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THE CONFISCATION LAWS OF MASSACHUSETTS

BY

ANDREW McFARLAND DAVIS

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THE CONFISCATION LAWS OF MASSACHUSETTS

BY

ANDREW McFARLAND DAVIS

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THE CONFISCATION LAWS OF MASSACHUSETTS

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An examination of the several resolves passed by the Committee of Safety and the Provincial Congress in Massachusetts, and later the resolves and statutes passed by the Assembly of the Colony, will reveal the fact that there was some authority to be derived therefrom for nearly every outrage committed upon the property of the Loyalists in the name of the Committees of the several towns.[1] No such legislation exists, however, under cover of which assaults upon the person could be justified. The great dramatist

[1] The legislation considered in this paper is that which applied to refugees like John Chandler and to their property. The following Acts which reached the cases of Loyalists who remained in Massachusetts, are not discussed. Perhaps reference to them is necessary to round out the subject: —

The Act for disarming persons notoriously disaffected to the cause of America, passed 1 May, 1776 (Province Laws, v. 479);

The Act for taking up and restraining persons dangerous to this State, passed 9 May, 1777 (*Ibid.* v. 641);

The Act for securing this and the other United States against the danger to which they are exposed by the internal enemies thereof, passed 10 May, 1777 (*Ibid.* v. 648);

The Act for prescribing and establishing an oath of fidelity and allegiance, passed 3 February, 1778 (*Ibid.* v. 770);

together with the several amendments, additions, and explanations of these acts subsequently passed.

represents the brawlers in the streets of Verona, even while carrying out the traditions of the houses to which they belonged, as discussing whether they had the law on their side before they would take their chances of injuring their opponents in a street fight. Not so the Patriots. However scrupulous they might be in seeking the protection of the law before invading property rights, they did not hesitate to maltreat offending Tories in a lawless and scandalous manner. Acts of this sort that were perpetrated in the name of Committees were subsequently brought under the ægis of the law. Any member of any of the Committees of Correspondence, etc., who at any time prior to the Declaration of Independence made any mistake in the seizure of property or in apprehending or confining any person was, by a law passed for that purpose, screened from suits for damage.[1]

The resolves and the statutes of this period also tell the story of the progressive change of feeling towards the Loyalists which accompanied the growth of belief that the colonies might prevail and that a separate government might be the result of the contest then going on. Even before the first collision at arms, many loyal citizens sought protection in Boston from the abuse of their former friends and neighbors. So long as there was no form of government, except that under the Charter, there was no such thing as an abandonment of property involved in taking such a step as this, but after the organization of the Provincial Congress, Massachusetts was for a time practically under two governments, the one having control in Boston, the other covering the rest of the Province. When, therefore, after the battle of Lexington, citizens of the towns near Boston fled to that place, their flight, in some cases at least, was accompanied by an abandonment of property. In some instances, relatives were left in charge of the homes thus deserted, but there were many prominent men who felt that personal safety was the first consideration, and who, being entirely unprepared for the unexpected situation, were compelled to leave their homes without having had a chance to install representatives. Property thus abandoned was exposed to pillage. Its protection

[1] An Act to indemnify, and to secure from prosecution in law, persons who by their laudable exertions under the late government of the king of Great Britain, have exposed themselves to actions of damage, and other prosecutions, in certain cases, passed 10 April, 1780 (Province Laws, v. 1169).

was the first thought of the authorities. Sequestration could not at that time have entered the mind of anybody as a possible solution for the question of its future disposition. It may be assumed, therefore, that the sole motive which governed the first legislation touching property in this condition was the protection of the community from the excesses of evil-doers. The exposed property was a temptation. There was a measure of responsibility on the part of the Patriots for this exposure. It could be atoned for in part by assuming control of the property for the benefit of whom it might concern. This was evidently the spirit in which the Committee of Safety, 3 May, 1775, instructed the quarter-master-general to pay the strictest attention that the household furniture of those persons who had taken refuge in the town of Boston might be properly secured and disposed of in places of safety.[1]

The masterful tone and the revengeful spirit of the Confiscation Act are entirely wanting here, and yet the next step taken, even though it was more than a year before the Declaration of Independence, is characterized by an apparent confidence not altogether warranted by the military situation, a confidence which analysis shows to have been, after all, merely apparent. This time it was the Provincial Congress which spoke, and on the twenty-second of May, forbade all persons in this "Colony" taking any deed, lease or conveyance of the lands, houses or estates of the refugees.[2] The object of this was clear enough. Refugees, if permitted, would hasten to lodge their titles in the names of relatives or friends less objectionable to the Provincial Congress than themselves. It will be observed that the resolve does not undertake to prevent refugees from making such conveyances, but simply forbids others to take them. In order to make such

[1] Province Laws, v. 706; and The Journals of each Provincial Congress of Massachusetts, in 1774 and 1775, and of the Committee of Safety, *etc.*, p. 534.

In the note to Chapter 38, Laws of 1776–77 (Province Laws, v. 706–713), Mr. Goodell has collected not only the legislation on this point but also much material bearing upon it. In a similar way he has performed for us the same service in connection with Chapters 24, 48 and 49, Laws of 1778–79 in the same volume (pp. 1001–1009, 1052–1057, 1064), which deal with the same general subject at a later date. There is more of detail in these notes than can be produced here, but their examination will disclose how exhaustive they are and how little is left for the student of the subject to do.

[2] Province Laws, v. 706; Journals of the Provincial Congress, *etc.*, p. 249.

deeds effective, the grantee must have been some person who could have access to the property. This was only possible at that time for such as had given in their allegiance to the Provincial Congress, hence the resolve in this form probably served its purpose.

Events had advanced far enough to stir up the more radical of the Patriots to a desire for aggressive legislation but not far enough to relieve the apprehensions of the timid and the conservative among the legislators. The first armed collision had taken place, but the lesson of confidence in the courage of the undisciplined volunteers then thronging on Cambridge Common, soon to be learned at Bunker Hill, had not been received. There was nothing which should cause even the timid to hesitate in the passage of a resolve to which obedience was alone expected from those who had given in their fealty to the Provincial Congress. There was nothing in its wording which portended confiscation, yet this compulsory retention of titles in the names of the refugees must have had some such ulterior intention.

Meanwhile, the Committee of Safety was in closer touch with current events bearing upon this property question than was the Provincial Congress. Complaints of the waste and destruction of the property of refugees poured in upon the committee in such numbers that on the twelfth of June 1775, they called the attention of the Provincial Congress to the subject.[1] How close was the touch and how trivial were some of the affairs with which the Congress and the Committee concerned themselves is shown by the recommendation to the Committee made by the Congress in consequence of that appeal. They were requested to have the grass cut on certain estates of refugees in Cambridge, Charlestown, Roxbury and Milton, and to secure it in some convenient place for the benefit of the colony.[2] Two committees were appointed by the Congress, one to take care of estates of refugees and one to take into consideration the property of persons who had left their habitations in sundry towns in the Colony and who had "discovered" themselves to be enemies to the Colony and the continent.[3]

[1] Province Laws, v. 706; Journals of the Provincial Congress, *etc.*, p. 563.

[2] Province Laws, v. 707; Journals of the Provincial Congress, *etc.*, p. 322.

[3] Province Laws, v. 707; Journals of the Provincial Congress, *etc.*, p. 337, and Report of Committee, 17 June, p. 348.

On the twenty-first of June, 1775, the Provincial Congress recommended the selectmen and the committees of correspondence of towns where any of the property of refugees was to be found, to take possession of such property and protect it from waste. They were to keep a record of the rents and profits which they should receive and they were to account to the Provincial Congress or the Assembly of the Colony for what they should collect, when thereto required.[1] This important resolve lies at the base of all subsequent legislative action down to the passage of the Confiscation Act. The underlying principles are the same as those which were subsequently elaborated into the act to prevent the waste, destruction and embezzlement of the property of refugees. All property of refugees was to be seized and the rents and profits therefrom were to be accounted for to the government.

The use in this connection of the descriptive title The Assembly of the Colony calls attention to the legal theory under which the proceedings of the colonists had theretofore been conducted. There was of course no provision in the Charter under which such a body as the Provincial Congress could have been organized. Its members, although in revolt against the duly appointed representative of the Crown, had not as yet thrown off allegiance to Great Britain, nor was the situation such that they could with confidence expect that their proceedings would eventuate in such a result. They bore the same relation to the Crown as did their ancestors when they seized and imprisoned Andros, and the name Provincial Congress which they adopted was to a certain extent a misnomer, for the essence of a province was that it should have a Governor appointed by the Crown. The elective body which in the summer of 1775 was organized for legislative purposes through the instrumentality of this Congress was styled an Assembly of the Colony, and as such its first act was to legalize the doings of the "Provincial Congress of the Colony."[2]

The attitude taken in the resolve of the twenty-first of June would seem to have been too bold for some of the legislators, for, on the eighth of July, they secured the passage of an explanatory resolve, to the effect that the resolve of the twenty-first of June

[1] Province Laws, v. 707; Journals of the Provincial Congress, *etc.*, pp. 368, 369.

[2] Province Laws, v. 415.

was only intended to apply to such estates as were "left unimproved and void of any occupant or possessor." Other estates ought not to be so treated until the refugees should be "regularly indicted and tried for their supposed offences."[1] The operation of the resolve differed from that produced by the one passed on the third of May, as follows: Instead of being restricted to the household furniture of those who had taken refuge in Boston, it applied to all abandoned property in the Province, and instead of the custody being turned over to the quarter-master-general, the property was intrusted to the care of the selectmen and committees of correspondence. The cause of these changes is obvious. To avoid insult and actual physical maltreatment, Loyalists from all parts of the Province had been compelled to take refuge in Boston. If, in so doing, they left behind them property without adequate provision for its care, it was plain that so narrow a description as "household furniture" might not cover all cases. The appointment in the original resolve of the quarter-master-general as custodian was evidently a mere temporary makeshift. The transfer of the keepership of the seized property to the selectmen and committees of correspondence was a practical acknowledgment of responsibility and indicated a recognition of the probable necessity for a more protracted custody and an acceptance of the self-imposed trust.

Legislation with reference to abandoned property was permitted to rest in the condition laid down by the resolve of 21 June, 1775, as amended by that of the eighth of July of the same year, for about ten months. The subject was however discussed from time to time in the legislative body representing the people, whether congress or assembly, and the various propositions then introduced indicate that the representatives were becoming more and more aggressive. Thus, on the fifteenth of August, 1775, the House appointed a committee to examine the resolutions of the Continental Congress respecting refugees and report what was required to be done.[2] Again, on the ninth of November, 1775, a resolve was passed in the same body empowering the selectmen and committees of correspondence, in towns where refugees had

[1] Province Laws, v. 707; Journals of the Provincial Congress, *etc.*, p. 476.

[2] Province Laws, v. 707; House Journal, p. 73.

left estates, both real and personal, to take care of the personal estate and to sell stock which could not be kept on account of the scarcity of fodder; to take care of the produce of the farms; to keep an account of their doings and report to the court when required.[1] The Council amended this resolve in three ways: They wanted to have the control of the selectmen and committees limited to abandoned property; they desired to have the report under oath; and they wished to preserve a loop-hole for refugees who might have some explanation to give of their conduct. This they proposed to accomplish by defining the purpose of the required report to be "that justice may hereafter be done to the public as also to those individuals, when due inquiry can be made into their conduct."[2] Apparently, these amendments were not acceptable to the House. The subject was again taken up by the Representatives on the fifth of January, 1776, and a committee appointed to bring in a report.[3] On the eighth a resolve was submitted to the House.[4] The hostility of the refugees was set forth in the preamble in strong terms. They had left behind them estates liable to waste and perish, and in some instances had arranged to receive rents from their real estate and the proceeds of sales of their personal property. The selectmen and committees of correspondence of any town where such abandoned estates were situated were to take possession of the same; and to manage the real estate and dispose of the personal estate, in such manner that no part of the rents or proceeds would get in the hands of the refugees. Proper accounts were to be kept for the information of the General Court when required. This resolve, like its predecessor, met with amendment in the Council.[5] The most important of the changes suggested seems to convey the idea that certain Patriots fleeing from Boston had arranged with Loyalists who had taken refuge in Boston for an exchange of property. The Council proposed

[1] Province Laws, v. 707; House Journal, p. 254; Massachusetts Archives, ccvii. 270.

[2] Province Laws, v. 708, where Mr. Goodell adds: —

By the minutes upon the original resolve in the Archives as well as by the recorded doings of the Council and the House upon this resolve on the 18th and 27th, it does not appear to have been passed, notwithstanding an entry to that effect in the so called records of the General Court.

[3] House Journal, p. 119. [4] *Ibid.* pp. 127, 128.

[5] For this amendment, see House Journal, 11 January, 1776, p. 141.

that after the clause requiring a report to the General Court, there should be added the words —

"to whom they are to be accountable, provided always that nothing in the foregoing resolve shall extend to such estates real or personal as are now improved by persons late inhabitants of the town of Boston, who have given up their estates in said town to the owners of estates on which they now dwell."

This amendment was not accepted by the Representatives, and at this stage the proposed legislation was apparently arrested.

On the fourteenth of February, 1776, the subject was again considered by the House. A resolve was reported which was duly passed and sent up for concurrence.[1] This resolve was, in substance, the same as that which had been passed by the House on the eighth of January, but to the clause requiring the selectmen and the committee to report their doings to the court when required by that body, these words were added, "and unto whom they shall be accountable." There was also a proviso added to the effect that the resolve was not to be construed to include estates which had been conveyed to persons friendly to the Colony prior to 22 May, 1775. There is no record of the action taken by the Council on this specific resolve, but it may be assumed that it failed of passage in that body.

Meantime, the evacuation of Boston introduced a new set of problems urgent in their nature and requiring immediate attention. The compulsory withdrawal of the English army and fleet, not only affected military affairs, but the prestige gained by the Americans in consequence of this important success reacted upon the political situation. It is not strange, therefore, to find immediately after this event, that thoughts of confiscation began to obtrude in the body from which all aggressive action had heretofore come. On the nineteenth of March, 1776, it was moved in the House that a list of the Boston Loyalists be made out, and an order was passed for the appointment of a committee to bring in a bill for the confiscation of the estates of persons who had aided the enemy.[2] It would seem that the Council was not ready for this step, for on the twenty-fifth of March the General Court appointed

[1] Province Laws, v. 708, 709; House Journal, p. 293.

[2] Province Laws, v. 1052; House Journal, p. 18.

a committee to repair to Boston and make an inventory of the real and personal property belonging to the mandamus councillors, commissioners of customs and others, open and avowed enemies to the rights and liberties of America, who through fear of the American arms and the just resentment of their injured countrymen had departed the town of Boston, and report the same to the court as soon as may be. Meantime, they were to cause such effects to be secured so as to prevent embezzlement.[1] This committee found unexpected obstacles in the way of securing possession of the property of refugees and sought for and obtained, on the third of April, 1776, an extension of their powers.[2] The resolve under which this was granted, recites that the Court was informed that some of the estates of the refugees were then in the occupation and possession of persons who had clandestinely taken the same, and others were held under pretence of gift, sale or attachment. To secure possession of these estates the committee was authorized to examine under oath persons suspected of having in their possession estates of refugees in the same manner as was permitted by the law governing estates of intestates. The committee was also authorized to take possession of property belonging to persons in Great Britain, the management of which was by power of attorney lodged in the hands of refugees. All of this without regard to legal proceedings instituted since the nineteenth of April, 1775.

On the sixth of April, 1776, justices of the peace were appointed to examine Loyalists whose names were on the list.[3] On the eighth of the same month, the House recurred to the question of confiscation but was then held in check by the Council.[4] On the ninth, the House passed a resolve extending the provision as to inventories of property of Loyalists to all towns and requiring committees of correspondence, safety and inspection, aided by the justices of the peace, to prepare lists of refugees.[5]

Having thus made provision for securing as far as possible the

[1] Province Laws, v. 709, 1064; House Journal, pp. 37, 40, 41.

[2] Province Laws, v. 709; House Journal, p. 75; Massachusetts Archives, ccviii. 328.

[3] House Journal, pp. 88, 89.

[4] *Ibid.* p. 96.

[5] Province Laws, v. 1052; Massachusetts Archives, ccviii. 357; House Journal, p. 104.

property in Boston abandoned by the refugees who accompanied the British army to Halifax, the House took up the resolve originally introduced on the fourteenth of February, and on the nineteenth of April, 1776, passed a resolve in which the Council concurred on the twenty-third.[1] The preamble asserted that certain enemies of the Colony and others who had left the Colony with intent to aid the enemy had left behind them real and personal property subject to waste. The committees of correspondence, safety and inspection, in each town where there was property of this sort which the committees believed was the property of such refugees, were instructed to take possession of the property and to manage the estates according to their best judgment. They were to lease the real estate for one year; and to return an inventory of the personal property and a statement giving details as to leases. Estates occupied by persons friendly to the Colony under written conveyance dated prior to 22 May, 1775, were exempted from the operation of this resolve. To this was added another clause intended to reach Loyalists who had not absconded, but had aided the enemy. The committees were ordered to return to the court a list of such Loyalists, including therein the names of those who had voted any address to General Gage approving his errand to the Colony or his acts as Governor since the dissolution of the General Court at Salem in 1774; or to Governor Hutchinson after the arrival of General Gage; or to General Howe; or who had signed or promoted any association for joining or assisting the enemy; and, finally, a list of the refugees who had left the Colony with the British army or fleet. Accompanying such lists, the committee were to forward evidence to prove that the names on the lists were properly there. There was a qualifying paragraph which probably means that the names of the Loyalists who had given satisfactory evidence of having abandoned the cause of the Crown and of having become true Patriots were not to be included in the lists. Justices of the peace were to aid in the preparation of the depositions. There is a degree of hesitancy in this resolve, which, under the circumstances, seems singular. The evacuation of Boston was such a triumph for the American forces that the Patriots must thereafter

[1] Province Laws, v. 710; House Journal, pp. 153, 154.

have felt reasonably secure in taking whatever steps they chose. To a certain extent this feeling is shown in calling for lists of Loyalists and refugees, but the power of control over the estates of refugees was limited in such a way as to indicate some ulterior purpose as to these estates. The leases of real estate which the committees were authorized to make were limited to one year and no authority whatever to dispose of personal estate was conferred in the resolve. It was soon realized that this resolve conflicted with the one of the twenty-fifth of March, appointing a committee to take charge of the abandoned estates in Boston. This situation was remedied by the passage on the second of May of a resolve continuing the powers of this committee until further order of the General Court, notwithstanding the resolve of the nineteenth of April.[1]

By this time it was realized that the fugitive Loyalists had left behind them families dependent for their support upon the property which had been seized and in this resolve recognition was had of the obligation which the government had assumed by taking possession of the property. This was accomplished by adding a proviso which gave authority to the committee to make allowance out of such estates, or the improvement thereof, for the support of the wives and children of the persons whose property was in the hands of the committee. The committee was also ordered to dispose of perishable property by auction. Through the above-mentioned action, provision was, to a certain extent, made for the support of the families of the Boston refugees, but no thought was had for those who were similarly situated elsewhere in the Colony. On the twenty-fifth of June, 1776, however, a committee was appointed by the House to inspect the returns of the committees of correspondence with respect to the estates of refugees and to report if anything was required to be done in connection therewith.[2] On the same day the House passed a resolve authorizing the committees of correspondence having estates of refugees in their possession, to allow for the support of the families so much of the improvement of the estates as, combined with the industry

[1] Province Laws, v. 710; Massachusetts Archives, ccix. 107. The resolve of 19 April, as it is generally cited, is the one that was concurred in by the Council April twenty-third.

[2] Province Laws, v. 711; House Journal, p. 127.

of the families, would provide for their comfortable support.[1] The selectmen of the towns, or the overseers of the poor, were by the terms of this resolve "empowered to bind out the children of such Tories in like manner as they are by law empowered to bind out the poor of their towns." The committees of correspondence were also authorized to sell perishable property belonging to said estates. It scarcely needs to be stated that the Council did not agree to the proposition to permit the compulsory apprenticeship of all children of Tories, irrespective of their surroundings and regardless of the question whether the seizure of the property of their parents would of necessity result in their becoming public charges.

Up to this point there had been no general authority conferred to sell property, and no appropriation by the Colony of the seized effects. Perishable property had been ordered to be sold, and from time to time specific instructions and special authority had been given in particular cases.

The Assembly of the Colony was in session at the date of the Declaration of Independence, but was prorogued on the thirteenth of July, 1776, prior to the receipt of official information of the action of the Continental Congress. When the legislators met in August of that year, they represented one of the United States of America, and the revolt which had been in progress had become an open war against England. This permitted, indeed, it may be said to have compelled, the placing upon the statute books, in permanent form, a definite policy with regard to the estates of refugees, in place of the various conflicting resolves under which seizures had been made. The matter was taken up in October,[2] but the act to prevent the waste of the estates of refugees, which was the result of these deliberations, was not finally passed until April, 1777. Meantime, the only change in the relations to the subject of those holding property of refugees under authority of the various resolves, would seem to have been effected by a resolve passed 31 January, 1777, ordering the committee for securing the estates of the absconding enemies to the rights of America to turn over to the

[1] Province Laws, v. 711; Court Records, xxxv. 77; printed Resolves, chap. cix.

[2] See supplementary note to chap. 38 of the Acts of 1776–77, Province Laws, v. 725.

Board of War such effects in their hands as might be available for this and the other United States.[1]

The "Act to prevent the waste, destruction and embezzlement of the goods or estates of such persons who have left the same, and fled to our enemies for protection; and also for the payment of their just debts, out of their estates" was passed in April.[2] This act authorized the judges of probate to appoint agents to take possession of the property of persons who had voluntarily fled to the enemy leaving behind them estates amounting in value to twenty pounds or upwards. Judges of probate were authorized to allow the wife and family of the refugees, bedding and household furniture, and could also assign to the wife the use and improvement of one third of the real estate during the absence of the husband.

The agent was to sell the personal property and pay the debts of the refugee. If there was not enough personal property to meet the debts, then recourse could be had to the real estate. Except for the purpose of paying debts, the agent had no power to sell real estate. Where the estates were not insolvent, the judge of probate could make allowance out of the rents and profits of the estate for the support of the absentee's family and servants. The agent was to pay over to the Treasurer of the State any balance in his hands after paying the debts of the estate and thereafter was to account to the judge of probate by whom he was appointed. Thus matters stood until the passage of the Confiscation Act. The flight of the refugee was treated as being equivalent to his having committed suicide. The agent appointed to take possession of his estate was given authority to manage the same "in as full and ample a manner as though the absent person was naturally dead and the said agent was appointed administrator of his or her estate." It was evidently the purpose of the act to give the agent control over the management of the real estate, but the extent of that control and its limits are only to be inferred. The agent is put in possession and can receive the rents from leases made by committees under authority of the court. He can make repairs. Out of the rents and profits in his hands he can pay such sums as the court allows for the support of the family. The committees having

[1] Province Laws, v. 711; printed Resolves, chap. cxxxi.; Massachusetts Archives, ccxii. 213.

[2] Province Laws, v. 629 *et seq.*

charge of real estate were only authorized to lease for one year. Perhaps it is a fair inference that the agents' power in this respect was similarly restricted. On the nineteenth of September, 1778, collectors of taxes were stayed from proceeding against the unimproved estates of absentees.[1] On the sixteenth of October, 1778, the power of judges of probate in the appointment of agents was extended. They were directed to exercise this power as soon as it should appear to them, by information or otherwise, that any persons had fled to the enemy for protection. The estates of refugees who since leaving home had died were not to be exempt, and commissioners were to be appointed to examine claims against all estates whether insolvent or not.[2] The same act was further amended in February, 1779, by the addition of a clause which empowered judges of probate to treat absentee executors and administrators as if dead. Appointments could be made of persons to fulfil the trusts which the absentees were unable to perform.[3]

Pursuant to the recommendation of Congress, the subject of confiscation was taken up by the General Court in January, 1778. On the twenty-third of February[4] a Confiscation Act was reported and a list of names of refugees was ordered to be prepared. This was under consideration for a protracted period, the details concerning which are given in the note to Chapter 48 of the Acts of 1778–79.[5] The passage on the sixteenth of October, 1778, of the Act to prevent the return to this State of certain persons therein named and others who have left this State or either of the United States and joined the enemies thereof, would seem to have been the immediate outcome of this discussion.[6] The State, at this time, had possession of practically all the property of the refugees. The personal property had, under authority, been disposed of. The real estate was still under the management of the agents who had been put in charge of it. Difficulties of various sorts turned up, most of which were met by legislation, general in character, but calculated to meet the emergency which called it into being. The spring of 1779 was fertile with such legislation. On the nineteenth of February, 1779, agents who had not made returns of inventories were ordered to do so immediately. They were also required to

[1] Printed Resolves, September Session, 1778, Resolve xi. p. 38.
[2] Province Laws, v. 910, 911.
[3] *Ibid.* v. 931.
[4] *Ibid.* v. 1053.
[5] *Ibid.* v. 1052 *et seq.*
[6] *Ibid.* v. 912.

make up their accounts with all possible expedition, and after deducting such allowance to the wife, widow, or family, as the judge of probate might have approved, to pay over the balance to the Treasurer of the State.[1] The same day, another resolve was passed instructing agents to lease for circulating currency the real estate on one year leases.[2] The property of subjects of Great Britain who had not resided in this State was, by resolves of date of 20 February and 19 April, ordered to be turned over to the agents.[3] A special resolve was passed 1 May, providing for the ejectment of persons improperly holding possession of the property of refugees,[4] and resolves were passed 1 May and 3 May to meet the cases arising from delinquent agents.[5]

This review of special legislation of a general character at this period has carried us beyond the date of the passage of the two Confiscation Acts in which all of this legislation may be said to have culminated. On the thirtieth of April, 1779, two bills were passed, the one directed against the estates of Mandamus Councillors, Commissioners of Customs and certain other Royal office-holders, the other against the estates of refugees in general. In the former, the estates of the named persons were confiscated without further hearing. In the general Confiscation Act there was detailed provision for the mode of trial under which the estates would be confiscated. Personal service, or the ordinary substitutes, lay at the base of the action and a jury was required even in case of default. In both acts provision was made for setting aside dower for the wife or widow of the refugee, out of the estate.

In the proceedings under the Confiscation Act the result was simply that possession in behalf of the Commonwealth was given to an agent appointed for that purpose. No provision was made in the act by means of which the agent could pay debts. On the nineteenth of June, 1780, a committee was appointed by resolve who were authorized to borrow money for the use of the State, and as security for the loans they could put lenders in possession of the real property of absentees.[6] On the twenty-ninth of November, 1780, a resolve was passed for selling

[1] Province Laws, v. 1000.
[2] *Ibid.* v. 1000.
[3] *Ibid.* v. 1000, 1001.
[4] *Ibid.* v. 1002.
[5] *Ibid.* v. 1002.
[6] Resolves of Massachusetts, 1780, Resolve lxxxiii.

at public auction the estates and effects of absentees. The proceeds were to be paid into the treasury.[1] On the fourth of December, 1780, the Confiscation Act was amended.[2] The requirement of a jury where there was no contest was dispensed with, and instead of the notification to the absentees set forth in the act as a basis for the proceedings in court, notice by publication in newspapers was substituted. The personal service required in the original act on absentees who were by law prohibited from entering Massachusetts was of course a legal farce and an absurd proposition, nor was it much improved by having a notice left at the last and usual abode of the absentee, nor by posting it on the premises. Such absentees had, under the circumstances, no recognized interest in the proceedings and their families had no claim except through them. Only those were legally interested who might claim through some conveyance or contract which the courts would recognize as valid, and as these might not be known, publication was clearly the best way to reach them. Some of the confiscation suits were, at the time of the passage of this act, ripe for judgment. Taking advantage of the provision which dispensed with the jury requirement, some of the courts at once proceeded to enter up judgment in the cases pending before them. It was soon discovered that the act which had made it possible to get along without a jury had also upset the service of the writs upon which these cases were based. To remedy this, a special act was passed 18 January, 1781, legalizing the proceedings in these suits.[3]

The committees and agents were instructed, 2 February, 1781, not to lease property of absentees,[4] but on the third of March, following, they were authorized to lease for one year if they thought it was for the interest of the government.[5]

[1] Laws and Resolves of Massachusetts, 1780–81, chap. 95, p. 183.

[2] *Ibid.* 1780–81. An act in addition to and for the alteration of some of the provisions of an act, *etc.*, chap. 48, p. 113. I have used for my citations of subsequent legislation the reprints of the laws now in progress, the title given being the binder's title. This is sometimes misleading since the years which govern it are session years and the fall sessions overlapped the calendar year.

[3] *Ibid.* 1780–81, chap. 49, p. 114.

[4] *Ibid.* 1780–81, chap. 65, p. 254; Resolves of Massachusetts, 1781, Resolve lxv. p. 79.

[5] Laws and Resolves of Massachusetts, 1780–81, chap. 196, p. 335; Resolves of Massachusetts, 1781, Resolve cxcvi. p. 129.

The act to provide for the payment of the debts due from conspirators, etc., was amended 1 May, 1781. Committees appointed to sell the estates of absentees were authorized to sell at private sale to persons who had advanced money to the Commonwealth under the resolve of 19 June, 1780, the estates then turned over to them as security, provided the creditor of the Commonwealth made application for that purpose and was willing to take the estate at the appraised value designated by a committee appointed for that purpose.[1] The action taken in this last resolve is peculiar and not altogether consistent with what had just taken place, for on the second of March, the Legislature had formally passed an act to provide for the payment of debts due from conspirators and absentees and for the recovery of debts due to them in which they had appointed committees to sell the estates and pay the debts.[2] The claims were to be examined by the committees formerly appointed by the judges of probate. The sales were to be conducted as in the case of intestates. The committees for the several counties were named in the act and were authorized to sell the estates, pay the debts and pay over what was left to the Treasurer of the State. Money paid to the Treasurer could be reached by warrants issued on certificates of probate judges.

On the fifteenth of May, knowledge having been acquired that there were persons in possession of real estate of absentees, who did not pay rent and others having personal property illegally in possession, a resolve was passed directing the committees appointed to sell confiscated estates in the several counties, to make inquiries on these points and report thereon.[3] The same day an act was passed directing commissioners to reject all claims originating from conspirators or absentees and extending the time for proving claims against the estates and, in order to expedite payments, authorizing payment in full to creditors who would give an indemnity bond to refund *pro rata* in case the proceeds of sales should be inadequate to meet all claims.[4]

The committees of the several counties within the Commonwealth, appointed to dispose of confiscated estates, were, on the

[1] Laws and Resolves of Massachusetts, 1780–81, chap. 52, p. 122.

[2] *Ibid.* 1780–81, chap. 50, pp. 115 *et seq.*

[3] *Ibid.* 1780–81, chap. 176, p. 460.

[4] *Ibid.* 1780–81, chap. 53, pp. 123–125.

eleventh of February, 1782, instructed to receive in payments the securities given to officers and soldiers.[1] On the seventh of March, 1782, the committees for the sale of estates of absentees were authorized to lease the said estates for the ensuing year.[2]

On the eighth of March, 1782, in order that persons might be protected who had been prevented by good reasons from prosecuting their claims against the estates of absentees, a resolve was passed, authorizing judges of probate to renew for three months the commissions of those previously appointed to examine claims. The commissioners thus re-appointed, or others in their places, were instructed to re-examine claims.[3]

On the fifteenth day of June, 1782, an amendment to the act to provide for the payment of debts due from conspirators and absentees, etc., was passed, the purpose of which was to relieve the Commonwealth from the embarrassment caused by the exemption from the operation of the original act of estates put into the hands of persons who had advanced money under the resolve of 19 June, 1780. Committees were authorized to sell to lessees at an appraised value, or to others at public or private sale, if the lessees refused to take the property on those terms. In cases where the proceeds of sales were inadequate to pay debts, committees were empowered to divide such proceeds among creditors *pro rata*, taking bonds for the repayment of the creditors' ratable proportion.[4] If it be borne in mind that the agents had been called upon to remit to the State Treasurer, the character of the task of determining the solvency of the estates thus imposed upon the committees will be better appreciated.

Various resolves were passed in the summer of 1782, the purpose of which was to stimulate the settlement of estates of absentees.

It would seem that the complicated state of affairs brought about by the great variety of legislation bearing upon the settlement of the estates of absentees brought with it the penalty of suits against agents and committees, in such numbers that the Legislature was obliged to come to their defence. This was done by the passage,

[1] Laws and Resolves of Massachusetts, 1780–81, chap. 403, p. 846.

[2] *Ibid.* 1780–81, chap. 524, p. 925.

[3] *Ibid.* 1780–81, chap. 514, pp. 919–921.

[4] *Ibid.* 1782–83, chap. 69, pp. 177–179.

13 March, 1783, of an act empowering agents and members of committees in certain cases to plead the general issue and give the acts and resolves of the General Court and any special matter in evidence.[1]

At the time of the passage of this last act, it was known in this country that George the Third had announced at the opening of Parliament that a preliminary treaty of peace had been signed between Great Britain and the United States. The provisional treaty, concluded in November, 1782, had at last become operative through the signing, in January, 1783, of the preliminary treaty of peace between Great Britain and France and Spain. The fifth article in the provisional treaty provided that Congress should recommend to the several States the revision of the laws against refugees, "so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation which, on the return of the blessings of peace, should universally prevail." The first step taken by the legislature of Massachusetts in this "spirit of conciliation" was the passage, on the second of July, 1783, of an act "to carry into execution an act made in the year one thousand seven hundred and seventy-eight, entitled 'an act to prevent the return of certain persons therein named,'" etc. It was prescribed in the "act to prevent the return" that the Board of War should deport absentees who should venture to return to the State. That body, it was stated, was now discontinued. It was therefore provided that cases arising for consideration under that act should be examined by two justices of the peace, whose decision was to be certified to the Governor. It was made the duty of the Governor to cause violators of the law to be deported, and it was provided that a second return of the refugees was to be met with the penalty prescribed in the original act, which was death. Replevin suits could not be maintained in behalf of persons arrested under this act. Service of writs in such suits was declared to be void, and the officer making the service not only became subject to a fine of £100, but was by the very act of making the service incapacitated from making further legal service of papers. This act was to remain in force until the recommendation of Congress should be

[1] Laws and Resolves of Massachusetts, 1782–83, chap. 70, p. 179

laid before the Court and a final determination thereon should be had.[1]

On the eighteenth of March, 1783, committees were authorized to lease for one year.[2] On the fifth of June, the committee intrusted with the settlement of the accounts of committees on absentees' estates was instructed to require final settlements and to have balances paid over.[3]

On the fourth of October, a resolve was passed instructing committees appointed to make sale of the estates of absentees "to surcease the sale of the said estates until the further order of the General Court."[4]

The definitive treaty of peace, executed at Paris in September, 1783, was ratified and confirmed by Congress, 14 January, 1784, and a broadside was thereupon issued, calling upon all good citizens and all bodies of magistracy, — legislative, executive and judicial, — to observe its terms and carry into effect its definitive articles. The fifth and sixth articles of the treaty were similar to those bearing the same numbers in the provisional treaty. The former of these articles has been already alluded to. The latter provided that there should be no more confiscations of the property of Loyalists and no more prosecutions by reason of the part taken by them in the war. What legislation follows was carried through with a full knowledge of the character of the recommendations of Congress which were referred to as impending in the last paragraph of the act of July second.

The first step taken by the Legislature after it was furnished with knowledge of these recommendations was to put forth efforts to close up the estates of absentees. On the sixteenth of March, 1784, registers of probate were ordered to return to the Secretary's office before June tenth, all accounts rendered by agents of such estates. If any agent had failed to render his accounts, registers were instructed to bring suit on his bond. Committees having absentees' estates in their hands were ordered to make return to the Secretary. He in turn was to report to the Attorney-General if any committees were delinquent in this respect, and it was made

[1] Laws and Resolves of Massachusetts, 1782–83, p. 499.
[2] *Ibid.* 1782–83, chap. 175, p. 458.
[3] *Ibid.* 1782–83, chap. 10, p. 680.
[4] *Ibid.* 1782–83, chap. 14, p. 783.

the duty of the Attorney-General to prosecute such delinquents. It was at the same time provided that there should be no further sale of estates of absentees, either as a whole or in part, until the further order of the General Court.[1]

The first act passed in which the obligations of the treaty were distinctly recognized was the "act for repealing two laws of this State, and for asserting the right of this free and sovereign Commonwealth, to expel such aliens as may be dangerous to the peace and good order of government." This act became a law 24 March, 1784.[2] The preamble asserted that it was the undoubted right of the State to expel such aliens as were possessed of dispositions incompatible with the safety or sovereignty of the State. It is quite possible that in the more liberal spirit of to-day we should be inclined to assert our abstract right to expel from the country those whose presence threatened the safety of the State; but our sympathy with the alleged principle of the act would probably stop at this point, for what was meant by it was more specifically defined in the next sentence, in which absentees were pronounced to be aliens. Alas for the hoped-for spirit of conciliation! All those who had borne arms against the State or lent money to Great Britain, and all those who were named in the Confiscation Act were designated as aliens and as such ought to be excluded from the State. The admission even of others of this class was declared to be full of danger to the State, but under the circumstances it was thought that the present laws for their exclusion were not calculated to produce peace and tranquillity. Therefore, the act to prevent the return of certain persons therein named, etc., and the act to carry that act into execution, — the former of the year 1779, the latter of 1783, — were both repealed. This of course threw the bars down and let in everybody, but to make it clear that the spirit of conciliation in which the Legislature complied with the recommendation of Congress did not go far enough to permit the more odious of the Loyalists to stay in the Commonwealth after they had got there, it was then provided that absentees named in the Confiscation Act or who had borne arms against the country in the late war, who should return to the State with intent to reside therein, should be reported by justices of the

[1] Laws and Resolves of Massachusetts, 1782–83, chap. 132, p. 873.

[2] *Ibid.* 1782–83, p. 661.

peace to the Governor, and if they did not immediately depart from the State when thereto ordered by the Governor, they were to be committed to gaol. Absentees of other descriptions than the above were required to take out licenses from the Governor, which licenses should only run from the end of one General Court to the end of the next.

The sixth article of the treaty, which provides that there should be no more confiscations, was recognized, and it was provided that land held by claimants 19 April, 1775, which had not been confiscated should be restored unless they were pledged for the payment of debts due from absentees. From the benefit of this provision, however, those named in the Confiscation Act were excluded, or rather it would be nearer the fact to say, that an attempt was made to exclude them. This was done by referring to the Confiscation Act as "the act of 1778," an error of date which compelled subsequent legislation by way of correction.

On the second of July, 1784, it was ordered that confiscated lands should be sold by auction for public securities. From this order, estates which were insolvent were excepted.[1] It was evident that the titles to the confiscated estates acquired by the purchasers at the auction sales were assailed, for on the twenty-eighth of October, 1784, a resolve was passed directing the Attorney-General to appear and defend the titles of confiscated estates.[2]

It has been mentioned that corrective legislation was needed to cure the hasty and erroneous description of the Confiscation Act in the act just above described. This was accomplished 10 November, 1784, by an act in addition to the former act in which it was also provided that where real estate of absentees had been mortgaged by the government, the equity of redemption should be regarded as having been confiscated. In the case of property leased by the government, the rentals were deemed to have been confiscated, but the claimant could demand the property at the termination of the lease. It was also provided in the same act, that all acts of agents or committees in connection with the real estate of absentees, or of real British subjects, where the real estates had not been confiscated, if such acts were done according

[1] Laws and Resolves of Massachusetts, 1784–85, chap. 58, p. 234.

[2] *Ibid.* 1784–85, chap. 25, p. 272.

to law, should be good and valid. Personal estates of absentees, sold or used, were to be deemed confiscated. No action was to lie against an agent. If sued, he might plead the general issue and give this act in evidence.[1] The same day, a letter was addressed to the delegates to Congress in which they were instructed to ascertain whether it would consist with the treaty for the Legislature to debar British subjects and absentees from recovering interest during the war? What did the expression "*bona-fide* debt," used in the treaty, mean? Ought it to include interest during the war? These questions arose under the fourth article of the treaty, which provided that no lawful impediment should be imposed to the recovery of debts theretofore contracted. Pending an answer which should furnish the congressional interpretation of the treaty, actions for interest were suspended until the next session of the legislature.[2] When that event took place the reply of Congress to these questions was still in abeyance. A resolve was therefore passed on the seventh of February, 1785, continuing the resolve of November tenth in force until the further order of the General Court.[3] Whether that order has ever been made can be determined by search of the records, if any person should deem it worth his while.

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[1] Laws and Resolves of Massachusetts, 1784–85, chap. 31 (1784), p. 105.

[2] *Ibid.* 1784–85, pp. 300–301.

[3] *Ibid.* 1784–85, p. 338.

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