NEW YORK LAW SCHOOL

NYLS Law Review

Volume 5 | Issue 1 Article 3

January 1959

The Formative Era of American Admiralty Law

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THE FORMATIVE ERA OF AMERICAN ADMIRALTY LAW

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IT HAS been remarked with truth, that no government can exist and flourish which does not have as a part of its system of administration, a branch invested with authority of judicial function; to exercise it with promptness and efficiency on any proper call. Its permanence and readiness to act on the instant breathes confidence in the polity. The judiciary holds this position in the United States. The institutions which characterize and underlie both the federal and state judiciaries are, in point of fact, but an outgrowth of those which obtained from the forepart of the seventeenth century to the declaration of the United Colonies, in the century following as "Free and Independent States."[1]

As a branch of the judicature, admiralty law stands as a system *sui generis*—taking its characteristics from the civil law, and not as an outgrowth of the common law. This venerable law of the sea, as Mr. Justice Bradley observed, "reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding from the civil law, and embracing altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world."[2] Further, it embraces all maritime contracts, torts, injuries or offences.[3]

The function of its tribunal, the Court of Admiralty, is two-fold —the Instance Court, and the Prize Court. In retrospective commentary, the commissions to hold these courts were distinct,[4] but usually given to the same official. The Instance Court, on its civil

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[1] The Unanimous Declaration of the Thirteen United States of America. In Congress, July 4, 1776.

[2] Insurance Company v. Dunham, 78 U.S. (11 Wall.) 1, 23, 20 L. Ed. 90, 97 (1870).

[3] See Lee v. Licking Valley Coal Digger Co., 209 Ky. 780, 781, 273 S.W. 542, 543 (1925).

[4] *Cf.* Act of June 25, 1948, c. 646, § 1, 62 Stat. 931, 28 U.S.C. § 1333 (1952). "The district courts shall have original jurisdiction . . . of (1) any civil cause of admiralty and maritime jurisdiction . . . (2) any prize brought into the United States. . . ."

side, extended to marine contracts, salvage, and maritime torts. On its criminal side, it had sole cognizance of piracy and all other indictable offences committed either upon the seas or "in parts out of the reach of the common law."[5] Adjudication upon all matters relating to prize, to wit: every acquisition made *jure belli,* which was of itself of a maritime character and made whether at sea, or by land, or by naval force, fell within the justicial purview of the Prize Court.[6]

Having sighted these introductory observations upon the general limits of this writing, the course may now be veered to investigation and inquiry touching the formative era of American admiralty law.

I. PARLIAMENTARY RECOGNITION OF AMERICAN COLONIAL VICE-ADMIRALTY COURTS

There appears to be no evidence pointing to a conclusion that the vice-admiralty courts of the American colonies were established by parliamentary mandate. From and through the regnal ascension of the first of the Stuarts, James I, to Charles I, the Commonwealth in 1649, and the Protectorate terminating in the year 1660, no statute is to be found concerning the colonial plantations in America. From the ascension of Charles II to the end of the century, there are seven statutes[7] of colonial application. They dealt with trade, navigation, shipping, piracy, and crimes. Of especial significance to this article are an act of 1696, entitled "An act for preventing frauds, and regulating abuses in the plantation trade"; and a statute promulgated four years later, titled "An act for the more effectual suppression of piracy."

[5] I.e., on the coasts beyond the limits of any English county.
See 3 BLACKSTONE, COMMENTARIES 68 (Portland 1807).

[6] The Henrick and Maria, 3 C. Rob. Adm. 43, 54, 165 Eng. Rep. R. 529, 533 (Adm. 1799). "A prize should be brought *infra præsidio* of the capturing country where by being so brought, it may be considered, as incorporated into the mass of national stock. . . . In later times, an additional formality has been required, that of a sentence of condemnation in a competent Court decreeing the capture to have been rightly made, *jure belli.*"

[7] In chronological order:
12 CAR. II, c. 18 (1660), "An act for the encouraging and increasing of shipping and navigation."
15 CAR. II, c. 7 (1663), "An act for the encouragement of trade."
22 & 23 CAR. II, c. 26 (1670), "An act to prevent the planting of tobacco in England, and for regulating the plantation trade."
25 CAR. II, c. 7 (1672), "An act for the better securing the plantation trade."
7 & 8 WM. III, c. 22 (1696), "An act for prosecuting frauds, and regulating abuses in the plantation trade."
11 & 12 WM. III, c. 7 (1700), "An act for the more effectual suppression of piracy."
11 & 12 WM. III, c. 12 (1700), "An act to punish governors of plantations in this kingdom for crimes by them committed in the plantations."

The emergence of the aforementioned statutes of the reign of William III manifested parliamentary acknowledgment of the existence of vice-admiralty courts in America. Special legal-historical value attaches to the earlier statute[8] for it represented the initial statutory recognition of the functioning of vice-admiralty courts in the American colonies; the other act[9] served to reaffirm recognition of colonial courts exercising admiralty jurisdiction. The second section of the Act of 1696, prohibited the import or export "of goods or merchandizes whatsoever" to and from "any colony or plantation in America" but in "any ship or bottom, but what is or shall be built of England . . . or the said colonies." It then proceeded to declare a significant exception to such vessels. This embraced "such ships only as are or shall be taken as prize and condemnation thereof made in one of the courts of admiralty in England . . . or the said colonies or plantations."

The penalties and forfeitures which were incurred for violation of the second section of the Act were subject to division under the seventh section, to wit: "third part to the use of his Majesty . . . one third part to the governor of the colony or plantation where the offence shall be committed" and the remaining third part "to such person or persons as shall sue for the same." Of instant relevancy is the circumstance that "the same to be recovered in any of his Majesty's courts at Westminster . . . or in the court of admiralty held in his Majesty's plantations respectively, where such offence shall be committed."

It is to be observed that the language employed in the second and seventh sections respectively denotes recognition of status and not one of creation of judicial tribunal. Each evinces external evidence, by parliamentary declaration, of a system of American colonial vice-admiralty courts to which enlargment of jurisdictional function is made manifest by the addition thereto of prizes, penalties, and forfeitures.

The Act of 1700, which had for its purpose the more effectual suppression of piracy, provided that "all piracies, felonies, and robberies committed upon the sea, or in any haven, river, creek or place . . . may be examined, inquired of, tried, heard, and determined and adjudged . . . in any of his Majesty's colonies and plantations . . .

[8] 7 & 8 WM. III, c. 22 (1696). See *supra* note 7.
[9] 11 & 12 WM. III, c. 7 (1700). See *supra* note 7.

by judges of vice-admiralties."[10] Here, then, is to be found a reaffirmation of parliamentary recognition and sanction of American colonial vice-admiralty courts. Wherein the earlier act extended the jurisdiction of the colonial vice-admiralty courts on its Prize Court side, the later one accomplished the same for the criminal side of the Instance Court of the American colonial vice-admiralty courts.

II. AMERICAN COLONIAL VICE-ADMIRALTY COURTS: THE SEVENTEENTH CENTURY

A. *Grant of Admiralty Jurisdiction*

The genesis of American admiralty law is shrouded in the retrospective obscurity of dim and deficient historical records. As heretofore noted, the existence of tribunals administering admiralty law in the American colonies during the initial century of migration is within the written record. The authoritative basis for the exercise of admiralty jurisdiction during the colonial period, from the forepart of the seventeenth century to the advent of national independence in the century following, was predicated upon any one of three methods for the institution of judicial function. Such authority rested upon commissions issued from the crown; by the express reservation in colonial charters granted of the power of establishment of vice-admiralty courts; and lastly, creation by legislative action of colonial assemblies.[11]

At this juncture of inquiry, it may serve well to illustrate each of these in operative manifestation during the seventeenth century. Concerning commissions from the crown to establish a vice-admiralty court, in the year of 1678, Governor Andros was granted a special commission to act as vice-admiral of the entire colonial government and "authorized and empowered to appoint a Judge, Register, and

[10] It was further provided (section VII) that the register of the admiralty court" shall prepare all warrants and articles, and take care to provide all things requisite for any trial according to the substantial and essential parts of proceedings in a court of admiralty, in the most summary way; and shall take minutes of the whole proceedings and enter them duly in a book by him to be kept for that purpose . . . and shall transmit the same . . . unto the high court of admiralty of England."

[11] See the opinion of Mr. Justice Wayne, in its historical overtones, in Waring v. Clarke, 46 U.S. (5 How.) 441, 451, 12 L. Ed. 226, 231 (1847). *Cf.* De Lovio v. Boit, 7 Fed. Cas. 418, No. 3776 (C.C. Mass. 1815), wherein Mr. Justice Story, speaking of "the authority and powers of the vice-admiralty courts in the United States under the colonial government," stated at 442, "In some of the states, and probably in all, the crown established, or reserved to itself the right to establish, admiralty courts."

Marshall of the Admiralty."[12] Regarding the express reservation in colonial charters to establish vice-admiralty courts, the charter of the Massachusetts Bay Colony, which was granted in 1691, provided that all "admiral court, jurisdiction, power, or authority" was reserved to the crown.[13] Touching the third method for the establishment of colonial vice-admiralty courts, the Court of Assistants of the Colony of Massachusetts Bay derived its judicial authority from legislative enactment;[14] and by an act of 1691, which provided for "Establishing Courts of Judicature for the Ease and benefitt of each respective Citty Town and County within this Province [of New York]," there was established an "Admiralty Court" wherein "their Majesties reserve the appointment of a Judge, Register and Marshall."[15]

B. *Vestigial Materials of Seventeenth Century American Colonial Admiralty Law*

1. Extent of Colonization and Admiralty Jurisdiction: (a) To the Mid-Century.—Up to the middle of the seventeenth century, eight of the original colonies had marked their historical genesis. In chronological order of incipience they were Virginia (1607),[16] Massachusetts (1620),[17] New York (1624),[18] Maryland (1634),[19] Rhode

[12] 3 O'CALLAGHAN, THE DOCUMENTARY HISTORY OF NEW YORK 268 (Albany 1850-1851).

To the effect that the commissions contained a much larger jurisdiction than existed in England when they were granted, as citing as illustrative the commission granted to the Governor of New Hampshire, see Waring v. Clarke, 46 U.S. (5 How.) 441, 453, 12 L. Ed. 226, 232 (1847).

[13] MASSACHUSETTS COLONIAL AND PROVINCIAL LAWS (Boston 1814), 716. It was further provided that power or authority was to be exercised under the great seal.

[14] WASHBURN, JUDICIAL HISTORY OF MASSACHUSETTS 26, 68 (Boston 1840).

[15] (Passed 6 May, 1691) in COLONIAL LAWS OF NEW YORK, *From the Year 1664 to the Revolution* 216, 226-231 (Albany 1896).

[16] Founded at Jamestown in 1607 by the London Company under its charter of 1606. In 1624, a writ *quo warranto* was issued against the charter, and Virginia became a royal colony.

[17] The first permanent settlement was made at Plymouth in 1620, under a charter from the London Company for the purpose of establishing a settlement in Northern Virginia. In 1627, the colonists purchased the financial interest of the London merchants who had advanced money for the enterprise. The Colony of New Plymouth was never able to obtain a charter from the king because of their avowed opposition to the Church of England. In 1691, the Colony of New Plymouth was incorporated with the Massachusets Bay Colony.

The foundation of the Massachusets Bay Colony was laid on Cape Ann for trading purposes in 1623; six years later, a charter was granted to the Governor and Company of Massachusetts Bay. In 1641, the first body of statutes called "the Body of Liberties" was adopted. The charter was revoked in 1684. By virtue of a commission to Sir Edmund Andros in 1688, he was constituted and appointed "Captain Generall and Governor in Cheif in and over all that part of our territory and dominion of New

Island (1636),[20] Connecticut (1637),[21] New Jersey (1638),[22] and New Hampshire (1641).[23] During the historical period under consideration, there appears to be no evidence, either internal or external, upon which to predicate the proposition that vice-admiralty courts as such were established in any of the then existing colonies.

Available records point to the conclusion that the earliest exercise of admiralty jurisdiction in Colonial America was invested in the Court of Assistants of the Colony of Massachusetts Bay.[24] Under the charter which was granted to the Governor and Company of the Massachusetts Bay in New England in the year 1629, admiralty jurisdiction was not reserved to the crown. Resultingly, such jurisdictional exercise as occasion might have required fell within the purview of the local colonial court. This court—the Court of Assistants of the

England in America known by the names of our Colony of Massachusets Bay, our Colony of New Plymouth, our Provinces of New Hampshire and Main and the Narraganset Country or Kings Province . . . the neighboring Colonies of Road Island and Connecticutt, and Province of New York and East and West Jersey." See note 15 *supra,* COLONIAL LAWS OF NEW YORK, at 216 *et seq.* A new charter was obtained in 1691 by which the Colony of Massachusetts Bay was made a royal province.

[18] Settlement was made at New Amsterdam (New York) by the Dutch West India Company in 1624. Its existence as a Dutch colony under Governors Minuit, Van Twiller, Kieft, and Stuyvesant was superseded by English occupation in 1664. In 1690, the first colonial congress met at Albany.

[19] By virtue of a charter for the land north of the Potomac granted by Charles I to Cecil Calvert, Lord Baltimore, the proprietary colony of Maryland was founded in 1634.

[20] The Colony of "Road Island" had a dual origin. Providence (called the "Providence Plantations") was founded by Roger Williams in 1636. Two years later Portsmouth was founded, and in 1639 Newport was settled to form the Rhode Island Colony. In 1644, a charter was granted by which these settlements were united in one colony. This charter was revoked and in 1664 the Parliamentary Commissioners issued a patent by which union was again achieved. However, the dual title persisted to the time of emergence as a state. See THE ARTICLES OF CONFEDERATION which was signed "on the part of and behalf of the State of Rhode Island and Providence Plantations."

[21] Two colonies were established in Connecticut. In 1637, New Haven was founded (it adopted the Bible as the Constitution); and in 1639, Hartford was settled (it adopted a Constitution which made no reference to the king of England). Under a charter from Charles II, issued in the year 1662, New Haven was incorporated with Hartford. This charter was adopted as a Constitution in 1776 and continued in force until 1818.

[22] The first settlement in 1638 continued until it was secured by the Duke of York in 1664; at which time he granted the territory between the Delaware and the Hudson to Lord Berkeley and Sir George Cataret. The former sold his share (West Jersey) to William Penn in 1676; and six years later, William Penn and his associates purchased East Jersey. The two colonies (both Jerseys) were united in a royal colony in 1702.

[23] The territory was annexed to the Massachusetts Bay Colony in 1641. In 1679, New Hampshire was made a royal province. Six years later, it was again annexed to the Massachusetts Bay Colony and continued in such status until 1749 when it again became a royal province.

[24] See note 14, *supra.*

Colony of Massachusetts Bay—began to function in the year of 1630.[25] The records of the court, extending from 1630 to 1692, consist of a few minute books and certain volumes which pertain to accounts of sales. The adjudications contained therein indicate a wide variety of matters both on the civil and criminal side. Moreover, the distinction between admiralty and common law proceedings is hardly discernible. The earlier records of the Court of Assistants which have survived the vicissitudes of time are conspicuously incomplete. However they show that the earliest cause of a maritime nature which came on for consideration occurred in the year of 1635. The litigation concerned "the shipp Thunder."[26] Although maritime causes are thinly scattered in the minutes of the years following it may nevertheless be concluded that the Court of Assistants of the Colony of Massachusetts Bay exercised the earliest admiralty jurisdiction in colonial America. The significance of this sole circumstance of admiralty jurisdiction during the forepart of the seventeenth century may well have its explanation in the fact that the Colony of Massachusets Bay was probably more largely engaged in water commerce than any other colony. In any event "the Colony probably got safely thru all those cases that smelled of the sea in the Court of Assistants without much difficulty for many years."[27]

1. Extent of Colonization and Admiralty Jurisdiction: (b) From the Middle to the Close of the Seventeenth Century.—Of the remaining five of the original thirteen colonies, three were founded during the last half of the seventeenth century: North Carolina (1653),[28]

[25] At "The First Court of Assistants holden att Charlton Aug 23th Ano Dm 1630 . . . . It was ordered that there should be a Court of Assistants helde at the Govr howse on the 7th day of Septembr nexte . . . att 8."—2 NOBLE, RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1 (Boston 1904).

[26] "Att the Court, holden in June 2, 1635 . . . . It is ordered with the consent of [the parties] that the arbitrators chosen by them . . . shall have full power to make a finall end of all differences & accompts betwixt the same ptyes concerneing the shipp Thunder, wch the Court enjoines them to pforme this day fortnight, & to returne into the next pticular Court what they have done herein, & in the meane tyme all execucons concerneing the shipp Thunder respeted. Also, it is ordered that the arbitrators shall have the power to examine witnesses vpon oathe."—1 SHURTLEFF, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 150-151 (Boston 1853).

[27] NOBLE, *A Few Notes on Admiralty Jurisdiction in the Colony and in the Province of Massachusetts Bay*, 8 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 151 (Boston 1906).

See, CRUMP, *Colonial Jurisdiction in the Seventeenth Century*, ch. 3 (Royal Empire Society, London; Imperial Studies no. 5, London 1931).

[28] First permanent settlement at Albemarle under a grant of the Carolinas by Charles I to Sir Robert Heath in 1629. The issuance of a proprietary charter by

South Carolina (1670),[29] and Pennsylvania (1680).[30] The remaining two colonies came into existence in the early part of the succeeding century: Delaware (1703),[31] and finally Georgia (1733).[32] In the search for legal maritime materials among the colonies during the period aforenoted, the light of discovery is rather exclusively directed towards Massachusetts and New York. The year 1650 is of foremost significance in that it bore the first acknowledgment for the need of a code of admiralty law. This was manifested by legislative action at Boston. The enactment reads: "Att a Courte of Eleccon, held at Boston, the 22nd 3 M°, 1650. Whereas this commonwealth is much defective for want of lawes for Marityne affayres, and forsomuch as there are already many god lawes made and published by O^r owne land & the French nation, & other kingdomes & common wealths, this court doth therefor order, that the sajd lawes, printed and published in a booke called Lex Mercatoria,[33] shalbe pused & duly considered, & such of

Charles II in 1665 was followed by a separation of the two colonies; and in 1729 North Carolina became a royal colony.

[29] Under the proprietary charter of 1665, Charleston was founded in 1670. Its separation from North Carolina (see note 28, *supra*) in the year 1700 was also followed by a decree declaring it a royal colony in 1729.

[30] Following a grant of land by Charles II to William Penn in 1681, Philadelphia was founded in the following year. Penn established a proprietary government; his rights passed to his heirs from whom they were purchased by the State of Pennsylvania in 1776.

[31] Delaware (i.e., "the three lower counties on the Delaware") which was included in Penn's grant of 1681 obtained recognition as a separate colony in 1703.

[32] Georgia constituted a part of the Carolinas under the proprietary charter of Charles II in 1665. In 1732 it was set apart and granted to James Edward Oglethorpe to be held in trust for twenty-one years. Savannah was founded in the following year. In 1752, Oglethorpe resigned the charter to the crown and it thereafter became a royal colony.

[33] Reference is made, it would appear, to MALYNES, *Consuetudo Vel Lex Mercatoria*: or, *Antient Law Merchant* which issued in folio edition in 1622. This was followed by the editions of 1629, and 1636. The edition of 1656 contained "A Collection of Sea-Laws composed by a Professor of the Civill law"; the edition of 1686 contained the following additions: (1) "Jurisdiction of the Admiralty of England asserted, by Richard Zouch"; (2) "Ancient Sea Laws of Oleron, Wisby, and the Hanse-Towns still in force, rendered into English by G. Miege [out of] Les Us et Costumes de la Mer by Etienne Cleriac"; and (3) "Sovereignty of the British Seas, by Sir John Buroughs."

The following works on admiralty law, by English and Continental authors, were in print at the time of the Massachusetts enactment of 1650, and in chronological order of apearance:

CELELLES, IL CONSOLATO DEL MARE (Barcelona 1494).

COPLAND, THE RUTTER OF THE SEA . . . with the lawes of the ile of Auleron and ye judgements of the sea (n.p., 1528).

BAYFIUS, ANNOTATIONES IN LEGEM IN (Basiliae 1537).

SCHARD, DE VARIA TEMPORUM IN JURIS CIVILI OBSERVATIONE LIBELLUS (Basiliae 1561).

FERRETUS, DE JURE ET RE NAVALI ET DE IPSIUS REI NAVALI, ET BELLI AQUATICI PRAECEPTIS LEGITIMIS LIBER (Venice 1579).

them as are approved by this Court shalbe declared and published, to be in force within this jurisdiction after such time as this Court shall appoynt; and it is further ordered that . . . [the following][34] shalbe a committee to ripen the worke, & to make returne of that which they shall conclude vppon unto the General Court, and the time of their Meetings the first third day of the sixth mo[th] next—p Cur."[35]

Running parallel to the Court of Assistants of the Colony of Massachusetts Bay was the "Worshipful Court of the Schout, Burgomasters, and Schepens," which was established in New York in 1653. The minutes of this court from its year of inception to its abolition in 1664 have been preserved.[36] They manifest a wide variety of judicial business which included the exercise of admiralty jurisdiction. Following the English occupation of 1664, the court was superseded by the "Mayor's Court."[37] The area of judicial business—as attested by forty-five volumes of engrossed minutes which became the subject of transcription into more accessible printed form a quarter of a century ago[38]—was similar to that of its predecessor. These pages

VOISIN, SEIGNEUR DE LA POPELLINIERE (Paris 1584).

DE FERRANDE, GRAND ROUTIER DE LA MER (Rouen 1584).

LA POPELLINIERE (SR. DE), L'ADMIRAL DE FRANCE ET PAR OCCASION DE CELVY DES AUTRES NATIONS TANT VIELES QUE NOUVELLES (Paris 1585).

WELWOOD, SEA LAW OF SCOTLAND (n.p. 1590).

AGUSTIN, DE LEGIBUS NAUTICUS (Tarragona 1591).

LLIBRE DE CONSOLAT DELS FETS MARITIMS (Barcelona 1593).

GROTIUS, DE MARI LIBERO (n.p. 1609).

GENTILIS, HISPANICAE ADVOCATIONIS, LIBRO DUO, QUESTIONES MARITIMAE (Hanover 1613).

WELWOOD, ABRIDGEMENT OF ALL SEA-LAWES (n.p. 1613).

DE DOMINIO MARIA, LURISBUSQUE AD DOMINIUM PRAECIPUE SPECTANTIBUS, ASSERTIO BREVIS ET METHODICA (Cosmopoli 1615).

MALYNES, CONSUETUDO VEL LEX MERCATORIA: or ANTIENT LAW MERCHANT (n.p. 1622.)

SELDEN, MARE CLAUSUM: SERI, DE DOMIMO LIBRI DUO (London 1635).

PECKIUS, COMMENTARII IN TITT. DIG. ET COD. AD REM NAUTICAM PERTINENTES (Amsterdam 1647).

[34] "M[r] Bellingham, M[r] Nowell, M[r] Willoby, Capt. Hawthorne, the Auditor General, & M[r] John Alden."

[35] 3 SHURTLEFF, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 193 (Boston 1853).

[36] FERNOW (ed.), RECORDS OF NEW AMSTERDAM FROM 1653-1664 (4 vols., New York 1897): vol. 1, MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS 1653-1655; vol. 2, *ibid.*, August 27, 1656-1658; vol. 3, *ibid.*, September 3, 1658-December 30, 1661; vol. 4, *ibid.*, January 3, 1662-December 18, 1663.

[37] The Mayor's Court, fashioned after its prototype in London and Amsterdam, consisted of the Mayor, Recorder, and six Aldermen. The venue of the court was wide and its jurisdiction large. Under the Dongan Charter of 1686, the Mayor, Recorder, and Aldermen were authorized "to hold and keep . . . one court of common pleas."

[38] MORRIS (ed.), SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-

bear ample testimony to the jurisdiction of the Mayor's Court over maritime and admiralty business.

Upon the advent of being commissioned governor of the colony of New York,[39] Major General Andros was instructed by the Duke of York to put into execution the so-called "Duke's Laws";[40] and it was declared by gubernatorial proclamation[41] that "the same book of Laws formerly establisht are to be observed and practiced."[42] Some four years later,[43] Governor Andros was empowered to act as vice-admiral of the entire colonial government. By further provision he was authorized to appoint a judge, register, and marshal in admiralty. However, a reservation of nomination as well as revocation of authority for "Judge, Register, and Marshall of the Admiralty"[44] was retained by the grantor, the Duke of York. In its pertinent parts, the commission read: "Whereas it may be convenient for you to be authorized and empowered to appoint a Judge, Registrar and Marshall of the Admiralty within your government by reason of its distance from home . . . these are therefore to authorize and empower you from time to time during the vacancies of the said places to nominate, constitute and appoint the Judge, Register and Marshall of the aforesaid to continue during my pleasure only."[45] That a regular court for the adjudication of admiralty causes was ever founded under the

1784 (The American Historical Society; *half-title*: 2 American Legal Records, Washington, D. C. 1935).

The minutes of the Mayor's Court may be evaluated as a storehouse of much colonial treasure; and especially so for the beginnings of our legal and social traditions. The publication by the American Historical Society is of significant importance to lawyer and antiquary alike in a hitherto unchartered field.

39 July 1, 1674.

40 "Certaine Laws established by authority of His Majesties Lres Pattents graunted to me and digested into one volume for ye publique use. . . ."—3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 226 (Albany 1853-1887). Also, 1 COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY FOR THE YEAR 1809, 307 (New York 1809); see *supra*, note 15 COLONIAL LAWS OF NEW YORK 6 *et seq.*

41 November 9, 1674.

42 See *supra*, note 40, DOCUMENTS at 227.

43 May 20, 1678.

44 See *supra*, note 12 at 268.

45 (Original text)—"Whereas it may be convenient for you to be authorized and empowered to appoint a Judge, Register, and Marshall of the Admiralty, within your government by reason of its distance from hence, (notwithstanding the clause in your commission of Vice Admiral w^{ch} reserves the nomination of them to myself). These are therefore to authorize and empower you, and I hereby authorize and empower you from time to time dureing the vacancyes of the said places to nominate constitute and appoint the Judge Register and Marshall of the Admiralty afores^{d} to continue dureing my pleasure only. Given under my hand and seale at St. James's ye 20th day of May, 1678."

1678 commission to Governor Andros and thence began to function is a matter of conjecture. However, there is evidence to the effect that commissions were issued to Stephen Van Cortlandt[46] to be judge of the newly-commissioned tribunal, William Leet to be Register, and the office of Marshall to Thomas Ashton.[47]

Colonel Thomas Dongan, upon being commissioned governor of New York in the year 1682, received instructions which, among other matters, directed him together with the council[48] to make laws which "are fitt and necessary to be made and established for the good weale and governmt of the said colony and its Dependencyes."[49] There is no record, however, that Governor Dongan established a court of admiralty; although several cases were heard by Judge Luke Santon who was granted a commission to act as judge of the admiralty.[50]

Although Henry Sloughter had been commissioned "Captain General and Governor in chief in and over our Province of New York and the Territories depending thereon in America,"[51] by proclamation at the Court of Whitehall on November 14, 1689, Jacob Leisler, then Lieutenant Governor, took forcible possession of the government during the war between England and France. Some French vessels which had been captured on the high seas were brought into the port of New York and held as prizes of war. This circumstance coupled with the statutory recognition that "ye Pr'sent Warr with the ffrench & their adherents requires that there be appointed Severall Officers Civill & Military for due Administering ye Lawes"[52] led Lieutenant Governor Leisler to establish a temporary court of admiralty for the purpose of taking cognizance of the captures and to render judgments of disposition thereof. This colonial vice-admiralty court, functioning as a

[46] The then Mayor of New York. His successive incumbents (Thomas Delavall, 1679; Luke Santon, 1683; John Palmer, 1684), *ex officio,* received commissions as Judge of the Admiralty.

[47] See generally, 3 CHESTER, LEGAL AND JUDICIAL HISTORY OF NEW YORK 303 *et seq.* (National Americana Society, New York 1911).

[48] I.e., "a genll [general] Assembly of all the Freeholders."

[49] See *supra,* note 40, at 331 *et seq.*; also see *supra,* note 15, COLONIAL LAWS OF NEW YORK.

[50] For primary source materials, see, RECORDS OF THE SURROGATE'S OFFICE, CITY OF NEW YORK (New York, compiled 1893-1909), volume 1. *Cf.,* SMITH, REPORT OF CASES ADJUDGED AND DETERMINED IN THE COURT OF COMMON PLEAS, p. lxvi *et seq.* (New York 1955).

[51] See *supra,* note 15, COLONIAL LAWS OF NEW YORK at 221-222.

[52] Id. at 219. Reference is made to an act passed at the Second Session of the General Assembly held in the City of New York on September 15, 1690.

Upon the arrival of Governor Henry Sloughter in New York, Jacob Leisler was tried, condemned and executed for treason.

Prize Court, was administered by Judge Peter De La Noy.[53] Its existence continued for a period short of a week when its prize business reached completion, whereupon the court was discontinued.

The gubernatorial commission to Henry Sloughter,[54] hereinabove noted, conferred upon him power "to summon & call generall Assemblies of the Inhabitants being Freeholders within your Government according to the usage of other Plantations in America."[55] The Assembly was granted "full power and authority to make, constitute and ordaine Laws Statutes and Ordinances for ye publique Peace, welfare and good Government."[56] By way of making these provisions operative, writs for the election of representatives to a legislative assembly were issued. The first session of the First Assembly was convened on April 9, 1691. On the sixth of May, the Assembly passed "An Act for the Establishing of Courts of Judicature for the Ease and benefitt of each respective Citty Town and County within the Province."[57] This statute created, among other courts of judicature,[58] an "Admiralty Court" wherein "their Majesties reserve the appointment of a Judge, Register and Marshall."

The year 1691 marks, it would appear, the initial instance of the creation of a vice-admiralty court by virtue of colonial legislation. It is to be observed that an earlier act, that of 1673 of the Colony and the Province of Massachusetts Bay, had delegated the exercise of admiralty powers to the Court of Assistants;[59] while under the

[53] Note 47 *supra,* LEGAL AND JUDICIAL HISTORY at 307. And see *supra,* note 12, DOCUMENTARY HISTORY.

[54] November 14, 1689.

[55] Note 15 *supra.* COLONIAL LAWS OF NEW YORK at 221.

[56] It was further provided that "Said Laws, Statutes & Ordinances (as near as may be) agreeable unto the Laws & Statutes of this our kingdome of England [shall be] . . . transmitted to us under our seal of New York for Approbation or Disallowance of the same." See note 15, *supra,* at 222.

[57] LIVINGSTON AND SMITH (eds.), LAWS OF NEW YORK FROM THE YEAR 1691 TO 1751, 4, 16, 23, 24 (New York 1752).

Laws of 1691, ch. 4 continued by ch. 28 (November 11, 1692); ch. 54 (October 24, 1695); and ch. 62 (April 21, 1697).

[58] I.e., Single Justice, Quarter Sessions, County Court, Court of the Mayor and Aldermen, Supreme Court, Chancery Court, Prerogative Court, and "Court Martiall."

The section of the statute directed to appellate review stated that appeals might be taken to the governor and council and "from the Governour & Councill to their Majesties in Councill." As a prerequisite to appeal the appellant was required to pay costs of the judgment ordered, and further security in double the amount of the judgment, to secure judgment and costs on appeal in the event of final adverse adjudication to the appellant. The time for prosecution of appeal was limited to twelve months after a request for an appeal had been lodged. See *supra,* note 15, COLONIAL LAWS at 226-231.

[59] WASHBURN, SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS FROM 1630 TO THE REVOLUTION IN 1775, 172 (Boston 1840).

Province Charter the power of establishing courts of admiralty was reserved to the crown. It was not until 1694, however, that a vice-admiralty court was created in the Massachusetts Bay Colony.[60]

There appears to be no evidence which would point to an immediate institution of an admiralty court by virtue of the Judiciary Act of 1691. This was not accomplished until two years after the creation of the Massachusetts vice-admiralty court. In the instructions to Governor Fletcher there was contained authority—similar to that of the earlier commissions of Andros, Dongan, and Sloughter—to establish a court of admiralty. Pursuant to such authorization, Governor Fletcher forwarded a request[61] to the Lords of Admiralty of England for power to appoint a judge, register, and marshal for the province. This resulted in the appointment of William Pinhorne,[62] during 1696, as the first judge of an American colonial vice-admiralty court. Although no records of the court of vice-admiralty over which Judge Pinhorne presided are either accessible or known to be in existence yet the historical fact has secondary evidential substantiation. Such may be gleaned from a communication by Lord Viscount Cornbury to the Lords of Trade in England, wherein the former recorded, "I have made the best inquiry I can, and find the first time there was a regular Court of Admiralty here it was established by Coll. Fletcher by virtue of a warrant from the Lords of Admiralty impowering him to appoint a Judge, Register and Marshall for the Court of Admiralty."[63]

The incumbency of William Pinhorne was of short duration for, in the year following, a special commission[64] by the Lords of Admiralty in England authorized the governor to supersede the incumbent and appoint William Smith as judge of the "Court of Vice-Admiralty of New York, Connecticut and East Jersey."[65] The tenure of Judge

[60] *Ibid.*

[61] November 19, 1694.

It is to be noted that although the Fletcher commission contained authority to establish a court of admiralty yet it restrained him from appointing a judge, register, and marshal "which officers," Governor Fletcher informed the Lords of Admiralty, "are absolutely necessary to its existence."

[62] The appointment was effected, in 1696, by the governor and council in conformity with instructions contained in a special warrant from the Lords of Admiralty. See note 47, *supra,* LEGAL AND JUDICIAL HISTORY at 307.

[63] See *supra,* note 12, DOCUMENTS at 1000 *et seq.*

[64] April 29, 1697.

[65] John Tudor, James Marshall, and James Graham were appointed respectively register, marshal, and advocate general of the "Court of Vice-Admiralty of New York, Connecticut and East Jersey."

The special commission also provided that in the event of death of any incumbent,

William Smith is of especial significance in the annals of American colonial admiralty law for it has preserved the mode of proceedings employed in the vice-admiralty courts. In a letter to the Earl of Bellomont in 1697, Judge Smith wrote, "in the Court of Vice Admiralty here we have in all things as near as possible followed the proceedings of the Admiralty Court in England save only where greater power is given here in the plantations by an act of parliament to the Admiralty, than allowed of or practicable in England which hath been duly observed in my administration in that Court in this province."[66]

In the closing year of the seventeenth century the Vice-Admiralty Court for New York, Massachusetts, Rhode Island and New Hampshire came into existence with Wait Wintrop as judge of admiralty. No mention is made of Judge Wintrop in the Lord Cornbury letter to the Lords of Trade, hereinabove referred to, however it does state that William Atwood succeeded William Smith as Judge of the Court of Vice-Admiralty for New York, Massachusetts, Connecticut, Rhode Island, New Hampshire and the Jerseys. In the language of the communication, "in my Lord Bellomont's time there was a commission from the Lords of the Admiralty appointing Coll. Smith Judge of the Admiralty here, and since that M[r] Atwood brought over with him a commission from the Lords of the Admiralty constituting him judge of that Court."[67]

III. AMERICAN COLONIAL VICE-ADMIRALTY COURTS: THE EIGHTEENTH CENTURY

Although there is evidence to establish the exercise of admiralty jurisdiction in the American colonies during the forepart of the seventeenth century, vice-admiralty courts did not appear until the closing years of that century. However, tribunals of purely admiralty jurisdiction did not begin to function with any degree of real continuity until the advent of the eighteenth century. The basis of establishment

power of appointment was to vest in the governor subject to disapproval or ratification by the Lords of Trade in England. See, SCOTT, COURTS OF THE STATE OF NEW YORK 118 *et seq.* (New York 1909).

[66] See *supra*, note 12, DOCUMENTS at 828.

[67] See *supra*, note 12. Cf., note 59, *supra*, SKETCHES wherein it is stated at 175: "The first judge of admiralty whose appointment I have ascertained was Wait Wintrop . . . he was commissioned a Judge of Admiralty in 1699, and New York, Massachusetts, Rhode Island, and New Hampshire was within his jurisdiction. He was succeeded by William Atwood, October 27, 1701 whose commission embraced the Jerseys in addition to the provinces already mentioned."

and authority of these American colonial vice-admiralty courts lay in so-called commissions.

A. *Form of Commissions*

The form of the commissions of judges of the colonial vice-admiralty courts indicates that the dates were arbitrary and the name of the particular province was omitted. All commissions given in the colonies were alike and the jurisdiction conferred by the instrument was commensurate with the ancient practice of admiralty.[68] In a work of the eighteenth century, Anthony Stokes of the Inner Temple and Chief Justice of Georgia preserved the language of the commission to act as judge of colonial vice-admiralty courts. It reads: "We do hereby grant and remit unto you, the aforesaid ——, our power and authority in and throughout the province of ——, aforementioned and maritime ports whatsoever, of the same and thereto adjacent, and also throughout all and every of the sea-shores, public streams, ports, fresh water rivers, creeks and arms, as well as the sea as of the rivers and coasts whatsoever of our said province of ——."[69]

B. *The Mompesson Commission*

The earliest extant commission[70] to judges of American colonial vice-admiralty courts in the eighteenth century was issued to Roger Mompesson. The Court of Vice-Admiralty to which he was appointed embraced the provinces of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, the Jerseys, New York, Pennsylvania and dependencies.[71]

The extensive jurisdictional venue comprehended within the Mompesson commission was apparently poised on the supposition that one vice-admiralty court with one judge, register, and marshal could transact all of the admiralty business which might arise within the strikingly extensive area designated in the commission.

The historical sequence of commissions from the year 1715 to 1764 would destroy the validity of the supposition. Illustratively,

[68] See text to, and bibliographical materials in, note 33, *supra*.

[69] STOKES, A VIEW OF THE CONSTITUTION OF THE BRITISH COLONIES IN NORTH AMERICA 150 (London 1783).

[70] Dated April 1, 1703.

[71] Compare the scope of earlier grants in commissions to governors: Dongan (1682) "New York and the Islands"; Andros (1688) "New York and New England"; Fletcher (1693) "New York, East and West Jersey, New Castle and dependencies"; and Bellomont (1698) "New York, Massachusetts Bay, New Hampshire and dependencies."

the commission to Nathaniel Byfield in 1715 embraced Massachusetts, New Hampshire, and Rhode Island; John Menzies in 1716, Massachusetts, New Hampshire, and Rhode Island; Francis Harrison, 1721, New York; Robert Auchmuty, 1728, Massachusetts, New Hampshire, and Rhode Island; Lewis Morris, 1738, New York, Connecticut, and West Jersey; Charles Russell, 1747, Massachusetts, Rhode Island, and New Hampshire; and the commission to Richard Morris in 1762 extended to New York, Connecticut, and East and West Jerseys.[72]

A momentary revival of the all-inclusive characteristic of the Mompesson commission transpired in the year 1764 when William Spry was commissioned to be "Judge of his majesty's Court of Vice-Admiralty over all America." Although it is recorded that Judge Spry issued a proclamation which declared that a court would be held in Halifax "when and where all causes civil and maritime arising in any province of America may be prosecuted" the minutes of the court, if there were any, have not survived.[73] Nor was the intention of Judge Spry to remove the court to Boston in 1765 ever carried out.[74] From that year to the commencement of the next period of inquiry, that is, the establishment of state admiralty courts in 1776, Richard Morris presided over the Vice-Admiralty Court of New York, Connecticut, and the East and West Jerseys; Robert Auchmuty the younger was appointed Judge of the Vice-Admiralty Court of "All New England" in 1767; and in 1773, Thomas Oliver became "Judge of Admiralty for the Province of New Hampshire."[75]

[72] Note 47, *supra,* LEGAL AND JUDICIAL HISTORY; note 59, *supra,* SKETCHES, *passim.*

[73] "Search in Nova Scotia reveals no evidence that there ever were such papers [i.e., admiralty and other records] there—certainly there are none now discoverable."—HOUGH, REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK 1715-1788, 257 (New Haven 1925).

[74] "The year following [Spry's] proclamation, he made arrangements for removing from Halifax to Boston to enter as Supreme Judge of Vice Admiralty but I do not find that he carried his design into effect. In December, 1767, he was commissioned as Governor of Barbadoes, and sailed for that island in January, 1768, where he died about 1772 (Bos. Ev. Post)."—Extract from note 59, *supra,* SKETCHES at 174. *Cf.,* 2 ANDREWS, GUIDE TO THE MATERIALS FOR AMERICAN HISTORY IN THE PUBLIC RECORD OFFICE OF GREAT BRITAIN 37, 46-47 (London 1914).

[75] See note 47, *supra*; and, Aldrich, *Admiralty Jurisdiction in the Admiralty Courts of New Hampshire* in 3 Proc. N.H. Bar Assoc. 31 *et seq.* (1909-1910).

In Waring v. Clarke, *supra,* note 12, at 453, 12 L. Ed. at 233, Mr. Justice Wayne found "that the [commission] to the Governor of New Hampshire, investing him with the power of an admiralty judge, declares the jurisdiction to extend 'throughout all any every the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever of our paid provinces.'"

C. *Reports of Admiralty Cases*

The reporting of cases during the American colonial era was isolated and scattered. The cases which were adjudged and determined and thereafter reported are to be found in five reports. In chronological sequence of cases they are the Reports of Harris & M'Henry, Jefferson, Dallas, Quincy, and Root.[76] Maryland cases spanning the years 1685 to 1799 are contained in Harris & M'Henry; Virginia cases from 1730 to 1772 are reported by Jefferson; Dallas covers Pennsylvania cases from 1754 to 1806; the Massachusetts cases of 1761 to 1772 are reported in Quincy; and lastly, the Root Reports, in two volumes, contain the Connecticut cases from 1764 to 1793. An examination of these volumes with spectacles trained on the admiralty side of judicial endeavors will reveal the somewhat total absence[77] of reported admiralty cases.

The nearest approximation to a compilation of reported admiralty cases of colonial vintage—and these based upon minute books—appeared over a quarter of a century ago in the form of "Reports of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York,"[78] by the late Charles Merrill Hough.[79] The earliest case reported therein bears the date of October 7, 1715.[80] A valuable note[81] by the author, based upon inquiry and examination of the records of vice-admiralty courts throughout the colonies, reveals the fact of existence of little vestigial

[76] Dates of publication, in chronological sequence: Dallas (1790), Root (1794), Harris & M'Henry (1809), Jefferson (1829), and Quincy (1865).

An admiralty cause of 1736, Hastings v. Plater, is to be found in the Bland (Maryland) Reports of the High Court of Chancery of Maryland for the years 1811 to 1832. The case appears as a note to The Chancellor's Case, 1 Bland (Md.) 595, 613 (1825).

[77] See Hastings v. Plater, 1 Bland (Md.) 613 n. (1736); Nixon and Harper, 1 Dall. (Pa.) 6 (1762); Scollay v. Dunn, Quincy (Mass.) 74 (1763); Thomas Wallace v. Child and Styles, 1 Dall. (Pa.) 7 (1763); Story and Wharton v. Amos Strettel, 1 Dall. (Pa.) 10 (1764); Brown v. Cornwell, 1 Root (Conn.) 60 (1773); and Thompson & Barker v. Alsop, 1 Root (Conn.) 64 (1774).

[78] New Haven, 1925. Pp. xxxvi, 311.

[79] United States Circuit Court Judge, United States Court of Appeals, New York City.

[80] William Davis Qui Tam &c. Cont Isaac Dawson. Oct. 7, 1715 Mr. George proctor for the defend't moves that the defendant may be discharged without stipulations on the affidavits of Baruch Mapler, John Kelley and William Wooton. Ordered the Defend't be discharged paying fees.

The author has reported approximately one hundred cases from the year 1715 to September, 1774; and five cases in the Court of Admiralty for the State of New York.

[81] "Note A—Records Other Than Those of New York," at 257-258.

The author has also preserved a number of admiralty forms in "Note C" to "Note X," at 259-296.

evidence of admiralty records. There are no existing admiralty records for Connecticut, New Jersey, Delaware, Maryland, Virginia, North Carolina, and Georgia. Scanty papers exist for New Hampshire,[82] and minute books but no file papers are to be found in Pennsylvania, and South Carolina. Aside from the preservation of the New York admiralty records, there are records of admiralty proceedings for Rhode Island,[83] and the Commonwealth of Massachusetts.[84]

D. *Extent of Admiralty Jurisdiction in the Vice-Admiralty Courts*

A work of the eighteenth century[85] summarized the extent of powers of the American colonial vice-admiralty into three sorts of jurisdiction. It was the proper court for deciding all maritime causes; to act as a court for the trial of prizes for the determination of whether captures were or were not lawful prizes; and lastly, it had a concurrent jurisdiction with other colonial courts in the case of forfeitures[86] and penalties incurred by breach of parliamentary enactments in the area of trade and revenues.

A particularized description of the vice-admiralty jurisdiction may best be gleaned from the language used in the commission which was granted to Richard Morris in the exercise of his office as "Judge of the respective Courts of the Provinces and Colonys of New York, Connecticut, and East and West Jerseys in America."[87] The document granted "Full power to take cognizance of, and proceed in all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, policies of assurance, accounts, charter parties, agreements, bills of loading ships, and all matters and contracts which in any manner whatsoever relate to freight due for ships, hired or let out, transport money or maritime usury, or which do any ways concern suits, trespasses, injuries, extortions, demands, and affairs, civil and maritime whatsoever, between merchants or between owners and proprietors of ships, or other

82 See *supra,* note 75, *Admiralty Jurisdiction.*

83 See, Wiener, *Notes on Rhode Island Admiralty, 1729-1790,* 46 HARV. L. R. 44 (1932).

84 See, Noble, *A Few Notes on Admiralty Jurisdiction in Massachusetts Bay,* 8 PUBL. COL. SOC. MASS. 150 (1903).

85 See note 69, *supra* at 270 *et seq.*

86 A masterful presentation upon the subject of forfeitures in the American colonial and Revolutionary eras is to be found in the opinion of the Court, delivered by Mr. Chief Justice Stone, in C. J. Hendry Co. et al. v. Moore et al., as The Fish and Game Commission of California, 318 U.S. 133, 137-153, 63 S. Ct. 499, 501-510, 87 L. Ed. 663, 666-675 (1942).

87 Letters patent granted by George the Third October 15, 1762.

vessels, and merchants, or other persons whomsoever, with such owners and proprietors of ships or other vessels whatsoever, employed or used, or between any other persons howsoever had, made, begun, or contracted for any matter, cause, or thing, business, or injury whatsoever, done or to be done as well in, upon or by the sea, or public streams, or fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, as upon any of the shores, or banks adjoining to them."[88]

E. *Appeals from the Vice-Admiralty Courts*

Appeals from the vice-admiralty courts were prosecuted to the High Court of Admiralty in England.[89] Blackstone observed that they could also be brought before the king in council.[90] He observed further that "in case of prize vessels, taken in time of war, in any part of the world, and condemned in any court of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judge's delegates."[91]

The prelude to a change on the procedural side of appeals from the colonial courts of vice-admiralty occurred shortly before the American Revolution. Parliament, in the fourth year of the reign of George III, enacted provisions relative to the trade in the American colonies.[92] The forty-first section read: "And it is hereby further enacted and declared, that . . . all the forfeitures and penalties inflicted by this or any other act or acts of parliament relating to the trade and revenues of the said British colonies or plantations in America, which shall be incurred there, shall and may be prosecuted, sued for, and recovered in any court of record, or in any court of admiralty, in the said colonies or plantations where such offence shall be committed, or in any court of vice admiralty which may or shall be appointed over all America (which court of admiralty or vice-admiralty are hereby respectively authorized and required to proceed, hear and determine the same). . . ."[93]

88 The commission, to be found in the Office of the Secretary of State of New York, is represented in full in 4 BENEDICT, LAW OF AMERICAN ADMIRALTY, 427-433 (New York 1940).

89 See bibliographical materials, and text relative thereto, in notes 99 to 106, *infra*.

90 3 BLACKSTONE, COMMENTARIES 68-9 (Portland 1807).

91 Id. at 69.

92 Anno quarto Georgii, c. 15 (1764).

93 4 GEO. III, c. 15, s. 41, in 26 Statutes at Large, cap. xv, pp. 33-52, at 49. (Pickering ed., Cambridge 1764).

The parliamentary sanction for a "court of vice admiralty which may or shall be appointed over all America" did not become materially manifest until the year 1768. In that year there was established a High Court of Vice Admiralty for All America. Within the limits of its juridical activity, this court heard all appeals relating to maritime affairs and those touching "the trade and revenues of the British colonies or plantations in America" generally.[94] This mode of appellate procedure continued until the close of the colonial years, when, pursuant to an act of the Continental Congress,[95] provisions were instituted for the prosecution of appeals from state admiralty courts to a specially designated committee of the Continental Congress.[96]

F. *Practice in the Vice-Admiralty Courts*

That the practice and procedure of the American colonial vice-admiralty courts was that followed by the High Court of Admiralty in England may be attested to by directions contained in the commissions to the judges of the vice-admiralty courts. Illustratively, the commission to Richard Morris, hereinabove referred to, directed that admiralty and maritime causes were to be heard and determined "according to the civil and maritime laws and customs of the High Court of Admiralty in England."[97] In a contemporary doctrinal writing, the author states "I have only to observe, that it [the Court of Vice-Admiralty in the Colonies] proceeds in the same manner that the High Court of Admiralty in England does."[98]

During the period of inquiry of this article, a number of books had appeared in England concerning admiralty practice and procedure.[99] Bearing the imprint of the seventeenth century there were *Articles of Enquirie;*[100] Zouch, *View of the Admiralty Jurisdiction;*[101] by the same author, *Jurisdiction of the Admiralty of England;*[102]

94 Note 85, *supra.*

95 Act of October 13, 1777.

96 See title V "Federal Admiralty Judicature (1776-1789)" *passim, infra.*

97 See notes 87 and 88, *supra.*

98 See note 85, *supra.*

99 Works prior to the period of inquiry: MONUMENTA JURIDICA (circa 1340), *q.v.*, Twiss (ed.), BLACK BOOK OF THE ADMIRALTY (4 vols., Rolls Series, London 1871-1876); DE OFFICIO ADMIRALITATIS ANGLIAE (circa 1540).

100 *Full title*: Articles of Enquirie to be ministered concerning the Admiraltie in the County of Sussex (1638).

101 *Full title*: View of the Admiralty Jurisdiction, with the Privileges of the Court (1661).

102 *Full title*: Jurisdiction of the Admiralty of England asserted against Sr. E. Coke's Articuli Admiralitatis in xxii. Chapter of his Jurisdiction of Courts (1663). Editions of 1683, 1685.

Clerke [or Clarke], *Praxis Curiae Admiralitatis Angliae;*[103] Godolphin, *View of the Admiralty Jurisdiction;* [104] and, Exton, *Maritime Dicaeologie.*[105] Together with various editions which followed the works mentioned there also appeared in the eighteenth century Rowghton's *Articuli ad Officium Admiralitatis Angliae.*[106] Of these it would appear, upon the observation and authority of a contemporary historian,[107] that the *Praxis Curiae Admiralitatis Angliae* of Clerke was the one used by the admiralty practitioners during the advent of American colonial vice-admiralty courts.

IV. State Admiralty Courts (1775-1789)

The year 1776, marking the advent of independence of the American colonies, brought to a conclusion the era of American colonial vice-admiralty courts. The Continental Congress made the recommendation that the several states proceed to establish courts for the adjudication of admiralty and maritime causes.[108] It is to be remarked that the forms of government did not agree in every particular in any two states. Correspondingly, some of the states established admiralty courts by constitutional precept while others accomplished it by legislative mandate.

A. *Establishment by Constitutional Precept*

Under the New York Constitution of 1777,[109] it was provided that the "Register and Marshal of the Court of Admiralty [shall be appointed] by the Judge thereof . . . and the said marshals and registers . . . to continue in office during the pleasure of those by

[103] The first edition appeared in 1667; others followed in 1679, 1722, 1743, 1798, and 1829.

[104] The first edition (1661) bears the title: View of the Admiralty Jurisdiction, as also divers of the Laws, Customs, Rights, and Privileges of the High Admiralty of England. Another edition appeared in 1685.

[105] *Full title*: Maritime Dicaeologie; or Sea Jurisdiction of England (1664). Editions followed in 1741, 1746, and 1755.

[106] Rowghton [or Roughton], Articuli ad Officium Admiralitatis Angliae, spectantes, è Libro Nigro Admiralitatis Recogniti, appeared in 1743 appended to the edition of the same year of Clerke, Praxis Admiralitatis.

[107] Note 85, *supra.*

[108] November 25, 1775. See Scott, The Courts of the State of New York, 353 *et seq.* (New York 1909).

[109] Established by Convention, April 20, 1777.

It was further provided that the statute law of England and Great Britain and the Acts of Assembly under the King's Government which together formed the law of New York on April 19, 1775 were to be the law of the state subject to alteration by the Legislature. Also, such courts as might be instituted by the Legislature were to "proceed according to the course of the Common Law."

whom they are to be appointed as aforesaid."[110] The Delaware Constitution of 1776[111] declared: "The President and General Assembly shall appoint . . . the Judge of the Admiralty." In Maryland, its constitution of 1776,[112] established "a Court of Appeals . . . whose judgment is final in all appeals from the . . . Court of Admiralty." In 1776, the Constitution of Virginia[113] contained a provision whereby "The judges of . . . [the Court] of Admiralty are to be appointed by the joint ballot of both Houses of the Assembly." North Carolina, by its adoption of the 1776 Constitution,[114] made the appointment of "Judges of the Admiralty [subject to] joint ballot of a Senate and House of Commons."

It is to be noted that in each of the foregoing there was acknowledgment of a state admiralty tribunal by specific reference in the basic organic law of the respective states.

B. *Establishment by Legislative Mandate*

Although, as previously remarked, the establishing authority of state admiralty courts was made by medium of constitutional reference; in some of the original states the creation of state admiralty tribunals came by virtue of statutory sanction.

In Massachusetts, by act of 1775 the state was divided into three districts in each of which a court for maritime causes was established.[115] When Boston came under federal occupation, in the year following, the districts were reorganized.[116] An act passed in the year of 1776 in Rhode Island called for the establishment of a Maritime Court. Four years later it was replaced by a Court of Admiralty.[117] The legislature of New Hampshire passed an act in

110 1 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK, 179 (New York 1906).

111 Agreed upon in full Convention on the 20th of September, 1776, by the Government of the Counties of Newcastle, Kent and Sussex in the Delaware called "the Delaware State."

112 Agreed to in a Convention of Delegates held at Annapolis on the 14th day of August, 1776. An admiralty court was sanctioned under a colonial law of 1763.

113 The constitution and form of government of Virginia was agreed to in General Convention held at Williamsburgh from May 6 to July 5, 1776.

114 Agreed to, and resolved upon, by the Provincial Congress assembled at Halifax, December 18, 1776.

115 Acts and Resolutions of the Province of Massachusetts Bay, Act of November 1, 1775.

116 *Ibid.*, Act of April 13, 1776. See, DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS INCLUDING THE PLYMOUTH AND MASSACHUSETTS COLONIES, THE PROVINCE OF MASSACHUSETTS BAY, AND THE COMMONWEALTH, *75 et seq.* (Boston 1900); see *supra*, note 27, ADMIRALTY JURISDICTION at 150, 154.

117 Laws of Rhode Island, 1780 (May 9, 1780).

1776 wherein it was recited, "that there shall be erected and constantly held in the Town of Portsmouth, or some town or place adjacent, in the county of Rockingham, a court of justice by the name of the court maritime."[118] The initial act for the establishment of a court of admiralty for New Jersey was passed on October 5, 1776; and continued by an act of 1778. However, in 1781, a general statute was enacted to establish and regulate a court of admiralty. The legislation directed "that the Judge of the Admiralty hold a Court of Admiralty and therein have cognizance in . . . all controversies, suits and pleas of Maritime Jurisdiction, and thereupon the said Judge shall pass sentence and decree according to the maritime law and the law of nations, and the ordinances of the Honorable, the Congress of the United States of America and the laws of the State."[119]

The legislature of Pennsylvania, by the act of September 9, 1778,[120] created a court of admiralty which was to be situated at Philadelphia. Two years later, a further act was passed wherein its jurisdiction was described as having "cognizance of all controversies, suits and pleas of maritime jurisdiction, not cognizable at the common law, offences and crimes other than contempts against said court only excepted, and thereupon shall pass sentence, and decree according as the maritime law and the law of nations, and the laws of this commonwealth shall require."[121] By further provision in the enactment, the proceedings of the Court of Admiralty of Pennsylvania were to be deemed "liable to the prohibition of the Supreme Court of Judicature, in like manner, and with like effect as the prohibition of the Court of King's Bench in England, in like cases."[122] In the year 1776, both South Carolina[123] and Georgia[124] instituted a Court of Admiralty. The former reconstructed the tribunal, in the year following, to give a right of appeal to the Continental Congress. The Court of Admiralty of Georgia was founded under the act entitled, "An act regulating captures and seizures made in this state or on the

118 Judicial power was entrusted to "such able and discreet person as shall be appointed and commissioned by the council and the assembly." Laws of New Hampshire, 1776 (July 3, 1776).

119 Laws of New Jersey, 1781.

120 Laws of Pennsylvania, 1778; superseded by the Act of 8 March, 1780.

121 *Ibid.*, s. 22 (8 March, 1780).

122 *Ibid.* For a time during its colonial years, admiralty jurisdiction was vested in the Provincial Council. See, LOYD, THE EARLY COURTS OF PENNSYLVANIA, 68 *et seq.* (Boston 1910).

123 Laws of South Carolina, 1776 (April 11, 1776); *ibid.*, 1777 (February 13, 1777).

124 Laws of Georgia, 1776 (September 16, 1776).

high seas under and by virtue of the resolves and regulations of Congress.[125]

V. FEDERAL ADMIRALTY JUDICATURE (1776-1789)

During the thirteen years which elapsed between the Declaration of Independence and the Constitution,[126] there was no federal judicial system.[127] The Articles of Confederation and Perpetual Union, operative as the law of the land,[128] during the period alluded to, had authorized and sanctioned state judiciaries by providing in article two thereof: "Each state retains its sovereignty, freedom, and independence and every power, jurisdiction and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled."[129]

Simultaneously with the reservation of power for the establishment of state admiralty courts and within the scope of express delegation of powers the Articles of Confederation, in article nine, delegated to the Congress[130] the right to establish courts of final appeal in all cases of capture. In the language of the document: "The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . establishing courts for receiving and determining finally appeals in all cases of capture."[131] Accompanying congressional power of particular federal judicial establishment is to be found a corresponding legislative power over jurisdictional matters. That is, the Congress was delegated the sole and exclusive right "of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States, shall be divided or appropriated."[132]

125 *Ibid.*

126 July 4, 1776 and March 4, 1789, respectively.

127 Reference is made to title: "VII. Judiciary Act of 1789," *infra.*

128 "Each state shall abide by the determinations of the United States, in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by each state. . . ."—Articles of Confederation, art. 13.

129 *Ibid.*, art. 2.

130 Other powers, judicial in nature, which were delegated to the Continental Congress were: "appointing courts for the trial of piracies and felonies committed on the high seas"—art. 9, § 1; "Congress . . . shall be . . . the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever"—art. 9, § 2.

131 It was also provided that "no member of Congress shall be appointed a judge of the said courts."

132 There was a further delegation to the Continental Congress of the right "of

A. *Committee on Appeals*

As prefatory to the creation and establishment of the first federal judicial tribunal—the Court of Appeals in Cases of Capture—in 1780 and nine years before the inception of the United States Supreme Court,[133] it is of importance to note its jurisdictional predecessor. A resolution of the Continental Congress of November 25, 1775, authorized the capture of prizes on the high seas and provided that suits for condemnation should be commenced in the first instance in the colonial courts. The sixth item of the resolution was directed to appeals in such cases and stated: "An appeal shall be allowed to the Congress or such person or persons they shall appoint for the trial of appeals." Pursuant to the resolution, the Continental Congress proceeded to appoint committees to hear appeals from the colonial and later the state admiralty courts. These committees were styled the "Committee on Appeals."[134]

B. *Appeals from State Admiralty Courts*

There appears to be no extant record of cases heard by the Committee on Appeals prior to September 9, 1776. A compilation of these cases by an eminent legal historian of the period, J. C. Bancroft Davis,[135] gives the date, hereinabove cited, as that of the earliest case, *Roberts, Claimant and Appellant* v. *The Thistle and McAroy,* an appeal from the Court of Admiralty of Pennsylvania.[136] The Committees on Appeals functioned from 1776 to the year of 1780 when

granting letters of marque and reprisal in times of peace"—art. 9, § 1. *Cf.,* U.S. Const. art. 10 (enumerating limitations on the powers of the states)—"No state shall . . . grant letters of marque and reprisal."

133 All the appointments to the first bench of the United States Supreme Court were made during the year 1789: Chief Justice Jay (September 26); Justices Cushing (September 27), Wilson (September 29), Blair (September 30); excepting James Iredell (February 10, 1790).

The first term of the Supreme Court, at New York, was the February Term, 1790.

134 CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES FROM THE DECLARATION OF INDEPENDENCE TO THE CLOSE OF THE CIVIL WAR, *passim.* (New York, 2 v., 1889-1896); BECK, THE CONSTITUTION OF THE UNITED STATES: *A Brief Study of the Genesis, Formulation, and Political Philosophy of the Constitution of the United States,* lect. 1. (New York 1922).

135 Reporter to the United States Supreme Court.

J. C. Bancroft Davis published his compilation (hereinafter referred to as the "Davis Compilation of State Admiralty Cases") as the "Appendix to the Reports of the Decisions of the Supreme Court of the United States from Sept. 24, 1789 to the End of the October Term 1888." See 131 U.S. xxxix (1889).

136 Roberts v. The Thistle and McAvoy. Appeal from a decree in the Court of Admiralty for the Port of Philadelphia, condemning the vessel. September 9, 1776, referred to a committee. September 19, 1776, reversed.

it heard its last case, *Gardner* v. *The Brig Sea-Horse and Cargo, John Lynch, Claimant.*[137] In summary, based upon the Davis Compilation of State Admiralty Cases, sixty-four cases in all were submitted to the Committees appointed by the Continental Congress; and these were forwarded from twelve of the states. Approximately one-half of the judicial business came from Massachusetts which had a Middle District and Southern District (eleven appeals);[138] New Jersey (eleven);[139] and Pennsylvania (ten).[140] Thence followed: Rhode Island (seven);[141] North Carolina (five);[142] Connecticut (four);[143] Delaware (four);[144] Maryland (three);[145] New Hampshire (two);[146] South Carolina (two);[147] Georgia (two);[148] and Virginia (one).[149] In two appeals, there is no evidence to establish the identity of the state admiralty court from which the appeals emanated.[150] The circumstance that no cases came from the State of New York must be attributed to the historical incident that, during the period of time which is of present concern, the maritime portions of the state were under military occupation. The occupation ran from the year 1776 to the end of hostilities.[151]

137 Gardner v. The Brig Sea-Horse and Cargo. Appeal from a decree in the Court of Admiralty for New Jersey. March 14, 1780, claimant's letter lodged with the Committee on Appeals. Decided in 1780. Date and judgment not given.

138 From the Maritime Court for the Middle District of Massachusetts Bay (six appeals); the Maritime Court for the Southern District of Massachusetts Bay (two); Superior Court of Judicature, Court of Assize, and General Jail Delivery (two); and, the Maritime Court for the Middle District of the State of Massachuetts Bay held at Salem (one).

139 From the Court of Admiralty for New Jersey (nine appeals); and the Court of Admiralty for the State of New Jersey (one).

140 All appeals came from the Court of Admiralty for the port of Philadelphia, in Pennsylvania.

141 From the Court of Justice for the Trial of Prize Causes for Rhode Island and Providence Plantations (three appeals); the Maritime Court for Rhode Island and Providence Plantations (three); and, the Court of Admiralty for Rhode Island and the Providence Plantations (one).

142 All appeals from the Court of Admiralty for North Carolina.

143 One appeal each from the following: the Maritime Court for New London County; County Court of Fairfield County; County Court for the County of Hartford in Connecticut; and, the Court of Admiralty in Connecticut.

144 All appeals from the Court of Admiralty for Delaware.

145 From the Court of Admiralty of Maryland.

146 One appeal each from the Court Maritime of New Hampshire; and, the Court of Admiralty for New Hampshire.

147 Both appeals from the Court of Admiralty for South Carolina.

148 Both appeals from the Court of Admiralty in Georgia.

149 Appeal from the Court of Admiralty for Virginia.

150 Reference is made to Cases No. 22. The Private Sloop of War Retaliation, and No. 26. The Peggy, of the Davis Compilation of State Admiralty Cases, *supra*, note 135.

151 Occupation of New York began on September 14, 1776. Following actions at

C. *The Court of Appeals in Cases of Capture*

The exercise of appellate judicial function by the legislative body, through the medium of the Committee of Appeals, was superseded on January 24, 1780, by our first federal appellate court[152]—styled, the Court of Appeals in Cases of Capture. Although the Articles of Confederation had delegated to the Continental Congress "the sole and exclusive right of . . . establishing courts for receiving and determining finally appeals in all cases of capture,"[153] congressional procrastination in this direction may well be attributed to the reluctance of exercise of legislative power of judicial establishment until the Articles of Confederation were confirmed by the legislatures of every state. Ten states had transmitted ratification of the Articles by May 5, 1779; and more than three years elapsed before the last of the states, Maryland, assented to the document as so made it the law of the land on March 1, 1781. It is reasonable to suppose that substantial assurance of unanimous adoption prompted the establishment of the precursor of the United States Supreme Court and its concomitant judicial hierarchy.[154]

The initial cause, *Bragg* v. *Sloop Dove,*[155] which came before the newly-established tribunal on May 9, 1780, was an appeal from a decree of the Court of Admiralty for North Carolina. The Court of Appeals in Cases of Capture handed down its last decision in *Cruger* v. *The Captor of the Brig Cumberland,*[156] an appeal from the Court of Admiralty in Connecticut, on May 3, 1787. During the seven year span of existence, this court made adjudications in fifty-two cases.[157]

The highest number of appeals were lodged by Massachusetts, sixteen in number;[158] followed by Connecticut with twelve appeals.[159]

Long Island, at White Plains, and at Fort Washington in Upper Manhattan, the retreat across New Jersey into Pennsylvania secured the focal point of military operations. It was not until November 25, 1784 that reentry was made by the Continentals under Washington and as such designated Evacuation Day.

[152] See text to, and note 133, *supra.*

[153] See text to, and note 131, *supra.*

[154] See note 133, *supra.*

[155] Appeal No. 65, 131 U.S. (Appendix) XLIV (1889).

[156] Appeal No. 109, *ibid.,* XLIX.

[157] This number includes one case reheard—Miller v. The Ship Resolution, &c.; The Same v. The Cargo of the Ship Resolution, &c., 2 U.S. (2 Dall.) 19, Fed. Cas. No. 9588, 1 L. Ed. 271 (1781).

[158] From the Maritime Court in the Middle District of Massachusetts Bay (two appeals); the Maritime Court for the Southern District of Massachusetts Bay (one); the Maritime Court for the Middle District of the Commonwealth of Massachusetts (six); and the Supreme Judicial Court of the Commonwealth of Massachusetts (seven).

[159] From the Maritime Court for New London County (four appeals); the Mari-

The admiralty courts of North Carolina,[160] Rhode Island,[161] Pennsylvania,[162] and New Jersey,[163] forwarded seven, four, four, and three appellate causes respectively. One appeal each from the admiralty courts of New Hampshire,[164] Delaware,[165] Maryland,[166] Virginia,[167] and South Carolina;[168] together with one appeal of which the lower court is not ascertained,[169] round out the business[170] of the Court of Appeals in Cases of Capture.

D. *Reports of Cases of the Court of Appeals in Cases of Capture*

Of the sixty-four formal entry of orders made by the Committees on Appeals none was accompanied by an opinion.[171] Of the fifty-two cases adjudicated by the Court of Appeals in Cases of Capture, forty-four were no opinion decisions. The opinions in the remaining eight cases have been preserved in the second volume of the United States (or Dallas) Reports. All are *per curiam* opinions rendered between the August, 1781 and May, 1787 Sessions of the Court.

In relevant digression, it is to be remarked that A. J. Dallas, the first of the federal reporters, confined his endeavors to those cases which were decided in the courts, national and state, sitting at Philadelphia which at the time was "the seat of the Federal government." This imprint of prescription is borne by the first four volumes of the United States Reports which also constitute the series styled the

time Court for Fairfield County (two); the Admiralty Court for the County of New Haven (one); the Court of Admiralty in Connecticut (one); the County Court of the County of Hartford (two); the County Court of Fairfield County (one); and the County Court of New Haven (one).

160 From the Court of Admiralty for North Carolina (six appeals); and the Court of Admiralty at Beaufort, North Carolina (one).

161 From the Maritime Court for the Trial of Prize Causes in the State of Rhode Island and Providence Plantations (one appeal); The Court of Admiralty for Rhode Island and Providence Plantations (two); and the Court of Admiralty for Rhode Island (one).

162 From the Admiralty Court of Pennsylvania (three appeals of which one was a rehearing, *q.v.* note 157, *supra,* and notes 178 and 179, *infra*; the Court of Admiralty for the Port of Philadelphia, in Pennsylvania (one).

163 The Court of Admiralty for New Jersey.

164 The Maritime Court for the State of New Hampshire.

165 The Court of Admiralty for Delaware.

166 The Court of Admiralty of Maryland.

167 The Court of Admiralty for Virginia.

168 The Court of Admiralty for South Carolina.

169 Luke v. Hulbert, 2 U.S. (2 Dall.) 40, *sub nom.* Lake v. Hulbert, 1 L. Ed. 280 (1784).

170 No appeals were lodged with the Court of Appeals from the Court of Admiralty for Georgia; nor from New York, *q.v.* note 151 and text thereto, *supra.*

171 See title *B. Appeals from State Admiralty Courts, passim, supra.*

"Dallas Reports."[172] Volume one is confined exclusively to Pennsylvania state courts.[173] In the opening pages of volume two (wherein the report of cases of the United States Supreme Court begin) and under the caption "Federal Court of Appeals,"[174] Dallas reported the opinion decisions of the Court of Appeals in Cases of Capture.

The opinion in *Miller et al., libellants and appellants,* v. *The Ship Resolution, and Ingersoll, claimant and appellee* [and] *Miller et al., libellants and appellees,* v. *The Cargo of the Ship Resolution, and O'Brien, claimant, appellant,*[175] is of capital historical significance in that it is the first opinion rendered by a federal tribunal. It antedates the first *per curiam* opinion of the United States Supreme Court, in *West, Plaintiff in error* v. *Barnes et al*[176] by a period of exactly ten years.[177]

The Resolution, hereinabove noted, concerned itself essentially with the legality of captures and condemnation as prize. It was an appeal from the Admiralty Court of Pennsylvania, *Miller* v. *The*

[172] Note on the earliest United States Reports:

1 U.S. (1 Dall.), 1 L. Ed., (1786-90) reports cases in the High Court of Errors and Appeals of Pennsylvania; the Supreme Court of Pennsylvania; the Court of Oyer and Terminer at Philadelphia; and the Court of Common Pleas of Philadelphia County.

2 U.S. (2 Dall.), 1 L. Ed., contains cases of the United States Supreme Court (Feb. Term, 1790 to Aug. Term, 1793); Federal Court of Appeals [i.e. Court of Appeals in Cases of Capture]; the United States Circuit Court for the Pennsylvania District (April, 1792 to April, 1798); the High Court of Errors and Appeals of Pennsylvania; the Supreme Court of Pennsylvania; and the Court of Common Pleas of Philadelphia County.

3 U.S. (3 Dall.), 1 L. Ed., continue the United States Supreme Court cases (Feb. Term, 1794 to Feb. Term 1799); the Circuit Court of the United States, Pennsylvania District (April Term, 1799); and the Supreme Court of Pennsylvania.

4 U.S. (4 Dall) contains reports of the United States Supreme Court cases (Aug. 1799 to Aug. 1800); the Circuit Court of the United States for the Pennsylvania District (Apr. 1796 to Oct. 1806); the High Court of Errors and Appeals of Pennsylvania); the Supreme Court of Pennsylvania; the Mayor's Court of Philadelphia; the Court of Errors and Appeals of Delaware; and the Privy Council (i.e. an appeal from New Hampshire to the Committee of the Privy Council, Deering v. Parker, 4 U.S. (4 Dall.) xxii, 1760).

5 U.S. (1 Cranch) is the first of the United States Reports dedicated exclusively to "Reports of Cases Argued and Adjudged in the Supreme Court of the United States."

[173] See *ibid.,* 1 U.S. (1 Dall.).

[174] Report of cases of the "Federal Court of Appeals" [i.e. Court of Appeals in Cases of Capture], 2 U.S. (2 Dall.) 1-34, 1 L. Ed. 263-281 (1781-1787).

[175] *Sub nom.* The Resolution, 2 U.S. (2 Dall.) 1, 1 L. Ed. 263 (1781).

[176] 2 U.S. (2 Dall.) 401, 1 L. Ed. 432 (1791).

[177] The record of orders of the United States Supreme Court commence with the February Term, 1790. The Court at its February Term, 1790 met in New York "the seat of the Federal government." Beginning with its February Term, 1791, it met at Philadelphia which had become "the seat of the Federal government." *Cf.* text to note 172, *supra.*

Resolution, which is reported in Bee, and Hopkinson.[178] The opinion and judgment of the Court were delivered by Cyrus Griffin, the presiding Commissioner. In a rehearing of the case, *Miller* v. *The Ship Resolution, &c.* [and] *The Same* v. *The Cargo of the Ship Resolution, &c,*[179] the Court stated, "As the original decree has not been carried into execution, we think it proper, under the peculiar circumstances of the present case, to allow a rehearing." The revisionary decree was delivered by William Paca and Cyrus Griffin, the presiding Commissioners. *Darby et al., appellants* v. *The Brig Erstern et al.*[180] came on by appeal from "the admiralty of the state of Massachusetts-bay." The definitive sentence of the Court, involving the seizure and confiscation of a neutral vessel in violation of neutrality, was pronounced by Paca and Griffin, the presiding Commissioners. The case of *Keane et al., libellants and appellants,* v. *The Brig Gloucester et al., appellees,*[181] came on by appeal of *Mahoon* v. *The Gloucester,* from the "Admiralty of Pennsylvania."[182] The definitive sentence concerning the distribution of the proceeds of prize property was delivered by the same presiding Commissioners as in the two preceding cases. *Stoddard, appellant,* v. *Reed, appellee, and the Schooner Squirrel and Cargo*[183] involved interlocutory proceedings in an appeal from a judgment in the Court of Admiralty for Rhode Island. The Court therein ordered that "the schooner, her tackle, apparel and furniture" be sold at public auction before an appearance filed on behalf of the appellee because the prize schooner was "in a perishing condition."[184] The presiding Commissioners, Griffin, Read and Lowell, delivered the judgment in *Bain et al., appellants,* v. *The Schooner Speedwell et al., appellees.*[185] This appeal from "the Admiralty of the

178 Miller v. The Resolution, Bee 404, 3 Hopk. 70, 17 Fed. Cas. 347 No. 9588 (Admiralty Court, Pa. 1781); *aff'd in part* and *rev'd in part* 2 U. S. (2 Dall.) 1, 1 L. Ed. 271 (1781).

179 *Sub nom.* The Resolution, 2 U.S. (2 Dall.) 19, 1 L. Ed. 271 (1781) of the December session.

180 *Sub nom.* The Erstern, 2 U.S. (2 Dall.) 27, 1 L. Ed. 277 (1782) of the January session.

181 *Sub nom.* The Gloucester, 2 U.S. (2 Dall.) 30, 1 L. Ed. 278 (1782) of the January session.

182 Mahoon v. The Gloucester, 3 Hopk. 55, Bee, 395, 2 Pet. Adm. 403, 16 Fed. Cas. 499 No. 8970 (Admiralty Court, Pa. 1780); *aff'd* 2 U.S. (2 Dall.) 30, *ibid.*

183 *Sub nom.* The Squirrel, 2 U.S. (2 Dall.) 32, 1 L. Ed. 280 (1783) of the May session.

184 The report does not indicate the names of the Commissioners who decided the case.

185 *Sub nom.* The Speedwell, 2 U.S. (2 Dall.) 33, 1 L. Ed. 280 (1784) of the May session.

State of Rhode Island" considered the question of condemnation as prize of a vessel captured after the operation of preliminary articles of peace. The case was decided at the May Session of the Court, 1784. The next reported case does not appear until three years later —May Session, 1787. It is *Luke, &c.* v. *Hulbert et al.*[186] which considered a point of appellate procedure. At the same Session of the Court, it considered the rehearing of an appeal from a decree of the Court of Admiralty in the State of South Carolina. The case—*The Owners of the Sloop Chester* v. *The Owners of the Brig Experiment et al.*[187]—with May, Griffin, Read and Lowell, the presiding Commissioners, was the final case of the Court of Appeals in Cases of Capture.

VI. The Close of the Formative Era of American Admiralty Law

The year 1789 should be scored as the most significant one in the history of American admiralty law. Two events transpired—both of these brought to an end the formative period of American admiralty law, colonial and state; and ushered in the advent of a federal admiralty system. The first of these, and in chronological sequence, concerned itself with the judiciary article of the Federal Constitution;[188] the second with the Judiciary Act of 1789.[189]

A. *The Third Article of the Federal Constitution*

As a prelude to the happening of the events aforementioned, history has recorded the fact that the inadequacies of the Articles of Confederation had been recognized by some of the wisest of our statesmen of the post-Revolutionary years. Among the weaknesses which became objects of recognition was the one—pertinent to the thesis of this writing—pointing to the absence of a federal judiciary. Causes which arose under the Articles of Confederation, in reality the law of the land, were triable by state courts which would naturally lean towards the states. The exceptions to total state jurisdiction (i.e., piracy, offences committed on the high seas, the establish-

[186] 2 U.S. (2 Dall.) 33; Lake [*sic*] v. Hulbert, 1 L. Ed. 280 (1787) of the May session.

The case came on by petition; Griffin, Read and Lowell, Commissioners.

[187] *Sub nom.* The Experiment, 2 U.S. (2 Dall.) 34, 1 L. Ed. 250 (1787) of the May session.

[188] U.S. Const. art. III, §§ 1, 2, 3 (effective date, March 4, 1789).

[189] Acts of the First Congress of the United States, First Session, Statute I, Chapter XX "An Act to establish the Judicial Courts of the United States." (Approved, September 24, 1789.)

ment of a court of appeals in prize cases, and disputes between two or more states) provided for in the Articles did not in any manner minimize the inadequacies of the matter. However, with the disappearance of the coalescing pressure of hostilities, the insufficiencies of the Articles of Confederation[190] ripened opinion in the direction of a stronger union.

The harbinger of the Constitution of the United States took the form of a call for a Federal Constitutional Convention[191] at Philadelphia in May of 1787. Of the plans[192] which were then submitted for the organization of a new government—and concerning the judiciary article of each—only one made specific reference to the establishment of a court of admiralty. The Pinckney Plan provided that the Congress "shall have the exclusive right of instituting in each State a Court of Admiralty."[193] The Virginia Plan recited, "a national judiciary shall be established . . . the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance . . . all piracies and felonies on the high seas, captures from an enemy [&c.]."[194] The New Jersey Plan read, "the judiciary so established shall have authority to hear and determine . . . by way of appeal, in the *dernier resort* . . . in all cases of captures from an enemy, in all cases of piracies and felonies on the high seas [&c.]."[195] The development of these various and several proposals by the Committee of Detail culminated in the framing of the judiciary article of the Federal Constitution.[196]

However, a federal judiciary did not become operative until

[190] Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. "Done at Philadelphia, in the State of Pennsylvania, on the 9th day of July, in the year of our Lord 1778, and in the third year of the Independence of America."

[191] May 14, 1787.

[192] The "Virginia Plan" submitted by Governor Randolph of Virginia on May 29, 1787; the "Pinckney Plan" submitted by Charles Pinckney of South Carolina on May 29, 1787; and the "New Jersey Plan" the resolutions of which were reported by Governor Patterson on June 15, 1787. See TOWLE, A HISTORY AND ANALYSIS OF THE CONSTITUTION OF THE UNITED STATES (Boston 1871); BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES (New York 1882); JAMESON, ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN ITS FORMATIVE PERIOD, 1775-1789 (Boston 1889), *passim*.

[193] Article X. 3 FERRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 608 (4 vols., New Haven 1911-1937).

[194] Article IX. 1 Id. at 21.

[195] Resolution V. Id. at 224.

[196] Note 188, *supra*.

ratification of the Constitution by nine states.[197] The Congress, on September 28, 1787 ordered the instrument sent to the legislatures of the respective states in order to be submitted to a convention of delegates chosen by the people thereof. Three of the states, Delaware, Pennsylvania and New Jersey forwarded ratification in the same year as submission;[198] and six states, Georgia, Connecticut, Massachusetts, Maryland, South Carolina and New Hampshire,[199] followed in the ensuing year.[200]

Hence, with "the ratification of the conventions of nine states"[201] the Constitution of the United States was established and became operative on the first Wednesday[202] of the month of March of the year 1789. Accordingly, the most salient page in American admiralty law had been written in the words: "The judicial power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction[203] . . . ."[204]

B. *The Judiciary Act of 1789*

The final phase in the formative era of American admiralty law had its beginning on the same day the Federal Constitution came into

[197] U.S. Const. art. VII:—The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

[198] Delaware (December 7, 1787); Pennsylvania (December 12, 1787); New Jersey (December 18, 1787).

[199] Georgia (January 2, 1788); Connecticut (January 9, 1788); Massachusetts (February 6, 1788); Maryland (April 28, 1788); South Carolina (May 23, 1788); and the ninth state, New Hampshire (June 21, 1788).

[200] Two states, Virginia (on June 26, 1788) and New York (on July 26, 1788) ratified in the interim between requisite approval (June 21, 1788) and operative time (March 4, 1789).

Two states submitted ratification after the Constitution had gone into effect; North Carolina (November 21, 1789) and Rhode Island (May 29, 1790).

[201] U.S. Const. art. VII; note 197, *supra.*

[202] March 4, 1789.

[203] Note on the terms *admiralty* and *maritime* as constitutional nomenclature: These terms are not synonymous and each has its appropriate use. Both terms belong to the law of nations as well as to domestic law. A court of admiralty is a court of the law of nations and derives, in part, its jurisdiction from that law. The Federal Constitution, therefore, refers to the law of nations for the meaning of these terms, or constituting a part of the national law. The object of the framers of the Constitution was to make the judicial co-extensive with the legislative power. The regulation and government of maritime commerce is given to the legislature, and by taking the word *maritime* in this clause of the Constitution, in its usual and natural sense, the judicial power is made co-extensive with that of the legislature. See the observations of Mr. Justice Ware in The Huntress, 12 Fed. Cas. 984, at 989 No. 6914 (D.C. Me. 1840); also, Cunningham et al. v. Hall, 6 Fed. Cas. 967, 970 No. 3481 (C.C. Mass. 1858); New England Mutual Marine Ins. Co. v. Dunham, 18 Fed. Cas. 66, 68 No. 10155 (C.C. Mass. 1871).

[204] U.S. Const. art. III, § 2, cl. 1.

operation. For on March 4, 1789 the Congress convened for its first session,[205] held at the City of New York, and continued until September 29, following.

The statutory implementation of the constitutional grant to Congress respecting the vesting of federal judicial powers in one Supreme Court "and in such inferior courts as the Congress may from time to time, ordain and establish,"[206] took shape, on September 24, 1789, as Chapter XX of the Acts of the First Congress.[207] As such it bears the title: "An Act to establish the Judicial Courts of the United States."

Section 2 of the Act made provision for the division of the federal union into thirteen districts. Although the number of districts provided for corresponded to the number of colonies and superseding states, it is to be remarked that neither a North Carolina nor a Rhode Island District was created. To the remaining eleven original states there was added a "Kentucky District"[208] and a "Maine District."[209]

205 The First Congress: George Washington, President; John Adams, Vice President and President of the Senate; and Frederick Augustus Muhlenberg, Speaker of the House of Representatives.

206 U.S. CONST. art: III, § 1, cl. 1.

207 First Congress, Stat. I, sess. 1, c. XX (September 24, 1789). And see the earliest congressional declarations establishing the jurisdiction and powers of the United States District Courts: Act of March 3, 1793; Act of March 5, 1794; Act of May 10, 1800; Act of December 31, 1814; Act of April 16, 1816; Act of April 20, 1818; and Act of May 15, 1820.

208 "One [district] to consist of the remaining part of Virginia, and to be called the Kentucky District."

North Carolina did not ratify the Constitution until November 21, 1789 some nine months after its operative date. However, on June 4, 1790 Congress passed "An Act for giving effect to an Act intituled 'An Act to establish the Judicial Courts of the United States' within the State of North Carolina" wherein it was provided that the Judiciary Act of 1789 "shall have the like force and effect within the State of North Carolina, as elsewhere within the United States . . . to be called North Carolina District."—First Congress, Stat. II, sess. II, c. XVII (approved June 4, 1790).

209 "One [district] to consist of that part of the State of Massachusets which lies easterly of the State of New Hampshire and to be called Maine District."

The "State of Rhode Island and Providence Plantations" did not assent to the Constitution until some fourteen months after it had gone into effect. By convention of May 29, 1790 ratification was given.

An act of June 14, 1790 had declared that the "act for laying a duty on goods, wares and merchandise imported into the United States" [Act of July 4, 1789, c. 2; Act of July 20, 1789, c. 3] was in force as to the "state of Rhode Island and Providence Plantations."—First Congress, Stat. II, sess. II, c. XIX, (approved, June 14, 1790).

Some days thereafter, the Congress passed "An Act for giving effect to an act intituled 'An Act to establish the Judicial Courts of the United States,' within the State of Rhode Island and Providence Plantations" wherein it was declared that the Judiciary Act of 1789 "shall have the like force and effect, within the State of Rhode Island and Providence Plantations as elsewhere in the United States . . . that the said state shall be one district to be called Rhode Island district. . . ."—First Congress, Stat. II, sess. II, c. XXI, (approved, March 23, 1790).

The section which followed created the United States District Courts, one for each of the federal districts[210] hereinbefore created. The court was to be called a "District Court" to consist of one judge called a "District Judge" who "shall hold annually four sessions."[211]

The ninth section of the Act is of signal significance for the matter under inquiry. This section provided, *inter alia,* that "the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States committed . . . upon the high seas."[212] Original cognizance was given to "all seizures under laws of impost, navigation or trade of the United States" as well as "all suits for penalties and forfeitures incurred, under the laws of the United States."

By the language "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it,"[213] the statutory exception to the exclusive jurisdiction in admiralty conferred on the District Courts of the United States was enunciated.

And thence on to the most important inscription on the cornerstone of the edifice of American admiralty law that the District Courts of the United States "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction."[214]

The last page of the formative era of American admiralty law had been written. The succeeding pages open the era of growth of admiralty law in the United States as a single system of jurisprudence

[210] Section four provided that the "before mentioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit . . . and that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum."—First Congress, Stat. I, sess. I, c. XX, § 4 (1789).

[211] *Cf.,* the Hilary, Easter, Trinity, and Michaelmas Terms of the law year of England.

[212] "Where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term not exceeding six months, is to be inflicted."

[213] The so-called saving clause. *Cf.* Act of June 25, 1948, note 4, *supra,* "The district court shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." The remaining portion of the section confers original jurisdiction in prize cases, i.e., "any prize brought into the United States and all proceedings for the condemnation of property taken as prize." (June 25, 1948, ch. 646, § 1, 62 Stat. 931; May 24, 1949, ch. 139, § 79, 63 Stat. 101.)

[214] First Congress, Stat. I, sess. I, c. XX, § 9 (1789). *Cf.* Act of June 25, 1948, note 4, *supra,* cl. 1.

operating with general uniformity throughout the nation, adhering to its own precedents and unaffected by local decisions and enactments and having its own court ond procedure.[215] Affirmation by judicial pronouncement came early in the history of the United States Supreme Court. And this, rather significantly in the very first admiralty case to come before that tribunal—*Glass et al., appellants,* v. *The Sloop Betsey et al.*[216]—which posed the problem of the powers of the United States District Courts as courts of admiralty. The unanimous opinion, *inter alia,* declared: "The judges being decidedly of opinion, that every district court in the United States possesses all the powers of a court of admiralty, whether considered as an instance or as a prize court, and that the plea . . . to the jurisdiction of the district court of Maryland, is insufficient: therefore, it is considered by the supreme court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby overruled and dismissed, and that the decree of the said district court of Maryland, founded thereon, be and the same is hereby revoked, reversed and annulled."[217] Thus spoke Chief Justice Jay.

[215] In a leading admiralty case, the United States Supreme Court, speaking through Mr. Justice Bradley, said: "That we have a maritime law of our own, operative throughout the United States cannot be doubted. . . . One thing however is unquestionable; the Constitution [*i.e.,* the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction] must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."—The Lottawanna, 88 U.S. (21 Wall.) 555 at 574-575; *sub nom.* Rodd v. Heartt, 22 L. Ed. 654, 662 (1874); *s.c.* 84 U.S. (17 Wall.) 354, 21 L. Ed. 627 (1872).

[216] *Sub nom. The Betsey,* 3 U.S. (3 Dall.) 6, 1 L. Ed. 485 (1794).

The commander of a privateer having captured the sloop Betsey, as prize on the high seas, sent the vessel into Baltimore. The owners of the sloop and her cargo filed a libel for restitution in the District Court of Maryland upon the allegation that both vessel and cargo belonged to the subjects of neutral powers. The decree of the District Court allowing the captor's plea to the jurisdiction of the court was affirmed by the Circuit Court whereupon appeal to the Supreme Court was prosecuted.

[217] Id. at 15.