defines the authority and structure of a governing body, then the concept is as old as the common law. It had been the practice of the King to grant charters to corporate bodies which defined the rights and duties of the governing body. Every colony established in America had its beginnings under such charters. Other local examples followed. William Penn granted to the colonies of Pennsylvania and the Lower Counties which became Delaware, a Charter of Privileges which defined the rights of the individuals as well as the limits on the authority of the proprietors.[13] This was an important document for it gave the accused

8. Pennsylvania Act of January 28, 1777, Smith Pa. Laws, v.1 p. 429.

9. John Alexander Jameson, *A Treatise on Constitutional Convention* (4th ed. 1887), p. 83. The author argues that both Connecticut and Rhode Island at the time of the Revolution had "unwritten" constitutions for having found that under their charters that the Mother Country had not oppress them then the rulers would be unable to do so under the new government. Connecticut did not adopt a constitution until 1818 and Rhode Island in 1842.

10. John Alexander Jameson, *A Treatise on Constitutional Convention* (4th ed. 1887), p. 125.

11. Julian P. Boyd, *Fundamental Laws and Constitutions of New Jersey* (1964).

12. Allen Soule, ed., *Laws of Vermont, State Papers of Vermont* (1964), v. 12, p. 4.

13. This remarkable document was the subject of debate during the Proprietorship. Before 1701, similar documents had been adopted by William Penn but due to the unsettled question of his ownership and this problem was put to rest, he issued the final version in 1701. Text may be found in Delaware Laws, 1797, vol. 1, appendix p. 37.

the right to counsel, and summons witnesses. Massachusetts, Rhode Island, and Connecticut vigorously defended their rights under their respective charters originally granted by the King during the colonial period.

These documents had been granted on application to the sovereign but the question was open as how best adopt and approve a constitution. There was no sovereign after Independence to do this but popularly elected legislators. A few colonies called special conventions for the purpose while in others, the committees then in charge of the government performed this function.

All of these constitutions demonstrated a distrust of the executive power of government for the colonists did not accept the idea of the royal governor who felt bound by this Instructions and who held several judicial posts including that of chief justice of the General Court in Virginia. Under the new governments, the governor was elected by various methods, either by the upper house alone or by both houses for a period of one year. In some states, the governor was eligible for re-election, but his power were circumscribed. Several constitutions contained provisions continuing the laws of the colonial period.[14]

None of these early constitutions deal extensively with the organization of the judiciary, with the exception of the Pennsylvania Constitution of 1776.[15] That constitution provided that the Supreme Court and several Courts of Common Pleas of this commonwealth shall have the power usually exercised by such courts, and would have the powers of the Court of Chancery so far as relates to perpetuating testimony, obtaining evidence from places not within the state, and the care of persons in the state who are *non compotes mentis* and such other powers as may be found necessary by future general assemblies, not inconsistent with this constitution. It should be noted that exercise of chancery courts was looked upon with disfavor for this court was presided over by the Governor and proceeded without the intervention of a jury. The Constitution of North Carolina, adopted December 1776, makes no mention of the courts except to provide that the legislature should appoint the judges.

This group of constitutions concluded between 1776-1778, were found inadequate after the adoption of the Federal Constitution that all had to be replaced within two decades. When considering the fact that these colonies were attempting to prosecute a war as well as to established a form of government and somehow in some way, replace the general administration by the British Government, it is surprising that the constitutions were drafted as well as they were. It may safely be assumed that the political leaders in their various official offices had given some thought to the alterations in the form of government, not in a grand design but by pragmatic changes.

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14. Delaware, art. 25; Maryland, art. 3; New Jersey, art. 22; New York, art. 25; South Carolina, art. 29.

15. Pa. Const. (1776), Sec. 24.

ADMIRALTY COURTS

As the Revolution opened and the new governments were established, a number of existing Imperial Institutions and officials had to be replaced, including the collectors of customs and other lesser representatives of the British Government. The mere establishment of the new governments was sufficient legal sanction for abolishment of these offices and instruments, for what official would dare continue to enforce the tariffs imposed by the old British Acts of Trade? But the one institution feared in all the colonies were the instruments for enforcing the maritime and trade policies of the former government, the admiralty courts.

Until 1763, the royal governor was commissioned as a vice admiral and exercised control normally associated with maritime affairs including holding an admiralty court. Apparently, these courts were not active. However, in 1767, Parliament authorized the establishment of an admiralty court in Halifax and three vice admiralty courts in Boston, Philadelphia and Charleston with an appeal to the court in Halifax and finally, to the High Court of Admiralty in London.[16] Among the factors which contributed to the unpopularity of these courts was the lack of a jury trial and any vessel caught in illicit trade, regardless of where the incident took place, could be taken to the court in Halifax for trial, the location favored by the Royal Navy because a naval base was located there. Thus, in the Declaration of Independence, George III is accused of transporting Americans beyond the seas for trial. The lack of a jury trial for those accused of being pirates or smugglers is clearly stated, "as being contrary to the spirit of the common law" in a Pennsylvania statute.[17] Jury trials were authorized in all types of actions within the admiralty jurisdiction.

With the termination of the British authority, the Admiralty courts needed to be replaced by other courts. The increasing number of British ships captured by American privateers was the compelling reason for establishing these courts. Massachusetts established the first Admiralty Court in 1775.[18] The state was divided into three districts and a court was appointed to be held in each of the three districts.This act was later amended to authorize holding of sessions of the court in several cities in each of the districts.[19] Virginia was the next colony to establish an Admiralty Court in 1776. This was a single court and apparently, all sessions were held in the state capital at Williamsburg.[20] All of these courts were generally called Courts of Admiralty with the exception of the court of New Jersey which was given the title of Court of Admiralty and Custom Houses within the State of New Jersey.[21]

16. Erwin C. Surrency, "The Courts in the American Colonies," 11 Amer. J. Leg. Hist. 353 (1967).

17. Pa. Act of September 9, 1778, 9 Pa. Stat. L. 281.

18. Act of November, 1775, Mass. Laws, p. 9.

19. Act of April, 1775, Mass. Laws, p. 45.

20. Act of October, 1776, 9 Hening's Va. Stat. 202.

21. Act of October 5, 1776, N.J. Laws, p. 7.

The acts establishing these courts generally did not fully explain their jurisdiction for it was assumed that they would exercise the normal jurisdiction of an Admiralty Court. The Constitution of South Carolina stated that the jurisdiction of the court "be confined to maritime causes".[22] The North Carolina Act was more specific in denoting the courts jurisdiction which included suits for freight, mariners' wages, charter parties. recoveries for building, repairing, or the necessary victualing of a ship, salvage and "all matters and transactions that are in their nature maritime".[23]

Nearly all the acts provided that the courts would be governed by the general maritime laws, as well as the laws and ordinances of the Continental Congress. The Virginia legislature specifically laid down in addition to these sources, the English statutes, the Laws of Olern, the Rhodian and Imperial Laws so far as they are observed in English Courts of Admiralty.[24] In nearly all the colonies, the court was presided over by a single judge. However, the Virginia court had three judges any two of whom constituted a quorum.[25] In Massachusetts, the three separate courts had different judges.[26]

Throughout the Colonial Period, the Admiralty Courts were not popular forums.The chief source of dissatisfaction was the lack of a jury trial in the maritime's procedure. Hence, when the state Admiralty Courts were established, the acts provided for a jury trial. The Massachusetts Act provided a trial by jury where "one or more material facts is alleged".[27] The Pennsylvania Act provided that the findings of the jury in matters of fact would be final.[28]

All the states maintained the jury system in the Admiralty Courts until these courts were abolished after the adoption of the Federal constitution. It is worthy of note that when the First Judiciary Act under the Constitution was passed in 1789, it did not confer jury trials in admiralty suits, but it did specifically preserve the common-law rights in maritime jurisdiction where the common law was competent to give justice.

The Articles of Confederation gave to the Continental Congress the power to provide for appeals "in all cases of captures", and to establish rules for deciding, in all cases, "what captures on land or water shall be legal, and in what manner prizes, taken by the land or navel forces in the service or the United States, shall be divided or appropriated".[29] Congress, by ordinance of January 15, 1780, recommended to the states that they make "laws authorizing and directing the Courts of Admiralty to carry into

22. S. C. Const. (1778), rec. xxv. Thorpe, *Federal and State Constitutions,* colonial charters, and other organic acts, v. 6, p. 3254.

23. Act of November, 1777, N.C. Laws, p. 62; NC. State Records, v. 24, p. 123.

24. Act of October 1776, 9 Hening's Va. Stat. 203.

25. Act of October 1776, 9 Hening Va. Stat. 202.

26. Act of November 1, 1775, Mass. Laws, p. 9.

27. Act of 1778, Mass. Laws, p. 177.

28. Provision for jury trial omitted in act of March 8, 1780, 10 Pa. Stat. L. 97.

29. Articles of Confederation, article 9, 1 Stat. 9.

full and speedy execution, the decrees of the courts of appeals.[30]

The only state to carry into effect this spirit of the Continental Ordinances was New Jersey which attached no limitation on the appeals to the courts established by the Continental Congress.[31] However, all the other states sought to limit this appeal in one way of another. The Virginia Act provided for an appeal for Congress from all cases of captures from the enemies of the United States. This provision was later limited in cases not involving citizens of Virginia.[32]

The Massachusetts Act of 1779 provided that there was to be an appeal to Congress from the Maritime Courts of Massachusetts, but they gave to the appellant the right to appeal to Congress or to appeal to the Superior Court of Judicature of that state. The appeal to Congress did not apply when the matter in controversy involved citizens of Massachusetts and the decisions of the maritime court were final in controversies involving the wages of sailors.[33]

The admiralty courts of the various colonies functioned throughout the Revolutionary Period. However, some courts were busier than others. The British Navy kept the southern colonies blockaded and in fact, occupied Georgia and South Carolina from 1779 until the close of the war. The courts in the New England states had a flourishing business. Governor Thomas Jefferson wrote to the president of Congress in June, 1779; "A British prize would be a more rare phenomenon here than a comet, because the one has been seen, but the other never was." There seemed to have been some rivalry between the courts and the Continental captors hoping to get their prizes into another court.[34]

During the occupation in New York, the British established an Admiralty Court in New York for the trial of prize cases involving captured American ships. Since the British occupied New York from 1776 until the end of the Revolution, this court was active.[35] Unfortunately, its records were lost.

The Constitution of the United States adopted in 1787 and which came into effect in 1789, gave to the Federal Courts exclusive jurisdiction in admiralty and maritime affairs. Since the Supreme court very early confined admiralty jurisdiction to areas beyond the ebb and flow of the tides, the states bordering along the great rivers of American had to settle matters which were in the nature of Admiralty problems. When the Supreme Court abandoned the ebb and flow of the tides test to determine admiralty jurisdiction, the state courts lost all maritime jurisdiction.

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30. *Journal of the Continental Congresses*, v. 16, p. 61.

31. Act of December 5, 1778, N.J. Laws, p. 18.

32. Act of October. 1776, 9 Hening Va. Stat. 205; and Act of May, 1779,10 Hening Va. Stat. 101.

33. Act of June 30, 1799, Mass. Laws, p. 248.

34. Quoted in Campbell, *"The Case of the Three Friends,"* 74 Va. Mag. Hist. and Bio. 194, (1966).

35. Smith, (ed.), Repts. p. lxviii. (N.Y.C.P.).

Another imperial court that had to be replaced was the appeal from the highest court in the colony to the Privy Council in London. No act of Parliament or colonial legislation governed this process which was established by Instructions issued to the Royal Governors by the Privy Council. After the Revolution began, Pennsylvania created the High Court of Appeals as did Delaware which functioned in a similar fashion to the Privy Council, with the exception that this new court did not review legislation. The Pennsylvania statute praises the fact that the people had been delivered from its previous dependency and have become free and sovereign and thus released from this "badge of slavery", that it was necessary to established a competent court of appeals.[36] The two areas which the statute cites where this need was greater was in appeals common law including chancery and probate. In both of these areas, the judge's decisions were final and because of the expense "difficult and precarious" resulted in a denial of such review.

On the local level, many minor officials continued to exercised their offices and were only slowly replaced. For example, the naval officer was a local official who look after the port and the comings and goings of the ships into the harbors. Later federal legislation imply that there officials were in place. The transition from the colonial status to the independence was gradual and uneven.

ARTICLES OF CONFEDERATION

It was obvious and debated earlier, that some type of national government was necessary to represent the views of the colonists within an association with England. Benjamin Franklin had earlier proposed a plan of union of the colonies and certainly urged such an organization during his tenure as agent for Pennsylvania, and for a time, for Massachusetts and Georgia in the decade immediately preceding the break. Some members of the British government were receptive to this idea but more immediate controversies pushed such schemes into the background. For the colonists, it was obvious that they must cooperate but to what extent! It should be no surprised that a limited form of union was proposed and adopted.

On June 7, 1776, Richard Henry Lee of Virginia introduced a resolution in the Continental Congress to the effect that the colonists "ought to be free and independent States, ...that a plan of confederate be prepared and transmitted to the respective Colonies".[37] Thus, the resolution which led to the drafting of the Declaration of Independence also led to the drafting of the first national constitution for the United States. A committee was appointed on June 12, 1776 to prepare a plan of union. A month later, the committee made its report, which included a draft of the Article of

36. Statutes at Large of Pennsylvania, v.10, p.52; Act of February 28, 1780.

37. *Journal of the Continental Congresses,* v. 5, p. 425. The best study of the events leading to the drafting of the Articles is Merrill Jensen, *The Articles of Confederation* (1962).

Confederation and perpetual union drafted by John Dickinson of Pennsylvania.[38] Congress immediately entered upon the consideration of this draft but it was faced with many of the problems including the issue of voting in Congress. However, the biggest stumbling block was the problem of the Western lands to which there were conflicting claims. Little by little, the powers granted to the Congress in Dickinson's draft was whittled away. The Articles were finally adopted by Congress on November 15, 1777, and were sent for ratification to the states. For the Articles to become effective, the consent of all the states was necessary. By the end of 1778, all the states save Delaware and Maryland had approved the Articles. Because Maryland feared that those states which had Western lands would become so large, the smaller states would have no influence, that state did not approve the Articles until 1781. The Articles became effective on March 1, 1781. During the three years between the proposal of the Articles and until their final adoption, Congress ruled as if the plan was in effect.

It is generally agreed that the powers granted to Congress were extremely limited. It was given the right to regulate the alloy and value of coins struck by them or by the respective states, fix standard measures throughout the United States, to regulate Indian affairs and the post office, and generally to conduct the war. In the Congress, each state had on vote. When Congress was not sitting, the affairs of state was managed by a Committee of the States which consisted of one representative from each state. The members of Congress were to elect one of their number to preside who was known as the President, who was also, a member of the Committee of States. This Committee of States was given the power to execute all the authority of Congress when that body was in recess. The affairs or government were generally managed in Congress by committees, but by 1781, provision was made for the creation of the offices of Superintendent of Finance, Secretary of War, Secretary of Marine, and Secretary of Foreign Affairs. The Congress was given no power to tax but it had to depend upon appropriating the financial needs of the Confederation among the several states in relation to the value of property. Congress made requisition upon the states for funds but only a small amount of the funds sought was voted by the states. Congress at one time experimented with requisitioning supplies rather than money, but this attempt was unsuccessful. The Congress turned from local financing to loans from the foreign governments and a liberal use of paper money and later found itself unable to meet its financial obligations.

The Confederation struggled on for several years after the war but it became apparent to everyone it was ineffective. The need for co-operation was over with the cessation of the fighting, and the Confederation fell apart. The central government had no powers to enforce its policies and the states began to impose their own commercial restrictions on both foreign and domestic trade. Because of these factors and the general

38. *Journal of the Continental Congresses*, v. 5, p. 546.

economic hardships, a change in government became imperative to the leaders of the country.

JUDICIAL FUNCTIONS UNDER THE ARTICLES

Under the Article of Confederation, Congress received the authority to establish or designate the courts to try disputes in four areas including naval affairs and western lands.[39] The Congress was given the authority to appoint courts for the trial of piracies and felonies committed on the high seas. It is questionable if this clause gave the central government the authority to establish courts for this purpose, and this question never arose for Congress, by an ordinance passed on April 5, 1781, provided that a person charged with any of the above crimes should be tried according to the course of common law in courts consisting of the "Justices of the Supreme or Superior Courts of judicature and the judge of the courts of admiralty". The governors were authorized to commission any one of the judges of the state courts of admiralty, if there were two or more judges, to join in the performance of this duty. The ordinance adopted the same punishment for felonies committed upon the sea, as for those committed on land.[40] Later, this ordinance was amended to require the judge of the Court of Admiralty to be a member of the court.[41]

The second area of jurisdiction was more significant. Congress was given the authority to establish courts to hear appeals in all cases of captures and prize. Acting under this clause even before the Articles went into effect, Congress established a court of appeal in prize cases which heard a number of cases and which caused some little dispute.

The states had overlapping claims to areas west of the Allegheny Mountains. To resolve these claims, the Articles established an elaborate procedure. Each state who was a member of the Confederation, was required to appoint a panel of three individuals. From the panel, the commissioner of each state who was a party to the dispute, was to strike the names from this panel alternately until the list was reduced to thirteen. At this point, in the presence of Congress, seven to nine names were to be drawn by lots, and this commission was to hear and settle the controversy. If a state did not appear, the secretary of the Congress would act for the absent commissioner. The findings of the commissioners were final and conclusive. The decision was to be transmitted to Congress "and lodge among the acts of Congress for the security of the parties concerned". Only one case proceeded to trial under this provision and that was the case between Pennsylvania and Connecticut. The decision was rendered in favor of Pennsylvania on December 30, 1782.[42]

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39. Articles of Confederation, article 9.

40. Ordinance of April 5, 1781, *Journal of the Continental Congresses*, v. 19, p. 354.

41. Ordinance of March 4, 1783, *Journal of the Continental Congresses*, v. 24, p. 164.

42. C. D. Davis, "Federal Courts prior to the adoption of the Constitution," 131 U.S. (Appendix) p. liv - lviii. For the dispute between New York and Connecticut which

Finally, Congress was given jurisdiction to settle land titles of individuals claiming under grants from different states using the same procedure as that used in settling disputes between states. As far as is known, no dispute was brought to Congress under this provision.

COURT OF APPEALS IN CASES OF CAPTURE

In November, 1775, George Washington forwarded to the Continental Congress a copy of the Massachusetts Act establishing a prize court along with the suggestion that Congress establish a court for prizes taken by ship commissioned by it under the provisions of the Articles. After a declaration of war by Congress, the States could grant letters of marque.[43] A committee was appointed to consider this letter and the idea was extensively debated. Finally, a resolution was adopted allowing appeals to Congress provided it be filed within five days and the appeal lodged with the secretary within forty days of judgement. The party bring this writ of appeal was required to give security to prosecute it. The resolution further provided that the appeal should be heard in Congress within twenty days. All suits were to commence in the colonial courts. Acting on this suggestion, several of the states established admiralty courts. However, several states limited the appeals to Congress to those cases involving vessels commissioned by the Confederation."

The first case to be heard under this appellate procedure was the *Schooner Thistle*. Congress attempted to hear this case, but eventually referred it to a committee which reversed the condemnation of the vessel. Beginning at this point, all cases were referred to a committee for it was obvious that such issues could not be considered before a group of varying number of members. Later, the resolution referred a case to a "committee on appeals" without naming the members.[45]

In 1777, the Congress appointed a standing committee of five members to hear appeals brought against sentences passed in the courts of Admiralty. The following named individuals were chosen as members of this committee, many of whom became known in later years as judges; James Wilson of Pennsylvania, Johathan D. Sergeant of New Jersey, William Ellery of Rhode Island, Samuel Chase of Maryland, and Roger Sherman of Connecticut.[46]

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proceeded to the point of selecting the agents, see Julius Goebel, Jr., *The Law Practice of Alexander Hamilton* (1964) v.1, p. 545-564. Henry J. Bourguignon, *The First Federal Court, the Federal Appellate Prize Court of America* (1977) is an excellent study of this court. See brief account of this court in Erwin C. Surrency, *History of the Federal Courts, 2d ed.* (2002), p.13.

43. Articles of Confederation, article 6.

44. C.D. Davis, "Federal Courts prior to the adoption of the Constitution," in 131 U.S. (Appendix) xix, xx.

45. C.D. Davis, "Federal Courts prior to the adoption of the Constitution," in 131 U.S. (Appendix) xxiii.

46. C.D. Davis, "Federal Courts prior to the adoption of the Constitution," in 131 U.S. (Appendix) xxiii.

The committee was discharged the following year because it felt that it was too large to function properly. Another committee was appointed with the same number of individuals, any three of which were authorized to hear an appeal. Congress authorized this committee to appoint a register. The personnel on the committee changed frequently, but this did not seem injurious to its work.[47]

Congress did not consider establishing a court to hear appeals from the state Admiralty Courts until January 15, 1780. The ordinance provided for a court consisting of three judges commissioned by Congress, any two of whom could hold the court. The trials were to be conducted according "to the usage of Nations and not by Jury". The debates do not reveal any reason for this provision, for there would be no need for a trial in an appellate court. The judges were required to hold the first session of court as soon as possible in Philadelphia, and then at such places as they should judge conducive to the public good, provided they did not sit father southward than Williamsburg, Virginia, and farther eastward than Hartford, Connecticut. The first judges were George Wythe from Virginia, William Paca from Maryland, and Titus Hosmer of Connecticut. Wythe declined the appointment and Cyrus Griffin of Virginia was appointed in his place.[48] Thus, the first federal court was constituted. Both Griffin and Paca later became United States District Court judges in their states.

In December, 1784, the court informed Congress that all matters pending before it had been concluded. This letter was referred to a committee that recommended the court be continued, but this resolution was rejected. However, the salaries of the judges were suspended. In June, 1786, Congress authorized the court to hear certain appeals made to Congress in New York. The final case handled by the court was the case of the *Sloop Chester* on an appeal from the Court of Admiralty of South Carolina.

The weakest point of the whole judicial system was the fact that the Court depended upon state offices to enforce the decisions, which they were unwilling to do. In at least one case, the state officers refused to carry out these orders. Congress recommended to the State "to make laws authorizing and directing the courts of Admiralty therein established...to carry into full and speedy execution the final decrees of the Court of Appeals".[49]

One of the most interesting cases brought before the court was the case of the *Sloop Active* for this cases would continued in the federal courts for several years.[50] Gideon Olmsted, a Connecticut fisherman, was captured with three others by the British and carried to Jamaica. Olmsted and his crew recaptured the ship and off the coast of New Jersey, and then a vessel

47. C.D. Davis, "Federal Courts prior to the adoption of the Constitution," in 131 U.S. (Appendix) p.xxiii-xxiv.

48. C.D. Davis, "Federal Courts prior to the adoption of the Constitution," in 131 U.S. (Appendix) p.xxv; 16 *Journals of the Continental Congresses* 61-62.

49. *Journal of the Continental Congresses*, v. 16, p. 61.

50. This series of cases has been the subject of numerous articles, but the most thorough and the account relied upon here is Carson, *"The Case of the Sloop Active,"* 7 Green Bag 17 (1895).

commissioned by Pennsylvania captured the *Active*. The question whether this was a lawful prize was tried before the Pennsylvania Admiralty Court which decided that the capture of the *Sloop Active* was lawful, and ordered it to be sold and the proceeds divided among the captives. Olmsted took an appeal to the Court of Appeals in Case of Capture which upheld his position. This incident infuriated Judge Ross of Pennsylvania who felt that the Court of Appeals had no authority to examine the facts in the case, in view of the Pennsylvania Act setting up the Court of Admiralty which provided for a trial by jury whose findings should be final. The Court of Appeals took every step it could to enforce its decision, but without avail. The matter was considered by Congress which concluded that the Court had the authority to examine into the facts the case. However, the Pennsylvania Admiralty Court continued to ignore the confederation authorities.

Olmsted continued to pursue his legal rights and in 1790, he won a suit by default against the estate of Judge Ross of Pennsylvania Admiralty Court. Ross' estate then proceeded against the estate of the signer of the bond of indemnity. When this suit came before Chief Justice Thomas McKean of Pennsylvania Supreme Court, he refused to sustain the suit, thus ruling against Olmsted.[51] Olmsted quietly awaited the turn of events and in 1795, the Supreme Court decided the case of *Penhollow v. Doane*,[52] holding that the District Courts of the United States had the power to carry into effect the decrees of the Court of Appeals in Cases of Capture. Olmsted presented himself before Judge Richard Peters of the United States District Court of Pennsylvania and asked for a decree against the estate of the individuals who posted the security bond. McKean had become Governor of Pennsylvania and the action of Olmsted aroused the governor's wrath because of the apparent inattention paid to his decision as chief justice. The Governor ordered that the money in dispute be paid into the state treasury. No decree was entered by Judge Peters because he viewed the case as a source of conflict between the state of Pennsylvania and the United States. Olmsted in 1808 applied to the U.S. Supreme Court for a writ of mandamus against Judge Peters which was granted.[53] Judge Peters issued the necessary writs, but it was necessary to serve them. The State turned out the militia to protect the executors of the estate, but the United States Marshal was clever enough to serve the writs without being observed by the militia. The commander of the troops and several of his officers, as well as the militia were arrested for obstructing federal justice and were tried and sentenced. Thus, in the end, the jurisdiction of the Court of Appeals in Cases of Capture was upheld.

The committee of Congress decided forty-nine cases and the Court of Appeals decided eleven.[54] The Court wrote opinions in eight cases

51. *Russell et al. V. Rittenhouse,* 2 Dallas 160 (1794).

52. *Penhollow v. Doane,* 3 Dallas 54 (1795).

53. *United States v. Peters,* 5 Cranch 115 (U.S. 1809).

54. C.D. Davis, "Federal Courts prior to the adoption of the Constitution," in 131 U.S. (Appendix) p.xxv. The list of all cases considered by the court begins on this page.

which were published in Dallas' Reports.[55] Finally, in 1792, the Congress under the Constitution provided that the records of this court were to be deposited with the clerk of the Supreme Court.[56]

ORDINANCES OF CONGRESS

The legislative power of the Continental Congress was extremely limited. Article 9 of the Articles of Confederation authorized the Congress to adopt laws regulating the value and alloy in coins, manage Indian affairs, establish and administer a post office, make rules governing the armed forces and regulate prizes and capture of ships at sea and other maritime matters. Before the official adoption of the Articles of Confederation, the Congress would only adopt resolutions which established some legal principles including rates of subsistence, settling lines of promotion, establishing various boards including the Admiralty Board. Many of the rules governing the Post Office are found in the resolves of Congress.[57] The states were often solicited to enact laws which would promote the administrative powers of Congress.[58] One such resolve asked the states to enact laws which would make it easier for national agents to collect on debts or accounts in the State Courts due the Confederation. Surprisingly, the Confederation had a number of agents in the different colonies to collect or disburse funds and perform other functions. For example, in 1778, Congress elected three attorneys to claim "the continental share of all prizes libelled in the admiralty court in South Carolina" on the recommendation of the Committee of Commerce".[59] These resolves often addressed some minor omission and seldom if ever, did they attempt to be comprehensive in any sense. After the final ratification of the Articles in 1781 by Maryland, Congress enacted its first ordinance but it continued to adopt resolutions which amended the ordinance.

Acting under the authority granted it by the Articles, Congress enacted a number of ordinances governing matters which were authorized. The first such ordinance was adopted March 27, 1781, entitled "An ordinance relative to the capture and condemnation of Prizes" proposed by James Madison.[60] It appears that Congress adopted the practice of considering an ordinance three times before passage. Often these ordinances were a collection of former resolves.

In this legislating, if this be the correct word, Congress was most concerned about maritime affairs. In 1781 an ordinance for establishing a

55. 2 Dallas, pp. 1- 42, incl.

56. Act of May 9, 1972, 1 Stat. 279.

57. Resolve of October 19, 1781, *Journal of the Continental Congresses,* v. 21, p.1067.

58. These requests are found in the Journals but a good example will be found in *Journal of the Continental Congresses,* v. 21, p. 1136.

59. *Journal of the Continental Congresses,* v. 10, p. 114.

60. *Journal of the Continental Congresses,* v. 19, p. 314. This ordinance was printed as a broadside in Philadelphia, p. 1199.

court "for receiving and determining finally all Appeals in cases of capture" was considered.[61] This ordinance opens with the statement "Be it ordained by the United States in Congress assembled". It clearly repeals all previous resolves of Congress and cites its authority under the Articles for this ordinance. This ordinance was considered over several weeks before final adoption. Such an ordinance was passed in 1782 allowing reasonable salvage for recapturing American ships within cannon shot of the coast, the classical definition of territorial waters.[62] The subject of the majority of these ordinances was public law matters, including the establishment of boards and committees through which the Congress acted. Members of these bodies were not necessarily members of Congress but individuals engaged to perform these functions. Although these ordinances would not attract the attention of later generations, their importance lie in their establishing precedents for the government under the Constitution. The Continental Congress passed ordinances governing the army and military matters, establishing departments and performing other governmental functions which were copied by the first Congress.[63] Comparison of the Ordinance establishing the Department of Foreign Affairs headed by a secretary under the Articles of Confederation with the statute of the first Congress establishing a similar department is striking.[64] In establishing the Post Office Department, the statute declared that the "regulations of the post-office shall be the same they last were under the resolutions and ordinances of the late Congress".[65]

The power to legislate is not significant unless the legislation is made known to both the individuals who are expected to enforce it and those who are to abide by its provisions. One mundane failure of Congress in its proceedings was to clearly separate the text of the resolves or ordinances apart from routine business in its minutes. Often, it is not entirely clear whether the ordinance was adopted by the prerequisite votes of States. The ordinances of Congress have never been collected, and published as a compilation of laws, but are found throughout its journals which were published at this period. A limited number of these rules or ordinances were published as separate broadsides as was the ordinance governing the taking of prizes. These broadsides were widely distributed but they are extremely rare print items today.

Statutes lose any validity unless enforced. Although no authority discussed the issue whether the Continental Ordinances were effective

61. *Journal of the Continental Congresses,* v. 20, p. 761; v. 21, p. 961.This draft is interesting for it includes James Madison's proposed amendments.

62. *Journal of the Continental Congresses,* v.22., p. 99.

63. The powers of Congress are stated in article 9. *The Article of Confederation,* 1 STAT. 4.

64. Act of July 31, 1789, 1 Stat. 28; Act of September 15, 1789, 1 Stat. 68 in which the title was changed to Department of State and this statute added the responsibility of keeping the records of the government under the Articles of Confederation as well as the records of the federal government. The Ordinance establishing the office of Secretary of Foreign Affairs under the Confederation is printed as a note to the act of July 31, 1789.

65. Act of September 22, 1789, 1 Stat. 70.

without further action, a few states made specific provision for their application. The Constitution of South Carolina for 1776 provided that the resolutions of the Continental Congress which were in force, would continue until altered or revoked by them.[66] Occasional references were made in state statutes to the ordinances. The Pennsylvania Act establishing an Admiralty Court directed that ships taken would be considered lawful prizes if they had been "employed contrary of the resolves of the honorable Continental Congress".[67] A later act stated that prize cases would be tried according to the "law of nations and the acts and ordinance of the honorable, the Congress of the United States of America".[68]

As far as can be determined, only in one case did a court consider and interpret the ordinances.[69] The High Court of Errors and Appeals of Pennsylvania considered the several ordinances of Congress relating to Admiralty. Here the court stated that the act of the Legislature had made it a court of appeals from the state Admiralty Court, and since it had the jurisdiction of the case, it was competent to decide it. The court did not declare the ordinances allowing appeals to the Court of Appeals in Cases of Capture inoperative but it holds that where it was authorized by a state statute to hear appeals from the Pennsylvania Admiralty Court, it has jurisdiction to do so and that the appeal to the Court of Appeals in cases of capture was not exclusive. In another Pennsylvania decision, Judge Shippen stated:

> We afterwards divided ourselves into several distinct governments, by the name of states, still leaving the general power in Congress, which, being in a great measure undefined, was exercised, with regard to internal matters, by recommendations to the several Governments, instead of laws, which however, had generally the force of laws.[70]

Doubtless, other courts considered and applied the various ordinances and resolves of Congress pertaining to Admiralty.

Several states placed limitation on the appeal. For example, the law of Massachusetts limited appeals to the Court of Appeals of the Continental Congress only where the capturing vessels was in the service of the United States but when the capture was made by any other armed vessels than those in "the Service of the United States" no appeal to the Continental Congress would be allowed. The Court of Appeals in its report to Congress noted that this law "has a very dangerous tendency to interrupt the peace, Safety and Union of the United States and is in direct violation of the resolve of Congress which grants an appeal in all Cases".[71] The Court invited Congress to make a "speedy Decision"

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66. Section xxviii, Thorpe, *The Federal and State Constitution, Colonial Charters and Other Organic Acts,* v. 6, p. 3247.

67. Act of September 9, 1779, 9 Pa. Stat. L. 278.

68. Act of March 8, 1780, 10 Pa. Stat. L 97.

69. *Talbot v. Commander and Owners of Three Brigs,* 1 Dallas 95 (Pa. 1784).

70. *Camp v. Lockwood,* 1 Dallas 393, 401 (Pa. C. P. 1788).

71. *Journal of the Continental Congresses,* v.12, p. 1022, October 17, 1778.

whether this contravenes their resolves. A close examination does not reveal any action taken on this matter.

Probably the reason the ordinances were not of greater significance in legal developments of the period may be explained by the fact that they did not generally deal with legal matters, other than in admiralty, affecting individuals, who would be affected and who would bring legal actions to enforce any rights which the ordinances may have conferred.

Two major exceptions to this observation on the limited application of the Continental ordinances is the Northwest Ordinance and the Articles of War. The Northwest Ordinance establishing the government and law in the Northwest Territory, the conclusion has been drawn that this was the only piece of legislation of the period continued by the new government.[72] However, several of the ordinances of the Continental Congress were continued. The Board of Commissioners set up for the purpose of settling accounts between the confederation and state governments was continued by the new Congress, but the method of appointment was changed.[73] Many of the ordinances at the end of the war dealt with the western lands and veteran affairs. Surveys of western lands authorized by the Continental Congress were completed by the new Congress.[74] Grants to certain groups were confirmed.[75] Legislation dealing with payment to veterans was either continued or amended.[76] The Articles of War adopted by the Continental Congress continued to govern the Army for years thereafter.[77]

One last question remains; why did the Continental Congress termed their statutes, "ordinances"? No clear answer can be given to this question but it can be suggested that since the Confederation was limited in its powers and in view of the jealousy of the new states, it was thought best to use a term which was not as forceful as statute or law. The articles did not come into force until 1781; hence, the Congress was without authority to exercise it limited functions until then. The species of legislation known as ordinances were known to the leaders of this period for the term was used in both British and Colonial practices. The term suggests a piece of legislation not passed with the same dignity as a Parliamentary Statute or one enacted by the colonial General Assemblies. The term was generally applied to instruments which were temporary and were issued by the a branch of government under its powers to govern. The delegates in the Continental Congress did not think they had the full power of sovereignty to adopt perpetual laws which would bring it into conflict with the state governments.

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72. Adopted by Act of August 7, 1789, 1 Stat. 50. The text of the ordinance found on p. 51 as a note.

73. Act of August 5, 1789, 1 Stat. 49.

74. Act of August 26, 1789, 1 Stat. 96; Resolution of August 12, 1790; 1 Stat. 187.

75. Act of March 3, 1791, 1 Stat. 222; Act of January 3, 1792, 1 Stat. 229; Act of April 21, 1782, 1 Stat. 257.

76. Act of March 23, 1792, 1 Stat. 243; Act of March 276, 1792, 1 Stat. 245.

77. Act of September 29, 1789, 1 Stat. 95.

STATE COURTS DURING THE REVOLUTION

Many constitutional issues which have been ignored by later generations which disturbed the colonists but with Independence afforded the newly established government an opportunity to settle. Among such issues was who had the authority to create courts? No clear constitutional principle was ever articulated except a general principle that the King was the foundation of all justice and it was his prerogative to establish courts. Indeed, in several colonies, the judicial system was initially established by ordinance of the royal governor.[78] Under English practice, the holder of certain offices carried with it the authority to conduct a court. Because the English Chancellor had custody of the Great Seal, he held a court of chancery in matters the King through usage allowed this official to settle in his name. Several royal governors who had the custody of the great seal of the colony, believed that the same authority was vested in him.

The primary dissatisfaction with the courts at the time of the Revolution was the failure of the chief justice of the colony to go on circuit to other parts of the colony which resulted in the litigants having to travel to the colonial capitol for court week. Another source of annoyance was the limited use of the jury. Suits in chancery, admiralty, probate and the courts held by the justices of the peace, did not require the use of a jury. The Americans who took charge of the government address themselves to these issues.

Although superficially, it may appear that little changes was made in the existing judicial institutions, at least one state, Virginia, restructured its court, and several states used the opportunity to decentralizes its major trial court, sending it on circuit. Neither were the laws governing matters affecting individuals changed very greatly during the same period. For all these reasons, little or no change in the functioning or organization of the courts took place except for change in personnel. Many cases initiated during the colonial period in States which were not occupied of the British continued over the period and came to a final trial after the establishment of Independence. Other cases were dropped because individuals had fled the country.

An example of where the judicial process was not interrupted by the transition of to a new government was Pennsylvania. The Supreme Court of Pennsylvania, which was the chief trial court of the period, met for its April term, 1776, on April 10th and all cases were continued by "adjournment until -." The Court of Quarter Sessions for Philadelphia County met on June 3, 1776 and adjourned until the next day. At that time, all the cases were continued until the next term. However, the Court did not meet again for nearly a year when it assembled September 3, 1777 with new judges under the Constitution of 1777. The first cases heard by the new court was entitled *The CommonWealth v. William Livingston*, who was

78. Erwin C. Surrency, "The Courts in the American Colonies," 11 Amer. J. Leg. Hist. 253 (1967). Many of these issues are discussed and examples given.

"Charged with felony—stealing goods of Henry Woodrow". The defendant was found guilty and sentenced to be "whipt on Saturday next with fifteen lashes on his bare Back, restore the Goods of the Value thereof—pay a fine to the Common Wealth of three pounds thirteen shillings and pay the cost of prosecution and stand committed till this sentence is complied with".[79]

In other colonies, the courts were interrupted, for who, during such troublesome times, would overly concerned themselves with the judiciary. Throughout the Revolution, the British occupied large areas of their former colonies. When Washington caused the British army to evacuate Boston, they then occupied New York City in September, 1776 and continued to occupy that city and surrounding areas throughout the war. With the outbreak of the Revolution, Chief Justice Horsmanden and two of the associate judges remain loyal to the crown while Justice Robert R. Livingston joined the Revolutionary party. Horsmanden remained in New York and exercised the functions of the Chief Justice until his death in 1778, when the sole administration and judicial affairs fell to Justice Ludlow. Justice Ludlow continued to act as the principal judge until the end of the war when he left to go to Canada where he became Chief Justice of the Province of New Brunswick. Apparently, the British Government did not appoint additional judges as these vacant positions in New York.[80] The British retained control of New York, Long Island, and a part of Westchester County and these courts held under British authority continued to function in those areas. However, the state of New York continued courts previously established which functioned in the other areas under their control.

In January, 1776, the Royal Governor and Chief Justice of Georgia were taken prisoner and the Royal Government came to an end. However, in the latter part of 1778, Georgia was conquered by the British and the Royal Governor and Chief Justice returned to established civil government. The Chief Justice opened the courts and exercised jurisdiction over practically all of Georgia except for the settlements on the frontier.[81] The courts held by the Chief Justice during the colonial period under the British government were held in Savannah only, although proposals were made to required the chief justice to travel to Augusta. It is doubtful that the courts established by the Revolutionary Government of Georgia were ever established although a Chief Justice was appointed who required to hold court in each of the counties in the state. After the Revolution, the legislature passed an act in 1782 that recited "the courts of justice of this state have been greatly interrupted in their proceedings since the first day of July," 1775 and it further declared that the period between that date and July 1782 would not be counted in pleading the statutes of limitations.[82]

79. This information taken from the minutes of the court.
80. E. D. Smith, Repts., C.P. (NY), p. lxviii.
81. Horace Montgomery, *Georgian in Profile* (1958), p. 79.
82. Warren Grice, *The Bench and Bar of Georgia* (1931), p. 62.

No records of the courts held by the British Chief Justice are extant and neither are the records of the courts held after the Revolution established by the state of Georgia. after the Revolution in Georgia, it is doubtful whether the courts recognized the decrees of the judiciary rendered during the period of occupation.

Charleston fell to the British Army in 1780 which immediately occupied a large portion of the state. However, the British Government did not re-established civil government or the colonial courts. Whether the courts established under the Revolutionary Government of South Carolina functioned before the conquest is difficult to determine. The area occupied by the British Army was placed under military law. One June 13, 1780, Sir Henry Clinton appointed a commandant at Charleston and Intendant-General of Police of the province, and several Intendants of Police for Charleston. This group formed a council to "Advise and assist the commandant in forming a civil police to maintain the Quiet and Peace of the Country until the Civil Government is restored".[83] The Intendant-General and the Intendants of Police formed the Police Board which proceeded to hear civil and criminal cases. Many of the cases were actions on debts and these were generally referred to arbitrators to settle.[84] Very often, the parties were represented by attorneys. A Mr. Johnson appeared before the board to request a re-hearing in a case which had been referred to a referee because the defendant did not get a fair trial in that he did not speak English.[85] The board often directed the referees to reconsider their awards.

The Board of Police applied to the commandant to issue an order to make effective certain laws. In addition, the Board issued rules governing practice before it. On January 30, 1782, the commandant of Charleston issued an order which required the Board of Police not to take jurisdiction of cases unless the defendant could be served or unless the defendant was about to leave the province. The order recited the fact that all other claims would be saved until establishment of civil government. The Board issued a rule which required a petition before it to state why the action was being brought at that particular time. In the same order, the Board provided for the establishment of a jury system.[86] On October 29, 1782, the Board adjourned *sine die*. The Board refused to bring to a final hearing certain cases because they could not enforce their judgments.[87] The state government of South Carolina soon assumed jurisdiction within the area, and presumably, many of these commercial cases went into the state courts.

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83. British Public Record Office, CO5/520, p. 2, MMS entitled "Comment's Council".

84. British Public Record Office CO5/521, at meeting of Board of Police on November 7, 1780, 62 cases were referred to three individuals to settle.

85. British Public Record Office CO5/523, p. 3v.

86. British Public Record Office CO5/523, p. 33.

87. British Public Record Office CO51526.

ESTABLISHING STATE COURTS

Those statesmen responsible for the establishment of the state governments gave no general philosophical scheme for structuring the courts. However, it appears that agreement on several principles was generally accepted without extensive debate. First, was the insistence on the separation of the branches of government. This is understandable when the royal governors served as judge in chancery, in vice admiralty, in probate, and as the presiding official in the Court of Appeals in which included the members of his council. Only in New Jersey was the governor continued as chancellor for the state into the Nineteenth Century. Practically all these statutes contained a clause prohibiting the judges from holding another political office. The prohibition did not extend to the justices of the peace.

A second principle obvious from the statutes is the need for the courts to be more accessible to all parts of the state. This was accomplished by creating judicial districts for the trial judge or by requiring the chief justice to go on circuit, a requirement that was opposed by the Privy Council, mainly due to lack of a geographical knowledge of the size of each colony. This was a reaction to the major courts—the General Court in Virginia or the Supreme Court in Pennsylvania—which held their sessions exclusively in the colonial capital forcing litigants to travel to that location including those accused of a crime. Local courts generally held by the justices of the peace, existed in all counties of the colonies but with limited jurisdiction. The first judiciary act of 1777 of Georgia required the chief justice of the State to go into each county to hold the Superior Court. He was assisted by several justices of the peace appointed for that purpose. In Connecticut, the trial court during the colonial period had traveled around the State.

A third trend was the extension of the jury to decide all facts into areas of the law where traditionally, juries were not used, such as admiralty and equity cases. New trials became more prevalent. In Georgia, the defeated party could require an appeal jury and in essence, the case was retried at the same term. In Massachusetts, a criminal case could be tried before three juries. Two centuries later, the emphasis is on the application of legal principles in the appellate process rather than the evidence establishing the facts.

A final trend was curbing the power of judges to punish for contempt. In many colonies, the judges of the trial court had been perceived of abusing the contempt procedure. One could be charged with contempt of court regardless where the act was committed. Unkind words about the chief justice or any judge on the court spoken in the local tavern could be and often were punished as contempt of court. Acts following the Revolution limited contempt to those acts committed in the presence of the court. Otherwise, the procedure in a law suit or the titles of the court after Independence were recognizable to those who had practiced in the colonial courts.

As noted above, the majority of the colonies continued their former

court structure subject to the above changes of requiring circuit riding but Virginia took the opportunity under the leadership of Thomas Jefferson of completely changing the structure of their courts. In 1776, Jefferson drafted four bills for the establishing an admiralty court, a court of appeals, a High Court of Chancery, and a General court.[88] In addition, Jefferson prepared a bill on procedure. Jefferson introduced a total of forty-eight bills including one to establish a committee of five to revise the laws of Virginia to which Jefferson was appointed. The preamble to this statute suggested that the change of government made it "necessary to make corresponding [changes] in the laws heretofore in force, many of which are inapplicable to the powers of government as now organized, others are founded on principles heterogeneous to the republican spirit", while other laws were needed which the colony was prevented from enacting during under the former government.[89] Jefferson was successful in getting his court bills passed while a member of the legislature. The Court of Admiralty was established in 1776 and the other courts in 1777.

The Court of Admiralty consisted of three judges which had cognizance of all causes coming within the admiralty jurisdiction and would be governed in its decisions by the acts of the "General Assembly, English statutes enacted prior to the fourth year of the reign of James I and the "laws of Oleron, the Rhodian and Imperial laws, so far as the same have been heretofore observed in the English courts of admiralty".[90] But what is most interesting in this statute was the provision making the ordinances of the Continental Congress superior to the acts of the General Assembly when a conflict existed. An appeal would lie to either the Virginia Court of Appeals or the court established by the Congress. All questions of facts were to be decided by a jury. A later act provided that the court would be held in Williamsburg but the judges could appoint other locations for their sessions. Virginia was rather generous to the judges of this court for their salaries was established on a per diem basis but they were allowed travel expenses which was paid from the proceeds of all condemnation cases.[91]

The next court established from bills drafted by Thomas Jefferson was the High Court of Chancery consisting of three judges appointed during good behavior.[92] There are several features which reflect the current thinking about court structure. Judges were to hold their office "so long as they shall demean themselves well". After complaining in the Declaration of Independence of King George III making judges dependent upon him by commissioning them during his pleasure, but the majority of states limited their tenure to terms. In this Court of Chancery, any disputed facts

88. The drafts of these bills are found in Julian Boyd, ed., *The Papers of Thomas Jefferson,* v.1, p. 605.

89. Hening Virginia Statutes, v. 9, p. 175.

90. Hening Virginia Statutes, v. 9, p. 202.

91. Hening Virginia Statutes, v. 9, p. 219.

92. Hening Virginia Statutes, v. 9, p. 389.

were resolved by a jury which was contrary to the customary practice of the judge making his decision based upon the filed documents. A close review of the procedure established for this court discloses major changes from the practice common in the English chancery courts.

The old General Court of the colonial period which consisted of the Royal Governor and his Council was replaced by another court entitled the General Court of Virginia consisting of five judges.[93] The statute does not authorize the judges to sit separately or in any other city than Williamsburg. Jefferson went a long way in changing the procedure before the court for on a writ of error from the county courts it could shape a final judgement, an attribute of the writ of appeal.

In composition of court of appeals established for final determination "of all suits and controversies", consisted of panels of judges from the courts which had original cognizance of the controversy. If the suit was from the General court, the judges of that court and three assistant judges chosen by the legislature would consider issues from that court. Recognition was given to the traditional method of bringing such a suit; by writ of error from the General Court which was a common law court in contemporary terms and the writ of appeal from chancery and admiralty with all the technical distinctions.[94] The statute introduced the concept that this court could not hear any matter until a final decision was rendered in the lower court. This may sound obvious but in the Eighteenth Century procedural methods existed to bring a suit to a higher court, chiefly by the writ of certiorari, which removed the suit regardless of the stage it had reach in the lower court.

This review of the courts established in Virginia in 1777 and 1778 illustrate some of the concepts implemented by the newly independent states. The executive was removed from the process and procedure was simplified.

CHANGING THE CRIMINAL LAW

The most dramatic changes in the law during the time of the Revolution and in the following decades was in criminal law. During the Colonial Period, procedural rights were accorded to those accused of crime which were not available to a defendant under the contemporary law of England. In the colonies, those accused of a crime could be represented by counsel, summon witnesses on his behalf, given a copy of the indictment, challenge members of the trial jury and question witnesses summons against him. One other colonial innovation was the appointment of a permanent prosecutor who tried all criminal cases. Although these rights are taken for granted presently, they were certainly generous for this period of the Eighteenth Century.

The leaders of the Revolution were influenced by the political writ-

93. Hening Virginia Statutes, v. 9, p. 401.

94. Hening Virginia Statutes, v. 9, p. 522.

ers of the period, including Beccaria, who wrote *On Crime and Punishment* urging less capital punishment and other changes in the European criminal law. This work furnished the philosophical basis for the moderation of the criminal law as did Montesquieu *Spirit of the Law*. A general perception existed that a need existed to ameliorate the criminal penalties. The first Pennsylvania Constitution required that the penal law "as heretofore used shall be reformed". This provision of the Pennsylvania Constitution was certainly remarkable when one considers the fact that a war for Independence was in progress which demanded the attention of legislators. Under the new statute for many serious crimes formerly punished by hanging, the offender was sent to a Workhouse maintained in many counties. Workhouses were rather common where the vagabonds and those without a visual means of support were sent and it was a short step to the creation of a special place of confinement for criminal—the penitentiary. Other states followed this example but as today, those who wish to be tough on crime were as vocal then as they are now! The legislature of New York was the next state to adopt a modification of its criminal law.[95] Georgia did not adopt a modification of its criminal law until 1811, some thirty years later, mainly because some feared this change would lead to an increase in crime.[96]

This constitutional mandate was implemented in a number of statutes.[97] The number of crimes punished by hanging was reduced to murder and treason, all others carried a period of confinement which the length in some cases were prescribed while in others, it was left up to the judge to determine. Other states kept capital punishment for other crimes such as burning down a residence. Several crimes including witchcraft and the death of a bastard child were abolished. Under the colonial practice, it was the legal burden of the mother to prove that the child had been born dead.

Not only was the penalties reduced in these criminal statutes following the Revolution but many doctrines, previously applied in the colonies, were abolished. Among these were the Benefit of clergy, a procedure whereby for certain crimes, a defendant could escape the noose by exercising this option once and accept a branding of the letter B on his thumb by claiming this right. In theory, the accused was a member of the established clergy, and he was not subject to punishment in temporal courts. Over the centuries of English law, this privilege was extended to anyone accused of a crime. The process of outlawry and transportation were abolished. Outlawry was a judicial procedure whereby a court could declare

95. William Roscoe, *Observations on Penal Jurisprudence and the Reformation of Criminals* (1819) p.90; reprinted in *Reform of Criminal law in Pennsylvania selected Enquires* (1972).

96. Georgia began with an act of 1811, replaced by an act in 1816, and that in turn, replaced by the Act of 1817. This act went into effect when the governor issued a proclamation declaring the penitentiary open and ready to receive inmates.

97. Pennsylvania did not enact one comprehensive penal statute but passed several acts. Act of September 15, 1786, 12 Pa. Stat. L., Act of March 27, 1789, 13 Pa. Stat. L. 243; Act of April 5, 1790, 13 Pa Stat. L. 511.

an individual suspected of a crime an outlaw or one who did not appear when summoned. Although under English law, such a person could be killed on sight, several colonies required the person to be brought before a court after capture before such a penalty could be inflicted.[98] Obviously, the newly independent governments in 1776 had no distant place to ship those convicted of given crimes as England had before the Revolution and as a result, the penalty of transportation was abolished.

OTHER CHANGES IN PRIVATE LAW FOLLOWING THE REVOLUTION

The process of changing the laws, which as Jefferson wrote were not within the spirit of a republican form of government, was a daunting task. Other than the criminal law, many institutions of the Royal Government including such officers as the church wardens and their authority to provide for the poor and other local duties had to be replaced, by guess who—the justices of the peace. Since the legislative bodies were considered as being the source of sovereignty, it fell to them to provide all legal changes. No better example are the series of statutes in Virginia for which Jefferson was responsible, but no state addressed the identical problems as those in Virginia.

The first bill introduced by Jefferson was changing the tenure in tail to a fee simple. Great tracts of land had been granted in Virginia which had descended to the eldest son under the principle of primogeniture thus creating a number of landed families which control colonial Virginia government.[99] Tenure in male tail or by primogeniture was not a problem in other states as they struggled to set up the machinery to dispose of the vacant lands within their boundaries. Georgia statutes were precise in declaring that all grants of such lands were held in fee simple. In several colonies, all property was subject to quit rents, which, as in Maryland, were promptly abolished.[100]

Disestablishing the Church of England in Virginia was opposed by the more conservative elements of society and in the first statute, only certain ecclesiastical crimes which made it criminal to maintain "any opinions in matters of religion, forbearing to repair to church or exercising any mode of worship" were repealed. Dissenters were relieve of paying taxes for the upkeep of the ministers of the established Church. Glebe lands were save to the parishes. This statute expired at the next session of the legislature.[101] A later statute made the provisions for the freedom of worship and the disestablishment of the Church as the significant step in the establishment of freedom of religion.[102] However, like so many historical

98. Act of May 31, 1718, sec. XVII, Smith Pennsylvania Laws, p. 116.

99. Paul Leicester Ford, *The Works of Thomas Jefferson* v.1, p. 58.

100. Maryland Act of 1780, Maxey Laws of Maryland, v. 1, p. 391.

101. Hening Virginia Statutes, v. 9, p. 164.

102. Dumas Malone, *Jefferson the Virginian* (1948), p. 274.

exaggerations, it would be a surprise to those living in Pennsylvania and Maryland, just to mention two colonies, that they did not have the freedom to worship as they please. Promptly, other colonies discontinued using tax money to support the local Anglican minister.

Another area demanding the immediate attention was the revamping of the laws concerning probation of wills and the provisions governing inheritance. The New England states had earlier abolished primogeniture and applied the Biblical rule of giving the eldest son a double portion of the estate. Jefferson observed "that if the eldest son could eat twice as much, or do double work, it might be natural evidence of his right to a double portion" but "he should be on par with his brothers and sisters in the partition of the patrimony".[103]

The Revolution was not a complete break in the legal heritage but it was a period of change. No attempt was made by any of the newly independent states to provide a complete body of law as embodied in a code covering all eventualities for such a task would be impossible. Each state turn to declaring that the English statutes passed prior to the settlement of Virginia in 1607, the common law of England, and the colonial statutes would continue in effect until change by legislation. These were known as the Adoption Statutes and much academic ink has been spilled trying to determine which English laws were embraced in this legal theory.[104]

103. Paul Leicester Ford, *The Works of Thomas Jefferson* v.1, p. 68.

104. Watkins, *Digest of the Laws of Georgia,* p. 239, 281, 289. These statutes are rather general, saving the common law of England and all laws enacted before May 14, 1776, which were binding on the citizens of the state and not contrary to the constitution, and acts of the General Assembly. The significant of the date was a resolution was adopted in the Continental Congress on the 15th declaring that the colonies ought to be independent.