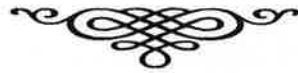


NUNC PRO TUNC

THE HISTORICAL SOCIETY OF THE UNITED STATES DISTRICT COURT



FOR THE DISTRICT OF NEW JERSEY

Vol. IV No. 1

Winter 2002

LETTER FROM THE PRESIDENT

We at the Historical Society are very happy to revive our 12-year dormant newsletter, "Nunc Pro Tunc." This publication will make a contribution to the alliance of those interested in preserving the history of our greatest district. Please make your work part of our living history, not only by joining the Society, but by using the membership form on the back of this newsletter to bring at least two other colleagues in as members. Only in this way will our past be preserved for the future.

We welcome everyone to our First Annual Gala in the Ceremonial Courtroom. Professor Geoffrey Hazard of the University of Pennsylvania Law School will be presenting a discussion on the representation of unpopular clients, especially alleged terrorists, in the media age. After the presentation, New York and Pennsylvania CLE credits should be available.

At the program, the Society will formally unveil the long-lost sculptured eagle from the first federal courthouse in Newark. You will find more about the eagle in this issue. We will also include in the program a short documentary film of historical significance and a preview of the upcoming written history of the Court.

We will also dedicate the newly furnished and electronically-equipped Lawyers' Lounge honoring Judge Lawrence A. Whipple, who served on the Court from 1966 to 1983.

This year is the first year the Society will be conducting a membership drive. With more members, we will be better able to make the public more aware of the magnificent 212-year history of our Court. Judge Gerry reminded us:

As all of those before us, during the proud history of this second oldest District Court in the Nation, we are but temporary custodians of its traditions and authority. And the living institution that is the Court has afforded each of us that rare privilege most often denied to others, to reach beyond ourselves in its service.

We have completed a significant project, the permanent exhibit in the lobby of the Clarkson S. Fisher Courthouse in Trenton. We expect to open permanent exhibits in the King Building in Newark and the Cohen Courthouse in Camden.

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An excerpt from:

Judge Robert Morris and His Rules: A Note on Court Procedures in the District of New Jersey and the Nature of Federal Jurisprudence, 1790-1815



Robert Morris
Aug. 28, 1790-May 2, 1815

Robert Morris, of New Brunswick, was of impeccably patrician New Jersey stock with an equally impressive legal pedigree. He was the son of the colonial Chief Justice, and himself one of the state's most prominent attorneys; significantly, he was also a political ally of [Senator William] Paterson and a staunch adherent of the Federalist Party.... Given his political association with Paterson, and the senator's influence in New Jersey, [President] Washington readily accepted the recommendation and nominated Morris in early September. Congress was not

then in session; but upon reconvening, they received the nomination on December 17 and voted to confirm the new District Court judge on the twentieth.

Morris would serve for twenty-five years, until his death in 1815, a tenure that made him one of the longest-serving of the early-federal judges. It fell to him to do what Brearley [the first Judge of the U.S.D.C. for the District of N.J.] had barely begun: to make the federal courts in the District of New Jersey into effective judicial tribunals.

Of all of the tasks Morris confronted, perhaps none was more important to the functioning of the early federal courts than the establishment of court rules for the district.

On 2 October 1790, during his first session on the circuit bench, Morris dealt with the question of rules for the District of New Jersey. Unlike Brearley, Morris was facing a case and the circuit court was issuing writs, and the judge clearly felt that orderly proceedings required rules. Like many other federal judges, he resorted to the rules he knew and adopted those of the New Jersey Supreme Court. From the bench, he "Ordered that the general course of practice in the Supreme Court of New Jersey, shall whenever applicable, be the rule of practice in this court." Over time, Morris would issue new rules as necessary, and in 1803 the Third Circuit Court of Appeals (which had replaced the Middle Circuit under the Judiciary Act of 1801), in effect, clearly established the primacy of federal court rules. At a session held in Trenton, the court specified any changes in state rules would "not

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authorize a departure from the rules adopted" in the federal courts. They would chart their own course in the matter. But in the meantime, adopting the state rules allowed the new federal courts to operate on a familiar basis. It was a practical but important step.

Yet the simplicity of the matter was deceptive. Court rules were central to the nature of the judicial system and reflected attachments to tradition, attitudes toward change and innovation, as well as the civic values of those who practiced and worked in the legal system. As such, court rules have been part of an historical debate on the nature of the post-Revolutionary judiciary. In fact, a number of legal historians have discerned a strong anti-British current in American courts after Independence; a few scholars have seen a genuine legal Anglophobia and an antipathy toward traditional English common law.

Beneath the public comment, however, and the few judicial or legislative actions, there was little to sustain an argument that New Jersey was disillusioned with English law. In fact, despite the nationalist petulance of the 1801 legislative action, and the rule against traditional court garb, the laws of New Jersey, and the procedures under which New Jersey courts had operated since the 1600's, were thoroughly grounded in English legal traditions and practices. Colonial statutes frequently noted the importance of English precedents and procedures in law and equity and remained faithful to the old writs and pleas. Over the early to mid-eighteenth century, for example, in various acts (e.g., "An Act for shortening the Law of Suits, and Regulating the Practice of Law" [1714]), the provincial assembly repeatedly affirmed the various traditional writs of *capias*, *habeas corpus*, *replevin*, *audita querela*, and the writs of error (among others), and the time-honored English practices of non-suits, rejoinders, replications, and defaults. In 1728, another act specifically provided that all statutes on the limitation of actions in force or enacted in "that Part of *Great Britain* called *England*" would also govern practice in New Jersey. Over the years, the provincial Supreme Court of Judicature made new rules to facilitate business, entering them in the record as the justices adopted them. These additions to the rules dealt with filings, dilatory pleas, court security and support arrangements, orderly proceedings, admissions to the bar, and related matters of court functions; but such rules never departed from established legal conventions. Certainly the colonial courts adapted to local circumstances – the less complex colonial society, for example, routinely employed very few of the hundreds of traditional English writs available – but their traditions remained consciously English.

Independence did not change this. This became clear when the New Jersey Supreme Court undertook a new compilation of its rules in 1791, a matter certainly known to Morris when he ordered the federal courts to conform to state rules. In a draft of the new rules, a prefatory statement noted that earlier rules had "become entirely obsolete," and in any case were scattered throughout the various records of the court. The justices wanted a convenient single source, including necessary new rules, that would "greatly...expedite the business of the court" and promote justice. In fact, the full draft of the "Practical Rules of the Supreme Court of Judicature of the State of New Jersey" made very few rule changes, and was less of a revision than a compilation....The rules emphasized efficiency and uniformity in court operations without any rejection of the English legal heritage. In fact, British judges and lawyers would have found the 1791 rules fully explicable....

The record is silent on exactly when the Supreme Court actually adopted the draft rules, but the justices did adopt them....

The minutes of the District and Circuit Courts in the District of New Jersey easily confirm that Judge Morris was satisfied on the matter of rules. The court records are substantially complete from 1789 to 1815 (when Morris died), and during these years he issued only one additional rule. On 4 April 1796, the judge "Ordered, that notices of trial be filed with the Clerk of this Court by the first day of the term." This liberalized the operant New Jersey rule, which had required filings by the last day of the term prior to the term in which a case would be tried. Nor, when he could find an English statute that applied, did Morris feel compelled to order a new rule in matters (however rare) in which the existing rules appeared silent or ambiguous. The state Supreme Court rules, for example, required sixteen days notice of trial for any case in which a party lived more than forty miles from the courthouse, and twelve days for those living under forty miles. Notices of countermand of trial required notice of only six days, although the rules failed to specify whether the six days applied to all parties regardless of the forty-mile limit. When an attorney argued for costs because his client had received a countermand with only two days notice, instead of the expected six, Morris quickly rebuffed him. After hearing from the United States attorney, the judge was "of opinion that two days notice within the Statute of fourteenth of George second C. seventeen [that is, 14 Geo. II. c. 17] is sufficient, the Defendant living within forty miles of the Court-house at Trenton." For Morris, then, even obscure facets of English practice were very much alive – and still useful.

Conclusion

Thus departures from English practice came slowly in New Jersey, not in any revolutionary or ideological haste. In adopting the rules of the New Jersey Supreme Court, Morris tacitly endorsed the standing order of jurisprudence and its traditions. To have done otherwise would have broken with the system that had produced generations of well-trained New Jersey lawyers, himself included. Moreover, prevailing opinion among contemporary lawyers and judges already held that New Jersey procedures provided a high level (for its day) of public access to the courts and justice, a judgment historians generally have sustained. This was the system that people knew and generally accepted. To have substantially changed court rules would have set the federal courts in New Jersey at variance from the legal norms of the society they were supposed to serve. Instead, in adopting New Jersey rules, Judge Morris adhered to procedures that, in virtually all critical areas, were fully consistent with time-honored English practices. There is no evident desire to depart from tradition; and in adopting this familiar course, Morris signaled that while Americans had declared their political independence from Great Britain, they quite deliberately had not done so from English law.

Any revision of scholarly view on the nature of the early federal courts – or at least of the view that American law and legal practice had a distinctly anti-British caste – must rest on a more thorough study. The early federal court records of other states await detailed inspection. But the New Jersey experience fully supports [one scholar's] findings in Kentucky that the early federal courts were fully steeped in traditional English jurisprudence. Historians convinced of an American hostility toward English law may have overstated their case. Certainly there was little enough evidence to support it in the courtrooms of Judge Robert Morris in the District of New Jersey. (sources omitted)

- Mark Edward Lender
Nathan Weiss College of Graduate Studies, Kean University

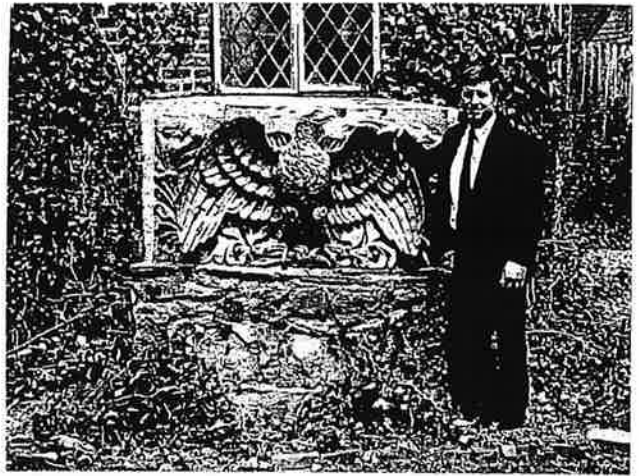
RETURN OF THE EAGLE



In the late 1890s, the U.S. Custom House and Post Office was constructed on Broad and Academy Streets in Newark, New Jersey. This building contained the U.S. courts, the Internal Revenue Service, the post office, and the customs service. A key feature of the building was a sculpture of an eagle carved in stone that was set into the building below the flagpole on the third floor.

In 1937, the U.S. Custom House and Post Office was torn down. Thereafter, the sculpture of the eagle was missing. In early 1938, however, a newspaper ran an article reporting that a man in Montclair, New Jersey — B. Palmer Davidson — had the eagle sculpture and was keeping it in the yard of his Montclair home. Mr. Davidson stated in the article that the sculpture weighed two tons and that he obtained the sculpture from "a nearby warehouse." The article had a picture of Mr. Davidson and his two young children standing behind the eagle sculpture.

The U.S. District Court Historical Society in New Jersey embarked upon a project to formalize the history of the Court in 1999. In that process, the issue of the eagle sculpture was revived. Through the resources of the Historical Society, it was discovered that the Davidson family continued to own their Montclair home and that the eagle sculpture was in the back yard of the home. The historical Society referred the matter of reclaiming the eagle sculpture to the US. Attorney's Office.



The eagle sculpture was recovered on November 15, 2001 and is in excellent condition. It has been restored and will be placed in front of the Martin Luther King, Jr. Federal Courthouse in Newark by March 2002.

—Michael A. Chagares, A.U.S.A.
Chief, Civil Division

**Missing Newark Cornerstone
Turns Up on Montclair Porch**



B. Palmer Davidson and his two children, Paul and Charlotte Elizabeth Davidson, display the stone eagle

Carving Disappeared When Old Custom House and Postoffice Was Demolished; New Owner Says He Got It From a Warehouse

Special to the Herald-Examiner
MONTCLAIR, N. J., Nov. 15.—The mystery surrounding the missing cornerstone of the old Custom House and Postoffice, demolished in Newark, apparently has been solved with the appearance of a stone, a large American eagle, on the front porch of B. Palmer Davidson, of 383 Park Street, Montclair.

When the Newark building was being demolished, scores of W. P. A. workers searched for the eagle, which became the source of much debate as to whether it had ever existed or not. Some declared the building never had a cornerstone. Others said it had been lost during construction of an addition. Those who insisted it did exist recalled that an American flag had been wrapped over its wings in 1897, when the building was dedicated.

Cephas I. Shirley, business manager of the Newark Board of Education, was among those who insisted the eagle was more than a myth. His uncle, Robert Shirley, had carved it, he said. In the absence of another

cornerstone, the eagle had been pressed into service as main stone at the dedication ceremonies, Mr. Shirley stated.

Mr. Davidson said he got the eagle at a near-by warehouse. The carving weighs about two tons. He observed it one morning last year on his front porch at 383 Park Street, where it had apparently come to roost.

Handsome carved, the eagle is not the only relic in the Davidson home. Shifting in a wind on top of the house is a two-year-old weather vane, from the recently demolished St. Paul's Methodist-Episcopal Church, at Broad and Marshall Streets, in Newark.

Other relics in the Davidson home include the gray felt hat which Colonel Charles A. Lindbergh left behind when he flew to Paris in 1927, an airplane propeller used by Clarence Chamberlin, part of the covering from Richard E. Byrd's tri-motored trans-Atlantic plane "America" and a torn piece of fabric from the Graf Zeppelin.



After reviewing blueprints of the U.S. Custom House and Post Office and after examining photographs of the building, the U.S. Attorney's Office confirmed that the eagle sculpture in the Davidson's back yard was, in fact, the sculpture that adorned

the U.S. Custom House and Post Office. In addition, the U.S. Attorney's Office secured a commitment from the Davidson family to relinquish the eagle sculpture.

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I hope you will enjoy the First Annual Gala and have, or plan to, go to Trenton to see our completed exhibit. Please enjoy the Lawyers' Lounges in the Cohen Courthouse and the Fisher Courthouse, as well as the Whipple Lounge. Relish in the prospect of new members and remember that we are but temporary custodians – and we need your help and support for the Society's important work.

Thank you.

Donald A. Robinson
President

Editors: Robert E. Bartkus/Kathryn R. Renahan
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