FEDERAL COURTS PRIOR TO THE ADOPTION OF THE CONSTITUTION.

I. *COURTS OF APPEAL IN PRIZE CASES.*

The idea of a Federal Court, with a jurisdiction coextensive with the limits of what were then the United Colonies and Provinces of Great Britain in North America, originated with Washington some months before Congress put off British rule. On the 11th of November, 1775, he wrote from Cambridge, in Massachusetts, to the President of Congress, enclosing a copy of an act then just passed by the Council and House of Representatives of that Province[1] for the establishment of a Prize Court, and he added: "Should not a court be established by authority of Congress, to take cognizance of prizes made by the Continental vessels? Whatever the mode is which they are pleased to adopt, there is an absolute necessity of its being speedily determined on."

This letter was communicated to Congress on Friday, the 17th day of the same November, whereupon it was "*Resolved*, That a committee of seven be appointed to take into consideration so much of the General's letter as relates to the disposal of such vessels and cargoes belonging to the enemy, as shall fall into the hands of, or be taken by, the inhabitants of the United Colonies." A committee was chosen, consisting of Mr. George Wythe of Virginia, Mr. Edward Rutledge of South Carolina, Mr. John Adams of Massachusetts, Mr. William Livingston of New Jersey, Dr. Franklin and Mr. James Wilson of Pennsylvania, and Mr. Thomas Johnson of Maryland.

Again, on the 4th of December, 1775, Washington, not having heard of this action of Congress, wrote to its President as follows: "It is some time since I recommended to the Congress that they would institute a court for the trial of prizes made by the Continental armed vessels, which I hope they have ere now taken into

[1] This act is remarkable as having been the first which was passed by any of the colonies for fitting out vessels of marque and reprisal, and for establishing a court to try and condemn the captured vessels of the enemy. 3 Sparks' Washington, 154. See also 1 Curtis' Hist. Constitution, 75–77.

their consideration; otherwise I should again take the liberty of urging it in the most pressing manner."

On the 23d of November, 1775, the committee to whom his letter of November 11th was referred brought in their report. After hearing it read, Congress "ordered that the same lie on the table for the perusal of the members." It was "debated by paragraphs" on the 24th and the 25th, and the resolutions which accompanied it were adopted on the latter date. They authorized the capture of prizes on the high seas; legalized those already made; settled a rate of distribution of prize money (a settlement which was afterwards modified); provided that suits for condemnation should be commenced in the first instance in Colonial courts, and, further, contained the following section respecting appeals:

"6. That in all cases an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the Secretary of Congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect; and in case of the death of the Secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof."

When Washington learned of this action he wrote to the President of Congress (December 14, 1775): "The resolves relating to captures made by Continental armed vessels only want a court established for trial to make them complete. This I hope will soon be done, as I have taken the liberty to urge it often to the Congress."

The Colonies and States responded very generally to the suggestion of Congress that they should organize courts for this purpose; but they did it with jealous reservations. The collection of statutes in the library of Congress enables us to get a general outline of this legislation.

In New Hampshire the statute was passed on the 3d of July, 1776, which is set forth at length in *Penhallow* v. *Doane*, 3 Dall. pp. 57–59. In it the right of appeal to Congress was limited to cases in which the capture was made by an armed vessel, fitted out at the charge of the United Colonies; and in 1779 it was further limited to cases in which the claim should be made by a subject of a foreign government in amity with the United States.

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In Massachusetts the State was divided into three districts, in each of which a court was established by the statute which Washington sent to Congress. (Act of November 1, 1875, 5 Acts and Resolutions of the Province of Massachusetts Bay, 436.) Boston, being occupied by the enemy, was not included in this division. On the 13th of April, 1776, (Id. 474, 477,) Boston having come into Federal possession, the districts were re-organized, and an appeal was given to Congress in cases of vessels captured by vessels fitted out at the charge of the United Colonies. On the 29th April, 1778, provision was made for a trial by jury in all cases. (Id. 806.) On the 30th of June, 1779, the right of appeal was extended to all cases of maritime capture. (Id. 1077.) This was declared to be done in consequence of the resolution of Congress of March 6, 1779 (which will be found on pages xxxii–xxxiii, *infra*): "the reasons upon which the said resolves are founded appearing to this court, in many instances, to arise out of the greatest political convenience and necessity."

In Rhode Island a Maritime Court was established in January, 1776. The act was amended in October, 1776. On the 9th of May, 1780, it was replaced by a Court of Admiralty, and the right of appeal to Congress was curtailed.

In Connecticut County Maritime Courts were created in the counties bordering upon Long Island Sound. In New York the maritime counties being occupied by the enemy after the summer of 1776, there was no necessity for a court.

New Jersey passed an act to establish a Court of Admiralty on the 5th day of October, 1776. In 1778 an act was passed continuing this court. In 1781 a general statute was enacted to regulate and establish Courts of Admiralty, which was amended in 1782, and repealed in 1799.

A Court of Admiralty for the port of Philadelphia was created by the legislature of Pennsylvania by the act of September 9, 1778. In this act it was provided that "the finding of a jury shall establish the facts without re-examination or appeal." On the 8th of March, 1780, a further act was passed which repealed this clause.

In Delaware such a court must have been established before May 20, 1778, as on that day an act was passed recognizing it as an existing court, and conferring upon it additional jurisdiction over stranded vessels.

In Maryland an Admiralty Court existed under a Colonial law of

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1763. The convention responded to the call of Congress, May 25, 1776, by an ordinance giving the desired jurisdiction, providing for trial by jury, and giving an appeal to Congress in all cases. There does not appear to have been any further legislation on the subject, except that a statute of November, 1779, settled the fees of the officers of the court.

Virginia, by an act entitled "An ordinance for establishing a mode of punishment for the enemies to America in this Colony," created a Court of Commissioners in Admiralty in December, 1775. In October, 1776, this was replaced, so far as prizes were concerned, by a Court of Admiralty, organized under a statute which provided for the supremacy of the laws of Congress and for an appeal to any appellate court which might be created by Congress. In 1779 this right of appeal was taken away when the controversy should be between two citizens of the State.

In North Carolina the legislature passed the act of 1777, c. 16, "to empower the Court of Admiralty of this State to have jurisdiction in all cases of capture of the ships and other vessels of the inhabitants and subjects of Great Britain, and to establish the trial by jury in said court in cases of capture." This act remained in force until the adoption of the Constitution.

South Carolina created a Court of Admiralty on the 11th of April, 1776, and reconstructed it February 13, 1777, giving a right of appeal to Congress. Georgia, on the 16th of September of the same year, passed an act entitled, "An act regulating captures and seizures made in this State or on the high seas under and by virtue of the resolves and regulations of Congress." Under this act a Court of Admiralty was instituted.

In nearly all these States the right of trial by jury was reserved in prize cases. We shall see later that this caused trouble.

The purpose of Congress to take only appellate jurisdiction was apparently misunderstood in the beginning. The first two applications to it, one by a Mr. Barbain, on the 31st of January, the other relating to the brigantine Nancy and her cargo, on the 27th of February, 1776, prayed for the exercise of its original jurisdiction; but in each case Congress referred the applicant to the Colonial courts. On the 4th of the next April, however, it did undertake to regulate the sale of a prize vessel which had been run ashore within the county of Burlington, and the disposition of the proceeds arising from the sale. The vessel was the sloop Sally, James McKnight,

prize master. The sale took place as ordered; but, on the 22d of the following month, Congress repealed its resolution of April 4th, alleging that McKnight had proceeded in the sale contrary to the mode prescribed, and without authority from Congress. After that time it only exercised an appellate jurisdiction through committees, sometimes styled commissioners, and abandoned even this when it established an appellate court.

The case of the *Schooner Thistle*, the first appellate case under the new law, came before it on the 5th of August, 1776. Congress attempted to hear the appeal itself, but eventually referred it to a special committee, whose report, reversing the condemnation, was received and approved September 25th, 1776. The next three cases, *The Elizabeth*, *The Charming Peggy* and *The Betsey*, Nos. 2, 3 and 4 in the accompanying list, were referred to special committees, the same gentlemen being chosen as members in each case. Then came a case, *Hopkins* v. *Derby*, No. 6, which was referred to "the Committee on Appeals," without naming any members. Then followed two others, Nos 7 and 8, which were referred to the same special committee, naming them; but by this time (January 4, and January 11, 1777) it had apparently become necessary to substitute two new members in the place of those who had been formerly named. This brings events up to the appointment of a standing Committee on Appeals.

Under date of January 30th, 1777, the Journal of the Continental Congress contains this entry: "*Resolved*, That a standing committee, to consist of five members, be appointed to hear and determine upon appeals brought against sentences passed on libels in the Courts of Admiralty in the respective States, agreeable to the resolutions of Congress; and that the several appeals, when lodged with the secretary, be by him delivered to them for their final determination." The members then selected and chosen for this duty were Mr. James Wilson of Pennsylvania, Mr. Jonathan D. Sergeant of New Jersey, Mr. William Ellery of Rhode Island, Mr. Samuel Chase of Maryland and Mr. Roger Sherman of Connecticut.

On the 8th day of the following May this committee was formally discharged, because it had been represented that it was too numerous; and it was "*Resolved*, That a new committee of five be appointed, they or any three of them to hear and determine upon appeals brought to Congress." Congress chose as this committee Mr. Wilson and Mr. Sergeant, as before, Mr. James Duane of New

York, Mr. John Adams of Massachusetts, and Mr. Thomas Burke of North Carolina. On the 12th of that month, this committee was "authorized to appoint a register to attend said committee" and apparently soon made the appointment. Again, on the 13th of the following October, "a number of the members of the committee being absent," it was "*Resolved*, That a new committee, to consist of five members, be appointed, and that they, or any three of them, be empowered to hear and finally determine upon appeals brought to Congress." Mr. John Adams, Mr. Joseph Jones of Virginia, Mr. Richard Law of Connecticut, Mr. Henry Marchant of Rhode Island and Mr. Henry Laurens of South Carolina, (who was at that time the President of Congress,) were chosen as the new committee.

On the 17th of November, 1777, Mr. John Harvie of Virginia, Mr. Francis Dana of Massachusetts and Mr. Ellery of Rhode Island were elected as members of the committee in place of the President, Mr. Adams, and Mr. Marchant; and on the 10th day of the following December Mr. Benjamin Rumsey of Maryland was chosen as another member.

On the 17th of February, 1778, Mr. Thomas McKean of Delaware, Mr. Samuel Huntington of Connecticut, Mr. John Henry, Junior, of Maryland and Mr. James Smith of Pennsylvania were added to the committee.

On the 27th of July, 1778, it was "*Resolved*, That three members be added to the committee for hearing and determining appeals and that any three of said committee be empowered to hear and finally determine appeals to Congress from the judgments of Courts of Admiralty." Mr. Joseph Reed of Pennsylvania, Mr. William Drayton of South Carolina, and Mr. Elias Boudinot of New Jersey were duly elected as such new members. It further appears by the same record that, notwithstanding the numerous recruits brought into the committee by the various elections, Congress had been informed that but two members were then present, and that sundry causes were then ready for trial.

On the 23d of September, 1778, Mr. John Matthews of South Carolina and Mr. Marchant of Rhode Island were added to the committee, and on the 26th of the following October Mr. Oliver Ellsworth of Connecticut was made a member.

On the 9th of March, 1779, the record again says that the committee is reduced to three — Messrs. Drayton, Ellery and Henry —

and Mr. Jesse Root of Connecticut and Mr. William Paca of Maryland were accordingly chosen to complete it.

On the 29th of July, 1779, Mr. Marchant (again) and Mr. Edmund Randolph of Virginia were elected members in the places of Mr. Ellery and Mr. Paca, who were said to be absent. On the 27th of the next month Mr. Paca was again elected a member in the place of Mr. Randolph, who was said to be absent. On the 7th of December, 1779, Mr. Ezra L'Hommedieu of New York and Mr. Ellery were chosen to be members in the places of Mr. Marchant and of Mr. Root; and on the 5th of January, 1780, Mr. Ellsworth was again elected as a member, in the place of Mr. Paca, who was absent.

These frequent changes in a body entrusted with judicial powers could not but prove injurious to the interests of suitors. They certainly vindicate the wisdom of Washington in urging Congress to complete its work by instituting a regular court. They also seem to show that the committee was well supplied with work, and sometimes failed to secure the requisite quorum for doing it. The time had now come when the whole subject was to be taken out of Congress and sent to a court for judicial determination.

As early as Tuesday, the 5th of August, 1777, it was "*Resolved*, That Thursday next be assigned to take into consideration the propriety of establishing the Court of Appeals." When Thursday came the matter was postponed, and it was not until January 15th, 1780, that Congress, "*Resolved*, That a court be established for the trial of all appeals from the Courts of Admiralty in these United States, in cases of capture, to consist of three judges appointed and commissioned by Congress, either two of whom, in the absence of the other, to hold the said court for the despatch of business; that the said court appoint their own register; that the trials therein be according to the usage of nations, and not by jury;" and "that the said judges hold their first session as soon as may be at Philadelphia, and afterwards at such times and places as they shall judge most conducive to the public good, so that they do not at any time sit further eastward than Hartford in Connecticut, or southward than Williamsburg in Virginia." Mr. George Wythe of Virginia, Mr. William Paca of Maryland, and Mr. Titus Hosmer of Connecticut were elected as judges January 22d, 1780. A letter was read in Congress March 13th, 1780, from Mr. Wythe, declining the office, and Mr. Cyrus Griffin of Virginia was thereupon

elected in his place, April 28, 1780. Mr. Paca accepted on the 9th of February, and Mr. Hosmer and Mr. Griffin on the 4th of May, 1780. The great delay in creating the court probably arose from the reluctance of Congress to take such power to itself until the ratification of the Articles of Confederation should be substantially assured; which was done, as already seen, before the passage of this resolution.

The resolution of January 15th, 1780, creating the court, made no general provision for the transfer of cases to it. On the 9th of May, an appeal being brought before Congress, (No. 65 on the list,) it was referred to the new court, and on the 24th of that month Congress resolved "that the stile of the Court of Appeals appointed by Congress be 'the Court of Appeals in cases of capture;'" "that appeals from the Courts of Admiralty in the respective States be, as heretofore, demanded within five days after definitive sentence, and in future such appeals be lodged with the register of the Court of Appeals in cases of capture within forty days thereafter;" and "that all matters respecting appeals in cases of capture now depending before Congress, or the Commissioners of Appeals, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law; and that all papers touching appeals in cases of capture lodged in the office of the Secretary of Congress, be delivered to and lodged with the register of the Court of Appeals."

Simultaneously with this, an appeal, presented that day to Congress, (No. 67 on the list,) was ordered referred to the court; and after that time I cannot find that any appeal, that had been properly taken, reached the court through the action of Congress. That body acted in a few cases, but only to give the court a jurisdiction which it could not have taken under the general law.

Mr. Hosmer died in office on the 4th of August, 1780. On the 21st of November, 1782, Mr. Paca resigned, having been elected Governor of Maryland. At an election held on the 5th of December, 1782, Mr. George Read of Delaware was elected by Congress in the place of Mr. Paca, and Mr. John Lowell of Massachusetts in the place of Mr. Hosmer; and, on the 15th of that month, lots were drawn in Congress for precedence, with a result in favor of Mr. Read.

In view of the provision in the Articles of Confederation that "no member of Congress shall be appointed a judge of any of said

courts," it may be noted that Mr. Read and Mr. Lowell, the only judges elected after the ratification of the Articles by all the States, were members of Congress when elected. Congress thus construed that instrument as meaning only that no person could act in both capacities at the same time.

On the 23d of December, 1784, Congress being then in session at Trenton, in New Jersey, Mr. Griffin and Mr. Lowell addressed to its President the following letter:

"TRENTON, *Dec.* 23*d*, 1784.

"SIR: We had the Honour, immediately after our last sitting, to inform Congress by a letter directed to the President, that all the Causes which had been brought before the Court of Appeals were determined, and altho' some motions had been made for Rehearings, they had not been admitted. Since that Time no further applications have been made to us; of this we also think it our Duty to inform Congress, that they may take such order concerning the Court as they may think proper.

"We have the Honour to be, with great Respect, your Excellency's Most obedient Servants,

"C. GRIFFIN.
"J. LOWELL.

"His Excellency, the President of Congress."

This letter was referred to a committee, and on the 1st of July, 1785, the committee, consisting of Mr. Pinckney, Mr. R. R. Livingston, Mr. King, Mr. Monroe, and Mr. Johnson, reported "that in their opinion the present Judges of the Court of Appeals are still in commission, and that it will be necessary that the Court of Appeals should remain upon its present establishment, except with respect to the salaries of the judges, which should cease from the —— day of ——, and that in lieu thereof they shall be entitled to —— dollars per day during the time they shall attend the sitting of the courts, and including the time they shall be necessarily employed in travelling to and from said courts."

"A motion was made by Mr. King, seconded by Mr. Smith, to postpone the consideration of the report, to take up the following: That the commission of the judges of the Court of Appeals be vacated and annulled: and that in all cases which have been

decided by the Court of Appeals, upon application to Congress, within ——, for a rehearing or new trial, the same shall be granted where justice and right may require it." This being lost, the report was recommitted, and, immediately following, the Journal reads: "On motion of Mr. Smith, seconded by Mr. Ramsay, *Resolved*, That the salaries of the Judges of the Court of Appeals shall henceforth cease."

Mr. Griffin apparently remonstrated against this: for, on the 9th of February, 1786, the first entry in the Journal reads: "On the report of a committee, consisting of Mr. Pinckney, Mr. King, Mr. Johnson, Mr. Grayson, and Mr. Hindman, to whom was referred a letter from Cyrus Griffin, Esq., *Resolved*, That Congress are fully impressed with a sense of the ability, fidelity and attention of the judges of the Court of Appeals in the discharge of the duties of their office; but that, as the war was at an end, and the business of that court in a great measure done away, an attention to the interests of their constituents made it necessary that the salaries of the said judges should cease."

After that the Journals of Congress show but two entries respecting the court. On the 27th June, 1786, on the report of a committee "to whom were referred several memorials and petitions from persons claiming vessels in the Courts of Admiralty in some of the States, praying for hearings and rehearings before the Court of Appeals, *Resolved*, That the judges of the Court of Appeals be, and hereby are, authorized and directed, in every cause which has been or may be brought before them, to sustain appeals and grant rehearings or new trials of the same wherever justice and right may in their opinion require it."

After a provision respecting suspense of execution, and one respecting a *per diem* pay to the judges while holding court and travelling, it was further "*Resolved*, That the said court assemble at the city of New York on the first Monday of November next, for the despatch of such business as may then and there be before them; and that the Secretary of Congress take order for publishing these resolutions for the information of all persons concerned."

The last entry in the Journals of Congress relating to this court is on the 24th July, 1786, empowering it to hear an appeal against a decree in the Court of Admiralty of South Carolina, condemning the sloop Chester. Soon after this the judges appeared in other capacities; and it would seem, from some cases reported in the 1st

of Dallas, that the appellate courts of the States gradually resumed jurisdiction over all such appeals. On the 20th November, 1787, Mr. Griffin presented his credentials as a member of Congress from Virginia, and on the 22d January, 1788, (the first meeting thereafter with a quorum of States,) was elected President of that body. Mr. Lowell, on the 11th of November, 1784, was appointed by Massachusetts a commissioner to represent it in Federal proceedings to adjudicate upon rival claims of Massachusetts and New York to certain territory, and he appears to have been occupied with this from time to time until October 8, 1787, when an amicable settlement was reported to Congress. Mr. Read was named as a member of the court to settle the controversy between New York and Massachusetts, which appointment did not take effect, as the controversy was settled amicably. He was a member of the Convention at Annapolis in 1786, and of the Convention which framed the Constitution. All three judges, however, met in New York in 1787, as appears by the reports of the cases, *Luke* v. *Hulbert* and *The Experiment*, in 2 Dall. 40 and 41, and by original opinions and decrees bearing their signatures on file in the office of the Clerk of this court.

The weak point of this whole judicial system was this: that it necessarily depended upon state officers to enforce the judgment of the appellate tribunal when it reversed the decree of a state court. State courts refused to enforce the rights of property acquired under Federal decrees. *Doane* v. *Penhallow*, 1 Dall. 218. How powerless the appellate court was left may be seen by examining the facts respecting the Susannah, captured by the McClary, reported in *Penhallow* v. *Doane*, 3 Dall. 54; and by the following report of the proceedings in regard to the sloop Active, gathered partly from the Journal of Congress, partly from the original archives in the custody of the Clerk of this court, and partly from *United States* v. *Peters*, 5 Cranch, 115.

In the Admiralty Court of Pennsylvania the Active and cargo were libelled at the instance of Thomas Houston, libellant; Gideon Olmstead and others appearing as claimants. A trial was had by jury, whose verdict was as follows: "One-fourth of the net proceeds of the sloop Active and her cargo to the first claimants; three-fourths of the net proceeds of the said sloop and her cargo to the libellant and the second claimant as per agreement between them." Judgment was entered on the verdict, from which an appeal was taken by Olmstead and others to the Committee on Appeals.

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On the 15th of December, 1778, the Committee, in a decree in which they style themselves "Commissioners," reversed the judgment, and directed the court below to issue process commanding the marshal to sell the sloop and her cargo, and to pay the residue remaining after payment of costs, charges and expenses to the appellants. On the 3d January, 1779, they received the following letter from General Benedict Arnold, commanding in Philadelphia, (evidently dated by mistake January 3, 1778:)

"PHILADELPHIA, 3*d Jan'y*, 1778.

"GENTLEMEN: Such are the extraordinary and unprecedented attempts of the Judge and Court of Admiralty for this State and the appellees in the case of the prize sloop Active and cargo to baffle the attempt of the Court of Appeals to do justice and to prevent your determination from taking effect, that while the matter is under consideration in the Superior Court the judge is about getting possession of the money with the avowed and declared purpose of standing out obstinately against any orders that may be given. He has issued his orders to the Marshal to deliver the amount of sales to him, which is to be done by appointment at nine o'clock to-morrow morning, and positively declares that no order of the Court of Appeals shall take it out of his hands or be obeyed. Also from some other matters just come to my knowledge there is reason to fear that much trouble will ensue unless some steps can be fallen upon to stop the case from falling into his hands. Such a daring attempt as this to evade the Justice of the Superior Court at a time too when the matter is under consideration, will, I doubt not, apologize for my troubling you with a request to meet this evening at such time and place as you may think proper in order to determine upon what process shall issue at so early an hour to-morrow morning as will tend to the carrying into execution the decree above.

"This I have wrote by the advice of the claimants' counsel and hope you will think the necessity of the case a justification.

"I am with great respect and esteem, gentlemen,

"Your most obed't humble serv't, B. ARNOLD.

"P. S. I am informed from good authority that a member of *the* Assembly has applied to get the money paid into his hands, and if he should succeed in this it will probably be paid into the Treasury, and the claimants will have the whole State to contend with in their own government.

"The Hon'ble, the Court of Appeals."

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On the morning of the 4th of January Andrew Robeson the register of the Court of Admiralty of Pennsylvania, appeared before the commissioners and deposed "that he, as register aforesaid, received notice from the judge of the said court, by the marshal of said court, to attend at the chambers of the said judge at nine o'clock this morning for the purpose of making a minute or record of the said marshal's having paid into the said court the moneys arising from the sale of the cargo of the sloop Active, lately libelled against in the said court by Thomas Houston, etc."

Thereupon the commissioners issued an order of injunction against the marshal of that court, in which, after reciting the proceedings in the court below, the appeal, and the reversal, they said, "and whereas a copy of the decree of this court hath been regularly transmitted to the judge of the said Court of Admiralty, and by a certified copy of the proceedings of the said court since receiving the said decree it appeareth manifestly to this court that the said judge hath refused to pay obedience to the said decree, and did, on the twenty-eighth day of December last, issue process returnable on the seventh day of January instant commanding you, as marshal of the said Court of Admiralty, to make sale of the said sloop, her cargo, etc., and, after deducting the cost and charges aforesaid, to lodge the residue of the monies arising from the said sale in the court aforesaid, ready to abide the further order of the said court; and whereas, on the twenty-eighth day of December aforesaid, a motion was made in this court for a writ to issue to the said marshal, commanding him to execute the decree of this court, and further argument on the said motion was appointed to be heard at five o'clock this evening; and whereas it is testified to this court, on oath, that this day at nine o'clock in the forenoon, is, by special order of the said judge, appointed for you to lodge the monies arising from the said sale in the said court, whereby the writ, upon the motion aforesaid, if this court shall think proper to issue such, will be eluded; these are therefore to command and firmly enjoin you to detain and keep in your hand and custody the whole of the monies arising from the said sale of the said sloop and her cargo, etc., saving and excepting the costs and charges aforesaid until the further order of this court be made known unto you, as you will answer the contrary at your peril. Given at Philadelphia, in the State of Pennsylvania, the fourth day of January, in the year of our Lord one thousand seven hundred and seventy-nine."

This paper being duly served, the marshal on the same day made return as follows: "In obedience to a writ under the hand and seal of the Honorable George Ross, Esquire, judge of the Court of Admiralty for the State of Pennsylvania, I have deposited in the said court the monies arising from the sale of the cargo of the sloop Active, within mentioned. The said sloop being yet unsold, no monies have come into my hands on account of her."

"Whereupon the court declared and ordered to be entered upon record, that, as the judge and marshal of the Court of Admiralty of the State of Pennsylvania had absolutely and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them were and was bound to pay obedience, this court, being unwilling to enter upon any proceedings for contempt lest consequences might ensue at this juncture dangerous to the public peace of the United States, will not proceed farther in this affair, nor hear any appeal, until the authority of this court shall be so settled as to give full efficacy to their decrees and process."

"*Ordered*, That the Register do prepare a statement of the proceedings had upon the decree of this court in the case of the sloop Active, in order that the Commissioners may lay the same before Congress."

Congress referred this statement, when presented, to a committee consisting of Mr. Floyd, Mr. Ellery, and Mr. Burke, who reported, March 6, 1779, that the judge of the Court of Admiralty had refused to obey the mandate of the committee because the Pennsylvania act organizing the court "had declared that the finding of a jury shall establish the facts in all trials in the Courts of Admiralty, without re-examination or appeal, and that an appeal was permitted only from the decree of the judge." On the recommendation of the committee Congress thereupon passed the following resolutions, Pennsylvania only objecting:

"*Resolved*, That Congress, or such person or persons as they appoint to hear and determine appeals from the Courts of Admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon, and that no finding of a jury in any Court of Admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal and the re-examination of the facts reserved to Congress.

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"That no act of any one State can or ought to destroy the right of appeals to Congress in the sense above declared:

"That Congress is by these United States invested with the supreme sovereign power of war and peace:

"That the power of executing the law of nations is essential to the sovereign supreme power of war and peace:

"That the legality of all captures on the high seas must be determined by the law of nations:

"That the authority ultimately and finally to decide in all matters and questions touching the law of nations does reside and is vested in the sovereign supreme power of war and peace:

"That a control by appeal is necessary in order to compel a just and uniform execution of the law of nations:

"That the said control must extend as well over the decisions of juries as judges in courts for determining the legality of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations in all cases of captures, and might at any time exercise the same in such manner as to prevent a possibility of being controlled; a construction which involves many inconveniences and absurdities, destroys an essential part of the power of war and peace entrusted to Congress, and would disable the Congress of the United States from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties or other breaches of the law of nations, and would enable a jury in any one State to involve the United States in hostilities; a construction which for these and many other reasons is inadmissible:

"That this power of controlling by appeal the several admiralty jurisdictions of the States has hitherto been exercised by Congress by the medium of a committee of their own members."[1]

"*Resolved*, That the committee before whom was determined the appeal from the Court of Admiralty for the State of Pennsylvania, in the case of the sloop Active, was duly constituted and authorized to determine the same."

A committee was twice appointed by Congress to confer with a committee of the Pennsylvania legislature, and on the 8th March, 1780, the statute admitting juries to decide admiralty causes was

[1] This is the resolution referred to in the Massachusetts act of June 30, 1779.

repealed. But it was left to this court, at its February Term in 1809, to settle the matter in dispute in this case, by deciding that the power exercised by the committee of the Continental Congress to reverse the judgment of the state court in this case was properly exercised. *United States* v. *Peters*, 5 Cranch, 115.[1]

Sixty-four cases in all were submitted to the committees of Congress, of which forty-nine were decided by them, four seem to have disappeared, and eleven went over to the Court of Appeals for decision. Fifty-six cases in all, including the eleven which went over, were submitted to the Court of Appeals, and all were disposed of. Appeals were heard from every maritime State except New York. None came from that State; doubtless because its maritime counties were occupied by the enemy from the autumn of 1776 to the end of the war.

It is possible, perhaps probable, that this showing is not quite accurate. No record is known to be left of the doings of either body, and only very incomplete dockets. It was their habit to draw decrees to be signed by the members of the committee or the court, and to place them on file with the other original papers. In some cases the decree is wanting, but its character and date are found in a minute on the file wrapper. In other cases where there is neither a decree nor a minute of one, there may nevertheless have been a decision. The records in the courts below, perhaps, would show. I have not felt justified, however, in entering upon that field

[1] "When the District Court proceeded to execute this mandate, the Governor issued orders to General Bright, directing him to call out a portion of the militia in order to protect the persons and property of the representatives of Rittenhouse against any process issued by the District Court of the United States in pursuance of this *mandamus*. At first the marshal was prevented from serving the process by soldiers under the command of Bright, but subsequently, eluding their vigilance, he succeeded in taking into custody one of the defendants. A writ of *habeas corpus*, sued out on behalf of the prisoner, was, however, discharged by Chief Justice Tilghman, and subsequently General Bright with others were indicted in the Circuit Court of the United States for obstructing the process of the District Court. Mr. Justice Washington presided at the trial, which resulted in a verdict of guilty. The prisoners were sentenced to be imprisoned, and to pay a fine; but were immediately pardoned by the President of the United States. *Olmsted's Case*, Brightly, Penn. 1. This appears to have been the first case in which the supremacy of the Constitution was enforced by judicial tribunals against the assertion of State authority." (Mr. Justice Matthew's Address before the Yale Law School, June 26, 1888.)

of inquiry, although the returns which I have received from Philadelphia, through the kindness of the clerk of the District Court of the United States there, show that it is an inviting subject for historical investigation. Some of the opinions below in the Pennsylvania Court of Admiralty will be found in Hopkinson's "Judgments in the Admiralty of Pennsylvania," Philadelphia, 1789, and in the "Miscellaneous Essays and Occasional Writings of Francis Hopkinson, Esq.," vol. 3, Philadelphia, 1792. See also Bee, Appendix 339–440; 1 Dall. 95; and 5 American Museum, 32, etc.

So far as appears by these papers, no written reports in the nature of opinions were made by the committees. The Court of Appeals filed only eight opinions, all of which are reported in 2 Dall. 1–42, under the general title of "Federal Court of Appeals." These opinions were delivered in, (1) *The Resolution*, p. 1; and (2) *S. C.*, on rehearing, p. 19; date of lodgment not known; final decree January 24, 1782: — (3) *The Erstern*, p. 33; lodged January 11, 1781; final decree February 5, 1782: — (4) *The Gloucester*, p. 36; date of lodgment not known; final decree February 5, 1782: — (5) *The Squirrel*, p. 40, see No. 90 *post* in table: — (6) *The Speedwell*, p. 40; lodged June 17, 1783; decided May 24, 1784: — (7) *Luke* v. *Hulbert*, p. 41; no papers on file: — (8) *The Experiment* v. *The Chester*, p. 41; referred by Congress by the resolution of July 24, 1786, already spoken of; decided May 1, 1787. They were properly placed in the volumes which contain the commencement of the series of Reports of the Supreme Court of the United States; for the court from which they proceeded was in its day the highest court in the country, and the only appellate tribunal with jurisdiction over the whole United States.

TABLE OF CASES DECIDED BY THE COMMITTEE OF APPEALS IN THE CONTINENTAL CONGRESS, AND CASES DECIDED BY THE COURT OF APPEALS NOT REPORTED BY DALLAS; ALL ARRANGED, SO FAR AS POSSIBLE, IN THE ORDER IN WHICH THEY WERE PRESENTED.

1. *Roberts, Claimant and Appellant,* v. *The Thistle and McAroy.* 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.