

The Articles of Confederation—The First U.S. Government

Chapter Objectives

In this chapter you will learn . . .

- That George Washington was not really the first U.S. president
- Whether Christopher Columbus really discovered America
- That the first United States government failed and had to be reorganized
- That the Constitution was based on *The Federalist Papers*
- That the Constitution was ratified as a compromise

Introduction

If someone were to ask you: who was the first president of the United States, you would confidently reply, George Washington, right? Well, what if you were to find out that George Washington was *not* really the first president? In fact, what if you found out that he was not even the second, third, or fourth? Technically, George Washington was the *eighth* president of the United States! So, who came before him?

Was it Thomas Jefferson? No, he became president after Washington.

Abraham Lincoln? No, he became president *much* later. Paul Revere? No, he was never president.

Aaaah, it must have been Benjamin Franklin! No, he was never president, either.

So, who were these seven men who preceded George Washington? Well, the first one was John Hanson. Aha! The guy who signed the Declaration of Independence! No, that was John *Hancock*. So who was this John Hanson person? Before we answer that, let's take a look at the other six presidents who preceded Washington: Elias Boudinot, Thomas Mifflin, Richard Henry Lee, Nathan Gordman, Arthur St. Clair, and Cyrus Griffin.

Chances are that you do not know who *any* of those presidents were, and, in that respect, you are certainly not alone. They are not mentioned in most history books, especially the books that you probably read while studying history in school. And when we think about famous

Americans during the colonial and revolutionary times, we refer to Washington, Jefferson, Franklin, and several others, but *none* of the first seven presidents! Why, then, do we know so much about George Washington, but very little about the presidents who came before him? In order to find out, let's begin with a quick history of America.

Did Christopher Columbus Discover America?

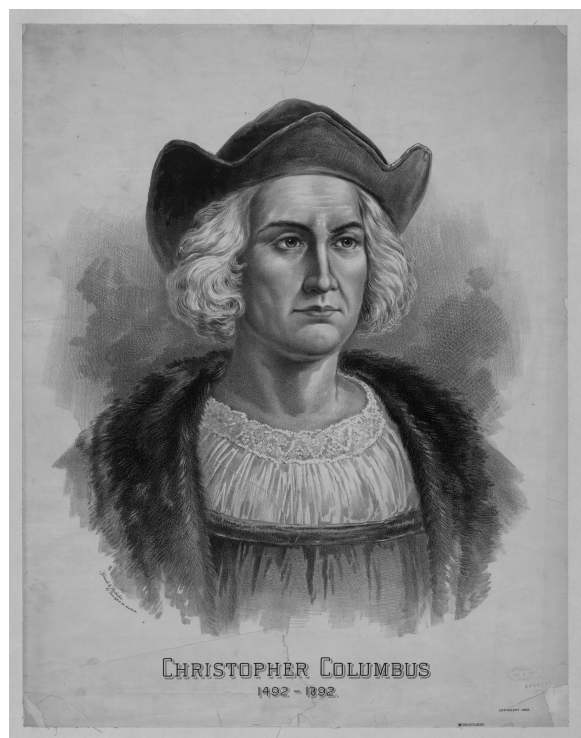
Over the past few years, there has been a great deal of controversy surrounding Christopher Columbus' discovery of America. Emphatically, some who are itching to rewrite history declare: "Christopher Columbus *did not* discover America!" Clearly, they are wrong. If their argument was that Christopher Columbus was not the *first* person to discover the land that became America, then they are correct. But to *discover* something does not necessarily mean being the first person to do so. Consider these examples:

1. Ralph *discovered* that the Italian restaurant in his neighborhood made excellent ravioli.
2. Paula *discovered* that sleeping on a heating pad made her back feel much better in the morning.
3. Marilyn *discovered* America when she first visited in 1995.

All three of these people made discoveries, yet none of them was the *first* to do so. Similarly, Christopher Columbus was not the first person to discover America; he discovered it in 1492. A bunch of people had discovered it earlier, and hundreds of millions have discovered it since that time. Why, then, do we point to Columbus' discovery?

The Importance of Columbus' Discovery

The reason we celebrate Columbus Day every year, as opposed to other discoverers of America, is because Columbus' discovery paved the way for the settlements that eventually led to the formation of the United States of America. It does not matter whether he was the first, second, fifth, eighth, or 3,894th person to discover America. What *does* matter is that *his* discovery was the one that counted in terms of colonial settlements—mostly from England, France, and Spain—that eventually resulted in the creation of the United States of America.



Millions of people have discovered America over the centuries. But Christopher Columbus' discovery was particularly important.

From Columbus to the Constitution

If we were to study the entire saga of this land—from Columbus' settlement to the formation of the Constitution—in great detail, that would be an entire book of its own, if not several of them! Instead, let's take just a brief look at what happened over that 300-year period.

Various countries began to send colonists to settle in the New World. It was a great trade-off for both parties; the settlers were able to enjoy a combination of adventure, profit, and religious freedom. You see, here in the United States, we are permitted to worship in whatever way we choose and to whomever we choose, or decide that we do not want to be religious at all (more about that later in Chapter Four). That is not the case in some other countries, and it certainly was not the case in various European nations back in the 1700s.

Additionally, the land on which the United States sits is one of massive proportion, indeed! Imagine all of that land readily available to anyone who simply ran and jumped on it and said, "mine!" This provided great economic opportunity for anyone who had the financial resources to send workers here to work the land. As the saying goes, the workers had the opportunity to "make the pie" for the owners, but who then gave the workers "a slice of the pie?"

Colonial life was not all rosy, however. Those living in the colonies from different countries had territorial and cultural disputes not only among each other, but also with multiple Native American Indian nations, whose inhabitants had been displaced by the settlers. At that time,

the British colonists were extremely dependent upon and loyal to their Mother Country: Great Britain. Much like a small child who needs the guidance and protection of its parents, the colonists relied on Britain for that support. As Britain eventually became the dominant colonial nation in the New World, thus greatly reducing if not altogether eliminating any threat to the colonists from other nations, things began to change.

The colonists no longer behaved like loyal, affectionate toddlers. Instead, they acted more like rebellious teenagers, demanding various rights that their parent was not providing. As a result, they decided to break apart from Great Britain and become their own nation, simply by saying that's what they would do!

In fact, the Declaration of Independence is simply a fancy way to state, "we say we're free!" Think about it in modern-day terms. Suppose that you and nine of your friends decide to take over an office building and you declare, "This building is now our country. It is our property, and we can do whatever we want here!" Well, in that case, what would probably happen next is that the security guard would have all of you removed. If you managed to overpower the guard, the police might be called in to do the job. If, astonishingly, the ten of you overpowered the entire police department, then perhaps the National Guard would be called in, followed by the entire U.S. military! And, if, by some incredible miracle, the ten of you managed to overpower *all* of those forces, to the point where they simply stopped fighting and agreed to your terms, then guess what: the ten of you would, indeed, be your own nation!

Of course, the chances of ten individuals overpowering the entire United States Armed Forces is about as likely as an elephant growing wings and flying like a bird. Nonetheless, that is what it would take to gain independence. And in the case of the colonists, the odds might not have been quite that extreme, but they were extreme nonetheless, and the result was rather miraculous in its own right.

You see, Great Britain was the most powerful force in the world. Yet the colonies were barely even united. This was not a case of 13 colonies meshing together wonderfully. Instead, many colonies were reluctant to join forces with one another, and many individuals inside the colonies were either loyal to Great Britain and did not want to rebel, or simply did not want to risk life and limb to do so. Then again, some simply did not care either way; they just wanted to go about their lives and political issues and injustices did not really concern them.

When Great Britain received the news that the colonies had formed their own nation, the United States of America, they sent in troops to squash the revolution. The better part of the fighting was not over until 5 years later. In the meantime, the fledgling young nation had to be governed. During the Revolutionary War, also known as the War for Independence, the United States was governed by the Second Continental Congress (the First was the one that was formed to declare independence in the first place).

In 1781, once the fighting was over upon Great Britain's surrender, the United States was truly free! But now what? No longer under the protection of the most powerful nation

in the world, the 13 colonies found themselves in quite a dilemma. Do they return to being independent and risk being attacked by any number of nations, or do they stay together and give up the blessings of not being confined to a group?

The Articles of Confederation

The first government actually formed after the United States was truly independent was established by the Articles of Confederation, in 1781. We do not really hear a whole lot about that government, and for good reason: it failed after 6 short years of operation. Its successor, the U.S. Constitution, has lasted quite long. Born in 1787, it is still going strong. Accordingly, it is understandable why we know some things about the Constitution, but next to nothing about the Articles. In order to better understand the government that we have in place now, it is wise to take a look at the one that came beforehand.

Essentially, the Articles contained many of the same provisions (and much of the same language) found in the Constitution, but there were some notable differences. Let's take a look at the Preamble and all 13 articles of the Articles, highlight the key points of each, and compare and contrast them with the Constitution.

Preamble

The Articles' Preamble merely lists the names of the 13 states that joined together in a *perpetual union*. They are 12 of the original 13 states that also joined together under the Constitution to form the new government (New Hampshire later joined the 12 to form the Constitution). In alphabetical order they are: Connecticut, Delaware, Georgia, Maryland, Massachusetts (referred to in the Articles as Massachusetts Bay), New Jersey, New York, North Carolina, Pennsylvania, Rhode Island (referred to as Rhode Island and the Providence Plantations), South Carolina, and Virginia.

Article I

The name of the *confederacy* shall be: The United States of America.

(Note: the use of the word *confederacy* in the Articles has no relation to the Confederacy, or Confederate States of America, which was formed when the Southern States seceded from the Union and formed their own country during the American Civil War).

Article II

Other than rights specifically granted to Congress in these Articles, each state retains its own sovereignty and freedom. The Constitution's Tenth Amendment states something similar. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states. . . ." The question then, is to what extent the federal government was stronger than the states, or vice versa, in both documents.

Article III

The states hereby unite for their common defense, against attacks for whatever reason, for their liberty, and for their general welfare.

Article IV

All free inhabitants of every state shall have the same privileges in any other state. Excepted are vagabonds and fugitives from justice. Notably, this is the first distinction of rights held by those who were free as opposed to those who were enslaved.

Article V

Delegates from each state shall be sent to Congress, no less than two and no more than seven from each state. No delegate may serve more than 3 years during any 6-year period, and each state shall have one vote.

Article VI

No state may wage wars or execute foreign policy without the consent of Congress, nor shall any two states enter into any alliance without Congressional approval.

Article VII

When an army is raised for the common defense, soldiers under the rank of colonel shall be appointed by the legislatures of their respective states, and it shall be that state's responsibility to fill any vacancies. This Article was one of the primary reasons why the Articles ultimately failed. Essentially, it leaves the responsibility of maintaining a common military to each individual state.

Suppose that nowadays, each state had the responsibility of supplying forces to prevent any terrorist attacks from occurring on U.S. soil. States such as California and New York, for example, might have greater reason to be concerned about such attacks, as both of those states house large, powerful cities, which can be perceived as likely targets. But what about states such as Arkansas, Vermont, and Wyoming? Of course, anything is possible, but is it likely that those states would be the victims of a terrorist attack? If not, then why would the taxpayers of those states be willing to foot the bill for a cause that is unlikely to affect them? Would they do it out of sheer patriotism? Maybe, though they might argue that their contribution should be minimal as compared with the proportions paid by their counterparts in states more likely to be attacked.

Similarly, looking back at the geographical breakdown of the 12 U.S. states, a state such as North Carolina was shielded by other states and unlikely to be the victim of a border attack, such as Georgia. Accordingly, North Carolina might not have been particularly zealous in establishing and maintaining a formidable military.

Article VIII

Contributions to the common defense shall be made by each state, proportionate to the amount of its land. Thus, a state with a large land size might not be particularly happy with this type of arrangement, particularly if it is not likely

to be a victim of a terrorist attack. Today, that would mean a state such as Montana would pay nearly 19 times more in military taxes than a small state like New Jersey. Population was not taken into account for this tax.

Article IX

This Article, the longest of the 13, contains various provisions whereby Congress shall have ultimate power in waging war, coining money, and deciding disputes among two or more states. However, as some of the provisions required 9 of the 12 states to agree, it made it very difficult for an effective national government to exercise its authority and influence the direction of the nation.

Article X

In the absence of Congress, nine states would be necessary to act as Congress would. Again, this requirement made it difficult for policy to be implemented absent almost unanimous agreement.

Article XI

This Article provides that Canada may be admitted into the United States if it so chose, but that any other territory that wished to gain admission would have to be assented to by nine states.

Article XII

The United States will pay off all of its debts.

Article XIII

All states shall obey Articles, fully ratify them, and so forth.

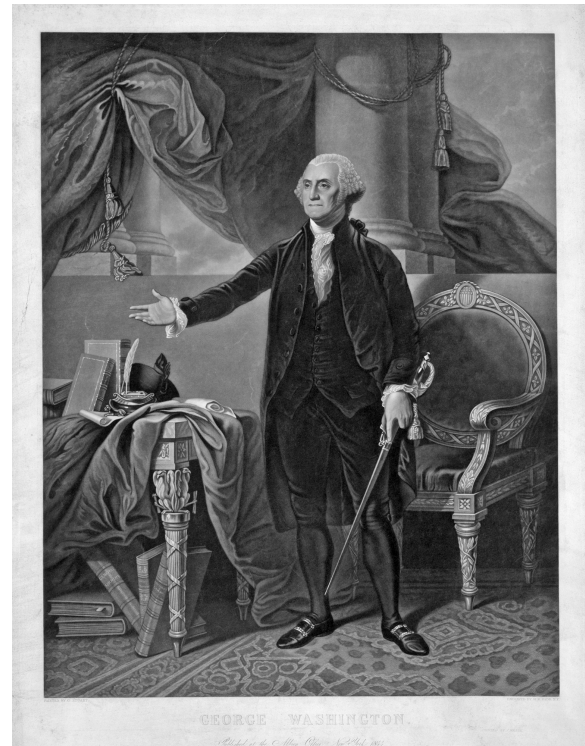
Taken as a whole, the Articles were not wholly inconsistent to the notions that were made part of the U.S. Constitution. The main differences were that in the Articles the states had too much veto power, which made it difficult for national policy to be effective.

The First Seven Presidents

Getting back to our trivia question about the seven men who were president of the United States *before* George Washington, each of them served a one-year term under the Articles. We never really got to the part about why we do not really know anything about them. For the same reasons that we do not really know too much about most of the people who discovered America before Columbus: because they did not really matter a whole lot, at least, not in terms of American history.

Similarly, the seven presidents under the Articles of Confederation did not have nearly the amount of power and influence as the presidents under the Constitution. They were largely administrative figureheads rather than leaders of a nation. Accordingly, they did not do a whole lot in their capacity as president to merit noteworthiness and to be embedded into our memories.

Another reason why John Hanson and the six presidents who followed him are not household words is because the government under the Articles was a failure. As the



George Washington, the Father of Our Country, technically was not the first U.S. President.

Constitution became the new law of the land, upon which the new form of government was founded, there was still a great deal of concern about whether it would succeed. Nowadays, well over 200 years since the Constitution was ratified, we have long been in a state of relief, knowing that our *second* U.S. government, the Constitution, was the one that lasted.

But what about the first few years after the Constitution took effect? What if in 1789, or 1792, or 1795, a textbook about American history was written? Would it include information about the Articles? Maybe some small mention, but it would probably focus on the *new and improved* American government, the Constitution. If the Articles had been given considerable attention, then the Constitution might be viewed as destined to fail, too.

Accordingly, the first seven presidents of the United States are a mere afterthought in American history. Because the Articles were unsuccessful, and because their presidents' tenures were uneventful, most children and adults nationwide consider their first president to have been George Washington.

The Federalists

The road from the Articles to the Constitution was not as simple as changing the name and a few words here and there. It took a Constitutional Convention to ratify the document that would become the most important in our nation's history. And, in great part, the delegates at that Convention were swayed by a series of articles sent to

various New York newspapers, titled *The Federalist* and modernly referred to as *The Federalist Papers*. The three authors were, in order of number of contributions, Alexander Hamilton, James Madison, and John Jay. At the time, they wrote anonymously, using the name Publius.

The type of government they proposed—a strong federal one—inspired the name Federalists to indicate those who espoused that ideology.

Alexander Hamilton

The biography of Alexander Hamilton is one of the most fascinating stories in American history. In fact, it would be difficult to find a fictional tale more compelling. Hamilton was born in the West Indies, which today would render him ineligible to run for President of the United States, because Article Two of the Constitution prohibits anyone who is not a natural-born U.S. citizen to become president. However, there is a stipulation that anyone who was a U.S. citizen *when the Constitution was ratified*, which Hamilton was, would be eligible. Why, then, did such an important and influential American statesman not run for president? Two main reasons: first, he was a polarizing figure. Many idolized him and considered him among the greatest of the Founding Fathers, if not *the* greatest. Others, however, chastised him for being abrasive and elitist. The second reason is that he was an illegitimate child, a very difficult stigma to overcome in politics.

In any event, Hamilton was a brilliant thinker who won George Washington's favor, both militarily and politically. He was instrumental in propelling *The Federalist Papers* to the forefront of Constitutional discussion. Indeed, much of Hamilton's mark has been embedded on our current system of government.

Amazingly, Hamilton's life was cut short when he was killed in a duel by Aaron Burr, who was Vice President of the United States at the time. But that's a whole other story.

James Madison

Often referred to as the father of the Constitution, James Madison eventually parted ways with his *Federalist Papers* coauthor, Hamilton, and instead became Thomas Jefferson's protégé and, eventually, President of the United States. Where Hamilton was polarizing, Madison was conciliatory. It was Madison's ability to bring disputing parties together toward the common cause of forming a new government that was instrumental in the ratification of the Constitution.

John Jay

John Jay wrote the fewest of *The Federalist Papers*, but that was not really by choice. You see, Jay was injured in a politically-motivated physical attack. Between that and the Burr–Hamilton duel, you can imagine how intense and violent things were back then in comparison to, say, today's political battles, which are usually reduced to verbal attacks in the media and in campaign commercials.

In any event, Jay went on to become the first Chief Justice of the U.S. Supreme Court.

Some of the Key Federalist Papers

There were 85 *Federalist Papers* in all: Hamilton wrote 51 of them, Madison 29, and Jay 5. Let's take a look at some of the more notable ones.

The Federalist Number 1

In the first of the *Papers*, Hamilton called upon his fellow Americans to support a new Constitution, resist opposition to it, all the while respecting and encouraging the moderation that will evolve from clashing intellectual differences. In a series of papers, he proposed to discuss the usefulness of a successful federal government, the insufficiency of the Articles to preserve the Union, and the need to preserve the republican form of government, liberty, and property.

The Federalist Numbers 2 and 6 through 9

In the second *Paper*, Jay cited many reasons why the nation ought to remain united, including geographical and cultural unity, and that severing the nation would be a risk to liberty. In the *Federalists* 3, 4, and 5, Jay continued his argument about why a fragmented nation would invite foreign attack. Hamilton, in Numbers 6 through 9, echoed those same concerns with respect to attacks by individual or groups of states against one another.

The Federalist Number 10

This is the first *Paper* that Madison authored, and is one of the most important of them all. Madison explained that a pure democracy would result in violent chaos, as there would be no safeguards against the trampling of the rights of the minority. Moreover, he conveyed how a republic is superior to a democracy, because a large republic will have more qualified people whose talent will be pooled together, and it will be more conspicuous, thus reducing the chance for corruption.

The Federalist Number 17

In the *Federalist* 17, Hamilton continued his advocacy for a strong central government, insisting that state and local governments would not lose their effectiveness if commerce, finance, and foreign policy are federally controlled.

The Federalist Numbers 23, 29, and 46

Two more Hamilton writings supported a strong and energetic national government. Number 29, in particular, discussed the need for a strong national military, though state militias equipped with local civilians would prevent the federal military from spiraling out of control. In *Federalist* 46, Madison specifically wrote that America is unique because it arms its citizens and its militias to prevent federal authority from overstepping its bounds. We discuss more about the right to bear arms in Chapter 10.

The Federalist Numbers 67 through 74

Hamilton spent a great deal of time advocating for a president, something that was lacking in the Articles. He dissuaded fears that the president would be like a king, and explained, in great detail, how a president's powers would

be significantly fewer. Moreover, Hamilton discussed the concept of electors, and how they were ideally suited to choose the president, because that would be their only function. In *Federalists* 71 and 72, Hamilton discussed the notion of term limits, explaining why they would exclude worthy candidates from seeking reelection. Finally, Hamilton advocated for a 4-year presidential term, arguing that it is just the right amount of time for a president to establish his agenda.

The Federalist Numbers 84 and 85

Hamilton concluded *The Federalist Papers* with a discussion about a Bill of Rights. More specifically, that he was not in favor of such a notion. He believed that a Bill of Rights would weaken government, and was confident that the Constitution itself was a bill of rights, because the people retained the power. Finally, he added that the Constitution could always be amended later on, if the people were not completely satisfied with it.

Ratification

Although many of Hamilton's ideas were tempered considerably at the Convention, he and his fellow federalists were instrumental in implementing their agenda. Hamilton himself, though perpetually opinionated, was willing to compromise significantly in order to achieve ratification.

On June 21, 1788, 9 of the 13 states had ratified, in this order: Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, and New Hampshire. Nine were enough to secure ratification, and the other four states ratified afterward: Virginia a few days later, New York a month later, Rhode Island 2 years later, and the last holdout, Vermont, on January 10, 1791.

Therefore, the Constitution was unanimously approved, and has been the law of our land ever since.

Conclusion

It took two tries, then, not just one, for the United States to figure out what government worked best. The result was the Constitution, which is a compromise in itself of a strong central government balanced with individual state rights.

In Chapter three we discuss the essence of our Constitutional government, which is divided into two tiers, each with three branches.

Questions for Review

1. Who were the six presidents of the United States before George Washington?
2. Why do most history books ignore the presidents before George Washington?
3. What were the Articles of Confederation?
4. Did Christopher Columbus discover America?
5. What were *The Federalist Papers*?
6. Who was Alexander Hamilton?
7. Who was James Madison?
8. Who was John Jay?
9. When was the Constitution ratified?
10. Which nine states ratified the Constitution originally, rendering it the law of the land?

Constitutionally Speaking

When the Constitution was established, there was an intense debate between the Federalists, who preferred a strong national government, and the Antifederalists, who believed that far more authority ought to rest with the individual states.

But that was the 18th Century, and now we are in the 21st. How should our government operate nowadays: should most of the decisions come from Congress and the president in Washington, D.C., or should they be left up to the state and local governments? Which do you think would result in a more effective system, and why?

James Madison's Preface to the Constitutional Convention

This is the preface to the Constitutional Convention, by James Madison, who was one of the authors of *The Federalist Papers*, is called the father of our Constitution, and was the fourth president of the United States.

As the weakness and wants of man naturally lead to an association of individuals, under a common authority whereby each may have the protection of the whole against danger from without, and enjoy in safety within, the advantages of social intercourse, and an exchange of the necessaries & comforts of life: in like manner feeble communities, independent of each other, have resorted to a Union, less intimate, but with common Councils, for the common safety against powerful neighbors, and for the preservation of justice and peace among themselves. Ancient history furnishes examples of these confederal associations, tho' with a very imperfect account, of their structure, and of the attributes and functions of the presiding Authority. There are examples of modern date also, some of them still existing, the modifications and transactions of which are sufficiently known.

It remained for the British Colonies, now United States, of North America, to add to those examples, one of a more interesting character than any of them: which led to a system without a example ancient or modern, a system founded on popular rights, and so combining, a federal form with the forms of individual Republics, as may enable each to supply the defects of the other and obtain the advantages of both.

Whilst the Colonies enjoyed the protection of the parent Country as it was called, against foreign danger; and were secured by its superintending controul, against conflicts among themselves, they continued

independent of each other, under a common, tho' limited dependence, on the parental Authority. When however the growth of the offspring in strength and in wealth, awakened the jealousy and tempted the avidity of the parent, into schemes of usurpation & exaction, the obligation was felt by the former of uniting their counsels and efforts to avert the impending calamity.

As early as the year 1754, indications having been given of a design in the British Government to levy contributions on the Colonies, without their consent; a meeting of Colonial deputies took place at Albany, which attempted to introduce a compromising substitute, that might at once satisfy the British requisitions, and save their own rights from violation. The attempt had no other effect, than by bringing these rights into a more conspicuous view, to invigorate the attachment to them, on one side; and to nourish the haughty & encroaching spirit on the other.

In 1774, the progress made by G.B. in the open assertion of her pretensions and in the apprehended purpose of otherwise maintaining them than by Legislative enactments and declarations, had been such that the Colonies did not hesitate to assemble, by their deputies, in a formal Congress, authorized to oppose to the British innovations whatever measures might be found best adapted to the occasion; without however losing sight of an eventual reconciliation.

The dissuasive measures of that Congress, being without effect, another Congress was held in 1775, whose pacific efforts to bring about a change in the views of the other party, being equally unavailing, and the commencement of actual hostilities having at length put an end to all hope of reconciliation; the Congress finding moreover that the popular voice began to call for an entire & perpetual dissolution of the political ties which had connected them with G.B., proceeded on the memorable 4th of July, 1776 to declare the 13 Colonies, Independent States.

During the discussions of this solemn Act, a Committee consisting of a member from each colony had been appointed to prepare & digest a form of Confederation, for the future management of the common interests, which had hitherto been left to the discretion of Congress, guided by the exigences of the contest, and by the known intentions or occasional instructions of the Colonial Legislatures.

It appears that as early as the 21st of July 1775, a plan entitled "Articles of Confederation & perpetual Union of the Colonies" had been sketched by Doctr Franklin, the plan being on that day submitted by him to Congress; and tho' not copied into their Journals remaining on their files in his handwriting. But notwithstanding the term "perpetual" observed in the title, the articles provided expressly for the event of a return of the Colonies to a connection with G. Britain.

This sketch became a basis for the plan reported by the Come on the 12 of July, now also remaining on the files of Congress, in the handwriting of Mr Dickinson. The plan, tho' dated after the Declaration of Independence, was probably drawn up before that event; since the name of Colonies, not States is used throughout the draught. The plan reported, was debated and amended from time to time, till the 17th of November 1777, when it was agreed to by Congress, and proposed to the Legislatures of the States, with an explanatory and recommendatory letter. The ratifications of these by their Delegates in Congs duly authorized took place at successive dates; but were not completed till March 1. 1781, when Maryland who had made it a prerequisite that the vacant lands acquired from the British Crown should be a Common fund, yielded to the persuasion that a final & formal establishment of the federal Union & Govt would make a favorable impression not only on other foreign Nations, but on G.B. herself.

The great difficulty experienced in so framing the fedl system as to obtain the unanimity required for its due sanction, may be inferred from the long interval, and recurring discussions, between the commencement and completion of the work; from the changes made during its progress; from the language of Congs when proposing it to the States, wch dwelt on the impracticability of devising a system acceptable to all of them; from the reluctant assent given by some; and the various alterations proposed by others; and by a tardiness in others again which produced a special address to them from Congs enforcing the duty of sacrificing local considerations and favorite opinions to the public safety, and the necessary harmony: Nor was the assent of some of the States finally yielded without strong protests against particular articles, and a reliance on future amendments removing their objections.

It is to be recollected, no doubt, that these delays might be occasioned in some degree, by an occupation of the public Councils both general & local, with the deliberations and measures, essential to a Revolutionary struggle; But there must have been a balance for these causes, in the obvious motives to hasten the establishment of a regular and efficient Govt; and in the tendency of the crisis to repress opinions and pretensions, which might be inflexible in another state of things.

The principal difficulties which embarrassed the progress, and retarded the completion of the plan of Confederation, may be traced to (1) the natural repugnance of the parties to a relinquishment of power; (2) a natural jealousy of its abuse in other hands than their own; (3) the rule of suffrage among parties

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unequal in size, but equal in sovereignty; (4) the ratio of contributions in money and in troops, among parties, whose inequality in size did not correspond with that of their wealth, or of their military or free population; and (5) the selection and definition of the powers, at once necessary to the federal head, and safe to the several members.

To these sources of difficulty, incident to the formation of all such Confederacies, were added two others one of a temporary, the other of a permanent nature. The first was the case of the Crown lands, so called because they had been held by the British Crown, and being ungranted to individuals when its authority ceased, were considered by the States within whose charters or asserted limits they lay, as devolving on them; whilst it was contended by the others, that being wrested from the dethroned authority, by the equal exertion of all, they resulted of right and in equity to the benefit of all. The lands being of vast extent and of growing value, were the occasion of much discussion & heart-burning; & proved the most obstinate of the impediments to an earlier consummation of the plan of federal Govt. The State of Maryland the last that acceded to it held out as already noticed, till March 1, 1781, and then yielded only to the hope that by giving a stable & authoritative character to the Confederation, a successful termination of the Contest might be accelerated. The dispute was happily compromised by successive surrenders of portions of the territory by the States having exclusive claims to it, and acceptances of them by Congress.

The other source of dissatisfaction was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carried on. New Jersey, placed between Phila & N. York, was likened to a cask tapped at both ends; and N. Carolina, between Virga & S. Carolina to a patient bleeding at both arms. The Articles Of Confederation provided no remedy for the complaint: which produced a strong protest on the part of N. Jersey: and never ceased to be a source of dissatisfaction & discord until the new Constitution, superseded the old.

But the radical infirmity of the “arts Of Confederation” was the dependence of Congs on the voluntary and simultaneous compliance with its Requisitions, by so many independant Communities, each consulting more or less its particular interests & convenience and distrusting the compliance of the others. Whilst the paper emissions of Congs continued to circulate they were employed as a sinew of war, like gold & silver. When that ceased to be the case, the fatal defect of the political System was felt in its alarming force. The war was merely kept alive and brought to a successful conclusion by such foreign aids and temporary expedients as could be applied; a hope prevailing with many, and a wish with all, that a state of peace, and the sources of prosperity opened by it, would give to the Confederacy in practice, the efficiency which had been inferred from its theory.

The close of the war however brought no cure for the public embarrassments. The States relieved from the pressure of foreign danger, and flushed with the enjoyment of independent and sovereign power; [instead of a diminished disposition to part with it,] persevered in omissions and in measures incompatible with thier relations to the Federal Govt and with those among themselves.

Having served as a member of Congs through the period between Mar. 1780 & the arrival of peace in 1783, I had become intimately acquainted with the public distresses and the causes of them. I had observed the successful opposition to every attempt to procure a remedy by new grants of power to Congs. I had found moreover that despair of success hung over the compromising provision of April 1783 for the public necessities which had been so elaborately planned, and so impressively recommended to the States. Sympathizing, under this aspect of affairs, in the alarm of the friends of free Govt, at the threatened danger of an abortive result to the great & perhaps last experiment in its favour, I could not be insensible to the obligation to co-operate as far as I could in averting the calamity. With this view I acceded to the desire of my fellow Citizens of the County that I should be one of its representatives in the Legislature, hoping that I might there best contribute to inculcate the critical posture to which the Revolutionary cause was reduced, and the merit of a leading agency of the State in bringing about a rescue of the Union and the blessings of liberty a staked on it, from an impending catastrophe.

It required but little time after taking my seat in the House of Delegates in May 1784 to discover that, however favorable the general disposition of the State might be towards the Confederacy the Legislature retained the aversion of its predecessors to transfers of power from the State to the Govt of the Union; notwithstanding the urgent demands of the Federal Treasury; the glaring inadequacy of the authorized mode of supplying it, the rapid growth of anarchy in the Fedl System, and the animosity kindled among the States by their conflicting regulations.

The temper of the Legislature & the wayward course of its proceedings may be gathered from the Journals of its Sessions in the years 1784 & 1785.

The failure however of the varied propositions in the Legislature for enlarging the powers of Congress, the continued failure of the efforts of Congs to obtain from them the means of providing for the debts of the Revolution; and of countervailing the commercial laws of G.B., a source of much irritation & agst which the separate efforts of the States were found worse than abortive; these Considerations with the lights thrown on the whole subject, by the free & full discussion it had undergone led to an general acquiescence in the Resoln passed, on the 21 of Jany 1786, which proposed & invited a meeting of Deputies from all the States to “insert the Resol (See Journal.)”

The resolution had been brought forward some weeks before on the failure of a proposed grant of power to Congress to collect a revenue from commerce, which had been abandoned by its friends in consequence of material alterations made in the grant by a Committee of the whole. The Resolution tho introduced by Mr Tyler an influencial member, who having never served in Congress, had more the ear of the House than those whose services there exposed them to an imputable bias, was so little acceptable that it was not then persisted in. Being now revived by him, on the last day of the Session, and being the alternative of adjourning without any effort for the crisis in the affairs of the Union, it obtained a general vote; less however with some of its friends from a confidence in the success of the experiment than from a hope that it might prove a step to a more comprehensive & adequate provision for the wants of the Confederacy.

It happened also that Commissioners who had been appointed by Virga & Maryd to settle the jurisdiction on waters dividing the two States had, apart from their official reports recommended a uniformity in the regulations of the 2 States on several subjects & particularly on those having relation to foreign trade. It appeared at the same time that Maryd had deemed a concurrence of her neighbors Pena & Delaware indispensable in such a case, who for like reasons would require that of their neighbors. So apt and forceable an illustration of the necessity of a uniformity throughout all the States could not but favour the passage of a Resolution which proposed a Convention having that for its object.

The commissioners appointed by the Legisl: & who attended the Convention were E. Randolph the Attorney of the State, St. Geo: Tucker & J. M. The designation of the time & place for its meeting to be proposed and communicated to the States having been left to the Comrs they named for the time early September and for the place the City of Annapolis avoiding the residence of Congs and large Commercial Cities as liable to suspicions of an extraneous influence.

Altho the invited Meeting appeared to be generally favored, five States only assembled; some failing to make appointments, and some of the individuals appointed not hastening their attendance, the result in both cases being ascribed mainly, to a belief that the time had not arrived for such a political reform, as might be expected from a further experience of its necessity.

But in the interval between the proposal of the Convention and the time of its meeting, such had been the advance of public opinion in the desired direction, stimulated as it had been by the effect of the contemplated object, of the meeting, in turning the genal attention to the Critical State of things, and in calling forth the sentiments and exertions of the most enlightened & influencial patriots, that the Convention thin as it was did not scruple to decline the limited task assigned to it and to recommend to the States a Convention with powers adequate to the occasion. Nor was it unnoticed that the commission of the N. Jersey Deputation, had extended its object to a general provision for the exigencies of the Union. A recommendation for this enlarged purpose was accordingly reported by a Come to whom the subject had been referred. It was drafted by Col H. and finally agreed to unanimously in the following form. Insert it.

The recommendation was well recd by the Legislature of Virga which happened to be the first that acted on it, and the example of her compliance was made as conciliatory and impressive as possible. The Legislature were unanimous or very nearly so on the occasion and as a proof of the magnitude & solemnity attached to it, they placed Genl W. at the head of the Deputation from the State; and as a proof of the deep interest he felt in the case he overstepped the obstacles to his acceptance of the appointment.

The law complying with the recommendation from Annapolis was in the terms following:

A resort to a General Convention to remodel the Confederacy, was not a new idea. It had entered at an early date into the conversations and speculations of the most reflecting & foreseeing observers of the inadequacy of the powers allowed to Congress. In a pamphlet published in May 81 at the seat of Congs Pelatiah Webster an able tho' not conspicuous Citizen, after discussing the fiscal system of the U. States, and suggesting among other remedial provisions including a national Bank remarks that “the Authority of Congs at present is very inadequate to the performance of their duties; and this indicates the necessity of their calling a Continental Convention for the express purpose of ascertaining, defining, enlarging, and limiting, the duties & powers of their Constitution.”

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On the 1. day of Apl 1783, Col. Hamilton, in a debate in Congs observed that He alluded probably to [see Life of Schuyler in Longacre. It does not appear however that his expectation had been fulfilled].

In a letter to J. M. from R. H. Lee then President of Congs dated Novr 26, 1784 He says The answer of J. M. remarks

In 1785, Noah Webster whose pol. & other valuable writings had made him known to the public, in one of his publications of American policy brought into view the same resort for supplying the defects of the Fedl System [see his life in Longacre].

The proposed & expected Convention at Annapolis the first of a general character that appears to have been realized, & the state of the public mind awakened by it had attracted the particular attention of Congs and favored the idea there of a Convention with fuller powers for amending the Confederacy.

It does not appear that in any of these cases, the reformed system was to be otherwise sanctioned than by the Legislative authy of the States; nor whether or how far, a change was to be made in the structure of the Depository of Federal powers.

The act of Virga providing for the Convention at Philada, was succeeded by appointments from other States as their Legislatures were assembled, the appointments being selections from the most experienced & highest standing Citizens. Rh. I. was the only exception to a compliance with the recommendation from Annapolis, well known to have been swayed by an obdurate adherence to an advantage which her position gave her of taxing her neighbors thro' their consumption of imported supplies, an advantage which it was foreseen would be taken from her by a revisal of the "Articles of Confederation."

As the pub. mind had been ripened for a salutary Reform of the pol. System, in the interval between the proposal & the meeting, of Comrs at Annapolis, the interval between the last event, and the meeting of Deps at Phila had continued to develop more & more the necessity & the extent of a Systematic provision for the preservation and Govt of the Union; among the ripening incidents was the Insurrection of Shays, in Massts against her Govt; which was with difficulty suppressed, notwithstanding the influence on the insurgents of an apprehended interposition of the Fedl troops.

At the date of the Convention, the aspect & retrospect of the pol: condition of the U.S. could not but fill the pub. mind with a gloom which was relieved only by a hope that so select a Body would devise an adequate remedy for the existing and prospective evils so impressively demanding it.

It was seen that the public debt rendered so sacred by the cause in which it had been incurred remained without any provision for its payment. The reiterated and elaborate efforts of Cong. to procure from the States a more adequate power to raise the means of payment had failed. The effect of the ordinary requisitions of Congress had only displayed the inefficiency of the authy making them: none of the States having duly complied with them, some having failed altogether or nearly so; and in one instance, that of N. Jersey a compliance was expressly refused; nor was more yielded to the expostulations of members of Congs deputed to her Legislature, than a mere repeal of the law, without a compliance. [see letter of Grayson to J. M.]

The want of authy in Congs to regulate Commerce had produced in Foreign nations particularly G.B. a monopolizing policy injurious to the trade of the U.S. and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishg all apprehensions of a Countervailing policy on the part of the U. States.

The same want of a general power over Commerce, led to an exercise of the power separately, by the States, wch not only proved abortive, but engendered rival, conflicting and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighbouring ports, and to coerce a relaxation of the British monopoly of the W. Inds navigation, which was attempted by Virga [see the Journal of the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them, as N.Y. Pena Virga & S. Carolina. Some of the States, as Connecticut, taxed imports as from Massts higher than imports even from G.B. of wch Massts complained to Virga and doubtless to other States. [See letter of J. M. In sundry instances as of N.Y. N.J. Pa & Maryd [see] the navigation laws treated the Citizens other States as aliens.

In certain cases the authy of the Confederacy was disregarded, as in violations not only of the Treaty of peace; but of Treaties with France & Holland, which were complained of to Congs.

In other cases the Fedl Authy was violated by Treaties & wars with Indians, as by Geo: by troops raised & kept up witht the consent of Congs as by Massts by compacts witht the consent of Congs as between Pena and N. Jersey, and between Virga & Maryd. From the Legisl: Journals of Virga it appears, that a vote refusing to apply for a sanction of Congs was followed by a vote agst the communication of the Compact to Congs.

In the internal administration of the States a violation of Contracts had become familiar in the form of depreciated paper made a legal tender, of property substituted for money, of Instalment laws, and of the occlusions of the Courts of Justice; although evident that all such interferences affected the rights of other States, relatively creditor, as well as Citizens Creditors within the State.

Among the defects which had been severely felt was that of a uniformity in cases requiring it, as laws of naturalization, bankruptcy, a Coercive authority operating on individuals and a guaranty of the internal tranquillity of the States.

As natural consequences of this distracted and disheartening condition of the union, the Fedl Authy had ceased to be respected abroad, and dispositions shown there, particularly in G.B., to take advantage of its imbecility, and to speculate on its approaching downfall; at home it had lost all confidence & credit; the unstable and unjust career of the States had also forfeited the respect & confidence essential to order and good Govt, involving the general decay and confidence & credit between man & man. It was found moreover, that those least partial to popular Govt, or most distrustful of its efficacy were yielding to anticipations, that from an increase of the confusion a Govt might result more congenial with their taste or their opinions; whilst those most devoted to the principles and forms of Republics, were alarmed for the cause of liberty itself, at stake in the American Experiment, and anxious for a system that wd avoid the inefficacy of a mere confederacy without passing into the opposite extreme of a consolidated govt it was known that there were individuals who had betrayed a bias toward Monarchy [see Knox to G W & him to Jay] (Marshall's life) and there had always been some not unfavorable to a partition of the Union into several Confederacies; either from a better chance of figuring on a Sectional Theatre, or that the Sections would require stronger Govts, or by their hostile conflicts lead to a monarchical consolidation. The idea of a dismemberment had recently made its appearance in the Newspapers.

Such were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided.

As a sketch on paper, the earliest perhaps of a Constitutional Govt for the Union [organized into the regular Departments with physical means operating on individuals] to be sanctioned by the people of the States, acting in their original & sovereign character, was contained in a letter of Apl. 8. 1787 from J. M. to Govr Randolph, a copy of the letter is here inserted.

The feature in the letter which vested in the general Authy. a negative on the laws of the States, was suggested by the negative in the head of the British Empire, which prevented collisions between the parts & the whole, and between the parts themselves. It was supposed that the substitution, of an elective and responsible authority for an hereditary and irresponsible one, would avoid the appearance even of a departure from the principle of Republicanism. But altho' the subject was so viewed in the Convention, and the votes on it were more than once equally divided, it was finally & justly abandoned see note for — for this erasure substitute the amendt marked * for this page [as, apart from other objections, it was not practicable among so many states, increasing in number, and enacting, each of them, so many laws instead of the proposed negative, the objects of it were left as finally provided for in the Constitution.]

On the arrival of the Virginia Deputies at Phila it occurred to them that from the early and prominent part taken by that State in bringing about the Convention some initiative step might be expected from them. The Resolutions introduced by Governor Randolph were the result of a Consultation on the subject; with an understanding that they left all the Deputies entirely open to the lights of discussion, and free to concur in any alterations or modifications which their reflections and judgments might approve. The Resolutions as the Journals shew became the basis on which the proceedings of the Convention commenced, and to the developments, variations and modifications of which the plan of Govt proposed by the Convention may be traced.

The curiosity I had felt during my researches into the History of the most distinguished Confederacies, particularly those of antiquity, and the deficiency I found in the means of satisfying it more especially in what related to the process, the principles, the reasons, & the anticipations, which prevailed in the formation of them, determined me to preserve as far as I could an exact account of what might pass in the Convention whilst executing its trust, with the magnitude of which I was duly impressed, as I was with the gratification promised to future curiosity by an authentic exhibition of the objects, the opinions & the reasonings from which the new System of Govt was to receive its peculiar structure & organization. Nor was I unaware of the value of such a contribution to the fund of materials for the History of a Constitution on which would be staked the happiness of a people great even in its infancy, and possibly the cause of Liberty throught the world.

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In pursuance of the task I had assumed I chose a seat in front of the presiding member, with the other members on my right & left hands. In this favorable position for hearing all that passed, I noted in terms legible & in abbreviations & marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment & reassembling of the Convention I was enabled to write out my daily notes [see page 18 during the session or within a few finishing days after its close—see pa. 18 in the extent and form preserved in my own hand on my files.]

In the labour & correctness of doing this, I was not a little aided by practice & by a familiarity with the style and the train of observation & reasoning which characterized the principal speakers. It happened, also that I was not absent a single day, nor more than a casual fraction of an hour in any day, so that I could not have lost a single speech, unless a very short one. Insert the Remark on the _____ slip of paper marked A.

[It may be proper to remark, that, with a very few exceptions, the speeches were neither furnished, nor revised, nor sanctioned, by the speakers, but written out from my notes, aided by the freshness of my recollections. A further remark may be proper, that views of the subject might occasionally be presented in the speeches and proceedings, with a latent reference to a compromise on some middle ground, by mutual concessions. The exceptions alluded to were, —first, the sketch furnished by Mr. Randolph of his speech on the introduction of his propositions, on the twenty-ninth day of May; secondly, the speech of Mr. Hamilton, who happened to call on me when putting the last hand to it, and who acknowledged its fidelity, without suggesting more than a very few verbal alterations which were made; thirdly, the speech of Gouverneur Morris on the second day of May, which was communicated to him on a like occasion, and who acquiesced in it without even a verbal change. The correctness of his language and the distinctness of his enunciation were particularly favorable to a reporter. The speeches of Doctor Franklin, excepting a few brief ones, were copied from the written ones read to the Convention by his colleague, Mr. Wilson, it being inconvenient to the Doctor to remain long on his feet.]

Of the ability & intelligence of those who composed the Convention, the debates & proceedings may be a test; as the character of the work which was the offspring of their deliberations must be tested by the experience of the future, added to that of the nearly half century which has passed.

But whatever may be the judgment pronounced on the competency of the architects of the Constitution, or whatever may be the destiny, of the edifice prepared by them, I feel it a duty to express my profound & solemn conviction, derived from my intimate opportunity of observing & appreciating the views of the Convention, collectively & individually, that there never was an assembly of men, charged with a great & arduous trust, who were more pure in their motives, or more exclusively or anxiously [devoted to the object committed to them, than were the members of the Federal Convention of 1787, to the object of devising and proposing a constitutional system which would best supply the defects of that which it was to replace, and best secure the permanent liberty and happiness of their country.]

AMERICAN COURT CASES UNDER THE ARTICLES OF CONFEDERATION

Here is a rare glimpse at some cases decided by the U.S. Supreme Court during the days of the Articles of Confederation, before the Constitution was established. As compared to subsequent Supreme Court opinions, these early ones were rather brief.

Shrider's Lessee v. Morgan, 1 U.S. 68 (1782)

In this cause, M'Kean C. S. said, that he had ruled it in a case at Lancaster, that the lessor of the plaintiff shall not be obliged to show his title further back, than from the person who last died seized, first showing the estate to be out of the Proprietaries, or the commonwealth.

It was objected by Lewis and Clymer, that a sheriff's deed of sale of lands, under a writ of venditioni exponas, not being recorded in the Rolls Office, according to the Act of Assembly of 1774, could not be read in evidence. Sed mon allocatur: Because it was acknowledged [*Shrider's Lessee v. Morgan* 1 U.S. 68 (1782)] in court, and the registering of it in the Prothonotary's office (as is always done) is a sufficient recording within the act.

Sergeant and Ingersol opposed the reading a deed in evidence, upon this ground: that by the1 act of assembly last mentioned, all deeds not recorded in the Rolls Office, according to the particular directions

of that act, are declared void as against subsequent purchasers, and therefore, though this deed was dated before the sheriff's deed, under which the defendant claimed, 'et as it was not recorded till afterwards, they insisted it was void, and could be no evidence at all. Sed non allocatur: And M'Kean C. S. said, we cannot hinder the reading of a deed under seal, but what use will be made of it is another thing: and he cited the case of *Ford v. Lord Grey* 6. Alod. 44.2.

Kennedy v. Fury, 1 U.S. 72 (1783)

A conveyance was made to A. in trust for B. and B. brought an ejectment on his own demise. Blair contended that the demise ought to have been laid in the name of A. in-as-much as the legal estate was in him.

But by Atlee Justice, (M'Kean C. J. being absent) the demise by B. is well enough. We have no Court of Equity here; and, therefore, unless the cestui que trust could bring an ejectment in his own name, he would be without remedy, in the case of an obstinate trustee.

Leib v. Bolton, 1 U.S. 82 (1784)

A motion was made, the 10th of November, on the part of the defendant, to set aside the return of the jury of inquiry, on affidavit of irregular proceedings; and the Court granted a rule to show cause & c.

And now two of the jurors attended and deposed, that Leib's book, supported by his own oath, had been admitted as evidence of the delivery of a quantity of leather by Leib, to the order of Bolton, in part discharge of an agreement between them. But being asked, whether they founded their inquest in any degree upon that evidence, they said it was founded upon that, and concurrent testimony.

In support of the motion it was contended, that, though the admission of books in the manner above stated, had been customary; yet that the custom ought not to be carried farther than to prove work done, or wares delivered; that the purpose for which they had been introduced, on the present occasion, arose upon a collateral point, to establish a sett off in diminution of the damages, and that it was, therefore, irregular to admit them. With respect to the concurrent testimony mentioned by the jurors, it was said, that as neither the nature, or effect of it, appeared to the Court, it might have been even more improper than the allowance of the books as evidence; but that, in all events, the inquest ought to be set aside, as what did appear, shows it to have been raised so far upon an erroneous foundation.

But, BY THE COURT: We will not set aside the verdicts of juries of inquiry; nor the reports of referees, upon frivolous grounds. Nor, will we examine into the effect of any particular piece of evidence upon the minds of the jury; for, unless it appears, that there was no proper evidence before them, we must presume that they had sufficient grounds for their inquest.

The Rule discharged.

Wharton v. Morris, 1 U.S. 125 (1785)

Debt upon a bond. Plea, payment, with leave to give the special matter in evidence.

The case was this: The plaintiffs, copartners; fold to Pleasants, Shore & Co. merchants in Virginia, a considerable quantity of tobacco in March 1778, when the Pennsylvania scale of depreciation, estimates continental money at the rate of five for one. Articles of agreement were executed between the vendors and the purchasers, in which Pleasants, Shore & Co. covenanted to procure Willing, Morris, and Inglis, merchants of Philadelphia, as sureties for the payment of the tobacco; and, accordingly, a bond for that purpose was afterwards executed by those gentlemen, in the penalty of L12,000 on condition to be void, if Pleasants & Co. should pay the sum agreed upon (that is L7 per cent.) 'on the thirtieth of September 1782 in lawful current money of Pennsylvania.' It appeared that Inglis, one of the defendants, had offered to pay the value of the tobacco, at the time of the sale, with interest; but this was refused by the plaintiffs; and no payment or tender, being made upon the 30th of September 1782, they brought the present action upon the bond. [125-Continued.]

The evidence was brief, consisting only of the articles of agreement, the bond, a deposition of the offer made by Inglis, and testimony that the usual price of tobacco, during many years preceeding the war, was about 20s per Cwt.

Wilcocks, Sergeant, and Lewis, for the plaintiffs, contended that this transaction was a fair and lawful wager on the part of Wharton, & Co. in confidence that the continental money would recover its original value; and that on the other hand they ran a considerable risque; as, if it depreciated, they would have been bound to take it, provided it continued a legal currency. But the act which repealed the

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tender law destroyed its currency; so that on the 30th September 1782, when the bond became due and payable, the only lawful current money of Pennsylvania, was coin, of gold or silver; and that by the terms of the bond ought to be paid.

Gouverneur Morris, Wilson and Ingersol, for the defendants, denied that the transaction was founded in a wager; and contended that the plaintiffs had set up a hard and unconscionable demand: for, they insisted, that the lawful current money, expressed in the bond, meant what was current at the time of its execution; and they declared the readiness of the defendants either to pay at the rate established by the scale of depreciation, or according to the real value of the tobacco, with interest from the date of the sale.

McKean, Chief Justice delivered a circumstantial and learned charge to the Jury. He said, that the want of a Court with equitable powers, like those of the Chancery in England, had long been felt in Pennsylvania. The institution of such a Court, he observed, had once been agitated here; but the houses of Assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of encreasing, by that means, the power and influence [Page 1 U.S. 125, 126] of the Governor, who claimed it as a right to be Chancellor. For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty & c. This defect of jurisdiction, has necessarily obliged the Court upon such occasions, to refer the question to the jury, under an equitable and consciencious interpretation of the agreement of the parties; and it is upon that ground, the jury must consider and decide the present cause.

His Honor, having recapitulated the evidence, concluded with the following observations.

The bond is made payable in current money of Pennsylvania; but, I would ask, what is the current money of Pennsylvania? For my part, I know of none, that can properly be so called, for current and lawful are synonymous. In Great Britain, the King by his proclamation may render any species of coin a lawful currency. But here, it can only be done by an act of assembly; and except in the temporary laws for supporting the former emissions of paper-money, there is no pretence that the legislature has ever interfered upon this subject. The expressions in the 2 Sect. of the act of the 27th January, 1777, cannot be construed to make the Spanish milled dollars a legal tender, as they are only mentioned by words of reference; but that which was declared to be a lawful tender, and consequently, became the legal currency of the land, was the money emitted under the authority of Congress.

To that species of money, therefore, the bond must be taken to relate; and the jury will either reduce the penalty to gold or silver, according to the scale of depreciation; or, if they think it more equitable, they will find a verdict for the value of the tobacco, and give the plaintiffs legal interest from the day of sale.

The jury adopted the latter opinion, and found for the plaintiffs with £.3,600 damages and 6d. costs.

Hollingsworth v. Leiper, 1 U.S. 161 (1786)

A rule had been obtained to show cause, why the report of Referrees should not be set aside, on the ground of their having heard a witness interested in the event of the suit; and, after argument, THE PRESIDENT pronounced the decision of the Court.

SHIPPEN, President.

The determination of causes by referrees under a rule of Court, has become so frequent and useful a practice, and is attended with so many advantages towards the summary administration of justice, that it would be extremely mischievous to shake their reports by captious objections, where the substantial rules of justice are not violated. The merits of the cause are solely submitted to them, as judges of the parties own chusing, and are not afterward; enquired into by the Court, unless there should appear a plain mistake of the law or fact.

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As to the forms of their proceeding, both parties should have an opportunity of being heard, and that in the presence of each other, that they may be enabled to apply their testimony to the allegations. The witnesses, on both sides, are likewise, to give their evidence in the presence of the parties, that they may have an opportunity of cross examining them. No surprise is permitted, such as refusing the parties a reasonable time to bring forward their witnesses, or refusing to hear them when they are brought. These rules, or similar ones, are founded in natural justice, and are absolutely necessary for the due administration of justice in every form whatever.

As to the kind of evidence which the referrees may hear, there always has been, and must necessarily be, in this kind of tribunal, a very great latitude. The parties, generally unassisted by counsel, are permitted to relate their own stories, and confront each other; their witnesses are heard even without an

oath, unless the contrary is stipulated, or the referees require it. Books and papers are inspected and examined by them, without regard to their being such as would be strictly evidence in a Court of Law. And this practice being known to both parties before they agree to the reference, and the advantages arising from it, being mutual, there seems no just reason to complain of it.

In public trials in Courts of law, the judges sit to superintend the evidence, and no interested witnesses are, in general, permitted to give evidence to the jury; but referees occupy the office both of judge and jurymen; their discretion, therefore, must necessarily be much relied on, and as they are generally unacquainted with the artificial rules of law, they must be guided principally by their own reason. If we were once to set aside a report, because the referees had heard an interested witness, we should open a door for such a variety of objections, that scarcely a single report would stand the test. Papers not formally or legally proved, or hearsay evidence admitted, would be as fatal to reports, as the admission of interested witnesses, being equal violations of the rules of evidence.

***Gerard v. La Coste*, 1 U.S. 194 (1787)**

This case came before the Court on a special verdict, and, after argument, the following judgment was pronounced by the President.

Shippen, President.

This action is brought against the acceptors of an inland Bill of Exchange, made payable to Bass and Soyer and indorsed by them, after the Acceptance, to the Plaintiff for a valuable consideration. The Bill is payable to Bass and Soyer, without the usual words 'or order' 'or assigns,' or any other words of negotiability. The question is, whether this is a Bill of Exchange, which, by the law merchant, is indorsable over, so as to enable the indorsee to maintain an action on it against the acceptors, in his own name.

The Court has taken some time to consider the case, not so much from their own doubts, as because it is said eminent Lawyers, as well as Judges, in America, have entertained different opinions concerning it. There is certainly no precise form of words necessary to constitute a Bill of Exchange, yet from the earliest time to the present, merchants have agreed upon nearly the same form, which contains few or no superfluous words, terms of negotiability usually appearing to make a part of it. It is indeed generally for the benefit of trade that Bills of Exchange, especially foreign ones, should be assignable; but when they are so, it must appear to be a part of the contract, and the power to assign must be contained in the Bill itself.

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The drawer is the lawgiver, and directs the payment as he pleases; the receiver knows the terms, acquiesces in them, and must conform. There have doubtless been many draughts made payable to the party himself, without more, generally perhaps to prevent their negotiability: Whether these draughts can properly be called Bills of Exchange, even between the parties themselves, seems to have been left in some doubt by the modern Judges. Certainly there are draughts, in the nature of Bills of Exchange, which are not strictly such, as those issuing out of a contingent fund; these, (say the Judges in 2 Black. Rep. 1140.) do not operate as Bills of Exchange, but, when accepted, are binding between the parties. The question, however, here, is not whether this would be a good Bill of Exchange between the drawer, payee, and acceptor, but whether it is indorsable. *Marius's Advice* is an old book of good authority; in page 141 he mentions expressly such a Bill of Exchange as the present, and the effect of it, and he says, that the Bill not being payable to a man or his Assigns, or Order, an assignment of it will not avail, but the money must be paid to the man himself. In 1 Salkeld 125, it is said, that it is by force of the words, 'or order' in the Bill itself, that authority is given to the party to assign it by indorsement. In 3 Salk. 67 it is ruled, that where a Bill is drawn payable to a man, 'or order,' it is within the custom of merchants; and such a Bill may be negotiated and assigned by custom and the Contract of the Parties. And in 1 Salk. 133 it is expressly said by the Court, that the words 'or to his order,' give the authority to assign the Bill by indorsement, and that without those words the Drawer was not answerable to the indorsee, although the Indorser might. An argument of some plausibility is drawn in favor of the Plaintiff from the familiarity of Promissory Notes to Bills of Exchange. The statute of 3 & 4 of Ann appears to have two objects; one to enable the person to whom the Note is made payable, to sue the drawer upon the Note as an instrument (which he could not do before that Act) and the other to enable the Indorsee to maintain an action in his own name against the drawer. The words in this Act which describe the Note on which an action will lie for the Payee, are said to be the same as those on which the action will lie for the indorsee, namely, that it shall be a Note payable to any person, or his Order; and it appearing by adjudged cases, that an action will lie for the Payee although the words 'or order' are not in the note, it follows (it is contended) that an

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action will also lie for the Indorsee, without those words. If the Letter of the Act was strictly adhered to, certainly neither the Payee, nor Indorsee, could support an action on a Note, which did not contain such words of negotiability as are mentioned in the Act; yet the construction of the Judges has been, that the original payee may support an action on a Note not made assignable in terms. The foundation of this construction does not fully appear in the cases, but it was probably thought consonant to the Spirit [Page 1 U.S. 194, 196] of the Act, as the words 'or order' could have no effect, and might be supposed immaterial, in a suit brought by the payee himself against the maker of the Note. But to extend this construction to the case of an Indorsement, without any authority to make it appearing on the face of the Note, would have been to violate not only the Letter but the Spirit of the Act. Consequently no such case any where appears. On the contrary, wherever the Judges speak of the effect of an indorsement, they always suppose the Note itself to have been originally made indorsable. The case of *Moore versus Manning* in Com. Rep. 311. was the case of a Promissory Note originally payable to one and his Order; it was assigned without the words 'or order' in the indorsment; the question was, whether the assignee could assign it again: The Chief Justice, at first, inclined that he could not, but it was afterwards resolved by the whole Court, that if the Bill was originally assignable, 'as it will be (say the Court) if it be payable to one and his Order,' then to whomsoever it is assigned, he has all the interest in the Bill, and may assign it as he pleases. Here the whole stress of the determination is laid upon what were the original terms of the Bill, if it was made payable to one and his Order, it was assignable, even by an indorsee without the word 'order' in the indorsment; it follows, therefore, that if the Bill was not originally payable to order, it was not assignable at all. The same point is determined, for the same reasons, in the case of *Edie & Laird v. the East India Company*, in 1 Black. R. 29, where Lord Mansfield says, 'the main foundation is to consider what the Bill was in its origin; if in its original creation it was a negotiable draught, it carries the power to assign it.' In a similar case, cited in Buller's nisi prius 390, the Court held, that as the Note was in its original creation indorsable, it would be so in the hands of the indorsee, though not so expressed in the indorsment.

These cases leave no room to doubt what have been the sentiments of the Courts in England upon the subject. To make Bills, or Notes, assignable, the power to assign them must appear in the instruments themselves; and then, the custom of merchants, in the case of Bills of Exchange, and the Act of Parliament, in the case of Notes, operating upon the Contract of the Parties, will make them assignable.

In the case before us, no such contract appears in the Bill. The acceptance was an engagement to pay according to the terms of the Bill to Bass & Soyer; a subsequent indorsment, not authorized by the Bill, cannot vary or enlarge that engagement, so as to subject the acceptor, by the law merchant, to an action at the suit of the indorsee.

Judgment for the Defendant.