APPENDIX.

THE "Act to Establish the Judicial Courts of the United States" (1 Stat. 73) was approved by President Washington, in the city of New York, on the 24th day of September, 1789. It provided, in its opening words, "that the Supreme Court of the United States shall consist of a Chief Justice and five Associate Justices, any four of whom shall be a quorum, and shall hold annually, at the seat of government, two sessions, the one commencing the first Monday of February, and the other the first Monday of August."[1]

On the 26th of the same month, John Jay, Esq., of New York, was appointed to be the Chief Justice of the new court, and John Rutledge, of South Carolina, an Associate Justice. William Cushing, Esq., of Massachusetts, was appointed Associate Justice on the 27th; Robert H. Harrison, of Maryland, on the 28th; James Wilson, Esq., of Pennsylvania, on the 29th; and John Blair, Esq., of Virginia, on the 30th of the same month. The court organized itself in the city of New York, on the first Monday of the following

[1] The act of February 24, 1807, c. 16, § 5, 2 Stat. 421, authorized the appointment of a sixth Associate Justice. The act of March 3, 1837, 5 Stat. 176, authorized the appointment of two more Associate Justices, making eight Associate Justices in all. The act of March 3, 1863, 12 Stat. 794, added a ninth Associate Justice. Under the act of July 23, 1866, 14 Stat. 209, the number of Associate Justices was to be reduced to six, by not filling vacancies. The death of Justices Catron and Wayne reduced the number of Associate Justices to seven before this act was repealed. On the 10th April, 1869, 16 Stat. 44, it was enacted that "the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight Associate Justices," which law still remains in force.

By the act of 1802, 2 Stat. 156, the August Term was dispensed with. By the act of May 4, 1826, 4 Stat. 160, the second Monday of January was substituted for the first Monday of February as the day for beginning. By the act of June 17, 1844, 5 Stat. 676, the first Monday of December was substituted for the second Monday of January; and by the act of January 24, 1873, 17 Stat. 419, the second Monday of October was made the day for the beginning of the Term, as it still continues to be.

February (the 1st), and adjourned *sine die* on February 10, 1790. On the day of the adjournment, Mr. James Iredell, of North Carolina, was appointed an Associate Justice in the place of Mr. Harrison, who declined. He qualified August 2, 1790, at the opening of the August Term.

Thus it will be seen that the first century of the existence of this court expires between the close of the present term and the opening of October Term, 1889. In view of this fact, after consultation with friends in whose judgment I place confidence, I have gathered together several matters connected with the judicial history and decisions of the highest courts of the United States prior to the adoption of the Constitution; and I have placed them in this Appendix, in order that they may be preserved in connection with the decisions of the highest court since its adoption, and in the belief that they will prove interesting and useful to the practising constitutional lawyer, as well as to the student of our judicial system.

I have also, under like advice, caused the original records in the office of the clerk of this court to be carefully searched, in order to ascertain what opinions of the court have been omitted in the published reports; and I have printed all such opinions in this Appendix, either in full or in substance.

With these several papers incorporated into the official series of Reports, it is substantially complete, both as to the work done by the highest Federal courts before the adoption of the Constitution, and as to the decisions of this court.

The ninth Article of the "Articles of Confederation and Perpetual Union" contained these provisions:

"The United States in Congress assembled shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no Member of Congress shall be appointed a judge in any of the said courts.

"The United States in Congress assembled shall also 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. . . . All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they

may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States."

These Articles were finally "agreed to" by Congress, in the session of Saturday, the 15th of November, 1777, and it was ordered that they should "be proposed to the Legislatures of all the United States, to be considered, and if approved of by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same shall become conclusive." On the 9th day of July, 1778, "the ratification of the Articles of Confederation, engrossed on a roll of parchment," was laid before Congress, and was signed "on the part and in behalf of their respective States by the delegates of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, Pennsylvania, Virginia and South Carolina." The ratification of North Carolina was made on the 21st July, 1778; of Georgia on the 24th July, 1778; of New Jersey on the 26th November, 1778; and of Delaware on the 5th of May, 1779. Maryland delayed, in the hope of securing a provision for the holding of the unsettled public lands for the benefit of all the States. The negotiations on this point took shape in a paper which was submitted to Congress by the delegates from that State on behalf of the State, and spread upon the Journals on the 21st May, 1779. Things continued in this way, without anything being done to meet the wishes of Maryland, until February 12, 1781; when the delegates from that State presented to Congress a resolution of the legislature of the State, in which, after reciting that "it hath been said that the common enemy is encouraged by this State not acceding to the Confederation, to hope that the union of the sister States may be dissolved, and therefore prosecutes the war" as a reason why the State should give its adhesion, the delegates were authorized to affix their signatures. On the 1st of March following, the delegates from Maryland signed the engrossed parchment, and on that day the whole was entered in full on the Journal of Congress as it now stands. The value of these dates, as bearing upon the action of Congress on these subjects, will appear later.

Congress took jurisdiction of appeals from the judgments of State Courts of Admiralty in prize cases some years before the ratification

and adoption of the Articles of Confederation; and it created a court with like jurisdiction about a year before that date. An account of its doings in this respect, and of the court which it created for this purpose, will be found in the paper entitled "I. *Courts of Appeal in Prize Cases.*"

What Congress and the courts which it established did, under the power conferred upon it concerning disputes and differences between two or more States, is shown in the paper entitled "II. *Courts for determining Disputes and Differences between two or more States concerning Boundary, Jurisdiction, or any other Cause whatever.*"

The power conferred upon it to appoint courts for the trial of piracies and felonies committed on the high seas it exercised in the following manner: On the 5th April, 1781, it passed an ordinance in which it was provided that persons charged with such offences should be "enquired of, tried and judged by grand and petit juries, according to the course of the common law, in like manner as if the piracy or felony were committed upon the land, and within some county, district, or precinct of one of these United States. The justices of the supreme or superior court of judicature and judge of the court of admiralty of the several and respective States, or any two or more of them, are hereby constituted and appointed judges for hearing and trying such offenders." "If there shall be more than one judge of the admiralty in any of the United States, then, and in such case, the supreme executive power of such State may and shall commission one of them exclusively to join in performing the duties required by this ordinance."

This ordinance was amended on the 4th of March, 1783, by providing that "the justices of the supreme or superior court of judicature, and the judge of the admiralty, or any two or more of them, including the judge of the admiralty in the several and respective States; or, in case there shall be several judges of the admiralty in a State, the justices of the supreme or superior court of judicature, and a judge of the admiralty, to be commissioned for that purpose by the executive power of such State, or any two of them, including a judge of the admiralty, are hereby constituted and appointed a court for hearing and trying all offenders who, in and by an ordinance entitled an ordinance," etc., "passed the 5th day of April, 1781, are triable," etc., etc.

I have not thought that any good purpose would be served by hunting up and printing a list of the persons tried under these ordinances.

Some decisions of this court, made since the adoption of the Constitution, are also necessary, as has already been said, in order to make the series complete. These will be found in the paper entitled "*Omitted Cases in the Reports of the Decisions of the Supreme Court of the United States.*" A word of explanation in regard to this paper may be advisable.

When this court assembled in New York at February Term, 1790, for the purpose of organizing under the Judiciary Act of 1789, only one volume of American Reports had appeared. Kirby's Cases decided in the Supreme Court of Connecticut was published at Litchfield, in that State, in 1789. It contained cases from 1758 to 1788; and of these cases, all after 1785 were decided subject to the provisions of a statute of that year which required the judges of the highest court in the State to give their opinions in writing. So far as I know, this is the first volume of Common Law or Equity Reports containing such written opinions.

In the Ecclesiastical Courts of Great Britain the judges had been in the habit of giving written reasons for the judgments which they pronounced. See Cases *temp.* Lee; Hagg. Con. In the Admiralty Courts, also, there were exceptional instances of the same thing. See Marriott. That it had been done occasionally in Massachusetts, is evident from two cases in Quincy, first published in 1865. Harris & McHenry's Reports, published in 1809, show that there had been early examples of the same practice in Maryland; and from the first volume of Dallas, which made its appearance between the February and August Terms of this court in 1790, it would seem that it obtained in the State of Pennsylvania, also, before the Revolution. From Hopkinson's Judgments, (Philadelphia, 1789–1792,) it is apparent that this had been done at times in the Admiralty Court of Pennsylvania. In 2 Dallas, published about the close of the century, there are a few written opinions delivered by the judges in the Court of Appeals in cases of capture (1781–1787); but this was not the practice of that court.

Mr. Cranch was the first regular reporter of this court. The cases reported by Mr. Dallas were mostly decided before the series under Mr. Cranch began; but they appeared in the last three volumes of Dallas at irregular intervals, in company with cases from other courts, and some of them as late as about the time of the issue of the third volume of Cranch.

It is apparent from the cases in Dallas that in the outset this court did not reduce its opinions to writing except in important cases, especially in cases involving novel questions of constitutional

law. Dallas probably published all the opinions that were filed. In the condition of the archives this cannot be accurately determined. It was not until the 14th of March, 1834, that an order was made requiring all opinions to be filed with the clerk. See 8 Pet. vii.[1] Under this rule the manuscript record of opinions begins with January Term, 1835. The printed record does not commence until December Term, 1857. From 1863 to 1881, both inclusive, there are two records of opinions, one in print and one in manuscript. Then the rule which is printed in 108 U. S. 588, as § 3 of Rule 25, took effect, and, from 1882 on, there is only the printed record. Prior to 1835, as there was no rule requiring the manuscript of the opinions to be filed in the office of the clerk of the Court, the Reports of Dallas, Cranch, Wheaton and Peters furnish the only accessible evidence for determining what opinions were delivered in writing.

It is to be presumed, from the evidence, that the practice of delivering opinions in writing, which, in the beginning had been exceptional, had become the rule when Mr. Cranch was made reporter. Indeed, he tells us himself that he was "relieved from much anxiety, as well as responsibility, by the practice which the court had adopted of reducing their opinion to writing in all cases of difficulty or importance." As in Mr. Dallas's case, so here, there is no means of knowing whether, during the time covered by the nine volumes of Cranch, (August T. 1801 to February T. 1815,) the court delivered any opinion in writing which the reporter failed to report.

In Mr. Wheaton's time, which extends from February T. 1816 to January T. 1827, we know that some cases were omitted. He says in his preface that "discretion has been exercised in omitting to report cases turning on mere questions of fact, and from which no important principle or general rule could be extracted;" but what those cases were, it is impossible to determine from the records or minute books in the clerk's office. Possibly an examination of the original rolls might disclose something that has not been printed; on the other hand, however, there is a greater probability, for reasons already suggested, that it would disclose the absence of opinions in cases that have been reported.

Mr. Peters, who began with January T. 1828, probably reported

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[1] As late as January T. 1830, it was held that certified copies of the opinions of the court were to be given by the reporter, and not by the clerk of the court. *Anonymous*, 3 Pet. 397.

nearly everything. He said in his preface that it was his "earnest endeavor" "to exhibit the facts of *each* case presented to the court." An examination of the records from the commencement of January T. 1835, when the record of opinions begins, to the end of his term of office, (the close of January T. 1842,) shows that he reported all the cases in which there are recorded opinions, and several *per curiam* decisions, of which there are no records among the opinions. Only one case has been found (*West* v. *Brashear*) which seems to merit publication; and that does not contain a written opinion with the name of the justice delivering it.

Mr. Howard, so far as I can find, omitted but few opinions. His time extends from the commencement of January T. 1843 to the close of December T. 1860.

With the end of Mr. Howard's time we come to the commencement of the war, and the consequent great increase in the business of the court. Mr. Black, (December Terms, 1861, 1862,) Mr. Wallace, (December T. 1863 to the close of October T. 1874,) and Mr. Otto, (October T. 1875 to the close of October T. 1882,) each, in the exercise of his discretion, omitted to report many cases with printed opinions. When I was appointed reporter, (October T. 1883,) I was directed to publish all the cases of the previous term "not included in the volumes already published by Mr. Otto." Regarding this as an indication of the desire of the court that thenceforward nothing should be omitted, I have since caused every opinion of the court to be published, however brief.

Thus the omitted cases, taken in connection with the Reports of Dallas, Cranch, Wheaton, Peters, Howard, Black, Wallace, and the United States Reports, complete the reports of the decisions of this court, so far as a careful research enables us to call them complete. They now contain minutes of several cases which are not reported elsewhere.

Some published opinions in Wallace and Otto differ from the opinions in the same cases on file in the clerk's office. The records of the court are silent on the subject of these changes. If we assume that they were made by the reporter, we must infer that they were acceptable to the court. For it is not for a moment to be supposed that they escaped observation as volume after volume appeared, and it is certain that there is no repudiation of them in the records, on the part of the court, or of any justice. They therefore stand, and must continue to stand, in the published books, as the latest and accepted authoritative expression of the will of the court;

and this, all the more, that in many cases both the judge who delivered the opinion, and the reporter who reported it, have since died.

But it cannot be true that these changes were all made by the reporter. Judges frequently correct their opinions in the hands of a reporter, after a printed copy has been filed with the clerk. When this is done, it is the habit of the present reporter to see to it that an order is made for like corrections in the records of the court; but his predecessors may not have done so, and probably did not.

If one curious in such things would know how long this corrective practice has existed, let him look as far back as the 7th of Cranch, 1st ed., where, in a memorandum following the Table of Cases Cited, he will find some corrections by Mr. Justice Story in the opinion of the court, delivered by him, in *Barnitz' Lessee* v. *Casey*, 7 Cranch, 456. (In later editions, the changes are incorporated in the text.) If he would further know how absolutely unaltered in sense the opinion is left, after it has been subjected to literary changes dictated by taste or fancy, let him compare *McLaughlin* v. *United States*, 107 U. S. 526, with *Western Pacific Railroad Company* v. *United States*, 108 U. S. 510. These are two reports of the same case. Mr. Otto made the first report. When the present reporter was appointed, he was, as already stated, directed to publish reports of all the cases at October Term, 1882, not reported by Mr. Otto. This case was put into his hands by the clerk by mistake, the record title having been changed by Mr. Otto, in the exercise of his undoubted right, in order to make the names of the parties conform to those of the real contestants in the case. The report in 108 U. S. agrees with the opinion as recorded. That in 107 U. S., although varying from the other, sometimes in phrase or point or expression, and sometimes in the break of the paragraphs, in reality and at bottom differs from it less than tweedledum differs from tweedledee.

In addition to these papers I have added, at the end of the Appendix, a list of cases in which statutes or ordinances have been held by the court to be repugnant, in whole or in part, to the Constitution or laws of the United States. The period covered by this table begins with 2 Dall. and ends with the present volume.

It only remains to say that all this matter has been laid before the justices of the court individually; and it is now respectfully submitted to the judgment of the members of our common profession.